

2018

## The Purpose (and Limits) of the University

John D. Inazu

Washington University in St. Louis School of Law, jinazu@wustl.edu

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_scholarship](https://openscholarship.wustl.edu/law_scholarship)



Part of the [Education Law Commons](#), [First Amendment Commons](#), and the [Legal Studies Commons](#)

---

### Repository Citation

Inazu, John D., "The Purpose (and Limits) of the University" (2018). *Scholarship@WashULaw*. 622.  
[https://openscholarship.wustl.edu/law\\_scholarship/622](https://openscholarship.wustl.edu/law_scholarship/622)

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Scholarship@WashULaw by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## THE PURPOSE (AND LIMITS) OF THE UNIVERSITY

John Inazu\*

### *Abstract*

*Scholars of the university have produced volumes about growing pressures on the coherence and purpose of institutions of higher education. Meanwhile, legal scholars' writing about the university has typically focused on its First Amendment dimensions. This Article links insights from these two groups of scholars to explore the purpose of the university and defend it against increasing technological, ideological, and cultural pressures. It argues that a better understanding of the relationship between the First Amendment and the university can help strengthen the coherence of the university's purpose against these pressures. The connection between the First Amendment and institutional purpose is in some ways unsurprising. Limits on expressive liberties have always set the boundaries of expression for political communities, and the university is a kind of political community. These boundaries reflect something about a community's goals, values, and—ultimately—its purpose.*

*Part I sets forth a normative framework for the university as what the philosopher Alasdair MacIntyre terms a “place of constrained disagreement.” The paradigmatic university under this framework reflects three characteristics: it is dialogical, it is democratic, and it is residential. Part II builds upon this understanding of the university by considering its intersection with five contemporary First Amendment issues: academic freedom, public employee speech, public forums, safe spaces, and religious pluralism.*

### INTRODUCTION

After the Klan and the Neo-Nazis marched in Charlottesville in the summer of 2017, University of Virginia professor Chad Wellmon lamented his school's tepid response. The university's president, Teresa Sullivan, had spoken vaguely of

---

\* © 2018 John Inazu. Sally D. Danforth Distinguished Professor of Law and Religion, Washington University in St. Louis. Thanks for comments on earlier drafts from Ashutosh Bhagwat, Marc DeGirolami, Richard Garnett, Laurie Maffly-Kipp, Kate Moran, Mark Valeri, Abram Van Engen, Chad Wellmon, and Timothy Zick, as well as participants at faculty workshops at the University of Kentucky School of Law, Washington University School of Law, the John C. Danforth Center on Religion and Politics, and University of San Diego School of Law. Thanks also to Dan Aldrich, George Boden, Andrea Butler, Karen Hinkley, Kara Lillehaug, Kelly Oeltjenbruns, Johanna Christophel, and Allie Spors for research assistance.

“ideologies and beliefs” that “contradicted our values of diversity, inclusion, and mutual respect.”<sup>1</sup> Wellmon longed for a more direct rebuke of racism and white supremacy, but on reflection, he was not sure that kind of institutional response was possible:

The contemporary university, at least in its local form in Charlottesville, seems institutionally incapable of moral clarity. Individual faculty members had spent the days and weeks before Saturday’s rally denouncing and organizing against the white supremacists. But as an institution, UVa muddled along through press releases, groping for a voice and a clear statement . . . Sullivan’s missives, especially her initial ones, read like press releases from the bowels of a modern bureaucracy, not the thoughts of a human responding to hate.

And that makes a lot of sense. What can the president of a contemporary university say? The University of Virginia is many things—a health center, a federal contractor, a sports franchise, an event venue, and, almost incidentally, a university devoted to education and knowledge. It is most often, as Clark Kerr wrote in 1963, a multiversity, with little common purpose but the perpetuation of itself and its procedures. Why should my colleagues and I look to our chief executive for moral leadership? As a university president, Sullivan is, in the words of Thorstein Veblen, a captain of erudition, not the leader of a community bound to a common moral mission.<sup>2</sup>

Wellmon’s indictment is not limited to his own institution. The question of purpose haunts most contemporary universities. Clark Kerr’s 1963 book identified a central problem:

A university anywhere can aim no higher than to be as British as possible for the sake of the undergraduates, as German as possible for the sake of the graduates and the research personnel, as American as possible for the sake of the public at large—and as confused as possible for the sake of the preservation of the whole uneasy balance.<sup>3</sup>

The five decades since Kerr’s diagnosis have brought little clarity. Today, academic disciplines fracture around ideology and methodology, and they increasingly lack the shared linguistic resources even for internal, let alone cross-

---

<sup>1</sup> Chad Wellmon, *For Moral Clarity, Don’t Look to Universities*, CHRON. HIGHER EDUC. (Aug. 14, 2017), <https://www.chronicle.com/article/For-Moral-Clarity-Dont-Look/240921> [<https://perma.cc/86LE-ZPMZ>] [hereinafter Wellmon, *Moral Clarity*].

<sup>2</sup> *Id.*

<sup>3</sup> CLARK KERR, *THE USES OF THE UNIVERSITY* 14 (5th ed. 2001).

disciplinary, dialogue.<sup>4</sup> A renewed wave of campus activism asks university administrators to further “social justice,” although the particulars of what that means are not always clear.<sup>5</sup> In some cases, the pressure to land federal research dollars or succeed in big-time athletics compromises the university’s academic mission.<sup>6</sup>

Scholars of the university have produced volumes about these and other challenges to higher education.<sup>7</sup> Meanwhile, legal scholars’ writing about the

---

<sup>4</sup> Myra H. Strober, *Communicating Across the Academic Divide*, CHRON. HIGHER EDUC. (Jan. 2, 2011), <https://www.chronicle.com/article/Communicating-Across-the/125769> [<https://perma.cc/2RH3-JTDW>] (“Although people outside of universities seem to think that faculty members talk to one another across their fields of study . . . substantive conversations are infrequent.”). For a compelling account of the growing epistemic divides within the discipline of political science, see JOHN GUNNELL, *DESCENT OF POLITICAL THEORY 1* (1993) (providing a “reconstruction of the hereditary derivation and ancestral extraction of the enterprise of academic political theory”).

<sup>5</sup> See, e.g., Allison Stanger, *Understanding the Angry Mob at Middlebury that Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html> [<https://perma.cc/CLL7-25LC>] (opinion piece by Middlebury College professor injured during protests opposing talk by Charles Murray).

<sup>6</sup> See, e.g., Gordon G. Gallup, Jr. & Bruce B. Svare, *Hijacked by an External Funding Mentality*, INSIDE HIGHER ED (July 25, 2016) (chronicling the pressures and consequences of faculty who pursue federal research dollars); GEORGE FALLIS, *MULTIVERSITIES, IDEAS, AND DEMOCRACY* 56 (2007) (“The magnitude and rapid expansion of U.S. federal commitments to university research are, in retrospect, astonishing. From 1953 to 1968, federal funding jumped ninefold, adjusted for inflation. That fifteen-year interval has been dubbed ‘the golden age’ . . . . Nonetheless, federal commitments continued to expand thereafter. In 1980, funding stood at U.S. \$4.1 billion and rose to U.S. \$13 billion by 1995.”); see generally CHARLES T. CLOTFELTER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* (2011) (exploring the effects of collegiate sports on academic and administrative functions); Michael Powell, *North Carolina’s Dominance Fails to Cover Cheating’s Stain*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/sports/ncaabasketball/north-carolina-final-four-cheating-fake-classes.html> [<https://perma.cc/8YRV-H9E9>] (“Put simply, for two decades until 2013, the university provided fake classes for many hundreds of student athletes, most of them basketball and football players.”).

<sup>7</sup> John Henry Newman’s *The Idea of the University* is perhaps the most well-known study of the purpose of the university. JOHN H. NEWMAN, *THE IDEA OF THE UNIVERSITY DEFINED AND ILLUSTRATED* (1852) (writing on the objective duty of the university); see also ELLEN CONDLIFFE LANGEMANN, *WHAT IS COLLEGE FOR? THE PUBLIC PURPOSE OF HIGHER EDUCATION* 9–46 (2012) (commenting on the indifference on matters of the college’s purposes); see generally JOHN H. NEWMAN, *THE IDEA OF THE AMERICAN UNIVERSITY* (Bradley C.S. Watson ed. 2011) (addressing the relativism on the idea of core curriculum); STANLEY HAUERWAS, *THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD* (2007) (discussing theology and the characteristics of the modern university); WILLIAM DERESIEWICZ, *EXCELLENT SHEEP: THE MISEDUCATION OF THE AMERICAN ELITE AND THE WAY TO A MEANINGFUL LIFE* (2014) (commenting on the dearth of critical thinking among the educated class); *THE UNIVERSITY NEXT DOOR: WHAT IS A COMPREHENSIVE UNIVERSITY, WHO DOES IT EDUCATE, AND CAN IT SURVIVE?* (Mark

university have typically focused on its First Amendment dimensions rather than on the challenges to its institutional coherence.<sup>8</sup> For example, Robert Post has examined the pedagogical implications of the university's unique blend of academic inquiry and free speech.<sup>9</sup> Mary-Rose Papandrea has argued for strengthening student speech protections in light of the university's role as "the quintessential marketplace of ideas."<sup>10</sup> And Paul Horwitz has suggested that the university is the paradigmatic example of a "First Amendment institution" that warrants special constitutional consideration.<sup>11</sup>

This Article links insights from these two groups of scholars to explore the purpose of the university and defend it against growing technological, ideological, and cultural pressures. The connection between the First Amendment and institutional purpose is unsurprising. Expressive restrictions always set the boundaries of expression for political communities, and the university is a kind of political community. These boundaries reflect something about a community's goals, values, and—ultimately—its purpose.

Part I briefly sets forth a normative framework for a university that is dialogical, democratic, and residential. Part II builds upon this understanding of the university by considering its intersection with five contemporary First Amendment issues: academic freedom, public employee speech, public forums, safe spaces, and religious pluralism.

---

Schneider & KC Deane eds. 2015) (opining on whether comprehensive universities can respond to the nation's call to action); CHAD WELLMON, ORGANIZING ENLIGHTENMENT: INFORMATION OVERLOAD AND THE INVENTION OF THE MODERN RESEARCH UNIVERSITY (2015) (detailing key role of research universities in developing modern information culture).

<sup>8</sup> The word "university" imperfectly captures the class of institutions that most contemporary scholars assume in writing about institutions of higher education. It also includes colleges whose lack of certain professional schools formally distinguishes them from universities but which otherwise share the characteristics of the institutions of higher education that usually occupy the core of First Amendment analysis.

<sup>9</sup> ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 67–69 (2012). In another book coauthored with Matthew Finkin, Post takes a different approach and focuses only on "professional understandings of academic freedom" to the exclusion of "[t]he constitutional law of academic freedom." MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 8 (2009). Post and Finkin suggest that the "consensus vision of the purposes of American higher education" has concluded that "[u]niversities and colleges are autonomous professional institutions dedicated to creating new knowledge and to educating young adults to think for themselves." *Id.* at 7; *see also* STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 3–18 (2008) (discussing the role of the university and its members).

<sup>10</sup> Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1802 (2017).

<sup>11</sup> PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 140 (2013).

## I. WHAT IS A UNIVERSITY?

Kerr's characterization of the university as a "multiversity" remains accurate; most institutions of higher education are unable to articulate a singular, unified purpose.<sup>12</sup> In the face of such confusion, this Article argues that a central purpose, if not *the* central purpose, of the university is to be a place of facilitating disagreement across differences, what the philosopher Alasdair MacIntyre has termed a "place of constrained disagreement, of imposed participation in conflict."<sup>13</sup> The paradigmatic university pursuing this purpose embodies least three core characteristics: it is dialogical; it is democratic; and it is residential.

### A. *The Dialogical University*

The first characteristic of a university oriented toward constrained disagreement is that it is dialogical. Under MacIntyre's vision, "a central responsibility of higher education would be to initiate students into conflict."<sup>14</sup> The process requires participants "to enter into controversy with other rival standpoints, doing so *both* in order to exhibit what is mistaken in that rival standpoint . . . *and* in order to test and retest the central theses advanced from one's own point of view against the strongest possible objections to them."<sup>15</sup> John Courtney Murray's succinct formulation adds another dimension: the university should be a place where creeds are intelligibly at war with one another.<sup>16</sup>

MacIntyre and Murray hint at two necessary conditions for genuine argument within the university: disagreement must be constrained,<sup>17</sup> and creedal war must proceed intelligibly.<sup>18</sup> Constraint and intelligibility create the possibility of genuine dialogue across difference. Disagreement without any constraints would open the door to manipulation and even violence. Similarly, creedal war with no intelligibility would render communication impossible. On the other hand, we never attain perfect constraint and complete intelligibility—to do so would mean overcoming the nuances of human emotion and the limits of interpersonal communication. In the

---

<sup>12</sup> I mean to highlight challenges to the coherence of purpose *within* specific institutions, as distinct from the properly diverse purposes represented by different kinds of institutions. See John Garvey, *Introduction, AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125, 127 (2009) (discussing the importance of "institutional pluralism").

<sup>13</sup> ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 230–31 (1990) [hereinafter MACINTYRE, *MORAL ENQUIRY*].

<sup>14</sup> *Id.* at 231.

<sup>15</sup> *Id.* at 231.

<sup>16</sup> JOHN C. MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 125 (1960).

<sup>17</sup> MACINTYRE, *MORAL ENQUIRY*, *supra* note 13, at 230–32.

<sup>18</sup> MURRAY, *supra* note 16, at 125–130.

university, most of our disagreements are modestly constrained and our creedal wars somewhat intelligible.

These conditions suggest a shared commitment to a mode of discourse that could encourage some of the university's deepest values. That is no small achievement. As Chad Wellmon observes, "these values are not simply bureaucratic or professional procedures."<sup>19</sup> Rather, "[t]hey are robust epistemic virtues—an openness to debate, a commitment to critical inquiry, attention to detail, a respect for argument—embedded in historical practices particular to the university."<sup>20</sup>

The significance of modestly constrained disagreement can be shown by contrasting two controversial figures: Ann Coulter and Charles Murray.<sup>21</sup> In 2017, Coulter and Murray both made national headlines when colleges and universities revoked speaking invitations extended to them by student groups.<sup>22</sup> For this thought experiment about constrained disagreement, think of Murray and Coulter as points along a spectrum, with Murray closer to modest constraint and Coulter closer to the lack of any constraints. Many progressives dislike both Murray and Coulter.<sup>23</sup> But on our spectrum of constrained disagreement, there is a lot of distance between these two figures. Murray is a scholar who is willing to respond to questions and engage in debate. Coulter is a bomb thrower who delights in insulting those with whom she disagrees. In other words, even if Coulter's argument satisfies John Courtney Murray's intelligibility condition, it lacks MacIntyre's condition of constrained disagreement. We might say that Charles Murray plays by the university's rules of the game and Coulter does not.

We can make similar distinctions at the other end of the political spectrum. The Black Lives Matter activist who delivers a university lecture about methods of protests and the reasons underlying those protests is adhering to the university's discourse-enabling constraints on disagreement. The same activist who disrupts the speech of a university administrator shows little commitment to these constraints.

The differences between Ann Coulter and Charles Murray, and the differences between the activist as interlocutor and the activist as disruptor, demonstrate the modest constraints that shape a university's discourse. The law enforces the outer boundaries of these constraints. Student activists cannot incite imminent lawbreaking.<sup>24</sup> English professors cannot teach calculus in their poetry classes. And

---

<sup>19</sup> Wellmon, *Moral Clarity*, *supra* note 1.

<sup>20</sup> *Id.*

<sup>21</sup> Coulter is a conservative political commentator, and Murray is a conservative scholar. Both have made highly controversial claims in their speaking and writing.

<sup>22</sup> See, e.g., Jeremy W. Peters, *In Ann Coulter's Speech Battle, Signs that Conservatives Are Emboldened*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/us/politics/ann-coulter-university-of-california-berkeley.html> [<https://perma.cc/7KFJ-HZM7>]; Katharine Q. Seelye, *Protesters Disrupt Speech by "Bell Curve" Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html> [<https://perma.cc/U7G5-46LS>].

<sup>23</sup> Peters, *supra* note 22.

<sup>24</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

university administrators cannot limit access to a public dialogue based on race, gender, or sexuality. But most other discourse constraints are not legally enforceable—they arise out of customary norms and civic practices that we ask of one another.<sup>25</sup>

Constraint and intelligibility are only half of MacIntyre's and Murray's formulations. Genuine argument also means real disagreement and the possibility of creedal war. Many of these disagreements and conflicts will involve imbalances of power; two sides of a creedal war seldom reach cultural and political equilibrium. When two sides respectively represent "minority" and "majority" positions, it is important to allow minority perspectives to be voiced. Often, a willingness to listen to these perspectives is embedded in the customary norms of the university. But on some of the most contested political, religious, and ideological issues, it is easy to think of examples where certain perspectives are explicitly or implicitly excluded. The dialogical university works to protect against these exclusions under conditions of constrained agreement and intelligibly warring creeds.

### *B. The Democratic University*

The second university characteristic oriented toward facilitating disagreement across difference is the democratic nature of higher education. As Andrew Delbanco has suggested, "the college classroom has been a rehearsal space for democracy—a place where students learn to speak and listen with civility to peers whose perspective on the world differs from their own."<sup>26</sup> The democratic university must also strive to protect minority, dissenting, or unpopular views—an aspiration that draws its inspiration from the First Amendment. The history of our country suggests that civic practices and cultural norms can quickly turn hostile against unpopular and dissenting viewpoints. The First Amendment at its best shields and protects these viewpoints from majoritarian suppression, sometimes at great cost. As the Supreme Court has emphasized, "freedom to differ is not limited to things that do not matter much" and the test of freedom is "the right to differ as to things that touch the heart of the existing order."<sup>27</sup>

The First Amendment expressly governs public universities and informs the culture and norms of many private universities.<sup>28</sup> The distinction between public and

---

<sup>25</sup> See generally JOHN INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016) (providing an extended discussion of these aspirational civic practices).

<sup>26</sup> ANDREW DELBANCO, *COLLEGE: WHAT IT WAS, IS, AND SHOULD BE* xiii-xiv (2012).

<sup>27</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>28</sup> See, e.g., UNIV. OF PA., *HANDBOOK FOR FACULTY AND ACADEMIC ADMINISTRATORS* (2017), [http://provost.upenn.edu/uploads/media\\_items/ii-a-academic-freedom-and-responsibility.original.pdf](http://provost.upenn.edu/uploads/media_items/ii-a-academic-freedom-and-responsibility.original.pdf) [<https://perma.cc/6Q4A-92NQ>] (granting faculty members at the private University of Pennsylvania "freedom of inquiry," "freedom in research" and "freedom in the classroom"); Robert R. Kuehn, *A Normative Analysis of the Rights and*



private universities is both longstanding and important.<sup>29</sup> In fact, some private universities with religious or other missions properly constrain aspects of discourse based on their institutional purpose.<sup>30</sup> But even within these constraints, the normative aspirations of the First Amendment can still function to protect minority, dissenting, and unpopular views.

Public institutions can also adopt these cultural norms; in other words, they can view themselves not only as constitutionally constrained by the First Amendment but also as occupying a particular social role that embodies First Amendment values. Consider, for example, this passage from the plurality opinion in *Sweezy v. New Hampshire*:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.<sup>31</sup>

*Sweezy* identifies an instrumental role that the public university plays in preparing future generations of citizens.<sup>32</sup> But the university also enacts the aspirations of democratic governance when it models the free exchange of ideas, facilitates relationships across deep difference, and points the next generation of leaders toward the possibility of a shared political project.<sup>33</sup>

---

*Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 264–65 (2003) (noting that university customs may protect faculty members' academic freedom at private universities).

<sup>29</sup> See, e.g., Safia Samee Ali, *Harvard Revokes Admission of Several Students for Posting 'Offensive' Memes*, NBCNEWS.COM (June 5, 2017), <https://www.nbcnews.com/news/us-news/harvard-revokes-admission-several-students-posting-offensive-memes-n768361> [<https://perma.cc/H4UK-GTE2>] (quoting law professor Katherine Franke as saying, "The First Amendment's Free Speech protections apply only to violations by public entities, and since Harvard is a private university the First Amendment does not apply."). Additionally, public schools ostensibly serve public purposes, while private schools might advance non-public missions, as in the case of some religious colleges and universities.

<sup>30</sup> See, e.g., Scott Jaschik, *Fall From Grace*, INSIDE HIGHER ED (Aug. 15, 2011), <https://www.insidehighered.com/news/2011/08/15/fall-grace> [<https://perma.cc/HPD2-BJ3A>] (detailing science faculty member's resignation from Calvin College over publication in tension with official school doctrine); Lauren Jones, Note, *Straddling the Wall: Academic Freedom in Religious Universities and How Institutions May Engage in Judicious Self-Regulation*, 30 REV. LITIG. 319, 320 (2011) (noting Catholic University of America's 1989 policy prohibiting faculty members from advocating pro-choice politics).

<sup>31</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>32</sup> Cf. DELBANCO, *supra* note 26, at 29 ("It should be obvious that the best chance we have to maintain a functioning democracy is a citizenry that can tell the difference between demagoguery and responsible arguments").

<sup>33</sup> Nor are these merely antiquated notions from an earlier era. Justice O'Connor drew upon similar connections in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (noting that

These democratic aspirations will not be realized to the same extent at every institution of higher education. Some private institutions will prioritize other aspirations to varying degrees. But differences will also unfold among public institutions. Not every public school will accommodate constrained disagreement and intelligibly warring creeds. In other words, not every public school will share the same purpose or institutional culture. A community college is not the same as a public research university. A satellite campus of the University of Wyoming is not the same as the University of Michigan at Ann Arbor. The United States Military Academy is not the same as the University of California at Berkeley. Each of these institutions has a public-facing mission, but not all represent what Paul Horwitz has characterized as the “paradigmatic example of a First Amendment institution.”<sup>34</sup>

Despite these institutional differences, the Supreme Court has assumed something like Horwitz’s ideal when addressing the First Amendment in the higher education context.<sup>35</sup> For example, in its 1972 decision *Healy v. James*, the Court asserted that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”<sup>36</sup> The year after *Healy*, the Court underscored that “the 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.’”<sup>37</sup>

---

“universities occupy a special niche in our constitutional tradition” in light of “the expansive freedoms of speech and thought associated with the university environment”). Chief Justice Rehnquist has suggested that the “public” nature of public universities might be different in kind than other public governmental functions. *See, e.g., Healy v. James*, 408 U.S. 169, 203 (1972) (Rehnquist, J., concurring) (suggesting a “constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 908 (1982) (Rehnquist, J., dissenting) (asserting that the First Amendment “may speak with a different voice” when the government acts in its non-sovereign capacity).

<sup>34</sup> HORWITZ, *supra* note 11. Horwitz highlights some unique aspects of the university: academic freedom, tenure, curricular development, selective admissions, and student speech. *Id.* at 109–10, 122–28. But the most important function of the university, in his view, is a “uniquely academic contribution to public discourse.” *Id.* at 120–21. Even the modern research university falls short of this ideal. Consider, for example, Horwitz’s home institution, the University of Alabama. Some of its scholars contribute to the pursuit of knowledge, but major sections of the university focus on alumni partnerships, affiliated hospitals and clinics, and high-profile athletics, all of which have little to do with “public discourse.”

<sup>35</sup> Importantly, that doctrine has largely assumed the same basic understanding of the university adopted in this Article: the four-year residential institution of higher education.

<sup>36</sup> *Healy v. James*, 408 U.S. 169, 180–81 (1972).

<sup>37</sup> *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973). The university’s interest in the free exchange ideas does not compel other governmental actors to guarantee the fullness of that exchange against all competing interests. In a case decided three days after *Healy*, the Supreme Court overruled a lower court’s holding that the First Amendment interests of American scholars who had invited a Belgian Marxist to participate in academic conferences

The Court's reliance on the First Amendment to protect universities from majoritarian orthodoxies predates *Healy*. It prevailed even in the face of the Second Red Scare when many other sectors of society capitulated to fear-mongering and charges of guilt by association. In 1957, *Sweezy* rebuffed efforts by state officials to inquire into the political affiliations of faculty.<sup>38</sup> Insisting that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding,"<sup>39</sup> the plurality made clear that compelling a professor to disclose the nature of his past expressions and associations ran afoul of the First Amendment.<sup>40</sup> In three subsequent decisions, the Court struck down laws restricting universities from employing members of the Communist Party.<sup>41</sup>

These hard-fought battles established basic principles that transcend ideology. In the 1950s, public universities sought to exclude socialist and communist ideas.<sup>42</sup> Today, some of these same schools sometimes target politically conservative

---

required the government to grant him a visa to enter the country. *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). The Court held that the Attorney General's justifications for granting or denying visas under the authority delegated to him under the Immigration and Nationality Act of 1952 need not be balanced against "the First Amendment interests of those who seek personal communication with the [visa] applicant." *Id.* Even so, the majority acknowledged that the public's right to receive information "is nowhere more vital than in our schools and universities." *Id.* at 763 (internal quotations omitted). Justice Marshall's dissent also called attention to the academic nature of the proposed interactions. *Id.* at 774 (Marshall, J., dissenting) ("Dr. Ernest Mandel, a citizen of Belgium, is an internationally famous Marxist scholar and journalist. He was invited to our country by a group of American scholars who wished to meet him for discussion and debate. With firm plans for conferences, colloquia and lectures, the American hosts were stunned to learn that Mandel had been refused permission to enter our country.").

<sup>38</sup> *Sweezy*, 354 U.S. at 254–55.

<sup>39</sup> *Id.* at 250.

<sup>40</sup> *Id.* at 254–55.

<sup>41</sup> *See Baggett v. Bullitt*, 377 U.S. 360, 368 (1964) (finding unconstitutionally vague state statutes requiring University of Washington faculty and staff to take loyalty oaths as a condition of employment); *Whitehill v. Elkins*, 389 U.S. 54, 60 (1967) (finding state loyalty oath applicable to teachers at the University of Maryland hostile to academic freedom); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (finding unconstitutional state statutes that prevented the public employment of university teachers unless they certified that they were not members of the Communist Party or subversive groups).

<sup>42</sup> *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 564 n.6 (1956) (quoting ASS'N OF AM UNIVS., *THE RIGHTS AND RESPONSIBILITIES OF UNIVERSITIES AND THEIR FACULTIES* (Mar. 24, 1953)) ("Above all, [the university professor] owes his colleagues in the university complete candor and perfect integrity, precluding any kind of clandestine or conspiratorial activities. He owes equal candor to the public. If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor. . . . In this respect, invocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to reexamine his qualifications for membership in its society.").

speakers.<sup>43</sup> The exclusion of ideas or ideologies, simply because one finds them unpleasant or dangerous, is usually inconsistent with the role of the democratic university as a place of genuine inquiry and debate.<sup>44</sup>

### C. *The Residential University*

The final characteristic of the kind of university best situated to pursue the MacIntyrean aim of constrained disagreement is one whose programs, place, and people allow for deep and sustained dialogue across difference. Although a variety of institutions might fill this role, the paradigmatic example is the residential university.

Dialogue within the residential university is complicated by the intersection of multiple actors, roles, and places. In one sense, the same could be said of many other settings. For example, police officers may speak in their official capacities or as private citizens; they may express themselves on the job or in a private setting; and they may confront challenges in their use of social media that complicates keeping their roles distinct.<sup>45</sup> But the university is a more complex version of this general puzzle.<sup>46</sup> It encompasses administrators, faculty, students, staff, and visitors. Some of these actors perform multiple roles. As a faculty member, I am an employee, teacher, researcher, and community member at my institution. Some of my roles unfold in multiple places. And I am not alone. Students find themselves in classrooms, dorm rooms, common spaces, off-campus settings, and online forums. The different actors, roles, and places of the university commonly intersect with one another, with each combination implicating different norms and values. These varied contexts also mean that free speech is not an unqualified value or absolute norm across the entire university.<sup>47</sup>

---

<sup>43</sup> See *supra* note 22.

<sup>44</sup> But see Ulrich Baer, *What “Snowflakes” Get Right About Free Speech*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/opinion/what-liberal-snowflakes-get-right-about-free-speech.html> [<https://perma.cc/2QPE-8X58>] (“The great value and importance of freedom of expression, for higher education and for democracy, is hard to overestimate. But it has been regrettably easy for commentators to create a simple dichotomy between a younger generation’s oversensitivity and free speech as an absolute good that leads to the truth.”).

<sup>45</sup> See, e.g., *San Diego v. Roe*, 543 U.S. 77, 78 (2004) (First Amendment does not protect police officer from adverse employment action for selling videotapes of sexually explicit acts he undertook off-duty in a police uniform); *Heffernan v. Paterson*, 578 U.S. 1412, 1416 (2016) (First Amendment protects off-duty police officer from adverse employment action for perceived political activity).

<sup>46</sup> For thoughtful considerations of the unique characteristics of the university within a broader First Amendment landscape, see TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 259–93 (2009); PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2012).

<sup>47</sup> The observation applies to the First Amendment more generally. For example, while the text of the First Amendment provides that Congress shall make “no law” abridging

The residential university is a complex physical place, a separate “town” of sorts, playing host to a variety of campus spaces with numerous purposes.<sup>48</sup> For students, the university encompasses every aspect of life: eating, sleeping, exercising, and socializing. Many students live on campus, and even those who live off campus often cluster together in groups. These realities have not gone unnoticed, and smart people have spent a lot of time thinking about the benefits of this proximity.<sup>49</sup> There is something to be said for carefully constructed shared spaces like dorm commons, dining halls, campus coffee shops, gyms with smoothie bars, and other places to congregate.<sup>50</sup> These spaces also provide a degree of safety and stability important to providing the background conditions for dialoguing across difference.<sup>51</sup> And even in this era of social media, online education, and virtual

---

speech, Congress makes all kinds of speech-restricting laws. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004); DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 263 (2008) (making a similar observation).

<sup>48</sup> *See, e.g.*, Hays Cty. Guardian v. Supple, 969 F.2d 111, 117 (5th Cir. 1992) (“Roughly 5,000 students live and work on the campus, making the campus, in the words of the University’s own promotional booklet, a ‘town’ of which the resident student will be a ‘contributing citizen’ and ‘voting member.’”); Bowman v. White, 444 F.3d 967, 976–77 (8th Cir. 2006) (“A modern university contains a variety of fora. Its facilities may include private offices, classrooms, laboratories, academic medical centers, concert halls, large sports stadiums and arenas, and open spaces . . . . Some places on the University’s campus, such as the administration building, the president’s office, or classrooms are not opened as fora for use by the student body or anyone else . . . . Other campus locations, such as auditoriums or stadiums allow for certain speech on certain topics. These locations may be described as designated public fora. Further, the public streets and sidewalks which surround the campus but are not on the campus likely constitute traditional public fora . . . .”).

<sup>49</sup> *See, e.g.*, Lauren T. Schudde, *The Causal Effect of Campus Residency on College Student Retention*, 34 REV. HIGHER EDUC. 581, 581 (2011); Ruth N. Lopez Turley & Geoffrey Wodtke, *College Residence and Academic Performance: Who Benefits from Living on Campus?*, 45 URBAN EDUC. 506 (2010); Gary R. Pike, *The Differential Effects of On- and Off-Campus Living Arrangements on Students’ Openness to Diversity*, 39 NASPA J. OF STUDENT AFFS. RES. & PRAC. 283 (2002).

<sup>50</sup> As one college student quipped, “In a university with a student body diverse enough that students may feel that they have little in common, a literal common ground is needed.” Sarah C. Stein Lubrano, *The Productivity of Social Space: Harvard should replace its student center*, HARV. CRIMSON, (Apr. 18, 2012), <http://www.thecrimson.com/column/exodoxa/article/2012/4/18/social-space-productivity/> [<https://perma.cc/XM2C-484Q>].

<sup>51</sup> The prevalence of sexual assault, and the far less frequent but still psychologically unsettling risk of campus shootings both qualify this claim of safety in important ways. These questions become more complicated at schools with large percentages of students who live off-campus or where questions surrounding safety and material provisions are exacerbated by wealth disparities among students. *See, e.g.*, Janese Silvey, *Tiger Pantry aims to feed MU community*, COLUM. DAILY TRIB. (Oct. 2, 2012, 1:00 PM), <http://www.columbiatribune.com>

relationships, there remains value in face-to-face interactions facilitated through shared physical space. This is not to say that virtual interactions can never accomplish the pedagogical or relational goals of the university.<sup>52</sup> But shared space and personal dialogue that incorporates physical presence can enhance these goals in meaningful ways.<sup>53</sup>

Another important aspect of the residential university is the typical age of its students. The Supreme Court generally looks to the age of students in distinguishing between student speech in universities and in secondary schools. Even though *Healy* came just three years after the Court's seminal decision in *Tinker v. Des Moines Independent Community School District*,<sup>54</sup> the Court chose not to apply the standard set forth in *Tinker*.<sup>55</sup> In subsequent student speech cases, the Court has suggested that at least part of the justification for weaker First Amendment protections in secondary schools rests on the developmental stage of the students. For example, in *Bethel School District No. 403 v. Fraser*, a case involving secondary students, the

---

[/f917a28f-0151-5632-8b82-e2c30ac236b1.html](https://perma.cc/49VK-MEVZ) [https://perma.cc/49VK-MEVZ]  
(describing a food pantry for staff and students at the University of Missouri and quoting the pantry's director explaining that "[a]lthough hunger is not a visible problem on campus, based on the number of students receiving financial aid, food insecurity is an issue").

<sup>52</sup> See generally John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013) (discussing some of the relational possibilities of virtual interactions).

<sup>53</sup> Justice Marshall remarked on this difference in a footnote in his dissent in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Disagreeing with the majority's reasoning that a Belgian Marxist denied an American visa could nonetheless send taped lectures, Marshall observed:

The availability to appellees of Mandel's books and taped lectures is no substitute for live, face-to-face discussion and debate, just as the availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work. Lengthy citations for this proposition, which the majority apparently concedes, are unnecessary. I simply note that in a letter to Henrik Lorenz, accepting an invitation to lecture at the University of Leiden and to discuss "the radiation problem," Albert Einstein observed that, "[i]n these unfinished things, people understand one another with difficulty unless talking face to face."

*Id.* at 776 n.2 (Marshall, J., dissenting) (quoting *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1154 n.101 (1972)). Our modes of communication have advanced since Marshall wrote in 1972 (or Einstein before him), but personal interaction remains unmatched by its technologically mediated surrogates.

<sup>54</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>55</sup> In university cases, the Court usually only cites *Tinker* in support of the principle that the First Amendment applies to the public university. See generally *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Minn. St. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973). Mary-Rose Papandrea has observed that "[t]he Supreme Court has cited *Tinker* in some of its university speech cases, but it has never relied on the *Tinker* standard to restrict speech" in those cases. Papandrea, *supra* note 10, at 1841.

Court noted “the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”<sup>56</sup>

The Court has hinted that these concerns may not apply in the university context. In *Widmar v. Vincent*, the majority mentioned in a footnote that college students were “less impressionable than younger students.”<sup>57</sup> And in *Board of Regents of the University of Wisconsin System v. Southworth*, Justice Souter’s concurrence observed that the Court’s “cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”<sup>58</sup>

There may have been a time, as Justice Thomas noted in his concurrence in *Morse v. Frederick*,<sup>59</sup> when a college professor’s relationship with his students was more akin to that of a high school teacher.<sup>60</sup> But as the Third Circuit has noted, in the modern era, the “public university has evolved into a vastly different creature.”<sup>61</sup> The “authoritarian role of today’s college administrations has been notably

---

<sup>56</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (“This Court’s First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. . . . These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech” (citing *Ginsberg v. New York*, 390 U.S. 629 (1968) and *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality, concurring, and dissenting opinions))).

<sup>57</sup> 454 U.S. at 274 n.14 (1981) (noting that college students, as “young adults . . . are less impressionable than younger students”); see also *Tilton v. Richardson*, 403 U.S. 672, 685 (1971) (“There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.”); *Oyama v. Univ. of Haw.*, 813 F.3d 850, 863 (9th Cir. 2015) (“key rationales for restricting students’ speech are to ensure that students ‘are not exposed to material that may be inappropriate for their level of maturity . . . .’[but] [c]oncerns about student maturity cannot justify restrictions on speech in [the graduate school] context because certification candidates are adults” (internal citations omitted)).

<sup>58</sup> 529 U.S. 238, n.4 (2000) (Souter, J., concurring) (internal citations omitted).

<sup>59</sup> 551 U.S. 393, 408 (2007) (permitting a school to regulate speech reasonably seen as promoting drug use because of the “‘special characteristics of the school environment,’ and the governmental interest in stopping student drug abuse,” where the speech was a student poster reading “Bong Hits 4 Jesus”).

<sup>60</sup> *Id.* at 412 n.2 (Thomas, J., concurring) (noting that in an earlier era, “[e]ven at the college level, strict obedience was required of students,” as teaching models “fostered absolute institutional control of students by faculty both inside and outside the classroom.” (citing Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1140 (1991))).

<sup>61</sup> *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 244 (3d Cir. 2010).

diluted.”<sup>62</sup> Meanwhile, students have assumed some rights and responsibilities formerly held by administrators.<sup>63</sup> In fact, “[e]ighteen-year-old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past . . . . [T]oday students vigorously claim the right to define and regulate their own lives.”<sup>64</sup>

Lower courts have examined more directly whether “the free speech standards that developed in K–12 school cases apply in the university setting.”<sup>65</sup> Their conclusions have been less than clear.<sup>66</sup> The Seventh Circuit illustrates the

---

<sup>62</sup> *Id.* (citing *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979)). The Third Circuit even notes that the “idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance.” *McCauley*, 618 F.2d at 245; *see also* *Guest v. Hansen*, 603 F.3d 15, 21 (2d Cir. 2010) (noting that colleges do not act *in loco parentis* per New York law).

<sup>63</sup> *McCauley*, 618 F.2d at 244 (quoting *Bradshaw*, 612 F.2d at 138–40).

<sup>64</sup> *Id.* at 245 (quoting *Bradshaw*, 612 F.2d at 140).

<sup>65</sup> *See, e.g.*, *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 519 n.5 (Minn. 2012); *see also* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students’ First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 46–49 (2008) (observing that courts have struggled with adapting First Amendment doctrine from elementary and high schools to the university).

<sup>66</sup> *See, e.g.*, *McCauley*, 618 F.3d at 247; *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (writing that courts “must proceed with greater caution [than in high school cases] before imposing speech restrictions on adult students at a college campus”); *Hosty v. Carter*, 325 F.3d 945, 948 (7th Cir. 2003), *vacated on reh’g en banc*, 2003 U.S. App. LEXIS 13195 (7th Cir. 2003), *different result reached on reh’g*, 2005 U.S. App. LEXIS 11761 (7th Cir. 2005) (“*Hazelwood*’s rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities. The differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels”); *Brown v. Li*, 308 F.3d 939, 955 (9th Cir. 2002) (upholding a state university thesis committee’s refusal to approve a graduate student’s thesis based on a nonconforming section under the *Hazelwood* standard); *Kincaid v. Gibson*, 236 F.3d 342, 346 nn. 4–5 (6th Cir. 2001) (en banc) (“Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.”); *Burnham v. Ianni*, 119 F.3d 668, 679 (8th Cir. 1997) (using a substantial interference test and citing *Tinker*); *Student Gov’t Ass’n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“*Hazelwood* . . . is not applicable to college newspapers.”); *Gay Student Servs. v. Tex. A & M Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984) (using *Tinker* to invalidate one justification for a college’s refusal to recognize a gay student group); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974) (same); *Williams v. Eaton*, 443 F.2d 422, 430 (10th Cir. 1971) (reversing a lower court’s dismissal of football players’ First Amendment claim when their coach dismissed them after they wore black armbands in protest of the opposing school’s alleged racially discriminatory practices and saying “[t]he starting point for weighing the constitutional claim of the plaintiffs is *Tinker*”); *Norton v. Discipline Comm. of E. Tenn. State Univ.*, 419 F.2d 195, 210–11 (6th Cir. 1969) (“If, in



confusion. In 2003, it examined the First Amendment rights of student journalists at a public university.<sup>67</sup> The Supreme Court had previously applied a First Amendment analysis to high school student journalists in *Hazelwood School District v. Kuhlmeier*.<sup>68</sup> But Judge Evans steered clear of *Hazelwood*'s framework, noting that "[t]he differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities" in part because "[t]he missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels."<sup>69</sup> After a rehearing *en banc*, the Seventh Circuit reversed course, embracing *Hazelwood*.<sup>70</sup> Writing for the court, Judge Easterbrook concluded that in some areas, like ensuring the quality of work produced under the school's auspices and "dissociating the school from 'any position other than neutrality on matters of political controversy,' there is no sharp difference between high school and college papers."<sup>71</sup> This blurring of standards across institutional lines misses the fact that universities and secondary schools have different purposes and missions—and quite plausibly different First Amendment norms and limitations.<sup>72</sup>

---

*Tinker*, the United States Supreme Court found the evidentiary record inadequate to support a finding of material and substantial interference with the normal operations of a junior and senior high school; then there is certainly insufficient evidence in the present record to support a finding of 'material and substantial interference' in the more adult educational environment of a university campus.").

<sup>67</sup> *Hosty v. Carter*, 325 F.3d 945, 948 (7th Cir. 2003).

<sup>68</sup> 484 U.S. 260, 272 (1988).

<sup>69</sup> *Hosty*, 325 F.3d at 948.

<sup>70</sup> *Hosty v. Carter*, 412 F.3d 731, 735–76 (7th Cir. 2005) (vacating the court's earlier refusal to use *Hazelwood*, and applying *Hazelwood* instead).

<sup>71</sup> *Id.* at 735 (internal citations omitted). The Tenth and Eleventh Circuits have also applied *Hazelwood* to the university setting. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (finding that, under *Hazelwood*, a school may compel a student to say profane words in a theatrical script if the reading is reasonably related to legitimate pedagogical concerns, per *Hazelwood*); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (relying on *Hazelwood* to find that a university classroom, like a school newspaper, is not a public forum and therefore a university can restrict a professor's ability to discuss his personal beliefs in class).

<sup>72</sup> Consider Judge Easterbrook's reliance on *Hazelwood*'s rationale that a secondary school should be able to disassociate from "any position other than neutrality on matters of political controversy." *Hosty*, 412 F.3d at 735 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)). Easterbrook's opinion fails to recognize that the Supreme Court immediately qualifies that *Hazelwood* passage by observing that secondary schools "would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'" *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). See also Papandrea, *supra* note 10, at 1828. ("Relying on decisions in the K–12 and workplace contexts is deeply troubling in light of the fundamental differences between universities, workplaces, and K–12 schools.").

## II. CONTEMPORARY FIRST AMENDMENT CHALLENGES

The preceding observations have set forth an aspirational framework for the dialogical, democratic, and residential university. This section explores five issues that emerge within that framework: academic freedom, public employee speech, public forums, safe spaces, and religious pluralism. Its formal constitutional analysis focuses on public universities subject to the constraints of the First Amendment, but many of its observations have normative implications for private universities. These are certainly not the only issues facing university campuses today. In fact, they are not even the only First Amendment issues: university lawyers regularly confront a host of First Amendment issues including fair use of copyrighted material,<sup>73</sup> patent rights related to scholarly research,<sup>74</sup> and expressive restrictions in Title IX investigations.<sup>75</sup> But the five issues addressed in this Part may be the ones most closely aligned with the question of purpose suggested by MacIntyre and Murray, an increasingly urgent question amid growing pressures on the university.

### A. Academic Freedom

Modern American understandings of academic freedom first appeared in a 1915 statement by the American Association of University Professors (AAUP).<sup>76</sup> Twenty-five years later, the AAUP revisited these ideas in its *1940 Statement of Principles on Academic Freedom and Tenure*.<sup>77</sup> These statements suggest that one

---

<sup>73</sup> See, e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 90, 103 (2d Cir. 2014) (upholding under fair use a digitized literary database, created by a consortium of research universities for restricted uses, against a copyright challenge).

<sup>74</sup> See, e.g., *St. John's Univ. v. Bolton*, 757 F. Supp. 2d 144, 169 (E.D.N.Y. 2010) (denying defendant's motion for summary judgment and discussing a professor's contractual obligation to assign patentable inventions to his university).

<sup>75</sup> See, e.g., Jonathan H. Adler, *Northwestern's Kipnis Cleared in Title IX Investigation*, WASH. POST: VOLOKH CONSPIRACY, (June 1, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/northwesterns-kipnis-cleared-in-title-ix-investigation/?utm\\_term=.97ccd0dfb1bd](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/northwesterns-kipnis-cleared-in-title-ix-investigation/?utm_term=.97ccd0dfb1bd) [<https://perma.cc/WEG6-39VE>] (detailing Title IX investigation of Northwestern University Professor Laura Kipnis, triggered by an essay she wrote for *The Chronicle of Higher Education*).

<sup>76</sup> See 1 Bull. Am. Ass'n of U. Professors, Declaration of Principles 15 (1915), reprinted in *General Report of the Committee on Academic Freedom and Academic Tenure*, 91 Ind. L.J. 57 (2015).

<sup>77</sup> See *Statement of Principles on Academic Freedom and Tenure* (1940), available at <https://www.aaup.org/file/1940%20Statement.pdf> [<https://perma.cc/HWC7-7XLH>] [hereinafter *Statement of Principles*] (In developing the preceding statement, the AAUP collaborated with other organizations including the Association of American Colleges (AAC), which has since been renamed the Association of American Colleges and Universities.); See Jerry G. Gaff, ACADEMIC FREEDOM FOR A NEW AGE, ASSOC. OF AM. COLLEGE AND U. 1 (June 12, 2015), [https://www.aacu.org/sites/default/files/Gaff\\_Academic](https://www.aacu.org/sites/default/files/Gaff_Academic)

of the core principles of academic freedom is that “[t]eachers are entitled to freedom in the classroom in discussing their subject . . . .”<sup>78</sup> But the realities of academic freedom are not as clear as these ideals.

Robert Post and Matthew Finkin have observed that “[t]he American concept of academic freedom grew directly out of the German concept of *akademische Freiheit*.”<sup>79</sup> But those who attempted to transplant the German idea “confronted an organization of higher education very different from that which existed in Germany.”<sup>80</sup> The primary difference was that German universities were faculty-run while American universities “were instead governed by a lay board chosen by a private proprietor, by a sponsoring religious denomination, or by a political process.”<sup>81</sup> This difference meant that “in America nonscholars retained the right to decide what should and should not be taught, what should and should not be published.”<sup>82</sup>

The mismatch between academic freedom and nonacademic governance left unclear how to resolve conflicts between a university’s institutional decision-makers and its individual faculty members. The AAUP clearly favored the latter, a position reinforced in some judicial rhetoric. In a 1967 decision declaring unconstitutional a state law aimed at restricting Communist teachers, Justice Brennan’s majority opinion asserted that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”<sup>83</sup> For Brennan, academic freedom was “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>84</sup>

But courts have not always agreed with Justice Brennan.<sup>85</sup> One of the most striking qualifications to faculty academic freedom came in a 1998 case, *Edwards v. California University of Pennsylvania*.<sup>86</sup> There, a tenured professor challenged the

---

Freedom.pdf.

<sup>78</sup> *Statement of Principles*, *supra* note 77, at 14.

<sup>79</sup> FINKIN & POST, *supra* note 9, at 23.

<sup>80</sup> *Id.* at 24.

<sup>81</sup> *Id.* at 24.

<sup>82</sup> *Id.* at 25.

<sup>83</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>84</sup> *Id.*

<sup>85</sup> Walter Metzger has described the professional and judicial definitions of academic freedom as “seriously incompatible and probably ultimately irreconcilable.” Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1267 (1988). Metzger also observes that “no American court had ruled that any provision of the federal constitution protected academic freedom” until the middle of the twentieth century. *Id.* at 1285. The Supreme Court’s earliest consideration of these issues (in the context of public schoolteachers rather than university faculty) relied on the First Amendment freedoms of speech and assembly, not academic freedom. *See, e.g., Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952).

<sup>86</sup> 156 F.3d 488 (3d. Cir. 1998).

university's decision to restrict his choice of classroom materials and suspend him with pay for part of an academic term after he purportedly used a course to advance his religious views.<sup>87</sup> In an opinion authored by then-Judge Samuel Alito, the Third Circuit concluded that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom."<sup>88</sup> The Eleventh Circuit held similarly in *Bishop v. Aronov*<sup>89</sup> that it could "not find support to conclude that academic freedom is an independent First Amendment right."<sup>90</sup>

Even judicial rhetoric more friendly to academic freedom has sometimes focused on the institution of the university rather than the individual faculty member. For example, Justice Frankfurter's oft-quoted *Sweezy*<sup>91</sup> concurrence emphasized "'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."<sup>92</sup> Other cases have further suggested that conflicts between professor and university will be resolved in favor of the university.<sup>93</sup> The Supreme Court has not directly addressed this issue. In *Garcetti v. Ceballos*,<sup>94</sup> it concluded that the First Amendment provided limited protection to a public employee's private speech but left open the question of whether its approach to public employee speech "would apply in the same manner to a case involving speech related to scholarship or teaching."<sup>95</sup> Since *Garcetti*, three circuit courts have ruled against tenured professors who asserted violations of First Amendment academic freedom rights,

---

<sup>87</sup> *Id.* at 489–90.

<sup>88</sup> *Id.* at 491.

<sup>89</sup> 926 F.2d 1066 (11th Cir. 1991).

<sup>90</sup> *Id.* at 1075.

<sup>91</sup> *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J., concurring).

<sup>92</sup> *Id.* at 262 (quoting *THE OPEN UNIVERSITY IN SOUTH AFRICA* 10–12 (Elbert van de Sandt Centlivres et al., eds., Johannesburg: Whitwatersrand Univ. Press (1957)) (emphasis added)).

<sup>93</sup> See, e.g., *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each nontenured professor be made a sovereign unto himself."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (defining academic freedom as "[t]he freedom of a university to make its own judgments as to education . . ."); *Brown v. Armenti*, 247 F.3d 69, 75 (3rd Cir. 2001) (holding that a public university professor's First Amendment right to expression does not apply to the school's grade assignment procedures); *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (holding that—compared to other public employees—public university professors do not have any additional, academic freedom-based rights); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (Former 5th Cir. 1982) (rejecting plaintiff professor's claim that his refusal to assign a certain grade constituted a constitutionally protected teaching method).

<sup>94</sup> 547 U.S. 410 (2006).

<sup>95</sup> *Id.* at 425.

either denying such a right on the merits or finding it was not clearly established for purposes of qualified immunity.<sup>96</sup>

The judicial presumption that academic freedom belongs to the university rather than to individual faculty members is at odds with the norms espoused by the AAUP. Moreover, some of the reasoning underlying that intuition seems deeply misguided. For example, the Eleventh Circuit's *Aronov* opinion expressed a "trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom."<sup>97</sup> In the court's view, "University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do."<sup>98</sup> This kind of market solution ignores the likelihood that some of the most unpopular and destabilizing views will be rejected across most institutions; think, for example, of faculty advocating for civil rights on university campuses in the Jim Crow South.

On the other hand, individual faculty do not have an unfettered ability to teach whatever they want in the classroom. Nobody thinks a physics professor has a First Amendment right to teach French poetry instead of electricity and magnetism in her introductory physics course. Perhaps the classroom comes closer to a limited public forum in which expressive freedoms are contextually limited. Just as aspiring

---

<sup>96</sup> *Renken v. Gregory*, 541 F.3d 769, 770 (7th Cir. 2008); *Hong v. Grant*, 403 F. App'x. 236, 237 (9th Cir. 2010); *Gorum v. Sessoms*, 561 F.3d 179, 182 (3d Cir. 2009). All of these cases involved administrative functions rather than the scholarship or teaching mentioned in *Garcetti*. The assumption that academic freedom is an institutional—rather than an individual—right also draws some support from the Supreme Court's analysis of affirmative action in higher education. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring) (contending that a university can "make its own judgments as to education"); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (adopting Powell's reasoning). *See also* *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 16 (D.C. Cir. 2008) (J. Edwards, concurring) (concluding that *Grutter* adopted and extended institutional academic freedom by granting constitutional protection to admissions decisions); Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 981 (2009) (arguing that *Grutter* "extended academic freedom beyond research and teaching to cover the kinds of academic matters embodied in the four essential freedoms.").

<sup>97</sup> *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991); *see also* Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087, 1094 (2011) (discussing these three cases and suggesting that "[w]hile the *Garcetti* Court appeared to signal that faculty teaching and scholarship were different than public employee speech and entitled to greater First Amendment protection, the circuit courts have not been so generous"). Joy also notes that some courts have attempted to insulate university decision-making from interference from state legislatures. *Id.* at 1097–98.

<sup>98</sup> *Bishop*, 926 F. 2d at 1075; *see also* FINKIN & POST, *supra* note 9, at 39 ("If the First Amendment protects the interests of individual persons to speak as they wish, academic freedom protects the interests of society in having a professoriat that can accomplish its mission.").

musicians have no First Amendment right to showcase their talents in a town hall meeting devoted to a local ballot initiative, so too can the classroom be restrictively focused on particular subject matter.

On closer inspection, however, even the analogy to a limited public forum falls short. Suppose the physics professor insisted on teaching that magnetic fields were caused by invisible goblins rather than electromagnetic force. Neither principles of academic freedom nor the First Amendment would protect her ability to teach this perspective. Few people would be bothered by restrictions on the goblin-touting physics professor. But what about more controversial examples, like the science professor who rejects climate change, the medical school professor who advocates for or against sex reassignment surgeries, or the international relations professor who denies the sovereignty of Israel or Palestine?

In the context of academic freedom, departing from First Amendment norms against viewpoint discrimination may leave controversial scholarly claims unprotected. And it is not clear at what point a particular claim moves from controversial to impermissible—or who gets to make that determination. Post and Finkin suggest that “the production of knowledge requires not merely the negative liberty to speculate free from censorship but also an affirmative commitment to the virtues of reason, fairness, and accuracy.”<sup>99</sup> That commitment might work well in certain scientific inquiries, but its application in the humanities is far less clear. How, for example, can humanities scholars commit to the virtue of reason when at times the definition of reason itself is contested?<sup>100</sup> Nor can Post and Finkin escape this puzzle by appealing to “compliance with professional norms” and “professional regulation.”<sup>101</sup> As recent examples suggest, entire disciplines—or at least the key gatekeepers to disciplinary power—can be captured more by politicized viewpoints than “commitment to the virtues of reason, fairness, and accuracy.”<sup>102</sup>

Focusing on the university’s purpose as a place of constrained disagreement can help address both these seemingly irresolvable tensions and the strains between individual faculty and institutional governance that arise under the umbrella of

---

<sup>99</sup> FINKIN & POST, *supra* note 9, at 42–43.

<sup>100</sup> See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981) (arguing that forms of reason are based on tradition-dependent argumentative practices); STANLEY HAUERWAS, *How to Be Theologically Funny*, in *THE WORK OF THEOLOGY* (2015) (making a similar critique of “practical reason”).

<sup>101</sup> FINKIN & POST, *supra* note 9, at 43.

<sup>102</sup> See, e.g., Jose Luis Bermudez, *Defining ‘Harm’ in the Tuvel Affair*, *INSIDE HIGHER ED* (May 5, 2017) (discussing the open letter against philosophy professor Rebecca Tuvel for her article exploring parallels between being transgender and being transracial) <https://www.insidehighered.com/views/2017/05/05/real-damage-done-flare-over-philosophers-journal-article-essay> [<https://perma.cc/ST8Q-EXGT>]; Andrew Koppelman, *Corrupting the National Book Award?*, *BALKINIZATION* (October 26, 2017), <https://balkin.blogspot.com/2017/10/corrupting-national-book-award.html> [<https://perma.cc/DV47-THA8>] (critiquing the selection of Nancy MacClean’s *Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America* as a finalist for the National Book Award despite egregious and widely documented errors in the book).

academic freedom. Intelligibly warring creeds require a kind of structured discourse in the university and most especially in the classroom. That emphasis suggests that faculty have broad but not unfettered discretion to explore contested and controversial subjects and viewpoints. But constraint and intelligibility impose some limits. In some subjects, they might also place a greater responsibility on the classroom instructor to remember her primary role in facilitating constrained disagreement and warring creeds. Accepting this purpose of the university means that in the classroom, the instructor acts as teacher and facilitator more than activist and indoctrinator. That emphasis has implications for pedagogy, content selection, and broader curricular priorities.

### B. Public Employee Speech

A second issue at the intersection of the university's purpose and its expressive limits is speech by university employees. Many members of a public university—faculty, staff, administrators, and even some students—are also public employees subject to special restrictions on their speech and conduct.<sup>103</sup> The framework for assessing these restrictions comes from the Supreme Court's public employee speech cases.<sup>104</sup> Unfortunately, these cases are themselves murky about the line between "public" and "private" speech by public employees and what kinds of topics qualify as matters of "public concern" sufficient to trigger additional employer restrictions.

In the university context, courts have insufficiently defined the intersection between academic freedom and limits on public employee speech.<sup>105</sup> For example, in *Hong v. Grant*, a federal district court held that a university professor was not entitled to First Amendment protection for remarks he made during promotion and hiring decisions.<sup>106</sup> The court concluded that a public university's internal staffing practices were of little public concern.<sup>107</sup> But this singular attention to matters of public concern neglects other First Amendment values. For example, comments regarding promotion and hiring may be highly relevant to matters of academic freedom in ways that warrant greater rather than less First Amendment protection.

---

<sup>103</sup> See Papandrea, *supra* note 10, for a recent consideration of university students' free speech rights generally.

<sup>104</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

<sup>105</sup> See Darryn Cathryn Beckstrom, *Reconciling the Public Employee Speech Doctrine and Academic Speech After Garcetti v. Ceballos*, 94 MINN. L. REV. 1202, 1223 (2010) ("Professors must therefore proceed at their own risk when raising concerns about departmental matters and the self-governance process, as courts could view this speech as nothing more than employee grievances that fail to constitute a matter of public concern.").

<sup>106</sup> *Hong v. Grant*, 516 F. Supp. 2d 1158, 1161 (C.D. Cal. 2007), *aff'd*, 403 F. App'x 236 (9th Cir. 2010).

<sup>107</sup> *Id.*

Some courts have applied the framework for public employee speech to university students. In *Marcum v. Dahl*, the Tenth Circuit analogized student-athletes to government employees.<sup>108</sup> The case involved University of Oklahoma basketball team members who complained to their athletic director and the media about their head coach and subsequently lost their scholarships due to their “attitude and behavior.”<sup>109</sup> The court concluded that the students were public employees and their comments did not involve matters of public concern.<sup>110</sup>

Courts have also upheld expressive restrictions on students enrolled in professional and preprofessional programs.<sup>111</sup> In *Tatro v. University of Minnesota*, the Minnesota Court of Appeals rejected a First Amendment claim by Amanda Tatro, an undergraduate student enrolled in the University of Minnesota’s mortuary-science program.<sup>112</sup> Tatro had made several off-color Facebook posts about the cadavers she was dissecting.<sup>113</sup> When these posts came to light, the university contended that Tatro had engaged in “unprofessional conduct.”<sup>114</sup> School officials failed her in the class, placed her on probation for her remaining time at the university, required her to enroll in an ethics course, and mandated a psychiatric evaluation.<sup>115</sup> The Minnesota Court of Appeals upheld the school’s decisions,

---

<sup>108</sup> *Marcum v. Dahl*, 658 F.2d 731, 734 (10th Cir. 1981).

<sup>109</sup> *Id.* at 733.

<sup>110</sup> *Id.* at 734; *see also* Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005) (analyzing a University of Kansas track athlete’s claim under public employee speech doctrine and concluding that the student’s speech leading to his loss of athletic scholarship did not touch upon matters of public concern); *see generally*, James Hefferan, *Picking Up the Flag? The University of Missouri Football Team and Whether Intercollegiate Student-Athletes May Be Penalized for Exercising Their First Amendment Rights*, 12 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 44, 68 (2016) (exploring “whether intercollegiate student-athletes may be penalized for exercising their First Amendment right to freedom of speech”).

<sup>111</sup> A professional school consists of coursework that prepares students for careers in specific fields. Although most of these are graduate-level programs, some schools also offer undergraduate degrees in specific professions. These are distinct from a traditional graduate school where students focus primarily on mastering a particular field of study and do not focus on training for a specific career. *See* CORNELL CAREER SERVICES, GRADUATE & PROFESSIONAL SCHOOL, CORNELL UNIV. 1 (2016), <https://www.career.cornell.edu/resources/upload/Graduate-School-Guide-16-17.pdf> [<https://perma.cc/39LJ-DRG>].

<sup>112</sup> *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 814 (Minn. Ct. App. 2011), *aff’d on other grounds*, 816 N.W.2d 509 (Minn. 2012).

<sup>113</sup> *Id.* at 814. Tatro commented that she “[r]ealized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort [sic]. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket.” *Id.*

<sup>114</sup> *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 522 (Minn. 2012); *see also* Minn. Stat. § 149A.70, subd. 7(3) (2010) (“[U]nprofessional conduct [of a mortician] includes the ‘failure to treat the body of the deceased’ or ‘the family or relatives of the deceased’ ‘with dignity and respect.’”).

<sup>115</sup> *Tatro*, 800 N.W.2d at 815.



concluding that Tatro's "Facebook posts materially and substantially disrupted the work and discipline of the university . . . ." <sup>116</sup>

Applying public employee speech to students raises several line-drawing questions. If public universities can regulate the speech and conduct of athletes and preprofessional students, then what about students on academic scholarships or those participating in work-study programs? And how far into students' personal lives do these restrictions extend? These questions are not easily answered, but focusing on the university's purpose might inform decisions about student and employee speech. Expression or expressive conduct in the service of constrained disagreement or intelligibly warring creeds might warrant heightened protection even when manifested within extracurricular rather than formally curricular contexts.

### C. Public Forums

Some of the most visible spaces for constrained disagreement on public university campuses are public forums—the government-managed spaces where people gather and express themselves.<sup>117</sup> The government owns and manages these forums, but within those spaces, anyone can say almost anything.<sup>118</sup> The ideal of the public forum reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."<sup>119</sup> Yet this ideal faces practical constraints.

The limits on First Amendment activity in a public forum fall under what the Court has called content-neutral time, place, and manner restrictions.<sup>120</sup> The doctrine

---

<sup>116</sup> *Id.* at 822. In reaching that conclusion, the court reasoned that standards for online speech by students in secondary schools could be applied to pre-professional university students. *Id.* at 821; *see also* Keefe v. Adams, 44 F. Supp. 3d 874, 877 (D. Minn. 2014), *aff'd*, 840 F.3d 523 (8th Cir. 2016).

<sup>117</sup> *See generally* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 259–93 (2009) (explaining the history of political and social activism on university campuses and the characteristics of public universities that facilitate this activism).

<sup>118</sup> Speech that advocates imminent lawless action is prohibited. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a state may not proscribe advocacy of the use of force "except where such advocacy is directed to inciting or producing imminent lawless action"). Certain "unprotected" categories of speech can also be restricted. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (holding that obscenity does not receive First Amendment protection because it is "utterly without redeeming social importance"). The limits on discourse in the public forum are otherwise minimal.

<sup>119</sup> *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted); *see also* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (referring to streets and parks as "quintessential public forums").

<sup>120</sup> *See* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable

is far from clear; as Steven Shiffrin has suggested, “if content neutrality is the First Amendment emperor, the emperor has no clothes.”<sup>121</sup> Content neutrality misses the expressive connection between a message and the time, place, and manner in which it occurs.

The challenges of the public forum doctrine are even more pronounced within the varied spaces of a public university.<sup>122</sup> Dormitories and classrooms are not the same as open public spaces.<sup>123</sup> More generally, the university also differs from “quintessential public forums” like public streets and public parks.<sup>124</sup> As one court has observed:

[T]he purpose of a university is strikingly different from that of a public park. Its essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty.<sup>125</sup>

---

time, place, or manner restrictions.”); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (“A major criterion for a valid time, place, and manner restriction is that the restriction ‘may not be based upon either the content or subject matter of speech.’” (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980))).

<sup>121</sup> STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 66 (1999).

<sup>122</sup> See *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (“A university campus will surely contain a wide variety of fora on its grounds.”); *Bowman v. White*, 444 F.3d 967, 976–77 (8th Cir. 2006) (“[L]abeling the campus as one single type of forum is an impossible, futile task.”); *Justice for All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005) (“The Supreme Court’s forum analysis jurisprudence does not require us to choose between the polar extremes of treating an entire university campus as a forum designated for all types of speech by all speakers, or, alternatively, as a limited forum where any reasonable restriction on speech must be upheld.”); *Roberts v. Haragan*, 346 F.Supp.2d 853, 860 (N.D. Tex. 2004) (noting that the “entire University campus is not a public forum subject to strict scrutiny,” but the “University, by express designation, may open up more of the residual campus as public forums for its students, but it can not designate less”).

<sup>123</sup> See generally *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (discussing that a classroom is not the same as an open public space); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (discussing that a classroom is not the same as an open public space); *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989) (discussing that a college dormitory is not the same as an open public space).

<sup>124</sup> *Perry Educ. Ass’n*, 460 U.S. at 45 (1983). See also *Gilles v. Garland*, 281 F. App’x 501, 511 (6th Cir. 2008) (“[T]he great weight of authority . . . has rejected the notion that open areas on a public university campus are traditional public fora.”); *Haragan*, 346 F. Supp. 2d at 860 (The “entire University campus is not a public forum subject to strict scrutiny.”).

<sup>125</sup> *Bloedorn*, 631 F.3d at 1233–34.

On the other hand, this broad characterization of the university does not insulate all spaces from expression. Campus space that is “physically indistinguishable from public sidewalks” or otherwise blends into noncampus areas can still qualify as a traditional public forum.<sup>126</sup> But unlike a city park or street with clearly marked boundaries, the ambiguous borders of traditional public forums within public universities can sometimes create “an impermissible amount of doubt” for a potential speaker.<sup>127</sup> This potential chilling effect has led at least two federal circuits to extend traditional forum analysis to spaces adjacent to sidewalks and open areas.<sup>128</sup>

The unique context of the public university permits certain speaker-based distinctions that would be unavailable in traditional public forums.<sup>129</sup> For example,

---

<sup>126</sup> See *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (“Because the perimeter sidewalks at [Tennessee Tech University] blend into the urban grid and are physically indistinguishable from public sidewalks, they constitute traditional public fora.”); *Brister v. Faulkner*, 214 F.3d 675, 683 (5th Cir. 2000) (finding “a unique piece of university property that is, for all constitutional purposes, indistinguishable from the Austin city sidewalk” to be a traditional public forum); *Hershey v. Goldstein*, 938 F. Supp. 2d 491, 512 (S.D.N.Y. 2013) (holding that the sidewalks surrounding a university’s campus are traditional public forums). *But see Bloedorn*, 631 F.3d at 1233–34 (“Even though GSU’s campus possesses many of the characteristics of a public forum—including open sidewalks, streets, and pedestrian malls—it differs in many important ways from public streets or parks. Perhaps most important, the purpose of a university is strikingly different from that of a public park. . . . Nor is this case like [a case where the Supreme Court’s sidewalks] were indistinguishable from other public sidewalks in Washington, D.C., and, thus, constituted traditional public fora. Here, the sidewalks, Pedestrian Mall, and Rotunda are all contained inside of the GSU campus. All of the University’s entrances are identified with large blue signs and brick pillars, all of the buildings are identified with large blue signs, and all of its parking lots have signs restricting their use to GSU community members.” (internal citations omitted)).

<sup>127</sup> *Brister*, 214 F.3d at 682–83 (5th Cir. 2000) (“If individuals are left to guess whether they have crossed some invisible line between a public and non-public forum, and if that line divides two worlds—one in which they are free to engage in free speech, and another in which they can be held criminally liable for that speech—then there can be no doubt that some will be less likely to pursue their constitutional rights, even in the world where their speech would be protected.”).

<sup>128</sup> See *id.*; see also *McGlone*, 681 F.3d at 734–45 (finding requirements that potential speakers obtain advance permission to be an unconstitutional restriction on the evangelist’s free speech rights in a traditional public forum).

<sup>129</sup> Universities’ restrictions on speech can affect a range of actors including professors, administrators, staff, coaches, and others. See Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 483 (2005) (citing *Galdikas v. Fagan*, 342 F.3d 684, 686 (7th Cir. 2003) (students)); *Besser v. Hardy*, 260 F.3d 671, 674 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) (professors); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1180 (6th Cir. 1995) (coaches); *Hoover v. Morales*, 164 F.3d 221, 224 *superseding* 146 F.3d 304 (5th Cir. 1998) (employees as consultants or expert witnesses); *American Future Sys. v. Pa. State Univ.*, 618 F.2d 252, 256–57 (3d Cir. 1980) (vendors); *American Future Sys. v. Pa.*

the Eleventh Circuit recently noted that an evangelist not associated with the university was “not a member of the class of speakers for whose especial benefit the forum was created,” and thus could be “constitutionally restricted from undertaking expressive conduct” on areas that the university opened for expressive speech by campus community members.<sup>130</sup> The Eighth Circuit has also upheld permit requirements for nonuniversity speakers based on safety and space concerns.<sup>131</sup>

Within the university context, we might return to the idea of constrained disagreement to think about limits on the public forum. When a university functionally treats a space as a public forum—a green space, walkway, or bridge that can be painted with messages—it triggers a high presumption against viewpoint discrimination. Even so, it can still impose time, place, and manner restrictions, and it can “manage” the forum to ensure that all voices have a reasonable opportunity to make their perspectives known. And unlike more traditional public forums, perhaps the university should also be able to impose restrictions against ad hominem attacks for the sake of facilitating constrained disagreement. That possibility raises a host of line-drawing challenges, and it may be that only certain spaces can be constrained in this way. But on the public university campus, perhaps not every open forum should be open in the same way.

#### *D. Safe Spaces*

In recent years, debates have erupted over whether university students should have access to “safe spaces”—places on campus free from offensive and unsettling expression.<sup>132</sup> Greg Lukianoff and Jonathan Haidt worry that some advocates of safe spaces seek to transform campuses into places “where young adults are shielded

---

State. Univ., 688 F.2d 907, 918 (3d Cir. 1982) (vendors); *Linnemeier v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034, 1038 (N.D. Ind. 2001) (discussing the institution itself as speaker).

<sup>130</sup> *Bloedorn*, 631 F.3d at 1235. See also *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1224 (S.D. Ala. 2016) (“[T]he Court accepts that the Perimeter could theoretically be a designated public forum as to students despite being a limited public forum as to the general public.”).

<sup>131</sup> See *Bowman v. White*, 444 F.3d 967, 981 (8th Cir. 2006). The court found that a five-day cap on permits was not narrowly drawn to achieve an interest in “fostering a diversity of viewpoints and avoiding the monopolization of space” as, “the space will go unused even if Bowman still wants to use the space” after his five days are over. *Id.* at 981–82. See also *Gilles v. Garland*, 281 F. App’x 501, 511 (6th Cir. 2008) (upholding a student-sponsorship requirement as applied to a campus evangelist).

<sup>132</sup> This section draws from Ashutosh Bhagwat & John Inazu, *Searching for Safe Spaces*, INSIDE HIGHER ED (March 21, 2017), <https://www.highered.com/views/2017/03/21/easily-caricatured-safe-spaces-can-help-students-learn-essay> [https://perma.cc/46DT-55G7].

from words and ideas that make some uncomfortable.”<sup>133</sup> Their concerns are not entirely unwarranted. In November 2016, following the election of Donald Trump, the University of Michigan Law School offered students “stress-busting self-care activities” that included coloring, blowing bubbles, and sculpting with Play-Doh.<sup>134</sup> A year earlier, student activists at the University of Missouri asked that reporters be denied access to their tent city “so the place where people live, fellowship, and sleep can be protected from twisted insincere narratives.”<sup>135</sup> One Ivy League professor has even suggested that students should be provided “campus-wide, reflective, self-aware distance from the grit of the everyday.”<sup>136</sup>

The idea of a “campus-wide” safe space raises serious practical and theoretical concerns. But there are also dangers of overreacting with First Amendment bluster, or ridicule, as some right-leaning critics have done in deriding advocates for safe spaces as “snowflakes.”<sup>137</sup> Proponents of safe spaces have some important arguments. In fact, we know from experience that people depend upon private and protected places to regroup, rest, and reenergize. We form our most intimate bonds and our deepest convictions outside of the public eye, with trusted friends, in spaces that might fairly be characterized as “safe.”

The term “safe space” saw its first consistent usage with the 1960s and 1970s women’s movement, when it connoted “a means rather than an end and not only a physical space but a space created by the coming together of women searching for community.”<sup>138</sup> Buttressed by developments in critical theory, Malcolm Harris

---

<sup>133</sup> Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [https://perma.cc/4K9P-5C9R].

<sup>134</sup> Emily Zanotti, *University of Michigan cancels plan to help students “cope” with Trump using coloring books, Play-Doh and bubbles*, FOXNEWS.COM (November 14, 2016), <http://www.foxnews.com/us/2016/11/14/university-michigan-cancels-plan-to-help-students-cope-with-trump-using-coloring-books-play-doh-and-bubbles.html> [https://perma.cc/W4KH-SVWB].

<sup>135</sup> Conor Friedersdorf, *Campus Activists Weaponize “Safe Space,”* THE ATLANTIC (November 10, 2015), <https://www.theatlantic.com/politics/archive/2015/11/how-campus-activists-are-weaponizing-the-safe-space/415080/> [https://perma.cc/5PXA-BZNF].

<sup>136</sup> Matthew Pratt Guterl, *On Safety and Safe Spaces*, INSIDE HIGHER ED (August 29, 2016), <https://www.insidehighered.com/views/2016/08/29/students-deserve-safe-spaces-campus-essay> [https://perma.cc/BF8V-8HBZ].

<sup>137</sup> Emily Jashinsky, *Ben Shapiro, Adam Carolla Slam Campus Safe-Space Culture in Congressional Hearing*, THE WASH. EXAMINER (July 27, 2017), <https://www.washingtonexaminer.com/ben-shapiro-adam-carolla-slam-campus-safe-space-culture-in-congressional-hearing> [https://perma.cc/33F4-PTBZ] (quoting conservative activist Ben Shapiro as stating that safe space culture “turns students into snowflakes, craven, and pathetic”).

<sup>138</sup> Malcolm Harris, *What’s a ‘Safe Space’? A Look at the Phrase’s 50-year History*, FUSION (Nov. 11, 2015), <http://fusion.net/story/231089/safe-space-history/> [https://perma.cc/3Y7F-PF8J]. Writing in a publication called Mind Hacks, an anonymous author challenged Harris’s account and argued that the concept of safe spaces emerged not

asserts, the push for safe spaces evolved by the early 2000s into arguments for “gender-neutral bathrooms, asking people’s preferred pronouns, trigger warnings, internal education ‘anti-oppression’ trainings, and creating separate auxiliary spaces for identity groups to organize their particular concerns.”<sup>139</sup>

Of course, in a broader sense, the idea of places where like-minded groups could gather, organize, and seek mutual support long predates the formal use of “safe space.”<sup>140</sup> Black churches sustained alternative communities and social movements through much of our nation’s history, from the antebellum era to the civil rights era.<sup>141</sup> The suffragist movement grew out of women who gathered not only in conventions but also around teatimes, potato sack races, and pageants.<sup>142</sup> Even taverns offered private meeting places in the lead up to the American Revolution.<sup>143</sup>

The notion of a safe space builds on the idea that people develop intellectually and relationally not only from exposure to conflicting ideas but also from the protection of intimate and private settings. This principle is supported not only by common sense and history but also by an important strand of constitutional law that allows private citizens to form and participate in groups of their choosing. As Ken White has argued, “[s]afe spaces, if designed in a principled way, are just an application of [the freedom of association].”<sup>144</sup>

The Constitution does not explicitly protect a freedom of association, but the Supreme Court has long recognized the right to associate, to organize, and to gather in groups with like-minded individuals as implicit in the First Amendment rights of

---

from feminist and gay liberation movements but within corporate America through the work of psychologist Kurt Lewin. *The Real History of the ‘Safe Space,’* MIND HACKS (Nov. 12, 2015), <https://mindhacks.com/2015/11/12/the-real-history-of-the-safe-space/> [<https://perma.cc/JH2M-J6AV>]. According to the Mind Hacks article, Lewin’s late 1940s work on the development of corporate leadership training laid a foundation for what came to be known as sensitivity training: “One of the ideas behind sensitivity training was that honesty and change would only occur if people could be frank and challenge others in an environment of psychological safety. In other words, without judgment . . . [a] ‘safe space’ is created.” *Id.*

<sup>139</sup> *The Real History of the ‘Safe Space,’* *supra* note 138.

<sup>140</sup> See generally, JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012) (examining the right of assembly and its importance for social movements like abolitionism, women’s suffrage, and the labor and civil rights movements).

<sup>141</sup> Judith Weisenfeld, *Religion in African American History*, in OXFORD RESEARCH ENCYCLOPEDIA, AMERICAN HISTORY (2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-24#notes> [<https://perma.cc/Z2DE-N4W4>].

<sup>142</sup> INAZU, *supra* note 140, at 45.

<sup>143</sup> See Baylen J. Linnekin, “Tavern Talk” and the Origins of the Assembly Clause: *Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L. Q. 593, 596 (2012).

<sup>144</sup> Ken White, *Safe Spaces As Shield, Safe Spaces As Sword*, POPEHAT (Nov. 9, 2015), <https://popehat.com/2015/11/09/safe-spaces-as-shield-safe-spaces-as-sword/> [<https://perma.cc/RTB7-TS9L>].

assembly and speech.<sup>145</sup> In one of its earliest cases acknowledging the right of association, the Supreme Court noted that it is essential to the ability of individuals to develop and communicate their views.<sup>146</sup> The Court has also recognized that the right to choose those with whom we associate—and to exclude from a group individuals who do not share the group’s beliefs—is a central aspect of association.<sup>147</sup> The right to associate is the right to associate with individuals of one’s choice. When individuals form an association, they may exclude (and shield themselves from) opposing viewpoints. In many ways, a private association is a kind of safe space.

The relationship between private associations and safe spaces takes on particular importance in the context of the residential college, which contains both sites of contested inquiry and places of intimate repose. The debate over safe spaces raises important questions about the nature of human interaction, the limits of free expression, and the role of the First Amendment in our civic practices. The emergence of these debates on college campuses is not simply a function of campus activism and progressive faculty. Rather, the nature of college campuses—including the people, places, and purposes that comprise them—creates an environment that illustrates both the limits and the possibilities of safe spaces.

Undergraduates at the typical residential college spend most of their waking and sleeping hours on campus. Unlike faculty members, administrators, and graduate students, they do not have off-campus homes to which they can easily retreat during the school year. In this sense, residential colleges share similarities with other institutions like secondary schools, prisons, and military bases that present unique First Amendment challenges. The institution is neither an open public forum nor a wholly privatized space.

Even the most vigorous academic proponents of open debate would not want their living rooms to become open forums for diverse viewpoint expression. Most people need to be able to retreat and rejuvenate in their homes and other intimate social settings. In these environments, they commune with like-minded friends, engage in informal interactions, and pursue mindless pastimes with no ideological content at all. In these settings, people rarely want to have to defend their deepest beliefs or confront hostility.

There will, of course, be variations among campuses, both in what a “safe space” means and in a school’s willingness or ability to commit resources to this area. Even here, however, the First Amendment provides some guidance. Most notably, the Supreme Court in 1988 upheld a law banning sidewalk picketing

---

<sup>145</sup> INAZU, *supra* note 140, at 2–3.

<sup>146</sup> NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

<sup>147</sup> Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) (upholding the right of the Boy Scouts of America to expel a gay assistant scoutmaster). *But see* Roberts v. United States Jaycees, 468 U.S. 609, 612 (1984) (rejecting associational claim of all-male civic organization). For a critical take on the tensions between *Dale* and *Jaycees*, see INAZU, *supra* note 140, at 10.

directed at private residences, as applied to antiabortion protestors gathering on a public sidewalk in front of a physician's home.<sup>148</sup> In most settings, the First Amendment protects the right to speak and protest in public places. But the Court recognized that the interest in preserving "residential privacy" outweighed this general principle.<sup>149</sup> This reasoning suggests that, at a minimum, residential universities are entirely justified in protecting intellectual and physical privacy in dormitories that function as students' homes.

Legitimate calls for privacy and intimacy are not, however, limited to the home. As the earlier discussion of the right of association suggests, people often foster their intellectual and emotional development within groups. But groups need private places to meet and deliberate. Students who spend their lives on campus need spaces on campus, and cramped dorm rooms are hardly adequate. Groups of like-minded students who wish to meet in private spaces on campus and limit attendance to those with whom they share values and beliefs are a core example of the need for strong associational protections.

The debate over safe spaces is unlikely to end anytime soon. But situating that debate within the broader context of the university and the First Amendment pierces some of the partisan framing that suggests only one side or the other has any merit. Like the university itself, the safe space is a complex idea that, properly construed, can help students engage more fully in the pursuit of knowledge and dialogue across differences.

### *E. Religious Pluralism*

A final issue at the intersection of the First Amendment and the university is religious pluralism. The challenge of religious pluralism (which is related to the challenge of pluralism more generally) emerges out of the institutional history of the American university, which at its origins was pervasively Christian in nature.<sup>150</sup> That was true not only for private universities like Harvard and Yale but also for the first public universities like the University of North Carolina. As historian George Marsden has suggested, "[u]nlike some other Western countries which addressed the problems of pluralism by encouraging multiple educational systems, the American tendency was to build what amounted to a monolithic and homogenous educational establishment and to force the alternatives to marginal existence on the periphery."<sup>151</sup>

As American universities and the broader society became more pluralistic, baseline assumptions about religion also changed.<sup>152</sup> Marsden suggests that the

---

<sup>148</sup> *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

<sup>149</sup> *Id.* at 484.

<sup>150</sup> GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 3 (1994).

<sup>151</sup> *Id.* at 5.

<sup>152</sup> *Id.* at 4–5.



move away from this religious baseline can be characterized in one of two ways, each with different implications:

On the one hand, it is a story of the disestablishment of religion. On the other hand, it is a story of secularization. From the point of view of persons with wholly secular values, these two ways of characterizing the history may fit harmoniously, both being laudable . . . . For those who have religious commitments, on the other hand, “disestablishment” and “secularization” are likely to suggest opposed evaluations. Disestablishment is likely to sound like a good thing, while secularization, even if desirable in many of its forms, seems undesirable if it excludes religion from the major areas of public life that shape people’s sophisticated beliefs.<sup>153</sup>

This dueling narrative describing the changing relationship between the American university and religion contextualizes contemporary challenges surrounding religious freedom in the university.

One of the most important questions is the extent to which the university must include religious beliefs and viewpoints. The Supreme Court has been less than clear in approaching this question, initially signaling a commitment to robust religious pluralism but more recently suggesting that a different set of commitments might qualify or even nullify genuine religious pluralism.<sup>154</sup>

In 1981, the Court addressed the question of whether public university funding should extend to student religious groups in *Widmar*.<sup>155</sup> The case arose when the University of Missouri at Kansas City prohibited the use of buildings or grounds “for purposes of religious worship or religious teaching.”<sup>156</sup> Members of a Christian student group contended that the regulation violated their free exercise and free speech rights.<sup>157</sup> The university argued that the Establishment Clause required the regulation.<sup>158</sup> The Supreme Court made clear that the balance of constitutional interests lay squarely in favor of the student group.<sup>159</sup> Because the university had “created a forum generally open for use by student groups,” it had “assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”<sup>160</sup> That obligation extended to religious groups even though it was “possible—perhaps even foreseeable—that religious groups will benefit from

---

<sup>153</sup> *Id.* at 6.

<sup>154</sup> Compare *Rosenberger v. Rector and Visitors of U. of Va.* 515 U.S. 819 (1995), and *Widmar v. Vincent*, 454 U.S. 263 (1981), with *Christian Legal Soc’y v. Martinez* 130 S. Ct. 2971 (2010).

<sup>155</sup> *Widmar*, 454 U.S. at 264–65 (1981).

<sup>156</sup> *Id.* at 265.

<sup>157</sup> *Id.* at 266.

<sup>158</sup> *Id.* at 270.

<sup>159</sup> *Id.* at 276.

<sup>160</sup> *Id.* at 267.

access to University facilities.”<sup>161</sup> In fact, denying “access to the customary media for communicating with the administration, faculty members, and other students” would limit “the capacity of a group or individual ‘to participate in the intellectual give and take of campus debate.’”<sup>162</sup> The Court concluded that the “exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.”<sup>163</sup>

Justice Stevens concurred separately. In his view, the majority’s public forum analysis would “needlessly undermine the academic freedom of public universities.”<sup>164</sup> Stevens elaborated:

In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.<sup>165</sup>

Stevens’ argument stretches the notion of academic freedom beyond even that proposed by the AAUP.<sup>166</sup> Under his view, little within the university falls outside the purview of academic freedom—or at least academic freedom for “the managers of a university,” many of whom are not themselves research and teaching faculty.<sup>167</sup>

While the student petitioners in *Widmar* asserted both free exercise and free speech violations, the Supreme Court framed the case entirely around free speech doctrine. Fifteen years later, it reinforced this approach in *Rosenberger v. Rector and Visitors of University of Virginia*.<sup>168</sup> In that case, the University of Virginia provided funding for student-run publications but withheld funds from a particular publication because it “primarily promote[d] or manifeste[d] a particular belie[f] in or about a deity or an ultimate reality.”<sup>169</sup> Using a free speech analysis, the Supreme Court rejected the university’s viewpoint discrimination, concluding that the purpose of the university’s funding scheme was “to encourage a diversity of views

---

<sup>161</sup> *Id.* at 273.

<sup>162</sup> *Id.* at 274 (quoting *Healy v. James*, 408 U.S. 169, 181–82 (1972)).

<sup>163</sup> *Id.* at 277.

<sup>164</sup> *Id.* at 278 (Stevens, J., concurring).

<sup>165</sup> *Id.* at 278–79 (Stevens, J., concurring).

<sup>166</sup> See *supra* notes 75–77 (discussing AAUP’s approach to faculty-centered academic freedom).

<sup>167</sup> *Widmar*, 454 U.S. at 278 (Stevens, J., concurring).

<sup>168</sup> 515 U.S. 819 (1995).

<sup>169</sup> *Id.* at 834.

from private speakers.”<sup>170</sup> Justice Kennedy’s majority opinion added that “[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”<sup>171</sup>

*Widmar* and *Rosenberger* both assert strong protections for religious pluralism, but both subsume any distinctive free exercise concerns into a monolithic free speech doctrine. Were this simply a doctrinal shift, religious pluralism might remain viable in the university under a different name. But the Court’s more recent consideration of these issues suggests otherwise. In 2010, *Christian Legal Society v. Martinez*<sup>172</sup> upheld Hastings College of the Law’s “all comers” policy that required all student groups to accept any student as a member.<sup>173</sup> Hastings denied official recognition to a Christian Legal Society (CLS) student chapter because the group limited membership and leadership on the basis of sexual conduct and religious belief, in violation of the school’s policy.<sup>174</sup> In addition to withholding modest funding and the use of its logo, Hastings denied the CLS chapter the opportunity to send mass e-mails to the student body, to participate in the annual student organizations fair, and to reserve on-campus meeting spaces.<sup>175</sup> CLS filed suit in federal district court asserting violations of expressive association and free speech.<sup>176</sup>

Justice Ginsburg’s opinion for a five-justice majority applied a speech-based public forum analysis and concluded that the all-comers policy was “a reasonable, viewpoint-neutral condition on access to the student-organization forum.”<sup>177</sup> In fact, according to Justice Ginsburg, the policy was “textbook viewpoint neutral” because it applied equally to all groups.<sup>178</sup> Yet elsewhere in her opinion, Justice Ginsburg noted approvingly that Hastings’ all-comers policy “encourages tolerance, cooperation, and learning among students”<sup>179</sup> and “conveys the Law School’s decision ‘to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.’”<sup>180</sup> These normative assertions sound like

---

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 836.

<sup>172</sup> 130 S. Ct. 2971 (2010). The discussion in this section draws from John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 821–23 (2014).

<sup>173</sup> *Christian Legal Soc’y v. Martinez* 130 S. Ct. 2971, 2979 (2010).

<sup>174</sup> *Id.* at 2980.

<sup>175</sup> *See id.* at 2979.

<sup>176</sup> *Christian Legal Soc’y v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at \*4 (N.D. Cal. May 19, 2006).

<sup>177</sup> *Martinez*, 130 S. Ct. at 2978. Justice Ginsburg somewhat controversially concluded that the rights of speech and association “merged” in this case. *Id.* at 2985.

<sup>178</sup> *Id.* at 2993.

<sup>179</sup> *Id.* at 2990.

<sup>180</sup> *Id.* (quoting Brief for Respondents at 35, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (No. 08-1371)).

Justice Ginsburg was attempting to justify Hastings' policy under a government speech rationale. But the assertions are not "textbook viewpoint neutral."<sup>181</sup> And they are at odds with "Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups."<sup>182</sup>

If Justice Ginsburg is correct that there can be no clearer case of content neutrality than an all-comers policy, it is difficult to see how a commitment to religious pluralism survives in the university context. A great number of religious groups hold exclusive truth claims and require their adherents to affirm those claims. Their approach to membership and leadership is fundamentally incompatible with an "all comers" norm.<sup>183</sup>

### CONCLUSION

Issues of academic freedom, public employee speech, public forums, safe spaces, and religious pluralism highlight the intersection of the First Amendment and the university as a place of constrained disagreement and intelligibly warring creeds. Viewing these questions through this lens can also remind us of the university's limits. Wellmon drives home this point in his reflection on the University of Virginia's uninspired response to white supremacists:

The university has moral limitations. Universities cannot impart comprehensive visions of the good. They cannot provide ultimate moral ends. Their goods are proximate. Faculty members, myself included, need to acknowledge that most university leaders lack the language and moral imagination to confront evils such as white supremacy. They lack those things not because of who they are, but, as Weber argued, because of what the modern research university has become. Such an acknowledgment is also part of the moral clarity that we can offer to ourselves and to our students. We have goods to offer, but they are not ultimate goods.<sup>184</sup>

---

<sup>181</sup> *Martinez*, 130 S. Ct. at 2993.

<sup>182</sup> *Id.* at 3001 (Alito, J., dissenting); *see also id.* at 3013 ("The RSO forum 'seeks to promote a diversity of viewpoints *among* registered student organizations, including viewpoints on religion and human sexuality.'" (quoting Joint Appendix at 216)).

<sup>183</sup> I have argued elsewhere that a better approach to the generally available funding and facilities for privately organized student groups is to let students decide the contours and compositions of their groups. JOHN INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 79–80 (2016).

<sup>184</sup> Wellmon, *Moral Clarity*, *supra* note 1. The university's proximate goods can still undergird a coherent response to the Klan and the Neo-Nazis. *See* Chad Wellmon, *After the University, Long Live the Academy!*, CHAD WELLMON BLOG (October 26, 2017), <https://chadwellmon.com/2017/10/26/after-the-university-long-live-the-academy/> [<https://perma.cc/RK52-PHFT>] ("[The Academy's] epistemic practices and virtues entail a commitment to the moral dignity and equality of persons . . . . And so when 400 hundred white supremacists marched across my back yard and across the Lawn at the University of

Recognizing the limits of the goods of the university can also remind the university and its leaders of the need “to look outside themselves and partner with other moral traditions and civic communities.”<sup>185</sup> At the same time, universities remain “uniquely positioned to help students engage in open debates and conversations about the values they hold most dear.”<sup>186</sup> It is not that the goods of the university do not matter—they matter a great deal. The university can only take us so far, but we still need it to take us there.

If the university could be a place for MacIntyre’s constrained disagreement and Murray’s intelligibly warring creeds, it could help initiate students into the kind of conflict through which they learn to live together rather than fracture through indifference, apathy, or violence. Students and faculty could push each other toward a more generous dialogue across difference and wrestle with difficult concepts without giving up on one another. This country, now as much as ever, needs such places. Citizens of the university are also citizens of a much larger political project, where the stakes are much higher, the differences much starker, and the possibilities for dialogue often much smaller. The vision of the First Amendment is ultimately not just a vision for the university, but a vision for this broader political endeavor. And the university confident in its purpose, and cognizant of its limits, might be just the place to begin.

---

Virginia chanting: Jews Will Not Replace Us and White Lives Matter with tiki torches, they claimed that the young women of color in my class didn’t belong there; they claimed that my Jewish students who come visit me in office hours didn’t belong there. They denied their very capacity to participate in The Academy, to be formed by its practices, and to share in its goods. And so members of The Academy can and should denounce the neo-Nazis and white supremacists who marched on the Lawn at the University of Virginia because they are an affront to the ethics of The Academy.”).

<sup>185</sup> Wellmon, *Moral Clarity*, *supra* note 1.

<sup>186</sup> *Id.*