SEARCHING FOR TRUTH THAT SPEAKS TO POWER: FREE SPEECH AND EQUALITY ON CAMPUS

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University campuses are being rent apart in disputes pitting free expression against equality [read: diversity, equity, and inclusion]. Yet scholarly discussions and university declarations widely agree: While universities should encourage an inclusive educational environment, free-speech principles prohibit universities from restricting or punishing hate speech, group libel, and other forms of offensive expression. This Article argues that this prioritizing of free speech over equality on campus is mistaken. Equality should often be favored over free expression in campus settings. Although Supreme Court precedents are ambiguous, one can reasonably argue that the doctrine allows universities to restrict and punish offensive expression, including hate speech and group libel, to pursue educational missions. Crucially, expression targeting a historically marginalized group and its members undermines their educational opportunities and environment. The history of free expression supports this thesis, as it urges caution when wielding free-speech principles to the detriment of marginalized groups. Moreover, contrary to the usual scholarly and university assertions, the university does not constitute a pristine marketplace of ideas where the search for truth advances free of domination and coercion. When universities favor free expression over equality, they typically reinforce the status quo of structural hierarchies rather than speak to power. Finally, because universities play a central role in the nurturing of democracy, one can bolster

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this argument for equality on campus by conceptualizing the university's mission as cultivating full and equal citizenship for all, including historically marginalized groups.

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INTRODUCTION

Numerous university[1] campuses have recently been rent apart in disputes pitting free expression against equality—where equality means diversity, equity, and inclusion.[2] At Stanford Law School, the students' Federalist Society chapter invited Judge Kyle Duncan of the Fifth Circuit Court of Appeals to speak at the school on March 9, 2023.[3]

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1. Throughout this Article, I use the word "university" to describe both universities and colleges; my argument applies to both undergraduate and graduate students. *See Frequently Asked Questions (FAQs)*, EDUCATIONUSA, https://educationusa.state.gov/experience-studying-usa/us-educational-system/frequently-asked-questions-faqs [https://perma.cc/QZM4-9BHW] (explaining that "college" and "university" are often used interchangeably); Cecilia Seiter, *What's The Difference Between a College and a University? Everything You Should Know*, FORBES (Oct. 25, 2023, 11:35 AM), https://www.forbes.com/advisor/education/student-resources/differences-between-college-and-university [https://perma.cc/U6YD-TXUD] (explaining that colleges tend to be smaller and tailored towards specific fields of study or student groups, whereas universities tend to be larger, offer graduate programs, and serve as research institutions).

2. *See generally* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008) [hereinafter FELDMAN, FREE EXPRESSION AND DEMOCRACY] (providing a comprehensive history of the interrelationship between free expression and democracy).

3. *See, e.g.*, Letter from Jenny S. Martinez, Dean of Stanford Law School, to Stanford Law School Community (Mar. 22, 2023), https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf [https://perma.cc/4VKZ-U5HV] (apologizing for students' response and outlining university policy towards protest and free speech); Ruth Marcus, Opinion, *Stanford Students Lost a Chance to Learn When They Shouted down a Judge*, WASH. POST (Mar. 27, 2023, 3:23 PM),

While the events of that day are disputed,[4] Judge Duncan was already known as a right-wing advocate against LGBTQ+ rights.[5] Stanford students opposed to Duncan's views asked the Federalist Society student president to cancel the event or move it to Zoom.[6] He refused. When Duncan entered the room to speak, more protesters than Federalist Society members were present, and Duncan, anticipating a confrontation, was "filming protesters on his phone."[7]

Protests and heckling disrupted Duncan's presentation, leading Duncan to ask for an administrator to intervene.[8] Associate Dean Tirien Steinbach, a woman of color, volunteered, but apparently Duncan initially questioned whether she was truly an administrator.[9] Steinbach, though, eventually spoke to the crowd: "[S]he 'wholeheartedly' welcomed Duncan to campus, but told him, 'For many people here, your work has caused harm.'"[10] Twice, Steinbach questioned whether it was worth Duncan continuing his

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https://www.washingtonpost.com/opinions/2023/03/27/stanford-law-free-speech-judge-stuart-kyle-duncan [https://perma.cc/5XS4-SV4Y] (arguing the benefits to the law students and the legal community in hearing from different viewpoints); Greta Reich, *Judge Kyle Duncan's Visit to Stanford and the Aftermath, Explained*, STANFORD DAILY (Apr. 5, 2023, 11:39 PM) [hereinafter Reich, *Explained*], https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained [https://perma.cc/72YT-LVE2] (providing a timeline of the events); Greta Reich, *Law School Activists Protest Judge Kyle Duncan's Visit to Campus*, STANFORD DAILY (Mar. 11, 2023, 5:33 PM) [hereinafter Reich, *Protest*], https://stanforddaily.com/2023/03/11/law-school-activists-protest-judge-kyle-duncans-visit-to-campus [https://perma.cc/8SQ3-3EK3] (explaining the various responses to the protest); Mark Joseph Stern, *A Trump Judge's Tantrum at Stanford Law was Part of a Bigger Plan*, SLATE (Mar. 13, 2023, 4:53 PM), https://slate.com/news-and-politics/2023/03/trump-judge-kyle-duncan-stanford-law-scotus-audition.html [https://perma.cc/XBL8-U69X] (characterizing the events by stating that "Judge Stuart Kyle Duncan went to Stanford Law School looking for a fight, and he got one").

4. Stern, *supra* note 3.

5. *See* Reich, *Explained*, *supra* note 3 (explaining that Judge Duncan had "served as lead trial and appellate counsel in a case that stopped transgender people from using the bathroom of their choice at state institutions"); Letter from Vanita Gupta, Pres. & CEO of the Leadership Conf. on Civ. & Hum. Rts., to U.S. Senator (Nov. 28, 2017) (opposing the confirmation of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit based on his agenda to set back LGBTQ+ rights, voting rights, immigrant rights, women's reproductive freedom, and criminal justice progress).

6. Reich, *Explained*, *supra* note 3.

7. *Id.*

8. *Id.*

9. Stern, *supra* note 3.

10. Reich, *Explained*, *supra* note 3.

presentation.[11] After that, Duncan fielded questions from the audience but often refused to answer.[12] For instance, "after one student's question about a 'decision denying a pro se motion to use the petitioner's preferred pronouns,' Duncan responded with, 'Read the opinion. Next question.'"[13] Duncan subsequently admitted calling student protesters "'appalling idiots,' 'bullies' and 'hypocrites.'"[14] Later, Stanford Law School Dean Jenny S. Martinez emphasized "[t]he university's commitment to diversity, equity, and inclusion,"[15] including "the value and place of LGBTQ+ people in our community,"[16] yet condemned the protests and apologized to Duncan.[17] Associate Dean Steinbach was placed on leave for worsening, rather than ameliorating, the conflict.[18]

An incident at the University of Wyoming provides a variation on this type of dispute. Todd Schmidt, an elder from the Laramie Faith Community Church, often displayed evangelical signs and books at a table located in the university's student union breezeway.[19] On December 2, 2022, Schmidt displayed a sign stating "God created male and female and [X] is a male," with Schmidt expressly naming X, a

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11. *Id.*; *see* Marcus, *supra* note 3 ("'I mean, is it worth the pain that this causes and the division that this causes?' Steinbach asked Duncan . . . .").

12. Reich, *Explained*, *supra* note 3.

13. *Id.*

14. *Id.*

15. Martinez, *supra* note 3, at 4.

16. *Id.* at 6.

17. *See id.* at 1–7 ("The President of [Stanford] and I have apologized to Judge Duncan for a very simple reason—to acknowledge that his speech was disrupted in ways that undermined his ability to deliver the remarks he wanted to give to audience members who wanted to hear them, as a result of the failure to ensure that the university's disruption policies were followed."); Reich, *Protest*, *supra* note 3 (displaying a commentator who characterized Dean Martinez's apology as "inadequate").

18. Martinez, *supra* note 3, at 8.

19. Clair McFarland, *Man Sues over University of Wyoming Censorship of Sign Naming Transgender Sorority Member*, COWBOY STATE DAILY (June 16, 2023), https://cowboystatedaily.com/2023/06/16/church-elder-sues-over-university-of-wyoming-censorship-of-sign-naming-transgender-sorority-member [https://perma.cc/Q93W-TUYQ]; *see also* Jeff Victor, *Anti-Trans Incident at UW Inspires Student Protest, One-Year Ban*, LARAMIE REP. (Dec. 8, 2022), https://laramiereporter.substack.com/p/anti-trans-incident-at-uw-inspires [https://perma.cc/H5H8-RCTD] (outlining the events leading up to and following Todd Schmidt's tabling in the student union at the University of Wyoming); *Union Policy Allows Schmidt to be Banned*, BRANDING IRON (Dec. 8, 2022), https://www.uwbrandingiron.com/2022/12/08/union-policy-allows-schmidt-to-be-banned [https://perma.cc/5F3K-66YS] (listing the university policies that allow the university to ban Todd Schmidt).

student at the university and a member of the LGBTQ+ community.[20] University officials asked Schmidt to remove the student's name from the sign.[21] He initially refused, but when told he was violating the student union's policies, he blanked out the name while retaining the remainder of his message.[22]

The university president, Ed Seidel, issued a statement three days later describing this incident and reminding "everyone that our UW community values are fundamental and straightforward: community, integrity, responsibility[,] and social consciousness. The university continues to support creating a climate where all members feel they are welcomed and belong."[23] Two days after that, on December 7, President Seidel announced that the university had penalized Schmidt.[24] As Seidel explained, Schmidt's naming of the student "violated the university policy prohibiting discrimination and harassment. Given this, the individual's privileges to reserve a table in the Union have been suspended for one year."[25] Seidel emphasized that "a line was crossed when a student was harassed by name."[26] Schmidt responded by suing Seidel and the university for violating his right to free speech.[27]

These types of disputes, pitting free expression against equality, have provoked many reactions, including popular-media commentaries,[28] scholarly discussions,[29] and university declarations regarding free

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20. McFarland, *supra* note 19.

21. Victor, *supra* note 19.

22. McFarland, *supra* note 19.

23. Letter from Ed Seidel, Pres. of Univ. of Wyo., to the University of Wyoming Community. (Dec. 5, 2022), https://www.uwyo.edu/newssupport/newshighres/documents/2022/12/pres-message2.pdf [https://perma.cc/6FL6-FZ7S].

24. Ed Seidel, *Supporting Our UW Communities Following Recent Events*, UNIV. WYO. NEWS (Dec. 7, 2022), https://www.uwyo.edu/news/2022/12/supporting-our-uw-communities-following-recent-events.html [https://perma.cc/7JGS-BX54].

25. *Id.*

26. *Id.*

27. McFarland, *supra* note 19; *see* Schmidt v. Seidel, No. 2:23-cv-00101-NDF (D. Wyo., Aug. 18, 2023) (granting Schmidt's preliminary injunction). For another recent campus dispute, see also Erwin Chemerinsky, *Op-ed: When a Berkeley Law Debate on Free Speech Got Turned into a Social Media Circus*, L.A. TIMES (Nov. 20, 2022, 3:30 AM), https://www.latimes.com/opinion/story/2022-11-20/berkeley-law-student-group-israel-zionism-free-speech [https://perma.cc/NJB7-DS7B].

28. *E.g.*, Marcus, *supra* note 3; Stern, *supra* note 3.

29. *See generally* SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS 3 (2017) (examining the "current state of arguments about free speech on campus"); ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 19 (2017) (developing a thesis that "all

expression.[30] While all do not agree, the predominant viewpoint is clear—especially if one examines university statements on free expression. The widespread consensus is that universities must favor free expression over equality.[31] To be sure, many scholars and universities initially assert that no choice is necessary, that free expression and equality do not conflict.[32] For instance, Stanford Dean Martinez not only denied a conflict between free expression and equality, she insisted that "our commitment to diversity and inclusion means that we *must* protect the expression of all views."[33]

Even so, when the inevitable conflict arises—whether in a discussion of abstract principles or an actual controversy—the usual conclusion is to favor free expression. Hence, Martinez apologized to Duncan while punishing Steinbach, who was Associate Dean for Diversity, Equity, and Inclusion.[34] Martinez, in the end, wrote: "I believe that strong protection for freedom of speech is a bedrock principle that ultimately supports diversity, equity, and inclusion and that we must do

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ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel"); RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY (2018); JOHN PALFREY, SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION 2 (2017) (arguing that "diversity and free expression ought to coexist"); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH xi (2018) (calling "[t]he current crisis of free speech on college campuses" both a "symptom and cause of a larger threat to the maintenance of liberal democracy itself").

30. *E.g.*, Martinez, *supra* note 3. The University of Wyoming recently convened an ad hoc committee focused on free speech issues on campus. For the result of that committee's work, see The University of Wyoming Principles, *Executive Summary of the Recommendations of the Freedom of Expression, Intellectual Freedom, and Constructive Dialogue Working Group*, UNIV. OF WYO. 10–11 (2023) [hereinafter Wyoming Principles], https://www.uwyo.edu/news/_files/documents/2023/06/uw-freedom-of-expression-working-group-final-report.pdf [https://perma.cc/AD6Z-STFW].

31. *See Chicago Statement: University and Faculty Body Support*, FIRE: FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION [hereinafter *Chicago Statement*], https://www.thefire.org/research-learn/chicago-statement-university-and-faculty-body-support [https://perma.cc/7H8H-US7W] (listing 103 institutions or faculty bodies that have endorsed the "Chicago Statement," a model free speech policy for universities).

32. *E.g.*, BEN-PORATH, *supra* note 29, at 2–5; CHEMERINSKY & GILLMAN, *supra* note 29, at 20–21.

33. *See* Martinez, *supra* note 3, at 1, 4 (arguing for harmony between free expression and diversity, equity, and inclusion).

34. Greta Reich, *DEI Dean Leaves Stanford Law School*, STANFORD DAILY (Aug. 23, 2023), https://stanforddaily.com/2023/08/23/dei-dean-leaves-stanford-law-school [https://perma.cc/7FFY-TE4L].

everything in our power to ensure that [free speech] endures."[35] Martinez's position, it should be added, is consistent with the so-called Fundamental Standard for Stanford University, which claims "to balance the fundamental freedom of speech with the essential goal of fostering an inclusive campus culture."[36]

The Chicago Principles, issued by the University of Chicago in 2015, are perhaps the most influential university statement on free expression.[37] Free speech scholar, Geoffrey R. Stone, led the committee that formulated the Principles,[38] and more than 100 universities have since "adopted or endorsed the Chicago [Principles] or a substantially similar statement."[39] As to any potential clash between equality and free expression, the Chicago Principles unequivocally favored free expression: "Although the University greatly values civility . . . concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our

35. Martinez, *supra* note 3, at 7.

36. Stanford Office of Community Standard, *Additional Resources*, STANFORD UNIV., https://communitystandards.stanford.edu/resources/additional-resources [https://perma.cc/5QHE-LV8B]; Stanford University Office of Community Standards, *Freedom of Speech & the Fundamental Standard*, STANFORD UNIV. [hereinafter Stanford *Fundamental Standard*], https://communitystandards.stanford.edu/resources/additional-resources/freedom-speech-fundamental-standard [https://perma.cc/8PMD-NYEN]. Stanford first adopted the Fundamental Standard in 1896, but it has been updated as recently as June 12, 2023. Stanford University Office of Community Standards, *The Fundamental Standard*, STANFORD UNIV. (June 12, 2023), https://communitystandards.stanford.edu/policies-guidance/fundamental-standard [https://perma.cc/PZ8J-569N].

37. *See* The University of Chicago, *Report of the Committee on Freedom of Expression*, (2014) [hereinafter *Chicago Principles*], provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/448B-J4SD] (outlining the Chicago Principles based on the importance of free speech); *see also* Wyoming Principles, *supra* note 30, at 11 (invoking the Chicago Principles); WHITTINGTON, *supra* note 29, at 55–56 (discussing the Chicago Principles).

38. Stone is the author of a well-known book on the history of free expression. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004).

39. *Chicago Statement*, *supra* note 31. Harvard also favors free expression over equality. According to its *Free Speech Guidelines*, "[h]ard choices regarding appropriate time, place, and manner should have a presumption favoring free speech." Likewise, "the speaker's right of expression and the audience's right to listen take precedence." *Free Speech Guidelines*, HARVARD UNIV.: FACULTY OF ARTS & SCIENCES (Feb. 13 & May 15, 1990), https://hwpi.harvard.edu/files/facultyresources/files/fs_guidelines_1990.pdf [https://perma.cc/448B-J4SD].

community."[40] Thus, university invocations of equality or civility are rendered precatory.[41] In the context of the Stanford dispute involving protesting students and Judge Duncan, the Chicago Principles would urge precisely the same conclusion as that reached by Dean Martinez. The Chicago Principles stated:

> Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe.[42]

Scholarly studies generally agree with the Chicago Principles. In a book aptly titled, *Free Speech on Campus*, renowned constitutional scholar, Erwin Chemerinsky, and political scientist, Howard Gillman—both of whom have served as university administrators—extensively analyzed the constitutional doctrine of free expression and its implications for campus settings.[43] They emphasized a desire to protect both free expression and equality: "The challenge is to develop an approach to free speech on campus that both protects expression and

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40. *Chicago Principles*, *supra* note 37. The Wyoming Principles reach the same conclusion. *See* Wyoming Principles, *supra* note 30, at 11 ("[The University of Wyoming] does not shield individuals from the free expression of ideas and criticism, including that which community members may find uncomfortable, disagreeable, or even deeply offensive.").

41. The Wyoming Principles provide another example, similar to the Chicago Principles, stating that the university "encourages people with diverse backgrounds and values to speak, write, live, and learn together in a welcoming, inclusive, and intellectually stimulating environment that celebrates free expression and intellectual and academic freedom." Wyoming Principles, *supra* note 30, at 11.

42. *Chicago Principles*, *supra* note 37 ("[T]he University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."). The Chicago Principles remained consistent with a previous statement from the *University of Chicago*, the Kalven Committee's *Report on the University's Role in Political and Social Action*. The Kalven Committee concluded: "The university is the home and sponsor of critics [read: faculty and students]; it is not itself the critic . . . . [A] university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures." The Kalven Committee, *Kalven Committee: Report on the University's Role in Political and Social Action*, UNIV. CHI. (Nov. 11, 1967) [hereinafter *Kalven Committee*], https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [https://perma.cc/BSF3-KHFU].

43. *See generally* CHEMERINSKY & GILLMAN, *supra* note 29. Chemerinsky is the Dean of the *University of California Berkeley School of Law* and was previously Dean at the *University of California Irvine School of Law*. Gillman is the chancellor at the *University of California Irvine* and was previously Dean of arts and sciences at the *University of Southern California*.

respects the need to make sure that a campus is a conducive learning environment for all students."[44] After suggesting that these two goals can be simultaneously achieved—that no choice is necessary—they devoted a chapter to explaining how universities can encourage and cultivate inclusive learning environments.[45] Even so, Chemerinsky and Gillman ultimately reached a conclusion similar to the Chicago Principles, favoring free expression: "Our position is absolute: campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge."[46]

My thesis is that the wide consensus favoring free expression over equality on university campuses is wrongheaded. While the right to free expression should be valued and protected, the right to equality is no less significant. In some instances on campus, equality should take precedence over free expression.[47] To focus this discussion, I examine a hypothetical incident resembling the events that occurred at the University of Wyoming. Recall that, at Wyoming, a Christian pastor, Schmidt, displayed a sign on campus that read: "God created male and female and [X] is a male."[48] The University punished Schmidt but only because he specifically targeted an individual (X). What if Schmidt, however, had targeted the LGBTQ+ community without identifying a specific individual? For instance, imagine that he displayed the following sign: "God created male and female, and all gays will go to Hell." Presumably, the University of Wyoming would not have punished Schmidt—a university position that would harmonize with the Chicago Principles, the Chemerinsky and Gillman book, and the Stanford Dean's approach.[49] I argue that a university should be able to restrict and punish this type of expression, targeting a historically marginalized group, whether the LGBTQ+ community, Black

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44. *Id.* at 19.

45. *See id.* at 20, 111–52.

46. *See id.* at 19–20 ("Our central thesis is that all ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel.").

47. *See* DELGADO & STEFANCIC, *supra* note 29, at 53–62 (criticizing free speech absolutism).

48. McFarland, *supra* note 19.

49. The recently released Wyoming Principles would reach this result. *See* Wyoming Principles, *supra* note 30, at 10–11.

Americans, Jews, Muslims, or otherwise.[50] I refer to this expression as hate speech or group libel. The latter term, group libel, underscores that the expression libels or defames a group (often a historically marginalized one) without necessarily targeting an individual.[51]

Part I of this Article concentrates on current constitutional doctrine. While most analyses of campus free expression disputes conclude that this type of hate speech or group libel must be constitutionally protected, numerous Supreme Court cases suggest a different conclusion. Namely, precedents allow school administrators to restrict expression to further the educational missions of their universities. Expression targeting a historically marginalized group undermines the educational opportunities and environment for members of that group in the university community. Part I concludes with a brief discussion of *303 Creative LLC v. Elenis*,[52] which held that a wedding website designer had a free speech right to discriminate against same-sex couples.[53] Part II examines the history of how free expression has

50. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 609 (2023) (Sotomayor, J., dissenting) (noting that states can ensure that "groups historically marked for second-class status are not denied goods or services on equal terms"). For a related discussion of no-platforming, free speech disputes on campus, see generally Stephen M. Feldman, *Broken Platforms, Broken Communities? Free Speech on Campus*, 27 WM. & MARY BILL RTS. J. 949 (2019) [hereinafter Feldman, *Platforms*].

51. Partly because hate speech diminishes an individual for belonging to a group, Jeremy Waldron prefers to talk of group libel. JEREMY WALDRON, THE HARM IN HATE SPEECH 34–35, 37, 39–41, 56–59 (2012). A group libel law revolves around "what happens to individuals when defamatory imputations are associated with *shared characteristics* such as race, ethnicity, religion, gender, sexuality, and national origin." *Id.* at 60 (emphasis added). That is, a group defamation law centers on the "basic social standing" of group members qua group members within the broader American society. *Id.* at 59. The Court previously upheld a group libel law. Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1952) ("We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack."). Recently, the Court has been more skeptical about the constitutionality of hate speech laws. Virginia v. Black, 538 U.S. 343, 367 (2003) ("For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face."); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) ("Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional."); *see* CHEMERINSKY & GILLMAN, *supra* note 29, at 83–90 (discussing the concepts of hate speech and group libel). It is important to note that *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964), did not overrule *Beauharnais*, though many seem to assume as much. Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1233–34 (2020) (recognizing that *Beauharnais* remains good law).

52. 600 U.S. 570 (2023).

53. *Id.* at 2321.

been wielded throughout American history. Part II then briefly discusses possible implications of an originalist approach to the First Amendment.

Part III explores why universities should favor equality over free expression in these types of hate speech and group libel scenarios. Those who favor free expression over equality often emphasize that universities should be "bastions of free thought."[54] The university, from this perspective, must be dedicated to the search for truth, and free expression is "critical to [this] scholarly project."[55] This viewpoint, though, fails to account for structures of power; when speech targets a historically marginalized group, group members who wish to contribute to the search for truth are at a double disadvantage. First, the societal and cultural structures of power are already aligned against historically marginalized groups.[56] Second, the hate speech or group libel aligns with and reinforces those structures of power.[57] A focus on equality, rather than free expression, would facilitate challenging the structures of power, rather than reinforcing them: If we are searching for truth, let it be the truth that speaks to power.[58] Part IV is a conclusion that ties this discussion to democracy.

One point should be clarified at the outset. The First Amendment Free Speech Clause applies to government institutions.[59] In theory,

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54. *See, e.g.*, WHITTINGTON, *supra* note 29, at 6 (identifying universities as "First Amendment institutions" because that is "where ideas begin").

55. *Id.* at 30; *see* CHEMERINSKY & GILLMAN, *supra* note 29, at 62–63 (emphasizing the college campus as a marketplace of ideas).

56. *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA xv, 2, 7–9, 240–42 (5th ed. 2018) (discussing structural or systemic racism); STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 265–70 (1997) [hereinafter FELDMAN, PLEASE DON'T] (explaining structural power).

57. *See* FELDMAN, PLEASE DON'T, *supra* note 56, at 256–57, 264–65, 270–76 (discussing symbolic power and the interaction between symbolic and structural power).

58. *See* Mark T. Edwards, *When Not to Speak Truth to Power: Thoughts on the Historiography of the Social Gospel*, RELIGION AM. HIST. (Aug. 23, 2017) (citing AM. FRIENDS SERV. COMM., SPEAK TRUTH TO POWER: A QUAKER SEARCH FOR AN ALTERNATIVE TO VIOLENCE 59 (1955)), http://usreligion.blogspot.com/2017/08/when-not-to-speak-truth-to-power.html [https://perma.cc/29JA-QS5W] (attributing the origins of the phrase to a Bayard Rustin 1942 speech and a 1955 pamphlet he coauthored).

59. "*Congress* shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I (emphasis added). While the First Amendment expressly refers to Congress, the Court has also applied its limitations against state and

then, it applies only to public and not private universities. Nevertheless, some private universities are subject to First Amendment limitations because of state law while many other private universities voluntarily follow First Amendment principles. Stanford, for instance, is a private university in California subject to a state statute that imposes free speech principles on private universities.[60] The University of Chicago is a private university that voluntarily and purposefully follows free speech principles, and many of the universities that adhere to the Chicago Principles are also private institutions.[61]

I. FREE EXPRESSION DOCTRINE ON CAMPUS

The typical doctrinal analysis of free speech on campus largely ignores the campus setting. The university is treated as a government actor that seeks to restrict or punish expression in general, rather than specifically on a university campus.[62] While the Supreme Court's free expression doctrine should never be described as simple, examining free speech on campus without accounting for the campus environment oversimplifies the analysis. To be sure, most analyses of campus free speech do not completely ignore the campus setting. Instead, the analyses typically account for the university environment solely to enhance the importance of free expression.[63] From this perspective, the university is a special setting dedicated to the pursuit of truth and knowledge.[64] Therefore, free speech and the free

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local governments. *E.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011) (invalidating state campaign finance law under First Amendment).

60. CAL. EDUC. CODE § 94367 (West 2012); *see* Martinez, *supra* note 3, at 2 (discussing California's Leonard Law).

61. *Chicago Statement: University and Faculty Body Support*, FIRE, https://www.thefire.org/research-learn/chicago-statement-university-and-faculty-body-support [https://perma.cc/EVF3-2DHK].

62. *E.g.*, CHEMERINSKY & GILLMAN, *supra* note 29, at 150–52 (summarizing a free speech agenda for university campuses).

63. *Id.* at 19–21; WHITTINGTON, *supra* note 29, at 6, 29, 46.

64. "The mission of the university is the discovery, improvement, and dissemination of knowledge." *Kalven Committee*, *supra* note 42. "We are a community whose very purpose is the pursuit of knowledge." *Cornell Policy Statement on Academic Freedom and Freedom of Speech and Expression*, CORNELL UNIV., [hereinafter *Cornell Policy Statement*] https://theuniversityfaculty.cornell.edu/the-new-faculty-handbook/statement-on-academic-freedom-and-freedom-of-speech-and-expression [https://perma.cc/Z2LN-SEED]. Compared to other settings, universities need to be "closer to living up to the ideal" of the marketplace of ideas. WHITTINGTON, *supra* note 29, at 46.

exchange of ideas must be strongly protected to allow the university to fulfill its core "mission."[65]

A. General Rules of Free Speech

Since 1937, standard free expression doctrine has presumed that expression is constitutionally protected unless it falls into a low-value category of speech.[66] For the most part, low-value categories are beyond the compass of First Amendment protections.[67] Thus, like any government actor, the university can, for instance, punish obscenity because it is a low-value category.[68] The university can punish fighting words.[69] The university can punish speech inciting imminent unlawful conduct.[70]

Doctrinal complexity enters any free expression analysis partly because of the difficulty of defining or identifying these low-value categories. For example, the definition of obscenity is notoriously

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65. WHITTINGTON, *supra* note 29, at 6; *see also* CHEMERINSKY & GILLMAN, *supra* note 29, at xii. "Students are expected to uphold integrity of [Stanford University] as a community of scholars in which free speech is available to all . . . ." Stanford *Fundamental Standard*, *supra* note 36.

66. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (per curiam) (explaining categories of speech that do not raise Constitutional problems). Even if expression does not fall into a low-value category, the Court also now allows the government to try to satisfy strict scrutiny. In other words, the government can, in theory, punish expression if it shows that doing so is necessary or narrowly tailored to achieving a compelling state purpose. *E.g.*, Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 799–804 (2011). The government rarely satisfies this test. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (holding that a state may restrict speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"; however, the act at issue was directed at mere advocacy); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741, 743, 747 (1966) (holding that a law protecting kids from indecent or patently offensive content was constitutionally permissible because it was sufficiently narrowly tailored to achieve a compelling state interest). *See generally* FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 349–419 (explaining that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), served to turn the Court toward "accepting the new regime of pluralistic democracy" in 1937).

67. *Chaplinsky*, 315 U.S. at 571–72. This assertion remains largely true, though the Court complicated matters when dealing with hate speech. R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (suggesting the First Amendment protects expression within the low-value categories to some degree).

68. *See, e.g.*, Stanford *Fundamental Standard*, *supra* note 36 (explaining that obscenity is punishable because "it is so serious and injurious that a specific legal threshold is met").

69. CHEMERINSKY & GILLMAN, *supra* note 29, at 90–92; Stanford *Fundamental Standard*, *supra* note 36.

70. CHEMERINSKY & GILLMAN, *supra* note 29, at 182 n.12.

problematic. After years of disagreement, a narrow five-to-four majority of justices agreed on a definition in 1973[71]:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest (citation omitted); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[72]

The dissenting justices questioned the precision and workability of this doctrinal test.[73] Yet, it is worth noting that the test is no more difficult to apply in a university setting than anywhere else.

Regardless of whether a doctrinal test identifying or defining a particular low-value category is problematic in its application, the typical analysis of free speech on campus merely reiterates that low-value categories are outside of First Amendment protection. Therefore, a university can punish or restrict expression falling into any of those categories.[74] For this reason, there is widespread agreement that universities can restrict or punish expression harassing or physically threatening an individual, as occurred at the University of Wyoming.[75]

"True threats" constitute another low-value category.[76] As defined by the Court, "'true threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[77] The Court has explained, though, that "[t]he speaker need not actually intend to carry out the threat."[78] Still, the true threats

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71. Miller v. California, 413 U.S. 15, 16, 25, 37, 47 (1973).

72. *Id.* at 24.

73. *Id.* at 39–43 (Douglas, J., dissenting) ("Obscenity—which even we cannot define with precision—is a hodge-podge."); *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting) (questioning the *Miller* definition).

74. *See* CHEMERINSKY & GILLMAN, *supra* note 29, at 113, 115–18, 123–28, 143–45, 150 (describing categories of speech that fall outside of the First Amendment's protections); Stanford *Fundamental Standard*, *supra* note 36 (same).

75. CHEMERINSKY & GILLMAN, *supra* note 29, at 116–20 (including physical threats but not harassment within the true threat category of speech); *Chicago Principles*, *supra* note 37 (including threats and harassment in the subset of speech that universities may restrict); Stanford *Fundamental Standard*, *supra* note 36; McFarland, *supra* note 19.

76. Virginia v. Black, 538 U.S. 343, 359–60 (2003).

77. *Id.* at 359.

78. *Id.* at 359–60.

low-value category protects "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[79]

Given this constitutional doctrine, universities can punish true threats without violating the First Amendment.[80] Chemerinsky and Gillman emphasized that the true threats doctrine "focuses on protecting a person from fear of physical harm, but not from emotional injury."[81] In Stanford's discussion of its Fundamental Standard and free speech, the university similarly emphasized that it can punish "[s]peech that establishes a genuine physical threat toward a specific individual."[82] Stanford gave the following example:

> Whether or not something constitutes a true threat requires a close examination of the intent and impact of the statement, as the same sentence said in different contexts would yield different results. For example, someone who flippantly says "Communists don't deserve to live" in a group of people would not constitute a true threat, whereas someone who points a weapon at a known Marxist while saying "Communists don't deserve to live" would.[83]

Universities can also punish expression that harasses an individual based on "race, sex, religion, or sexual orientation."[84] While the Supreme Court has never expressly held that harassment constitutes a low-value category, it has upheld statutory claims based on harassment.[85] Stanford explained that for speech to constitute

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79. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). The true threats doctrine protects the individual from "fear of bodily harm or death." *Black*, 538 U.S. at 360. To punish a true threat, the government must prove that "the defendant had some subjective understanding of the threatening nature of his statements." Counterman v. Colorado, 600 U.S. 66, 69 (2023). More specifically, the government must prove that the defendant at least acted recklessly. *Id.* at 79–80.

80. CHEMERINSKY & GILLMAN, *supra* note 29, at 116–17; *Chicago Principles*, *supra* note 37; Stanford *Fundamental Standard*, *supra* note 36.

81. CHEMERINSKY & GILLMAN, *supra* note 29, at 117.

82. Stanford *Fundamental Standard*, *supra* note 36.

83. *Id.* In theory, then, a university could punish an individual for physically threatening a group of people by, for instance, waving a gun at them. *See Counterman*, 600 U.S. at 69 (clarifying recklessness as the true threats doctrine standard).

84. CHEMERINSKY & GILLMAN, *supra* note 29, at 118; *see* Chicago Principles, *supra* note 37 (recognizing that universities can punish harassment); Stanford *Fundamental Standard*, *supra* note 36 (same).

85. *E.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) (holding the school responsible for damages under Title IX of the Education Amendments of 1972 because of the school's deliberate indifference toward sexual harassment of one student by another); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (upholding a claim based on sexual harassment for damages under Title IX of the Education Amendments of 1972).

punishable harassment, "the speech must be targeted by the speaker toward a specific individual, unwelcome, discriminatory, and so serious that a reasonable person would find it materially limits participation in the educational experience."[86] Stanford stressed that the harassment must target an individual and that "the threshold [for proving a claim] is incredibly high."[87] Chemerinsky and Gillman agreed, explaining, as an example, that "a noose placed on a tree on a campus cannot by itself be deemed harassment, but a noose tacked to an African American student's door in a dormitory could be."[88]

The Supreme Court, however, has never deemed offensive expression to be a low-value category outside of First Amendment protections.[89] Therefore, the Chicago Principles, Stanford, and Chemerinsky and Gillman all emphasized that offensive expression, no matter how horrendous, is constitutionally protected on campus.[90] The Chicago Principles stated that "debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed."[91] Stanford likewise stated: "Speech that is unpopular, offensive, or even abhorrent is protected by the First Amendment. This includes speech that is political in nature, racist, sexist, or otherwise unseemly."[92] Chemerinsky and Gillman are similarly unequivocal: "A campus can't censor or punish speech merely because a person or group considers it offensive or hateful."[93]

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86. Stanford *Fundamental Standard*, *supra* note 36; *see* CHEMERINSKY & GILLMAN, *supra* note 29, at 120 (specifying the elements for a claim of discriminatory harassment in education).

87. Stanford *Fundamental Standard*, *supra* note 36.

88. CHEMERINSKY & GILLMAN, *supra* note 29, at 120–21 (emphasizing the need to prove severe or pervasive harassment). Harassment is considered a form of discrimination, and discrimination is understood to be conduct rather than speech. *Id.* at 118–19; *see* 303 Creative LLC v. Elenis, 600 U.S. 570, 603–10 (2023) (Sotomayor, J., dissenting) (discussing discrimination in relation to free expression).

89. *E.g.*, Cohen v. California, 403 U.S. 15, 16, 26 (1971) (holding that the state could not constitutionally punish an individual for wearing a jacket saying "Fuck the Draft"); *see* Snyder v. Phelps, 562 U.S. 443, 461 (2011) (reasoning that the First Amendment protects "even hurtful speech on public issues").

90. CHEMERINSKY & GILLMAN, *supra* note 29, at 113–15; Chicago Principles, *supra* note 37; Stanford *Fundamental Standard*, *supra* note 36. "We value free and open inquiry and expression—tenets that underlie academic freedom—even of ideas some may consider wrong or offensive." *Cornell Policy Statement*, *supra* note 64.

91. *Chicago Principles*, *supra* note 37.

92. Stanford *Fundamental Standard*, *supra* note 36.

93. CHEMERINSKY & GILLMAN, *supra* note 29, at 113.

At this stage, most doctrinal analyses of campus free speech stop. And from this position, hate speech, group libel, and other offensive expression targeting the LGBTQ+ community, people of color, Jews, Muslims, or other historically marginalized groups should, it seems, be constitutionally protected, so long as the expression does not physically threaten or harass an individual.[94] In my hypothetical, where an individual comes on campus and displays a sign, "God created male and female, and all gays will go to Hell," the university would be unable to restrict or punish the expression. The expression would be deemed hate speech or offensive, and as such, it would not fall into any clearly defined low-value category.

B. Free Speech in Schools

Stopping the doctrinal analysis at this point, however, ignores numerous cases that focus on public schools and universities as special free speech settings (partly because the government owns the property). The Supreme Court's landmark decision from 1969, *Tinker v. Des Moines Independent Community School District*,[95] articulated strong free speech rights in school settings.[96] A high school and a junior high school had suspended students for wearing black armbands as a political protest against the Vietnam War.[97] The Court emphasized that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[98] Nevertheless, the Court recognized that students might sometimes need to sacrifice free speech rights when at school. To determine the scope of rights in the school setting, the Court reasoned that student expression should be constitutionally protected unless it caused "material and substantial interference with schoolwork or discipline."[99] In the 1972 case, *Healy v. James*,[100] the Court clarified that the *Tinker* doctrine applied to not only high school and junior high school students, but also to university students.[101] And one year

94. The Court has not recognized hate speech as a low-value category. *See* WALDRON, *supra* note 51 (examining the Court's rulings recently concerning group libel and explaining that there is still no definitive answer regarding the status of hate speech laws).

95. 393 U.S. 503 (1969).

96. *See id.* at 506, 511.

97. *Id.* at 504.

98. *Id.* at 506.

99. *Id.* at 511.

100. 408 U.S. 169 (1972).

101. *See id.* at 180.

later, in *Papish v. Board of Curators of the University of Missouri*,[102] the Court again followed *Tinker* in a university context.[103]

If *Tinker*, *Healy*, and *Papish* were the only cases involving free speech in school and university settings, then the Chicago Principles and other typical doctrinal analyses would be correct: Offensive expression, including group libel or hate speech, must be constitutionally protected on campus.[104] While a university could punish expression inciting imminent disruptive conduct on campus, the school could not punish those who express or advocate for ideas.[105] In *Papish*, which involved the publication of a campus newspaper containing allegedly indecent expression, the Court stated, "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[106]

The Court, however, has decided subsequent cases that have substantially retreated from the strong free speech protections of *Tinker* and its progeny. The Court began chipping away at *Tinker* in 1986. *Bethel School District No. 403 v. Fraser*[107] arose when a high school suspended a student who delivered an allegedly lewd speech at an assembly.[108] The Court invoked *Tinker* but modified its doctrine.[109] Whereas *Tinker* protected student expression unless it caused material and substantial interference with schoolwork or discipline, *Bethel* emphasized school officials' discretion to determine whether the expression "would undermine the school's basic educational mission."[110] Given this deference, the Court found the student's expression unprotected.[111] Quoting Justice Hugo Black's *Tinker* dissent, *Bethel* denied "that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of

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102. 410 U.S. 667 (1973) (per curiam).

103. *Id.* at 670.

104. CHEMERINSKY & GILLMAN, *supra* note 29, at 113–15; *Chicago Principles*, *supra* note 37; Stanford *Fundamental Standard*, *supra* note 36.

105. *Healy*, 408 U.S. at 188–89.

106. *Papish*, 410 U.S. at 667, 670 (quoting Papish v. Bd. of Curators of Univ. of Mo., 464 F.2d 136, 145 (8th Cir. 1972)).

107. 478 U.S. 675 (1986) (distinguishing between the political message in *Tinker* and the sexual content of the speech in this case).

108. *Id.* at 677–78.

109. *See id.* at 680 (noting that, unlike *Tinker*, speech or action that encroached upon schools or students' rights was not at issue).

110. *Id.* at 685.

111. *Id.* at 685–86.

the American public school system to public school students."[112] Instead, the "'work of the schools'"[113] was to inculcate the "fundamental values of 'habits and manners of civility' essential to a democratic society . . . ."[114] In doing so, schools should encourage students to "take into account consideration of the sensibilities of others."[115]

The Court continued its retreat from *Tinker* in *Hazelwood School District v. Kuhlmeier*,[116] decided in 1988. *Hazelwood* upheld a high school principal's decision to delete articles discussing divorce and teen pregnancy from a school-sponsored newspaper.[117] The Court reasoned that, under *Bethel*, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission . . . .'"[118] The Court, though, did not apply the *Tinker* doctrine, as modified by *Bethel*. Instead, the Court carved out a large and explicit exception by limiting the scope of *Tinker* and *Bethel*. Those cases applied only when school officials seek to restrict "a student's personal expression that happens to occur on the school premises."[119] *Tinker* and *Bethel* did not apply to school-sponsored activities that "may fairly be characterized as part of the school curriculum . . . ."[120] With regard to such school-sponsored activities and curriculum, *Hazelwood* followed *Bethel* by deferring to school officials. Unless the officials have "by policy or by practice" transformed the school into a designated (or limited) public forum—by opening it "'for indiscriminate use by the general public,' . . . or by some segment of the public, such as student organizations"—the officials could regulate student expression in any way "reasonably related to legitimate pedagogical concerns."[121] In other words, school officials were in charge. They decided whether to transform the school into a designated public forum, and, if they did not do so, they could

112. *Id.* at 686 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

113. *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508).

114. *Id.* at 681 (quoting Charles A. Beard & Mary R. Beard, *The Beards' New Basic History of the United States*, 228 (1968)).

115. *Id.*

116. 484 U.S. 260 (1988).

117. *Id.* at 263.

118. *Id.* at 266 (quoting *Bethel*, 478 U.S. at 685).

119. *Id.* at 271.

120. *Id.* at 267, 272–73 (quoting Perry Educ. Assn. v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 47 (1983)).

121. *Id.* at 272–73.

regulate student activities and publications to promote the values of civility and even to avoid political controversy.[122]

The Roberts Court's more recent decisions have not changed the constitutional doctrine for speech in schools. In *Morse v. Frederick*,[123] decided in 2007, the Court upheld a school principal's decision to suspend a student for displaying a banner, "BONG HiTS 4 JESUS."[124] After paying homage to *Tinker*, the Court followed the retreat.[125] Quoting from *Bethel*, the Court emphasized that a school can punish a student's "offensively lewd and indecent speech[.]"[126] Then, quoting *Hazelwood*, the Court emphasized that school officials can control the "'content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.'"[127] Deference to the school principal was crucial to the ultimate decision. The Court acknowledged that the student's message, "BONG HiTS 4 JESUS," was ambiguous, but deferred to the principal's interpretation as "plainly a reasonable one."[128] The principal maintained that viewers of the banner would believe it encouraged illegal drug use.[129] Such a message, the Court concluded, did not merit constitutional protection.[130]

Finally, a decision from 2021, *Mahanoy Area School District v. Levy*,[131] reached a surprising conclusion: It was the first case in more than fifty years to uphold a high school student's free speech claim.[132] The school punished a student for sending friends a Snapchat photo that showed the student giving the finger and saying "Fuck school fuck softball fuck cheer fuck everything."[133] Reasoning that the expression occurred off campus, the Court concluded that the First Amendment

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122. *Id.* at 272.
123. 551 U.S. 393 (2007).
124. *Id.* at 397.
125. *See id.* at 403–06, 408.
126. *Id.* at 404 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
127. *Id.* at 405 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).
128. *Id.* at 401.
129. *Id.*
130. *Id.* at 402–03.
131. 141 S. Ct. 2038 (2021).
132. Robert Barnes, *Supreme Court Sides with High School Cheerleader in Free-Speech Dispute over Profane Snapchat Rant*, WASH. POST (June 23, 2021, 6:44 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-cheerleader-snapchat-free-speech/2021/06/23/09b905ba-d42a-11eb-a53a-3b5450fdca7a_story.html [https://perma.cc/2ZCS-BDWE].
133. *Mahanoy*, 141 S. Ct. at 2043.

protected the student from punishment.[134] Nevertheless, the Court emphasized that it was not articulating a general rule for deciding student free speech cases when the speech occurs off-campus, or even a rule for ascertaining what speech counts as being off-campus.[135]

Synthesizing the precedents on speech in schools leads to the following conclusion: The Court generally defers to school officials regarding educational decisions, including those related to pedagogy and curriculum, even if those decisions restrict or punish speech or writing. In accordance with this deference, school officials can reasonably promote certain values, including civility. From this perspective, a school or university could constitutionally prohibit and punish hate speech, group libel, and other offensive expression targeting the LGBTQ+ community, people of color, Jews or Muslims, and other historically marginalized groups. Restricting such expression would protect educational opportunities and promote an inclusive learning environment. In my hypothetical, where an individual displays a sign on campus stating, "God created male and female, and all gays will go to Hell," the university could restrict the expression and punish the perpetrator, even though the expression would not fall into any clearly defined low-value category.

To be sure, the current constitutional free speech doctrine does not unequivocally lead to the conclusion that universities can restrict and punish offensive expression, including hate speech and group libel. The doctrine is ambiguous, with perhaps the largest ambiguity arising from a possible distinction between high schools and universities. In the future, the Supreme Court could distinguish doctrinal rules for primary and secondary schools from rules for institutions of higher education. While individual justices have suggested making this distinction,[136] the Court as a whole has never seriously considered

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134. *Id.* at 2059.

135. *Id.* at 2045–46.

136. In *Morse*, when discussing the history of education and the regulation of students, Justice Thomas briefly focused on the "college level," *Morse v. Frederick*, 551 U.S. 393, 412 n.2 (2007) (Thomas, J., concurring), but then expressly stated that his "discussion is limited to elementary and secondary education." *Id.* at 413 n.3. In *Mahanoy*, Justice Alito suggested a possible distinction between high school and university students:

> This case does not involve speech by a student at a public college or university. For several reasons, including the age, independence, and living arrangements of such students, regulation of their speech may raise very different questions from those presented here. I do not understand the decision in this case to apply to such students.

141 S. Ct. at 2049 n.2 (Alito, J., concurring).

doing so.[137] To the contrary, the Court has largely ignored educational level: While *Tinker* arose in a high school and a junior high school,[138] *Healy* and *Papish* arose in universities.[139] The subsequent cases of *Bethel*, *Hazelwood*, *Morse*, and *Mahanoy* involved high schools.[140] Lower courts have mostly applied the school free speech doctrine interchangeably, the same at the high school and university levels, though some judges have argued for a distinction.[141]

Therefore, despite the doctrinal ambiguity, a reasonably strong argument can be made to allow universities to restrict offensive expression, including hate speech and group libel. University restrictions would be constitutional, though universities would not be constitutionally required to impose such restrictions. Indeed, a close examination of Stanford Dean Martinez's arguments reveals a paradox. On the one hand, she reasoned that the law school would have violated First Amendment norms by restricting Judge Duncan's speech, but on the other hand, she maintained that the law school acted constitutionally when it restricted (or attempted to restrict) students from disrupting Duncan's presentation.[142] Sprinkling in quotations from Supreme Court precedents, Martinez argued that "speech restrictions [such as those imposed on the students] may be especially reasonable 'in the educational context,' which requires

137. In *Hazelwood*, the Court expressly reserved the question of whether its doctrinal approach would apply to higher education. "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988).

138. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

139. Healy v. James, 408 U.S. 169, 170 (1972); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 667 (1973) (per curiam).

140. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986); *Hazelwood*, 484 U.S. at 262; *Morse*, 551 U.S. at 396; *Mahanoy*, 141 S. Ct. at 2042.

141. *E.g.*, Hosty v. Carter, 412 F.3d 731, 734–38 (7th Cir. 2005) (en banc) (applying *Hazelwood* at the university level); Axson-Flynn v. Johnson, 356 F.3d 1277, 1284–93 (10th Cir. 2004) (same); Bishop v. Aronov, 926 F.2d 1066, 1071, 1074–77 (11th Cir. 1991) (same); *see* Jeff Sklar, Note, *The Presses Won't Stop Just yet: Shaping Student Speech Rights in the Wake of* Hazelwood*'s Application to Colleges*, 80 S. CAL. L. REV. 641, 657–62 (2007) (discussing lower court cases, including *Hosty v. Carter*). Dissenters in *Hosty v. Carter* argued that the Supreme Court precedents supported a distinction. 412 F.3d at 739–42 (Evans, J., dissenting). Also, the en banc majority in *Hosty* suggested that the determination of what constitutes a reasonable regulation might vary with the age of the students. *Id.* at 734–35 (majority opinion). The court decided that, based on the summary judgment record, it could not resolve whether the expression was constitutionally protected, but that the university dean was nonetheless protected by qualified immunity. *Id.* at 737–38.

142. Martinez, *supra* note 3, at 3–7.

'appropriate regard for school administrators' judgment' in preserving a university's mission and advancing academic values."[143] Martinez explained that "a university is not just a platform for speech but is itself a speaker with its own First Amendment rights and prerogatives to edit the message it conveys to its students and the world."[144] If Martinez is correct on this point, and I think she is, then the same reasoning should apply to Judge Duncan or any other outside speaker. That is, a university should be able to choose speakers whose messages would harmonize with its educational mission.

Does the Court's recent decision in *303 Creative LLC v. Elenis*[145] change this conclusion? *303 Creative* held that a wedding website designer had a free speech right to discriminate against same-sex couples despite a state antidiscrimination statute.[146] As Justice Sonia Sotomayor emphasized in dissent,[147] the Court's decision appears to allow business owners to post notices or signs declaring their restrictions (and prejudices).[148] For example, a business could post a sign stating, "no wedding websites for gays," or "no Blacks, Jews, or dogs."[149] If true, then might not a speaker on a university campus claim a First Amendment right to post a sign saying, for instance, "Jews and Blacks are animals," or drawing from my hypothetical, "God created male and female, and all gays will go to Hell"?

Ironically, given the *303 Creative* Court's conclusion, which unequivocally diminished LGBTQ+ rights, the case might cut in the

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143. *Id.* at 3 (quoting Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 687 (2010)).

144. *Id.* To support this explanation, Martinez quoted from a concurring opinion written by Justice Felix Frankfurter regarding the freedom of a university to control its curriculum and pedagogy:

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

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

145. 600 U.S. 570 (2023).

146. *Id.* at 2312, 2321–22. The petitioner worried that the Colorado Anti-Discrimination Act (CADA) would have "force[d] her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman." *Id.* at 2308.

147. *Id.* at 2322 (Sotomayor, J., dissenting).

148. *Id.* at 2322, 2324, 2329.

149. *See id.* at 2323–24 (giving similar examples).

opposite direction.[150] *303 Creative* can be reasonably interpreted to support the power of a university to restrict expression in accordance with its educational and curricular goals. The Court emphasized that the website designer had a First Amendment right to "acts of expressive association."[151] The First Amendment, in other words, insulated the website designer from the mandate of the antidiscrimination statute, so she could choose not to associate with a same-sex couple and their wedding—a discriminatory action that would have otherwise violated the statute. This same reasoning supports a university that seeks to refuse to associate with individuals who would express hatred toward historically marginalized groups, including members of the LGBTQ+ community. In short, a university should be able to ban such speakers from campus.[152]

303 Creative involved the free speech rights of a private individual and business, rather than a state entity. Yet a public university should have the same right to expressive association. The doctrine is unclear, though several cases suggest that state governments, including universities, have First Amendment rights, as Dean Martinez concluded.[153] First, many of the already-discussed public school cases suggest the government has the power or right to shape the school mission and curriculum.[154] Second, the Court has recently recognized

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150. In fact, conservative Supreme Court majorities decided many of the cases I use to show that a university can constitutionally restrict hate speech and group libel. That is, I am invoking precedent for results that the conservative majorities would not likely have anticipated. Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1013–17 (2008) (relating politics of justices to several free speech cases involving education and schools). But the meaning of precedent is not fixed. Precedent, like constitutional text, always must be interpreted. *See* STEPHEN M. FELDMAN, PACK THE COURT! A DEFENSE OF SUPREME COURT EXPANSION 67–94 (2021) [hereinafter FELDMAN, PACK THE COURT] (explaining constitutional interpretation and the law-politics divide).

151. *303 Creative*, 600 U.S. at 586; *see* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (emphasizing expressive association).

152. In *303 Creative*, the Court was especially concerned that following the antidiscrimination statute would have resulted in compelling the website designer to express support for same-sex weddings. *Id.* at 2309. In my hypothetical, the university is not compelling or coercing any expression; it seeks to restrict or punish hate speech and group libel.

153. Martinez, *supra* note 3, at 3; *see* Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST (June 24, 2015, 5:17 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights [https://perma.cc/PF4X-ZF3T] (discussing the lower courts' split on whether state and local governments have free speech rights).

154. *E.g.*, Morse v. Frederick, 551 U.S. 393, 408 (2007).

(or created) a "government speech" doctrine that allows the government to choose what messages it will communicate.[155] Pursuant to the government speech doctrine, a town was allowed to refuse to display a monument sacred to a non-Christian religion, although the town already displayed a Ten Commandments monument.[156] In another case, the Court held that the government speech doctrine allowed a state to refuse to place offensive messages on license plates.[157] These cases suggest that a university, as a government entity, should have First Amendment rights, and *303 Creative* suggests those First Amendment rights should include a right to refuse to associate with individuals expressing hatred against historically marginalized groups (particularly if such refusal would be in furtherance of the university's educational mission).[158]

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155. Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (calling the government speech doctrine "recently minted").

156. "[T]he placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." *Id.* at 464 (majority opinion). The monument was a stone monument containing the Principles of Summum, sacred tenants of the Summum religion. *Philosophy: The Aphorisms of Summum and the Ten Commandments*, SUMMUM, https://www.summum.us/philosophy/tencommandments.shtml [https://perma.cc/6GYW-L8D4].

157. Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–20 (2015). The Court's most recent government speech case is inapposite. Shurtleff v. City of Bos., 142 S. Ct. 1583, 1593 (2022). The Court determined that a city was not engaged in government speech when it refused to allow a private entity to use a government flagpole to fly a Christian flag. *Id.* at 1587. In other words, the First Amendment applied to the government action, which the Court deemed to be viewpoint discrimination violating free speech. The Court articulated an ad hoc, multi-factor approach to determining whether the government was engaged in government speech outside of First Amendment restrictions:

> [W]e conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.

Id. at 1589–90. This decision does not seem to diminish the power of universities to establish curricula and shape educational environments.

158. To be clear, I do not approve of the *303 Creative* decision. To the contrary, I believe the Court should have reasoned that the antidiscrimination statute protected individuals based on their status or identity within societal groups specified in the statute. Discrimination against that status or identity is not equivalent to speech,

II. HISTORY AND THE WIELDING OF FREE SPEECH

Many commentators and scholars have argued that restrictions on offensive expression, including hate speech or group libel, occasionally harm the historically marginalized groups the restrictions are intended to protect.[159] Dean Martinez reiterated this view: "[T]he power to suppress speech is often very quickly directed towards suppressing the views of marginalized groups."[160] Perhaps more important is the flip side; many commentators and scholars have maintained that free expression ultimately benefits marginalized groups.[161] As Martinez stated: "[A]t key moments in history, robust protection for the rights of association and speech has been critical to the advance of social movements for historically marginalized groups."[162] From this historical perspective, restrictions on free expression undermine the ability of marginalized groups to challenge the entrenched cultural prejudices and structures of power in American society.[163]

Unfortunately, these depictions of history are misleading. Before the 1930s, the Supreme Court had never upheld any free speech claim, by anybody. During the World War I era and the first Red Scare, the Court repeatedly held that the First Amendment did not protect the expression of political outsiders, whether draft and war protesters

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particularly political speech. The fact that the speaker wants that status or identity to be a political issue does not make it so. The right of individuals to have a status or identity should not be open to public debate. *See* 303 Creative v. Elenis, 600 U.S. 570, 607, 625–26 (2023) (Sotomayor, J., dissenting) (separating discrimination against individuals based on status or identity from speech).

The Court's recent affirmative action decision, *Students for Fair Admissions, Inc. v. President of Harvard College,* is inapposite. 143 S. Ct. 2141 (2023). It held that race-based affirmative action in university admissions violates equal protection; it says nothing about how a university should treat students and others once they are on campus. *Id.* at 2175. Indeed, at one point, the Court states that "[u]niversities may define their missions as they see fit." *Id.* at 2168.

159. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1355 (6th ed. 2020) (arguing that hate speech codes are most likely to be used against minorities).

160. Martinez, *supra* note 3, at 7.

161. *Id.*; *see, e.g.*, Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 658–59 (1st Cir. 1974) (protecting an LGBTQ+ organization distributing publications on a university campus against some community members' wishes based on the freedom of expression).

162. Martinez, *supra* note 3, at 7.

163. CHEMERINSKY & GILLMAN, *supra* note 29, at 40–47; *see* Richard Delgado & David H. Yun, Essay, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 876–86 (1994) (articulating and opposing these standard arguments against hate speech regulations).

during the war or Communists during the 1920s.[164] After 1937, the history becomes more complicated.[165] In harmony with the Court's transformation of multiple realms of constitutional jurisprudence, the Court changed its approach to free expression, generally becoming more protective of speech and writing.[166] This more expansive judicial conception of free expression sometimes benefited previously marginalized groups. For instance, the Court began upholding the First Amendment rights of workers trying to organize labor unions.[167] The justices explained that they had "no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[168] The Court in the 1940s declared that free expression was a "fixed star in our constitutional constellation"[169] and emphasized that "[t]he vitality of civil and political institutions in our society depends on free discussion."[170]

Even with this more protective approach to free expression, the Court continued to narrow First Amendment protections during times of political crisis. For example, after the end of World War II, the nation plunged into its Cold War with the Soviet Union, which led to the second Red Scare.[171] Fearing Communist infiltration and influence, the government restricted free expression, and the Court repeatedly acquiesced.[172] In 1950, *American Communications Ass'n v. Douds*[173] upheld a statute requiring labor union officers to sign an affidavit declaring that they are "not a member of the Communist Party or affiliated with such party."[174] In 1952, *Adler v. Board of Education of New York*[175] upheld a New York law that compelled teachers to sign

164. Whitney v. California, 274 U.S. 357, 372 (1927) (Red Scare); Debs v. United States, 249 U.S. 211, 214–15 (1919) (World War I case involving a Socialist leader); Schenck v. United States, 249 U.S. 47, 52 (1919) (World War I case involving Socialists).

165. *See* FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 349–419 (discussing how President Franklin Roosevelt's court-packing plan impacted the Court's handling constitutional cases starting in 1937).

166. *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (holding that labor picketing is protected free speech).

167. *Id.*; *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (upholding right of unions to organize in streets).

168. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

169. *Id.* at 642.

170. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

171. FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 431–33.

172. *Id.* at 431–50.

173. 339 U.S. 382 (1950).

174. *Id.* at 386, 396, 402–03, 412 (upholding a provision of Taft-Hartley Act).

175. 342 U.S. 485 (1952).

affidavits swearing they did not belong to subversive organizations.[176] The Court's most renowned anti-Communist decision was *Dennis v. United States*,[177] decided in 1951, which upheld the convictions of eleven leaders of the Communist Party of the United States for advocating the violent overthrow of the government.[178] The Cold War was not the only crisis to undermine First Amendment protections. The 1960s might have been the high point of the Court's protection of free speech,[179] but even during that decade, the Court interpreted the First Amendment to allow government punishment of Vietnam War and draft protesters,[180] as well as civil rights protesters.[181]

More generally, the Court's free expression decisions resemble other constitutional decisions: The "haves" usually prevail, while historically marginalized groups and their members typically lose.[182] As early as the 1830s, Alexis de Tocqueville observed that societal outsiders risked social and legal punishments if they expressed dissident views.[183] An individual was free to speak or write if the expression remained within the broad streams of public opinion, but individuals venturing outside those parameters were often severely punished.[184] Tocqueville wrote that "[i]n America the majority raises very formidable barriers to the liberty of opinion."[185] He explained that

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176. *Id.* at 496.

177. 341 U.S. 494 (1951).

178. *Id.* at 516–17.

179. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 303–35 (2000) (tracing the Court's treatment of freedom of expression cases in the 1960s).

180. United States v. O'Brien, 391 U.S. 367, 386 (1968) (upholding the conviction of a Vietnam War protestor).

181. *See* Adderley v. Florida, 385 U.S. 39, 48 (1966) (upholding a state's use of its property to prevent protesting activity if the regulations are content-neutral and non-discriminatory); Walker v. City of Birmingham, 388 U.S. 307, 307 (1967) (upholding the criminal contempt conviction of Martin Luther King, Jr., without expressly reaching the free speech issue).

182. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 125 (1974) (discussing the advantages of the wealthy and powerful in litigation); *see* Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the "Haves" Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, 33 L. & SOC'Y REV. 811, 811 (1999) (showing, through empirical research, that victory in litigation depends more on access to resources than on formal legal arguments).

183. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 267–68 (Henry Reeve trans., rev. ed. 1990) (first published in French in 1835 & 1840).

184. *Id.*

185. *Id.* at 268.

"within these barriers an author may write whatever he pleases, but he will repent it if he ever step beyond them."[186]

In the late-twentieth and early-twenty-first centuries, political scientists' empirical studies showed that the Supreme Court rarely protects marginalized groups from majoritarian overreaching.[187] In the words of Robert Dahl, "it would appear to be somewhat naive to assume that the Supreme Court either would or could play the role of Galahad."[188] Instead, the Court typically acts as an integral "part of the dominant national alliance," deciding in harmony with the interests and values of that dominant political alliance or regime.[189] Infrequently departing from the political status quo, the Court decides in accordance with the interests and values of the white Christian mainstream and the wealthy.[190] The Roberts Court has continued to follow this regimist thesis (following the dominant political regime), deciding free expression cases to favor the mainstream and wealthy at the expense of outsiders and minorities. Corporations and Christians have consistently won cases involving free expression,[191] while non-Christian religious minorities,[192] people of color,[193] public employee

186. *Id.*

187. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285–91 (1957) (detailing the results of a series of empirical studies); *see also* TERRI JENNINGS PERETTI, PARTISAN SUPREMACY: HOW THE G.O.P. ENLISTED COURTS TO RIG AMERICA'S ELECTION RULES 5–9 (2020) (introducing the theory of regime politics and illustrating its application through examples of interbranch cooperation).

188. *Id.* at 284.

189. *Id.* at 293; *see* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 42–45 (2007) (discussing criticisms of Dahl's regimist thesis).

190. Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 L. & SOC. INQUIRY 273, 275 (2010) (describing the regimist approach).

191. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) (invalidating restrictions on corporate campaign spending). Many religious-freedom cases also involve free expression. *E.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

192. Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (holding against a free expression claim of Summum, a minority religious group, which sought to display a monument in a public park).

193. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1927 (2019) (invoking the state action doctrine to defeat a free speech claim by television producers focusing on East Harlem, a predominantly Hispanic and Black neighborhood in New York City).

unions,[194] prisoners,[195] and those seeking an equal voice in democratic government have consistently lost.[196]

In fact, from a historical standpoint, interest convergence can explain many free expression cases where have-nots appeared to win. Interest convergence occurs when the interests or values of marginalized groups temporarily coincide with those of the mainstream or wealthy.[197] These interest-convergence cases can be grouped into two categories: (1) cases where the expression of a marginalized group (or member) is protected, but the protected expression targets another marginalized group; and (2) cases where the mainstream or wealthy temporarily accept a marginalized group's interests.

A comparison of two post-World War II hostile-audience cases, *Terminiello v. Chicago*[198] and *Feiner v. New York*,[199] illustrates the first type of case. In *Terminiello v. Chicago*, decided in 1949, the Court held that the conviction of a Catholic priest for disorderly conduct violated the First Amendment.[200] Despite the current political alliance of Protestant evangelicals and Catholics, Protestant anti-Catholicism was strong and widespread for much of American history.[201] Therefore, the *Terminiello* defendant was a member of a historically marginalized group. Yet, his speech had targeted another historically marginalized religious group.

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194. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that workers cannot be forced to pay union fees related solely to collective bargaining representation, even though the workers benefit from the representation); Knox v. Serv. Emps. Int'l Union, Loc. 100, 567. U.S. 298, 321–22 (2012) (holding that public employee union could not impose a special assessment fee to support political advocacy, even if union members could opt out).

195. Beard v. Banks, 548 U.S. 521, 524–25 (2006) (plurality opinion) (severely limiting prisoner access to written materials and photographs).

196. *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding that the constitutionality of extreme political gerrymandering was a nonjusticiable political question).

197. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). As Derrick Bell first presented in the interest-convergence thesis, Black Americans historically gained social justice primarily when their interests converged with the interests of the white majority. *Id.*; *see* Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 249 (2012) (defending Bell and the interest-convergence thesis).

198. 337 U.S. 1 (1949).

199. 340 U.S. 315 (1951).

200. *Terminiello*, 337 U.S. at 5.

201. SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 7, 53, 853–54, 1006–07, 1090 (1972); FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 39–40, 170, 294–95, 304.

He had condemned "atheistic, communistic Jewish or Zionist Jews"[202] and claimed that Jewish doctors had performed atrocities on Germans.[203] The defendant said, "Do you wonder [why] they were persecuted in other countries . . . ?"[204] He then declared that "we want them to go back where they came from."[205] Audience members were moved to exclaim, "'Kill the Jews,' 'Dirty kikes,'" and "'the Jews are all killers, murderers. If we don't kill them first, they will kill us.'"[206] Nevertheless, *Terminiello* can be viewed as a great victory for free expression. The Court not only protected the free speech rights of a Catholic priest, a member of a historically marginalized group, but the Court also reasoned that the First Amendment protected speech even if it "stirred people to anger, invited public dispute, or brought about a condition of unrest."[207] Yet, that free speech victory came at the expense of another marginalized group, the Jewish people targeted by the hate speech.[208]

Feiner v. New York, decided in 1951, reached a significantly different result. The defendant was a university student who had spoken to a racially mixed crowd of seventy-five to eighty white and Black Americans gathered on a sidewalk in Syracuse, New York.[209] He had encouraged the audience to attend a meeting of the Young Progressives of America, protested the city's cancellation of a permit for a prior meeting, and made derogatory remarks about "President Truman, the American Legion, the Mayor of Syracuse, and other local political officials."[210] The Court held that the First Amendment did not protect this speech because it created a clear and present danger, although the evidence showed only that "[t]he crowd was restless and there was some pushing, shoving and milling around."[211] The justices

202. *Terminiello*, 337 U.S. at 20 (Jackson, J., dissenting).
203. *Id.* at 19–21.
204. *Id.* at 20.
205. *Id.* at 21.
206. *Id.* at 22.
207. *Id.* at 5 (majority opinion).
208. There are additional cases where the Court protected the expression of a member of a historically marginalized group who attacked or targeted another historically marginalized group. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 300–03, 307, 311 (1940) (protecting a member of the Jehovah's Witnesses who targeted Catholics); *see also* Murdock v. Pennsylvania, 319 U.S. 105, 106–07, 116–17 (1943) (granting broad liberties to "itinerant evangelists").
209. Feiner v. New York, 340 U.S. 315, 315–17 (1951); *see also id.* at 321 (Black, J., dissenting).
210. *Id.* at 317 (majority opinion); *see also id.* at 329–30 (Douglas, J., dissenting).
211. *Id.* at 317, 320–21 (majority opinion).

seemed especially worried that Feiner had urged Black Americans to "rise up in arms and fight for equal rights."[212] Yet, witnesses swore that Feiner had instead encouraged his listeners to "rise up and fight for their rights by going arm in arm to the [Young Progressives meeting], black and white alike."[213]

Contrasting *Terminiello* with *Feiner*—similar hostile-audience cases decided only two years apart—*Terminiello* protected inflammatory antisemitic speech, while *Feiner* allowed the government to punish speech criticizing public officials and encouraging Black Americans to take political action. The Court might not have intentionally discriminated against marginalized outsiders in these cases. Even so, in *Terminiello*, the Court emphasized the principled First Amendment protection of speech when the speech attacked a marginalized group.[214] Meanwhile, in *Feiner*, the Court found speech that threatened the mainstream and elites to be unprotected.[215]

In 1969, *Brandenburg v. Ohio*,[216] another landmark free speech decision, underscored how the Court has sometimes vigorously enforced the First Amendment at the expense of historically marginalized groups—even as the Court appears to protect the rights of another marginalized group (in this instance, the Ku Klux Klan).[217] In *Brandenburg*, the Court famously articulated its most speech-protective standard ever for determining when subversive advocacy or, more generally, speech inciting unlawful conduct, is outside First Amendment protections and, therefore, punishable.[218] Yet, one should not overlook that the evidence showed the defendant, Clarence Brandenburg, gathered with hooded figures around a burning cross.[219] A KKK leader, Brandenburg repeatedly denounced Black and Jewish

212. *Id.* at 317.

213. *Id.* at 324 & n.5 (Black, J., dissenting).

214. *See* Terminiello v. Chicago, 337 U.S. 1, 5 (1949) (finding that the First Amendment protects speech even where it incites unrest); *see also supra* notes 203–06 (discussing the effect of the ruling on marginalized peoples).

215. *See Feiner*, 340 U.S. at 320–21 (holding that a meeting advocating for racial equality created clear and present danger and therefore was not protected under the First Amendment); *see also supra* notes 209–13 (noting that the decision protected the government from criticism by labeling an arguably peaceful meeting as dangerous).

216. 395 U.S. 444 (1969) (per curiam).

217. *Id.* at 444–49.

218. *Id.* at 447–48 (establishing that speech inciting violence or unlawful conduct only violates the First Amendment when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see* STONE, *supra* note 38, at 522–23 (discussing *Brandenburg*).

219. *Brandenburg*, 395 U.S. at 445–47.

Americans with epithets and then declared that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[220]

A second type of interest-convergence, free expression case occurs when the mainstream or wealthy temporarily accept a marginalized group's interests and values as valid. In accordance with the regimist thesis, when public opinion regarding a marginalized group temporarily shifts, the Court has followed the shift. For example, the Court began upholding the First Amendment rights of labor organizers only after public opinion regarding labor unions shifted dramatically, growing more favorable during the throes of the Great Depression.[221] Consistent with growing public support for unionization, Congress enacted the National Labor Relations Act in 1935,[222] and the Supreme Court upheld the Act's constitutionality.[223] Likewise, as public opinion in the late-1960s and early-1970s shifted against the Vietnam War,[224] the Court became more receptive toward the free speech claims of draft and war protesters.[225] And again, as public opinion shifted to accept the legitimacy of civil rights protesters, the Court became more protective of their expression.[226]

The point of this Part is not that free expression never benefits marginalized groups. Often, the Court has interpreted the First Amendment to protect individuals who have targeted marginalized groups. While the Court occasionally interprets the First Amendment to protect the free speech rights of marginalized groups or their members, such cases often are explained by interest convergence,

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220. *Id.* at 444, 446 & n.1, 447.

221. Thornhill v. Alabama, 310 U.S. 88, 104–06 (1940) (holding that labor picketing is protected free speech); Hague v. Comm. for Indus. Org., 307 U.S. 496, 500–02, 512–16, 518 (1939) (plurality opinion) (upholding the right of unions to organize in streets).

222. 29 U.S.C. §§ 151–169 (2018).

223. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29–31, 33, 49 (1937); *see* FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 318–24 (discussing the rise of labor unions and the passage of the NLRA).

224. *See* William L. Lunch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 32 W. POL. Q. 21, 25–31 (1979) (illustrating shifting trends in public opinion and discussing growing disillusionment that led most Americans to favor withdrawal over escalation in Vietnam by the late 1960s).

225. Cohen v. California, 403 U.S. 15, 16, 26 (1971) (holding that state could not constitutionally punish an individual for wearing a jacket saying "Fuck the Draft").

226. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 898–900, 926–29 (1982) (protecting the speech of an NAACP Field Secretary leading a civil rights boycott of white merchants).

where the interests and values of the mainstream and wealthy coincide with those of the marginalized groups. The Court has rarely decided a free speech case favorably to a marginalized group if the decision would contravene the interests of the mainstream and wealthy.[227] Given this history, universities and scholars appear to be mistaken when they maintain that history demands the strong protection of free expression, to protect historically marginalized groups. From that perspective, any wavering on free speech protections on campus, such as the restriction of hate speech or other offensive expression, is likely to adversely affect historically marginalized groups. The actual history, though, is far more complex and does not support this position. If anything, when a university insists that free speech must be vigorously upheld to protect historically marginalized groups, the university's argument resonates uncomfortably with the historical wielding of free speech to the detriment of marginalized groups.

A final historical point should be made about originalist sources. If one were inclined to follow the original public meaning of the First Amendment, one would be hard-pressed to conclude that the Free Speech Clause protects offensive expression. The earliest (state court) cases interpreting the right of free speech applied a version of the bad tendency test, which allowed the government to punish expression likely to cause harm.[228] In other words, the government could restrict any speech or writing that appeared to contravene the common good.[229] Simultaneously, during the early national years, free expression would not likely be understood to protect marginalized groups, as people of color, women, the poor, and others were excluded

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227. *See* MacKinnon, *supra* note 51, at 1224 (emphasizing that powerful societal groups have "weaponized" free expression for their benefit).

228. *See, e.g.*, People v. Croswell, 3 Johns. Cas. 337, 349 (N.Y. Sup. Ct. 1804) ("A libel is punishable, not because it is false, but because of its evil tendency; its tendency to a breach of the peace.").

229. *Id.*; *cf.* Castle v. Houston, 19 Kan. 417, 422, 427–28 (1877) (establishing that in a criminal libel case, the fact that a statement was made "for public benefit" or "for justifiable ends" is a valid defense that can result in acquittal); Commonwealth v. Morris, 3 Va. 176 (1811) (holding that truth alone is generally not a justification for libel). *But see* Perkins v. Mitchell, 31 Barb. 461, 466–67 (N.Y. Sup. 1860) (opining that the court need not look at the tendency of a statement when its degrading and injurious impact is obvious). *See generally* FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 46–152 (detailing the development of free expression during the early decades of nationhood).

from participating in the polity.[230] In sum, history is far too complicated to support unequivocal conclusions about free speech and marginalized groups: What is clear, though, is that the strong protection of free speech does not inevitably benefit marginalized groups.

III. WHY IT MATTERS: INJURIES TO MARGINALIZED GROUPS, AND THE MARKETPLACE OF IDEAS

Even those who oppose hate speech restrictions on campus often acknowledge that hate speech and group libel harm the targeted group and its members.[231] As Richard Delgado phrased it years ago, hate speech constitutes "words that wound."[232] Victims of hate speech suffer psychological and physical harms. "The negative effects of hate messages are real and immediate for the victims," Mari Matsuda explained.[233] "Victims . . . have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[234]

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230. *FELDMAN*, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 23–26; *e.g.*, State v. Chandler, 2 Del. 553, 577–79 (1837) (upholding a conviction for blaspheming Christianity); City Council of Charleston v. Benjamin, 33 S.C.L. 508 (1848) (upholding constitutionality of a state law under which a Jewish defendant was convicted for failing to observe Sunday as "the Lord's day"); *see* LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 400–23 (1993) (discussing state blasphemy cases from pre-Civil War America). Given this historical understanding of speech, if one is concerned with equality for marginalized groups, the Equal Protection Clause (along with the Due Process Clauses) might be more likely to provide succor. *E.g.*, U.S. CONST. amend XIV. For criticisms of originalism, see generally Stephen M. Feldman, *Justice Scalia and the Originalist Fallacy*, *in* THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA 189 (Howard Schweber & David A. Schultz eds., 2018); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 B.Y.U. J. PUB. L. 283, 290, 349–50 (2014).

231. *E.g.*, CHEMERINSKY & GILLMAN, *supra* note 29, at 82–87.

232. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); *see* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 458–59, 462 (discussing the harms of hate speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335–38 (1989) (same).

233. Matsuda, *supra* note 232, at 2336.

234. *Id.* "Racial epithets and harassment often cause deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a victim's life." Lawrence, *supra* note 232, at 462. "Racial and sexual harassment and intimidation are threatening and traumatic to those it targets." JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 245 (2021).

Given the power of hate speech to inflict harm, victims are sometimes unable to respond other than with silence.[235] Significantly, hatred expressed against a historically marginalized group aligns with deeply entrenched cultural prejudices and structures of power in American society.[236] Hatred against Jewish Americans, Black Americans, the LGBTQ+ community, and other marginalized groups is not a new development.[237] Over decades and centuries, the hatred has been institutionalized in cultural and societal structures.[238] An expression of hatred against a historically marginalized group consequently carries enormous force—as if a strong wind were blowing at its back, thrusting the hatred forward. According to Charles Lawrence, being the subject of racial, religious, or similar slurs "is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech."[239]

These injuries might be more pronounced when hate speech targets an individual, rather than a group—though the hate speech would typically target and diminish the individual for being part of the group—but evidence also suggests that group libel (condemnation of a group rather than a specific individual) injures the group and its members. For instance, focusing on the LGBTQ+ community, statistics unsurprisingly demonstrate that "queer and trans youth ages 13 to 24 [show] alarmingly high rates of suicide attempts, depression and

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235. BEN-PORATH, *supra* note 28, at 43 (discussing the silencing of outsiders on campus); *see* PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 52 (Gino Raymond & Matthew Adamson trans., 1991) (arguing that dominated speakers can become speechless).

236. Eduardo Bonilla-Silva offers one definition of social structures: "By structure I mean . . . 'the networks of (interactional) relationships among actors as well as the distributions of socially meaningful characteristics of actors and aggregates of actors.'" Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 469 n.5 (1997); *see* FELDMAN, PLEASE DON'T, *supra* note 56, at 265–70 (explaining social structures). From this perspective, racial structure is "the totality of the social relations and practices that reinforce white privilege." BONILLA-SILVA, *supra* note 56, at 9.

237. According to Bonilla-Silva, we live in a "racialized" society. BONILLA-SILVA, *supra* note 56, at xv.

238. For a history of American racism, see generally IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016). For a history of the development of Christian cultural imperialism and antisemitism, see FELDMAN, PLEASE DON'T, *supra* note 56, at 10–254. For a focus on American antisemitism, see generally LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA (1994).

239. Lawrence, *supra* note 232, at 452.

anxiety . . . ."[240] While such data is depressingly bad in progressive states, it tends to be even worse in conservative states, where legislation condemns LGBTQ+ and trans youths.[241] In Texas, to take one example, during the year 2022, "47% of LGBTQ youth . . . seriously considered suicide . . . , including 56% of transgender and nonbinary youth[, and] 16% of LGBTQ youth . . . attempted suicide . . . , including 20% of transgender and nonbinary youth."[242]

The detrimental consequences of hateful group condemnations are clear in other ways. Students in historically marginalized groups, Jamal Greene emphasizes, often "spend an enormous and disproportionate amount of time and energy defending against and protesting speech that demeans them."[243] More generally, group libel or hate speech, whether targeting an entire group or an individual (for being part of the group), tends to undermine the dignity of each individual within the group while simultaneously communicating a denial of equality and inclusiveness for all group members.[244] Thus, the display of a sign denouncing Jewish or Black Americans—or, to focus on my hypothetical, a sign stating "God created male and female, and all gays will go to Hell"—sends the message that the group members should not be comfortable in American society and that other Americans

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240. Sam Levin, *More than 50% of Trans and Non-Binary Youth in US Considered Suicide this Year, Survey Says*, GUARDIAN (Dec. 17, 2022, 1:00 AM) https://www.theguardian.com/us-news/2022/dec/16/us-trans-non-binary-youth-suicide-mental-health [https://perma.cc/AT8N-4JLH].

241. *Id.*; THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH BY STATE (2022), https://www.thetrevorproject.org/wp-content/uploads/2022/12/The-Trevor-Project-2022-National-Survey-on-LGBTQ-Youth-Mental-Health-by-State.pdf [https://perma.cc/W324-XPSL].

242. Elliott Sylvester, *The Trevor Project Releases New State-Level Data on LGBTQ Youth Mental Health, Victimization, & Access to Support*, TREVOR PROJECT (Dec. 15, 2022), https://www.thetrevorproject.org/blog/the-trevor-project-releases-new-state-level-data-on-lgbtq-youth-mental-health-victimization-access-to-support [https://perma.cc/UK6S-VR4U]. Justice Sotomayor wrote:

> Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

303 Creative LLC v. Elenis, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting).

243. GREENE, *supra* note 234, at 245.

244. WALDRON, *supra* note 51, at 5–6; *see also 303 Creative LLC*, 600 U.S. at 607 (Sotomayor, J., dissenting) (emphasizing that the availability of services elsewhere does not diminish loss of dignity caused by hate speech or group libel).

would readily mistreat them or cast them out altogether.[245] Such denials of dignity and (equal) inclusiveness limit "the life opportunities" of condemned group members.[246]

When opponents of hate-speech restrictions acknowledge these types of harms, they frequently then argue that the proper response should be counterspeech rather than government suppression of the hate speech or group libel.[247] If one dislikes the ideas being communicated by hate speech, then one should respond with better ideas in the pursuit or search for truth. In other words, participate in the marketplace of ideas; do not try to shut it down.[248] Be a part of the dialogue or conversation searching for truth and knowledge rather than an opponent of it.[249] As Chemerinsky and Gillman put it, when confronted with hate speech or group libel on campus, "campus leaders can engage in more speech, proclaiming the type of community they seek and condemning speech that is inconsistent with it."[250]

Chemerinsky and Gillman, and other opponents of campus hate-speech codes, stress that the campus, more so than other institutions, should be conceptualized as a marketplace of ideas, as a site dedicated to the search for truth.[251] Decades ago, the Court itself voiced this view of the university: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas . . . .'"[252] Indeed, some proponents of the marketplace of ideas (and opponents of university hate-speech codes) describe the campus as if it were akin to Jürgen

245. WALDRON, *supra* note 51, at 5.

246. Lawrence, *supra* note 232, at 444.

247. BEN-PORATH, *supra* note 29, at 39; CHEMERINSKY & GILLMAN, *supra* note 29, at 39–40, 62–63; *see also* WHITTINGTON, *supra* note 29, at 43–50 (supporting diversity of viewpoints on university campuses and advocating against restrictions on free speech).

248. *See* FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 269–78 (discussing the historical development of the search-for-truth rationale and its conceptualization in the metaphor of a marketplace of ideas).

249. For example, according to the Wyoming Principles: "This adherence to impartiality reaffirms the intellectual freedom of all at [the University of Wyoming] to seek and receive information without restriction and enjoy unfettered access to all expression of ideas through which any side of a question, cause, or movement may be explored." Wyoming Principles, *supra* note 30, at 10.

250. CHEMERINSKY & GILLMAN, *supra* note 29, at 20.

251. *Id.* at 39–40 (discussing the emergence of the notion of "marketplace of ideas"); WHITTINGTON, *supra* note 29, at 43–50. Chemerinsky and Gillman wrote: "One might hope for a middle ground. Are we really limited to choosing between the absence of free thinking and a completely unregulated marketplace of ideas? We believe there is no middle ground." CHEMERINSKY & GILLMAN, *supra* note 29, at 62–63.

252. Healy v. James, 408 U.S. 169, 180 (1972).

Habermas's "ideal speech situation."[253] Habermas conceptualized the ideal speech situation as an encounter cleansed of domination, coercion, and other distortions arising from material forces and strategic rationality.[254] A consensus that emerges from the ideal speech situation reflects the force of the best argument only and thus allows us to identify truth and normative legitimacy. Because pure reason and evidence govern in the ideal speech situation, we can reach "unforced universal agreement."[255]

Keith Whittington, a Princeton political scientist, describes the "core mission of the university" in a manner resonating with this Habermasian ideal:

> Universities seek to constitute communities dedicated to experimentation, discussion, and learning. The university should welcome anyone who is willing to join such a community. The university embraces those who enter its campus, saying, "Come now, let us reason together." . . . Those who wish to maintain a closed mind and a stubborn orthodoxy will find nothing of interest on the college campus. Those who wish to keep an open mind and have their ideas and commitments tested and strengthened will find joy on the college campus.[256]

If we conceive of the campus in this sense, as composed solely of individuals committed to pure reason and evidence, then perhaps free speech should take precedence over all other values.[257] If that were

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253. Jürgen Habermas, *The Hermeneutic Claim to Universality*, *in* JOSEF BLEICHER, CONTEMPORARY HERMENEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY AND CRITIQUE 181, 206 (1980) [hereinafter Habermas, *Universality*]; *see* Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296 (2005) [hereinafter Feldman, *Critique*] (discussing Habermas in conjunction with Gadamer and Derrida as they fit into the metamodernism paradigm).

254. Jürgen Habermas, *What is Universal Pragmatics?*, *in* COMMUNICATION AND THE EVOLUTION OF SOCIETY 1, 105–10 (Thomas McCarthy trans., 1979). In his later work, Habermas spoke of an "ideal communication community." JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 322 (William Rehg trans., 1996); *see* Feldman, *Critique*, *supra* note 253, at 311–13 (explaining differences between the earlier Habermas as an abstract critique of communication and later Habermas as an analysis of the practical measures for communication).

255. Habermas, *Universality*, *supra* note 253, at 206.

256. *See* WHITTINGTON, *supra* note 29, at 19.

257. I qualify this statement with "perhaps" because I do not believe it is possible to have any group of individuals committed to such ideals in a realistic setting. *See* Feldman, *Critique*, *supra* note 253, at 304–15 (questioning Habermas's ideal speech situation for its inability to see that the hermeneutic process will never be rid of all distortive forces).

true, Chemerinsky and Gillman's absolutist conclusion might be correct: "[C]ampuses never can censor or punish the expression of ideas . . . because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge."[258]

The problem is that campuses do not constitute a Habermasian ideal speech situation. We might wish they were so, but they are not. Domination, coercion, and other distortions riddle discussions on campus.[259] For instance, wealth (or economic power) frequently distorts campus expression. In the Stanford dispute, Judge Duncan did not just happen to visit the law school; the students' Federalist Society chapter invited him.[260] The Federalist Society is a renowned, well-funded, national, conservative organization that, among other things, maintains a list of approved speakers, sponsors lectures and other events, and pays travel costs and honoraria.[261] The Stanford situation was not about the search for truth in a marketplace of ideas akin to the Habermasian ideal speech situation. Instead, a conservative organization with millions of dollars in funding was attempting to direct or skew a conversation before it even began.[262] The Stanford situation is all too typical. Most often, a student organization or specific university department, rather than the university or its administration, decides to invite a particular speaker.[263] Moreover, national conservative organizations—the Young America's Foundation is another—often recommend speakers and provide the funding for their respective student organizations.[264]

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258. CHEMERINSKY & GILLMAN, *supra* note 29, at 19–20. In correspondence commenting on this Article (in manuscript form), Howard Gillman stated that he and Chemerinsky did not conceive of the campus as an ideal speech situation.

259. *See* PALFREY, *supra* note 29, at 67 (recognizing that, in the marketplace of ideas, some people have more power than others).

260. Martinez, *supra* note 3, at 1.

261. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 135–42 (2008) (discussing the development and operation of the Federalist Society).

262. *E.g.*, *Federalist Society for Law and Public Policy Studies*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Federalist_Society_for_Law_and_Public_Policy_Studies [https://perma.cc/42X2-8CQK] (last updated Mar. 27, 2021, 2:56 PM) (documenting that the Federalist Society received more than $52 million in donations between 1985 and 2014).

263. *See* BEN-PORATH, *supra* note 29, at 25 (suggesting that such a distinction is important because the latter would diminish the preservation of free speech).

264. *See* Stephanie Saul, *The Conservative Force Behind Speeches Roiling College Campuses*, N.Y. TIMES (May 20, 2017), https://www.nytimes.com/2017/05/20/us/college-

Many other forces besides wealth skew or distort the search for truth within the campus marketplace of ideas. Cultural prejudices and structures of power embedded in American society, including racism, sexism, antisemitism, homophobia, and the like, influence the ideas that are injected into disputes about truth on campus.[265] After all, to focus on my hypothetical, an individual who posts a sign declaring, "God created male and female, and all gays will go to Hell," is unlikely to have developed this viewpoint through rational analysis and careful, scientific experimentation. More likely, the individual derived this viewpoint from being socialized in a subculture, from following a particular religious text, from belonging to a particular religious community, or from all of the above.[266] If the individual's views follow from religion, then the individual likely will not be looking to test them against reason and evidence.[267] Indeed, the individual might declare the views to be a matter of faith, not reason.[268]

Quite simply, the point of such a sign expressing condemnation, hatred, or both is not to present an idea to be tested against competing ideas in the search for truth. Yet, such a sign is likely to skew the search for truth. As discussed, members of a targeted group—in my

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conservative-speeches.html [https://perma.cc/M3LV-ERCX] (arguing that Young America's Foundation is the "propelling force" behind conservative speeches on university campuses); YOUNG AM.'S FOUND., https://www.yaf.org [https://perma.cc/TWT6-D2LM]. Conservative organizations such as the American Legislative Exchange Council (ALEC) and the Goldwater Institute have proposed model legislation that would regulate campus speech while claiming to protect free speech. ALEC, *Forum Act: Forming Open and Robust University Minds Act* (2017), https://alec.org/model-policy/forming-open-and-robust-university-minds-forum-act [https://perma.cc/JA23-2U6Y]; Stanley Kurtz, James Manley & Jonathan Butcher, *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST., 2–4, 16 (2017), https://www.goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf [https://perma.cc/3XAZ-XMLP].

265. *See* BONILLA-SILVA, *supra* note 56, at xv, 2, 7–9, 240–42 (emphasizing the existence of racism in American society regardless of whether particular individuals are intentionally racist).

266. For example, Rod Dreher, a prominent conservative Christian writer, states: "For a Christian, there is only one right way to use the gift of sex: within marriage between one man and one woman." ROD DREHER, THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION 195 (2017).

267. *See* PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 100–01 (1967) (articulating that religious discourse gains power by denying the meaning-producing role of humans in society).

268. *See* Stephen M. Feldman, *White Christian Nationalism Enters the Political Mainstream: Implications for the Roberts Court and Religious Freedom*, 53 SETON HALL L. REV. 667, 714–21 (2023) (explaining the religious roots of the political views of White Christian nationalists based on their fear of losing societal privilege).

hypothetical, members of the LGBTQ+ community—might react with silence.[269] If, however, they attempt to respond with counterspeech or otherwise participate in the marketplace of ideas, they must overcome not only the words of hatred or condemnation but also entrenched cultural prejudices and structures of power. A member of a marginalized group enters the marketplace of ideas from a position of disadvantage—a diminished communal status.[270] It is as if they are struggling against a strong wind—there is resistance in the air. The member of the marginalized group must prove that they belong and should be allowed to participate before the conversation even begins. Those within the cultural mainstream generally bear no such burden.

Moreover, if a member of the targeted group or anyone else responds to the hatred with counterspeech, they risk implying that there is a legitimate issue to be reasonably disputed. By responding with counterspeech, one lends a patina of respect or reasonableness to the hatred itself. The hatred becomes worthy of response, as if one might reasonably question whether members of the LGBTQ+ community—or Jewish Americans, or Black Americans, or other marginalized groups—are worthy of participating in the campus community or, more broadly, the American political community.[271]

If a university is to be a site for the search for truth—a marketplace of ideas—then the university must facilitate challenges to the normal, the mainstream, and the powerful.[272] If reason and evidence undermine—or reinforce—the status quo, then so be it. But we should not allow the status quo to be reinforced merely because it begins from a favored position.[273] Yet, on a campus, reinforcing the status quo is the

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269. *See* BEN-PORATH, *supra* note 29, at 43 (discussing the silencing of outsiders on campus compared to members of majority groups with resources and tools to participate in campus activities).

270. *See* WALDRON, *supra* note 51, at 5 (explaining that hate speech undermines an individual's dignity within a targeted group).

271. Waldron argues that equal citizenship for historically marginalized groups should be treated as among the "settled features of the social environment to which we are visibly and pervasively committed . . . ." *Id.* at 95.

272. *See* PIERRE BOURDIEU & LOÏC J. D. WACQUANT, *The Purpose of Reflexive Sociology (The Chicago Workshop)*, *in* AN INVITATION TO REFLEXIVE SOCIOLOGY 61, 90, 109 (1992) (emphasizing that sociological or synchronic analysis cannot be separate from historical study).

273. If one doubts that racism, antisemitism, homophobia, and other forms of condemnation and hatred are widely present and normal in the United States, then one should check various reports of hate crimes and incidents. *See Audit of Antisemitic Incidents 2022*, ANTI-DEFAMATION LEAGUE (2022), https://www.adl.org/resources

effect of protecting free speech over equality. If a university prioritizes free speech over equality, then members of marginalized groups must overcome messages of condemnation and hatred that align with historically entrenched cultural prejudices and structures of power. Free speech becomes a tool wielded by the forces of domination and coercion, while marginalized groups must fight an uphill battle merely to be heard and taken seriously. The status quo is reinforced because it aligns with and manifests the forces of power.[274] Rather than facilitating a search for the truths that might challenge power, the university allows the imposition of power against historically marginalized groups. On such a campus, "[w]hat emerges in the market might better be viewed as a testimonial to power than as a reflection of truth."[275]

CONCLUSION: ON DEMOCRACY

While the Supreme Court's current First Amendment doctrine regarding free speech on university campuses is ambiguous, one can reasonably argue that universities can constitutionally restrict offensive expression, including hate speech and group libel. To return one last time to my hypothetical, if an individual posts a sign on campus declaring, "God created male and female, and all gays will go to Hell," the university should be able to restrict the expression and punish the individual. Nonetheless, the near universal conclusion of universities and constitutional scholars that universities must protect free expression when it conflicts with equality is provocative yet predictable. It is provocative because a multitude of universities and scholars assert that the doctrine is clear—they must prioritize the protection of free speech—even though the doctrine is far from clear. Yet, this near universal conclusion is predictable considering the history of free expression. While universities and scholars typically assume that marginalized groups have historically benefitted from free expression,

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/report/audit-antisemitic-incidents-2022 [https://perma.cc/PWE5-MKBF]; Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RSCH. CTR. (Apr. 9, 2019), https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019 [https://perma.cc/QC4V-TFP7]; *Racism Facts & Figures*, SOC. JUST. RES. CTR., https://socialjusticeresourcecenter.org/facts-and-figures/racism [https://perma.cc/WRX2-AMV5]; *see* BONILLA-SILVA, *supra* note 56, at 247–48 n.6 (discussing the increase in "bias incidents" after former President Donald Trump's election in 2016).

274. *See* MacKinnon, *supra* note 51, at 1224–25 (emphasizing the use of free speech by dominant groups to reinforce the status quo).

275. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 6 (1999).

the historical evidence is complex.[276] Like with constitutional decisions in general, the "haves" usually come out ahead in free speech decisions. Celebrated Supreme Court free expression cases often protect speech attacking or targeting historically marginalized groups, and when those groups themselves or their members do win a free expression case, it typically involves a convergence of interests with the mainstream or wealthy.[277] History shows that free speech is a tool that largely benefits the mainstream and wealthy—with some benefits occasionally falling to the historically marginalized.[278]

Universities and scholars often insist that a university must vigorously protect free expression to fulfill its core mission, searching for truth in a marketplace of ideas. Since I question this mission—universities that prioritize free expression are more likely to bolster the status quo while reinforcing the marginalization of historical outgroups—let me suggest an alternative mission for universities: the nurturing of democracy.[279] The Roberts Court itself, in *Mahanoy*, stated that "America's public schools are the nurseries of democracy."[280] *Mahanoy* involved a high school,[281] but the same principle should also apply to universities, particularly public universities. To be sure, pluralist democracy requires the constitutional protection of political expression; since 1937,[282] the Court has recognized the self-governance

276. *See supra* Part II.

277. *See supra* Part II.

278. To be clear, if the current, strongly conservative Supreme Court were to decide this hypothetical dispute, I suspect the conservative justices would hold against any university seeking to restrict or punish hate speech or group libel on campus. As discussed, the precedential constitutional doctrine is ambiguous, and the conservative justices could readily reach the conservative conclusion. *See* FELDMAN, PACK THE COURT, *supra* note 150, at 121–69 (describing the Court's conservatism). Yet, the Supreme Court's likely conclusion should not guide one seeking the best interpretation of the constitutional text and precedent in an effort to reach a just result. To me, the best response to the Court's likely conclusion would be to add justices to the Court—that is, pack the Court. *Id.* at 171–85 (defending court packing).

279. Feldman, *Platforms*, *supra* note 50, at 968–74.

280. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021); *see* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (schools should inculcate the "fundamental values of 'habits and manners of civility' essential to a democratic society").

281. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2043.

282. *See* Feldman, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 349–419 (noting changes in the Court's treatment of free expression, beginning in 1937).

rationale as justifying the strong protection of political speech and writing.[283] Yet, there is more to democracy than free expression.[284]

In a university environment dedicated to nurturing democracy, expression must be strongly protected, but not if it diminishes the full and equal status of students or other members of the university community as democratic citizens.[285] 'Equal citizenship' within the university community should not be subject to debate[286] Therefore, a university should restrict and punish expression that would "attack a shared sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society in good standing—particularly . . . attacks predicated upon the characteristics of some particular social group."[287] At universities, equal citizenship for all, including historically marginalized groups, should be treated as among the "settled features of the social environment to which [universities] are visibly and pervasively committed."[288]

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283. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (explaining that public opinion controls government authority to establish the importance of the First Amendment, not vice versa); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 109, 179 (1989) (arguing that citizens get "an adequate opportunity" and "an equal opportunity" to "express[] their preferences" on the government agenda); FELDMAN, FREE EXPRESSION AND DEMOCRACY, *supra* note 2, at 395–402 (discussing the "intermingling of the process of self-government with the American tradition of speaking one's mind"); ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 25–27, 45–46 (1948) (explaining that the First Amendment's role in a self-governing community is to permit everyone to participate in societal discourse).

284. For discussions of democracy, see ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003).

285. According to Robert Dahl, "The demos must include all adult members except transients and persons proven to be mentally defective." ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 59–60 (1985).

286. WALDRON, *supra* note 51, at 33.

287. *Id.* at 47.

288. *Id.* at 95; *see* Stephen M. Feldman, *Hate Speech and Democracy*, 32 CRIM. JUST. ETHICS 78, 86–88 (2013) (linking Dahl's arguments on democracy with Waldron's arguments on hate speech). To a great extent, campus disputes over hate speech and group libel, as well as many of the Supreme Court's recent decisions, center around the question of 'who belongs?'—that is, who belongs fully and equally to the community. In her dissent in *303 Creative*, Justice Sotomayor alludes to this point:

> The unattractive lesson of the majority opinion is this: What's mine is mine, and what's yours is yours. The lesson of the history of public accommodations laws is altogether different. It is that in a free and democratic society, there

Greene nicely captures the difference between a university ostensibly dedicated to the marketplace of ideas and one dedicated to democracy:

> We have come to see the university green as the quintessential public square. It is not. The purpose of a university is not to provide a forum for free speech. It is to prepare students for democratic citizenship. Universities do so not by permitting speech but by curating it. Universities discriminate, pervasively, based on the content and viewpoint of the speech to which students are exposed, consistent with the pedagogical judgments of faculty and administrators.[289]

A university focused on nurturing democracy protects free expression but not at the expense of equality. Pluralist democracy requires "equal concern and respect" for all members of the community, so free expression cannot be used as a weapon to question or diminish the status of any community members.[290] Stanford Dean Martinez also emphasized a desire for "building a community."[291] For that reason, she was concerned about a "cycle of degenerating discourse," where opposed sides or groups merely trade increasingly hostile barbs disparaging each other.[292] Her solution was to suggest a formal rule (seemingly derived from the Golden Rule): "The cycle stops when we recognize our responsibility to treat each other with the dignity with which we expect to be met."[293]

> can be no social castes. And for that to be true, it must be true in the public market.

303 Creative LLC v. Elenis, 600 U.S. 570, 640 (2023) (Sotomayor, J., dissenting). In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, which holds that race-based affirmative action in university admissions is unconstitutional, Justice Sotomayor wrote: "At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race." 600 U.S. 181, 383 (2023) (Sotomayor, J., dissenting).

289. GREENE, *supra* note 234, at 240–41. "[A] school's role isn't just to support student expression and facilitate ideas, as it is sometimes caricatured by courts and critics. It is also to develop students' capacities for civility, critical reasoning, and persuasion. Democracy needs those capacities every bit as much as it needs informational freedom." *Id.* at 245.

290. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 73 (1996). Dworkin argues that the government must "treat everyone subject to its dominion with equal concern and respect." *Id.*

291. Martinez, *supra* note 3, at 7.

292. *Id.*

293. *Id.* The Golden Rule is derived from the Christian Bible: "In everything, do to others what you would want them to do to you." *Matthew* 7:12 (New International Readers Version).

Martinez's rule resonates with Chief Justice John Roberts's homage to a colorblind Constitution and against race-based affirmative action: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[294] The premise supporting these types of formal rules, whether Martinez's or Roberts's, is that by following the rule, the university or the government maintains neutrality.[295] Supposedly, the university or the government is not favoring one political position over another or one societal group over another.[296]

The problem is that these types of formal rules, in application, are never neutral.[297] To the contrary, such a rule supports the preexisting forces of domination and coercion as they reproduce the status quo.[298]

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294. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality opinion); *see id.* at 748 (Thomas, J., concurring) (emphasizing the presence of constitutional colorblindness within the dissenting opinion).

295. *See* Stephen M. Feldman, *Free-Speech Formalism and Social Injustice*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 47, 51–55 (2019) [hereinafter Feldman, *Formalism*] (explaining legal formalism and its commitment to a purely legal framework).

296. *See id.* at 54 (emphasizing that legal formalism stresses a distinction between law and politics); Stephen M. Feldman, *Free-Speech Formalism Is Not Formal*, 12 DREXEL L. REV. 723, 730–39 (2020) [hereinafter Feldman, *Not Formal*] (explaining the historical development of American legal formalism). University declarations regarding free speech on campus often emphasize neutrality. *E.g.*, Wyoming Principles, *supra* note 30, at 10; *Kalven Committee*, *supra* note 42 ("The university is the home and sponsor of critics; it is not itself the critic.").

297. *See* Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1822–24 (1994) (arguing against conceptualizing the marketplace of ideas as neutral or a "level playing field"); Feldman, *Not Formal*, *supra* note 296, at 739–45 (explaining the political tilt of free speech formalism). In *Students for Fair Admissions*, the dissenters reject the Court's invocation of colorblindness as a neutral rule of constitutional law. "Entrenched racial inequality remains a reality today. . . . Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 333–34 (2023) (Sotomayor, J., dissenting); *see id.* at 353 (rejecting "a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law").

298. *See* Feldman, *Not Formal*, *supra* note 296, at 753–61 (explaining how the Roberts Court used formalism to reach conservative results in a case involving gerrymandering); Feldman, *Formalism*, *supra* note 295, at 47–49, 66–73 (explaining how the right to free speech has not been universally administered under the Roberts Court). "[N]eutrality as a doctrinal approach supports the status quo distribution of social power under the First Amendment just as effectively as it largely does under the Equal Protection Clause, where neutrality [has also become] the mainstream doctrine." MacKinnon, *supra* note 51, at 1227.

In many instances, such a rule allows private-sphere actors to disparage historically marginalized groups in accordance with traditional hierarchies of power.[299] Thus, when a university applies such a rule, the university is not neutral. For instance, when a university allows a conservative student organization to invite and pay for a white Christian nationalist to come to campus and spout hatred against Jewish and Black Americans and the LGBTQ+ community, the university is far from neutral.[300] By allowing outside money to fund this speaker, providing a public site or platform for the speaker, and then protecting the speaker from potential harassment, the university facilitates the spread of hatred against marginalized groups—even though the university itself is not uttering the words. As discussed, this type of hate speech or group libel has consequences; among other effects, it will diminish or demean the standing of the targeted groups within and outside of the university community.[301]

So, yes, a university that nurtures democracy is not neutral. It should focus on directing students to fulfill the university's mission of nurturing democracy.[302] Doing so will sometimes require favoring equality over free expression. Yet such a university is no less neutral than one that favors free expression while allowing the continued disparagement of historically marginalized groups. Neutrality is a mirage, not an option.

In fact, when a university favors free speech over equality, it flips the script on protection. If a university prioritizes free speech, and student protesters shout down a paid provocateur spouting epithets that target marginalized outsiders, then the provocateur appears to become the victim. The provocateur seems to be the suppressed champion of the marketplace of ideas, ostensibly searching for truth. The provocateur appears to need protection. Meanwhile, the protesters, whether members of targeted groups or their supporters, seem to be the aggressors, thwarting the exercise of cherished constitutional rights, namely, free speech.[303] To a great degree, this dynamic describes the

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299. *See* FELDMAN, PACK THE COURT, *supra* note 150, at 42–52 (explaining the Court's use, and later repudiation, of formalism).

300. See Feldman, *Platforms*, *supra* note 50, at 985–87 (explaining that universities practicing neutrality is not an option).

301. *See supra* Part III.

302. Education is crucial for nurturing democracy. "[E]ducation [is] the very foundation of our democratic government and pluralistic society." *Students for Fair Admissions*, 600 U.S. at 318–19 (Sotomayor, J., dissenting).

303. *E.g.*, Feldman, *Platforms*, *supra* note 50, at 964–67 (describing a dispute at Lewis & Clark Law School).

Stanford situation. Dean Martinez invoked the right of free speech to protect Judge Duncan, a renowned vocal critic of LGBTQ+ rights, while condemning student protesters and punishing Associate Dean Steinbach for sympathizing with them.[304]

But Stanford and Martinez got it backwards: We should care about protecting historically marginalized groups. We should support and encourage their participation in the university community and democracy. Albert Einstein once observed that "[t]he search and striving for truth and knowledge is one of the highest of man's qualities – though often the pride is most loudly voiced by those who strive the least."[305] Judge Duncan and like-minded speakers might invoke the mantle of principle, claiming to want merely to speak, but they are not truly interested in a conversation among equals where reason and evidence predominate. Rather, they seek to disparage and even banish certain targeted and historically marginalized groups. They care about free speech only insofar as it can be used to defeat equality and undermine democracy. Universities should channel free speech to promote equality and bolster democracy.

304. Marcus, *supra* note 3; Reich, *Explained*, *supra* note 3.

305. Albert Einstein, Address for United Jewish Appeal—with Asst. Sec. of State Joseph C. Grew (Apr. 11, 1943) (transcript available at https://pastdaily.com/2024/01/15/albert-einstein-has-a-word-or-two-about-truth-knowledge-and-values-1943-past-daily-reference-room [https://perma.cc/4864-HBVF]).