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## A Catholic University Approach to Campus Speech: Using Constitutional Academic Freedom to Hold the Tension of Free Speech, Inclusive Diversity, and University Identity

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## ARTICLE

# A CATHOLIC UNIVERSITY APPROACH TO CAMPUS SPEECH: USING CONSTITUTIONAL ACADEMIC FREEDOM TO HOLD THE TENSION OF FREE SPEECH, INCLUSIVE DIVERSITY, AND UNIVERSITY IDENTITY

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As the general counsel of a university,<sup>1</sup> I have been thinking a lot recently about speech on college and university campuses. I suspect you have some familiarity with the current issues. In a nutshell, one group of stakeholders argues that universities<sup>2</sup> are according too much weight to the interest of free speech, to the detriment of other interests they consider more important: diversity, civility, and safety.<sup>3</sup> Another group argues that universities are according too much weight to diversity, civility, and safety, thereby compromising the speech freedoms these stakeholders consider

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1. It should go without saying—but since I am a lawyer, I will say it anyway—that the views expressed in this article are my own, and not those of my employer. However, my idea that U.S. colleges and universities can benefit from the experience of Catholic universities was inspired in large part by the resonance of the University of St. Thomas mission and convictions statements and their centrality to the work of the St. Thomas community to manage tensions between competing stakeholder interests.

2. For conciseness, I use “university” throughout this article to refer to all nonprofit higher education organizations that are generally understood to be part of academia. I set aside for-profit organizations because their pursuit of profit is inconsistent with academia’s institutional obligation to serve the common good, in the public trust, which I interpret to be consistent with public or charitable, but not with for-profit, identity. See *infra* notes 94–99 and accompanying text.

3. See, e.g., Jeremy Bauer-Wolf, *Lukewarm Embrace of Free Speech*, INSIDE HIGHER EDUC. (Oct. 11, 2017), <https://www.insidehighered.com/news/2017/10/11/students-opinions-free-speech-divided>; Ana Mari Cauce, *Messy But Essential*, INSIDE HIGHER EDUC. (Nov. 20, 2017), <https://www.insidehighered.com/views/2017/11/20/why-we-need-protect-free-speech-campus-essay>.

more important.<sup>4</sup> University administrators are in the middle, trying to manage the tension and persuade stakeholders that whatever approach the university has chosen is the appropriate one.<sup>5</sup> Everyone feels—as demonstrated in Charlottesville and elsewhere<sup>6</sup>—that the stakes are high.<sup>7</sup>

Tensions around campus speech are not new;<sup>8</sup> however, recent tensions arise in an environment that is more complex than ever.<sup>9</sup> Society and universities have become more pluralistic;<sup>10</sup> communities are increasingly

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4. See, e.g., Jamie Piltch, *Free Speech Isn't Under Attack on Campuses*, WASH. POST (Dec. 7, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/07/free-speech-isnt-under-attack-on-campuses>; Chris Quintana, *Colleges Are Creating 'A Generation of Sanctimonious, Sensitive, Supercilious Snowflakes,' Sessions Says*, CHRON. HIGHER EDUC. (July 24, 2018), <https://www.chronicle.com/article/Colleges-Are-Creating-a/243997>; Jeff Sessions, U.S. Attorney Gen., Address on the Importance of Free Speech on College Campuses at Georgetown Law (Sept. 26, 2017).

5. See, e.g., Cauce, *supra* note 3; Scott Jaschik, *Presidents and Provosts Gather to Consider Free Speech Issues*, INSIDE HIGHER EDUC. (Oct. 16, 2017), <https://www.insidehighered.com/news/2017/10/16/college-presidents-and-provosts-gather-consider-issues-free-speech>; Christina Paxson, Opinion, *Brown President: A Safe Space for Free Expression*, WASH. POST (Sept. 5, 2016), [https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-dont-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62\\_story.html](https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-dont-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62_story.html); AM. COUNCIL ON EDUC., *To the Point: Campus Inclusion and Freedom of Expression: Hateful Incidents on Campus* (2018), <https://www.acenet.edu/news-room/Documents/To-The-Point-Hateful-Incidents.pdf> [hereinafter *Hateful Incidents on Campus*].

6. See, e.g., Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death: How a Rally of White Nationalists and Supremacists at the University of Virginia Turned into a "tragic, tragic weekend,"* WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline>; Richard Cohen, Opinion, *Protestors at Middlebury College Demonstrate 'Cultural Appropriation' – of Fascism*, WASH. POST (May 29, 2017), [https://www.washingtonpost.com/opinions/protesters-at-middlebury-college-demonstrate-cultural-appropriation—of-fascism/2017/05/29/af2a3548-4241-11e7-9869-bac8b446820a\\_story.html](https://www.washingtonpost.com/opinions/protesters-at-middlebury-college-demonstrate-cultural-appropriation—of-fascism/2017/05/29/af2a3548-4241-11e7-9869-bac8b446820a_story.html).

7. See, e.g., Nicholas B. Dirks, *The Real Issue in the Campus Speech Debate: The University Is Under Assault*, WASH. POST (Aug. 9, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/08/09/the-real-issue-in-the-campus-speech-debate-the-university-is-under-assault>; Mark G. Yudof & Kenneth Waltzer, *Free Speech, Campus Safety, or Both*, CHRON. HIGHER EDUC. (Sept. 15, 2017), <https://www.chronicle.com/article/Free-Speech-Campus-Safety-or/241220>; Andy Thomason & Steven Johnson, *UNC Chancellor Steps Down and Orders the Removal of Silent Sam's Remains*, CHRON. HIGHER EDUC. (Jan. 14, 2019), <https://www.chronicle.com/article/UNC-Chancellor-Steps-Down-and/245472>.

8. See Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411 (1992); Natalie Shutler, Opinion, *The Free Speech-Hate Speech Trade-Off*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/opinion/berkeley-dean-erwin-chemerinsky.html>; ASS'N OF GOVERNING BOARDS, FREEDOM OF SPEECH ON CAMPUS: GUIDELINES FOR GOVERNING BOARDS AND INSTITUTIONAL LEADERS 3 (2017), [https://www.agb.org/sites/default/files/default/files/u27335/report\\_2017\\_free\\_speech.pdf](https://www.agb.org/sites/default/files/default/files/u27335/report_2017_free_speech.pdf) [hereinafter GUIDELINES FOR GOVERNING BOARDS].

9. See, e.g., ASS'N OF AM. C. & U., COLLEGE LEARNING FOR THE NEW GLOBAL CENTURY: A REPORT FROM THE NATIONAL LEADERSHIP COUNCIL FOR LIBERAL EDUCATION & AMERICA'S PROMISE (2007), [https://www.acu.org/sites/default/files/files/LEAP/GlobalCentury\\_final.pdf](https://www.acu.org/sites/default/files/files/LEAP/GlobalCentury_final.pdf).

10. See, e.g., ASPEN INST., PRINCIPLED PLURALISM: REPORT OF THE INCLUSIVE AMERICA PROJECT (2013), [https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/Principled-Pluralism\\_0.pdf](https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/Principled-Pluralism_0.pdf).

polarized;<sup>11</sup> costs of education have risen dramatically<sup>12</sup> while universities work to increase access;<sup>13</sup> our understanding of health and well-being has expanded beyond the physical;<sup>14</sup> social media and online speech dominate our discourse; and traditional boundaries between public, private, and professional are blurring.<sup>15</sup> The differences in higher education now versus fifty, or a hundred years ago are striking. Whether the law has kept appropriate pace with these changes in its approach to speech is an unresolved question.<sup>16</sup> It seems to me we should also be asking whether universities' approach to speech has kept appropriate pace: Does their current approach effectively serve the interests of universities, their students, and the public, given the realities of the twenty-first century?

My answer to both questions is no. In this article, I assert that the interrelated values of diversity, civility, and safety—which I refer to collectively as inclusive diversity—are as critical as speech to the distinctive in-

11. See, e.g., *The Big Sort*, ECONOMIST (June 19, 2008), <http://www.economist.com/node/11581447>.

12. See, e.g., Briana Boyington, *See 20 Years of Tuition Growth at National Universities*, U.S. NEWS & WORLD REP. (Sept. 20, 2017), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/See-20-years-of-tuition-growth-at-national-universities>; John W. Schoen, *Why Does a College Degree Cost So Much?*, CNBC (June 16, 2015, 10:22 AM), <https://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html>.

13. See, e.g., David Leonhardt, Opinion, *The Assault on Colleges—and The American Dream*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/opinion/sunday/the-assault-on-colleges-and-the-american-dream.html>; *Top Colleges Doing the Most for the American Dream*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/interactive/2017/05/25/sunday-re-view/opinion-pell-table.html>.

14. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, WELL-BEING CONCEPTS (2016), <https://www.cdc.gov/hrqol/wellbeing.htm>; Arielle Eiser, *The Crisis on Campus*, 42 AM. PSYCHOL. ASS'N. 18 (2011), <http://www.apa.org/monitor/2011/09/crisis-campus.aspx>.

15. See *Scholarly Activities and Reputation in the Digital Age: A Conceptual Framework*, CIBER, at 2 (Nov. 2016), [http://ciber-research.eu/download/20161116-Reputation\\_WP1\\_Scholarly\\_Activities.pdf](http://ciber-research.eu/download/20161116-Reputation_WP1_Scholarly_Activities.pdf) [hereinafter *Digital Age*]; Janet Eyler, *The Power of Experiential Education*, 95 LIBERAL EDUC. 4 (2009), <https://www.aacu.org/publications-research/periodicals/power-experiential-education>; Molly McCluskey, *Public Universities Get an Education in Private Industry*, THE ATLANTIC (Apr. 3, 2017), <https://www.theatlantic.com/education/archive/2017/04/public-universities-get-an-education-in-private-industry/521379/>; *Babson Study: Distance Education Enrollment Growth Continues*, ONLINE LEARNING CONSORTIUM (Feb. 9, 2016), [https://onlinelearningconsortium.org/news\\_item/babson-study-distance-education-enrollment-growth-continues-2/](https://onlinelearningconsortium.org/news_item/babson-study-distance-education-enrollment-growth-continues-2/); Barbara Kieslinger, *Academic Peer Pressure in Social Media: Experiences from the Heavy, the Targeted and the Restricted User*, FIRST MONDAY (June 2015), [https://www.researchgate.net/profile/Barbara\\_Kieslinger/publication/277566897\\_Academic\\_peer\\_pressure\\_in\\_social\\_media\\_Experiences\\_from\\_the\\_heavy\\_the\\_targeted\\_and\\_the\\_restricted\\_user/links/556d6c6d08aefcb861d7f5a6/Academic-peer-pressure-in-social-media-Experiences-from-the-heavy-the-targeted-and-the-restricted-user.pdf](https://www.researchgate.net/profile/Barbara_Kieslinger/publication/277566897_Academic_peer_pressure_in_social_media_Experiences_from_the_heavy_the_targeted_and_the_restricted_user/links/556d6c6d08aefcb861d7f5a6/Academic-peer-pressure-in-social-media-Experiences-from-the-heavy-the-targeted-and-the-restricted-user.pdf); Hamid R. Jamali, David Nicholas, & Eti Herman, *Scholarly Reputation in the Digital Age and the Role of Emerging Platforms and Mechanisms*, 25 RES. EVALUATION 37, 37 (2016).

16. See Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919 (2017); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687 (2016); Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016) [hereinafter *Balancing Free Speech*]; Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497 (2009); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010).

stitutional identity and mission of universities. I argue that campus speech tensions have been exacerbated by universities' failure to clearly articulate the essential nature of both interests to university identity and mission, and to publicly explain and assert the institutional autonomy that is necessary to manage the tension between them.

These failures have led stakeholders to expect that universities will apply the same balancing approach to manage speech tensions as the U.S. Supreme Court applies outside academia—an approach that usually results in an imbalanced outcome that favors one competing interest over the other. In practice, however, many universities appear to take a different approach: trying to achieve an even balance of competing interests, by compromising some aspects of each. The Court has demonstrated a willingness to facilitate this balance by granting substantial deference to university judgments in the realm of speech, but it has not articulated its decision-making framework or rationale in a way that universities, their stakeholders, or lower courts fully comprehend.<sup>17</sup> The lack of clarity about the proper scope of universities' autonomy when managing speech tensions has contributed to stakeholder confusion, concerns about institutional integrity, and declines in public trust in universities.<sup>18</sup>

I propose a new approach to campus speech that would better serve universities, their stakeholders, and constitutional interests, with greater transparency, accountability, and integrity. My approach is based on lessons gleaned from the experience of Catholic universities. Over the past fifty years, Catholic universities and their stakeholders have engaged in deliberate, communal efforts to manage the tension between the essential academic

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17. See Erica Goldberg & Kelly Sarabyn, *Measuring a Degree of Deference: Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 219 (2011); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 469 (2005) [hereinafter *Grutter's First Amendment*]; David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 235–37 (1990); Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti Versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405, 408, 459 (2013) [hereinafter *Citizen Servant*].

18. Confusion about the appropriate management of campus speech tensions is not the only reason for decreasing public trust in academia, but it clearly contributes to public concerns about the purpose and value of a university education. See Anna Brown, *Most Americans Say Higher Ed Is Heading in the Wrong Direction, but Partisans Disagree on Why*, PEW RES. CTR.: FACT TANK (July 26, 2018), <http://www.pewresearch.org/fact-tank/2018/07/26/most-americans-say-higher-ed-is-heading-in-wrong-direction-but-partisans-disagree-on-why/>; PUBLIC, *INSIDE HIGHER EDUC., 2018 SURVEY OF COLLEGE AND UNIVERSITY PRESIDENTS: A STUDY BY INSIDER HIGHER ED AND GALLUP*, 6, 23 (Scott Jaschik & Doug Lederman, eds., 2018), [https://www.insidehighered.com/system/files/media/2018\\_Presidents\\_Survey\\_Final.pdf](https://www.insidehighered.com/system/files/media/2018_Presidents_Survey_Final.pdf) [hereinafter 2018 GALLUP SURVEY] (noting decreasing American support for higher education, and discussing the extent to which university presidents believe campus racial protests and perceptions of liberal political bias contribute to this decline); Colleen Flaherty, *'Regaining Public Trust,' INSIDE HIGHER EDUC.* (Jan. 27, 2017), <https://www.insidehighered.com/news/2017/01/27/academics-consider-how-rebuild-public-trust-higher-education>; Scott Jaschik, *Why Republicans Don't Trust Higher Education*, *INSIDE HIGHER EDUC.* (Aug. 17, 2017), <https://www.insidehighered.com/news/2017/08/17/new-data-explain-republican-loss-confidence-higher-education>.

norms that underlie Catholic universities' identity as universities, and the essential ecclesiological norms that underlie their identities as Catholic. Rather than accepting an imbalanced outcome, Catholic universities acknowledged that *Catholic* and *university* were equally essential to their distinctive mission and identity. They committed to embrace and synthesize these competing interests by renewing their vision for the modern *Catholic university*—a unified institution that is both part of and distinguished from other universities and the Church. Their work, while imperfect, provides a useful model for all universities as they struggle with campus speech tensions and public ambiguity about university purpose and value.

My proposal requires an understanding of the differing applications of free speech principles within and outside academia, which, in my observation, are often only murkily understood by university stakeholders.<sup>19</sup> Part I provides context to help understand these distinctions. Part II describes in greater detail universities' current approach to managing campus speech tensions, its shortcomings, and the need for a new approach. Part III provides context to help understand the Catholic university experience. Part IV addresses the constitutionality of my proposal; it seeks to clarify the Court's decision-making framework, rationale, and the proper scope of deference to universities in the face of competing constitutional interests. Part V details my proposed approach, applying lessons from the Catholic university experience.

## I. FREE SPEECH AND THE UNIVERSITY MARKETPLACE

### A. *First Amendment Freedom of Speech*

Freedom of speech is guaranteed under the First Amendment of the U.S. Constitution, which states that “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>20</sup> However, this guarantee is not absolute; the Constitution only restricts or requires action by state actors. Moreover, the First Amendment provides no real guidance about what freedom of speech means and how it applies in practice. We rely on the Court to tell us.<sup>21</sup> It recognizes that completely unfettered speech would prevent the smooth functioning of society and is not entirely consistent with constitutional values.<sup>22</sup> Consequently, it interprets the Constitution to permit speech restrictions in limited circumstances.<sup>23</sup> It generally identifies these

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19. See also Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 205 (2012) [hereinafter *Discipline and Freedom*].

20. U.S. CONST. amend. I.

21. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 5–6 (2012) [hereinafter *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM*].

22. There is no single accepted theory to explain the Court's First Amendment decisions. See *id.*

23. See, e.g., *United States v. Williams*, 553 U.S. 285, 288–89, 292 (2008).

circumstances by applying a balancing construct that weighs the value of unfettered speech against the competing interests the government seeks to preserve and manage by regulating speech, assessing whether the competing interests are sufficiently compelling to justify the regulation.<sup>24</sup>

Of course, this is a metaphorical balancing process; it is not conducted using calibrated scales that assign weight to competing interests using objective measures like ounces and pounds. Rather, it involves subjective valuations of competing interests.<sup>25</sup> To be sure, these valuations are guided by the Court's norms (to the extent individual Justices determine they are compelled to follow them).<sup>26</sup> Ultimately, however, the balancing outcome depends on each decision maker's understanding of those norms, and on decision makers' understanding of their role in the balancing process—for example, whether they view it as their role to defer to existing norms or to facilitate the evolution and recognition of new ones.<sup>27</sup>

The term “balancing” suggests that the purpose of the balancing process is to maintain equal weight on both sides of the scale. Thus, in most situations, when a decision maker seeks to balance competing interests supported by different groups of stakeholders, there is an expectation of compromise, in which each side will give something up such that at the end of the process, both sides will be evenly positioned. But this is not the Court's approach to balancing under the First Amendment. Its balancing process almost always results in an *imbalance* in which one interest or set of interests is accorded more weight than another, and the heavier side of the scale wins.<sup>28</sup>

An imbalanced outcome in a First Amendment case is unlikely to surprise anyone. In fact, each side generally *hopes* for an imbalanced outcome. Speech cases involve highly valued interests, and each set of stakeholders wants to win. The public's expectation is that the winner almost always should be speech.<sup>29</sup> In practice, of course, the outcomes are mixed;<sup>30</sup> the

24. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003); *New York v. Ferber*, 458 U.S. 747, 759 (1982); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1329–32 (1988) [hereinafter *Intramural Speech*]. See generally Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 308–09 (1992) [hereinafter *Post-Liberal Judging*].

25. See Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1074–75 (1993) [hereinafter *Fraught*]; *Post-Liberal Judging*, *supra* note 24, at 294, 301; Goldberg, *supra* note 16, at 688; Grutter's *First Amendment*, *supra* note 17, at 574.

26. See Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

27. See *Fraught*, *supra* note 25, at 1085–86; Grutter's *First Amendment*, *supra* note 17, at 574.

28. See *Post-Liberal Judging*, *supra* note 24, at 293–97, 309.

29. See *Balancing Free Speech*, *supra* note 16, at 2; DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at x–xi.

30. See generally *Post-Liberal Judging*, *supra* note 24.

cases that rise to the Court generally involve circumstances where the constitutional value of competing interests is unclear. But as a general rule, the Court balances in favor of interests other than speech only if favoring speech would materially up-end deeply held and widespread community norms<sup>31</sup>—assuming, of course, that these norms do not themselves violate the Court’s understanding of constitutional guarantees.<sup>32</sup>

The Court has recognized a number of competing societal interests that always trump free speech rights,<sup>33</sup> and state actors are free to regulate speech to preserve these interests. Each of these interests shares the common goal of avoiding the heightened risk of personal harm or social or economic disruption that is inherent in these categories of speech.<sup>34</sup> Beyond these categorical interests, unless otherwise bound by precedent, the Court has generally sought to make its balancing decisions more predictable by utilizing forum analysis.

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31. Examples include: the expectation that minors should not be portrayed in or able to easily access obscene materials, *see, e.g.*, *United States v. Williams*, 535 U.S. 285 (2008); *Miller v. California*, 413 U.S. 15, 37 (1973); that we should not be disturbed by loud and raucous noise at times and places we ordinarily expect tranquility, *see, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and that organizations should be able to carry out their work without substantial disruption, *see, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). These decisions are consistent with Robert Post’s insight that “[a]s a sociological formation, community [a social order ‘in which persons are connected to each other through common socialization in mutual social norms’] is more fundamental than democracy.” Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 624 (2011) [hereinafter *Participatory Democracy*]. *See also Grutter’s First Amendment*, *supra* note 17, at 523.

32. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 866–67 (2008) [hereinafter *Institutions in the Marketplace*]. *See generally Fraught*, *supra* note 25; *Balancing Free Speech*, *supra* note 16, at 21, 32–34; *Grutter’s First Amendment*, *supra* note 17, at 574, 578.

33. While these “categorical” exceptions to protected speech generally are distinguished from the Court’s balancing approach to speech, in reality, balancing was still employed; it just occurred in the first instance of establishing the category. The distinction is one of categorical versus ad hoc balancing. *See Balancing Free Speech*, *supra* note 16, at 6, 34–35; *Post-Liberal Judging*, *supra* note 24, at 293, 308–09.

34. *See Balancing Free Speech*, *supra* note 16, at 3–4. These categorical interests include: avoiding violence and threats of violence, *see Virginia v. Black*, 538 U.S. 343 (2003); *Samuels v. Mackell*, 401 U.S. 66, 75 (1971); preventing material disruption or “substantial disorder or invasion of the rights of others” in an educational setting, *Tinker*, 393 U.S. at 513, or workplace, *see Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); preventing libel and defamation, *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974); prohibiting certain kinds of obscene materials, *see Williams*, 535 U.S. at 285; *Miller*, 413 U.S. at 37; and avoiding false and misleading commercial speech, *see Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). State actors also are free to regulate employee speech to some degree. The proper scope of such regulation by public universities has raised constitutional questions because the Court historically has treated universities differently than other participants in the marketplace of ideas, as further described in this article. *See Garcetti*, 547 U.S. at 425, 438 (Souter, J., dissenting).



Forum analysis grants more or less weight to the government's interest in regulating speech depending on the customary usage of the forum in which the speech occurs.<sup>35</sup> In public forums (such as public sidewalks) where speech traditionally has been unlimited, the courts accord little weight to competing government interests. In nonpublic forums that are never or rarely open to the public (such as the private offices of government officials), competing government interests are accorded more weight.<sup>36</sup> In forums that traditionally or by designation have a mixed purpose (such as auditoriums or meeting rooms made available for both private and public use), the courts permit the government to subject speech to reasonable time, place, and manner restrictions; however, any restrictions must be content-neutral and narrowly tailored, while also serving a compelling government interest and preserving "ample alternative channels for communication of the information."<sup>37</sup> In limited public forums, the courts permit more extensive restrictions, allowing the reservation of the forum "for certain groups or for the discussion of certain topics" so long as restrictions on speech are applied without consideration of the speaker's viewpoint.<sup>38</sup> The government's ability to regulate a forum it opens for public speech depends on

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35. See generally John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1169 (2014–15); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) [hereinafter *Governance and Management*]. Both Inazu and Post argue that public forum doctrine is not coherent. It seems likely to decrease in coherence as courts apply this doctrine to property that is decreasingly like a traditional, physical venue for speech. An example is the Eighth Circuit's decision in *Gerlich v. Leath*, in which the court held that a university's decision to permit students to use the university's trademarks, subject to certain policy conditions, had created a limited public forum. 861 F.3d 697 (8th Cir. 2017). The court relied on prior cases that applied forum analysis beyond traditional physical spaces to include state resources and programs, generally including the application of university-collected student activity fees, a school mail system, and a federal employee charitable contribution program. See *id.* at 705 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823–27, 829–30 (1995), *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–47 (1983), and *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985)). Post's claim that "in the past two decades . . . the Court seems to have lost track of why the First Amendment protects speech," particularly resonates in light of the holding of *Gerlich*: students' use of a university trademark does not expand or improve the opportunity for public discourse or otherwise advance the pursuit of truth or knowledge; what value can there be in allowing a student organization to tie its speech to a university's trademarks, aside from providing some kind of university imprimatur for that speech? Robert Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, YALE L. SCH. 7 (Sept. 28, 2017), <https://ssrn.com/abstract=3044434> (last updated Feb. 11, 2018) [hereinafter *Freedom of Speech and the University*]; see also *Post-Liberal Judging*, *supra* note 24, at 315.

36. See Inazu, *supra* note 35, at 1175–77.

37. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see also *Perry Educ. Ass'n*, 460 U.S. at 44 ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."); *Ward*, 491 U.S. at 781; *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

38. *Rosenberger*, 515 U.S. at 829.

how clearly it has articulated, and how consistently it has enforced, the forum's intended purpose.<sup>39</sup>

When the Court balances in favor of interests that compete with unfettered speech, it generally draws the boundaries around permitted restrictions as narrowly as practicable to avoid the socially disruptive consequences.<sup>40</sup> Additionally, it seeks to ensure any restriction is sufficiently clear to avoid ambiguity about whether it impermissibly "regulates a substantial amount of protected speech."<sup>41</sup>

### B. *Competing for Truth in the Marketplace of Ideas*

Since 1919, the First Amendment's free speech protections have frequently been explained using Justice Holmes' "marketplace of ideas" metaphor, equating public discourse to a competitive marketplace in which market acceptance is the "best test" of truth.<sup>42</sup> Courts, commentators, and university stakeholders regularly invoke this metaphor to justify the protection of speech within academia,<sup>43</sup> even outside the First Amendment context, in recognition of the truth-seeking mission that traditionally has guided universities.<sup>44</sup>

The marketplace metaphor reflects the antitrust principle<sup>45</sup> that a diversity of products and offerors will ensure an efficient market in which mar-

39. See *Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited disclosure, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate to a public forum." (citations omitted)); *Perry Educ. Ass'n*, 460 U.S. at 46–47; *Governance and Management*, *supra* note 35, at 1756.

40. See *Perry Educ. Ass'n*, 460 U.S. at 45; *United States v. Williams*, 553 U.S. 285, 292–93 (2008).

41. *Williams*, 553 U.S. at 304. At the same time, the Court recognizes that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* (citing *Ward*, 491 U.S. at 794).

42. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting 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"). See also *Healy v. James*, 408 U.S. 169, 180 (1972); Rabban, *supra* note 17, at 233. The marketplace metaphor has shown remarkable resonance given that truth-seeking is not conclusively understood to be the sole purpose or value served by the First Amendment. See generally *Balancing Free Speech*, *supra* note 16; Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004); *Participatory Democracy*, *supra* note 31; *Freedom of Speech and the University*, *supra* note 35.

43. See *Institutions in the Marketplace*, *supra* note 32, at 831; R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 807 (2007) [hereinafter *Emergence*]; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Healy*, 408 U.S. at 180, 197; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

44. See William J. Hoye, *The Religious Roots of Academic Freedom*, 58 THEO. STUD. 409, 415–22 (1997); *Intramural Speech*, *supra* note 24, at 1323–24; J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 267–69 nn.57–59 (1989) [hereinafter *Special Concern*]; *Emergence*, *supra* note 43, at 809–10.

45. See, e.g., Maurice E. Stucke, *Is Competition Always Good?*, 1 J. ANTITRUST ENFORCEMENT 162 (2013).

ket acceptance reveals product value.<sup>46</sup> The Court's limited regulation of the marketplace of ideas is consistent with this principle<sup>47</sup>: Anyone can join the marketplace, for any purpose that serves their fancy. With the exception of the few categories of speech restricted by the Court based on their inherent, heightened risk of harm or disruption,<sup>48</sup> participants can share whatever ideas they desire and can assess others' ideas based on whatever factors serve their personal interests.

But ensuring a diversity of offerors and products, without more, does not demonstrate any particular product's worth; market participants must assess the product for validity and value.<sup>49</sup> In a competitive commercial marketplace, market acceptance, validity, and value are generally aligned: simply count the number of products sold and ask whether the product did what consumers expected. Offerors whose products are proven not to work or are generally perceived to be of low worth must adapt their offerings, or lower their cost, to gain widespread market acceptance.

Not so in a competitive marketplace of ideas, where experience demonstrates that market acceptance does not always reflect an idea's validity or value<sup>50</sup>: The market sometimes rejects ideas simply because they are unconventional, complex, or can only be proven theoretically, even if supported by observable facts.<sup>51</sup> The market may dismiss ideas because they do not serve consumers' immediate or direct interests,<sup>52</sup> even when the ideas are well-grounded by rigorous, expert research.<sup>53</sup> Idea assessment poses unique challenges that do not exist in a commercial marketplace: How can individual market participants accurately determine the validity of ideas generated in pursuit of an unknown truth?<sup>54</sup> What compels the market to value ideas that individual market participants cannot personally test and prove? With plentiful, inexpensive, public-speech platforms that allow for anonymity or reward participants for the attention they receive, regardless of whether any evidence grounds the ideas they share, there are few incen-

46. See also *Balancing Free Speech*, *supra* note 16, at 2.

47. See *Emergence*, *supra* note 43, at 809; see also *supra* Part I.A.

48. See *supra* note 34 and accompanying text.

49. See DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 6–8.

50. See *Institutions in the Marketplace*, *supra* note 32, at 832–33; Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 237–38 (2017) [hereinafter *Search for Truth*].

51. Galileo's theory of heliocentrism is a well-known example of an idea now widely accepted as objectively true and beneficial that initially was rejected by the marketplace of ideas. See Hoye, *supra* note 44, at 412.

52. See Rabban, *supra* note 17, at 233; AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE, [hereinafter 1915 DECLARATION] reprinted in POLICY DOCUMENTS AND REPORTS 167, 167–68 (11th ed. 2014) [hereinafter REDBOOK].

53. See, e.g., UNION OF CONCERNED SCIENTISTS, GLOBAL WARMING SKEPTIC ORGANIZATIONS, <https://www.ucsusa.org/global-warming/solutions/fight-misinformation/global-warming-skeptic.html>.

54. See *Search for Truth*, *supra* note 50, at 232–38.

tives to withdraw or adapt attention-getting ideas that a large segment of the market, or even the offeror, knows or suspects to be flawed. The reality is, in the marketplace of ideas, market acceptance does not demonstrate validity or truth; it only demonstrates market acceptance.

Universities recognized many of these idea-assessment challenges long before Justice Holmes coined his metaphor.<sup>55</sup> Today's universities evolved from medieval communities of scholars who pursued truth for its own sake; they eventually formalized this pursuit, and the transmission of identified truths as knowledge, through the organized structure of universities.<sup>56</sup> University communities have long understood that without common standards of idea assessment, they cannot readily identify which ideas best reflect truth and thus deserve attention, promotion, and inclusion in the compendia of knowledge.<sup>57</sup> They resolved these challenges by adopting a system of self-regulation that applies common standards of idea assessment across academia.<sup>58</sup> This system distinguishes the university marketplace (my shorthand description for the subset of ideas generated or shared by or within university communities) from the public marketplace (my shorthand description for the broader marketplace of ideas that is generally open to anyone),<sup>59</sup> where there are no common standards of idea assessment.<sup>60</sup> As a result of academia's self-regulation, Justice Holmes' metaphor, which does not bear out in the public marketplace, works perfectly within the university marketplace, where market acceptance *is* the best test of truth.

## C. *The University Marketplace: Regulating Speech to Serve the Common Good*

### 1. *Academic Freedom: Assuring Academic Identity and Quality*

The terms "academia," "academe," and "the academy," commonly used to describe universities and scholars as a group, reflect their collective status as an institution: organizations and individuals who share a publicly recognized, common purpose and hold themselves accountable to shared

55. See generally Hoye, *supra* note 44.

56. See *id.* at 415–22; *Intramural Speech*, *supra* note 24, at 1324; *Special Concern*, *supra* note 44; *Emergence*, *supra* note 43, at 809–10.

57. See DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 6–7.

58. See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* at 265 (2013) [hereinafter *FIRST AMENDMENT INSTITUTIONS*]; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 *UCLA L. REV.* 1497, 1513–15 (2007) [hereinafter *Easy Answers*]; ASS'N OF AM. C. & U., *Academic Freedom and Educational Responsibility* 1, 4–7 (2006), <https://www.aacu.org/sites/default/files/files/about/academicFreedom.pdf> [hereinafter *AACU Statement on Educational Responsibility*].

59. My definition of "public marketplace" is derived from Robert Post's term "public discourse," which he uses to describe "the communicative acts deemed necessary for the free formation of public opinion." *Discipline and Freedom*, *supra* note 19, at 207; see also *Freedom of Speech and the University*, *supra* note 35, at 5.

60. See DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 6–10; *Freedom of Speech and the University*, *supra* note 35, at 13–22.

norms that distinguish them from society generally.<sup>61</sup> The shared norms of academia are designed to ensure that contributions to the university marketplace are subjected to rigorous professional standards and extensive competition from other participants within relevant disciplines, whose own contributions to the university marketplace have been demonstrated to have validity and value using the same standards of assessment.<sup>62</sup> This system of self-regulation is intended to facilitate continuous truth-seeking and knowledge expansion in a virtuous, accelerating cycle of learning and discovery.<sup>63</sup> If the system is working properly, only contributions meeting these shared standards of quality assurance will survive, rise, and be transmitted to students and the public marketplace,<sup>64</sup> while contributions failing to meet these standards will be rejected and buried.<sup>65</sup>

By holding themselves accountable to academia's common assessment process and standards, individual universities and scholars are marked as reputable members of academia.<sup>66</sup> Their reputations are further influenced by the extent to which they produce ideas that garner both market attention and acceptance.<sup>67</sup> To increase their odds, universities carefully select the scholars they invite to join their individual university communities, requiring prospective scholars to demonstrate a minimum level of expertise, diligence, and originality in the generation of ideas within the university's particular areas of educational focus, and preferring scholars who demonstrate a high level of originality and promise in these areas.<sup>68</sup>

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61. See *Institutions in the Marketplace*, *supra* note 32, at 840, 842; FIRST AMENDMENT INSTITUTIONS, *supra* note 58, at 47–48, 81, 86; Peter J. Byrne, *Constitutional Academic Freedom After Grutter: Getting Real about the “Four Freedoms” of a University*, 77 UNIV. COLO. L. REV. 929–53 (2006) [hereinafter *Getting Real*]; Grutter's First Amendment, *supra* note 17, at 571–72.

62. See DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 7–9; AACU Statement on Educational Responsibility, *supra* note 58, at 3.

63. See J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, J.C. & U.L. 79, 139 (2004) [hereinafter *Threat*]; DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 6, 63–64; *Search for Truth*, *supra* note 50, at 239–40.

64. See DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at xi–xii, 64–65.

65. See *Institutions in the Marketplace*, *supra* note 32, at 821, 824, 838; *Special Concern*, *supra* note 44, at 286; R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 27 (1977); *Discipline and Freedom*, *supra* note 19, at 205, 209–10. See also 1915 DECLARATION, *supra* note 52, at 207 (“Not less is it a distinguishable duty of the university to be the conservator of all genuine elements of value in the past thought and life of mankind which are not in the fashion of the moment. Though it need not be the ‘home of beaten causes,’ the university is, indeed, likely always to exercise a certain form of conservative influence. For by its nature it is committed to the principle that knowledge should proceed action . . . .”) (emphasis added).

66. See Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 J.L. & CONTEMP. PROB. 303, 309–10 & n.18 (1990).

67. See Jamali, Nicholas, & Herman, *supra* note 15 (discussing the evolving ways in which scholars build their reputations in a digital world); *Digital Age*, *supra* note 15, at 2 (asserting that digital developments and a broader interpretation of academia's purpose “both call for and enable taking a much more wide-ranging, inclusive and representative view of reputation-building scholarly achievement.”).

68. See, e.g., Alexander C. Kafka, *Another Sign of a Tough Job Market: Grad Students Feel Bigger Push to Publish*, CHRON. HIGHER EDUC. (May 30, 2018), <https://www.chronicle.com/arti>

Recognizing the institutional importance of a robust and flourishing university marketplace, and the inherent challenges of idea assessment, once a university accepts a faculty scholar into its community, the university guarantees the faculty member's freedom to offer, test, and promote ideas without interference or censure by the university,<sup>69</sup> so long as the faculty member maintains integrity with standards of conduct that are in accordance with recognized academic norms.<sup>70</sup> This guarantee is known as academic freedom, the most fundamental norm of academia.<sup>71</sup>

Academic freedom is a kind of free speech guarantee, but it is more constrained than First Amendment freedom of speech;<sup>72</sup> it only protects speech that is necessary for faculty to fulfill their professional obligations as scholars and teachers.<sup>73</sup> Specifically, it safeguards freedom in research and publication in the classroom when discussing the subject of the class and when speaking or writing as citizens.<sup>74</sup> These freedoms are conditional, requiring faculty to uphold related professional responsibilities: freedom in research is conditioned on "adequate performance of other academic duties"; freedom in the classroom does not extend to "controversial matter that has no relation to their subject"; and when speaking and writing as citizens,

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cle/Another-Sign-of-a-Tough-Job/243536; Maggie Kuo, *Hoping for a Faculty Job? Here's What Hiring Committees Are Looking For*, SCIENCE (Oct. 2, 2017, 3:40 PM), <http://www.sciencemag.org/careers/2017/10/hoping-faculty-job-heres-what-hiring-committees-are-looking>; Joel Warner & Aaron Clauset, *The Academy's Dirty Secret*, SLATE (Feb. 23, 2015, 8:00 AM), [http://www.slate.com/articles/life/education/2015/02/university\\_hiring\\_if\\_you\\_didn\\_t\\_get\\_your\\_ph\\_d\\_at\\_an\\_elite\\_university\\_good.html](http://www.slate.com/articles/life/education/2015/02/university_hiring_if_you_didn_t_get_your_ph_d_at_an_elite_university_good.html); Audrey Williams June, *How One College Reinvented Its Hiring Process to Better Test for 'Fit'*, CHRON. HIGHER EDUC., (July 6, 2018), <https://www.chronicle.com/article/How-One-College-Reinvented-Its/243866>.

69. See Rabban, *supra* note 17, at 284; William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 L. & CONTEMP. PROBS. 79, 87 (1990).

70. See AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, *reprinted in* REDBOOK, *supra* note 52 [hereinafter 1940 STATEMENT]; AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON RECRUITMENT AND RESIGNATION OF FACULTY MEMBERS, *reprinted in* REDBOOK, *supra* note 52; *Intramural Speech*, *supra* note 24, at 1333–35; *Discipline and Freedom*, *supra* note 19, at 205; Rabban, *supra* note 17, at 241–43, 255.

71. See Van Alstyne, *supra* note 69, at 87. The definitive standard of academic freedom for U.S. universities is set forth in 1940 STATEMENT, *supra* note 70, at 13–15. All other recognized, professional norms of academia derive from and support academic freedom. See AM. ASS'N OF UNIV. PROFESSORS, AAUP REPORT: ON THE RELATIONSHIP OF FACULTY GOVERNANCE TO ACADEMIC FREEDOM, *reprinted in* REDBOOK, *supra* note 52 [hereinafter FACULTY GOVERNANCE]; *Special Concern*, *supra* note 44, at 267, 318–20; *Intramural Speech*, *supra* note 24, at 1339; Larry G. Gerber, "Inextricably Linked": *Shared Governance and Academic Freedom*, 87 ACADEME 22, 23 (2001); Rabban, *supra* note 17, at 297–98.

72. See *Emergence*, *supra* note 43, at 7; AACU Statement on Educational Responsibility, *supra* note 58, at 3.

73. See 1940 STATEMENT, *supra* note 70, at 14; ACADEMIC FREEDOM OF STUDENTS AND PROFESSORS, AND POLITICAL DISCRIMINATION, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/academic-freedom-students-and-professors-and-political-discrimination> (last visited Sept. 18, 2018) [hereinafter ACADEMIC FREEDOM OF STUDENTS AND PROFESSORS].

74. See 1940 STATEMENT, *supra* note 70, at 14.

faculty members' "special position in the community imposes special obligations":

As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>75</sup>

Non-faculty personnel of a university may be published experts in their fields and officers of the university, but they are not entitled to academic freedom,<sup>76</sup> nor are they subject to its conditions.<sup>77</sup> There also is no clear, common expectation or definition of academic freedom for students, though there is broad recognition that students have a right to pursue and promote ideas in ways that enable them to learn what the university seeks to teach.<sup>78</sup>

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75. *Id.* The 1940 Statement is supplemented by 1970 Interpretive Comments, which provide additional guidance regarding the appropriate consequences for faculty who fail to comply with the standards governing this "extramural" speech:

The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to serve. Extramural utterances rarely bear upon the faculty member's fitness for continuing service. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.

1940 STATEMENT, *supra* note 70, at 15 (quoting AM. ASS'N OF UNIV. PROFESSORS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES, *reprinted in* REDBOOK, *supra* note 52, at 31 [hereinafter EXTRAMURAL UTTERANCES]). *See also* Rabban, *supra* note 17, at 234.

76. *See Intramural Speech*, *supra* note 24, at 1332–33, 1338–39; Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351, 1354–55 (1988).

77. *See* Yudof, *supra* note 76, at 1354–55.

78. *See* AACU Statement on Educational Responsibility, *supra* note 58; LYNN PASQUERELLA, ASS'N OF AM. C. & U., *Free Expression, Liberal Education and Inclusive Excellence* (Apr. 2017), <https://www.aacu.org/sites/default/files/files/about/FreeExpression2017.pdf> [hereinafter AACU Statement on Inclusive Excellence]. For an excellent and comprehensive discussion of student academic freedom, *see* WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 852–68 (5th ed. 2013); *see also* ACADEMIC FREEDOM OF STUDENTS AND PROFESSORS, *supra* note 73; AM. ASS'N OF UNIV. PROFESSORS, JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS, *reprinted in* REDBOOK, *supra* note 52, at 381 [hereinafter STUDENT RIGHTS]. The Joint Statement on Rights and Freedoms of Students was adopted in 1967 by the AAUP, the Association of American Colleges and Universities, and the United States Student Association and embraces broad speech freedoms for students in the context of their freedom to learn. *See, id.* at 383. The Joint Statement is often referenced for the proposition that students are entitled to academic freedom. *See, e.g.*, Henry Reichman, *On Student Academic Freedom*, INSIDE HIGHER EDUC. (Dec. 4, 2015), <https://www.insidehighered.com/views/2015/12/04/what-does-student-academic-freedom-entail-essay>. In practice, however, universities do not consistently follow the Joint Statement, and legal cases that sometimes are identified as supporting a student right of academic freedom generally have relied on the broader First Amendment freedoms that apply to the public marketplace. KAPLIN & LEE, *supra*, at 853–55; *see, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981); *cf. Healy v. James*, 408 U.S. 169, 181–82 (1972); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

Because academic freedom developed as a professional norm of academia and not as a legal right,<sup>79</sup> two related norms developed to safeguard faculty from potential violations of their academic freedom.<sup>80</sup> The first is tenure, which constrains universities' ability to terminate faculty who have met certain quality assurance standards.<sup>81</sup> The second is shared governance, which requires meaningful faculty involvement in university policymaking and other matters that have the potential to significantly affect either educational outcomes or faculty as a class of employees.<sup>82</sup> Consistent with this expectation, the most critical decisions affecting faculty, such as faculty tenure and termination, are expected to involve some level of peer review.<sup>83</sup>

In the best-case scenario, academic norms help ensure that faculty within each university and across academia will hold each other accountable to high standards in the realm of ideas, thereby fostering a vibrant and efficient university marketplace.<sup>84</sup> In the worst-case scenario, they could enable faculty within a university or across academia to keep standards low or incentivize groupthink.<sup>85</sup> The safeguard of shared governance also empowers faculty members in ways that can significantly challenge universi-

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79. There is no common, legislated right of individual academic freedom. Universities and faculty generally rely on contracts to allocate and resolve questions about their relative rights in these areas. *See* *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969); Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 *HAMLIN L. REV.* 467 (1999).

80. *See* *FACULTY GOVERNANCE* *supra* note 71, at 123; *see also* Gerber, *supra* note 71, at 23 (2001); *Threat*, *supra* note 63, at 84–85.

81. *See* 1940 *STATEMENT*, *supra* note 70; Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 *J.C. & U.L.* 115, 154–55 (2014).

82. Other matters that typically involve peer review include, for example, faculty hiring, evaluation, promotion, and grievances; the establishment of the curriculum and degree standards; student conduct proceedings; and the approval of university mission and values statements, policies, strategic plans, and budgeting processes. *See* *AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES*, reprinted in *REDBOOK*, *supra* note 52, at 117 [hereinafter *STATEMENT ON GOVERNMENT*]; *FACULTY GOVERNANCE*, *supra* note 71, at 123; Nugent & Flood, *supra* note 81, at 129, 153, & n.259.

83. These include faculty tenure and termination, *see* 1940 *STATEMENT*, *supra* note 70, at 16; *AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE* reprinted in *REDBOOK*, *supra* note 52, at 79, assessment of faculty scholarship, *see* Rabban, *supra* note 17, at 234, 263, 285–86, 293; *Special Concern*, *supra* note 44, at 278, 301; *Discipline and Freedom*, *supra* note 19, at 205, 209–10, and university accreditation, *see, e.g.*, *THE HIGHER LEARNING COMM'N, POLICY BOOK 17–26, 215–26* (2018), download. [hlcommission.org/policy/HLCPolicyBook\\_POL.pdf](https://www.hlcommission.org/policy/HLCPolicyBook_POL.pdf); *Policies, Guidelines & Procedures*, Middle States Comm'n on Higher Educ., (Sept. 1, 2018), <https://www.msche.org/?Nav1=POLICIES&Nav2=INDEX>.

84. *Institutions in the Marketplace*, *supra* note 32, at 857–59; *Easy Answers*, *supra* note 58, at 1514; *see* *Emergence*, *supra* note 43, at 823.

85. *See, e.g.*, Scott Jaschik, *Professors Urge Students: 'Think for Yourself,'* *INSIDE HIGHER EDUC.* (Aug. 30, 2017), <https://www.insidehighered.com/quicktakes/2017/08/30/professors-urge-students-think-yourself>.



ties: the required involvement of faculty in decision-making processes can have the effect of slowing change and making universities less agile and nimble in rapidly evolving educational conditions.<sup>86</sup> Perceived violations of any academic norms can jeopardize administrators' credibility and effectiveness<sup>87</sup> and lead to legal challenges.<sup>88</sup>

## 2. *Institutional Autonomy: An Essential Complement to Individual Academic Freedom*

Inherent in the norm of academic freedom is an expectation of institutional autonomy for universities—sometimes called institutional academic freedom.<sup>89</sup> A university can safeguard the academic freedom of its faculty only if the university's governing authorities leave the university free to do so.<sup>90</sup> At the same time, a university must retain sufficient autonomy from those protected by individual academic freedom to enforce the limits and conditions that define it.<sup>91</sup>

If truth-seeking is a core purpose of universities, and a competitive marketplace is essential to the pursuit of truth,<sup>92</sup> it may seem strange for academia to adopt a norm that constrains and conditions scholars' freedom to pursue and promote ideas.<sup>93</sup> Why not guarantee them the broader speech freedoms guaranteed by the First Amendment? This question is the key to understanding universities' distinctive role and treatment in the marketplace of ideas.

Universities are not just academic institutions; they have dual institutional identities and obligations, as academic *and* public or charitable organizations. Under both the self-imposed norms of academia, and the legally

86. See ASS'N OF GOVERNING BOARDS OF U. & C., *Shared Governance: Changing with the Times*, 8–9 (Mar. 2017), [https://www.agb.org/sites/default/files/report\\_2017\\_shared\\_governance.pdf](https://www.agb.org/sites/default/files/report_2017_shared_governance.pdf); Michael T. Miller & Myron L. Pope, *Leadership in Faculty Governance*, in POLICY AND UNIVERSITY FACULTY GOVERNANCE 45, 48 (J.A. Caplow & M.T. Miller, eds., 2003).

87. See, e.g., Terrence MacTaggart, *What Confidence Should Boards Give No-Confidence Votes?*, TRUSTEESHIP MAG. (Nov./Dec. 2012), [www.agb.org/trusteeship/2012/11/what-confidence-should-boards-give-no-confidence-votes](http://www.agb.org/trusteeship/2012/11/what-confidence-should-boards-give-no-confidence-votes).

88. See, e.g., *McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018).

89. See Rabban, *supra* note 17, at 229; Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 825, 851 (1983) ("[I]nstitutional autonomy was perceived as an integral element of the theory of academic freedom and played an important role in making German institutions among the intellectually freest in the world."); *Statement on Academic Principles*, ASS'N OF AM. U. (April 2013), <https://www.aau.edu/sites/default/files/AAU%20Files/AAU%20Documents/Academic-Principles.pdf> [hereinafter AAU Statement on Academic Principles]; *Academic Freedom Statement of the First Global Colloquium of University Presidents*, GLOBAL COLLOQUIUM OF U. PRESIDENTS (2005), [http://www.columbia.edu/~md2221/global\\_colloquium.htm](http://www.columbia.edu/~md2221/global_colloquium.htm).

90. See *Getting Real*, *supra* note 61, at 939.

91. See Rabban, *supra* note 17, at 260; *Discipline and Freedom*, *supra* note 19, at 208–09.

92. See *supra* notes 42–60 and accompanying text.

93. In my observation, many university stakeholders do not understand that individual academic freedom and First Amendment freedoms are not coextensive. See also *Discipline and Freedom*, *supra* note 19, at 205; Gary Olson, *The Limit of Academic Freedom*, CHRON. HIGHER EDUC. (Dec. 9, 2009), <https://www.chronicle.com/article/The-Limits-of-Academic-Freedom/49354>.

imposed norms of public and charitable institutions, universities must undertake a commitment to serve the common good<sup>94</sup>—that is, a purpose that is broadly understood to benefit the public<sup>95</sup>—in the public trust.<sup>96</sup> Universities are entrusted with public and charitable funding, and the benefits of tax exemption, only because they have committed to pursue a common-good mission,<sup>97</sup> with the further condition that they will use organizational resources only to advance this mission, and not for private benefit.<sup>98</sup> Consequently, in contrast to the public marketplace, the university marketplace is not open for any discourse that serves participants’ fancy, and seeking market attention is not a sufficient reason to participate.<sup>99</sup> Contributions to the

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94. Inazu, *supra* note 35, at 1193–95; *see* Bob Jones Univ. v. United States, 461 U.S. 574, 595 (1983) (affirming that an organization seeking tax-exemption “must demonstrably serve and be in harmony with the public interest”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (asserting that academic freedom is of “transcendent value to all of us, and not merely to the teachers concerned”); 1915 DECLARATION, *supra* note 52, at 8 (“The responsibility of the university as a whole is to the community at large”); 1940 STATEMENT, *supra* note 70, at 14 (“Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.”); Robert Post, *Why Bother with Academic Freedom?*, 9 FLA. INT’L UNIV. L. REV. 9, 12–13 (2013) [hereinafter *Why Bother*]; *see also Discipline and Freedom*, *supra* note 19, at 210–12; *Threat*, *supra* note 63, at 138.

95. *See The Common Good*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 26, 2018), <https://plato.stanford.edu/entries/common-good/>. Others may substitute “public good” or “public benefit” for “common good.” For the purpose of understanding the special obligations of educational organizations that are granted charitable status or are publicly funded and operated, these terms are interchangeable. *See generally* WHAT IS COLLEGE FOR? THE PUBLIC PURPOSE OF HIGHER EDUCATION (Ellen Condliffe Lagemann & Harry Lewis, eds., 2012).

96. Herrington J. Bryce, *The Public’s Trust in Nonprofit Organizations: The Role of Relationship Marketing and Management*, 49 CAL. MGMT. REV. 112 (2007); Kevin P. Kearns, *Ethical Challenges in Nonprofit Organizations: Maintaining Public Trust* 265, 265–66, in ETHICS IN PUBLIC MANAGEMENT (H. George Frederickson & Richard K. Ghere, eds., 2d ed. 2015); Rabban, *supra* note 17, at 233; AAU Statement on Academic Principles, *supra* note 89; *see* 1915 DECLARATION, *supra* note 52, at 5 (asserting that both public and private universities “constitute[ ] a public trust. The trustees [of universities] are trustees for the public. . . . They cannot be permitted to assume the proprietary attitude and privilege, if they are appealing to the general public for support.”).

97. I.R.C. § 501(c)(3) (2015); MODEL NONPROFIT CORPORATION ACT § 1.40 (3d ed. 2008); *Bob Jones Univ.*, 461 U.S. 574, 592 (to obtain tax exemption under § 501(c)(3), a university or other organization “must demonstrably serve and be in harmony with the public interest. The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”); Bryce, *supra* note 96, at 114; *see* 1915 DECLARATION, *supra* note 52.

98. This obligation of public and charitable institutions is partly legal and partly self-regulatory in nature. *See* I.R.C. § 501(c)(3) (2015); Internal Revenue Service Publication, GOVERNANCE AND RELATED TOPICS - 501(C)(3) ORGANIZATIONS (2008); MODEL NONPROFIT CORPORATION ACT, *supra* note 97; ASS’N OF GOVERNING BOARDS OF U. & C., AGB BOARD OF DIRECTORS’ STATEMENT ON THE FIDUCIARY DUTIES OF GOVERNING BOARD MEMBERS (July 24, 2015), [https://www.agb.org/sites/default/files/u27174/statement\\_2015\\_fiduciary\\_duties.pdf](https://www.agb.org/sites/default/files/u27174/statement_2015_fiduciary_duties.pdf); MINN. COUNCIL OF NONPROFITS, PRINCIPLES & PRACTICES FOR NONPROFIT EXCELLENCE (2014), <http://www.minnesotanonprofits.org/PrinciplesPractices.pdf> [hereinafter NONPROFIT EXCELLENCE]; Bryce, *supra* note 96, at 114, 128; Eileen Morrison, *Enforcing the Duties of Nonprofit Fiduciaries: Advocating for Expanded Standing for Beneficiaries*, 95 B.U. L. REV. (Annex) 1 (2015).

99. *See supra* notes 68–71 and accompanying text.

university marketplace, and its contributions to the public marketplace, must reflect the more transcendent goal of truth-seeking and knowledge promotion *for the common good*.

While truth-seeking, knowledge promotion, or a combination of the two is the fundamental, common-good institutional mission of universities, modern universities are diverse in kind and distinct in focus, and their missions have evolved over the past century to encompass a broader range of educational activities than communities of scholars traditionally pursued.<sup>100</sup> Universities customize their individual purposes<sup>101</sup> based on professional value judgments about how their particular university community can best serve the common good.<sup>102</sup> Universities' community standards—my shorthand description for a university's stated mission, values, documented policies, customary practices (including self-imposed institutional norms), and applicable law—reflect these judgments and tailored purposes, influence the university's decisions and allocation of resources, help shape the university's culture, and distinguish universities from each other.<sup>103</sup> In turn, these

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100. See *supra* note 56; Grutter's *First Amendment*, *supra* note 17, at 508; Adam Daniel & Chad Wellmon, *The University Run Amok! Higher Education's Insatiable Appetite for Doing More Will Be Its Undoing*, CHRON. HIGHER EDUC. (July 29, 2018), <https://www.chronicle.com/article/Why-The-Universities/244010>; Sol Gittleman, *Higher Education Has Always Been a Mess*, CHRON. HIGHER EDUC. (Nov. 15, 2015), <https://www.chronicle.com/article/Higher-Ed-Has-Always-Been-a/234162> (“[W]e have created a system of remarkable diversity and choice, made up of 4,000 to 6,000 institutions . . . an astonishing mixture of private, public, two-year, four-year, college, university, church-affiliated, faith-based, nonprofit, for-profit, on-campus, no-campus, online, urban, and rural, and ranging from institutions with fewer than 100 students to others with more than 80,000 and growing.”); AM. COUNCIL ON EDUC., *Statement on Academic Rights and Responsibilities* (June 23, 2005), <https://www.acenet.edu/news-room/Documents/Statement-on-Academic-Rights-and-Responsibilities-2005.pdf> [hereinafter ACE Statement] (“American higher education is characterized by a great diversity of institutions, each with its own mission and purpose. This diversity is a central feature and strength of our colleges and universities and must be valued and protected.”).

101. ACE Statement, *supra* note 100 (“The particular purpose of each school, as defined by the institution itself, should set the tone for the academic activities undertaken on campus.”); Grutter's *First Amendment*, *supra* note 17, at 508; see *Easy Answers*, *supra* note 58, at 1534.

102. A university's particular pursuits are likely to be shaped by judgments about economic and civic demands, educational needs of the communities they serve, and the services and educational environment they are best suited, or obligated, to provide in light of available resources and the goals of their founders, as understood by the university community over time. Cathy N. Davidson, *Is Higher Ed Omnivorous or Sucked Dry?*, CHRON. HIGHER EDUC. (Aug. 3, 2018), <https://www.chronicle.com/article/Is-Higher-Ed-Omnivorous-or/244137>; see Daniel & Wellmon, *supra* note 100; see also STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO* 104 (1994) [hereinafter *NO SUCH THING*] (“Speech is never a value in itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict.”); Michael J. Baxter, *Notes in Defense of Ex Corde Ecclesiae: Three Replies to Three Typical Objections*, 63 THOMIST 629, 631–33 (1999) (“[Fish's argument] suggests that all . . . appeals to academic freedom (as with freedom of speech) will at some point be suspended for the sake of some overriding conception of the good.”).

103. Grutter's *First Amendment*, *supra* note 17, at 572–73; see Kevin G. Creagh, *Building an Effective Bishop and President Relationship for the Mission of Catholic Higher Education: A Case Study of Five Bishop and President Partnerships*, 19 (2011) (explaining the importance of the mission, beliefs, shared assumptions, and norms to motivating employees and building organi-

distinctions influence faculty, students, and staff to join a particular university, and donors to fund it, over other available choices.<sup>104</sup>

In order for universities to retain their community members, maintain their funding, and advance their missions, their stakeholders must trust them to steward their resources in accordance with the university's known community standards and culture.<sup>105</sup> Institutional autonomy assures university administrators of their authority to make choices that, in their professional judgment, best maintain integrity with these standards, thereby preserving stakeholder trust.<sup>106</sup>

Institutional autonomy is not a common, legislated right of universities across the United States,<sup>107</sup> and the Constitution does not contain explicit safeguards for universities or academia as a whole, as it does for religion and the press.<sup>108</sup> Accordingly, universities' institutional autonomy is not just necessary to preserve stakeholder trust, it is *dependent* on stakeholder trust: If universities lose the trust of governing authorities (boards of trustees, legislators, regulators, the courts, and, in the case of religiously affiliated universities, religious authorities), authorities may act to constrain university autonomy. If universities lose the trust of stakeholders who can exercise significant influence without authority (faculty, students, alumni, donors, and the general public), a range of adverse consequences can result,<sup>109</sup> all increasing the risk that governing authorities will act.<sup>110</sup>

zational culture). *See generally* Melanie M. Morey & John J. Piderit, S.J., *CATHOLIC HIGHER EDUCATION: A CULTURE IN CRISIS* (2006) (addressing how Catholic universities maintain their distinctive identities and cultures).

104. Grutter's *First Amendment*, *supra* note 17, at 572–73; *see* Bryce, *supra* note 96, at 112, 114–15, 119, 123–24.

105. NONPROFIT EXCELLENCE, *supra* note 98; Bryce, *supra* note 96, at 113–14; Charles Garofalo & Dean Geuras, *Administrative Leadership and Transparency* 69, 72–74, in *ETHICS AND INTEGRITY IN PUBLIC ADMINISTRATION: CONCEPTS AND CASES* (Raymond W. Cox III ed., 2009); Kearns, *supra* note 96, at 270, 273; *see also* *Easy Answers*, *supra* note 58, at 1538. The AAUP expects universities to inform students about its community standards and characteristics. STUDENT RIGHTS, *supra* note 78, at 385 n.2.

106. *See Emergence*, *supra* note 43, at 813–16.

107. Some states have sought to protect public university autonomy through constitutional provisions. *See* Grutter's *First Amendment*, *supra* note 17, at 585–86; Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J. C. & U. L. 145, 171 (2009).

108. *See* U.S. CONST. amend. I.

109. These consequences may include, for example, a faculty no-confidence vote, *see, e.g.*, MacTaggart, *supra* note 87, censure by academic peers, *see, e.g.*, Colleen Flaherty, *Censures for Mizzou, Saint Rose*, *INSIDE HIGHER EDUC.* (June 20, 2016), <https://www.insidehighered.com/news/2016/06/20/aaup-votes-censure-two-institutions-alleged-violations-academic-freedom-and-calls>, student protests, and the resignation of campus leaders. *See, e.g.*, Scot Canon & Mara Rose Williams, *Mizzou Struggles to Rebuild Image After Hits to Reputation, Enrollment*, *KAN. CITY STAR* (May 28, 2017), <https://www.kansascity.com/news/state/missouri/article152939139.html> student protests.

110. Dan Simmons, *Tenure, Shared Governance at UW Faces Uncertain Future as Legislature Tinkers with Scott Walker Budget*, *WIS. STATE J.* (May 11, 2015), <https://madison.com/wsj/news/local/govt-and-politics/tenure-shared-governance-at-uw-face-uncertain-future-as-legislature/>

## II. THE CURRENT APPROACH TO CAMPUS SPEECH: MUDDLED MESSAGING AND MANAGEMENT

As flip sides of the same coin, it is natural for institutional autonomy and individual academic freedom to be in tension.<sup>111</sup> On one side, individual participants in the university marketplace want the maximum scope of freedom to express, test, and promote ideas in pursuit of market attention and acceptance. On the other, universities must ensure that these pursuits maintain integrity with the university's community standards, thus meeting their institutional obligations and preserving stakeholder trust.<sup>112</sup> When universities and their stakeholders reach different conclusions about whether an individual's pursuit or promotion of particular ideas is consistent with the university's institutional obligations, the situation is fraught: regardless of how the university manages the tension, it risks compromising or appearing to compromise its integrity,<sup>113</sup> ultimately risking the university's ability to effectively advance its mission.<sup>114</sup>

Integrity is in the eye of the beholder, informed by observation, experience, and information encountered privately and in the marketplace of ideas.<sup>115</sup> Because universities' public stakeholders may not engage directly with any particular university on a regular basis (or at all), universities' best opportunity to influence public perceptions is through their documented community standards and public marketplace communications. Universities can help ensure the accuracy of all stakeholders' perceptions by clearly articulating and explaining their community standards, making choices consistent with them, transparently explaining their choices, and holding themselves accountable to their publicized standards.<sup>116</sup> Problematically, when it comes to speech and inclusive diversity, universities have been less than clear and transparent about these standards, putting their accountability and integrity in question.

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article\_f7aaed63-dfde-5836-9147-eb6cab7c3f13.html; Michael Stratford, *Trump Administration Seeks to Open Harvard Admission Files*, POLITICO (Apr. 6, 2018), <https://www.kansascity.com/news/state/missouri/article152939139.html>; see, e.g., Daniel Turner, *What State Legislatures Are Doing to Protect Academic Freedom*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 11, 2016), <https://www.alec.org/article/what-state-legislatures-are-doing-to-protect-academic-freedom/>.

111. See *Threat*, *supra* note 63, at 89.

112. See *Emergence*, *supra* note 43, at 828.

113. See *id.*

114. Kearns, *supra* note 96, at 266–67, 272–73; see Bryce, *supra* note 96, at 113–15.

115. Garofalo & Geuras, *supra* note 105, at 72–74; Kearns, *supra* note 96, at 272–73; *Getting Real*, *supra* note 61, at 952; see Bryce, *supra* note 96, at 114–16, 119–20, 123–24; see also Morrison, *supra* note 98, at 1, 4–6.

116. Bryce, *supra* note 96, at 116, 119–20, 123–24, 128–29; Garofalo & Geuras, *supra* note 105, at 74; see Kearns, *supra* note 96, at 273.

A. *Universities Set Inappropriate Expectations Regarding Speech Freedoms in the University Marketplace*

To advance their common-good truth-seeking and knowledge promotion missions, universities must undoubtedly maintain an environment and culture that support free inquiry, dialogue, and debate.<sup>117</sup> At the same time, their institutional identities and obligations require them to regulate speech differently from the public marketplace, exercising judgment to make trade-offs and choices they consider to most effectively advance their missions in light of the circumstances and available resources.<sup>118</sup> When addressing recent campus speech tensions, universities and their faculty have failed to acknowledge and effectively explain these necessary judgments and the institutional autonomy that enables them; instead, the dominant theme is an unnuanced assertion that free speech is fundamental to university identity and mission.<sup>119</sup>

In their public statements, universities and faculty repeatedly promote the “more speech is better” approach to managing speech tensions.<sup>120</sup> Even

117. This intent is clearly reflected in both the 1915 DECLARATION and the 1940 STATEMENT. 1940 STATEMENT, *supra* note 70, at 14; *see* 1915 DECLARATION, *supra* note 52, at 6; *see also supra* Parts I.B and I.C.1.

118. AACU Statement on Inclusive Excellence, *supra* note 78, at 2 (“[T]hrough the missions of [individual universities] may be distinctive, they are united by the shared goals of educating students and advancing knowledge. There are circumstances under which the achievement of both objectives entails restrictions on free expression.”); Baxter, *supra* note 102, at 633; *see* NO SUCH THING, *supra* note 102, at 104; *supra* Parts I.B and I.C.

119. *See* Paxson, *supra* note 5 (blurring the distinctions between First Amendment speech freedoms and academic freedom by asserting that “freedom of expression is an essential component of academic freedom”); Erwin Chemerinsky, *Hate Speech Is Protected Free Speech, Even on College Campuses*, VOX (Updated Dec. 26, 2017), <https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest> (asserting that First Amendment freedom of speech principles are essential to academic freedom); Keith E. Whittington, *Commentary: Free Speech Is a Core Tenet of the Academy. College Trustees Really Ought to Know That.*, CHRON. HIGHER EDUC. (Dec. 5, 2018), <https://www.chronicle.com/article/Free-Speech-Is-a-Core-Tenet-of-245264>; GUIDELINES FOR GOVERNING BOARDS, *supra* note 8, at 10–11 (aligning academic freedom with free speech and asserting that faculty have the “same right to freedom of speech as do other campus stakeholders”); *see generally* *Hateful Incidents on Campus*, *supra* note 5 (addressing the value of freedom of expression solely in the context of the First Amendment, without any mention of the distinctions of the university marketplace). Interestingly, while the free speech advocacy organization FIRE asserts that public universities must comply with the same First Amendment speech guarantees that apply to the public marketplace, it takes a more open-minded approach to private university speech commitments than many academics. *State of the Law: Speech Codes*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC., <https://www.thefire.org/in-court/state-of-the-law-speech-codes/> (noting that it is acceptable for a private university to “define itself as being committed to values other than free speech, as long as the school makes it publicly and consistently clear that it holds a certain set of values above a commitment to free speech. . . . If a private college clearly does not promise free speech, and the college makes this known publicly and consistently, entering students have given informed consent and have voluntarily chosen to limit their own rights—in much the same way students entering military academies or theological seminaries understand that they are relinquishing many rights they would enjoy at a state college.”).

120. Jonathan R. Alger, *Free Speech Is Not a Free for All*, TRUSTEESHIP MAG. (Sept./Oct. 2017), <https://www.agb.org/trusteeship/2017/septemberoctober/free-speech-is-not-a-free-for-all>

private universities make statements that “prize[ ] and defend[ ] the right of free speech” for their community members.<sup>121</sup> Both public and private universities frame their speech policies using the same time, place, and manner balancing construct the Court applies to speech in non-academic designated and limited public forums.<sup>122</sup> Unsurprisingly, this approach supports an expectation that universities must and will manage speech tensions the same way the Court would manage them in the public marketplace.

But as free speech advocates regularly point out, in practice there is a disconnect between universities’ statements and actions.<sup>123</sup> Universities do not consistently balance in favor of speech.<sup>124</sup> They often prohibit hate speech and other speech that the Court permits in the public marketplace,

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(reinforcing the “more speech is better” approach by offering only First Amendment balancing solutions to campus speech tensions); *Private Universities*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC., <https://www.thefire.org/spotlight/public-and-private-universities/> (noting that most private universities hold themselves out a “bastions of free thought and expression” as if they were governed by First Amendment rules); *Yale University Report of the Committee on Freedom of Expression at Yale*, YALE UNIV. (Dec. 23, 1974), <https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale> [hereinafter *Yale Report*]; *San Diego State University Freedom of Expression Policy*, SAN DIEGO STATE UNIV. (updated June 2014), [https://newscenter.sdsu.edu/ootp/images/sdsu\\_freedom\\_of\\_expression\\_policy.1.pdf](https://newscenter.sdsu.edu/ootp/images/sdsu_freedom_of_expression_policy.1.pdf); *University of Michigan Freedom of Speech*, UNIV. OF MICH. (Oct. 2017), <https://publicaffairs.vpcomm.umich.edu/key-issues/freedom-of-speech-and-artistic-expression/>; *Carnegie Mellon University Freedom of Expression Policy*, CARNEGIE MELLON UNIV. (Feb. 2, 2007), <https://www.cmu.edu/policies/administrative-and-governance/freedom-of-expression.html>; Yudof & Waltzer, *supra* note 7; see Paxson, *supra* note 5; see also *Easy Answers*, *supra* note 58, at 1530–35; cf. Robert Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Oct. 25, 2017), <https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests> [hereinafter *No 1st Amendment Right*].

121. *Freedom of Expression and Dissent*, DARTMOUTH C. (July 1, 2015), <https://student-affairs.dartmouth.edu/policy/freedom-expression-and-dissent>; *Report of the Committee on Freedom of Expression*, U. OF CHICAGO (2015), <https://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf>; *Speech and Expression Policy*, GEORGETOWN U. (Jan. 1989), <https://studentaffairs.georgetown.edu/policies/speech-expression>.

122. *State v. Schmid*, 423 A.2d 615 (N.J. 1980); see *Speech and Expression Policy*, GEO. UNIV. (Jan. 1989), <https://studentaffairs.georgetown.edu/policies/speech-expression>.

123. Michelle Epstein Garland, *Hate Speech Versus Free Speech on College Campuses: Exploring the Viability of a Constitutional and Sustainable Campus Speech Code*, U. OF TENN. KNOXVILLE (2012), <https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1034&context=ccisymposium> (last visited Feb. 18, 2018); Benjamin Welch, *An Examination of University Speech Codes’ Constitutionality and Their Impact on High-Level Discourse*, U. OF NEB. LINCOLN (Aug. 8, 2014), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1046&context=journalismdiss>; see *Correcting Common Mistakes in Campus Speech Policies*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC. (2016), <https://www.thefire.org/spotlight/correcting-common-mistakes-in-campus-speech-policies/> [hereinafter *Correcting Common Mistakes*].

124. CHRON. HIGHER EDUC., *Focus: Free Speech on Campus, and Its Limits*, CHRON. HIGHER EDUC. (Oct. 26, 2016), <https://www.chronicle.com/resource/free-speech-on-campus-and-its/6121/> [hereinafter *Free Speech on Campus*]; Chris Quintana, *Under Fire, These Professors Were Criticized by Their Colleges*, CHRON. HIGHER EDUC. (June 28, 2017), <https://www.chronicle.com/article/Under-Fire-These-Professors/240457> [hereinafter *Under Fire*]; *Spotlight on Speech Codes 2018: The State of Free Speech on our Nation’s Campuses*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC. (2018), <https://www.thefire.org/spotlight-on-speech-codes-2018/> [hereinafter *Spotlight 2018*]; see, e.g., *Correcting Common Mistakes*, *supra* note 123.

but which individual universities consider to be inconsistent with their community standards.<sup>125</sup> Universities regularly discipline faculty and students whose speech is determined by administrators to offend these standards.<sup>126</sup> Free speech advocates assert that even when universities purport to apply the same balancing tests as the Court, universities apply time, place, and manner restrictions and other constraints in ways that minimize free speech opportunities to such a degree as to render them meaningless.<sup>127</sup> What causes this disconnect?

## B. *Universities Set Inappropriate Expectations About Their Balancing Process*

Because their frameworks look the same on paper, universities may believe they follow the same speech-balancing approach as the Court. But universities' approach differs from the Court's in three key ways that help explain the disconnect between universities' statements in support of free speech and their actions.

### 1. *Universities Weigh Speech Against Different Interests than the Court, Including the Emerging Norm of Inclusive Diversity*

When the Court balances speech interests, it considers whether unfettered speech will materially disrupt widespread community norms and interests that are not themselves unconstitutional.<sup>128</sup> Given the scope of the

125. *Free Speech on Campus*, *supra* note 124; *Yale Report*, *supra* note 120; see *Spotlight 2018*, *supra* note 124.

126. *See, e.g., Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 1448 (Apr. 3, 2017); *McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018).

127. *Speech Code of the Month: Middle Georgia State University*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC. (Sept. 12, 2017), <https://www.thefire.org/speech-code-of-the-month-middle-georgia-state-university/>; see *Correcting Common Mistakes*, *supra* note 123.

128. *See supra* notes 31–41 and accompanying text. The Court's most controversial cases tend to involve self-imposed community standards that are in the process of evolving, making it especially difficult to determine the appropriate constitutional outcome, and leading to split decisions. *See Linda Greenhouse, The Supreme Court: The Justices; Context and the Court*, N.Y. TIMES (June 25, 2003), <https://www.nytimes.com/2003/06/25/us/the-supreme-court-the-justices-context-and-the-court.html>. Greenhouse addresses the important role that societal context plays in Court decisions, quoting Justice O'Connor: "[C]ourts, in particular, are mainly reactive institutions. . . . [C]hange comes principally from attitudinal shifts in the population at large. . . . [R]are indeed is the legal victory—in court or legislature—that is not a careful byproduct of an emerging social consensus." *Id.* The cases involving "society's most profound disputes," *id.*, have often resulted in 5-to-4 decisions that, over time, contribute to erosion of public trust and confidence in the Court. Sarah Turberville & Anthony Marcum, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 Is Far More Common*, WASH. POST (June 28, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/?utm\\_term=.9b0719e38de3](https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/?utm_term=.9b0719e38de3). The Court, and particularly Chief Justice Roberts, seek to preserve trust by achieving consensus through narrower decisions. *Id.*; Adam J. White, *Judging Roberts*, WEEKLY STANDARD (Nov. 23, 2015, 12:00 AM), <https://www.weeklystandard.com/adam-j-white/judging-roberts> (quoting a speech by Chief Justice Roberts: "[T]he broader agreement you can get on the Court, the better," because it instills greater public confidence that the decision is correct. "And the way you get to broader agreement is to have a narrower decision. . . . I happen to



Court's purview, the community it considers is usually large: the entirety of society, the economy, a state, a city, or a national institution. Universities do not need to balance with these broader community interests in mind, except to the extent they are reflected in universities' own community standards that reflect institutional obligations. So long as universities uphold the law, the self-imposed norms of public and charitable academic institutions, and their other self-imposed standards that are consistent with these obligations,<sup>129</sup> they are free to weigh any other university interests they deem relevant, and to value those interests in their discretion as professional educational administrators.

Individual interests in unfettered speech pose a strange counterweight to university community norms, because academic freedom and the academic standards of individual disciplines inherently require universities to regulate scholars' speech consistent with the bounds of these norms, which are not coextensive with public marketplace speech freedoms.<sup>130</sup> Balancing outcomes that favor unfettered speech over the narrower parameters of academic freedom or academic disciplinary standards obviously would materially disrupt the shared norms that govern the university marketplace, as would balancing outcomes that weigh tenure rights, or other community standards that bear the imprimatur of a shared governance process, less heavily than individual interests in unfettered speech. This suggests that unless the law compels otherwise,<sup>131</sup> if a university is operating in accordance with academic norms, then it is not only permissible, but *obligatory* for universities to limit speech in the university marketplace consistent with the bounds of academic freedom and other community standards.

Current campus speech tensions demonstrate that, although they are not yet fully recognized as institutional norms, some of these other standards—namely, the interrelated values of diversity, civility, and safety that define inclusive diversity<sup>132</sup>—are embraced by much of academia and

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think that's a good thing, that our decisions reach as narrowly as possible, rather than the justices trying to write broadly to cover all sorts of situations that they might not have anticipated or thought about carefully enough.'").

129. See *supra* Part I.C; McConnell, *supra* note 66, at 309–10, n.18.

130. See *supra* Parts I.B and I.C.

131. As discussed in Part I.A and Part IV, the law generally does not compel universities to follow the same free speech rules as apply to the public marketplace. While many public universities have created public forums on their campuses, there is no legal obligation for universities to do so. See *supra* notes 35–39 and accompanying text; see also *supra* Part IV.

132. There is no single, accepted term that embodies these interrelated values. Jeffrey Flier, *Against Diversity Statements*, CHRON. HIGHER EDUC. (Jan. 3, 2019), <https://www.chronicle.com/article/Against-Diversity-Statements/245400> (noting that despite the academic community's widespread view that diversity and inclusion are essential values, “the key terms—diversity, equity, and inclusion—are rarely defined with specificity, and their meaning has been subtly shifting.”). The Association of American Colleges and Universities (AACU), which represents approximately 1,400 colleges and universities that embrace the concept of a liberal education, introduced the term “inclusive excellence” to reflect its commitment to both equity and quality of education, juxtaposing faculty and student freedoms of inquiry and expression against students' freedom to

weighted heavily by many universities when balancing speech interests.<sup>133</sup> Universities' support for diversity by itself is not new; this interest has developed over the past century with society's increasing attention to equity in educational opportunities.<sup>134</sup> More recently, universities are coming to understand, through growing attention to their students' experiences and outcomes and academically validated knowledge, that support for diversity is meaningless if those who bring diversity to the marketplace feel so unwelcome or unheard that they do not engage or persist.<sup>135</sup> This awareness has

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an effective educational environment: "A commitment to inclusivity, as well as respect for others and free inquiry, must be paramount in maintaining an environment in which the free exchange of ideas can thrive and in guiding the determination of whether speech is protected under academic freedom." AACU Statement on Inclusive Excellence, *supra* note 78, at 2. In an earlier statement, AACU made the argument for civility: "In a learning context, one must both respect those who disagree with oneself and also maintain an atmosphere of civility. Anything less creates a hostile environment that limits intellectual diversity and, therefore, the quality of learning." AACU Statement on Educational Responsibility, *supra* note 58, at 3.

133. See *supra* note 132; AACU Statement on Inclusive Excellence, *supra* note 78; ASS'N OF GOVERNING BOARDS, GOVERNING BOARD ACCOUNTABILITY FOR CAMPUS CLIMATE, INCLUSION, AND CIVILITY 5–7 (2016), [https://www.agb.org/sites/default/files/agb-statements/statement\\_2016\\_campus\\_climate.pdf](https://www.agb.org/sites/default/files/agb-statements/statement_2016_campus_climate.pdf) [hereinafter CAMPUS CLIMATE] (noting that "[d]iversity is a part of the value proposition" for universities "because of its demonstrated educational benefits for all students," "[d]iversity without inclusion is only a metric" and "requires sustained and intentional institutional commitment and action," and "[t]olerance and civility are at the heart of true freedom of expression"); *Hateful Incidents on Campus*, *supra* note 5, at Background ("Recent events on college campuses—and in greater civil society—have too often juxtaposed the values of diversity and inclusion against those of freedom of expression, when these values can and should be mutually reinforcing"); Lorelle L. Espinosa, Jennifer R. Crandall, & Philip Wilkinson, *Free Speech and Campus Inclusion: A Survey of College Presidents*, HIGHER EDUC. TODAY (Apr. 9, 2018), <https://www.higheredtoday.org/2018/04/09/free-speech-campus-inclusion-survey-college-presidents/> (describing both campus inclusion and free expression as "ideals" and reporting that "[n]early all [university] presidents indicated that promoting an inclusive society (98 percent) and protecting freedom of speech (98 percent) are extremely or very important to our democracy, reinforcing the understanding that these two concepts are not mutually exclusive").

134. Angela Chen, *Addressing Diversity on College Campuses: Changing Expectations and Practices in Instructional Leadership*, 7 HIGHER EDUC. STUDIES 17, 18 (Mar. 27, 2017); Susan VanDeventer Iverson, *Camouflaging Power and Privilege: A Critical Race Analysis of University Diversity Policies*, 243 EDUC. ADMIN. Q. 586, 599 (2007); *Board Statement on Diversity, Equity, and Inclusive Excellence*, ASS'N OF AM. C. & U. (June 27, 2013), <https://www.aacu.org/about/statements/2013/diversity> [hereinafter AACU Statement on Diversity]; see *Statement on Diversity by the Board of Directors of the Association of American Universities*, ASS'N OF AM. U. (Dec. 18, 2015), <https://www.aau.edu/newsroom/press-releases/statement-diversity-board-directors-association-american-universities>.

135. See Chen, *supra* note 134, at 18–20 (addressing higher education's increasingly nuanced understanding of diversity and addressing the effects of exclusionary practices on the student experience); Bryan McKinley Jones Brayboy, *The Implementation of Diversity in Predominantly White Colleges and Universities*, 34 J. BLACK STUDIES 72, 72–74 (arguing that to achieve diversity, it is insufficient for universities to increase numbers of underrepresented individuals; instead, they must make wholesale changes in organizational structures and activities); Sylvia Hurtado et al., *Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice*, 21 REV. HIGHER EDUC. 279, 289–96 (1998); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343, 385–86 (1991) (arguing that racist speech distorts discourse by disempowering minority rebuttal, "a result at odds, certainly, with marketplace theories of the first amendment"); *Advancing Diversity and Inclusion in Higher Education: Key Data Highlights Focusing on Race and Ethnicity and Promising Practices*, U.S. DEPT OF

given rise to the additional interests of civility and safety.<sup>136</sup> As I define and apply these terms in the university context, civility is an expectation that members of the community will treat each other with dignity,<sup>137</sup> courtesy, and professionalism. Safety is a shorthand way to describe an expectation that all members of the university community will respect both the physical and mental well-being of other community members—an expectation grounded in an expanding notion of health that includes mental health, which has been demonstrated to be critical to student success.<sup>138</sup>

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EDUC., 3, 35–45 (Nov. 2016), <https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf> [hereinafter *Advancing Diversity*]; Piltch, *supra* note 4; AACU Statement on Diversity, *supra* note 134; Christine M. Riordan, *Diversity Is Useless Without Inclusivity*, HARV. BUS. REV. (June 5, 2014), [https://hbr.org/2014/06/diversity-is-useless-without-inclusivity?referral=03758&cm\\_vc=RR\\_item\\_page.top\\_right](https://hbr.org/2014/06/diversity-is-useless-without-inclusivity?referral=03758&cm_vc=RR_item_page.top_right); see generally DARYL G. SMITH, DIVERSITY'S PROMISE FOR HIGHER EDUCATION (2009); RACE AND HIGHER EDUCATION: RETHINKING PEDAGOGY IN DIVERSE COLLEGE CLASSROOMS (Annie Howell & Frank Truitt, eds., 2003); Iverson, *supra* note 134, at 599; Carol Elam & Gilbert Brown, *The Inclusive University: Helping Minority Students Choose a College and Identify Institutions that Value Diversity*, 187 J. C. ADMISSION 14 (2005).

136. Robert Post suggests that student demands for civility and safety “reflect a desire for universities to adopt an educational commitment that can properly be called *in loco parentis*”; “[i]f universities were indeed to formulate their educational mission in this way, they would accept the obligation to educate the entire student, not just those aspects of students that directly interact with the university environment.” *Freedom of Speech and the University*, *supra* note 35, at 26. My own observations suggest a somewhat different characterization; they do not support the proposition that an obligation to educate the “entire student” equates to the kind of authority, responsibility, and control over students that *in loco parentis* suggests (although, in my view, educating the “entire student” is wholly proper so long as universities clearly articulate this intent as part of their community standards). Rather, it seems to me that students’ desire and universities’ obligation (regardless of whether they undertake the mission to educate the entire student) is to maintain a learning environment that offers students the best opportunity to learn whatever lessons the university seeks to offer (which may include, if the university is seeking to educate the whole person, lessons that promote both intellectual and personal development, such as developing the self-awareness and self-knowledge that often comes from engaging with challenging speech and conduct untethered from particular disciplinary studies). Ensuring an effective learning environment for all students is a very different proposition than asserting parental control of student speech and expressive conduct.

137. The concept of dignity is not clearly defined as a community norm within the United States, but it has both moral and constitutional relevance. See Guy Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT’L L.J. 277, 283–89 (2008); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 548–53 (2006). I use it to mean a level of mutual respect that is more akin to its Catholic meaning: a “vision of the transcendent worth—the sacredness—of human beings.” THE VATICAN, CATECHISM OF THE CATHOLIC CHURCH 27 (2d ed. 1994) [hereinafter CATECHISM].

138. *Mental Health on College Campuses: Investments, Accommodations Needed to Address Student Needs*, NAT’L COUNCIL ON DISABILITY (July 21, 2017), [https://www.ncd.gov/sites/default/files/NCD\\_Mental\\_Health\\_Report\\_508\\_0.pdf](https://www.ncd.gov/sites/default/files/NCD_Mental_Health_Report_508_0.pdf); see, e.g., Ingrid M. Nembhard & Amy C. Edmondson, *Making It Safe: The Effects of Leader Inclusiveness and Professional Status on Psychological Safety and Improvement Efforts in Health Care Teams*, 27 J. ORGANIZATIONAL BEHAV. 941 (2006); see also CAMPUS CLIMATE, *supra* note 133, at 6 (“[I]ndividuals should have the right to be safe from physical or emotional harm or harassment in their expression of ideas, beliefs, values, lifestyles, diversity, and personal characteristics.”).

The prevalence of university balancing outcomes that compromise interests in unfettered speech in favor of inclusive diversity<sup>139</sup> suggests that inclusive diversity is an emerging institutional norm of universities, if not all academia, that is becoming just as essential to modern university identity and mission as other institutional norms.<sup>140</sup> Some stakeholders have derided balances that favor inclusive diversity over unfettered speech as unnecessary and even harmful “coddling” of university students, eroding the foundational principles of free speech that these stakeholders understand to define universities.<sup>141</sup> This derision is rooted in a misunderstanding about the unique role and freedoms of universities.<sup>142</sup>

While inclusive diversity directly competes with interests in unfettered speech,<sup>143</sup> it is fully consistent with the objectives that underlie the self-regulatory system that governs the university marketplace.<sup>144</sup> Maintaining integrity with academia’s institutional purposes and norms requires universities to support not only a diversity of university marketplace participants, but also an environment that ensures the generation and fair assessment of their diverse ideas in furtherance of the university’s customized mission, in accordance with academic standards of idea assessment.<sup>145</sup> In other words, safety and civility are necessary precursors for diverse offerors to offer diverse ideas, and to assure diverse offerors that their ideas will be fairly

139. See *supra* notes 124–27 and accompanying text.

140. See Grutter’s *First Amendment*, *supra* note 17, at 573 (“Institutional norms are not fixed. They change and evolve as institutions do.”). See also Flier, *supra* note 132 (“Most in the academic community, including myself, see efforts toward greater diversity and inclusion as essential to the core commitments of a humane and liberal society, such as eliminating inappropriate barriers, creating equal opportunity, and displaying tolerance and respect for group differences.”).

141. GUIDELINES FOR GOVERNING BOARDS, *supra* note 8, at 9–11; Sessions, *supra* note 4; Quintana, *supra* note 4; see, e.g., Cauce, *supra* note 3.

142. See *supra* Part I.C.2; see also *Freedom of Speech and the University*, *supra* note 35, at 22–27.

143. See Grutter’s *First Amendment*, *supra* note 17, at 507; GUIDELINES FOR GOVERNING BOARDS, *supra* note 8, at 5 (describing the tension between “demands for unfettered freedom of speech” and “the desires of students and communities for a safer, more civil environment”).

144. See *supra* Part I.C.1. See also *Freedom of Speech and the University*, *supra* note 35, at 22–27; Piltch, *supra* note 4 (“[M]any student demands [for inclusive diversity] aren’t inherently at odds with liberalism. . . . In fact, a commitment to diversity can strengthen it: The more perspectives and arguments that are brought forward, the better public discourse about freedom, justice and equality can be.”).

145. See *supra* Parts I.B and I.C. See also Piltch, *supra* note 4 (“With student bodies that come from increasingly different backgrounds, universities are being forced to reckon with the fact that they haven’t historically valued the free expression of all groups equally. History and English professors have made a concerted effort to address this problem in their classrooms. It’s not as clear, though, that universities have confronted it in their public spaces. . . . Students are not snowflakes unable to handle ideological difference. They’re simply using the free speech that liberal universities have always valued in order to guarantee that the multicultural ideas and commitment to intellectual justice they’ve learned in the classroom are respected outside the classroom.”).

evaluated, thereby fostering a competitive and efficient university marketplace.<sup>146</sup>

Moreover, a university has no academic obligation to encourage or support the pursuit or promotion of ideas that are judged by academic standards to be invalid, irrelevant, or of low or no value,<sup>147</sup> or that the university reasonably determines to be inconsistent with its institutional obligation to serve the common good.<sup>148</sup> If a university understands the common good to require a commitment to inclusive diversity and the regulation of certain kinds of speech in the university marketplace that it considers to compromise that commitment, and its community standards clearly articulate its commitment and regulatory parameters, it would be wholly proper—institutionally—for the university to proceed with that regulation, so long as the parameters are consistent with the bounds of academic freedom. Under those circumstances, assigning less weight to inclusive diversity than to speech that exceeds the bounds of academic freedom would rightly raise concerns about institutional integrity.

## 2. *Universities Do Not Clearly Define or Explain the Interests They Weigh or the Balance They Strike*

Published descriptions of campus speech tensions regularly identify inclusive diversity as a university interest that competes with free speech,<sup>149</sup> and universities regularly make balancing decisions that compromise unfet-

146. See *supra* notes 42–46 and accompanying text. The importance of inclusive diversity to commercial marketplace efficiency also has been academically validated; see, e.g., David Feiter, *The Case for Team Diversity Gets Even Better*, HARV. BUS. REV. (Mar. 27, 2014), <https://hbr.org/2014/03/the-case-for-team-diversity-gets-even-better>; Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation>; Riordan, *supra* note 135.

147. ACE Statement, *supra* note 100, at 2 (“The validity of academic ideas, theories, arguments and views should be measured against the intellectual standards of relevant academic and professional disciplines. Application of these intellectual standards does not mean that all ideas have equal merit. The responsibility to judge the merits of competing academic ideas rests with colleges and universities and is determined by reference to the standards of the academic profession as established by the community of scholars at each institution.”); AACU Statement on Inclusive Excellence, *supra* note 78, at 2 (“While all views have equal standing in the public square under the First Amendment, this is not the case in the classroom.”). See DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 7–8.

148. See *supra* notes 92–106 and accompanying text; see also Grutter’s *First Amendment*, *supra* note 17, at 506–07; Aaron R. Hanlon, *Why Colleges Have a Right to Reject Hateful Speakers Like Ann Coulter*, NEW REPUBLIC (Apr. 24, 2017), <https://newrepublic.com/article/142218/colleges-right-reject-hateful-speakers-like-ann-coulter> (noting that a particular approach to divisive speech is “the kind of value judgment that lies at the heart of a liberal arts education . . . . This has always meant deciding what people needed to know, but also what they don’t need to know—or at least which knowledge and skills deserved priority in one’s formal education.”).

149. Lorelle L. Espinosa, Jennifer R. Crandall & Elizabeth Howard, *For College Students and Presidents Alike, Free Speech Is a Balancing Act*, HIGHER EDUC. TODAY (Apr. 9, 2018), <https://www.higheredtoday.org/2018/04/09/college-students-presidents-alike-free-speech-balancing-act/> (“[W]e also know that the tension is not over whether inclusion and speech are both important—they are. It’s what campus communities do when trying to achieve both ideals in the face of

tered speech in favor of inclusive diversity.<sup>150</sup> But neither universities nor the broader collective of academia has clearly acknowledged and defined inclusive diversity as an essential institutional norm.<sup>151</sup> This leaves stakeholders to question the relative values of inclusive diversity and unfettered speech and to puzzle over the rationale for apparent decision-making disconnects and inconsistent balancing outcomes.

Unless universities' strong statements supporting free speech are truly disingenuous, the only defensible justification for balancing outcomes that disfavor speech is the exercise of institutional autonomy to protect an equally compelling institutional obligation.<sup>152</sup> But universities have failed to connect their speech-balancing decisions to institutional autonomy, which is rarely invoked outside of litigation.<sup>153</sup> In some ways, this is unsurprising, as drawing attention to institutional autonomy has risks for both faculty and universities. Faculty have a personal interest in maintaining the maximum scope of freedom to pursue and promote their ideas; affirming the university's institutional autonomy risks narrowing that scope.<sup>154</sup> Universities' obligation to involve faculty in key decisions<sup>155</sup> may make administrators wary of asserting institutional autonomy unnecessarily, lest it provoke faculty ire. Absent certainty that governing authorities will preserve their institutional autonomy, universities and faculty both may be con-

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conflict."); GUIDELINES FOR GOVERNING BOARDS, *supra* note 8, at 5; CAMPUS CLIMATE, *supra* note 133, at 2; AACU Statement on Inclusive Excellence, *supra* note 78; *see also supra* notes 3–8.

150. *See supra* notes 124–27 and accompanying text; *see also, e.g.*, Thomason & Johnson, *supra* note 7 (reporting the University of North Carolina chancellor's simultaneous announcement of her decision to resign and to remove a controversial Confederate monument that some saw as a "symbol of white supremacy"; the chancellor explained her decision as "one that will promote public safety, enable us to begin the healing process, and renew our focus on our great mission").

151. *See supra* notes 15, 67 and accompanying text; *supra* note 132; AACU Statement on Inclusive Excellence, *supra* note 78; AAU Statement on Academic Principles, *supra* note 89; ACE Statement, *supra* note 100; Abigail Hauslohner & Susan Svrluga, *Free Speech or Hate Speech? Campus Debates Over Victimhood Put Universities in a Bind*, WASH. POST (Oct. 20, 2017), [https://www.washingtonpost.com/national/free-speech-or-hate-speech-campus-debates-over-victimhood-put-university-officials-in-a-bind/2017/10/20/7f610dfe-aa07-11e7-92d1-58c702d2d975\\_story.html?utm\\_term=.9c3483939ba8](https://www.washingtonpost.com/national/free-speech-or-hate-speech-campus-debates-over-victimhood-put-university-officials-in-a-bind/2017/10/20/7f610dfe-aa07-11e7-92d1-58c702d2d975_story.html?utm_term=.9c3483939ba8).

152. *See Freedom of Speech and the University*, *supra* note 35, at 24; *see also supra* notes 95–106 and accompanying text.

153. *See* Rabban, *supra* note 17, at 229; *Threat*, *supra* note 63, at 135, 139, 141; Donna R. Euben, *Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape*, AM. ASS'N OF UNIV. PROFESSORS, 11 (2002), <https://www.aaup.org/issues/academic-freedom/professors-and-institutions> ("The AAUP's focus is primarily on academic freedom as an individual right of professors," and it has, "on occasion, addressed on an ad hoc basis the scope of institutional academic freedom in responding to arguments made by college and university administrations in litigation."). The only other statement I could locate, outside of academic scholarship, defining universities' institutional autonomy was the American Association of Universities Statement of Academic Principles. AAU Statement on Academic Principles, *supra* note 89.

154. *See supra* Part I.C.2.

155. *See supra* notes 79–83 and accompanying text.

cerned that drawing attention to this unique institutional freedom could result in efforts to constrain it. Accordingly, they stay mostly mum.<sup>156</sup>

Without clarity of expectation or explanation, stakeholders cannot anticipate or understand the balance universities strike on speech. Universities' failure to effectively articulate their institutional values and commitments and to claim their autonomy leaves stakeholders in a muddle. Those who understand or expect university identity and standards to include a commitment to inclusive diversity are surprised by and critical of statements and outcomes that favor unfettered speech. Those who understand university identity and standards to incorporate the same free speech guarantees as apply to the public marketplace are surprised by and critical of outcomes compromising speech freedoms in favor of an amorphous interest in inclusive diversity.

Repeatedly failing to meet stakeholder expectations opens universities to unnecessary risks that will compound over time. Ambiguity about institutional and individual mission and commitments can lead to decreased enrollment and funding, constraining faculty and university freedoms through involuntary budget reductions.<sup>157</sup> Stakeholders who wish to exercise greater control over university decision-making can leverage an apparent lack of institutional integrity to their rhetorical and actual advantage.<sup>158</sup> Universities may feel such pressure from influential stakeholders that they voluntarily compromise essential interests to accommodate the stakeholders with the most authority or influence,<sup>159</sup> jeopardizing their continued ability to serve their distinctive societal role.

### 3. *Universities Seek to Avoid Imbalances*

Using the Court's *imbalance* approach to manage tensions between equally essential interests is a real problem: assigning greater weight to either interest undervalues the other. It appears many universities instead try to achieve an even balance, accommodating both speech and competing interests by compromising some aspects of each. This effort shows up, for example, in policies that technically meet the Court's time, place, and manner tests but restrict time, place, and manner so significantly that the resulting speech freedoms are extremely limited,<sup>160</sup> or require students to obtain permission before demonstrating,<sup>161</sup> or require sponsors of invited speakers

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156. See *No 1st Amendment Right*, *supra* note 120.

157. See *supra* notes 100–06 and accompanying text.

158. Quintana, *supra* note 4; see, e.g., Sessions, *supra* note 4.

159. Audrey Williams June, *Frustrated Faculty Struggle to Defend Tenure Before It's Too Late*, CHRON. HIGHER EDUC. (June 17, 2018), <https://www.chronicle.com/article/Frustrated-Faculty-Struggle-to/243675>; see, e.g., Colleen Flaherty, *Wisconsin Tenure Wars: Part Two*, INSIDE HIGHER EDUC. (Nov. 3, 2015), <https://www.insidehighered.com/news/2015/11/03/u-wisconsin-madison-approves-faculty-backed-tenure-policy>.

160. See *Correcting Common Mistakes*, *supra* note 123.

161. See *id.*

to pay all security costs from the sponsor's own budget.<sup>162</sup> While on paper universities may appear to apply the same speech rules as apply to the public marketplace, in practice they do not always uphold their spirit.

### C. *A New Approach is Needed*

In a metaphorical balancing process where stakeholders hope for an imbalanced result, achieving an even balance among competing interests is just as problematical as an imbalance. Even if a perfect balance is achieved, the interests on each side remain separate and in competition. If the forces on both sides are energized and dynamic, the balance will be delicate, and any change in force on one side will require an opposing adjustment on the other. If the forces are never reconciled and maintain their competitive energy, the competition and required adjustments could continue into perpetuity. Calling a tie will not resolve the competition any better than a clear win for one side; it will irritate everyone.

Stakeholders in the campus speech debates are energized and strongly hold their competing positions. Regardless of how hard universities try to convince inclusive diversity supporters to fight speech with more speech, they are unlikely to overcome the legacy of inequity underlying the emerging norm of inclusive diversity.<sup>163</sup> On the other side of the scale, as long as universities continue to promote (or appear to promote) the same speech freedoms guaranteed in the public marketplace, free speech absolutists will never understand university decisions that compromise interests in unfettered speech.

While stakeholders on both sides of speech tensions criticize universities for the balance they strike, their demands for change leave something to be desired: namely, a workable approach that enables universities to articulate and manifest an equally strong commitment to speech and inclusive diversity, in a way that maintains integrity with university identity and mission in this modern era. This approach can be found by looking to Catholic universities.

## III. THE CATHOLIC UNIVERSITY EXPERIENCE: HOLDING THE TENSION OF COMPETING INTERESTS

### A. *The Development of Ex Corde Ecclesiae*

To be recognized as a reputable member of academia, universities and their scholars are expected to pursue truth and share knowledge that has been validated and valued by their academic peers, pursuant to standards they develop themselves, and to revise these truths to the extent they are

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162. *See id.*

163. *See Institutions in the Marketplace*, *supra* note 32, at 834–35; *see also* Piltch, *supra* note 4.



mooted or superseded by academia's new truths or new methods of validation.<sup>164</sup> To be recognized as Catholic,<sup>165</sup> organizations and individuals are expected to accept and share the divine truth as revealed to and articulated by the Magisterium of the Church.<sup>166</sup> Given these apparently conflicting expectations,<sup>167</sup> how can a Catholic university manifest its identity and mission as both *Catholic* and *university*? Over the past half-century,<sup>168</sup> Catholic universities have worked with key stakeholders to manage this tension in a way that can be instructive for universities.

In the 1960s, a confluence of factors prompted influential, North American leaders in Catholic higher education to initiate efforts to define the nature and purpose of the modern Catholic university.<sup>169</sup> They were responding to the Vatican II ecumenical council, which called on Catholics around the world to renew and modernize the Church.<sup>170</sup> Their efforts also reflected a desire to capitalize on demographic changes, which offered opportunities to expand Catholic higher education, increase Catholic universi-

164. See *supra* Part I.B.

165. 1983 CODE c.216, c.804 §§ 1–2; NAT'L CONF. OF CATH. BISHOPS, CATH. CHURCH, THE APPLICATION FOR EX CORDE ECCLESIAE FOR THE UNITED STATES 14 n.31, (2000) [hereinafter USCCB APPLICATION]; see JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF JOHN PAUL II ON CATHOLIC UNIVERSITIES 30–32 (1990) [hereinafter EX CORDE]; see, e.g., John Hooper & Dan Collyns, *Peru University in Vatican Battle Over Right to Call Itself Catholic*, THE GUARDIAN (Oct. 28, 2012), <https://www.theguardian.com/world/2012/oct/28/peru-university-vatican-catholic>.

166. CATECHISM, *supra* note 137, at 27; see SECOND VATICAN COUNCIL, CATHOLIC CHURCH, DOGMATIC CONSTITUTION ON DIVINE REVELATION, DEI VERBUM 10 (1965) (“[T]he task of authentically interpreting the Word of God, whether written or handed on, has been entrusted exclusively to the living teaching office of the Church, whose authority is exercised in the name of Jesus Christ. This teaching office is not above the Word of God, but serves it, teaching only what has been handed on, listening to it devoutly, guarding it scrupulously and explaining it faithfully in accord with a divine commission and with the help of the Holy Spirit; it draws from this one deposit of faith everything which it presents for belief as divinely revealed.”).

167. See Charles L. Currie, S.J., *Pursuing Jesuit, Catholic Identity and Mission at U.S. Jesuit Colleges and Universities*, 14 CATH. EDUC. J. INQUIRY & PRAC. 346, 347 (2011); Neil G. McCluskey, S.J., *Land O’Lakes Statement on the Nature of the Contemporary Catholic University*, UNIV. NOTRE DAME PRESS (1967) [hereinafter *Land O’Lakes Statement*]; McConnell, *supra* note 66, at 309–10 n.18; *Emergence*, *supra* note 43, at 6–7 (“The very possibility of a sustained reconciliation of one sort or another of a distinctive faith mission commitment with individual academic freedom is contestable.”).

168. The Catholic-university tension has been recognized and discussed for a much longer period, but the 1960s marked the start of earnest efforts by North American Catholic leaders to address this tension. See Currie, *supra* note 167, at 346; Matthew Garrett, *The Identity of American Catholic Higher Education: A Historical Overview*, 10 CATH. EDUC.: J. INQUIRY & PRAC. 229, 239 (2006); see, e.g., John Henry Newman, THE IDEA OF A UNIVERSITY (Frank M. Turner ed., 1996). See generally Hoye, *supra* note 44.

169. Currie, *supra* note 167, at 347; Garrett, *supra* note 168, at 229–47; David J. O’Brien, *A Catholic Academic Revolution*, in MISSION & IDENTITY: A HANDBOOK FOR TRUSTEES OF CATHOLIC COLLEGES & UNIVERSITIES 23 (2004) [hereinafter *Catholic Academic Revolution*]; David J. O’Brien, “The Land O’Lakes Statement,” B.C. MAG., Winter 1998, at 3.

170. Garrett, *supra* note 168, at 238; see *Catholic Academic Revolution*, *supra* note 169, at 23–24.

ties' academic standing, relevance, and influence, and respond more effectively to student demands for a high quality education.<sup>171</sup>

In these leaders' judgment, renewing Catholic higher education would require Catholic universities to attain a level of academic and professional excellence comparable to their secular peers; this in turn would require an unwavering commitment to both individual academic freedom and the institutional autonomy that enables it.<sup>172</sup> They could not make this commitment unilaterally. Catholic organizations are dependent on the Church to affirm their Catholic identity; under the Church's principles of subsidiarity, the local ecclesiastical authority has discretion whether to recognize an organization as Catholic.<sup>173</sup> There is no guarantee that local Church leaders will appreciate and support Catholic universities in upholding the norms that mark universities as reputable members of academia, while still recognizing them as Catholic. Indeed, the prior experience of some U.S. Catholic universities reflected a lack of alignment with their local bishops and religious superiors, raising the specter of academic compromises.<sup>174</sup> Accordingly, it was important for Catholic university leaders to confront the Catholic-university tension in concert with the Church.

The North American leaders effectively forced this confrontation in 1967,<sup>175</sup> with their development of the "Statement on the Nature of the Contemporary Catholic University."<sup>176</sup> The Land O'Lakes Statement, as it commonly is called, expressed a vision for the modern Catholic university that emphasized the essential nature of both academic freedom and institutional autonomy.<sup>177</sup> It kicked off a rich, vigorous, and long debate and dialogue about the nature and role of the Catholic university in the modern era, and the tension between Catholic and university identity.<sup>178</sup> Eventually, it led to the issuance of the Apostolic Constitution *Ex Corde Ecclesiae* by Pope (now Saint) John Paul II in 1990.<sup>179</sup> *Ex Corde* articulates the defini-

171. These opportunities were primarily based on changed demographics, increased prosperity among Catholics, and increased federal financial aid. Currie, *supra* note 167, at 349; Garrett, *supra* note 168, at 238; see *Catholic Academic Revolution*, *supra* note 169, at 24.

172. See *Land O'Lakes Statement*, *supra* note 167, at ¶ 1 ("The Catholic University today must be a university in the full modern sense of the word, with a strong commitment to and concern for academic excellence. . . . institutional autonomy and academic freedom are essential conditions of life and growth and indeed of survival for Catholic universities as for all universities.").

173. Creagh, *supra* note 103, at 4; see 1983 CODE c.808.

174. See *Catholic Academic Revolution*, *supra* note 169, at 26.

175. Currie, *supra* note 167, at 349; Garrett, *supra* note 168, at 238; see *Catholic Academic Revolution*, *supra* note 169, at 24.

176. *Land O'Lakes Statement*, *supra* note 167.

177. See *id.*

178. See generally *Catholic Academic Revolution*, *supra* note 169 (discussing the "continuing dialogue" that initiated with the Land O'Lakes Statement and the effectiveness of efforts to achieve its vision).

179. EX CORDE, *supra* note 165; see Stephen J. Denig, *Between a Rock and a Soft Place*, 11 CHRISTIAN HIGHER EDUC. 44, 45 (2012). While *Ex Corde* is "normative for the Church throughout

tive vision for modern Catholic universities worldwide; it defines the role, essential characteristics, and general norms of the modern Catholic university, including its relationship with the Church and Church teaching.<sup>180</sup> These essential characteristics and norms include both academic freedom and institutional autonomy.<sup>181</sup>

### B. *Holding the Catholic-University Tension*

The Land O'Lakes Statement was and remains controversial among Catholic university stakeholders. Some commentators and critics have considered it to be the opening salvo in a battle for primacy between *Catholic* and *university*.<sup>182</sup> Others have reinforced this perspective by framing *Ex Corde*, and the work to address the Catholic-university tension, as a balancing process.<sup>183</sup> As with the Court and university approaches to managing speech tensions,<sup>184</sup> characterizing the management of Catholic and university tensions as a balancing process sets up a competition of essential interests. An imbalanced outcome will undervalue one interest,<sup>185</sup> and an even balance is likely to compromise both.<sup>186</sup> Either way, with competing stakeholders remaining on separate sides of the scale, maintaining the balance will be a perpetual struggle.<sup>187</sup>

I have a different view of what *Ex Corde* intended, which is supported by its plain language and offers a more compelling and inspiring vision for Catholic universities than the balancing characterization allows. As I read it, *Ex Corde* envisions that Catholic universities will *hold the tension* of their Catholic and university identities, with the intent for these interests to converge and transform into something new and more potent than a balancing process could ever achieve: a true synthesis of essential interests into a united and harmonized one.<sup>188</sup> Imagine two streams of electricity that con-

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the world," *Ex Corde* explicitly recognized the need to tailor its application to reflect regional differences in education. It provided that bishops in each region of the world would establish implementing guidelines for their region. Bishops were expected to "tak[e] into account the status of each college and university and, as far as possible and appropriate, civil law." *EX CORDE*, *supra* note 165, at General Norms, Art. 1 ¶ 2; USCCB APPLICATION, *supra* note 165.

180. *See id.*; USCCB APPLICATION, *supra* note 165; Currie, *supra* note 167, at 347.

181. *See Ex Corde*, *supra* note 165.

182. Creagh, *supra* note 103, at 30–31; *see Catholic Academic Revolution*, *supra* note 169, at 27–30.

183. *Catholic Academic Revolution*, *supra* note 169, at 30; Creagh, *supra* note 103, at 70–71; Charles E. Curran, 'Ex Corde Ecclesiae' and its Ordinances: Is This Any Way to Run a University or a Church, COMMONWEAL, NOV. 19, 1993, at 14–15, 22; Garrett, *supra* note 168, at 245; *see, e.g.,* Francis George, *Ex Corde Ecclesiae: Promises and Challenges*, 4 CATH. EDUC.: J. INQUIRY & PRAC. 239, 241 (2000).

184. *See supra* notes 22–29, 122 and accompanying text; *see also supra* Part II.C.

185. *See supra* Part II.B.3.

186. *See id.*

187. *See supra* Part II.C; *see also* Baxter, *supra* note 102, at 632.

188. The idea of holding the tension of opposing forces is found in the work of both psychotherapist Carl Jung and theoretical physicist David Bohm. *See also* Creagh, *supra* note 103, at 56,

tinuously push at each other until they meld and create a more powerful energy flow: an integration of two separate institutions, Catholic and university, into the new and singular institution of *Catholic university*.<sup>189</sup>

*Ex Corde* holds the Catholic-university tension by binding together the institutional mission and obligations of universities with the institutional mission and teaching of the Church, providing clarity on matters that universities usually are left to determine for themselves: when they will know they have identified truth, what it means to serve the common good, and the appropriate scope of institutional autonomy. *Ex Corde* confirms that every Catholic university “possesses that institutional autonomy necessary to perform its functions effectively and guarantees its members academic freedom, so long as the rights of the individual person and of the community are preserved *within the confines* of the truth and the common good.”<sup>190</sup>

“Common good” is a foundational principle of Catholic social teaching, similar to but more precisely defined than the “common good” that universities generally are expected to serve, and motivated by an even more fundamental obligation: to preserve human dignity.<sup>191</sup> “Truth” is best un-

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92–93, 105. Creagh notes that the relationship between Church and university is intended to be one of *communio*, that is, a communion between Church and university. Within the Church, the concept of communion “always involves a double dimension: the *vertical* (communion with God) and the *horizontal* (communion among men).” Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as Communion*, at ¶ 3 (May 28, 1992). Michael Baxter reflects this concept by describing *Ex Corde* as “locating [academic freedom] within a more substantive and comprehensive Catholic intellectual vision [in which] genuine intellectual inquiry is ordered to what has been revealed by God as true and good.” Baxter, *supra* note 102, at 632.

189. See Creagh, *supra* note 103, at 56, 92–93, 105; George, *supra* note 183, at 239, 247; Julie H. Sullivan, President, Univ. of Saint Thomas (Minn.), Academic Convocation Speech at the University of Saint Thomas (Sept. 7, 2017). President Sullivan described the intent of the Catholic university leaders at Land O’Lakes as the creation of an integrated, two-word noun, “Catholic university,” rather than a modified noun—a university that is Catholic or a Catholic institution that is a university. See also John Garvey & Mark W. Roche, *What Makes a University Catholic? An Exchange on Mission and Hiring*, COMMONWEAL (Jan. 26, 2017), <https://www.commonwealmagazine.org/what-makes-university-catholic>; Michael Sean Winters, *Catholic Identity at Catholic Colleges Is Complicated*, NAT’L CATH. REPORTER: DISTINCTLY CATH. (July 31, 2017), <https://www.ncronline.org/blogs/distinctly-catholic/catholic-identity-catholic-colleges-complicated>.

190. *EX CORDE*, *supra* note 165, at General Norms, 12, 29 (emphasis added); see Baxter, *supra* note 102, at 632 (noting that in *Ex Corde*, “the Pope affirms academic freedom not as an abstract, general principle to be applied regardless of the specific content of academic inquiry being pursued (there’s no such thing), but as a principle embedded in an overruling scale of values: academic-freedom-as-defined-by-truth-and-the-common-good.”). See also *supra* note 102.

191. See *supra* note 137; *supra* notes 94–98 and accompanying text. In Catholic doctrine, common good is defined as “the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily. . . .” SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, GAUDIUM ET SPES; PROMULGATED BY HIS HOLINESS POPE PAUL VI ON DECEMBER 7, 1965, #26 Section 1 (1998). The basis for all moral teachings of the Church is based upon the Catholic concept of human dignity, which is the fundamental motivation for the imperative to advance the common good:

derstood in the context provided by Pope Saint John Paul II in his introduction to *Ex Corde*, which explicitly references the intent to hold the tension:

With every other University [the Catholic University] shares that *gaudium de veritate* . . . which is that joy of searching for, discovering and communicating truth in every field of knowledge. A Catholic University's privileged task is "to unite existentially by intellectual effort two orders of reality that too frequently tend to be placed in opposition as though they were antithetical: the search for truth, and the certainty of already knowing the fount of truth."<sup>192</sup>

Within these confines of truth and the common good, *Ex Corde* defines institutional autonomy and academic freedom in ways that reflect the understanding of academia generally, but in my view, with greater clarity and deference to educational judgment. Institutional autonomy "means that the governance of an academic institution is and remains internal to the institution."<sup>193</sup> Academic freedom is:

the guarantee given to those involved in teaching and research that, within their specific specialized branch of knowledge, and according to the methods proper to that specific area, they may search for the truth wherever analysis and evidence leads them, and may teach and publish the results of this search, keeping in mind the cited criteria, that is, *safeguarding the rights of the individual and of society within the confines of the truth and the common good*.<sup>194</sup>

### C. *The Obligations and Effects of Ex Corde*

*Ex Corde* builds its vision and expectations for Catholic universities by first affirming the institutional obligations of universities, and then explaining how Catholic identity informs the execution of these obligations by Catholic universities.<sup>195</sup> In effect, *Ex Corde* simply adds a layer of custom-

The common good consists of three essential elements: respect for and promotion of the fundamental rights of the person; prosperity, or the development of the spiritual and temporal goods of society; the peace and security of the group and of its members.

The dignity of the human person requires the pursuit of the common good. Everyone should be concerned to create and support institutions that improve the conditions of human life.

It is the role of the state to defend and promote the common good of civil society. The common good of the whole human family calls for an organization of society on the international level.

CATECHISM, *supra* note 137, at Sections 1925–27; *see also* POPE JOHN PAUL II, EVANGELIUM VITAE, ENCYCLICAL OF POPE JOHN PAUL II ON CHRISTIANITY AND SOCIAL PROGRESS (Mar. 25, 1955); SAINT JOHN XXIII, MATER ET MAGISTRA, ENCYCLICAL OF POPE JOHN XXIII ON CHRISTIANITY AND SOCIAL PROGRESS no. 219 (May 15, 1961).

192. *EX CORDE*, *supra* note 165, at Introduction (citations omitted).

193. *Id.*

194. *Id.* (emphasis added).

195. In the introduction to *Ex Corde*, Pope Saint John Paul II states:

ized community standards, consistent with universities' other institutional obligations, that are common to all Catholic universities and help guide them in the development and implementation of their individualized community standards.<sup>196</sup> Indeed, *Ex Corde* expressly anticipates that individual Catholic universities will develop individualized mission statements and norms reflecting their individualized educational objectives, communities, and cultures, within the common *Ex Corde* framework.<sup>197</sup> Their mission statements or another public document must identify the university as *Catholic* and not just *university*,<sup>198</sup> and they must inform all faculty of the implications of Catholic identity in advance of appointment.<sup>199</sup> These obligations help ensure that even if academic stakeholders are unfamiliar with *Ex Corde*, they will be aware of Catholic universities' distinctive, interwoven identity, and that both components of this identity must inform stakeholder expectations about the Catholic university's mission, values, norms, and operations.<sup>200</sup>

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If it is the responsibility of every University to search for such meaning, a Catholic University is called in a particular way to respond to this need: its Christian inspiration enables it to include the moral, spiritual and religious dimension in its research, and to evaluate the attainments of science and technology in the perspective of the totality of the human person.

In this context, Catholic Universities are called to a continuous renewal, both as "Universities" and as "Catholic." For, "What is at stake is the *very meaning of scientific and technological research, of social life and of culture*, but, on an even more profound level, what is at stake is *the very meaning of the human person*." Such renewal requires a clear awareness that, by its Catholic character, a University is made more capable of conducting an *impartial* search for truth, a search that is neither subordinated to nor conditioned by particular interests of any kind.

EX CORDE, *supra* note 165, at Introduction (citations omitted); *see also id.* at Part B, ¶ 27 ("Every Catholic University, without ceasing to be a University, has a relationship to the Church that is essential to its institutional identity."); USCCB APPLICATION, *supra* note 165, at Art. 2 ¶ 1 ("The purpose of a Catholic university is education and academic research proper to the disciplines of the university. Since it enjoys the institutional autonomy appropriate to an academic institution, its governance is and remains internal to the institution itself. This fundamental purpose and institutional autonomy must be respected and promoted by all, so that the university may effectively carry out its mission of freely searching for all truth.") (citations omitted).

196. *See supra* Part I.C; EX CORDE, *supra* note 165, at Part B, ¶ 30 ("The basic mission of a University is a continuous quest for truth through its research, and the preservation and communication of knowledge for the good of society. A Catholic University participates in this mission with its own specific characteristics and purposes.").

197. EX CORDE, *supra* note 165, at General Norms, Art. 1 ¶ 3 ("It is contemplated that other Catholic Universities, that is, those not established or approved [directly by the Church], with the agreement of the local ecclesiastical Authority, will make their own the General Norms and their local and regional applications, internalizing them into their governing documents, and, as far as possible, will conform their existing Statutes both to these General Norms and to their applications.").

198. *Id.* at General Norms, Art. 2 ¶ 3; *see, e.g.*, MARQ. UNIV. MISSION, <http://www.marquette.edu/about/mission.php>; UNIV. DAYTON MISSION & IDENTITY, <https://www.udayton.edu/about/mission-and-identity.php>; UNIV. ST. THOMAS MISSION & CONVICTIONS, <https://www.stthomas.edu/mission/>.

199. *See EX CORDE, supra* note 165, at General Norms, Art. 4 ¶ 2.

200. EX CORDE, *supra* note 165, at General Norms, Art. 2 ¶ 3.

The specificity of *Ex Corde*'s general norms provide Catholic universities and their stakeholders with clear guidance regarding the proper motivations and parameters for Catholic universities' community standards, and the ultimate stakes against which their work must be measured. This alignment of expectations and understanding is particularly important when it comes to Catholic university presidents and local Church leaders. The local bishop, effectively the *Catholic* accreditor for Catholic universities,<sup>201</sup> may not have the academic background to fully understand that Catholic university identity is not the product of a balancing act where one force trumps or compromises the other. On the other hand, academic leaders may not fully understand the power of the unified *Catholic university* vision and how best to hold the tension of these two forces. *Ex Corde* seeks to ensure that Catholic universities and local Church leaders effectively advance a unified vision through an explicit expectation that the local bishop and university president will maintain a close, collaborative, relationship and continuous dialogue about the university's distinctive identity and mission and how to ensure they will permeate its operations and culture.<sup>202</sup>

*Ex Corde* goes one step further by directly addressing, not just those who directly engage with Catholic universities, but "all those who have an interest in" Catholic universities, effectively charging every Catholic with responsibility for the fulfillment of Catholic universities' "indispensable" mission.<sup>203</sup> In this way, *Ex Corde* incentivizes Catholic universities to maintain the mission clarity and transparency that *Ex Corde* expects: clarity about community standards and transparency about Catholic universities' decisions make it easier for stakeholders to assess whether Catholic universities are meeting their institutional and individualized obligations.<sup>204</sup> In other words, *Ex Corde* incentivizes Catholic universities to hold themselves accountable.<sup>205</sup> If Catholic universities take *Ex Corde* seriously, their distinctive *Catholic university* identity, mission, and norms will drive their

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201. Because of universities' institutional autonomy, academia developed the practice of accreditation, whereby private accrediting associations engage external peer reviewers to review individual universities and programs to determine whether they meet minimum institutional standards of quality. Under federal law, only universities that are accredited by federally recognized accreditors are eligible to use federal student aid funds. See *Accreditation in the United States*, U.S. DEPT OF EDUC., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg2.html](https://www2.ed.gov/admins/finaid/accred/accreditation_pg2.html). There is no similar accrediting association that evaluates all Catholic universities to determine whether they comply with the institutional obligations established by *Ex Corde* and the USCCB Application; this is left to the local ecclesiastical authority. See *supra* note 173 and accompanying text.

202. Creagh, *supra* note 103, at 7, 17; see *EX CORDE*, *supra* note 165, at Part I, ¶ 28; see also *id.* at General Norms, Art. 5.

203. See *EX CORDE*, *supra* note 165, at Introduction.

204. See Kearns, *supra* note 96, at 273.

205. Cf. Creagh, *supra* note 103, at 114 (noting that in practice, trust builds more effective Church-university partnerships than the idea of accountability to rules).

customized community standards and become integral to their culture and operations, thereby fulfilling *Ex Corde's* vision.<sup>206</sup>

The aspiration to achieve a true integration of Catholic and university is not perfect or complete by any means.<sup>207</sup> Transformation takes time, and individual organizations progress at their own pace. No doubt some Catholic universities pursue this work more effectively than others, and some stakeholders engage with Catholic universities more seriously or in richer or more nuanced ways than others. However, as an exercise in clarity, transparency, and accountability, *Ex Corde* has been effective. Since its publication, Catholic universities and their stakeholders have continued to engage in communal debate and dialogue regarding the best ways to manifest *Ex Corde's* vision that all aspects of Catholic university operations will radiate from and advance *Catholic university* identity.<sup>208</sup> Without the publication of *Ex Corde*, these efforts may have been haphazard or may not have occurred at all. *Ex Corde's* true value is that as a consequence of its publication, Catholic universities feel obligated to engage with it, “respond[ing] with diverse ways to enhance their Catholic identity . . . and [striving] to become institutions ‘from the heart of the church.’”<sup>209</sup>

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206. See generally Morey & Piderit, *supra* note 103 (addressing Catholic universities' efforts to maintain their distinctive identities and cultures while also competing effectively with the broader universe of universities).

207. See THEODORE M. HESBURGH, *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* (1994); John M. Breen & Lee J. Strang, *The Golden Age That Never Was: Catholic Law Schools from 1930–1960 and the Question of Identity*, 7 J. CATH. SOC. THOUGHT 489, 489–91, 515–16 (2010); James Tunstead Burtchaell, *The Dying of the Light: The Disengagement of Colleges and Universities from Their Christian Churches*, 16 J.L. & RELIGION 437 (2001); see also David J. O'Brien, *Developing American Saints: The Contribution of Catholic Higher Education to the American Experience*, CRESSET: REV. LITERATURE, ARTS & PUB. AFF. (2007).

208. See, e.g., Creagh, *supra* note 103, at 2, 72–73, 100, 103; George, *supra* note 183, at 242–43; University of Notre Dame Conference: Transcending Orthodoxies, Oct. 29–Nov. 1, 2015. The websites of the U.S. Conference of Catholic Bishops Higher Education and the Association of Catholic Colleges and Universities also contain numerous examples of the ways in which Catholic universities and their stakeholders have worked to manifest the vision of *Ex Corde*. U.S. CONF. CATH. BISHOPS HIGHER EDUC., <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/> (last visited Sept. 1, 2018); ASS'N CATH. C. & U., <https://www.accunet.org/> (last visited Sept. 1, 2018). In a simple example, the Association of Catholic Colleges and Universities (ACCU) publishes a series of “Strengthening Catholic Identity” brochures to help Catholic universities enhance the manifestation of their distinctive identity and mission across all aspects of university operations. See *Strengthening Catholic Identity*, ASS'N CATH. C. & U., <http://www.accunet.org/Strengthening-Catholic-Identity> (last visited Sept. 1, 2018). These guides address leaders and units across the university, with specific guides for presidents, chief academic officers, mission officers, faculty, student access and admissions, student affairs, stewardship, and campus operations, among others. See *id.*

209. Jason King, *After Ex Corde Ecclesiae*, 4 J. MORAL THEO. 167, 174, 190–91 (2015). King notes:

There is neither a platonic form of “Catholic identity” that can be attached to any and every Catholic university nor an assembly line method for cranking out “Catholic identity” widgets for any institution to purchase. One needs a philosophy of Catholic education that works in the particularities of an institution and culture, particularities that one often discovers through sociological research. This vision then has to be embedded in the mission of the institution, understood by administrators, enacted in the policies, and



IV. CONSTITUTIONAL ACADEMIC FREEDOM: THE COURT'S  
ACKNOWLEDGEMENT THAT OTHER UNIVERSITY INTERESTS ARE  
AS ESSENTIAL AS SPEECH

There is no universally applicable document, like *Ex Corde*, that explicitly guides the management of speech tensions in the university marketplace. Universities and their stakeholders must look to universities' community standards, including both their self-imposed purposes and norms and the externally imposed norms of applicable law. Because there is no common, legislated right of institutional autonomy or academic freedom across the United States, universities and their scholars usually turn first to contract law to enforce their respective rights.<sup>210</sup> When it is not clear whether contract law applies, they look to the Constitution.

Constitutional guarantees are generally understood to apply to universities on the same basis as they apply to public marketplace participants<sup>211</sup>: Private universities are not legally subject to constitutional requirements; effectively, the Constitution guarantees their freedom to regulate speech on campus, so long as the regulation does not violate constitutionally permissible contractual or statutory obligations (which means they can voluntarily adopt constitutional obligations if they so choose).<sup>212</sup> Public universities, as state actors, are subject to constitutional requirements and therefore may regulate speech on campus only to the extent such regulation is consistent with constitutional guarantees, as interpreted by the courts. Accordingly, the public university marketplace is typically regulated through the lens of forum analysis, considering public universities to be limited or designated public forums because they generally reserve some parts of the university (classrooms, offices) for non-public uses, while leaving other parts (audito-

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reflected in classroom pedagogies. It is a bit like putting together a puzzle, trying to fit numerous pieces into a coherent whole. Internal issues, however, constitute only part of the challenges. Catholic colleges and universities work on their Catholic identity amidst external pressures from federal regulations, academic norms, economic exigencies, and ecclesial expectations. So, it is a bit like working on a puzzle on a stage, in a competition, broadcasted on television, with a multi-million dollar prize.

*Id.* at 191.

210. *See supra* note 79.

211. Chemerinsky, *supra* note 119; Kent Fuchs, *Personal Message from President Fuchs*, UNIV. FLA. (Oct. 10, 2017), <http://statements.ufl.edu/statements/2017/10/statement-from-president-fuchs-about-richard-spencer-appearance.html>; GUIDELINES FOR GOVERNING BOARDS, *supra* note 8, at 1, 9–10; *see, e.g., Spotlight 2018*, *supra* note 124, at 7–8.

212. *See* Michael Stokes Paulsen, *Freedom of Speech at a Private Religious University*, 2 UNIV. ST. THOMAS J.L. & PUB. POL'Y 104, 105 (2008); *but see* Grutter's *First Amendment*, *supra* note 17, at 584. *See also* State v. Schmid, 423 A.2d 615 (N.J. 1980) (holding that a private university that committed, through its policies, to uphold broader standards of free speech than were legally required of private universities, must comply with the standards it voluntarily adopted).

riums, the quadrangle, community bulletin boards) open for public use and free expression all or some of the time.<sup>213</sup>

Despite widespread acceptance of this approach, constitutional jurisprudence suggests it is flawed, or at least reflects an incomplete understanding of applicable law<sup>214</sup>: for more than sixty years, the Court has accorded greater weight and deference to university judgments in cases involving the university marketplace than to other state actors in cases involving the public marketplace.<sup>215</sup> This deference has come to be understood as a constitutional right of academic freedom for universities. The Court's rationale for granting deference has been less than clear. It appears to me that like the Church, the Court recognizes that universities play a unique and essential societal role that requires the continual management of competing interests. Consequently, like the Church, the Court defers to universities to manage these tensions in universities' professional judgment, so long as they maintain fidelity to the institutional norms, and self-imposed individual norms, that distinguish them from the public marketplace.

#### A. *The Rise of Constitutional Academic Freedom*

Constitutional academic freedom is rooted in the Court's explicit recognition of academic freedom as a "special concern" of the First Amendment.<sup>216</sup> Academic freedom was first invoked by the Court in 1957, in a concurring opinion in *Sweezy v. New Hampshire*,<sup>217</sup> in which Justice Frankfurter asserted that the truth-seeking role of faculty should be protected from interference from "Church or State or any sectional interest."<sup>218</sup> Affirmations of academic freedom in *Sweezy* and subsequent decisions led some scholars to suggest that this self-imposed norm of academia may be constitutionally protected as a First Amendment right of individual faculty members.<sup>219</sup>

But Justice Frankfurter's concurrence did not focus only on individual academic freedom. He also recognized universities' need for institutional

213. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *see Bowman v. White*, 444 F.3d 967 (8th Cir. 2006); *supra* notes 35–39 and accompanying text.

214. *See Hanlon*, *supra* note 148; *No 1st Amendment Right*, *supra* note 120; *cf. Chmerinsky*, *supra* note 119.

215. *Grutter v. Bollinger*, 539 U.S. 306, 363–64 (2003) (Thomas, J., dissenting); *see Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

216. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citations omitted).

217. 354 U.S. at 234. *Sweezy* considered a state attorney general's demand that a public university faculty member answer questions about his academic lectures and writings to examine his possible connections to the Communist Party. The Court decided against the attorney general. *Id.*

218. *Id.* at 262.

219. *Hutchens*, *supra* note 107, at 1; *Discipline and Freedom*, *supra* note 19, at 204–05; *Emergence*, *supra* note 43, at 793–96; *Rabban*, *supra* note 17, at 230; *see Special Concern*, *supra* note 44, at 301.

autonomy, identifying four freedoms he considered essential to universities' ability to fulfill their educational missions in service of the common good:

For society's good—if understanding be an essential need of society—inquiries into [problems arising in the natural and social sciences], speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

. . . .

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>220</sup>

While the majority in *Sweezy* did not rely on either individual or institutional academic freedom for its holding, courts at all levels have continued to invoke these essential freedoms to explain decisions favoring universities in cases that uniquely affect the university marketplace.<sup>221</sup> These outcomes led some scholars to assert that universities have their own right to academic freedom (that is, a constitutional guarantee of institutional autonomy), instead of or alongside faculty rights of individual academic freedom.<sup>222</sup> This theory was given greater credence by the Court's 2003 majority opinion in *Grutter v. Bollinger*, which explicitly confirmed that there is a “constitutional dimension, grounded in the First Amendment, of educational autonomy”<sup>223</sup> that justifies a Court “tradition of giving a degree

220. *Sweezy*, 354 U.S. at 262–63 (citations omitted).

221. *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005); *Webb v. Bd. of Tr. of Ball State Univ.*, 167 F.3d 1146 (7th Cir. 1999); *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488 (3d Cir. 1998); *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982); *see, e.g., Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *cf. Garcetti*, 547 U.S. at 438 (“I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties’”) (Souter, J., dissenting) (citations omitted).

222. *Emergence*, *supra* note 43, at 794; *Getting Real*, *supra* note 61, at 929–30; *Grutter's First Amendment*, *supra* note 17, at 477–78; *Special Concern*, *supra* note 44, at 262; *see Garcetti*, 547 U.S. 410 (The idea that academic freedom may replace faculty rights under the First Amendment assures faculty of broader speech freedoms than other government employees, but more constrained speech freedoms than the First Amendment guarantees outside academia.); *see Rabban*, *supra* note 17, at 235–36, 256, 266. *But see* Richard H. Hiers, *Institutional Academic Freedom - A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004).

223. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

of deference to a university's academic decisions, within constitutionally prescribed limits."<sup>224</sup>

### B. *A More Complete Theory of Constitutional Academic Freedom*

After *Grutter*, most scholars agree that there is a constitutional right of academic freedom or, at least, a public policy interest sufficient to justify Court deference to universities in cases weighing regulation that uniquely affects the university marketplace.<sup>225</sup> However, the Court's lack of clarity in explaining its deference has led to considerable debate about why and the extent to which such deference is constitutionally defensible.<sup>226</sup>

Most scholars (unsurprisingly, given that they are faculty members) have rationalized the Court's deference by reference to individual academic freedom: They theorize that the Court will grant deference to "speech institutions" (like academia, the traditional press, or public libraries) whose missions or self-imposed norms primarily advance purposes the Court considers to be closely aligned with First Amendment values, like truth-seeking and knowledge promotion, which are primarily carried out by faculty and thus justify protection.<sup>227</sup> Or, they theorize, the Court grants deference to such institutions because their institutional norms enable them to facilitate the robustness of the marketplace of ideas more readily, at

224. *Id.* at 328.

225. DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21; *Emergence*, *supra* note 43, at 3–4; *Getting Real*, *supra* note 61, at 929; Goldberg & Sarabyn, *supra* note 17, at 220; Hiers, *supra* note 222, at 532; *Grutter's First Amendment*, *supra* note 17, at 461, 496; Nugent & Flood, *supra* note 81, at 132; Rabban, *supra* note 17; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270 (2005) [hereinafter *Institutional First Amendment*]; Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111 (2007) [hereinafter *Transcendent Value*]; *Why Bother*, *supra* note 94; see *Institutions in the Marketplace*, *supra* note 32. But see Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441 (1990).

226. DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21; *Emergence*, *supra* note 43, at 9; *Getting Real*, *supra* note 61, at 929; Goldberg & Sarabyn, *supra* note 17; *Grutter's First Amendment*, *supra* note 17, at 461; Nugent & Flood, *supra* note 81, at 132; Rabban, *supra* note 17; *Institutional First Amendment*, *supra* note 225, at 1270; *Transcendent Value*, *supra* note 225, at 111; *Why Bother*, *supra* note 94. See generally *Institutions in the Marketplace*, *supra* note 32.

227. Rabban, *supra* note 17, at 231; *Institutions in the Marketplace*, *supra* note 32, at 822; *Discipline and Freedom*, *supra* note 19, at 212; *Emergence*, *supra* note 43, at 8; *Why Bother*, *supra* note 94, at 14; see *Institutional First Amendment*, *supra* note 225, at 1260, 1270; see also *Easy Answers*, *supra* note 58, at 1545 ("[A]ssumptions that academic freedom is largely synonymous with institutional educational autonomy" is "surely encouraged by the courts, whose defense of institutional autonomy for universities is generally closely linked to the value of academic freedom."). Scholars in this camp generally argue that Court deference should be limited to matters that implicate individual academic freedom or faculty members' traditional academic functions, to avoid abuse by university administrators. *Citizen Servant*, *supra* note 17, at 463–64; *Emergence*, *supra* note 43, at 823–24; Goldberg & Sarabyn, *supra* note 17, at 221–23, 242–43; Nugent & Flood, *supra* note 81; see, e.g., Rabban, *supra* note 17, at 235–37; see also *Easy Answers*, *supra* note 58, at 1542.

lower cost, than the state (or in the case of public universities, other governmental entities) can.<sup>228</sup>

These theories and arguments do not fully account for the decisions in which the Court and lower courts have deferred to university judgments.<sup>229</sup> Although they recognize universities' need for autonomy to safeguard scholars' academic work, existing theories largely overlook universities' need for autonomy to ensure that all of the universities' pursuits align with a customized educational mission that serves the common good, in the public trust.<sup>230</sup> It appears to me these oversights have contributed to an incomplete understanding of constitutional academic freedom. Reading the Court's decisions with a view to both the academic and public or charitable facets of university identity reveals a more complete understanding of this right.

The Court generally has granted deference to universities when it determines their judgments<sup>231</sup> are: (1) "academic," "pedagogical," or "educational" in nature;<sup>232</sup> (2) consistent with the university's "proper"

228. See *Institutions in the Marketplace*, *supra* note 32, at 846, 857–58.

229. If the Court's deference to university judgments could be explained solely by reference to the values served by individual academic freedom, the Court logically would defer to universities only in matters that implicate individual academic freedom. In practice, the Court and lower courts have granted deference to university judgments involving a broader range of matters. These include: the selection and dismissal of students, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 214 (1985); the selection and retention of faculty, see, e.g., *Weinstein v. Univ. of Ill.*, 811 F.2d 1091 (7th Cir. 1987); control of the classroom curriculum, see *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488 (3d Cir. 1998); the choice of faculty to teach a particular course, see *Webb v. Bd. of Tr. of Ball State Univ.*, 167 F.3d 1146, 1149 (7th Cir. 1999); the importance of student diversity to the fulfillment of educational mission, see *Grutter v. Bollinger*, 539 U.S. 306 (2003); the germaneness of particular speech to educational objectives, see *Southworth*, 529 U.S. at 232 ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning"); universities' authority to prohibit discrimination in co-curricular activities, see *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010); see generally Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J. C. & U. L. 583, 584 (2004); universities' authority to restrict speech consistent with the standards of a profession or field in which students are being trained, see *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (Mar. 10, 2003); and the appropriate use of university resources, see *Widmar v. Vincent*, 454 U.S. 263, 278–79 (1981).

230. *Grutter's First Amendment*, *supra* note 17, at 510; *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239 (2000) (Souter, J., concurring) ("[P]rotecting a university's discretion to shape its educational mission may prove to be an important consideration of First Amendment analysis of objections to student fees.").

231. My articulation of this framework relies in large part on Paul Horwitz's analysis and insights. See *Grutter's First Amendment*, *supra* note 17.

232. *Bakke*, 438 U.S. at 312; *Martinez*, 561 U.S. at 663, 685–86 (2010); *Ewing*, 474 U.S. at 225–28; *Grutter's First Amendment*, *supra* note 17, at 492, 514–15; *Goldberg & Sarabyn*, *supra* note 17, at 234, 252; see *Grutter*, 539 U.S. at 328.

institutional or educational mission;<sup>233</sup> (3) consistent with the university's community standards;<sup>234</sup> (4) made after careful deliberation;<sup>235</sup> and (5) made in good faith, which is presumed absent evidence of the contrary (including evidence of intentional viewpoint discrimination that is inconsistent with universities' self-imposed institutional norms and community standards that uphold those norms).<sup>236</sup> Two of these elements (the academic nature of the decision and avoidance of viewpoint discrimination) can be explained by the unique contributions to market competitiveness, efficiency, and idea valuation that result from universities' academic identity. The others reflect a more holistic understanding of universities' obligations as public or charitable academic organizations.

Specifically, the Court's separate consideration of whether a university's judgment is both academic (or pedagogical or educational) *and* consistent with its "proper" mission can be explained by universities' obligation to advance an individualized mission that serves the common good<sup>237</sup>—the basis for its public or charitable support.<sup>238</sup> The Court's interest in ensuring that university judgments are consistent with their community standards can be explained by universities' obligation to operate in the public trust.<sup>239</sup> The Court's consideration of whether universities engaged in deliberation and the Court's presumption of good faith (absent evidence to the contrary) can be understood to demonstrate the Court's recognition of the fraught nature of university decision-making when an individual marketplace participant's pursuit and promotion of particular ideas competes with the university's obligation to use its resources only to support the tai-

233. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *Bakke*, 438 U.S. at 312–14; *Martinez*, 561 U.S. at 684; *Grutter's First Amendment*, *supra* note 17, at 499; *see Grutter*, 539 U.S. at 308, 340; *cf. Goldberg & Sarabyn*, *supra* note 17, at 234, 252.

234. *Bakke*, 438 U.S. at 274–77; *Martinez*, 561 U.S. at 686–90, 697; *Ewing*, 474 U.S. at 225, 227; *Grutter's First Amendment*, *supra* note 17, at 490–91, 499; *see Grutter*, 539 U.S. at 315; *see also Healy v. James*, 408 U.S. 169, 189 (1972).

235. *Bakke*, 438 U.S. at 318–19; *Martinez*, 561 U.S. at 697; *Ewing*, 474 U.S. at 225, 227; *see Grutter*, 539 U.S. at 329.

236. *Bakke*, 438 U.S. at 318–19; *Martinez*, 561 U.S. at 697; *Ewing*, 474 U.S. at 225, 227; *Grutter's First Amendment*, *supra* note 17, at 509, 572; *Goldberg & Sarabyn*, *supra* note 17, at 252–53; Neal H. Hutchens, Kristin Wilson & Jason Block, *CLS v. Martinez and Competing Legal Discourses Over the Appropriate Degree of Judicial Deference to the Co-Curricular Realm*, 39 J.C. & U.L. 541, 553, 557 (2013); *see Grutter*, 539 U.S. at 329.

237. *See Easy Answers*, *supra* note 58, at 1547–49 (encouraging courts to "defer substantially to universities' own sense of what their academic mission requires" and suggesting it is reasonable for universities to tailor their specific educational purposes based on the university's own judgments).

238. *See supra* notes 94–98 and accompanying text.

239. *See supra* notes 96–106 and accompanying text; Bryce, *supra* note 96, at 114–15 ("[Public] trust is dependent in part on the success with which [a nonprofit organization's] shared values and common interests are projected or communicated."); *see also Easy Answers*, *supra* note 58, at 1544 (suggesting that universities are unlikely to abuse their institutional autonomy in extreme ways if they must explain such decisions by reference to their mission).

lored purposes and environment that are consistent with its customized, common-good community standards.<sup>240</sup>

In these situations, the Court has trusted universities to manage, through the exercise of their professional judgment as educational administrators, what is inherently an *institutional* tension, so long as the decision remains within the four corners of the university's institutional obligations.<sup>241</sup> The Court's trust of universities under these circumstances helps promote public trust, and it further facilitates that trust by incentivizing universities to maintain integrity with their known identities and standards.<sup>242</sup>

The Court's approach suggests that it is equally or more concerned with the maintenance of institutional integrity and public trust than with the promotion, in any particular instance, of a competitive, efficient marketplace of ideas.<sup>243</sup> The Court could consistently balance on the side of speech, maintaining the primacy of First Amendment free speech guarantees. Instead, it has held universities accountable for institutional integrity.<sup>244</sup> If universities expect the Court will hold them accountable to their known community standards,<sup>245</sup> they are more likely to clearly articulate and maintain integrity with those standards.<sup>246</sup> Institutional integrity drives trust, and continued trust ensures that universities can continue to effectively advance their common-good missions and thus serve important constitutional interests.<sup>247</sup>

As I see it, promoting integrity and public trust in critical, national institutions is a foundational purpose served by the Court. The smooth func-

240. See *supra* Part I.C.2; see also Grutter's *First Amendment*, *supra* note 17, at 524 (post-Grutter, "universities have substantial freedom to negotiate between [competing societal] interests").

241. See *supra* note 236 and accompanying text; Hutchens, Wilson & Block, *supra* note 236, at 552 (noting that the *Martinez* dissent's concern that there was "strong evidence in the record that the policy was announced as a pretext" for viewpoint discrimination); *Citizen Servant*, *supra* note 17, at 462–63 (noting that the Court's decisions suggest deference is a rebuttable presumption that "can be overcome when a faculty member shows that the institution has infringed her First Amendment rights for reasons other than legitimate academic reasons."); see also Grutter's *First Amendment*, *supra* note 17, at 508–09.

242. See *supra* notes 96–106 and accompanying text.

243. See Steve Leben, *Public Trust and Confidence in the Courts: A National Conference and Beyond*, 36 CT. REV. 4 (Fall 1999); see David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24 (Fall 1999); Robert Roberts, *The Supreme Court and the Law of Public Service Ethics*, PUB. INTEGRITY 20 (1999); *Public Trust and Confidence*, NAT'L CTR. FOR ST. CTS. (last updated March 30, 2018), <http://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx>; *Purposes and Responsibilities of Courts, Public Trust and Confidence*, NAT'L ASS'N FOR COURT MGMT., [https://nacmnet.org/CCCG/cccg\\_1\\_corecompetency\\_purposes\\_cg1.html](https://nacmnet.org/CCCG/cccg_1_corecompetency_purposes_cg1.html).

244. See *supra* note 211 and accompanying text.

245. See *supra* notes 231–242 and accompanying text.

246. *Easy Answers*, *supra* note 58, at 1544; see Grutter's *First Amendment*, *supra* note 17, at 581.

247. Grutter's *First Amendment*, *supra* note 17, at 501, 526, 549–50; see DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 21, at 61–93 (arguing that academic freedom contributes to the constitutional interest of democratic competence); Bryce, *supra* note 96, at 113.

tioning of our democratic society is dependent on a web of nationally recognized institutions, like academia,<sup>248</sup> whose purposes and norms advance constitutional values that enable us to live in community.<sup>249</sup> The erosion of public trust in institutions is disruptive at best, fatal at worst. Individual fatalities are frequently absorbed and overcome by society, but society's ability to withstand an *institutional* fatality is less clear to me. I suspect it is no clearer to the Court. By following a decision-making approach that precisely maps the route to institutional integrity for institutions that uniquely serve constitutional interests,<sup>250</sup> the Court minimizes the risk of fatalities and helps ensure the continued, smooth functioning of society—surely a constitutional interest itself.<sup>251</sup>

Deferring to universities that maintain integrity with their known purposes and norms also reflects a pragmatism demanded by the increasing complexity and evolving nature of the university marketplace.<sup>252</sup> In the decades since *Sweezy*, universities have diversified,<sup>253</sup> and the cost of the education they offer has increased dramatically.<sup>254</sup> Competition for students has increased, too, and despite their common institutional standards, each university must distinguish its educational value proposition or risk losing market share.<sup>255</sup> A small number of U.S. universities face greater demand than their resources can support, most others cannot fill their seats,<sup>256</sup> and

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248. These institutions are both governmental (like Congress or the judiciary) and non-governmental (like academia, organized religion, libraries, or the press). See, e.g., *Grutter's First Amendment*, *supra* note 17, at 570.

249. *Balancing Free Speech*, *supra* note 16, at 18, 21–22; *Participatory Democracy*, *supra* note 31, at 624; *Why Bother*, *supra* note 94, at 12–16; see *Institutions in the Marketplace*, *supra* note 32, at 840–41.

250. For examples of cases suggesting the Court's deference to universities could be replicated for other institutions, see *Grutter's First Amendment*, *supra* note 17, at 570–71.

251. See *Participatory Democracy*, *supra* note 31, at 627 (“The most fundamental problem of any constitutional order is how to establish stable forms of social ordering, a value that democracy uniquely facilitates and that does not entail further systematic commitments to individual autonomy.”).

252. See *Grutter's First Amendment*, *supra* note 17, at 573; *cf. id.* at 471 (The Court's use of “generally applicable principles, such as neutrality and equality, as its guiding principles in First Amendment jurisprudence . . . blind the Court to the real-world context in which many speech acts take place.”).

253. See *supra* note 100.

254. See *id.*

255. Eric Hoover, *Marketing to Survive*, CHRON. HIGHER EDUC. (Feb. 29, 2016), <https://www.chronicle.com/article/Marketing-to-Survive/235460>; see, e.g., Greg Summers, *Back to the Future at Stevens Point*, CHRON. HIGHER EDUC. (Mar. 29, 2018), <https://www.chronicle.com/article/Back-to-the-Future-at-Stevens/242978>.

256. See, e.g., Farran Powell, *How Competitive Is College Admissions?*, U.S. NEWS & WORLD REP. (Sept. 22, 2016), <https://www.usnews.com/education/best-colleges/articles/2016-09-22/how-competitive-is-college-admissions>.



all are experiencing rapid shifts in students' academic demands,<sup>257</sup> requiring the careful and efficient management of university resources.<sup>258</sup>

In addition to these challenges, the boundaries around the university marketplace have dissolved. University marketplace participants regularly communicate ideas bound up with universities' expanding educational programs, policies, and activities through speech forums (like social media services and privately maintained websites) that are outside the university's borders and control.<sup>259</sup> An unexpected tweet can quickly transfer private speech to a designated or public forum, shining a spotlight on the university.<sup>260</sup> A single social media post can, within hours or minutes, mobilize a "flash mob" campus protest that can be broadcast globally in an instant, requiring an immediate response from both the university's public safety and public relations departments.<sup>261</sup> Modern speech forums operate twenty-four hours a day and have few effective mechanisms to enforce standards of participation (if they maintain standards at all).

In this environment, there is heightened potential for individual marketplace participants to seriously and unpredictably disrupt a university's ability to allocate resources in the manner it judges to best advance its common-good educational mission.<sup>262</sup> There also is heightened potential for the actions of a single marketplace participant, and the university's response to that participant, to raise public suspicion that a university is not effectively advancing its common-good mission, regardless of the facts. This rapidly evolving speech environment demands a constitutional decision-making framework that is consistently applicable to new speech forms and forums.<sup>263</sup> The framework must acknowledge universities' obligation to focus

257. See, e.g., Eric Hayot, *The Humanities as We Know Them Are Doomed. Now What?*, CHRON. HIGHER EDUC. (July 1, 2018), <https://www.chronicle.com/article/The-Humanities-as-We-Know-Them/243769>.

258. Davidson, *supra* note 102; Doug Lederman, *Leading in Turbulent Times: A Survey of Presidents*, INSIDE HIGHER EDUC. (Mar. 9, 2018), <https://www.insidehighered.com/news/survey/survey-college-presidents-finds-worry-about-public-attitudes-confidence-finances> (noting that recent college mergers, closures, and tuition resets "hint at a recognition by campus leaders that the financial pressures on their institutions is a permanent condition rather than a lingering result of the Great Recession"); see, e.g., Summers, *supra* note 255.

259. See *supra* note 15 and accompanying text; see also, e.g., *McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012).

260. See Beckie Supiano, *What Happens in the Classroom No Longer Stays in the Classroom. What Does That Mean for Teaching?*, CHRON. HIGHER EDUC. (July 19, 2018), <https://www.chronicle.com/article/What-Happens-in-the-Classroom/243974>.

261. See Michael Edison Hayden, *Richard Spencer: Prepare for More White Nationalist Flash Mobs*, NEWSWEEK (Oct. 10, 2017), <https://www.newsweek.com/richard-spencer-prepare-more-white-nationalist-flash-mobs-681242>.

262. See also *Freedom of Speech and the University*, *supra* note 35, at 27 ("All government institutions established to achieve particular goals must regulate speech as necessary to achieve those goals, on pain of becoming ineffective.").

263. See also *Easy Answers*, *supra* note 58, at 1512. A move away from ad hoc balancing in decisions affecting the university marketplace is consistent with the Court's general move away from ad hoc balancing and towards categorical balancing, in an effort to reduce the opportunity

resources as they judge to best advance their customized missions, within the context of institutional obligations.<sup>264</sup>

A framework that defers to universities that maintain institutional integrity with their known purposes and norms meets these demands. In an unbounded communication and educational environment, it offers better predictive value to universities, their stakeholders, and the lower courts than the old balancing construct of forum analysis and time, place, and manner restrictions.<sup>265</sup> It also reflects faculty interests: if a university is appropriately upholding the academic norm of shared governance, then all of its community standards should reflect faculty input or approval to the extent its shared governance system requires it.<sup>266</sup> Accordingly, by trusting universities only when their judgments are consistent with their community standards, the Court effectively grants as much deference to the university's faculty as it grants to the university itself.<sup>267</sup>

Universities' right of constitutional academic freedom reflects the Court's understanding—conscious or not—that to preserve public trust in universities, universities must retain sufficient freedom to manage institutional tensions using their own professional judgment, so long as they exercise that judgment in good faith.<sup>268</sup> The Court has demonstrated that it will

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for courts to exercise subjective judgments. *Balancing Free Speech*, *supra* note 16; *see generally Post-Liberal Judging*, *supra* note 24.

264. *See supra* notes 94–106 and accompanying text.

265. While this integrity-based framework would provide more consistent guidance than ad hoc balancing given the unpredictable nature of new speech forms and forums, in practice the outcomes of this framework should generally be consistent with forum analysis outcomes (at least where the speech forum is readily recognizable to university administrators), because forum analysis also is dependent on the university's clear articulation (through policy statements) of and demonstrated compliance (through customary practice) with the intended purpose and rules governing the forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802–03 (1985). Moreover, even public universities never have been obligated to open the university marketplace to public speech. *See supra* notes 35–39 and accompanying text. The outcomes of this integrity-based decision-making framework also would be consistent with the holding in a private university case in which the university committed, through its policies, to uphold broader standards of free speech than, as a private university, it was required to uphold; in that case, the university sought deference from the courts on the grounds of institutional autonomy and was rejected because its decision was inconsistent with its policy. *See State v. Schmid*, 423 A.2d 615 (N.J. 1980). Of course, the challenge for any university that has opened campus speech forums for public participation and later wishes to restrict them is how best to shift course. I think it is as simple as changing policy. *See Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017). Admittedly, changing policy in the university context is easier said than done due to shared governance obligations and the possibility that faculty, students, and other university stakeholders will strongly resist changes that seem inconsistent with their own interests and their perception of university obligations. Changes in policy that would tighten the university's focus and resources on core educational activities, with accompanying benefits to students and faculty, seem more likely to garner support than changes that simply eliminate the use of the forum for public purposes.

266. *See supra* notes 79–83 and accompanying text.

267. *See Julian N. Eule & Jonathan D. Varat, Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1617–18 (1998); *Easy Answers*, *supra* note 58, at 1533–34; *Grutter's First Amendment*, *supra* note 17, at 566.

268. *See supra* Part I.C.2.

not second-guess these judgments unless they appear likely to erode public trust in universities, individually or collectively.

### C. *The Proper Scope of Constitutional Academic Freedom*

Since *Grutter*, the Court and lower courts have not consistently invoked constitutional academic freedom to explain their deference to universities,<sup>269</sup> contributing to confusion about this right.<sup>270</sup> Cases that apply the Court's decision-making framework, despite failing to reference constitutional academic freedom, can help clarify its proper scope and application. Two key Minnesota student speech cases illustrate this.<sup>271</sup>

In *Keefe v. Adams*,<sup>272</sup> the Eighth Circuit affirmed the summary judgment dismissal of a nursing student's First Amendment claim contesting his removal from a community college nursing program based on his social media posts.<sup>273</sup> The court concluded that a professional school's administrators have discretion to require compliance with recognized professional standards both on and off campus,<sup>274</sup> so long as the restriction is not "a pretext for viewpoint, or any other kind of discrimination."<sup>275</sup> The court affirmed that the professional nursing code of ethics was a legitimate part of the academic program curriculum; thus, noncompliance with the code "materially disrupts" the program's "legitimate pedagogical concerns" and could be disciplined.<sup>276</sup>

269. Goldberg & Sarabyn, *supra* note 17, at 219; *Citizen Servant*, *supra* note 17, at 408, 459; see Rabban, *supra* note 17, at 235–37.

270. *Grutter's First Amendment*, *supra* note 17; see Goldberg & Sarabyn, *supra* note 17, at 222. See generally *Getting Real*, *supra* note 61.

271. The holdings in these cases, *Keefe v. Adams* and *Tatro v. University of Minnesota*, relied on the same decision-making framework the Court has applied to justify deference to university judgments. In each case, the university was managing a tension between speech freedoms in the university marketplace and the university's customized, common-good educational mission (training students for a profession). It made an academic decision, after deliberation and apparently in good faith, that was consistent with its customized mission and other known community standards, which were consistent with academic norms and the university's obligation, as a public university, to steward its resources consistent with its common-good mission. See *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012); *supra* notes 75, 94–106, 231–242 and accompanying text.

272. 840 F.3d 523.

273. See *id.*

274. The court noted that "[m]any courts have upheld enforcement of academic requirements of professionalism and fitness." *Id.* at 530; *Oyama v. Univ. of Haw.*, 813 F.3d 850, 866–68 (9th Cir. 2015); *Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875–76 (11th Cir. 2011); *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286–90 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 947–49 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003).

275. *Keefe*, 840 F.3d at 530 ("If compliance with professional ethical standards is a permissible academic requirement, then determinations of non-compliance will almost always be based at least in part on a student's speech.")

276. *Id.* at 531.

The court rejected the student's claim that it would violate the First Amendment to discipline off-campus speech that is not in an unprotected category of speech; it stated that a "student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct."<sup>277</sup> To explain its holding, the court cited *Regents of the University of Michigan v. Ewing* ("Considerations of profound importance counsel restrained judicial review of the substance of academic decisions"<sup>278</sup>) and the Sixth Circuit in *Ward v. Polite* ("When a university lays out a program's curriculum or class's requirement for all to see, it is the rare day when a student can exercise a First Amendment veto over them."<sup>279</sup>). The student's petition for certiorari was denied.

In *Tatro v. University of Minnesota*,<sup>280</sup> the Minnesota Supreme Court held that a university could restrict a mortuary student's social media posts containing disrespectful comments about the donated cadavers students worked on in class, because the posts violated established professional conduct standards of the mortuary profession requiring deceased bodies to be treated with dignity and respect.<sup>281</sup> The court granted "deference to the curriculum decisions of the University" and concluded that "the academic program rules imposed on Tatro . . . are directly related to established professional conduct standards" and "narrowly tailored."<sup>282</sup>

*Keefe* and *Tatro* confirm that it is a proper academic decision to hold students accountable to the established standards of a professional discipline in which they are being trained, and to hold students accountable for off-campus speech that implicates curricular obligations and legitimate pedagogical concerns.<sup>283</sup> A logical application of this conclusion is that universities may hold all students accountable for off-campus speech in accordance with the professional standards of *academic* disciplines in which they are being trained, which include the responsibilities of academic freedom.<sup>284</sup> Academic freedom responsibilities extend to scholars' expression and writing as citizens, because "the public may judge their profession and their institution by their utterances."<sup>285</sup> In today's high-stakes communication environment,<sup>286</sup> it seems reasonable to hold students accountable for extramural utterances that violate community standards in ways that im-

277. *Id.*

278. *Id.* at 533 (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985)).

279. *Id.* at 532 (citing *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012)).

280. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012).

281. *Id.*

282. *Id.*

283. *See supra* notes 235–41, 273–76, 280–81 and accompanying text.

284. Holding students accountable to academic freedom would appear to place more constraints on their speech than the Joint Statement on Rights and Freedoms of Students. *See STUDENT RIGHTS*, *supra* note 78; *cf.* 1940 STATEMENT, *supra* note 70. *See also Kaplin & Lee*, *supra* note 78, at 852–53.

285. 1940 STATEMENT, *supra* note 70, at 14; *see also supra* note 70.

286. *See supra* notes 259–64 and accompanying text.

pligate perceptions of university integrity, regardless of whether the statements are governed by the academic rules of a specific course,<sup>287</sup> so long as each other component of the Court's decision-making framework has been satisfied.<sup>288</sup>

If universities can regulate off-campus speech of faculty and students, it seems logical that universities also could regulate the on-campus speech of outside speakers whose speech may implicate university integrity, so long as the Court's decision-making framework has been satisfied.<sup>289</sup> This means universities would be required to notify invited speakers, in advance, of any standards they must uphold if they accept the invitation to speak.<sup>290</sup>

## V. A CATHOLIC UNIVERSITY APPROACH TO CAMPUS SPEECH AND UNIVERSITY IDENTITY

Campus speech tensions can ignite from myriad sparks: external speakers and messaging campaigns that touch the campus;<sup>291</sup> personal actions and interactions of university community members;<sup>292</sup> and administrative choices.<sup>293</sup> Ultimately, these tensions all arise from individuals' differing perceptions about the interests the university is expected to serve, and how it can best serve them. The work of Catholic universities, and the Court's past decisions, demonstrate that universities need not manage these tensions by trading off one essential element of university identity for another. Through the exercise of constitutional academic freedom, all universities can effectively hold the tension of free speech, inclusive diversity, and

287. If universities hold their students to the same academic freedom responsibilities as apply to faculty, then they also should follow the same controlling principle for responding to violations of those responsibilities as apply to faculty, resorting to dismissal only if the expression "clearly demonstrates . . . unfitness" to serve in a faculty or student role, taking their entire record into account. 1940 STATEMENT, *supra* note 70, at 15 (quoting EXTRAMURAL UTTERANCES, *supra* note 75, at 31); *see also supra* note 70.

288. *See supra* notes 75, 94–106 and accompanying text; 1940 STATEMENT, *supra* note 70; *see also Freedom of Speech and the University, supra* note 35, at 25–26 ("The fact that universities are . . . reaching out to regulate off-campus [sic] behavior suggests that they in fact do believe that it somehow relates to their educational mission.").

289. *See also No 1st Amendment Right, supra* note 120.

290. Universities could hold outside speakers accountable to universities' community standards, the professional norms of the speaker's own profession, or a hybrid or modified form of either, depending on the purpose of the speech and the profession of the speaker.

291. *See, e.g.,* Cohen *supra* note 6; Scott Jaschik, *Confronting 'It's OK to Be White,'* INSIDE HIGHER EDUC. (Nov. 5, 2018), <https://www.insidehighered.com/news/2018/11/05/campuses-confront-spread-its-ok-be-white-posters>.

292. *See, e.g., Under Fire, supra* note 124; *McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018).

293. *See, e.g.,* Thomason & Johnson, *supra* note 7; Monica Wang & Susan Svrluga, *Yale Renames Calhoun College Because of Historical Ties to White Supremacy and Slavery*, WASH. POST (Feb. 12, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/02/11/yale-renames-calhoun-college-because-of-historic-ties-to-white-supremacy-and-slavery/?utm\\_term=.5c959ddb64b0](https://www.washingtonpost.com/news/grade-point/wp/2017/02/11/yale-renames-calhoun-college-because-of-historic-ties-to-white-supremacy-and-slavery/?utm_term=.5c959ddb64b0).

their distinctive institutional and individual identities, by applying five lessons from the Catholic university experience.

A. *Renew the Institutional Vision for Modern Universities by Clearly Defining Their Fundamental Purposes, Essential Characteristics, and Norms*

University presidents believe that the public does not understand the purpose of higher education.<sup>294</sup> If this is true, the fault lies primarily with the institution. Academia last articulated a collective vision in 1915,<sup>295</sup> at a time when university communities were largely homogenous,<sup>296</sup> with fixed boundaries around their campuses and comparatively few platforms for individual expression. Over the past century, the educational landscape has grown significantly more complex.<sup>297</sup> Today's universities have a deeper understanding of the full range of needs of a highly diverse society, and they know more about what it takes to ensure an effective educational environment for all students who wish to learn.<sup>298</sup> Norms are evolving to reflect this new knowledge<sup>299</sup> but universities' messaging is out of sync.<sup>300</sup> They have failed to effectively communicate and demonstrate how they can serve the interests of all of their stakeholders with integrity.<sup>301</sup> Declining public trust in universities and the prevalence of campus speech tensions suggest that universities cannot resolve this issue simply by ramping up communications that reinforce the same themes universities have relied on in the past. U.S. universities must look to the future and establish their own *Ex*

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294. 2018 GALLUP SURVEY, *supra* note 18, at 23 (“Over all, 13 percent of presidents strongly agree or agree, while 56 percent strongly disagree, that Americans have an accurate view of the purpose of higher education.”).

295. 1915 DECLARATION, *supra* note 52. Since 1915, academic associations have published many policy statements that more fully address individual interests first articulated in the 1915 Declaration, with widespread support across the academy. *See, e.g.*, REDBOOK, *supra* note 58. These policy statements may reference particular elements of university identity, but none offers a comprehensive, institutional vision for universities. *See id.* The AACU Statement on Free Expression, Liberal Education, and Inclusive Excellence takes steps in this direction, but it is limited to universities focused on “liberal education” and does not offer the same type of concrete implementing guidance as *Ex Corde*. *See* AACU Statement, *supra* note 78.

296. *Cf.* R. George Wright, *Campus Speech and the Functions of the University*, 43 J.C. & U.L. 1, 9 (2017).

297. *See supra* notes 9–15 and accompanying text.

298. *See supra* notes 134–38 and accompanying text.

299. *See supra* notes 132–40 and accompanying text.

300. *See supra* Part II.

301. *See id.* University governing authorities recognize their challenges: The Association of Governing Boards of Universities and Colleges, which focuses on university governance, began an initiative in 2017 to synchronize messaging of university trustees, designed “to involve [them] in countering growing skepticism about the value of higher education.” The Guardians Initiative Aims to Reclaim Public Trust in Higher Education, ASS’N OF GOVERNING BOARDS, <https://www.agb.org/guardians> (last visited Feb. 1, 2019). Their research briefs address topics including “The Promise of Higher Education,” “Public Confidence in Higher Education,” and “Renewing the Democratic Purposes of Higher Education,” among others. *Id.* at <https://www.agb.org/guardians/learn>. However, these efforts are limited in scope and ad hoc in execution. *See id.*

*Corde*, a renewed, shared vision of what it means to be a university in the modern world.

Universities' vision must clearly articulate the indispensable purposes that modern universities serve, their essential characteristics, and the norms they are expected to uphold to retain their distinctive public or charitable academic identity.<sup>302</sup> Without an authoritative articulation of the framework that applies across all U.S. universities, there can be no common expectations against which stakeholders can assess whether universities meet their institutional obligations with integrity.<sup>303</sup> The lack of a well-defined framework also makes it easier for universities to shirk accountability.

In the case of Catholic universities, the visioning process was initiated by influential leaders in Catholic higher education, with the final vision articulated by the Church. Unless U.S. universities are prepared to defer to Congress, they must complete the process themselves. Influential university and academic association leaders could initiate this work, building on ad hoc trust-building efforts that already are underway within pockets of the academy.<sup>304</sup> The process could be iterative, beginning with a small group and then expanding to representatives from across academia, with opportunities for input from individual university communities and key external stakeholders. When the process is complete, academic associations and individual universities could be asked to make a public commitment to embrace and publicize their renewed institutional vision. If universities fail to establish an institution-wide framework, reflecting university and key stake-

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302. See *Easy Answers*, *supra* note 58, at 1546, 1549 (noting that academia “has long debated the very purpose of higher education” and encouraging dialogue “within and between universities about their educational missions and about the meaning of academic freedom.”); *Freedom of Speech and the University*, *supra* note 35, at 22–30. While the relative values of free speech and inclusive diversity are important aspects of this vision, they are only a piece of university identity and mission that requires greater clarity. See Peter Monaghan, *How Academe Can Retrieve Its Good Name*, CHRON. HIGHER EDUC. (Nov. 25, 2018), <https://www.chronicle.com/article/How-Academe-Can-Retrieve-Its/245154> (“The standing of higher education is in peril, so ‘we now need to make explicit the terms of the partnership’”) (quoting from Holden Thorp & Buck Goldstein, *OUR HIGHER CALLING, REBUILDING THE PARTNERSHIP BETWEEN AMERICA AND ITS COLLEGES AND UNIVERSITIES* (2018)).

303. It could be argued, perhaps, that higher education accreditation standards provide a common framework for measurement, but these standards are inconsistent across the country, and they do not require demonstrated integrity with any particular purposes or values. Moreover, accreditors are focused on quality assurance based on the accreditor’s understanding of the purpose of higher education institutions; accreditors do not establish that purpose. *Guiding Values*, HIGHER LEARNING COMM’N, <https://www.hlcommission.org/Publications/guiding-values.html>; see, e.g., *Accreditation Serving the Public Interest*, COUNCIL FOR HIGHER EDUC. ACCREDITATION (Aug. 2015), [http://www.chea.org/userfiles/uploads/chea-at-a-glance\\_2015.pdf](http://www.chea.org/userfiles/uploads/chea-at-a-glance_2015.pdf). While some higher education associations have developed principles that apply to their own members, see AACU Statement on Inclusive Excellence, *supra* note 78, AACU Statement on Diversity, *supra* note 134; AAU Statement on Academic Principles, *supra* note 89, no association has articulated comprehensively all of the academic norms and values essential to reputable standing in academia. ACE Statement, *supra* note 100; see also *Easy Answers*, *supra* note 58, at 1546, 1549.

304. See *supra* notes 295, 301, 303.

holder input and dialogue, external authorities may impose their own vision and rules.<sup>305</sup>

*B. Commit to Hold the Tension of Essential Interests, Within the Confines of Truth and the Common Good*

Catholic universities manage the tension of *Catholic* and *university* using the same tools available to all universities: they make value judgments, through the exercise of academic freedom and institutional autonomy, about what is truth, what truth deserves promotion as knowledge, and whether particular truth-seeking and knowledge-promotion pursuits advance the common good in ways that effectively serve student and societal needs in light of available resources.<sup>306</sup> But Catholic university leaders and the Church understood that to realize the full potential of Catholic universities, these value judgments cannot result in an imbalance or compromise of either interest; both elements are essential to their identity, and a clear touchstone would be required to gauge whether Catholic universities' value judgments effectively hold these interests in tension. The touchstone established by *Ex Corde* is simple, compelling, and meets the needs of both university and Church: Catholic universities must assess their ideas and pursuits based on whether they preserve human dignity, as defined by the Church, and "create and support institutions that improve the conditions of human life."<sup>307</sup>

Today, there is no clear touchstone that guides the value judgments of universities institution-wide when managing tensions between competing

305. Some lawmakers have begun such efforts already. *See, e.g.*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC., *Florida Becomes Ninth State to Ban Restrictive Campus Free Speech Zones* (Mar. 12, 2018), <https://www.thefire.org/florida-becomes-ninth-state-to-ban-restrictive-campus-free-speech-zones/>; Tyler Coward, *Louisiana Governor Signs Campus Free Speech Bill into Law; Law Needs Technical Improvement*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., INC. (June 6, 2018), <https://thefire.org/louisiana-governor-signs-campus-free-speech-bill-into-law-law-needs-technical-improvement/>; William Petroski, *Should Iowa Abolish Faculty Tenure at State Universities?*, DES MOINES REGISTER (updated Jan. 18, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/01/18/should-iowa-abolish-faculty-tenure-state-universities/1043576001/>; Colleen Flaherty, *Killing Tenure*, INSIDE HIGHER EDUC. (Jan. 13, 2017), <https://www.insidehighered.com/news/2017/01/13/legislation-two-states-seeks-eliminate-tenure-public-higher-education>.

306. *See* Baxter, *supra* note 102, at 634 ("[A]ll institutions of higher learning operate according to a scale of values that defines and thereby limits academic freedom. What is different about the Catholic institutions—at least the ones patterned after the vision of [*Ex Corde*—is that they are more explicit, more forthright and honest, about their scale of values, which the pope sums up in the phrase 'truth and common good.'"). *See also supra* Part I.C.

307. Catechism, *supra* note 137, at Section 1926. In Catholic teaching, improving the conditions of human life does not exclude interests in the preservation of non-human life; these interests are mutually supportive. *See id.* at Section 2415 ("The seventh commandment enjoins respect for the integrity of creation. Animals, like plants and inanimate beings, are by nature destined for the common good of past, present, and future humanity. . . . Man's dominion over inanimate and other living beings granted by the Creator is not absolute; it is limited by concern for the quality of life of his neighbor, including generations to come; it requires a religious respect for the integrity of creation." (citations omitted)).



interests. Moreover, there is no clarity about the values they should weigh.<sup>308</sup> Although many university marketplace participants have identified inclusive diversity as an essential value, the institution has failed to assign it weight,<sup>309</sup> making it harder for individual universities to do so. Ambiguity about institutional values encourages a lack of transparency because it is unclear whether particular value judgments are within institutional bounds. Universities, thus, continue to imbalance or compromise essential values in haphazard fashion without explanation, rather than holding them in tension in a way that stakeholders can understand.<sup>310</sup>

As a result of these shortcomings and the gap between stakeholder expectations and the outcomes of academia's value judgments, many stakeholders no longer trust academia's self-regulatory system to reveal truth<sup>311</sup>—the foundational purpose of the university marketplace. If universities are no longer trusted as a societal source of truth, there is no constitutional reason to distinguish them from the public marketplace through the grant of individual or institutional academic freedom. If universities care to continue their special role in society, they must define their confines of truth and the common good with greater precision, in ways that give stakeholders greater confidence that universities' collective pursuits advance public interests.

An indisputable truth of the university marketplace is that over the past century, it has failed to effectively engage the full diversity of prospective offerors, such that the marketplace is less competitive and efficient than intended.<sup>312</sup> Recent campus speech tensions have focused on universities' under-engagement of participants distinguished by race and ethnicity.<sup>313</sup> There is evidence that universities also have under-engaged some participants distinguished by socioeconomic status and political persuasion.<sup>314</sup> Universities could better serve the full range of prospective participants and societal interests by holding the tension of inclusive diversity and free

308. See *supra* Part II.B.1.

309. See *supra* Part II.B.2.

310. See *supra* Part II.B.

311. See Michiko Kakutani, *'The Death of Expertise' Explores How Ignorance Became a Virtue*, N.Y. TIMES (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/books/the-death-of-expertise-explores-how-ignorance-became-a-virtue.html>.

312. See *supra* notes 135–46 and accompanying text; *supra* Part I.C.1.

313. See *supra* notes 135–46, 163.

314. See, e.g., *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours.*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html>; Scott Jaschik, *Professors and Politics: What the Research Says*, INSIDE HIGHER EDUC. (Feb. 27, 2017), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means>; Kim Phillips-Fein, *How the Right Learned to Loathe Higher Education*, CHRON. HIGHER EDUC. (Jan. 31, 2019), [https://www.chronicle.com/article/How-the-Right-Learned-to/245580?cid=at&utm\\_source=at&utm\\_medium=en&elqTrackId=cc2459e9552840d6bb2d68970e322d77&elq=b94cc909a4e144ba8e1adde3cdc53f2f&elqaid=22129&elqat=1&elqCampaignId=10846](https://www.chronicle.com/article/How-the-Right-Learned-to/245580?cid=at&utm_source=at&utm_medium=en&elqTrackId=cc2459e9552840d6bb2d68970e322d77&elq=b94cc909a4e144ba8e1adde3cdc53f2f&elqaid=22129&elqat=1&elqCampaignId=10846).

speech within similar confines as apply to Catholic universities by making value judgments about truth and the common good based on whether particular ideas or pursuits preserve human dignity (however they wish to define it) and improve the communal conditions of human life. These are content-neutral objectives that are consistent with both institutional obligations and constitutional interests,<sup>315</sup> and they provide universities and their stakeholders with clear boundaries and direction that still allow ample room for customization by individual universities.

*C. Clearly and Precisely Articulate an Individualized Mission and Other Community Standards Within the Common, Institutional Framework*

Higher education accreditors generally require universities to articulate their missions;<sup>316</sup> however, regional accreditors vary in their documented expectations beyond a general requirement to state the university's purpose.<sup>317</sup> While accreditors may identify specific topics that must be addressed, none requires a university's mission to contain any particular characteristic or value that would mark the organization as a university.<sup>318</sup> This allows universities to be imprecise about the purposes, values, and norms that guide them.<sup>319</sup> In contrast, *Ex Corde* requires Catholic universities to precisely articulate their individualized mission and norms, including a public statement identifying the university as Catholic.<sup>320</sup> These obligations guarantee that Catholic universities will also be clear and transparent about the university component of their identity and its implications; otherwise, stakeholders might assume that Catholic universities are less committed to their academic obligations than to their Catholicity.

Universities that operate without deliberately developed and carefully articulated purposes, values, and norms will eventually run into trouble. In today's environment, university decisions are easily scrutinized by anyone with access to the Internet. Decisions that cannot be explained by reference to known standards are easily challenged by energized stakeholders who disagree with the decision. If, instead, the university can point to specific community standards that clearly demonstrate the integrity of its decisions, the focus shifts from whether its decision was appropriate, to whether the community standard that motivates it is appropriate. That is a more fundamental question, and it keeps the focus at the right level: high.

Using a shared governance process that includes substantial and meaningful faculty engagement, universities should ensure that their customized

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315. See *supra* notes 137, 247–51.

316. See *supra* note 303 and accompanying text.

317. See *id.*

318. See *id.*

319. See *Freedom of Speech and the University*, *supra* note 35, at 22–30.

320. See *supra* notes 197–200 and accompanying text.

community standards within their control are rigorously determined and precisely articulated, within the parameters of universities' common institutional framework. These standards should guide the creation of every university policy, decision, and stakeholder communication.<sup>321</sup>

#### D. *Encourage and Welcome Accountability*

*Ex Corde* has been effective in part because it is directed, explicitly, to every person with an interest in Catholic universities, encouraging their active support for Catholic universities' work to fulfill their missions, and providing standards of measurement that empower stakeholders to hold Catholic universities accountable.<sup>322</sup> The prospect of accountability incentivizes Catholic universities to seek to convert competition into cooperation. This incentive is reinforced through *Ex Corde*'s express expectation that university leaders will engage in intentional and ongoing collaborative dialogue with key stakeholders concerned with competing interests—most notably their local Church authorities.<sup>323</sup> By directly engaging stakeholders to discuss how to hold the tension of *Catholic* and *university* under the principles of *Ex Corde*, Catholic universities give themselves the best opportunity to achieve the full potential of their unified identity and mission. Active accountability fosters apparent integrity.

Universities cannot reasonably expect effective stakeholder support or engagement if expectations are unaligned and the standards of measurement are unclear. When universities have assured themselves of the necessary clarity of their vision, they should seek to foster collaborative, ongoing relationships and dialogues with key internal and external stakeholders across the spectrum, with a view to building and sustaining alignment of expectations and creatively considering the best ways for universities to integrate their competing interests as the educational environment and societal needs evolve.

#### E. *Engage in Continuous, Intentional Efforts to Maintain the Tension*

Catholic universities continually focus on holding the tension of their essential, competing interests, staying attuned as the component forces shift

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321. Groups of universities that share some defining characteristics, such as public research universities, vocational colleges, community colleges, or liberal arts colleges, might choose to collectively define a subset of purposes, values, and norms that guide the individualized standards of all universities in their respective category, like Catholic universities have done through *Ex Corde*. The AACU Statement on Free Expression, Liberal Education, and Inclusive Excellence is an example of how subgroups of universities might offer a more specific vision for their category of universities within the broader institutional framework; however, the AACU Statement offers less concrete guidance than *Ex Corde*. See AACU Statement on Inclusive Excellence, *supra* note 78. More concrete expectations would provide better guidance to these universities and their stakeholders.

322. See *supra* Part III.C.

323. See *supra* notes 201–02 and accompanying text.

and surge. Universities must do the same. While universities would benefit from a single institutional framework, there is no single path individual universities must follow to effectively hold the tension of free speech and inclusive diversity on a day-to-day basis. Each university must choose the way that works best for its particular university community and culture. I offer guiding principles:

- Be intentional. Consider how each university program, activity, investment, policy, decision, and communication, at every level, preserves human dignity and improves community conditions, both within and outside of your university marketplace, consistent with your individualized community standards. As your customized purposes, values, and resources evolve, acknowledge their evolution and re-value as needed.
- Regularly evaluate existing policies and resource allocations with a specific view to integrity with institutional obligations and individual mission and values. Re-focus your policies and resources around mission advancement, your documented values, and intended outcomes. When practicable, empower community members to exercise judgment within these parameters, rather than establishing formalistic rules, with the expectation of accountability for judgments that violate community standards. This approach requires standards to be articulated clearly, but not exhaustively.
- Hold both the university and individual community members accountable for maintaining and promoting integrity with community standards. Be transparent about choices and rationales. Where hard decisions are required, test them first by asking a range of influential community members whether the decision has integrity with the university's identity or how it can be made with integrity. If there is no consensus, go back to the drawing board.

Public universities may be nervous about holding the tension of free speech and inclusive diversity outside the bounds of specific course curricula.<sup>324</sup> The Court's decisions suggest that the best defense to these concerns is to ensure a clear, documented link between the activity in which speech is regulated and specific educational objectives the university considers to be essential to its educational value proposition.<sup>325</sup> It is not unusual for today's universities to seek to achieve specified educational outcomes through the design of co-curricular, extra-curricular, and student housing programs and facilities.<sup>326</sup> So long as the university is intentional about

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324. See *supra* notes 283–88 and accompanying text.

325. See *supra* Parts IV.B and IV.C.

326. See, e.g., Lawrence Biemiller, *What's New in Freshman Housing? Buildings that Help Students Make Friends*, CHRON. HIGHER EDUC. (Aug. 4, 2017), <https://www.chronicle.com/article/What-s-New-in-Freshman/240864> (describing how the design of student housing contributes to improved student retention); Scott Carlson, *Is It a Library? A Student Center? The Athenaeum*

those objectives, narrowly tailors speech regulations to meet them, clearly documents both the objectives and the regulations, and makes them known to its community members, the Court's past decision-making framework suggests it would defer to the university's judgment.<sup>327</sup>

Contrast a university's regulation of speech in facilities that primarily support mission advancement through the generation of increased operating revenue (for example, facilities primarily used by third parties for events not sponsored by the university). Unless the university can directly link the activities in these facilities to specific educational objectives, it would be more difficult for the university to defend the regulation of speech in those forums, which are distinguished from the public marketplace only by reference to the use of the revenue they generate and their location on the university campus. Requiring all events in those forums to meet minimum educational criteria and engage a minimum number of attendees from the university community might justify speech regulation in the forum consistent with the university's community standards. Or, the university might justify speech regulation only in events in those forums that meet the educational and community attendance criteria.

It may be helpful to remember that in today's marketplace of ideas, all prospective participants have "ample alternative channels for communication" of the ideas they wish to test and promote.<sup>328</sup> Universities best maintain their distinctions from the public marketplace by maintaining higher standards for participation,<sup>329</sup> in accordance with value-based judgments guided by a clear vision of what it means for universities to pursue truth-seeking and knowledge-promotion that serves the common good.<sup>330</sup> The diversity of universities today is staggering,<sup>331</sup> even with a common institutional vision, individual universities will be distinguished by their customized community standards. Individuals who do not wish to be subjected to the customized standards of a particular university need not join that marketplace.<sup>332</sup> If individuals seriously exercise their freedom to choose, over

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*Opens at Goucher College*, CHRON. HIGHER EDUC. (Sept. 14, 2009), <https://www.chronicle.com/article/Is-It-a-Library-A-Student/48360> (discussing how the design of a multi-purpose facility blends educational, intellectual, and social needs on a university campus); Katie Lauren Storey, *Bridging the Gap: Linking Co-Curricular Activities to Student Learning Outcomes in Community College Students*, Dissertation (2010), <https://digitalcommons.nl.edu/diss/30> (discussing the improvements in student learning outcomes that result from participation in co-curricular activities and how educational professionals can link co-curricular activities to academic program experiences or courses).

327. See *supra* notes 231–36 and accompanying text.

328. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see *supra* note 37 and accompanying text.

329. See *supra* notes 61–68, 220 and accompanying text.

330. See *supra* notes 94–105 and accompanying text; see generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

331. See *supra* notes 100–04 and accompanying text.

332. Cf. *Grutter's First Amendment*, *supra* note 17, at 572–73.

time their choices will either reinforce the university's community standards (if sufficient participants join the market) or require the university to revisit its standards (if sufficient participants reject it). If stakeholders judge a particular university's standards to lack integrity with institutional obligations, stakeholder trust, and the university's reputation, should rightly suffer.

Universities' opportunity to continue their meaningful role in defining and promoting truth for the common good of an increasingly complex society depends on their willingness to learn from others and take some risk: they must renew their vision for the modern university and confidently assert and hold the tension of inclusive diversity and free speech, within clearly defined confines of truth and the common good, by exercising their right of constitutional academic freedom. Holding this tension in a way that has real integrity with their distinctive institution and individual identities requires more effort than a compromise or imbalance. But without this effort, stakeholder trust will continue to erode. The better approach is to double-down on the uniqueness of the university marketplace, with a view to fully realizing its potential to engage and serve modern students and society.