BROKEN PLATFORMS, BROKEN COMMUNITIES? FREE SPEECH ON CAMPUS

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ABSTRACT

Free speech disputes have broken out on numerous college and university campuses. In several incidents, protesters have attempted to block the presentations of well-known and controversial speakers who threaten the communal status of societal outsiders. These events have sparked not only widespread media coverage but also the publication of multiple scholarly books and articles. None of this scholarship, however, has recognized that the interrelated histories of free expression and democracy can shed considerable light on these matters. This Article takes on that challenge. Specifically, this Article explores the ramifications of the historical interrelationship between free expression and democracy for campus no-platforming disputes. Starting in the late 1930s, the U.S. Supreme Court dramatically invigorated the protection of expression in reaction to a paradigm change in democracy, going from a republican to pluralist democracy. Yet, one cannot conceptualize pluralist democracy without accounting for the political community: who belongs and participates? Nowadays, to protect the operation of pluralist democracy itself, at least one issue must be taken off the table. All individuals must be treated as full and equal citizens in good standing. Any expression that undermines the political standing of a marginalized group should be subordinate to the needs of democracy and therefore beyond First Amendment protection.

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Free speech on college and university campuses has generated controversies for decades.[1] In recent years, though, several such controversies have attracted widespread and sustained media attention. In one instance, progressive students attempted to prevent conservative theorist Charles Murray, notorious for ostensibly linking intelligence to race,[2] from speaking at Middlebury College.[3] In a similar incident, progressive students at the University of California, Berkeley, interfered with a speech by former Breitbart editor and right-wing provocateur Milo Yiannopoulos.[4] In response to these roiling disputes, publishers have rushed into print multiple new books focused on campus free speech issues.[5]

The public has paid heed to these issues partly because of the polarizing politics that animate the disputes.[6] On the one side, conservatives emphasize liberty: right-wing speakers have a First Amendment freedom to speak.[7] From this perspective, progressive protesters contravene fundamental norms of free expression. On the other side, progressives argue that campuses need to promote equality and inclusiveness.[8] Speakers such as Murray and Yiannopoulos purposefully denigrate racial and sexual minorities and transform campuses into hostile environments.[9] Unsurprisingly,

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[1] RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY 23–29 (2018) (emphasizing recurring disputes). For a discussion of the Free Speech Movement of 1964 and 1965 at the University of California, Berkeley, see Jo Freeman, *The Berkeley Free Speech Movement*, *in* 4 ENCYCLOPEDIA OF AMERICAN SOCIAL MOVEMENTS 1178 (Immanuel Ness ed., 2004).

[2] For a discussion of that viewpoint, see RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

[3] Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667 [http://perma.cc/T6TA-S7AH]; Katharine Q. Seelye, *Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://nyti.ms/2lo8Ye9.

[4] Aaron Hanlon, *What Stunts Like Milo Yiannopoulos's 'Free Speech Week' Cost*, N.Y. TIMES (Sept. 24, 2017), https://nyti.ms/2yn9LxK; Benjamin Oreskes & Javier Panzar, *Milo Yiannopoulos Confronted by Dozens of Counter-Protesters During Brief Appearance on UC Berkeley Campus*, L.A. TIMES (Sept. 24, 2017), https://www.latimes.com/local/lanow/la-me-ln-berkeley-milo-20170924-story.html [http://perma.cc/HPV3-8KCV].

[5] For examples of such publications, see SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (2017); ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017); DELGADO & STEFANCIC, *supra* note 1; JOHN PALFREY, SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION (2017); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018).

[6] *See* Niraj Chokshi, *What College Students Really Think About Free Speech*, N.Y. TIMES (Mar. 12, 2018), https://nyti.ms/2tzsed9 (summarizing an empirical study of student attitudes toward free speech).

[7] *See* discussion *infra* Section II.A.

[8] *See* discussion *infra* Section II.B.

[9] For one discussion in the popular media, see Mark Peters, *Coulter, Milo, and the Censorious History of 'No-Platforming*,' BOSTON GLOBE (May 16, 2017), https://www.bostonglobe.com/ideas/2017/05/16/coulter-milo-and-censorious-history-platforming/V5xoR6sUabA9at5yd8WhrK/story.html [http://perma.cc/BQP5-2L73].

many constitutional scholars have adopted positions consistent with their general political orientations.[10] Even so, the apparent tension between the constitutional values of free speech and equality has prompted some liberal scholars to support the conservative speakers as a matter of First Amendment principle.[11] Other scholars insist that the tension between free speech and equality can be resolved without choosing between the two.[12]

Despite the proliferation of scholarship focused on campus free speech issues, nobody has recognized that the interrelated histories of free expression and democracy can shed considerable light on these matters.[13] To be sure, some scholars have sought guidance from either the history of free expression or the contours of democracy, but they have not put the two together.[14] This Article takes on that challenge. Specifically, this Article explores the ramifications of the historical interrelationship between free expression and democracy for campus no-platforming disputes, where student protesters try to prevent controversial right-wing speakers like Murray and Yiannopoulos from using campus facilities.

One cannot understand free expression in America without accounting for a twentieth-century transition from a republican to pluralist democracy. Roughly, republican democracy emphasized the virtuous pursuit of the common good, while pluralist democracy emphasized (and emphasizes) processes allowing widespread political participation.[15] Judicial protection of free expression under republican

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[10] *See, e.g.*, David E. Bernstein, Essay, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223 (2003) (arguing for the conservative side); Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919 (2017) (arguing for the progressive side). The politics of free expression has shifted over time. *See, e.g.*, LAWRENCE BAUM, IDEOLOGY IN THE SUPREME COURT 44–45 (2017).

[11] CHEMERINSKY & GILLMAN, *supra* note 5 (the liberal Chemerinsky arguing for protecting free expression).

[12] BEN-PORATH, *supra* note 5, at 2–5 (arguing that freedom and inclusion can be harmonized in inclusive freedom); PALFREY, *supra* note 5, at 2–3 (arguing for harmonization of free expression and equality); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017) (aiming for a middle ground).

[13] For a comprehensive history of the interrelationship between democracy and free expression, see STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008).

[14] *See, e.g.*, CHEMERINSKY & GILLMAN, *supra* note 5, at 10–12, 47 (arguing that the history of free expression is important to analyzing current campus free speech disputes); Delgado & Stefancic, *supra* note 10, at 1924–32 (discussing the history of free expression).

[15] For books discussing aspects of the transformation of democracy, see LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939 (1990); FELDMAN, *supra* note 13; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996). Bruce Ackerman also emphasizes regime change in constitutional law. His discussions of the key decade of the 1930s are spread over two volumes. 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

democracy was limited,[16] but free expression became a constitutional lodestar under pluralist democracy.[17] While theorists of pluralist democracy often emphasize its crucial processes, such as voting,[18] pluralist democracy necessarily includes substantive components as well.[19] Most important, one cannot conceptualize pluralist democracy without accounting for the political community: who belongs and participates? My argument is that, today, to protect the operation of pluralist democracy itself, we must take at least one issue off the table, so to speak. Namely, all individuals, regardless of subculture or societal grouping, must be treated as full and equal citizens in good standing. This issue can no longer be open to democratic debate. Consequently, any expression that undermines the political standing of a marginalized group should be subordinate to the needs of democracy and therefore beyond First Amendment protection.

With regard to the no-platforming disputes, this analysis suggests that universities and colleges should restrict the granting of platforms to speakers who are likely to threaten the full and equal standing of marginalized groups on campuses. If a platform is denied in the first place, then students will not need to protest against such speakers. The university or college should not pretend to maintain neutrality. It instead needs to nurture and protect the substantive norms of a democratic culture.

Part I of this Article traces the interrelated histories of free expression and democracy.[20] It emphasizes the twentieth-century transformation of democracy and the First Amendment implications of that transformation.[21] Part II focuses on no-platforming disputes, zeroing in on a recent controversy at Lewis and Clark Law School.[22] This Part first explains the arguments in favor of upholding the free speech rights of the speakers.[23] It then articulates a counterargument based on the interrelation of free expression and democracy.[24] Part III returns to history, briefly sketching the operation of politics in free speech disputes throughout American history.[25] Free expression, the history shows, has not been a neutral principle. In free speech controversies (as in other disputes), marginalized outsiders typically lose while the wealthy and mainstream usually win. This history helps explain why abstract or formal free-expression principles and doctrines cannot alone resolve the no-platforming disputes. Part IV is a conclusion.[26]

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[16] *See* FELDMAN, *supra* note 13, at 3.
[17] *Id.*
[18] *See infra* notes 196–202 and accompanying text.
[19] *See infra* notes 203–08 and accompanying text.
[20] *See* discussion *infra* Part I.
[21] *See* discussion *infra* Sections I.A, B.
[22] *See* discussion *infra* Part II.
[23] *See* discussion *infra* Section II.A.
[24] *See* discussion *infra* Section II.B.
[25] *See* discussion *infra* Part III.
[26] *See* discussion *infra* Part IV.

A caveat is appropriate at the outset. This Article does not argue that the United States has always been committed to a principle of full and equal citizenship. The nation, moreover, has not made steady progress toward achieving such equality. To the contrary, a conflicting combination of principles and traditions has always swirled through America. In his magisterial study of citizenship laws, Rogers M. Smith described a shifting mix of "liberal, democratic republican, and inegalitarian ascriptive elements."[27] In the history of free expression, competing traditions of dissent and suppression persistently animated American political disputes.[28] Furthermore, the tensions arising from conflicting principles and traditions remain as prominent today as ever. Thus, in a sense, the argument here is aspirational. A commitment to full and equal citizenship will not vanquish the inegalitarian ascriptive attitudes that still pulse through American society. In the no-platforming disputes, the issues revolve around the *treatment* of students and potential or invited speakers. Even if a university or college were to banish speakers likely to spout hateful words, hateful attitudes will not disappear. But banning speakers who target marginalized groups will help engender democratic communities of full and equal citizens.

I. THE INTERRELATED HISTORIES OF FREE EXPRESSION AND DEMOCRACY

A. Republican Democracy: Limited Protection for Expression

From the framing to the early twentieth century, Americans understood their government to be a republican democracy.[29] Citizens and government officials were supposed to be imbued with civic virtue.[30] Being virtuous, they were to pursue the common good rather than partial or private interests; the political pursuit of self-interest contravened republican democratic government.[31] To be sure, popular conceptions of virtue and the common good changed over time.[32] For instance, the framers considered political parties to be factions bent on government corruption.[33] Parties, therefore, were believed to inherently contravene the common good, but by

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[27] ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 6 (1997).

[28] FELDMAN, *supra* note 13, at 3–5.

[29] *See* FELDMAN, *supra* note 13, at 14–290; STEPHEN M. FELDMAN, THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION 19–104 (2017) [hereinafter FELDMAN, FAILING CONSTITUTION]; SANDEL, *supra* note 15, at 124–67. *See also* SMITH, *supra* note 27, at 1–6, 86–88, 470–71 (emphasizing that America combines democratic republican, liberal, and inegalitarian ascriptive traditions).

[30] FELDMAN, *supra* note 13, at 22.

[31] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 59 (1969).

[32] FELDMAN, *supra* note 13, at 32–40.

[33] STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 596–617 (1993).

the 1830s many Americans accepted political parties.[34] Supposedly, parties furthered the common good by promoting more widespread political participation.[35]

Even so, political participation remained sharply limited under republican democracy. An alleged lack of civic virtue could, in theory, legitimate the forced political exclusion of a societal group. Non-virtuous people supposedly would be unwilling to forgo the pursuit of their own private interests.[36] Partly on this pretext, African Americans, Irish-Catholic immigrants, women, and other peripheral groups were precluded from participating in republican democracy for much of American history.[37] To take one instance, when large numbers of Catholic immigrants began coming to the United States in the mid-nineteenth century, Protestant nativists condemned the immigrants as unqualified for citizenship.[38] "'Protestantism favors Republicanism,'" declared Samuel Morse, "whereas 'Popery' supports 'Monarchical power.'"[39] Unsurprisingly, then, conceptions of virtue and the common good typically mirrored the interests and values of wealthy, white, Protestant men.[40]

Under republican democracy, individual rights and liberties were protected from undue government interference but were always subordinate to the government's power to act for the common good. In the words of James Kent, "private interest must be made subservient to the general interest of the community."[41] These principles, to a great degree, structured republican democratic judicial review. Courts would review government actions to determine whether a disputed action was for the common good—and therefore permissible—or for partial and private interests—and therefore impermissible.[42] In an 1845 case, a Boston entrepreneur sought to sell

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[34] EDWARD PESSEN, JACKSONIAN AMERICA 197 (rev. ed. 1985).

[35] *Id.* at 197–232; HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 172–74 (1990). In fact, voter turnout soared during the middle decades of the nineteenth century. ERIK W. AUSTIN, POLITICAL FACTS OF THE UNITED STATES SINCE 1789, at 378–79 (1986).

[36] On exclusion of societal groups from the polity, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 54–60 (2000); SMITH, *supra* note 27, at 170–73.

[37] SANDEL, *supra* note 15, at 318; SMITH, *supra* note 27, at 85. *See, e.g.*, JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 6 (2d ed. 1988) (discussing the condemnation of Catholic immigrants).

[38] HIGHAM, *supra* note 37, at 6.

[39] SMITH, *supra* note 27, at 209.

[40] For example, during the late nineteenth century, as the nation industrialized, large corporations sought restrictions on government regulation by arguing that the common good was commensurate with laissez faire. *See, e.g.*, Millett v. People, 7 N.E. 631, 635–36 (1886) (invalidating a law preventing coal companies from cheating their miners when weighing the quantity mined); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 4–5 (Da Capo Press 1971) (1886) (recognizing the power of governments to act for the common good but arguing that such exercises of power were rare).

[41] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1827).

[42] FELDMAN, *supra* note 13, at 26–32; GILLMAN, *supra* note 15, at 51–55; WILLIAM J.

poultry he had acquired in New Hampshire, but in doing so, he violated a municipal regulation of the marketplace.[43] The city required a seller to show "that all the said articles are the produce of his own farm, or of some farm not more than three miles distant from his own dwelling-house."[44] The seller objected, contending that "the by-law is contrary to common right, in restraint of trade, against public policy, unreasonable and void."[45] In an opinion by Lemuel Shaw, the court upheld the regulation, reasoning that the city had provided "accommodations" for sales by "actual producers."[46] Consequently, the city had "a right so to control them, as best to promote the welfare of all the citizens. And we think they are well calculated to promote the public and general benefit," notwithstanding the restrictions on the economic marketplace.[47]

Courts treated free-expression rights similarly to other individual rights. Following the general republican democratic approach to judicial review, the predominant doctrinal framework for analyzing free-expression claims was the bad tendency test.[48] While "the government could not impose prior restraints . . . it could impose criminal penalties for speech or writing that had bad tendencies or likely harmful consequences."[49] According to Justice Joseph Story's *Commentaries on the Constitution*, the government could punish speakers and writers for "what is improper, mischievous, or illegal."[50] In other words, courts upheld government actions punishing expression likely to produce bad tendencies precisely because such speech or writing undermined virtue and contravened the common good.[51]

The Supreme Court of the late nineteenth and early twentieth centuries gave no greater protection to free expression than did other courts. In fact, the Court often skirted free-expression issues,[52] and when the Justices acknowledged such an issue,

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NOVAK, THE PEOPLE'S WELFARE 19–234 (1996). *See, e.g.*, State Bank v. Cooper, 10 Tenn. (2 Yer.) 599 (1831); Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825).

[43] Commonwealth v. Rice, 50 Mass. (9 Met.) 253–54, 256, 259 (1845).

[44] *Id.* at 256.

[45] *Id.* at 258.

[46] *Id.* at 258–59.

[47] *Id.*

[48] FELDMAN, FAILING CONSTITUTION, *supra* note 29, at 61.

[49] *Id.* The bad tendency test developed from the truth-conditional standard that first emerged in seditious libel cases. FELDMAN, *supra* note 13, at 110–18; Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2184–86 (2015) (referring to this standard as the "truth-plus defense").

[50] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 736 (1833).

[51] *See* Knowles v. United States, 170 F. 409 (8th Cir. 1909); Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824); Commonwealth v. Morris, 3 Va. (1 Va. Cas.) 176 (1811).

[52] Mut. Film Corp. v. Ohio Indus. Comm'n, 236 U.S. 230, 244–45 (1915) (rejecting a claim that a licensing requirement amounted to a prior restraint, the Court reasoned "that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit").

they tended to treat it as an aspect of due-process liberty.[53] In *Halter v. Nebraska*,[54] decided in 1907, the Court upheld the conviction under a state flag-desecration statute of defendants who used the American flag on beer bottles.[55] Justice John Marshall Harlan's majority opinion discussed free expression at length, but as an aspect of due-process liberty rather than as a First Amendment right per se.[56] He began by explicating the powers of a republican democratic government: "[A] [s]tate possesses all legislative power consistent with a republican form of government; therefore each [s]tate . . . may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."[57] Thus, as Harlan explained, "[i]t is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good."[58] More specifically, then, free expression, as an aspect of personal liberty, was subordinate to any state actions promoting the common good.[59] In this particular case, the protection of the flag from desecration, including its use "for purposes of trade and traffic," would further the common good.[60] A state would "be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it."[61]

The Court did not explicitly address free expression under the First Amendment until the World War I era. In a series of cases arising from Espionage Act prosecutions, Justice Oliver Wendell Holmes, Jr., articulated the scope of protection under the First Amendment with a multitude of phrasings.[62] Regardless of Holmes's terminology, he resolved each case in accordance with the bad tendency test.[63] In *Schenck v. United States*,[64] two leaders of the Socialist party were convicted for distributing a leaflet that had opposed the war-time draft.[65] The defendants argued that the First Amendment protected their expression.[66] A unanimous Court upheld the convictions.[67] With regard to the scope of free expression, Holmes stated: "The question

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[53] *See supra* notes 54–61 and accompanying text.
[54] 205 U.S. 34 (1907).
[55] *Id.* at 46.
[56] *See id.* at 40–43.
[57] *Id.* at 40–41.
[58] *Id.* at 42.
[59] *See id.* at 40–42.
[60] *Id.* at 42.
[61] *Id.*
[62] *See infra* notes 64–73 and accompanying text.
[63] *See infra* notes 64–73 and accompanying text.
[64] 249 U.S. 47 (1919).
[65] *Id.* at 48–49.
[66] *Id.* at 51.
[67] *Id.* at 53.

in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[68] Holmes's 'clear and present danger' terminology was novel, yet his application of the test demonstrated that he did not intend to pronounce a new standard for delineating the scope of free expression.[69] For Holmes (and the Court), clear and present danger meant bad tendency.

In the subsequent Espionage Act cases, *Frohwerk v. United States*[70] and *Debs v. United States*,[71] Holmes continued to follow bad-tendency principles, though he disregarded his 'clear and present danger' terminology.[72] For instance, Holmes's opinion in *Debs* approved a jury instruction that presented the bad tendency test in conventional terms—the jurors, as charged, "could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect [to violate the law], and unless the defendant had the specific intent to do so in his mind."[73] This first set of World War I cases revealed that all of the Justices believed the government could punish expression impeding the national war effort because such expression was harmful or had bad tendencies, in contravention of the common good.

Throughout the 1920s, the Court would continue to apply the bad-tendency standard to find speech and writing constitutionally unprotected.[74] But in the next set of Espionage Act cases, decided only months after *Debs*, Holmes (along with Justice Louis Brandeis) began dissenting and arguing for more expansive First Amendment protections.[75] Although Holmes would never admit as much, the arguments of a young Harvard professor, Zechariah Chafee, probably shaped Holmes's new

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[68] *Id.* at 52.

[69] Holmes apparently derived the 'clear and present danger' language from his book, *The Common Law*. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 66–68 (Little, Brown & Company ed. 1945) (1881). *See* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 414–19 (1992) (discussing Holmes's understanding of criminal attempts and how it shaped his clear and present danger test). *But see* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1271–78 (1983) (arguing that this connection was probable but not definite).

[70] 249 U.S. 204 (1919).

[71] 249 U.S. 211 (1919).

[72] *Id.*; *Frohwerk*, 249 U.S. 204.

[73] *Debs*, 249 U.S. at 216.

[74] *See generally* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921) (holding that the removal of second-class mailing privileges pursuant to the Espionage Act did not infringe on a publications right of free speech); Schaefer v. United States, 251 U.S. 466 (1920) (upholding the convictions of three newspaper publishers for wilfully making statements that might weaken the United States' war effort).

[75] *Burleson*, 255 U.S. at 417–38 (Brandeis, J. & Holmes, J., dissenting); *Schaefer*, 251 U.S. at 482–95 (Brandeis, J. & Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

approach to free expression.[76] Chafee had published an article arguing for stronger constitutional protections based on Holmes's own 'clear and present danger' terminology.[77] Chafee justified a more expansive First Amendment, going beyond bad tendency principles by invoking a search-for-truth rationale.[78] John Milton had first articulated this rationale in 1644 (during the English Civil War),[79] and John Stuart Mill had reiterated it in 1859.[80] Following in their path, Chafee linked an individual speaker's right to (or interest in) free expression with a societal interest in the search for truth: "The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . ."[81]

In *Abrams v. United States*,[82] decided in 1919, the Court once again upheld convictions under the Espionage Act.[83] Holmes, joined by Brandeis, dissented, reasoning that the defendants' expression should be constitutionally protected.[84] Like Chafee, Holmes relied on the clear and present danger test, but now with more bite than the bad tendency standard.[85] Also, like Chafee, Holmes justified First Amendment protections based on a societal search for truth:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[86]

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[76] *See* FELDMAN, *supra* note 13, at 272–81 (explaining Holmes's changed attitude toward free expression).

[77] *See* Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) [hereinafter Chafee, *War Time*]. Chafee based this article on an earlier essay. Zechariah Chafee, Jr., *Freedom of Speech*, 17 NEW REPUBLIC 66 (1918).

[78] Chafee, *War Time*, *supra* note 77, at 956–60.

[79] John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (Grolier Club 1890) (1644).

[80] JOHN STUART MILL, ON LIBERTY 21–27 (Currin Shields ed., Liberal Arts Press 1956) (1859). Chafee cited both Milton and Mill. Chafee, *War Time*, *supra* note 77, at 932–33 n.1, 954–55.

[81] Chafee, *War Time*, *supra* note 77, at 956.

[82] 250 U.S. 616 (1919).

[83] *Id.*

[84] *See id.* at 624–31 (Holmes, J., dissenting) ("I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution . . . .").

[85] *Id.* at 627–28.

[86] *Id.* at 630.

Holmes linked the clear and present danger test with the search-for-truth rationale.[87] The government, he explained, should allow speech and writing to flow into a marketplace of ideas.[88] From this free exchange of ideas, the truth will emerge.[89] Harmful ideas must be met with better ideas—counter-speech—rather than with force or suppression.[90] The only ideas (speech and writing) that should be restricted are those that would inhibit the further exchange of ideas—namely, those that would engender a clear and present (or imminent) danger of unlawful or harmful conduct.[91]

B. Pluralist Democracy: Expansive First Amendment Protection

During the late nineteenth and early twentieth centuries, multiple societal forces strained the republican democratic regime of government.[92] Because of immigration, the population grew increasingly diverse.[93] The agrarian economy transformed with industrialization and people left their rural homes to live in the "burgeoning cities."[94] "[O]ld-stock Americans" fought these changes in different ways.[95] For instance, in the 1920s, the government placed severe quotas on the immigration of eastern and southern Europeans, deemed to be "racially inferior to Anglo-Saxon[s]."[96] Likewise, surging nativism helped engender Prohibition as a religious and cultural strike against Catholics.[97] States introduced new laws limiting suffrage, supposedly to weed out corruption and create "a more competent electorate,"[98] yet these laws typically prevented immigrants and the poor from voting.[99]

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[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] *See id.*

[91] Holmes did not use the precise phrase, "marketplace of ideas." *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24 n.80 (noting the first use of this phrase was in Justice Brennan's majority opinion in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), decided more than forty years after Holmes's *Abrams* dissent).

[92] FELDMAN, *supra* note 13, at 166.

[93] *See id.* at 170–71.

[94] *See id.* at 166–78 (discussing in greater detail the development and effects of industrialization, urbanization, and immigration).

[95] *Id.* at 171.

[96] *Id. See* U.S. IMMIGRATION COMM'N, DICTIONARY OF RACES OR PEOPLES, S. DOC. NO. 662 (3d Sess. 1911) (describing racial differences of various immigrant groups); E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 187–92 (1981).

[97] JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 122–23 (1963).

[98] KEYSSAR, *supra* note 36, at 128.

[99] *See id.* at 128–29 (describing measures that prevented voting); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 53–55 (1983) (emphasizing reduced voting in poor and immigrant communities).

Despite the reactionary backlash from old-stock Americans, republican democracy was failing by the late 1920s.[100] The onset of the Great Depression precipitated its demise.[101] The nineteenth-century agrarian, rural, and relatively homogeneous American society was no more.[102] During the 1930s, massive numbers of immigrants and their children became part of the American polity; ethnic and immigrant urbanites who had previously been discouraged from partaking in national politics[103] became voters, casting their support for the New Deal.[104] As a practical matter, mainstream and old-stock Protestant values, long the foundation for the republican democratic ideals of virtue and the common good, were now to be balanced with the values of other Americans who constituted the demographically diverse population.[105] No single set of cultural values was authoritative.[106] Ethical relativism took hold as a political reality: all values, all interests—or at least a plurality of values and interests—mattered to Franklin Roosevelt and the New Dealers.[107] Democracy now revolved around the assertion of interests and values by sundry individuals and groups.[108] The pursuit of self-interest no longer amounted to corruption; rather it defined the nature of (pluralist) democracy.[109] Thus, for example, legislation favoring labor unions was no longer condemned as pursuing only partial or private interests, as it had been under republican democracy.[110] Labor and management now seemed to stand on the same footing—they both constituted legitimate interest groups, as did all other politically motivated groups.[111] Diverse voluntary organizations and interest groups openly sought to press their claims through the democratic process.[112]

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[100] FELDMAN, *supra* note 13, at 314.

[101] *See id.*

[102] *See id.* at 166–97.

[103] *See* KEYSSAR, *supra* note 36, at 128–29.

[104] *See* ANTHONY J. BADGER, THE NEW DEAL: THE DEPRESSION YEARS, 1933–40, at 248–49 (1989); COHEN, *supra* note 15, at 254–57, 362–66; WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940, at 184 (1963).

[105] *See* FELDMAN, *supra* note 13, at 316.

[106] *See id.* at 316–17, 341.

[107] *See id.* at 316–17; *see also* Franklin D. Roosevelt, *Campaign Address on Progressive Government at the Commonwealth Club* (Sept. 23, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 742, 742–56 (1938). Roosevelt was far more solicitous of African American interests than any previous president, yet he often sacrificed black interests and values so as to keep white Southerners aligned with the Democratic party. FELDMAN, *supra* note 13, at 327–28. Also, Roosevelt eventually broke with and became antagonistic toward big business. *See id.* at 318–19, 324.

[108] *See* FELDMAN, *supra* note 13, at 316.

[109] *See id.* at 321.

[110] *See id.* at 320–21.

[111] *See id.* at 320. *See also* JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL 27–53 (1966); MELVYN DUBOFSKY, THE STATE & LABOR IN MODERN AMERICA 107–34 (1994).

[112] *See* FELDMAN, *supra* note 13, at 341.

Lobbying—illegal during the republican democratic era—"became open, aggressive, and institutionalized."[113]

By the end of the 1930s, political theorists had begun to elaborate the new form of democracy. The foundation for the incipient democratic theory was the scholarly embrace of relativism.[114] While totalitarian governments, such as those in Nazi Germany and Stalinist Russia, claimed knowledge of objective values and forcefully imposed those values and concomitant goals on their peoples,[115] democratic governments allowed their citizens to express multiple values and goals.[116] The key to democracy lay not in the specification of supposedly objective goals, such as the common good, but rather in the following of processes that allowed all citizens to voice their respective values and interests within a free and open democratic arena.[117] After World War II, numerous political theorists celebrated pluralist democracy. The only way to determine public values and goals, they explained, is "through the free competition of interest groups."[118] By "composing or compromising" their different values and interests,[119] the "competing groups [would] coordinate their aims in programs they can all support."[120] Legislative decisions therefore turned on negotiation, persuasion, and the exertion of pressure through the normal channels of the democratic process.[121] From this perspective, the government appears to provide a neutral framework of processes or procedures that allows individuals and interest groups to assert their respective values and interests.[122]

For much of the 1930s, conservative Supreme Court Justices resisted the transition to pluralist democracy and attempted to continue enforcing republican

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[113] *Id.* at 322–23.

[114] *See id.* at 330.

[115] *Id.* at 331.

[116] 7 JOHN DEWEY, ETHICS (1932), *reprinted in* THE LATER WORKS, 1925–1953, at 359 (Jo Ann Boydston ed., 1985).

[117] SANDEL, *supra* note 15, at 250 (discussing the transition to procedural republic or democracy).

[118] WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS: THE NATIONAL GOVERNMENT 9 (1949).

[119] *Id.*

[120] *Id.* at 8.

[121] FELDMAN, *supra* note 13, at 332. Robert Dahl developed the most comprehensive explanation of the democratic process. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter DAHL, DEMOCRATIC THEORY]; ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985) [hereinafter DAHL, ECONOMIC DEMOCRACY]; ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) [hereinafter DAHL, DEMOCRACY AND ITS CRITICS]; ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001) [hereinafter DAHL, HOW DEMOCRATIC].

[122] *See* FELDMAN, *supra* note 13, at 396; JOHN RAWLS, POLITICAL LIBERALISM (1993) (articulating the philosophy of political liberalism); SANDEL, *supra* note 15, at 3–24, 28, 250–73 (explaining the procedural republic).

democratic principles.[123] By the end of the decade, however—1937 was a turning point—the Court had accepted the transition and stopped emphasizing virtue and the common good.[124] But the Court's abandonment of republican democracy created a problem: if judicial review had largely revolved around the republican democratic principles of virtue and the common good, how should the Court structure judicial review under pluralist democracy? The Justices experimented with different approaches.[125] During this time period, for instance, the Court first began using balancing tests to resolve constitutional issues.[126] In congressional power cases, though, the Court emphasized deference to the democratic process.[127] Significantly, before the 1930s, the Justices rarely even mentioned democracy, but after the 1937 turn, they regularly discussed democratic participation.[128]

In the realm of free expression, the rejection of republican democratic judicial review led the Justices to abandon the bad tendency test.[129] The Court and numerous commentators recognized that the emergent pluralist democracy depended on free speech more fundamentally than had republican democracy.[130] At least as far back as the framing, commentators had linked free expression—most often, a free press—ith free government.[131] This link was always conceived from within the parameters of republican democracy;[132] hence, the emphasis on free rather than self government. Most commonly, Republican democratic theorists would emphasize that free expression helped check the potential for government officials to become corrupt and

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[123] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1935).

[124] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage statute); FELDMAN, *supra* note 13, at 349–59 (discussing the 1937 switch); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 429–43 (2010).

[125] *See* SANDEL, *supra* note 15, at 47–54 (discussing the Court's efforts to reconceptualize judicial review).

[126] *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[127] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding production quotas of the Agricultural Adjustment Act of 1938).

[128] Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 56–57 (1993) (discussing the emerging importance of democracy). *See* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980) (emphasizing connections between pluralist democracy and judicial review).

[129] The first case in which the Court arguably upheld a free speech claim was decided in 1931. Stromberg v. California, 283 U.S. 359 (1931). FELDMAN, *supra* note 13, at 388–89 (discussing whether the Court based its decision on First Amendment grounds).

[130] *See* FELDMAN, *supra* note 13, at 391–92.

[131] *Id.* at 56, 63.

[132] *Id.* at 391.

contravene the common good.[133] The press, in particular, acted like a watchdog, sniffing out the unvirtuous.[134]

But with the onset of pluralist democracy, free expression appeared to perform a different and more crucial role. Soon after the Court began to defer to the democratic process in congressional power cases, Justice Stone's famous footnote four in *Carolene Products* questioned whether such deference was appropriate when legislation either infringed liberties protected by the Bill of Rights, including free expression, restricted participation in democratic processes, or discriminated "against discrete and insular minorities."[135] As the Justices and commentators recognized, free expression had become integral to the (pluralist) democratic process itself.[136] The people must be able to openly express their values and interests in the political arena.[137] Without free expression, pluralist democracy could not exist.[138] Thus, the so-called self-governance rationale was born.[139]

Pursuant to the self-governance rationale, free expression allows diverse groups and individuals to contribute their views in the pluralist political arena.[140] "If governmental officials interfere[ ] with the pluralist . . . process," if they dictate or control "public debates, then they . . . skew the democratic outcomes and undermine the consent of the governed."[141] In his 1948 book, *Free Speech and Its Relation to Self-Government*, Alexander Meiklejohn emphasized that the need to protect political expression "springs from the necessities of the program of self-government,"[142] or in other words, from "the structure and functioning of our political system as a whole."[143] Thus, partly because of the self-governance rationale, free expression became a

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[133] *Id.* at 396.

[134] *See id.* at 57–63. Some republican democratic theorists would add that free expression encouraged virtuous citizens to promote the common good. *Id.* at 396. When Justice Brandeis explained free expression in his *Whitney* concurrence, he discussed the relation between free expression and government from this republican democratic perspective. Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring). *See also* FELDMAN, *supra* note 13, at 385–86 (explaining Brandeis's viewpoint).

[135] United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

[136] FELDMAN, *supra* note 13, at 396.

[137] *See id.*

[138] *Id. See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 121, at 169–75; Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208 (emphasizing the importance of free expression).

[139] Frederick Schauer, *Free Speech and the Argument from Democracy*, *in* LIBERAL DEMOCRACY: NOMOS XXV, at 241, 245–47 (J. Roland Pennock & John W. Chapman eds., 1983).

[140] *See* FELDMAN, *supra* note 13, at 316.

[141] *Id.*

[142] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

[143] *Id.* at 18.

constitutional lodestar under pluralist democracy.[144] In a stark about-face from the Court's consistent repudiation of First Amendment claims during the republican democratic era, the Justices began to uphold one free speech claim after another.[145]

The principles of free expression and pluralist democracy are often combined to engender a mandate for government neutrality.[146] If pluralist democracy arises from the recognition that the people harbor diverse interests and values (ethical relativism),[147] then the people must be allowed to express and advocate for their respective interests and values in the democratic arena.[148] The government provides the framework of processes for people to express their views but cannot dictate the substance or content of those views.[149] In 1943, the Court explained: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[150]

II. FREE EXPRESSION ON CAMPUS

The interrelated historical evolutions of free expression and democracy shed light on the current campus free speech disputes, particularly those involving the granting of a platform to controversial speakers. A recent encounter at the Lewis and Clark Law School provides a useful illustration.[151] The Federalist Society,[152] a conservative student organization, invited Christina Hoff Sommers, a philosopher and resident scholar at the American Enterprise Institute,[153] to speak at Lewis and Clark.[154] Sommers is well-known for her inflammatory conservative political stances.[155] She questions the

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[144] G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 300–01 (1996).

[145] *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that labor picketing is protected free speech); Schneider v. State, 308 U.S. 147 (1939) (invalidating a conviction for distributing handbills); Hague v. Comm. for Indus. Org., 307 U.S. 496, 517 (1939) (upholding the right of unions to organize in the streets).

[146] *See* SANDEL, *supra* note 15, at 28 (emphasizing demands for government neutrality).

[147] FELDMAN, *supra* note 13, at 396.

[148] *See id.*

[149] *See id.*

[150] W. Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

[151] Scott Jaschik, *Speech, Interrupted*, INSIDE HIGHER ED. (Mar. 6, 2018), https://www.insidehighered.com/news/2018/03/06/students-interrupt-several-portions-speech-christina-hoff-sommers [http://perma.cc/ZQ2G-SQYC].

[152] For a discussion on the development and operation of the Federalist Society, see STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 135–80 (2008).

[153] *Christina Hoff Sommers*, AEI, https://www.aei.org/scholar/christina-hoff-sommers [http://perma.cc/W3MQ-698H] (last visited Apr. 11, 2019).

[154] Jaschik, *supra* note 151.

[155] *Id.*

usefulness of women's studies departments, the reality of a wage gap between women and men, and the need to advocate against sexual assaults.[156] When she visited Lewis and Clark, a group of student protesters attempted to block the door to the room where Sommers was scheduled to speak.[157] When the audience entered through a back entrance and Sommers began to speak, the protesters repeatedly interrupted the presentation, which nonetheless continued.[158] Some protesters sang, "Which side are you on, friends? Which side are you on? No platform for fascists, no platform at all. We will fight for justice until Christina's gone."[159] The co-chair of the Lewis and Clark National Lawyers Guild Student Chapter explained her interest in protecting equality and inclusiveness: "I think first and foremost what's on my mind is protesting giving a platform to someone who espouses essentially hate speech, male supremacy speech."[160]

Many reacted angrily against the protesters and argued that they contravened the free speech rights of Sommers.[161] Because Lewis and Clark, a private school, and its students do not represent the government, the protesters technically could not violate Sommers's constitutional rights.[162] Yet, the critics of these protesters reasonably invoked free speech values or norms, as do many disputants in these campus controversies.[163]

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[156] *See* Christina Hoff Sommers, *There Is No Gender Wage Gap*, PRAGERU (Mar. 6, 2017); Jaschik, *supra* note 151; Scott London, *The Future of Feminism: An Interview With Christina Hoff Sommers*, SCOTT LONDON, http://www.scottlondon.com/interviews/sommers.html [http://perma.cc/A5FW-UB83] (last visited Apr. 11, 2019).

[157] Jaschik, *supra* note 151.

[158] *Id.*

[159] *Id.*

[160] *Protesters Disrupt Speech by Author at Lewis & Clark Law School*, STATESMAN J. (Mar. 7, 2018), https://www.statesmanjournal.com/story/news/2018/03/07/protesters-disrupt-speech-author-lewis-clar-law-school/404865002 [http://perma.cc/4256-AFRD]. *See* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 798–802 (1993) (emphasizing equality when discussing campus hate speech).

[161] Mairead McArdle, *Law-School Students Shout Down 'Known Fascist' Christina Hoff Sommers*, NAT'L REV. (Mar. 6, 2018, 11:04 AM), https://www.nationalreview.com/2018/03/christina-hoff-sommers-lewis-clark-law-students-shout-down [http://perma.cc/K8LW-CRDS].

[162] WHITTINGTON, *supra* note 5, at 5 (discussing relation between private schools and free speech issues). *See* San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (applying the state-action doctrine).

[163] "Although the First Amendment applies only to public universities, *all* colleges and universities should commit themselves to these [First Amendment] values." CHEMERINSKY & GILLMAN, *supra* note 5, at 20; Charlotte Hays, *'Freedom of Speech' Is Too Sophisticated a Concept for Today's Illiberal Students*, THE HILL (Mar. 9, 2018), https://thehill.com/opinion/education/377648-freedom-of-speech-is-too-sophisticated-a-concept-for-todays-illiberal [http://perma.cc/5FJS-7SJX]. *See* CHEMERINSKY & GILLMAN, *supra* note 5, at 71–73 (arguing against no-platform policies); McArdle, *supra* note 161 (noting that the Federalist Society maintained that Sommers stood for free expression).

A. Free Speech Criticisms of the Protesters

Critics typically articulate several overlapping free expression arguments to reproach protesters. First, critics start with a presumption that expression should be protected: let the controversial speaker express her views; if the protesters disagree with the speaker, then they should respond in kind, by expressing their own countering views.[164] In other words, critics maintain that protesters should operate within the marketplace of ideas in a societal search for truth.[165] Good ideas are the appropriate response to bad ideas; the protesters should express their disagreement by using counter-speech rather than suppression (for instance, shouting down an invited speaker).[166] In the Lewis and Clark situation, the protesters should have allowed Sommers to complete her presentation, and then, if they disagreed, the protesters should have voiced their own alternative ideas. Through this orderly exchange of ideas, society supposedly will move closer to the truth.[167] If anything, a campus should epitomize the marketplace of ideas.[168]

Even if the speaker offends the protesters, the critics continue, the First Amendment does not allow the punishment or suppression of offensive expression.[169] People speak and write all sorts of nasty and even purposefully cruel epithets, some of which might diminish equality and inclusiveness (for example, in a campus community).[170] Yet, suffering through such offenses is the price of free expression.[171] Otherwise, the government would become a censor, specifying which pronouncements are too offensive and which are acceptable.[172] The government, though, must remain neutral about the content of messages.[173]

For example, the Court held in *Cohen v. California*[174] that the defendant's conviction for disturbing the peace violated the First Amendment.[175] To protest the

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[164] *See* BEN-PORATH, *supra* note 5, at 39.

[165] *See* MARTIN P. GOLDING, FREE SPEECH ON CAMPUS 16–17 (2000).

[166] BEN-PORATH, *supra* note 5, at 39; CHEMERINSKY & GILLMAN, *supra* note 5, at 19–20; PALFREY, *supra* note 5, at 17; WHITTINGTON, *supra* note 5, at 28–50. For a critique of the marketplace of ideas, see DELGADO & STEFANCIC, *supra* note 1, at 33–39.

[167] *See* GOLDING, *supra* note 165, at 16–17.

[168] *Id.* at 15–18; WHITTINGTON, *supra* note 5, at 6, 29.

[169] *See* Snyder v. Phelps, 562 U.S. 443, 461 (2011) (reasoning that the First Amendment protects "even hurtful speech on public issues").

[170] Although they argue to protect free expression, Chemerinsky and Gillman acknowledge the need to try to protect equality and inclusiveness on campuses. CHEMERINSKY & GILLMAN, *supra* note 5, at ix–x, 1.

[171] *Id.* at 72–73. "Our position is absolute: campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge." *Id.* at 19–20.

[172] *Id.* at 73.

[173] "The platform that campuses provide is designed to be an open platform, not one reserved for those who are thinking correct thoughts." *Id.* at 73. *See* DELGADO & STEFANCIC, *supra* note 1, at 53–62 (criticizing free speech absolutism).

[174] 403 U.S. 15 (1971).

[175] *Id.* at 26.

military draft during the Vietnam War, Cohen had worn into a courthouse a jacket inscribed with the message, "Fuck the Draft."[176] The Court acknowledged that "freedom [of expression] may often appear to be only verbal tumult, discord, and even offensive utterance."[177] But chaotic and insulting statements are "necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[178] After all, the Court reasoned, "one man's vulgarity is another's lyric."[179] The government therefore must remain neutral.[180] Ultimately, "[t]hat the air may at times seem filled with verbal cacophony is . . . not a sign of [national] weakness but of strength."[181]

As critics have explained, the Lewis and Clark situation and similar no-platforming disputes resonate with hostile audience cases.[182] In a hostile audience scenario, a speaker's words inflame an unfriendly audience to a point where some in the audience might react violently.[183] In such scenarios, should the police either, on the one hand, halt and arrest the speaker (for provoking potential violence) or, on the other hand, control the crowd and protect the speaker (thus allowing the speaker to continue)? To be sure, in one such case, decided in 1951, the Court upheld a speaker's conviction for disorderly conduct.[184] The Justices reasoned that the speaker's expression created a clear and present danger of violence and therefore was constitutionally unprotected.[185] But in more recent cases, the Court has effectively required the police to try reasonably to protect the speakers from a hostile audience.[186] The vehemence of hecklers cannot terminate a speaker's First Amendment rights.[187] Thus, in the Lewis and Clark situation, school officials (acting in the role of government officials) should have protected the right of the speaker, Sommers, to complete her presentation. If protesters insisted on interfering, the school should have punished them.[188]

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[176] *Id.* at 16.

[177] *Id.* at 24–25.

[178] *Id.* at 25.

[179] *See id.*

[180] *See id.* at 25–26.

[181] *Id.* at 25.

[182] *See* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 161–69, 178–84 (2017) (summarizing hostile audience jurisprudence and relating it to campus free speech disputes).

[183] *See id.* at 160.

[184] Feiner v. New York, 340 U.S. 315 (1951).

[185] *See id.* at 319–20.

[186] *See* Gregory v. Chicago, 394 U.S. 111, 112 (1969); Cox v. Louisiana, 379 U.S. 536, 558 (1965); Edwards v. South Carolina, 372 U.S. 229, 236–38 (1963). For a discussion emphasizing the heckler's veto in campus free speech disputes, see Howard Gillman & Erwin Chemerinsky, *Does Disruption Violate Free Speech?*, CHRON. HIGHER EDUC. (Oct. 17, 2017), https://www.chronicle.com/article/Does-Disruption-Violate-Free/241470 [http://perma.cc/249J-2A3V].

[187] *See, e.g.*, *Gregory*, 394 U.S. at 121–22 (Black, J., concurring) (discussing responsibilities of police).

[188] The critics often condemn the protesters for being "snowflakes," *see* BEN-PORATH, *supra* note 5, at 9, 117 nn.6–7 (citing examples of such comments), or as trying to enforce "political

B. The Counterargument: From Democracy and Free Expression

These arguments for the unequivocal protection of expression in the no-platforming disputes, such as at Lewis and Clark, are mistaken in multiple ways. We should remember that, from a historical standpoint, free expression became a constitutional lodestar only after the Court accepted pluralist democracy.[189] During the republican democratic era, when Holmes, Brandeis, and free speech advocates emphasized the search-for-truth rationale (or marketplace of ideas theory), the majority of Justices continued to apply the bad tendency test and to conclude that expression was constitutionally unprotected.[190] Later on, in the late 1930s and early 1940s, with the development of pluralist democracy and the correlative self-governance rationale, the Court began to validate free-expression claims under the First Amendment.[191]

Significantly, then, critics (of the protesters) typically invoke the search-for-truth rationale rather than the self-governance to justify absolute protection of expression, regardless of injurious potential or consequences.[192] The critics insist that an invited speaker, even one spouting hate speech, has a protected right to speak.[193] If protesters want to respond, they should do so with counter-speech.[194] But given that Supreme Court Justices and other judges consistently found that the government could restrict expression despite the search-for-truth rationale, critics would find firmer ground if they could invoke the self-governance rationale, the springboard for the transformation of free expression into a constitutional lodestar.[195]

In the context of campus free-expression disputes, however, the application of the self-governance rationale is problematic. Pluralist democratic theory requires full and equal participation for all citizens.[196] The preeminent theorist of pluralist democracy, Robert A. Dahl, specified the processes requisite to the operation of a democratic process.[197] For instance, each individual vote must be given an identical weight, and the option receiving the greatest number of votes wins.[198] Dahl emphasized,

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correctness." Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1988–93 (2017).

[189] *See* discussion *supra* Section I.B.

[190] *See* discussion *supra* Section I.A.

[191] *See* discussion *supra* Section I.B.

[192] *See* GOLDING, *supra* note 165, at 16–17.

[193] *See id.*

[194] *See* PALFREY, *supra* note 5, at 17.

[195] The search-for-truth counter-speech argument has other serious problems. *See* discussion *infra* Section II.B.

[196] *See* FELDMAN, *supra* note 13, at 396.

[197] *See* IRA KATZNELSON, DESOLATION AND ENLIGHTENMENT 107–76 (2003) (arguing that Dahl and several other post–World War II scholars sought to articulate an approach to politics and democracy that made sense in the shadow of recent world tragedies).

[198] DAHL, DEMOCRATIC THEORY, *supra* note 121, at 67; DAHL, ECONOMIC DEMOCRACY, *supra* note 121, at 59. *See* DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 121, at 109–11 (discussing voting equality).

though, that "effective participation" is the most important component of democracy.[199] Citizens must have "*adequate*" and "*equal*" opportunities "*for expressing their preferences . . . for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another*."[200] According to Dahl, in other words, free expression derives its import from the crucial demand for full and equal participation in the democratic arena.[201] Free expression allows citizens to participate effectively in democracy. From this perspective, equal democratic participation is primary; free expression is secondary.[202]

Although Dahl emphasized the democratic process, he did not intend to suggest that democracy is solely a matter of process. He has always insisted that pluralist democracy cannot be sustained without democratic norms—a culture of democracy.[203] If citizens are not widely committed to the rules of the democratic game—negotiation, compromise, and coalition-building—then the political community will splinter into sharply polarized interest groups.[204] Hence, when Dahl underscored participation in democracy, he was not referring to a purely formal right of participation. To the contrary, citizens must be personally and culturally vested in democratic norms as well as having sufficient resources to participate.[205] People who lack the fundamentals of housing, education, or medical care cannot fully engage in political discussion and participation regardless of their desire to play by the rules of the game.[206]

Consequently, pluralist democracy contains inherent *substantive* limits or conditions. For instance, if the crux of the democratic process is effective participation, then a legislature cannot constitutionally enact a law that would abridge some citizens' abilities and opportunities to participate—even if a supermajority of citizens and legislators followed the proper processes in enacting the law. Certain government actions must be off the table, beyond democratic debate, because they would contravene the conditions necessary for robust pluralist democracy. All individuals, regardless of subculture or societal grouping, must be treated as full and equal citizens in good standing.[207] Even if a supermajority of Americans were to support

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[199] DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 121, at 109.

[200] *Id.*

[201] *See id.* at 170.

[202] *See id.* at 169–75 (discussing free speech and other rights integral to the democratic process).

[203] DAHL, ECONOMIC DEMOCRACY, *supra* note 121, at 48–49.

[204] DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 121, at 172; DAHL, DEMOCRATIC THEORY, *supra* note 121, at 4. *See* DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS 162 (1953) (emphasizing a "genuine community of our values"); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 129, 138, 512–13 (1951) (emphasizing the rules of the game for democracy).

[205] *See* DAHL, HOW DEMOCRATIC, *supra* note 121, at 150–52.

[206] *See id.* at 132–33 (maintaining that liberty and equality are not in opposition); DAHL, ECONOMIC DEMOCRACY, *supra* note 121, at 46 (emphasizing relative economic well-being).

[207] *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 5, 60–61 (2012) (discussing the relation between hate speech and being a citizen in good standing).

a law discriminating against a racial minority, such government action must be unconstitutional because it would relegate the racial minority to second-class democratic citizenship.[208]

As Dahl underscored, whenever we raise the issue of constitutional rights, we implicitly ask the question, "rights for whom?"[209] In other words, who belongs to and can participate in the political community?[210] Under republican democracy, this question led to a focus on civic virtue.[211] Supposedly, only those individuals virtuous enough to pursue the common good rather than their own private interests were entitled to full and equal citizenship, to rights to speak and vote.[212] But under pluralist democracy, full and equal citizenship for all individuals is a premise of the system.[213] Without full and equal citizenship, allowing for equal political participation for all, then pluralist democracy does not exist.[214] In Dahl's words, "The demos must include all adult members except transients and persons proven to be mentally defective."[215]

John Hart Ely's constitutional theory of representation reinforcement—and the criticisms of it—underscore that the definition of democracy must include a substantive element; democracy cannot be reduced solely to processes.[216] In fact, though, Ely argued that representation-reinforcement theory was purely process-based; when

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[208] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (invalidating a Michigan law prohibiting same-sex marriages); Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 147–63 (2017) (arguing for the need to recognize the identity of societal groups in equal protection).

[209] DAHL, HOW DEMOCRATIC, *supra* note 121, at 132–33.

[210] An implicit and correlative substantive question is what counts as participation. To some extent, Dahl's discussions of the prerequisites or conditions for a democratic process answer this question. *See* DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 121, at 109–11, 169–75. Ultimately, then, the procedural and substantive components of democracy necessarily intertwine. We cannot fully discuss democracy without accounting for process and substance. *See* SMITH, *supra* note 27, at 491 (emphasizing that it is "morally imperative" to recognize the functions of political communities).

[211] *See* FELDMAN, *supra* note 13, at 22.

[212] *Id.* at 15, 22.

[213] *See* DAHL, HOW DEMOCRATIC, *supra* note 121, at 136.

[214] *See id.* at 135–37 (emphasizing political equality as an anchor for democracy); Emanuela Lombardo & Petra Meier, *Good Symbolic Representation: The Relevance of Inclusion*, 51 POL. SCI. & POL. 327 (2018) (emphasizing that inclusion is normative or substantive).

[215] DAHL, ECONOMIC DEMOCRACY, *supra* note 121, at 59–60. *See* Karen Celis & Sarah Childs, *Good Representatives and Good Representation*, 51 POL. SCI. & POL. 314 (2018) (discussing how to measure political equality in the form of good democratic representation); Eline Severs & Suzanne Dovi, *Why We Need To Return To the Ethics of Political Representation*, 51 POL. SCI. & POL. 309 (2018) (discussing the same).

[216] *See* ELY, *supra* note 128, at 101–02, 181. For criticisms, see Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

the Court exercises its power of judicial review, reviewing the constitutionality of a legislative action, the Court should "police" the democratic process but should never enunciate or enforce substantive principles or values.[217] Only the legislature, when following the proper pluralist democratic processes, could determine appropriate communal goals (or values).[218] When reviewing the constitutionality of a legislative action, the Court needed to defer to the legislative action so long as the democratic process had been fair and open—regardless of the substantive content of the legislative action.[219] But if the democratic process had been defective, then the Court should deem the legislative action unconstitutional.[220]

The Court, Ely explained, can police the democratic process in two ways.[221] First, the Court can clear the channels of political change.[222] Political "ins" cannot be allowed to protect their power by choking the channels of political change and permanently excluding the political "outs."[223] Denying or diluting the right to vote through legislative malapportionment is a "quintessential stoppage" in the democratic process and therefore unconstitutional.[224] Second, the Court can facilitate the representation of minorities.[225] Democratic representatives cannot be allowed to systematically disadvantage minorities because of hostility or prejudice. The democratic process malfunctions if everyone is not "actually or virtually represented."[226] Therefore, when a legislature intentionally discriminates against a minority for an improper motive, such as racial hostility, the Court should find the legislative action unconstitutional.[227]

As numerous critics pointed out, however, Ely's representation-reinforcement theory was not purely process-based.[228] Political battles in pluralist democracy always produce winners and losers;[229] some societal groups win while others lose. Yet Ely argued that the Court should police the democratic process by facilitating the

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[217] ELY, *supra* note 128, at 73–104, 106 (emphasizing representation-reinforcement theory as process-based).

[218] *See id.* at 103.

[219] "The day is gone when this Court [strikes down] laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955).

[220] In *Harper v. Virginia Board of Elections*, the Court held that poll taxes in state elections were unconstitutional because, according to Ely, such taxes prevented some citizens from participating fully in the democratic process. 383 U.S. 663 (1966). *See* ELY, *supra* note 128, at 120.

[221] *See infra* notes 222–27 and accompanying text.

[222] ELY, *supra* note 128, at 105–34.

[223] *Id.* at 103.

[224] *See id.* at 117.

[225] *Id.* at 135–79.

[226] *See id.* at 101.

[227] *See id.* at 101, 117.

[228] For a list of critics, see *supra* note 216.

[229] *See* discussion *infra* Section III.A.

representation of minorities.[230] To do so, the Court itself had to differentiate among the numerous societal groups that had lost in the pluralist democratic arena.[231] The Court designated some such groups as discrete and insular minorities deserving special judicial protection while deeming other groups mere losers in the democratic process.[232] But this judicial designation of discrete and insular minorities required the Court to engage in exactly those substantive value choices supposedly forbidden by representation-reinforcement theory; the Court needed to differentiate among the various groups of democratic losers.[233] Rather than remaining neutral among societal groups (and their respective values and interests), the Court was designating some groups for special judicial protection. One critic, Paul Brest, commented that Ely had articulated a process-based constitutional theory so artfully that his failure unwittingly demonstrated its impossibility: "John Hart Ely has come as close as anyone could to proving that it can't be done."[234] The criticisms of Ely's representation-reinforcement theory underscore that we cannot discuss democracy as solely a matter of process.[235] We must also discuss the status of different societal groups within the democratic community—a substantive issue. Do all groups have full and equal standing?[236]

Understanding the substantive component of pluralist democracy is crucial to analyzing campus free-expression controversies, particularly no-platforming disputes. Even though political speech and writing, in general, is robustly protected because of the self-governance rationale,[237] the reason for constitutionally protecting such expression is to preserve democracy.[238] If campus speakers are allowed to denigrate or denounce historically marginalized groups (or individual members of such groups), then those targeted groups and individuals are pushed into a diminished democratic status. Some individuals, when thrust into such second-class positions, will react by remaining silent.[239] Others will hazard to participate, to speak or write, yet their words and ideas must overcome the disadvantages of a diminished communal status. As Jeremy Waldron explained: "The issue is . . . the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and

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[230] ELY, *supra* note 128, at 120.

[231] *See id.* at 151–53.

[232] *Id.*

[233] Brest, *supra* note 216, at 140. *See* Parker, *supra* note 216, at 234–35 (arguing similarly).

[234] Brest, *supra* note 216, at 142.

[235] *See* SANDEL, *supra* note 15, at 274–316 (emphasizing the difficulties of a procedural republic).

[236] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 97–100 (2018) (emphasizing the need to enhance and protect democratic norms in order to protect democratic government); James, *supra* note 208, at 128–29 (emphasizing the importance of societal identity in equal protection).

[237] *See supra* notes 135–45 and accompanying text.

[238] *See supra* notes 129–39 and accompanying text.

[239] *See* BEN-PORATH, *supra* note 5, at 43 (discussing the potential for silencing outsiders on a campus).

semi-permanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship."[240] A fair and open democratic dialogue or exchange of ideas is impossible if social power is skewed before the dialogue even begins.[241]

In short, expression that diminishes the full and equal status of marginalized groups or their members within the political community is not worthy of constitutional value and should not be protected under the First Amendment. Full and equal citizenship for marginalized groups should not be treated as if it were an issue open for debate. Equal citizenship for marginalized groups should be treated as among the "settled features of the social environment to which we are visibly and pervasively committed."[242] Crucially, then, in the context of the no-platforming disputes, counter-speech cannot sufficiently respond to right-wing provocateurs who spout hate speech or otherwise denigrate outsiders. Counter-speech legitimates debate about the issue of full and equal citizenship. Counter-speech suggests that we ought to be engaged in conversation with those who would label and treat marginalized groups as second-class citizens. But there is no conversation to be had. We no longer need to try to persuade racists, sexists, homophobes, or anyone else that all citizens deserve full and equal membership in the polity. The conversation is over and off the table—or at least it should be.

Furthermore, to show that hate speech and the like are outside constitutional protection in specific contexts, nobody should need to prove that such expression creates imminent danger, psychological injury, risk of illegal conduct, or anything else.[243] The problem with such expression does not lie in its potential harmful consequences. Instead, the problem lies in the reality that such expression necessarily and inherently contravenes the requisite substantive conditions for pluralist democracy. Or to rephrase, the harmful consequence of such expression is precisely that it undermines democracy, regardless of any other consequences.[244]

From this perspective, the government (or a university or college) cannot remain neutral and should not try to do so. Because pluralist democracy contains inherent *substantive* limits or conditions,[245] government cannot be neutral. The government

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[240] WALDRON, *supra* note 207, at 33.

[241] *See id.* at 33, 47.

[242] *Id.* at 95. *See* Dara Z. Strolovitch & Chaya Y. Crowder, *Respectability, Anti-Respectability, and Intersectionally Responsible Representation*, 51 POL. SCI. & POL. 340 (2018) (arguing that marginalized groups should not need to prove their worthiness in accord with mainstream values).

[243] *See* WALDRON, *supra* note 207, at 96–97 (rejecting the judicial use of a doctrine such as the clear and present danger test in cases of hate speech).

[244] For discussions of why hate speech should be constitutionally unprotected, see Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[245] *See supra* notes 201–07 and accompanying text.

should affirmatively nurture democratic culture and should ensure that all citizens can fully and equally participate in the polity (or campus community).[246] If the government allows a speaker to spout epithets that target a marginalized group, the government is not neutral.[247] To the contrary, the government is facilitating the demeaning of the targeted group within the political community. The ability of that group and its members to speak and otherwise participate within the community will necessarily be diminished.[248] In other words, a pluralist democratic government cannot merely provide an abstract framework of procedures that allows individuals to voice and assert their respective interests and values, regardless of the content of those interests and values. Certain questions—including substantive matters—must be off the table if a pluralist democracy is to exist. Most important, all individuals, regardless of subculture or societal grouping, must be treated as full and equal citizens in good standing.

III. HISTORY REDUX: THE POLITICS OF FREE SPEECH

When it comes to the politics of free expression, history once again provides a sharp dose of reality. Free expression has never been neutral in American society.[249] It has never been equally enjoyed by all.[250] To be sure, many Americans have reveled in their own expressive liberties, but often those same Americans have purposefully suppressed the speech and writings of other Americans, both officially (through government processes) and unofficially (through nongovernment processes, such as tar and feathering).[251] In many such instances, judicial pronouncements of constitutional doctrine have proven to be beside the point.[252] To a large degree, a practical rule of free expression in America is that marginalized outsiders typically lose while the wealthy and mainstream usually win.[253] If marginalized outsiders assert their First Amendment rights to speak, courts hold it against them: sorry, no free speech rights here.[254] But when individuals who are wealthy or in the mainstream assert free

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[246] *See* SMITH, *supra* note 27, at 12 (arguing that egalitarians need "to give up conceiving of good governments as bloodless neutral umpires of private activities and preexisting rights").

[247] *Id.*

[248] "[F]ree speech advocates who insist [on] . . . open-minded free inquiry" ignore the reality that "when many on campus are effectively silenced, inquiry is in fact neither free nor open-minded." BEN-PORATH, *supra* note 5, at 43.

[249] *See* discussion *infra* Section III.A.

[250] *See* discussion *infra* Section III.A.

[251] *See* discussion *infra* Section III.A.

[252] FELDMAN, *supra* note 13, at 3–5.

[253] *See* PALFREY, *supra* note 5, at 14 ("[T]he right to free expression has been a tool of empowered people, not those who have been marginalized."); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 310 (2002) ("[T]he outliers in American politics were more often than not the victims than the beneficiaries" of the Court's decisions).

[254] *See infra* notes 312–42 and accompanying text.

speech rights, courts are likely to declare the importance of First Amendment guarantees and to find the expression constitutionally protected—even if the speech denigrates or attacks marginalized outsiders.[255] This phenomenon—that marginalized outsiders typically lose while the wealthy and mainstream usually win—was true during the republican democratic era and has continued to hold true during the pluralist democratic era, even though free expression is supposed to be a constitutional lodestar.[256] Examples are too numerous to cover comprehensively, but a few illustrations suffice to make the point.[257]

A. Winners and Losers

As early as the 1830s, Alexis de Tocqueville recognized that outsiders risked social and legal punishments if they voiced their views.[258] An individual was free to speak or write so long as he remained roughly within the broad mainstream of culture and opinion, but penalties were severe for those who ventured outside those parameters.[259] "In America the majority raises formidable barriers around the liberty of opinion," Tocqueville wrote.[260] "[W]ithin these barriers an author may write what he pleases, but woe to him if he goes beyond them. Not that he is in danger of an auto-da-fé, but he is exposed to continued obloquy and persecution."[261] For example, religious minorities in many states lived with the threat that speaking contrary to mainstream Protestant viewpoints might provoke a prosecution for blasphemy.[262] A Delaware court, upholding a blasphemy conviction in 1837, explained that it had "been long perfectly settled by the common law, that blasphemy against the Deity in general, or a malicious and wanton attack against the christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable . . . ."[263]

An egregious instance of suppression involved the origins of the Church of Jesus Christ of Latter-Day Saints.[264] Joseph Smith, Jr., founded the Mormon movement in

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[255] *See infra* notes 302–32 and accompanying text.

[256] *See* White, *supra* note 144, at 300–01.

[257] For a more extensive discussion, see FELDMAN, *supra* note 13, at 70–152, 209–40, 420–62.

[258] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1990) (1835).

[259] *See id.*

[260] *Id.*

[261] *Id.*

[262] In accord with America's inegalitarian ascriptive tradition, non-Protestants have often been targeted for suppression and persecution. *See, e.g.*, SMITH, *supra* note 27, at 75–76.

[263] State v. Chandler, 2 Del. (2 Harr.) 553, 555 (1837). According to a South Carolina court, "[a]ll blasphemous publications, carrying upon their face that irreverent rejection of God and his holy religion, which makes them dangerous to the community, have always been held to be libels, and punishable at common law." City Council v. Benjamin, 33 S.C.L. (2 Strob.) 508, 524 (1848) (convicting Jewish defendant for violating Sunday law). *See* LEONARD W. LEVY, BLASPHEMY 400–23 (1993) (discussing state blasphemy cases from pre–Civil War America).

[264] *See infra* notes 265–73 and accompanying text.

upstate New York during the first part of the nineteenth century.[265] He wrote the *Book of Mormon* in 1830.[266] In it, Smith incorporated the history of European colonization of America into Christian eschatology; Mormonism, that is, was to supplant mainstream Christianity, just as early Christianity had been intended to supplant Judaism (according to the New Testament).[267] Given such religious views, many Americans feared that Mormonism threatened the predominant forms of Protestantism as well as republican democracy.[268] Persecution of the Mormons was common and often violent, forcing Smith's followers to move from state to state as they sought refuge.[269] From New York, Smith went to Ohio, where he was eventually dragged from his house to be tarred and feathered.[270] Smith moved on to Jackson County, Missouri, where mob violence again forced him to flee, this time to northern Missouri.[271] Further violence led the Mormons next to Illinois, where Smith was arrested, then in June 1844, murdered while he was awaiting trial.[272] Smith's successor, Brigham Young, finally led the community to the Great Salt Lake area where they established the autonomous State of Deseret,[273] only to become embroiled with the federal government in legal struggles that would stretch on for decades.[274]

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[265] SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 501–02 (1972).

[266] *Id.* at 502.

[267] *Id.* JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE 242 (1990); NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 114–15 (1989).

[268] *See* AHLSTROM, *supra* note 265, at 557.

[269] *Id.* at 505–06

[270] *Id.* at 505.

[271] *Id.* at 505–06.

[272] *Id.* at 506.

[273] *Id.* at 506–07; ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER 69–89 (1999).

[274] Throughout the nineteenth century, many states explicitly limited the civil rights of Jews, often long after the state-established churches had been eliminated. In the early nineteenth century, Jews could practice law in only four states: Pennsylvania, Virginia, South Carolina, and New York. FREDERIC COPLE JAHER, A SCAPEGOAT IN THE NEW WILDERNESS: THE ORIGINS AND RISE OF ANTI-SEMITISM IN AMERICA 121 (1994). In Maryland, Jews were proscribed from holding public office until 1826, when the law was liberalized. CONSTITUTION OF MARYLAND (1776), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 817, 820 (Ben Perley Poore ed., 2d ed. 1878) [hereinafter 1 POORE]. Jews then could hold office, but only if they declared a "belief in a future state of rewards and punishments." Final Form of the "Jew Bill" (1826), *reprinted in* THE JEWS OF THE UNITED STATES, 1790–1840, A DOCUMENTARY HISTORY 53, 53 (Joseph L. Blau & Salo W. Barron eds., 1963). This bill was incorporated into the Maryland Constitution of 1851. *See* CONSTITUTION OF MARYLAND (1851), *reprinted in* 1 POORE, *supra*, at 837, 839. The North Carolina Constitution of 1776 limited public officeholding to those individuals who accepted "the truth of the Protestant religion." CONSTITUTION OF NORTH CAROLINA (1776), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1409, 1413–14 [hereinafter 2 POORE]. This provision, as amended in 1835 to allow all Christians to hold public office, remained in

During the nineteenth century, African Americans constituted the single societal group that endured the most severe suppression, "given the preservation of slavery as a legal institution."[275] Even free blacks lacked the civil rights of white citizens, as the Supreme Court held in *Dred Scott v. Sandford*,[276] decided in 1857.[277] Slaves, of course, were subjected to the most sweeping legal disabilities.[278] Unsurprisingly, then, free expression was deemed a right inconsistent with the status of a slave.[279] Meanwhile, many abolitionists were suppressed, often violently, for voicing opposition to slavery, especially in the southern and border states.[280]

During the late nineteenth and early twentieth centuries, immigrants were subject to multiple forms of suppression. Anthony Comstock led a vigorous anti-obscenity campaign that often targeted immigrant communities and inflamed mainstream fears of the ostensibly un-American values of immigrants.[281] During this era, factory workers, many of whom were immigrants, also faced suppression if they attempted to organize and form labor unions;[282] courts consistently enjoined picketing and other forms of expression that might facilitate unionizing.[283] Likewise, the World War I Espionage Act prosecutions often targeted immigrants, Socialists, and other societal outsiders.[284] The defendants in *Debs v. United States* and *Schenck v. United States* were Socialists;[285] the defendant in *Frohwerk v. United States*[286] was the editor of a German-language newspaper;[287] and all of the defendants in *Abrams v. United States* were Russian-Jewish immigrants.[288]

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effect until 1868. *See* AMENDMENTS TO THE CONSTITUTION OF 1776, *reprinted in* 2 POORE, *supra*, at 1415, 1418 (allowing all Christians to hold office); CONSTITUTION OF NORTH CAROLINA (1868), *reprinted in* 2 POORE, *supra*, at 1419, 1430 (this Constitution still barred "all persons who shall deny the being of Almighty God"); MORTON BORDEN, JEWS, TURKS, AND INFIDELS 42–50 (1984).

[275] FELDMAN, *supra* note 13, at 121.

[276] 60 U.S. (19 How.) 393 (1857).

[277] *Id.* at 404–05.

[278] *See* JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY 190–200 (1837) (discussing the legal incapacities of slaves); WATSON, *supra* note 35, at 22 (noting that slaves had "no rights of any kind").

[279] *See* Bob v. State, 32 Ala. 560, 565 (1858).

[280] For a discussion on abolitionist suppression, see RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860 (1949); *see also* FELDMAN, *supra* note 13, at 121–42. On the importance of race and whiteness in immigration laws, see IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006).

[281] FELDMAN, *supra* note 13, at 210–15.

[282] *Id.* at 175–76.

[283] *Id.* at 228–29.

[284] *Id.* at 252.

[285] Debs v. United States, 249 U.S. 211, 212 (1919); Schenck v. United States, 249 U.S. 47, 49 (1919).

[286] 249 U.S. 204 (1919).

[287] *Id.* at 205.

[288] Abrams v. United States, 250 U.S. 616, 617 (1919).

Even after the transition to pluralist democracy and the enhancement of First Amendment protections, societal outsiders frequently suffered both official and unofficial forms of suppression. The Court upheld punishments of Communists,[289] civil rights protesters,[290] and Vietnam War protesters.[291] A comparison of two hostile audience cases from the post–World War II era illustrates the typical judicial treatment of marginalized groups. In *Terminiello v. Chicago*,[292] a hostile audience case decided in 1949, the Supreme Court concluded that the speaker-defendant's conviction under a disorderly conduct ordinance violated the First Amendment.[293] The constitutionally protected expression was an antisemitic diatribe.[294] The defendant had condemned "atheistic, communistic Jewish or Zionist Jews."[295] He claimed that Jewish doctors had performed atrocities on Germans, and he asked, "Do you wonder [that] they were persecuted in other countries . . . ?"[296] Then he proclaimed that "we want them to go back where they came from."[297] Yet, two years later, when the Court decided another hostile audience case, *Feiner v. New York*,[298] the Court found the speech unprotected.[299] The speaker-defendant was a college student who had spoken to a racially mixed crowd of seventy-five to eighty whites and blacks gathered together on a sidewalk in Syracuse, New York.[300] He had encouraged the audience to attend a meeting of the Young Progressives of America, protested the city's cancellation of a permit for an earlier Young Progressives meeting, and made derogatory remarks about "President Truman, the American Legion, the Mayor of Syracuse, and other local political officials."[301] The Court held that the First Amendment did not protect this speech because it created a clear and present danger[302]—even though

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[289] Dennis v. United States, 341 U.S. 494 (1951) (upholding criminal convictions of the leaders of the United States Communist Party for conspiring to advocate the overthrow of the United States).

[290] Adderley v. Florida, 385 U.S. 39 (1966) (upholding the trespassing conviction of students for demonstrating on jailhouse grounds against the arrest of other students who had been protesting segregation). *See* Walker v. Birmingham, 388 U.S. 307 (1967) (upholding criminal contempt conviction of Martin Luther King, Jr., without expressly reaching the free speech issue).

[291] United States v. O'Brien, 391 U.S. 367 (1968) (upholding the conviction of an anti-war protestor for burning his Selective Service registration certificate).

[292] 337 U.S. 1 (1949).

[293] *Id.* at 6.

[294] *See id.* at 20–21 (Jackson, J., dissenting).

[295] *Id.* at 20.

[296] *Id.*

[297] *Id.* at 21. The speaker was a Roman Catholic priest. *Id.* at 14. In the context of the United States in the 1940s, one could possibly maintain that the Court protected the speech of a religious outsider.

[298] 340 U.S. 315 (1951).

[299] *Id.* at 321.

[300] *Id.* at 316.

[301] *Id.* at 317, 324.

[302] *Id.* at 320–21.

the evidence suggested otherwise.[303] The Justices seemed especially worried that Feiner had urged African Americans to "rise up in arms and fight for equal rights."[304] Yet, witnesses had sworn that Feiner had instead encouraged his listeners to "rise up and fight for their rights by going arm in arm to the [Young Progressives meeting], black and white alike."[305]

Hence, in *Terminiello*, the Court protected inflammatory antisemitic speech, while in *Feiner*, the Court allowed the punishment of speech largely criticizing public officials and encouraging African Americans to take political action.[306] To be sure, the Justices might not have intentionally discriminated against marginalized outsiders in these cases. Regardless, in one case, *Terminiello*, the Court emphasized the principled First Amendment protection of expression—speech that attacked a marginalized group.[307] In the other case, *Feiner*, the Court found speech that threatened the mainstream and elites to be unprotected.[308] In sum, in cases involving inflammatory or vituperative expression, the communal statuses of the speaker and the targeted group have at least tacitly influenced the Justices. A crucial landmark free speech case of the twentieth century underscores this phenomenon. In *Brandenburg v. Ohio*,[309] decided in 1969, the Court famously articulated its most speech-protective standard ever for determining when subversive advocacy or, more generally, speech inciting unlawful conduct, would be outside of First Amendment protections and therefore punishable.[310] Yet, one should not overlook that the defendant had spewed hate speech denouncing blacks and Jews. He had warned that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[311]

While societal outsiders typically lose in free-expression disputes, the "haves" usually come out ahead.[312] Starting in the 1970s, the Court began to increase protection for wealth and the economic marketplace under the umbrella of the First

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[303] While there was "some pushing and shoving . . . and some angry muttering" in the crowd, there were no fights or evidence of real "disorder." *Id.* at 330. (Douglas J., dissenting). One isolated audience member threatened to "get [Feiner] off there myself," *id.*, but was not close enough to Feiner to carry out the threat. *Id.* at 326 (Black, J., dissenting).

[304] *Id.* at 317 (majority opinion).

[305] *Id.* at 324, 324 n.5 (Black, J., dissenting).

[306] *Compare* Terminiello v. Chicago, 337 U.S. 1, 5, 20–21 (Jackson, J., dissenting), *with Feiner*, 340 U.S. at 321, 324, 324 n.5 (Black, J., dissenting).

[307] *Terminiello*, 337 U.S. at 4.

[308] *See Feiner*, 340 U.S. at 317, 320–21.

[309] 395 U.S. 444 (1969).

[310] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 522–23 (2004) (discussing the implications of the *Brandenburg* decision).

[311] *Brandenburg*, 395 U.S. at 445–47. The defendant was a Ku Klux Klan leader, so he too was somewhat of an outsider during the time period of the late 1960s. *Id.* at 444.

[312] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. & SOC'Y REV. 95 (1974) (discussing advantages of the wealthy and powerful in litigation).

Amendment.[313] One of the first cases to hold that commercial speech constituted protected expression linked advertising to pluralist democracy and the self-governance rationale. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[314] the Court held unconstitutional a state law prohibiting licensed pharmacists from advertising prescription-drug prices.[315] Democracy concerns the allocation of resources in society, the Court explained, but most resource-allocation decisions are made through the economic marketplace.[316] "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions."[317] The economic marketplace, from the Court's perspective, was a situs of democracy. Commercial speech or advertising seemed essential for self-governance, for "the proper allocation of resources in a free enterprise system."[318] Spending money had become a form of democratic politics—of political expression, "[a]dvertising, however tasteless and excessive it sometimes may seem, is . . . dissemination of information as to who is producing and selling what product, for what reason, and at what price."[319] Consequently, government restrictions on advertising are "highly paternalistic" intrusions into the marketplace (and, in turn, democratic processes).[320]

The Roberts Court has pushed to new heights the First Amendment protection of wealth and the marketplace, as demonstrated in a purported free speech case, *Sorrell v. IMS Health Incorporated.*[321] Data mining, including the gathering, analysis, and sale of data, is big business.[322] *Sorrell* arose from the gathering and use of medical data.[323] Pharmacies routinely record information about prescriptions, such as the doctor, the patient, and the dosage.[324] In Vermont, IMS Health Incorporated bought this information, analyzed it, and sold reports to pharmaceutical manufacturers, which used the reports to market their drugs more effectively to doctors.[325] Vermont enacted a law to prevent pharmacies from selling this prescription information.[326]

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313 *See* Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942) (holding that commercial advertising was a low-value category subject to government regulation). The Court first changed direction in *Bigelow v. Virginia*, 421 U.S. 809, 819–20 (1975) (holding that commercial advertising should no longer be deemed "unprotected per se").

314 425 U.S. 748 (1976).

315 *Id.* at 770.

316 *See id.* at 765.

317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.* at 770.

321 564 U.S. 552 (2011).

322 BRUCE SCHNEIER, DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD 39–53 (2015) (discussing data mining).

323 *Sorrell*, 564 U.S. at 558.

324 IMS Health Inc. v. Sorrell, 630 F.3d 263, 267 (2d Cir. 2010).

325 *Id.*

326 *Sorrell*, 564 U.S. at 557–60.

The legislature had two primary purposes: first, to protect the privacy of patients and doctors, and second, to improve public health by, for example, encouraging doctors to prescribe drugs in their patients' best interests rather than because of effective pharmaceutical marketing.[327] In such circumstances, the Court could have easily concluded that the statute was a permissible exercise of the state's police power in regulating the economic marketplace.[328] As such, the statute would not even raise a free speech issue.[329] But the Court instead reasoned that the statute raised an unusual commercial speech issue.[330] Commercial speech cases typically involve advertising, and as the Court admitted, the statute in *Sorrell* did not restrict advertising per se.[331] Yet, the Court reasoned that the First Amendment not only applied but also required "heightened judicial scrutiny," which the state could not satisfy.[332]

The Roberts Court's most renowned First Amendment decision protecting wealth and the economic marketplace is *Citizens United v. Federal Election Commission*,[333] which upheld (or created) a right for corporations to spend unlimited sums on political advertising.[334] After explaining that spending on political advertising constitutes speech,[335] and that free speech protections extend to corporations,[336] the Court emphasized that free expression must be a constitutional lodestar in American democracy, "[s]peech is an essential mechanism of democracy. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[337] The Court also invoked the search-for-truth rationale.[338] Restrictions on corporate campaign expenditures, the Court reasoned, interfere "with the 'open marketplace' of ideas protected by the First Amendment."[339] But the Court appeared to confound the marketplace of ideas and the economic marketplace, "[t]he censorship we now confront is vast in its reach," the Court explained.[340] "The Government has 'muffle[d]

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[327] *Id.* at 572.

[328] *Id.* at 580–81 (Breyer, J., dissenting).

[329] *Id.* at 581.

[330] The statute may appear like a "mere commercial regulation." *Id.* at 556. However, while "the First Amendment does not prevent restrictions directed at commerce . . . from imposing incidental burdens on speech," the Court held that the statute was actually a commercial speech law that "impose[d] a burden based on the content of speech and the identity of the speaker." *Id.* at 567.

[331] *Id.* at 562–63.

[332] *Id.* at 557.

[333] 558 U.S. 310 (2010).

[334] *Id.* at 365.

[335] *Id.* at 336–39.

[336] *Id.* at 340–42.

[337] *Id.* at 339.

[338] *See id.* at 354.

[339] Citizens United v. FEC, 558 U.S. 310, 354 (2010) (quoting N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

[340] *Id.*

the voices that best represent the most significant segments of the economy.'"[341] Speech, from this perspective, does not emanate from people—that is, from citizens—but from "segments of the economy."[342]

B. Beyond Constitutional Principle

What does this history, ranging from the early nineteenth century through the Roberts Court, have to do with the campus no-platforming disputes? The history suggests that, in these campus disputes, we need to look beyond the constitutional principle and doctrines of free expression.[343] In particular, who invites the controversial speakers, and who pays for them?

Universities and colleges, in fact, rarely invite speakers to campus; in most instances, a department or student organization extends an invitation.[344] Significantly, then, conservative student organizations often purposefully manufacture these disputes by inviting controversial speakers who push the boundaries of propriety and are likely to provoke outrage.[345] With regard to the Federalist Society, the student organization that invited Sommers to Lewis and Clark Law School, the national organization maintains a Speakers Bureau, a list of approved speakers.[346] The student chapters decide whom to invite.[347] Most importantly, the Federalist Society supplies funding; it sponsors lectures and other events, paying travel costs and honoraria.[348]

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[341] *Id.* (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part)).

[342] *Id.*

[343] *See* Delgado & Stefancic, *supra* note 10, at 1924–28 (arguing for free speech realism and a rejection of formalism); Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000) (arguing the same).

[344] BEN-PORATH, *supra* note 5, at 25.

[345] *Id.* at 7, 23; Joseph Russomanno, *Speech on Campus: How America's Crisis in Confidence Is Eroding Free Speech Values*, 45 HASTINGS CONST. L.Q. 273, 275 (2018) (discussing claims that conservative organizations choreograph free speech campus disputes).

[346] *Federalist Society for Law and Public Policy Studies*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Federalist_Society_for_Law_and_Public_Policy_Studies [http://perma.cc/2PAE-XGXE] [hereinafter *Federalist Society*].

[347] Eugene B. Meyer, *Letter From The President*, *in* FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES: 2010 ANNUAL REPORT 1, 1 (2010), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/kFrpIRa7RXgKX5yDUWzjKQFQy7e0rA9dmAQJWDkY.pdf [http://perma.cc/YDD9-FQRK].

[348] "The Society's main purpose is to sponsor fair, serious, and open debate about the need to enhance individual freedom and the role of the courts in saying what the law is rather than what they wish it to be." *Frequently Asked Questions*, FEDERALIST SOC'Y, https://fedsoc.org/frequently-asked-questions [http://perma.cc/5MJ7-QQ5K]. Ron Coleman, "a former Federalist Society chapter president," refers to the provision for speakers of "public platforms, honoraria and travel stipends." Ron Coleman, *Comment To The Federalist Society Caves to "Rape Culture" Orthodoxy*, MINDING THE CAMPUS (Oct. 19, 2014), https://www.mindingthecampus.org/2014/10/19/the-federalist-society-caves-to-rape-culture-orthodoxy/ [http://perma.cc/6SFC-J62Z]. For an example of a Federalist Society Student Division Speaker Reimbursement

And the organization is rolling in money; as of 2014, it had received more than $52 million in donations.[349] Funding comes from renowned conservative foundations such as the Charles G. Koch Charitable Foundation, as well as from other sources.[350] The organization enjoys such an abundance of resources that it can sponsor several hundred events each year while also covering travel costs for junior scholars seeking to present papers at workshops and conferences.[351] This type of alignment of conservative student groups, well-funded national conservative organizations, and conservative campus speakers is fairly typical.[352] The Young America's Foundation facilitates the invitation of conservative speakers by student groups and then substantially covers the costs.[353] When Ann Coulter was invited to University of California, Berkeley, the Foundation covered most of her $20,000 speaking fee.[354]

This alignment of wealth and power behind a right-wing speaker like Sommers casts a shadow over the Lewis and Clark no-platforming dispute. Recall that critics of the protesters maintained that the appropriate response for those who disagreed with Sommers was counter-speech: They should have responded in kind by expressing their own alternative views.[355] According to the critics, that is, protesters should have operated within the marketplace of ideas in a societal search for truth.[356] The problem with this approach, also advocated by numerous constitutional scholars,[357] is that it blinks reality. It pretends that we live and express ourselves in something akin to a Habermasian ideal speech situation.[358] According to Jürgen Habermas, an ideal speech situation is a counterfactual intersubjective encounter that is cleansed of domination, coercion, and other distortions, such as economic power.[359] As such,

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Request Form, covering travel expenses and honoraria, see https://s3.amazonaws.com/fedsoc-cms-public/library/doclib/20110724_SpeakersForm.pdf [http://perma.cc/XHC9-RUL6].

[349] *Federalist Society*, *supra* note 346.

[350] *Id. See* TELES, *supra* note 152, at 147–51 (discussing the funding of the Federalist Society).

[351] *Frequently Asked Questions*, FEDERALIST SOC'Y, *supra* note 348 (discussing number of events); *Support Funds for Presentation of Junior Scholarship*, FEDERALIST SOC'Y, https://fedsoc.org/opportunities/support-funds-for-presentation-of-junior-scholarship [http://perma.cc/7EUT-JQJH] (last visited Apr. 11, 2019).

[352] *See* Jeremy Bauer-Wolf, *Trickle-Down Antagonism*, INSIDE HIGHER ED (May 10, 2017), https://www.insidehighered.com/news/2017/05/10/gop-student-groups-mirror-tactics-national-organizations [http://perma.cc/89RE-MGSF] (discussing the phenomenon of conservative national groups coordinating with student chapters to bring conservative speakers to campuses).

[353] YOUNG AMERICA'S FOUNDATION, https://www.yaf.org [https://perma.cc/WSP4-8UXW].

[354] Stephanie Saul, *The Conservative Force Behind Speeches Roiling College Campuses*, N.Y. TIMES (May 20, 2017), https://nyti.ms/2rCnOw7.

[355] *See supra* notes 164–68 and accompanying text.

[356] *See supra* notes 164–68 and accompanying text.

[357] BEN-PORATH, *supra* note 5, at 39; CHEMERINSKY & GILLMAN, *supra* note 5, at 19–20; PALFREY, *supra* note 5, at 17; WHITTINGTON, *supra* note 5, at 28–50.

[358] *See infra* notes 359–62 and accompanying text.

[359] JÜRGEN HABERMAS, *What is Universal Pragmatics?*, *in* COMMUNICATION AND THE

an ideal speech situation "makes possible unforced universal agreement."[360] Truth, then, is an intersubjective phenomenon arising from a consensus among a group of speakers in such an ideal situation; the only force that matters is the rational force of the best argument.[361] In short, Habermas's ideal speech situation is what we wish the marketplace of ideas to be.[362]

But the marketplace of ideas is not an ideal speech situation. In reality, the marketplace of ideas is never free of distortions.[363] It is constantly skewed by prejudices, coercion, and especially economic power, as illustrated in many of the no-platforming disputes, including the Lewis and Clark imbroglio.[364] When one group of students, such as a student chapter of the Federalist Society, can access extensive funding to invite controversial speakers, such as Sommers, any ostensible societal search for truth is torpedoed before it even leaves the dock. As soon as the speaker arrives on campus, the starting point for discussion is tilted. The protesters in such scenarios might appear to interfere with the marketplace of ideas, but such a conclusion disregards what preceded the protests. The provision of funding and the invitation already undermined the search for truth.[365] The fact that conservative student organizations sometimes purposefully provoke no-platforming disputes only underscores the failure of the marketplace of ideas.[366]

EVOLUTION OF SOCIETY 1–3 (Thomas McCarthy trans., 1979). In his later work, Habermas spoke of an "ideal communication community." JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 322 (William Rehg trans., 1996).

[360] JÜRGEN HABERMAS, *The Hermeneutic Claim to Universality*, *in* JOSEF BLEICHER, CONTEMPORARY HERMENEUTICS 181, 206 (1980).

[361] *Id.*

[362] For more extensive discussions of Habermas's communication theory, see THOMAS MCCARTHY, IDEALS AND ILLUSIONS: ON RECONSTRUCTION AND DECONSTRUCTION IN CONTEMPORARY CRITICAL THEORY (1991); Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296 (2005) (discussing Habermas in conjunction with Gadamer and Derrida).

[363] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

[364] *See* PALFREY, *supra* note 5, at 67 (recognizing that, in the marketplace of ideas, some people have more power than others).

[365] "What emerges in the market might better be viewed as a testimonial to power than as a reflection of truth." STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 6 (1999).

[366] Gross disparities of wealth and an over-emphasis on the economic marketplace can threaten democracy and democratic rights. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); *see also* FELDMAN, FAILING CONSTITUTION, *supra* note 29, at 159–250 (arguing that gross inequality, among other factors, threatens American democratic government); MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO 266 (2009) (arguing that gross inequality of wealth "undermines the solidarity that democratic citizenship requires"); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (arguing that individual equality

The inherent distortions, the operations of economic and other forms of power, in these campus disputes remind us that a university (or the government) cannot maintain neutrality. When the search for truth is distorted before the conversation gets off the ground, then neutrality is impossible. The accumulation and protection of wealth, a central distorting factor in the marketplace of ideas, cannot occur without government sanction. By facilitating the operation of the economic marketplace and the ensuing disparities of wealth, the government has already placed its thumb on one side of the scales in any dialogic search for truth.[367] In the no-platforming disputes, the university (or college) that grants a platform contravenes neutrality at the outset. To be sure, denial of a platform would also contravene neutrality. But that fact only underscores a key point, neutrality is, quite simply, not an option.

Progressives and conservatives alike might not want university administrators to decide who is invited to speak on campus. Such administrative decision making, it is argued, resonates too closely with censorship.[368] Indeed, many university administrators undoubtedly would prefer not to make such decisions.[369] Ultimately, though, some individual or institution decides. And right now, conservative student groups and conservative national organizations with deep pockets often decide, in effect, whether to grant platforms for potential campus speakers. This crucial point circles back around to the substantive component of pluralist democracy: the need to guarantee full and equal participation for all.[370] When some individuals and groups—especially historically marginalized groups—are excluded from participating in decision-making, then the outcome of the decision process is likely to manifest and reinforce exclusion and marginalization—whether in Congress or on a university campus.[371]

In fact, conservative organizations currently seek to restrict and shape expression on campuses in multiple ways.[372] Numerous conservative Christian colleges, including Jerry Falwell's Liberty University, have denied platforms to speakers deemed unacceptable, including other Christians who question the politics of pro-Trump

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and freedom now depend on corporation decisions); K. Sabeel Rahman, *Reconstructing the Administrative State in An Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018) (reviewing JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017)) (arguing that privatization threatens democratic controls).

[367] Dahl argued that property and wealth endanger democracy if the wealthy can convert economic power into political power. DAHL, ECONOMIC DEMOCRACY, *supra* note 121, at 68–69. Likewise, Sandel argued that economic inequality undermines political community. SANDEL, *supra* note 15, at 330–32.

[368] CHEMERINSKY & GILLMAN, *supra* note 5, at 19–20, 72–73.

[369] *See id.* at 149 (the authors, both campus administrators, worry about the "risk [of] creating a campus orthodoxy of opinion").

[370] FELDMAN, *supra* note 13, at 396.

[371] If university administrators do not want to decide about campus platforms, then they should at least allow students to vote for potential speakers in fully fair elections—before the speakers are invited.

[372] *See supra* notes 373–74 and accompanying text.

evangelicals.[373] Meanwhile, organizations such as the American Legislative Exchange Council (ALEC) and the Goldwater Institute have proposed model legislation that would regulate campus speech while claiming to uphold First Amendment freedoms.[374] These organizations are not politically neutral. For example, ALEC is renowned for drafting model legislation that generally limits government, promotes an unregulated economic marketplace, and otherwise advances conservative causes.[375] ALEC encourages lawmakers to enact its various model Acts at the state level.[376] Its membership consists of nearly 2,000 state legislators, almost all of whom are Republicans, as well as corporations and corporate officers.[377] Most of ALEC's funding comes from corporations, including Pfizer, Bank of America, Best Buy, Walmart, AT&T, and Verizon.[378] Corporate members can effectively veto any proposed model legislation.[379]

The Goldwater Institute claims to be a libertarian organization.[380] Its so-called *Campus Free Speech Act* is instructive.[381] It expressly prohibits the types of "protests and demonstrations" that have disrupted no-platformed controversial conservative speakers like Sommers.[382] It also mandates that a university "shall strive to remain neutral, as an institution, on the public policy controversies of the day," yet the Act does not clarify what university actions might be construed to be non-neutral.[383] If the University president speaks against funding cuts for the University, is that prohibited speech on a policy controversy? And when might faculty speech be deemed

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[373] Laurie Goodstein, '*This Is Not of God': When Anti-Trump Evangelicals Confront Their Brethren*, N.Y. TIMES (May 23, 2018), https://nyti.ms/2GI8eX1; *The Invisible Free Speech Crisis*, NEW REPUBLIC (Apr. 10, 2018), https://newrepublic.com/article/147908/invisible-free-speech-crisis [http://perma.cc/4AHM-WBB9].

[374] Stanley Kurtz et al., *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST. (Jan. 30, 2017), https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf [http://perma.cc/5D3R-T9EA]; *Forming Open and Robust University Minds* (*Forum) Act*, AM. LEGIS. EXCH. COUNCIL (June 23, 2017), https://www.alec.org/model-policy/forming-open-and-robust-university-minds-forum-act [http://perma.cc/VD7N-2TDE].

[375] Mike McIntire, *Conservative Nonprofit Acts As A Stealth Business Lobbyist,* N.Y. TIMES (Apr. 21, 2012), https://nyti.ms/2jEpXXx.

[376] Molly Jackman, *ALEC's Influence Over Lawmaking In State Legislatures*, BROOKINGS (Dec. 6, 2013), https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures [https://perma.cc/6T4W-FL97].

[377] *Id.*

[378] *Id.*

[379] Information on ALEC is drawn from the following sources: McIntire, *supra* note 375; John Nichols, *ALEC Exposed*, THE NATION (July 12, 2011), https://www.thenation.com/article/alec-exposed [http://perma.cc/DVE5-TZYN] (last visited Apr. 11, 2019); ALEC EXPOSED, https://www.alecexposed.org/wiki/ALEC_Exposed [http://perma.cc/K4ZG-WVNZ] (last visited Apr. 11, 2019).

[380] GOLDWATER INST., https://goldwaterinstitute.org/about [http://perma.cc/QAS4-DRPG] (last visited Apr. 11, 2019).

[381] Kurtz et al., *supra* note 374, at 19–22.

[382] *Id.* at 20.

[383] *Id.*

institutional? If I send an email concerning a political controversy—for instance, let's say I interpret the Second Amendment as allowing gun regulation—would my email signature, which includes my faculty title, transform my writing into prohibited institutional speech? The Act even mandates an ominous Big-Brother-like "Committee on Free Expression," which shall report, criticize, and recommend university actions to comply with the legislative requirements.[384] Significantly, several Republican-controlled states have discussed and enacted legislation based on this model Act.[385]

CONCLUSION

The growing pluralism of American society in the early twentieth century led eventually to the emergence of pluralist democracy and the transformation of free expression into a constitutional lodestar. Ironically, then, in the no-platforming disputes, the critics of the protesters base their arguments on the lodestar status of free expression while resisting the democratic implications of a pluralist community.[386] While the challenges of a pluralist society engendered the strengthening of First Amendment freedoms in the twentieth century, those same challenges necessitate limits on free expression when necessary to preserve democracy. Expression cannot be free when it undermines the democratic status of marginalized groups in our polity. Certain issues must be off the table, beyond democratic debate, because debate of such issues would contravene the conditions necessary for robust pluralist democracy. All individuals, including members of historically marginalized groups, must be treated as full and equal citizens in good standing.

Nevertheless, this Article should not be interpreted as an argument against free expression. First Amendment freedoms are central to our pluralist democracy. But free expression has never been an absolute. As the Court has recognized over the years, the government can justifiably punish or otherwise restrict expression in numerous circumstances.[387] Regardless of whether the Court can be persuaded to deem speech uttered by right-wing provocateurs as categorically low-value expression outside First Amendment protection, the Court has allowed the government to restrict offensive expression in a variety of situations.[388] At a minimum, the no-platforming disputes demand similar judicial treatment.[389]

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[384] *Id.* at 21.

[385] *See* John Hardin, *You Can't Legislate Free Inquiry on Campus*, N.Y. TIMES (May 21, 2018), https://nyti.ms/2GDW69d.

[386] *See* Delgado & Stefancic, *supra* note 10, at 1922–32 (discussing four ironies of the campus free speech disputes).

[387] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (specifying the existence of low-value categories of expression outside First Amendment protection).

[388] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978) (upholding punishment of offensive language because of the potential presence of juvenile and captive audiences); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62–63 (1976) (upholding zoning laws restricting adult movie theaters because of the secondary effects of the expression).

[389] The Court has not held that hate speech is a low-value category, but the Court has

To be clear, hecklers are not necessarily entitled to shout down a speaker in a hostile audience situation. Frequently, in such situations, police should protect the speaker and control the crowd.[390] But in the no-platforming disputes, a hostile audience situation can be easily avoided. Universities and colleges should restrict the granting of platforms to speakers likely to threaten the full and equal standing of marginalized groups on the campuses. If a platform is denied in the first place, then a hostile audience situation will not arise. A student organization with deep pockets should not be free to invite speakers likely to challenge the full and equal status of some members of the campus community.[391]

A university or college, in such a situation, would not deny a platform to a conservative speaker because she is conservative per se. Conservative speakers must be allowed to speak and challenge progressive positions. But no speakers, conservative or progressive, can be allowed to undermine the substantive conditions necessary for democracy. No speakers can be allowed to undermine the democratic status of members of the political community.

This Article, finally, does not advocate for thought control.[392] While many individuals (including myself) would prefer that dislike and hatred of outsiders disappear, such attitudes are likely to persist far into the future. But for exactly that reason—because America has long sustained an inegalitarian, ascriptive tradition targeting societal outsiders—campuses should act to prevent the public expression of hatreds that undermine the existence of a truly democratic community.[393] The United States might harbor an inner Mr. Hyde, but we do not need to sit back and watch while letting him control the nation.

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suggested that, in some circumstances, hate speech can be constitutionally punished. *See* Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[390] Gregory v. Chicago, 394 U.S. 111, 121–22 (1969) (Black, J., concurring) (discussing the responsibilities of police).

[391] *See* Wright, *supra* note 182, at 183–84 (noting that controversial and well-known campus speakers have little trouble communicating their messages even if denied a speaking platform at a campus). In light of the nation's dramatic wealth and income disparities, numerous authors have argued that such inequalities threaten democratic government. *See, e.g.*, FELDMAN, FAILING CONSTITUTION, *supra* note 29; PIKETTY, *supra* note 366; GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017); SHELDON S. WOLIN, DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM (2008).

[392] *See* BEN-PORATH, *supra* note 5, at 41 (worrying about creating "thought police").

[393] *See* SMITH, *supra* note 27, at 1–6, 86–88, 470–71 (discussing inegalitarian ascriptive tradition).