

University Missions and Legal Limitations on Campus Speech

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I. INTRODUCTION

Hardly a day passes without news of a conflict between free speech on campus and a university goal such as community, diversity, civility, equality, dignity, or even someone else's speech rights. The university in question may or may not regard broad free speech rights, or any of the other goals listed above, as fundamental to its institutional mission. But many universities do indeed seek to emphasize all of these values. Our fragmenting broader culture has arrived at no consensual approach to conflicts between free speech on campus and a wide range of other basic university values. Nor do we have any consensus as to how severe these conflicts must be.

Given this absence of anything like a cultural consensus on how to approach tradeoffs between university faculty or student speech rights and any number of other university values, legislative and judicial modesty in this area should generally be encouraged. Legislatures and courts should be strongly reluctant to impose on universities any allegedly best model for addressing such conflicts. The law should be open to a range of defensible university policies on such value tradeoffs.

Legal tolerance of a range of university approaches to the legitimate scope of campus speech may, importantly, pay off in practice. A reluctance to legally impose controversial rules in this area may, crucially, promote healthy experimentation and competition among alternative university speech policies. A legitimate diversity of campus speech policies may also reduce the risk of broad and remarkably costly cultural mistakes. Legal tolerance of diversity in university approaches to campus speech may promote the discovery, and the broad and voluntary adoption, of attractive approaches to the value conflicts at stake.

Below, this Article elaborates upon, and seeks to justify, this endorsement of legislative and judicial modesty in addressing issues involving speech in our public and private universities.

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II. HOW DO MAJOR PUBLIC UNIVERSITIES CONCEIVE OF THEIR MISSION?

A natural approach to questions of speech on university campuses is to place such questions in the context of the university's own official, expressly articulated sense of its basic mission and values. Consider, merely to begin, the case of Oxford University. Oxford's current strategic plan¹ incorporates a brief mission statement.² This mission statement refers simply to "[t]he advancement of learning by teaching and research. . . by every means."³ But this arguably narrow statement of mission is then immediately qualified by an expression of the University's "[v]ision."⁴ Oxford's vision statement refers, in communitarian fashion, to "one Oxford."⁵ Oxford then commits itself to "benefit society on a local, regional, national and global scale,"⁶ and to the University's "long-standing traditions of independent scholarship and academic freedom. . . ."⁷

Oxford University's commitment to academic freedom, and to free speech, is elsewhere elaborated as the belief that "[f]ree speech is the lifeblood of a university."⁸ Oxford's free speech commitment declares that, "all voices or views which any member of the community considers relevant should be given the chance of a hearing."⁹ Such expression of views inevitably encompasses views perceived as

1. *Strategic Plan 2018-23*, UNIV. OXFORD 1 (2018), www.ox.ac.uk/about/organisation/strategic-plan-2018-24.

2. *See id.* at 2. Of course, Oxford's genuine mission and values may not always be entirely and accurately conveyed by any official university statement. This would be true as well of any other university.

3. *Id.*

4. *See id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Freedom of Speech*, UNIV. OXFORD, <https://compliance.web.ox.ac.uk/freedom-of-speech> (last visited Feb. 1, 2023). It should always be remembered that in some cases, campus freedom of speech and other important campus values may synergistically reinforce one another. As well, it may be difficult to disentangle the university's mission and internal speech policies from its policies regarding unsponsored outsider speech on campus. *See, e.g.,* Keister v. Bell, 29 F.4th 1239 (11th Cir. 2022); *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011).

9. *Freedom of Speech, supra* note 8. The 'hearing,' however, logically need not be in the particular setting most preferred by the would-be speaker.

“unsettling, extreme or offensive.”¹⁰ Whenever appropriate, however, the expression of views may be subject to critique; to peaceable response; to neutral time, place, or manner restrictions; or to other appropriate legal constraints.¹¹

The Oxford free speech policy does not contemplate the possibility that some forms of speech targeting a particular victim may not be trivializable as being merely unsettling, extreme, or offensive speech. The policy thus does not contemplate the possibility of more profound harms of hate speech that cannot be confined within a mere “offensiveness” paradigm. Whether all hate speech involves any genuine commitment to dialogue, or to conversation, within the meaning of the classic free speech paradigm, is also left out of consideration.

More broadly, the Oxford free speech policy must be set in the context of the Oxford commitment to “robust civility,”¹² and to the goal of avoiding any speaker, or any listener’s, having “any reasonable grounds to feel intimidated. . . .”¹³ Crucially, the commitment to free speech is inevitably also in tension, to one degree or another, with Oxford’s commitments “to equality of opportunity, to engendering inclusivity, and to supporting staff and student wellbeing,”¹⁴ or to the opportunity to flourish¹⁵ within a diverse¹⁶ community.¹⁷

It would, of course, be unrealistic to expect any university’s statement of its basic mission, purposes, and values to meaningfully explore the important synergies, tensions, and conflicts embodied therein. But equally clearly, the university must, in practice, implicitly

10. *Id.*

11. *See id.*

12. *Id.*

13. *Id.*

14. *Strategic Plan 2018-23*, *supra* note 1, at 2 (emphasis added).

15. *See id.*

16. *See id.*

17. *See id.* Universities have typically thought of themselves as communities, and further, as communities of communities. *See, e.g.*, JACQUES BARZUN, THE AMERICAN UNIVERSITY: HOW IT RUNS, WHERE IT IS GOING 244 n.-† (2d ed. 1993) (noting that originally, ‘universitas studiorum’ meant “a grouping of students, hence a community of learners, bent upon corporate life and action.”); *see also* MICHAEL OAKESHOTT, THE VOICE OF LIBERAL LEARNING 23, 34 (Timothy Fuller ed., 1989). We may thus wonder whether a purely virtual or online-only university, or a university that is based essentially on teaching through disembodied artificial intelligence programs, could amount to a community.

adopt some sort of policy, however under-defended or inconsistent, to address the inevitable conflicts among its own fundamental values.

The inevitability of conflicts among the elements of a major university's crucial value system is further displayed by Cambridge University's policies.¹⁸ Cambridge University's mission statement itself recognizes no such basic conflicts. The Cambridge mission is, rather, declared to be, "to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence."¹⁹ Cambridge's equally concise further declaration of its core values, however, then at least suggests the possibility of crucial value conflicts.²⁰

Cambridge University thus declares itself to have two, and only two, core values.²¹ The first of these core values is that of "freedom of thought and expression."²² And the second core value is, simply, "freedom from discrimination."²³ Again, we cannot expect mission and value statements to explore possible conflicts among mission priorities or core values. But precisely in its sparing formulas, Cambridge inevitably invites inquiry into whether freedom of expression, however it is understood, could ever encompass and even legitimize what the University would admit to be an act of discrimination.

As merely one element of such possible conflicts, consider the circumstances of potential applicants to study at Cambridge. In particular, consider the case of a member of any cultural group that might reasonably fear a greater than average chance of being victimized by discrimination. Should such a person simply rely confidently on Cambridge's formulaic rejection of discrimination?²⁴ Or would it instead be prudent for such a person to consider whether Cambridge's

18. See *The University's Mission and Core Values*, UNIV. CAMBRIDGE, <https://www.cam.ac.uk/about-the-university/how-the-university-and-colleges-work/the-universitys-mission-and-core-values> (last visited Feb. 1, 2023).

19. *Id.* One might wonder whether education and learning can be separated for this purpose, as though learning were not an intrinsic element, at the very least, of education.

20. *See id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *See id.*

protection of freedom of expression²⁵ may leave that person vulnerable to unredressed harms that are inconsistent with their full and equal membership within the Cambridge community?

This pattern of either glossing over, or not meaningfully addressing, basic conflicts in university missions, purposes, and values is replicated by the major American public universities. Consider, again merely for example, the official mission of the University of Michigan. That mission “is to serve the people of Michigan and the world through preeminence in creating, communicating, preserving, and applying knowledge, art, and academic values, and developing leaders and citizens who will challenge the present and enrich the future.”²⁶

The University of Michigan mission statement thus submerges the possibility of important conflicts in the elements of that mission.²⁷ Other American public university mission statements, however, at least bring the possibility of fundamental mission and value conflicts closer to the surface, if only by their greater elaboration in expounding their mission.²⁸

The Ohio State University, for example, explicitly declares that “diversity and inclusion are essential components of our excellence.”²⁹ Relatedly, the University seeks to “foster a sense of belonging where all

25. *See id.*; *see also* Sarah Conley, *Campus Speech Should Not Be Free*, 2 J. FREE SPEECH L. 299, 317-18 (2022) (noting the difficulty in distinguishing between campus speech that humiliates, or seeks to do so, or that attacks a person’s equal dignity, as distinct from campus speech that attacks one’s central intellectual identity, in ways that may or may not promote intellectual growth).

26. President’s Statement of Mission, UNIV. OF MICH., <https://president.umich.edu/about/mission/#:~:text=The%20mission%20of%20the%20University,present%20and%20enrich%20the%20future> (last visited Feb. 1, 2023). Even here, one might note that while actually enriching the future logically implies benevolent effects, merely challenging the present, in unspecified ways, may well have unintended malignant effects, as well as beneficial effects.

27. *See id.*

28. *See, e.g.,* Mission Statement, UF: ADMIN., <https://catalog.ufl.edu/UGRD/administration/#missionstatementtext> (last visited Feb. 1, 2023) (declaring that “[t]he university’s mission is to enable our students to lead and influence the next generation and beyond for economic, cultural and social benefit.”). So technically, research contributions by faculty that are not directed at, or otherwise mediated by, effects on Florida students would seem to literally fall outside of the University’s mission. Conflicts among basic elements of any university mission statement, more generally, are typically ignored in such statements. *See, e.g.,* Mission Statement, MASS. INST. TECH., <https://www.mit.edu/about/mission-statement/> (last visited Feb. 1, 2023) (demonstrating a latently internally conflicting mission).

29. *Vision, Mission, Values*, OHIO STATE UNIV. OFF.: ACAD. AFFS., <https://oaa.osu.edu/vision-mission-values> (last visited Feb. 1, 2023).

are valued,”³⁰ and to “[n]urture a community of kindness and gratitude.”³¹ More specifically, Ohio State commits, under the heading of “Inclusion and Equity,”³² to “address individual and systemic effects of bias and discrimination.”³³

Unsurprisingly, though, the Ohio State University site also commits itself to the principle of “[e]ncouraging open-minded exploration, risk-taking, and freedom of expression.”³⁴ And any conflicts between inclusion, belonging, diversity, or the rejection of bias, all on the one hand, and constitutionally required or otherwise protected freedom of expression on the other hand, are left unacknowledged.³⁵

Much more generally, the most widely recognized American public universities tend in some degree to converge on their underlying mission and basic values. There is certainly some variation at the level of even the briefest formulations. Thus, the University of Texas at Austin’s mission statement refers, forthrightly, to “the commercialization of University discoveries.”³⁶ The University of Virginia’s equally concise statement of purposes refers in part to “providing world-class patient care.”³⁷ Some of the major American public universities refer explicitly to their origin, or status, as land grant universities.³⁸

The relative, but far from complete, homogeneity of the major public university mission statements is to a degree paralleled by the corresponding mission statements of the major American private universities.³⁹ But as we might expect, there is a greater diversity in the mission statements of the major private, as distinct from public,

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See generally id.*

36. *Mission & Values*, UNIV. TEX. AUSTIN, www.utexas.edu/about/mission-and-values (last visited Feb. 1, 2023). This unusual forthrightness may, however, not reflect much real difference in practice among the major research universities.

37. *University Code of Ethics and Mission Statement*, UNIV. VA., www.virginia.edu/statementofpurpose (visited Feb. 1, 2023).

38. *See, e.g., UC’s Mission*, U.C.: OFF. PRESIDENT, <https://www.ucop.edu/uc-mission/> (linking historic land grant status to public service) (last visited Feb. 1, 2023); *see also* About Page, ILL., <https://illinois.edu/about/#:~:text=mission> (linking historic land grant status to creating knowledge in service to the “state, nation, and world”) (last visited Feb. 1, 2023).

39. *See infra* Part IV.

institutions.⁴⁰ It is to the varied sorts of American private universities and missions that we now turn.

III. HOW DO MAJOR PRIVATE UNIVERSITIES CONCEIVE OF THEIR MISSION?

The mission and value statements of the most especially prestigious private universities commonly tend to be largely indistinguishable from those of the highest ranked public universities. For example, Yale University, like its elite public university counterparts, “is committed to improving the world today and for future generations through outstanding research and scholarship, education, preservation, and practice.”⁴¹ Yale’s mission is to be carried out “through the free exchange of ideas in an ethical, interdependent, and diverse community of faculty, staff, students, and alumni.”⁴²

The Harvard College mission, similarly, is to “educate the citizens and citizen-leaders of our society”⁴³ with a reference to service to the world,⁴⁴ and with multiple references to the idea of transformation.⁴⁵ Apart from the anachronistic references to citizenship,⁴⁶ this rather sparing conception of mission could be incorporated into that of any major public university.⁴⁷

Stanford University, as well, tracks the elite public universities in its “founding purpose of promoting the welfare of people everywhere.”⁴⁸

40. See *infra* Part IV.

41. *Mission Statement*, YALE: ABOUT YALE, www.yale.edu/about-yale/mission-statement (last visited Feb. 1, 2023). See, e.g., Amy Gutmann, *The Fundamental Worth of Higher Education*, 158 PROC. AM. PHIL. SOC’Y 136, 137 (2014) (declaration of Amy Gutmann, former President of University of Pennsylvania) (“[T]o know whether a university education is worthwhile, we need to recognize and appreciate its tripartite mission: increasing educational opportunity, optimizing creative understanding, and contributing the fruit of that understanding to society.”). While private universities are of course not bound by the First Amendment, there may well be various legal grounds for protecting speech on private campuses.

42. *Mission Statement*, *supra* note 41.

43. *Mission, Vision, & History*, HARV. COLL.: ABOUT, <https://college.harvard.edu/about/mission-vision-history> (last visited Sept. 30, 2023).

44. See *id.*

45. See *id.*

46. See *id.*

47. See, e.g., *University Mission Statement*, COLUM. UNIV.: ABOUT, www.columbia.edu/content/about-columbia (last visited Feb. 1, 2023) (seeking partly through valuing diversity, “to advance knowledge and learning at every level and to convey the products of its efforts to the world.”).

48. STAN.: OUR VISION, <https://ourvision.stanford.edu> (last visited Feb. 1, 2023).

Stanford's Diversity Statement uncontroversially declares that "[a]t its core, a university is devoted to the discovery and transmission of knowledge."⁴⁹ More concretely, though, Stanford University, like a number of elite public universities,⁵⁰ implicitly raises, without resolving, the possibility of conflicts within its basic mission and values.

In particular, Stanford University aims at "[a]dvancing free expression in an inclusive community,"⁵¹ and at valuing "[f]ree expression within a diverse community."⁵² The possibility of any meaningful conflicts between free expression, however defined, and a genuinely inclusive community is left unexamined. It is possible that Stanford's understanding of free expression may be narrower, or perhaps even broader, in some respect, than the scope of expression that is legally protected from government interference.⁵³ And it is also certainly possible that freedom of expression is best promoted when the values of inclusiveness and community are taken into full account.⁵⁴ But any such mutual supportiveness between free expression and an inclusive community must eventually be argued for, rather than merely assumed.⁵⁵

Some leading private universities, however, then begin to diverge from mainstream public universities, at least as to the emphasis of their

49. *Diversity Statement*, STAN.: IDEAL, <https://ideal.stanford.edu/about-ideal/diversity-statement> (last visited Feb. 1, 2023).

50. *See supra* notes 8-35 and accompanying text.

51. *Diversity Statement*, *supra* note 49.

52. *Id.*

53. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (protecting abusive, epithet-laden hate speech from government interference).

54. At least some forms of hate speech may impair the speech of the speech's victims or targets, or the free speech value of self-realization in the speech of such persons. *See* R. George Wright, *Why Free Speech Cases are as Hard (and as Easy) as They are*, 68 TENN. L. REV. 335 (2001).

55. *See Diversity Statement*, *supra* note 49 (Stanford vaguely gesturing toward some such theory in then referring, more specifically, to "[f]ree expression within a diverse community -- in the form of thoughtful and respectful debate."). One might well argue that, for example, much speech that is constitutionally protected against state interference, including much hostile, insulting, abusive, intimidating, degrading, stigmatizing, and contemptuous speech, is neither thoughtful, nor respectful, nor even a contribution to any debate or civil discussion. *See, e.g.*, R. George Wright, *Cyber Harassment and the Scope of Freedom of Speech*, 53 U.C. DAVIS L. REV. ONLINE 187 (2020). One peculiarity for California-based private and non-sectarian institutions lies in the constraints of the so-called Leonard Law. *See* John K. Wilson, *Stanford and the Legacy of the Leonard Law*, ACADEME BLOG (June 27, 2020), <https://academeblog.org/2020/06/27/stanford-and-the-legacy>.

mission. New York University, for example, interestingly stresses “its role as an engine of social mobility,”⁵⁶ and “its representation of low-income and first-generation students within its community.”⁵⁷ Much more clearly, leading private institutions such as Howard University may adopt a mission with plainly distinctive elements.⁵⁸ Howard University thus refers to its status as a “historically Black private university.”⁵⁹ On this understanding, Howard emphasizes “scholarship that provides solutions to contemporary global problems, particularly ones impacting the African Diaspora.”⁶⁰

Further diversity then emerges within, and certainly among, religiously affiliated private universities. The mission of Yeshiva University, for example, “is to bring wisdom to life through all that we teach, by all that we do, and for all those we serve.”⁶¹ This emphasis on wisdom, as distinct from knowledge and the pursuit and sharing thereof, is to a degree rare among public and even religiously affiliated schools.⁶²

Among religiously affiliated universities, the degree of emphasis on sectarian doctrine, as distinct from mere religious heritage, or mere institutional history, plainly varies. Some religious university mission

56. *NYU Mission Statement*, N.Y.U., www.nyu.edu/about.html#:~:text=NYUMissionStatement (last visited Feb. 1, 2023).

57. *Id.* This is not to suggest that leading public universities do not also value their role in generating social and economic mobility, and in encouraging first generation university students.

58. *See Mission and Core Values*, HOW. UNIV., www.howard.edu/about/mission (last visited Feb. 1, 2023).

59. *Id.*

60. *Id.*

61. For a sense of Yeshiva University’s historically evolving sense of mission, *see* YU Pride All. v. Yeshiva Univ., 211 A.D.3d 562 (N.Y. App. Div. Dec. 15, 2022); *see also Mission & Vision*, YESHIVA UNIV., https://library.yu.edu/mission_and_vision (last visited Feb. 1, 2023).

62. *But see Mission of the University*, BYU: MISSION & AIMS (June 6, 2022), <https://aims.byu.edu/>; *The Mission Statement of the University*, FORDHAM UNIV. (Apr. 28, 2005), <https://www.fordham.edu/about/mission-statement/> (seeking “the discovery of Wisdom”); *Mission Statement*, BAYLOR UNIV., <https://about.web.baylor.edu/values-vision/mission-statement> (“[T]he University seeks to provide an environment that fosters spiritual maturity, strength of character, and moral virtue.”) (last visited Feb. 1, 2023). *See also* Michael Barber, *Houses of Wisdom: Universities, Scholarship and Diversity of Perspective*, KING’S COLL. LONDON: POL’Y INST. (Jan. 20, 2021), <https://www.kcl.ac.uk/policy-institute/assets/houses-of-wisdom.pdf>.

statements are especially forthright and commitment-laden.⁶³ Other such statements emphasize religious inheritance, tradition, and pluralism among religious perspectives.⁶⁴ In many cases, religiously affiliated universities welcome doctrinal non-adherents, as long as such persons either support or at least do not violate or impair, the school's religious mission.⁶⁵ Even within particular religious

63. See, e.g., *The Mission of Wheaton College*, WHEATON COLL., <https://www.wheaton.edu/about-wheaton/why-wheaton/mission/> (last visited Feb. 1, 2023) (“Wheaton College serves Jesus Christ and advances His Kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide”); *Mission, Vision, and Affirmation Statement*, PEPP., www.pepperdine.edu/about/our-story/mission-vision (last visited Feb. 1, 2023) (“Pepperdine is a Christian university committed to the highest standards of academic excellence and Christian values, where students are strengthened for lives of purpose, service, and leadership.”) (“God is revealed uniquely in Christ.”) (“The education process may not, with impunity, be divorced from the divine process.”).

64. See, e.g., *Mission Statement*, SMU: ABOUT SMU, www.smu.edu/AboutSMU/Mission (last visited Feb. 1, 2023) (affirming, after stating its commitment to knowledge, service, professional excellence, and individual dignity, “its historical commitment to academic freedom and open inquiry, to moral and ethical values, and to its United Methodist heritage.”); *Mission of Boston College*, B.C.: BYLAWS AND STATUTES B.C. (May 31, 1996), <https://www.bc.edu/bc-web/sites/bylaws-and-statutes/Mission-of-Boston-College.html> (declaring Boston College as “a Catholic and Jesuit university” that “regards the contributions of different religions and value systems as essential to the fullness of its distinctive intellectual heritage.”); *University Mission Statement*, GEO.: GOVERNANCE, <https://governance.georgetown.edu/mission-statement/> (last visited Feb. 1, 2023) (referring to “education in the Jesuit tradition for the glory of God and the well-being of humankind”).

65. See, e.g., *Mission Statement*, supra note 62 (“Baylor expects the members of its community to support its mission.”); *Aims and Goals*, CATH. UNIV. OF AM. (June 21, 1980), www.catholic.edu/about-us/at-a-glance/aims-and-goals.html (declaring that The Catholic University of America “welcomes the collaboration of all scholars of good will who contribute to institutional aims.”) (“As a member of the American academic community, [the University] accepts the standards and procedures of American institutions.”); *The Mission, Vision, and Charisms of Franciscan University of Steubenville*, FRANCISCAN, <https://franciscan.edu/mission-charisms/> (last visited Oct. 2, 2023) (emphasizing university supportiveness of community members, including persons of other faiths, “as long as their activities do not directly oppose or undermine the mission of the University.”); *Mission*, UNIV. NOTRE DAME, www.nd.edu/about/mission/ (last visited Feb. 1, 2023) (asking for “not a particular creed or affiliation, but a respect for the objectives of Notre Dame and a willingness to enter into the conversation that gives it life and character” and insisting “upon academic freedom that makes open discussion and inquiry possible.”). Any tensions, or else any possible symbioses, between respecting the communitarian university mission on the one hand, and free and open discussion on the other, are understandably not therein acknowledged. Notre Dame President John Jenkins has elsewhere sought to distinguish threatening verbal behavior from vilification and expressions of contempt. See John I. Jenkins, *Freedom of Expression at Notre*

denominations, there are substantial variations in the degree to which universities accent, or limit, any faculty or student non-commitment to the university's mission.⁶⁶

For some religiously affiliated universities, any conflicts between claiming to possess unalterable truth on the one hand, and seeking as yet undiscovered truth on the other, may be disturbing.⁶⁷ As well, there may be an especially disturbing sense that emphasizing academic freedom may come at the expense of either revealed religious truth or a range of other values and commitments.⁶⁸ And in any such conflict, the values of dignity and genuine freedom quite likely appear on both sides of the conflict. A further complication is that universities may, as well, be concerned precisely with public misperceptions of their approach to value conflicts.⁶⁹

In sum, private universities, including religiously affiliated universities, typically share some important similarities of mission with the major public universities. But the range of the differences among private university missions far exceeds that of the major public universities. This diversity as to mission, partly among the major public universities, but even more clearly among private universities,

Dame, UNIV. NOTRE DAME, <https://president.nd.edu/homilies-writings-addresses/freedom-of-expression/> (last visited Feb. 20, 2023). The problems are, first, that overt vilification and contempt, whether severe or pervasive or not, can reasonably be interpreted as expressing, or implying, a meaningful threat. And second, if deliberately offensive or contemptuous speech is ever directly contrary to Notre Dame's most fundamental values, why should such speech not be subject, even in principle, to any University sanction?

66. Consider, e.g., the different tone and emphasis among the Catholic universities referred to in, *supra* notes 63–65. This range, and this disparity, is hardly surprising, given the difficulty for a Catholic university of reconciling an assumed possession of established truth and the need to critically pursue the quest for truth. See Sara E. Gross Methner, *A Catholic University Approach to Campus Speech: Using Constitutional Academic Freedom to Hold the Tension of Free Speech, Inclusive Diversity, and University Identity*, 15 U. ST. THOMAS L.J. 358, 393 (2019). See also *The Application for Ex Corde Ecclesiae for The United States*, U.S. CONF. CATH. BISHOPS, (June 1, 2000) <https://www.usccb.org/committees/catholic-education/application-ex-corde-ecclesiae-united-states>.

67. See Methner, *supra* note 66, at 393.

68. See Michael Stokes Paulsen, *Freedom of Speech at a Private Religious University*, 11 U. ST. THOMAS J.L. & PUB. POL'Y 104, 107 (2008). Of course, secular institutions must also confront some version of both the tradeoffs and the synergies between free speech on campus and a range of other values that may seem to be subordinated by vindicating freedom of speech.

69. Note, in particular, the possibility of unintentional 'scandal' prompted by a university policy decision that the public understandably misinterprets. See CATECHISM OF THE CATHOLIC CHURCH para. 2287 2nd Ed., www.scborromeo.org.ccc/para/2287 (last visited Feb. 1, 2023).

turns out, as we shall see,⁷⁰ to be the key to the best legal response to many of the most important speech, equality, and diversity-related issues the universities face today.

IV. THE UNRESOLVED CONFLICTS WITHIN AND AMONG UNIVERSITY VALUES AND THE LIMITS ON CAMPUS SPEECH

Despite all the conflicts explored above, some persons may still think of university mission statements as unproblematic. Some observers may find typical university mission statements to be inspiring, platitudinous, or hypocritical, but still not internally problematic. As it turns out, though, not merely marginal tradeoffs, but basic conflicts within and among university mission elements, including the protection of speech, are common and largely inescapable.

The rhetoric of university missions can, certainly, sometimes be bracing. Consider thus the inspiring vision of the university as pursuing knowledge,⁷¹ or learning,⁷² or truth,⁷³ perhaps even for its own sake, rather than for any further doubtless worthy social goal. Learning, in particular, can be easily linked to an emphasis on teaching.⁷⁴ The pursuit of knowledge or truth can similarly be readily

70. See *infra* Part V.

71. See MATTHEW ARNOLD, THOUGHTS ON EDUCATION 243 (Leonard Huxley ed., 1912) (providing the classic declaration of the aim of education: “to get to know [oneself] and the world”). Interestingly, Lenin also emphasized the importance of broad knowledge acquisition, at least as a means, if not also as an end in itself. See V.I. LENIN, THE TASKS OF THE YOUTH LEAGUES 5 (1975) (discussing the value of “assimilating the wealth of knowledge amassed by humanity.”). See also D.W. Hamlyn, *The Concept of a University*, 71 PHIL. 205, 214 (1996) (asserting the university “must be one of higher learning and . . . concerned with pushing back the frontiers of knowledge.”).

72. See, e.g., Raimond Gaita, *Visions of the University: Truth and the Idea of a University*, <https://search.information.org/do1/IELAPA.9805233/> (on the value of the opportunity to “pursue learning for its own sake”) (last visited Feb. 1, 2023).

73. See The Right Honourable James Bryce, *The Functions of a University*, Address at a Special Congregation of the University 18 (July 19, 1912) (stating that “the university that teaches its students to love knowledge and love truth does the highest thing and the best thing that any university can do for its students. . . .”).

74. See, e.g., JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* 1 (Aeterna Press 2015) (1852).

linked to the activity of research.⁷⁵ But the potential for a vast range of conflicts between an emphasis on teaching on the one hand, and research on the other, is also clear.⁷⁶

Beyond the irreconcilable conflicts between teaching and research, there are also specific university commitments to develop individual independence of mind and autonomy of judgment.⁷⁷ But independence of mind and autonomy in judgment, clearly may trade off against a university mission of creating a common and mutually supportive campus community life.⁷⁸

Some members of the university community may then respond by seeking to reduce partisan political advocacy, at least in the context of teaching, if not also more broadly.⁷⁹ Other university community members may instead place official university emphasis on something

75. See, e.g., Robert Maynard Hutchins, *The Spirit of the University of Chicago*, 1 J. HIGHER EDUC. 5, 5 (1930); ANTHONY T. KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE 37-38 (2007).

76. See, e.g., NEWMAN, *supra* note 74, at 7; Robert Anderson, *The 'Idea of University' Today*, HIST. & POL'Y PAPERS, Mar. 1, 2010, at 1, <https://www.historyandpolicy.org/policy-papers/papers/the-idea-of-a-university-today>. Plainly, the more hours devoted to teaching basic material, the fewer hours in the research lab or library for the instructor. Budgetary conflicts and promotion and tenure conflicts between teaching and research are possible as well. And, of course, teaching and research may variously reinforce and enhance each other as well, perhaps synergistically.

77. For sources and discussion, see Robert Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University* 15 (forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044434).

78. On the value of truth-seeking versus the value of communal belonging, see Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE W. RES. L. REV. (forthcoming 2023). More broadly, see LORENZO ALBACETE, THE RELEVANCE OF THE STARS 123 (Lisa Lickona & Gregory Wolfe eds., 2021) ("the university is a community of learning"); CLARK KERR, THE USES OF THE UNIVERSITY 1 (1964) (the university as "a whole series of communities"); JAROSLAV PELIKAN, THE IDEA OF THE UNIVERSITY: A RE-EXAMINATION 58 (1992) (the university as a community of scholars in a shared quest); Robert Paul Wolff, *The Ideal of the University* 127 (1959) (the ideal university as a community of "persons united by common and communal goals"); Jamal Greene, *Constitutional Moral Hazard and Campus Speech*, 61 WM. & MARY L. REV. 223, 244 (2019) (emphasizing the university missions of developing empathy, norm-governed community, and persuasion rather than offense); Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557 (1995); Jurgen Habermas, *The Idea of the University – Learning Process*, 41 NEW GERMAN CRITIQUE 3, 3 (1987) (the university as an intersubjective shared life-form among its members).

79. See STANLEY FISH, THINK AGAIN: CONTRARIAN REFLECTIONS ON LIFE, CULTURE, POLITICS, RELIGION, LAW AND EDUCATION 301 (2015); see also STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (reprint ed. 2012).

like promoting epistemic justice,⁸⁰ or on a distinctively social freedom.⁸¹

Even more clearly, there are overt conflicts between the university missions of teaching, learning, and research for their own sakes, or for personal growth and fulfillment, and alternative university goals such as accommodating current and future labor markets.⁸² As well, robust and broad-ranging campus debate and contestation may trade off against values such as educational community, civility, solidarity, inclusion, and mutual respect.⁸³ Universities may thus fail in their citizenship missions⁸⁴ until they can reconcile their communitarian goals of civility, inclusion, and mutual respect with a largely unconstrained contest of ideas.⁸⁵

The conflicts between civility, inclusion, and mutual respect on the one hand and largely uninhibited speech on the other often manifest in widely reported campus incidents. These conflicts may arise from a number of microaggressions;⁸⁶ or else from what we might call

80. See Ben Kotzee, *The Epistemic Goods of Higher Education*, 25 PHIL. INQUIRY IN EDUC. 116, 129 (2018).

81. See Shane O'Neill & Nicholas H. Smith, *Social Freedom as the Purpose of the Modern University*, 4 PHIL. & THEORY IN HIGHER EDUC. 1 (2022).

82. See Anderson, *supra* note 76. For critique, see HENRY A. GIROUX, ON CRITICAL PEDAGOGY 112 (2012 ed.); FRIEDRICH NIETZSCHE, ANTI-EDUCATION, 55 (Damion Searls trans., 2016) (1872) (“[n]o course of instruction that ends in a career, in breadwinning, leads to culture or true education in our sense”); THORSTEIN VEBLÉN, THE HIGHER LEARNING IN AMERICA 68 (Richard F. Teichgraber ed., 2015) (1918) (noting the conflicts “between the needs of the higher learning and the demands of business enterprise”).

83. See, e.g., A. BARTLETT GIAMATTI, THE UNIVERSITY AND THE PUBLIC INTEREST 17 (1981) (emphasizing both freedom of inquiry and humane respect for other persons); Keith E. Whittington, *Free Speech and the Diverse University*, 87 FORDHAM L. REV. 2453, 2465 (2019) (on “how a commitment to inclusivity can be reconciled with a commitment to truth-seeking and robust debate”).

84. See, e.g., Greene, *supra* note 78, at 242 (“[t]he purpose of a university is to prepare students for citizenship”); Gutman, *supra* note 78; Robert M. Hutchins, *The College and The Needs of Society*, 3 J. GEN. EDUC. 175, 181 (1949); Geoffrey R. Stone, *Free Speech and Academic Politics*, 4 PERSPS.ON POLS. 740, 740 (2006).

85. See Stone, *supra* note 84, at 740. See also, the unrecognized value conflicts in Tennessee Tech’s recitation of the values of academic freedom, fairness, universal respect, and diversity. See *Gruber v. Bruce*, 2022 WL 17352455 at *4 (M.D. Tenn. Dec. 1, 2022).

86. See, e.g., the microaggression controversy in *Hiers v. Board of Regents*, No. 748502, slip op. at *1 (E.D. Tex. Mar. 11, 2022). For useful discussion of microaggressions, see April Bleske-Rechek, et al., *In the Eye of the Beholder: Situational and Dispositional Predictors of Perceiving Harm in Others’ Words*, 200 PERSONALITY & INDIV. DIFFERENCES 1-2 (2022),

mesoaggressions, defined for our purposes as reckless or indifferent microaggressions; or finally from macroaggressions, defined here as intentional challenges to the values of inclusion and mutual respect. Other inclusiveness value conflicts may arise in a formal classroom context,⁸⁷ or in cases of official university policy language.⁸⁸ In some instances, the university value of inclusion may be jeopardized by perceived threats to individual or group safety.⁸⁹

These basic mission and value conflicts are latent in even the least controversial declarations of how universities should operate. Consider, for example, a recent declaration by the Eleventh Circuit Court of Appeals that, as a general matter, a university's "chief mission is to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic."⁹⁰

If the chief mission of the university is to foster critical thinking, it may then seem natural to emphasize the familiar metaphor of the

available at www.sciencedirect.com/science/article/ads. See also Monica T. Williams, *Racial Microaggressions: Critical Questions, State of the Science, and New Directions*, 16 PERSPECTIVES ON PSYCH. SCI. 880 (2021).

87. See, e.g., the Hamline University classroom instruction controversy detailed in Eugene Volokh, *Hamline University Lecturer Is Fired Over a Medieval Painting of the Prophet Muhammad*, <https://reason.com/volokh/2022/12/26/hamline-university-apparently-fires-art-history-lecturer> (Dec. 26, 2022, 8:01 AM); Kimia Kowasari, *Who Belongs? Classroom Incident and Administrative Response Raise Questions for Muslim Students*, <https://hamlineoracle.com/category/news> (Dec. 6, 2022); Anna Khalid, *Most of All, I am Offended as a Muslim*, www.chronicle.com/article/most-of-all (Dec. 29, 2022); Eugene Volokh, *Hamline Adjunct Fired For Showing Muhammad Images Sues + Hamline Statement Seems to Backtrack*, <http://reason.com/volokh/2023/01/17/hamline-adjunct-fired> (Jan. 17, 2023, 8:44 PM).

88. See, e.g., the University of Southern California (USC) School of School Work's discontinuing the curricular use of the term 'field,' as discussed at <https://twitter.com/houmanhemmati/status> (referring to a USC policy memo of Jan. 9, 2023).

89. For a useful analysis of the idea of safety in general, see Niklas Moller, et al., *Safety Is More than the Antonym of Risk*, 23 J. APPLIED PHIL. 4, 419-420 (2006) (distinguishing absolute and relative safety, as well as objective and subjective safety, along with considerations of "harm, probability, epistemic uncertainty, and control"). For a broader theory, incorporating the classic work of Thomas Hobbes, see Jeremy Waldron, *Safety and Sec.*, 85 NEB. L. REV. 454, 456 (2006). For a critique of some approaches to the idea of promoting safety on campus, see GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AM. MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018). For thoughtful treatments of racist and hate speech and responsive policies, see Richard Delgado, *Legal Realism and the Controversy Over Campus Speech Codes*, 69 CASE W. RES. L. REV. 275 (2018); Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R. C.L. L. REV. 115, 126-132 (2021).

90. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022).

university campus to a “marketplace of ideas.”⁹¹ The idea of a metaphorical marketplace of ideas on campus clearly has some appeal, at the very least in the context of public research-oriented universities.

Especially for such institutions, judicially imposing a top-down distinctive, substantive orthodoxy in place of broadly accommodating speech-market transactions seems objectionable. As the Sixth Circuit Court of Appeals recently observed, lack of protected speech rights risks a compelled ideological uniformity in public institutions of higher education.⁹² The Sixth Circuit suggests that a public university might, in the absence of individual-level speech rights, require a tenured pacifist professor “to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as ‘comrades.’”⁹³

The problem is that, unfortunately, a largely uninhibited campus speech regime may, on balance, impair, rather than promote, the ability of some persons “to participate in . . . civic and political life.”⁹⁴ This impairment would be, most directly, of the targets or victims of speech that is stigmatizing, contemptuous, harassing, dismissive, discriminatory, or otherwise hostile, whether uttered in a classroom or not.⁹⁵ And one could argue as well that speech that is contemptuous of any campus community group may ultimately impair the democratic competence of all campus groups, not merely of those groups addressed with contempt.⁹⁶

The conflicts between more or less unconstrained university campus speech, understood perhaps as the largely uninhibited “pursuit

91. *Id.* at 1129 (as classically influenced by *Healey v. James*, 408 U.S. 169, 180 (1970) (“[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas’”).

92. *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021).

93. *Id.*

94. *Speech First, Inc.*, 32 F.4th at 1128.

95. Query whether the most frequent targets of contemptuous speech are likely to strongly identify with the broader polity, or to promote the interests of the broader polity at substantial cost in their own already downgraded group interests. For broad background, see RICHARD SCHACHT, *ALIENATION* (1970).

96. A false sense that one’s basic worth as a person is superior to that of others naturally leads to further errors, the adverse consequences of which cannot be confined entirely to one’s supposed inferiors. See Martin Luther King, Jr., *Letter From a Birmingham Jail*, [THE AFRICA CENTER](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html), www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (April 16, 1963).

of truth,”⁹⁷ and other university values, including genuine community and the speech capacities of stigmatized groups, are inescapable.⁹⁸ Even at public research universities, the particular speaker in a given case may not always prevail. A university may instead have “a compelling interest in preventing discrimination”⁹⁹ on various grounds. A leading champion of campus speech rights has thus argued that “[t]here is the right to say hateful things on the campus of a public university, but there is not a right to threaten someone or create a hostile environment.”¹⁰⁰

As well, there are now the complications of student speech that violate professional conduct codes. Public research universities and professional schools are only now beginning to explore conflicts between student free speech and a university goal of preparing students to responsibly adhere to some relevant code of professional ethics.¹⁰¹ Bona fide professional ethics standards may limit speech in which a professionally oriented student might wish to engage, at least

97. See, e.g., *Speech First, Inc.*, 32 F.4th at 1130 (Marcus, J., concurring).

98. Consider, for example, the recognition of some such conflicts in *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) (quoting *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981)).

99. *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 865 (8th Cir. 2021).

100. Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL OF RTS. J. 765, 768 (2009). There may be some disparity, though, between a particular court’s own understanding of the permissible scope of threatening or hostile environment speech and the most genuinely defensible understandings of that scope. Nor is the full scope of the harms of highly offensive speech confined solely to mere offense or severely hurt feelings. For a thoughtful discussion of limitations on hate speech at the public high school level, see *Chen v. Albany Sch. Dist.*, 56 F.4th 708, 726, 728 (9th Cir. 2022) (Gould, J., concurring) (“hate speech is antithetical to the values of this nation”).

101. See, e.g., *Oyama v. Univ. of Haw.*, 813 F.3d 850, 854-55 (9th Cir. 2015) (teacher certification standards case) (noting the conflict between promoting free and candid speech by university students and ensuring that graduating students meet reasonable professional accreditation and certification requirements); *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (discrimination against faith-based student speech in light of a university’s “legitimate pedagogical objective[s]”); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012) (“a university may regulate student speech on Facebook that violates established professional conduct standards”). For broader discussion, see Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN’S L. REV. 611 (2017); Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AM. L. REV. 382 (2013); R. George Wright, *Standards of Professional Conduct as Limitations on Student Speech*, 11 FIRST AM. L. REV. 426 (2013).

where the university adopts and enforces such professional standards.¹⁰²

In addition, universities may wish to reassess the tradeoffs between student or faculty speech and the university values that may be impaired when the speech in question does not even attempt to address any matter of any possible public interest or concern.¹⁰³ Where the student or faculty speech at issue does not seek to address any matter of any public concern, some schools may wish to discount the relevant free speech or academic freedom interests to near zero.¹⁰⁴

Historically, the range of opinion as to the proper scope of permissible speech on campus has been remarkably broad. Consider that in 1940, the leading philosopher of mathematics and eventual Nobel Prize winning writer Bertrand Russell was judicially denied the opportunity to teach at the City College of New York.¹⁰⁵ The court crucially found some of Professor Russell's more popular writings to be immoral¹⁰⁶ and declared that "[a]cademic freedom does not mean academic license. It is the freedom to do good and not to teach evil."¹⁰⁷ This remarkable approach to academic freedom on public

102. See *Oyama*, 813 F.3d at 854-55; *Ward*, 667 F.3d at 738; *Tatro*, 816 N.W.2d at 521. For broader discussion, see Calvert, *supra* note 101; Waldman *supra* note 101; Wright *supra* note 101. Query whether this general kind of restriction on student speech could apply to, say, pre-med or pre-law undergraduate courses, or where there is more than one relevant professional organization, or where the school has not expressly adopted the relevant professional organization's standards prior to enforcement, or where the cited professional standard is arguably more appropriate for actual practitioners than for students, or where the relevant professional ethics standard is itself constitutionally questionable. There is also the possibility of a state legislative attempt to prohibit faculty speech that is encouraged by, if not mandated by, a professional ethics standard to which the faculty member's students may wish to adhere. See the 2022 Florida Individual Freedom Act, prohibiting public university promotion of eight specified political beliefs, as discussed in *Pernell v. Fla. Bd. of Governors of the State Uni. Sys.*, No. 4:22cv304-MW/MAF, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022).

103. For discussion in the increasingly important context of cyber harassment and social media posts implying some sort of personal threat, see R. George Wright, *Cyber Harassment and the Scope of Freedom of Speech*, 53 U.C. DAVIS L. REV. ONLINE 187 (2020).

104. See *id.* For a possible recent example, see *Hedrick v. W. Mich. Univ.*, No. 1:22-cv-308, 2022 WL 10301990 (W.D. Mich. Oct. 17, 2022) (publicly shared personal video case). For discussion of the distinction between speech that does, or does not, address a matter of public concern in the public university faculty speech context, see *Gruber v. Bruce*, No. 2:21-cv-00039, 2022 WL 17352455, at *9 (M.D. Tenn. Dec. 1, 2022).

105. See *Kay v. Bd. of Higher Educ.*, 173 Misc. 943, 953, 18 N.Y.S.2d 821, 831 (N.Y. Sup. Ct. 1940), *aff'd per curiam*, 259 A.D. 879, 70 N.Y.S.2d 1016 (N.Y. App. Div. 1940).

106. See *id.* at 948, 18 N.Y.S.2d at 827.

107. *Id.* at 951, 18 N.Y.S.2d at 829.

campus changed in form, but hardly evaporated, in the ensuing decades.¹⁰⁸

V. A BROAD FRAMEWORK FOR SPEECH RIGHTS UNDER VARIED UNIVERSITY MISSIONS

University mission statements are, again, not the place for candid and exhaustive discussion of the often painful conflicts within and among each of the elements of the mission. And it is not as though educational theorists have devised any popular template, acceptable to nearly all major universities, for resolving conflicts within the university's chosen mission.

Consider the sheer variety in missions among contemporary American universities, including those universities with a commitment to religious or cultural values that are distinct from the values of the leading secular universities. It is unlikely that there can be much common ground among all such universities in addressing conflicts between speech rights and any other significant university value. No meaningful consensus on such matters seems likely for the foreseeable future. BYU and Boston College, Baylor and Berkeley, and Brandeis and Bethune-Cookman will each understand their basic campus priorities very differently.

The crucial point is that the variations among universities as to speech and mission are not necessarily evidence of any moral, legal, or policy failures. For our culture, there may, at least for the moment, be no single best understanding of speech rights and university mission, with some schools closer to the ideal arrangements, and other schools objectively more distant from the specified ideal. Perhaps the major universities will eventually converge on some single understanding of the role of speech in the campus mission. Perhaps two distinct competing models may come to dominate. But there is no reason, in

108. *See, e.g.*, *Oyama v. Univ. of Haw.*, 813 F.3d 850, 854-55 (9th Cir. 2015); *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012). For broader discussion, *see* Calvert, *supra* note 101; Waldman, *supra* note 101; Wright, *supra* note 101. *See* the 2022 Florida Individual Freedom Act, prohibiting public university promotion of eight specified political beliefs, as discussed in *Pernell v. Fla. Bd. of Governors of the State Uni. Sys.*, No. 4:22cv304-MW/MAF, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022).

law or policy, to pretend that any such convergence and consensus is likely, or even desirable, at this point.

The law has recognized the legitimacy, within appropriate bounds, of university autonomy with respect to university curriculum and with respect to teacher and student selection.¹⁰⁹ The logic of university institutional autonomy sets limits to legislative and judicial compulsion. Legally requiring similar priorities in cases of mission conflicts would clearly undermine whatever legitimate value there is in the diversity of university missions.¹¹⁰

The value of legitimate diversity among university missions and priorities is, in part, a matter of the value of experimentation, and of adaptive trial and error.¹¹¹ A university might view itself as, in part, a sort of experimental test case, to be replicated elsewhere if deemed successful, and perhaps even to serve as a warning to other universities if unsuccessful. But a university with a distinctive mission might instead be deeply convinced of that distinctive university mission, regardless of any other university's approval or disapproval. Such a university would not think of its mission as merely experimental.¹¹²

Thus, some universities may in part think of their mission as tentative and alterable. Perhaps their current understanding of their own mission is thought to be imperfect, and itself evolving. Universities thus need not feel committed permanently to any current ranking, or tradeoff rate, among their basic values in cases of conflict. But in all cases, some sense of how both speech and the regulation of

109. As crucially discussed in *Sweezy v. State of N.H.* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). See also the public university affirmative action case of *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (referring to *Sweezy*). For broad discussion, see John Inazu, *The Purpose (and Limits) of the University*, SSRN, <https://ssrn.com/abstract=3130381>

(Feb. 26, 2018). The value of university autonomy thus counsels against the curious sort of policy diversity that would result from 50 state legislatures legally imposing as many as 50 different speech policies on local universities.

110. See Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1534-35 (2007). Much more broadly, see JOHN STUART MILL, ON LIBERTY Ch. 3 (Dover Publications, Inc. 1859).

111. See RONALD J. DANIELS ET AL., WHAT UNIVERSITIES OWE DEMOCRACY 244-45 (2021).

112. Merely for example, the Catholic University of America presumably does not view its basic mission as entirely experimental, and to be retained if successful, but discarded if deemed unsuccessful. See *supra* note 65. For a broader perspective on internal and external competitions among university models, see ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY 234 (1990).

speech, advance the overall university mission must at least be implicit in university operations.¹¹³

Given this background, the best overall jurisprudential approach to public and private university missions, and to free speech in relation to such missions, would be for courts and legislatures to recognize, to value, and to accommodate reasonable pluralism and diversity in these respects.

The most reasonable legal approach to public and private university policies regarding speech and university mission would, thus, first recognize that universities, and particularly private universities, do not have anything like a current general consensus as to how to best reconcile free speech interests with other basic university interests and values.¹¹⁴ This is true even within the category of private universities,¹¹⁵ and indeed within the subcategory of private universities with a meaningful religious or cultural affiliation.¹¹⁶

Given this fundamental and perhaps stable lack of consensus, the law should instead emphasize the virtues of epistemic humility and of legislative and judicial modesty; the value of the gradual accrual of collective university experience; and the instrumental value of decentralized experimentation, trial and error, and risk-reduction strategies. In a phrase, the greater our cultural uncertainties in this regard, the greater should be the legislative and judicial tolerance of reasonable alternative approaches that are adopted by the universities. Lack of cultural consensus argues for a directly proportionate legal tolerance of diversity among university policy approaches.

We see the value of legal tolerance in broader constitutional contexts. In a diverse and mutually hostile culture, attempts to uniformly impose substantive priorities and tradeoff rates by law are, even where genuinely enforceable, likely to prove ill-advised. The fact of polarization, and legitimate diversity, do not properly call for the imposition, by legislatures or by courts, of the substantive values held by most the politically powerful. Legal accommodation of diverse

113. In particular, “[t]he trustees, administrators, and faculty . . . at every private college and university . . . must decide what sort of speech regulations best advance the mission of the institution they cherish . . .” Ben Trachtenberg, *Private Universities and the First Amendment*, 2018 J. DISP. RESOL. 71, 85 (2018).

114. See *infra* Parts II–IV. For a provocative discussion of the extent to which pluralism in basic values is inevitable, see THE LEGACY OF ISAIAH BERLIN 73–120 (Mark Lilla ed. 2001).

115. See *infra* Part III.

116. See *id.* at notes 61–68.

initiatives, rather than the legal imposition of controversial norms including, ironically, distinctively freedom-oriented campus speech broad norms,¹¹⁷ is instead advisable. As experience accumulates, and as university cultures evolve,¹¹⁸ some forms of reconciling freedom of campus speech with other, often conflicting, campus values may then more or less freely and spontaneously emerge.

This is not to suggest that university value systems that are themselves libertarian, pluralistic, or experimentalist are especially likely to prove the most widely popular or influential. The relationships among diverse forms of utilitarianism, libertarianism, genuine community, and other values are controversial, and are likely to remain so.¹¹⁹ Campus speech libertarianism may not be the wave of the future.

Nor should the law especially advantage those universities that emphasize the role of legally binding contracts between the university on the one hand and their students or faculty on the other.¹²⁰ Some universities may quite legitimately not wish to reduce their sense of community and of common concern merely to matters of legally

117. For a broad endorsement of reasonable constitutional experimentalism, including at the level of groups and institutions, see Cass R. Sunstein, *Experiments of Living Constitutionalism*, www.papers.ssrn.com/abstract.cfm?abstract_id=432957 (Jan. 13, 2023).

118. *Id.* (particularly in the contexts of declining traditional enrollment pools, increasing attention to the value of diversity, online and virtual education programs, careerism, and artificial intelligence in education.)

119. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 312 (1974) (“Utopia will consist of utopias, of many and divergent communities, in which people will lead different kinds of lives under different institutions . . . communities wax and wane”). *See id.* at 320 (“[t]hrough the [overall] framework is libertarian . . . individual communities within it need not be”). For further brief accounts of one form or another of libertarianism, whether on the political right or left, *see* Ronald Dworkin, *Foundations of Liberal Equality*, in EQUAL FREEDOM 190, 195 (Stephen Darwall ed., 1995); WILL KYMLICKA, PROPERTY RIGHTS AND THE SELF-OWNERSHIP ARGUMENT, in LEFT LIBERTINISM AND ITS CRITICS 295, 320 n.1 (Peter Vallentyne & Hillel Steiner eds., 2000); JAMES STERBA, EQUALITY IS COMPATIBLE WITH AND REQUIRED BY LIBERTY, in JAN NARVESON & JAMES P. STERBA, ARE LIBERTY AND EQUALITY COMPATIBLE?, 8 (2012) (libertarianism as “a philosophy of personal liberty -- the liberty of each person to live according to his own choices, provided that he does not attempt to coerce others and thus prevent them from living according to their own choices”) (quoting JOHN HOSPERS, LIBERTARIANISM 5 (1971)).

120. For background, *see* Stephen P. Aggergaard, *The Question of Speech On Private Campuses and the Answer No One Wants to Hear*, 44 MITCHELL HAMLINE MICH. L. REV. 629, 653 (2018); Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & Educ. 145, 146 (2010).

enforceable contract, where the final interpretation of those contracts may not be apparent to entering students.¹²¹ Religious or cultural belief may also counsel against emphasizing merely contractual relationships within the university community.

Instead, legal tolerance of a wide, but certainly not infinitely wide,¹²² range of approaches to campus speech and mission is consistent with the value of legislative and judicial humility¹²³ in the absence of anything like a cultural consensus. For legislators or courts to uniformly impose some single sense of the place of campus speech within a campus mission ignores, in particular, the risk of reducing cultural diversification, and the hedging of our broad cultural bets, under uncertainty.¹²⁴

It is certainly possible for academic cultures, no less than persons directing investment portfolios, to make unwise or improvident bets. Improvident bets are not typically recognized, at least by their makers, as such at the time they are made. And even the most apparently defensible judgments made by fallible institutions and cultures may turn out, over time, to be less than optimal.¹²⁵

Legitimate broad diversity among campus missions may thus limit the cultural damage caused by defective, if initially plausible, judgments made by universities.¹²⁶ In investment terms, we might think of the ways in which two divergent university mission statements might bring returns in ways that are more or less negatively

121. Many schools may believe that community, or solidarity, transcends the relationship of individual formal contract. And even the strongest contract-based endorsement of, say freedom of speech, or of dignity and inclusivity in community, does not lead to predictable outcomes in the interesting disciplinary cases, or to predictability of the degree of administration support for any side in the contested cases.

122. A university mission that implies, for example, the inferiority, ineducability, or contempt-worthiness of a specified socio-economic group would fall outside the range of creditable and otherwise legitimate missions. But the sorts of possible university priorities that simply should not be tolerated in a free and equal society may also evolve over time.

123. For an account of the range of judicial virtues, see Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *Metaphilosophy* 178 (2003).

124. See generally R. George Wright, *Dominance and Diversity: A Risk-Reduction Approach to Free Speech*, 34 *Val. U.L. Rev.* 1 (1999).

125. See JOHN STUART MILL, *ON LIBERTY* Chs. 2-3 (1859).

126. In the context of literal, rather than merely metaphorical, investment portfolios, see, classically, BURTON J. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 223-24 (1990). In the context of biodiversity, see Charles Perrings, et al., Introduction: Framing the Problem of Biodiversity Loss, in *Biodiversity: Economic and Ecological Issues* 1, 4 (Charles Perrings et al. eds., 1995).

correlated,¹²⁷ and thus jointly valuable in reducing overall cultural risks. In general, cultures should hedge their doubtful and risky bets.

The benefits of legitimate diversity among university mission statements, and in underlying missions, are not limited to reducing the chances of broad cultural value losses. Legitimate variations in how campus speech is treated may also increase the chances of arriving at some yet unforeseen cultural payoff. We already recognize that biodiversity, by analogy, can pay off through the development of new and better crops or medicines.¹²⁸ The specific benefits of biodiversity cannot be envisioned in advance. We should recognize that some divergent, and not especially currently popular, approaches to campus speech, perhaps emphasizing the basic epistemic virtues,¹²⁹ may have a surprisingly favorable long-term payoff.

VI. CONCLUSION

At the moment, and for the foreseeable future, we have nothing like a consensus on how statutory and judicial law should envision and shape the legitimate scope of speech on university campuses. Many of our major universities, public and private, have partly, but only partly, interchangeable mission and value statements. These statements tend to value free speech, and the exploration and exchange of ideas, at least in the abstract. Whether the protection of speech, in general or in a given context, reinforces or conflicts with other basic university values is, however, typically left unexplored.¹³⁰ The real scope and

127. See MALKIEL, *supra* note 126, at 223-24.

128. See, e.g., EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 347 (1992).

129. See *supra* note 62 and accompanying text.

130. The University of Chicago's official endorsement of freedom of expression, however, explicitly recognizes content-neutral restrictions of speech, along with limits on defamatory, threatening, harassing, privacy-invasive or confidentiality-invasive speech, and "speech that is otherwise directly incompatible with the functioning of the university." REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION, <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> at 2 (last visited Feb. 1, 2023). The University of Chicago formulation thus seeks to distinguish, for example, prohibitable threatening or harassing speech from protected speech that is unwelcome, uncivil, disrespectful, or offensive. The University of Chicago, to its credit, recognizes the possibility of serious conflicts between the values of genuine community and of protected but group-contemptuous expression. See also Princeton University's version of the

limits of permissible campus speech are often left unclear in the university's official statements.

Ultimately, though, every university must, whether forthrightly or consistently or not, in practice embrace some approach to the scope and limits of campus speech. Much, but not all, of the variation among such approaches is displayed by private and especially religiously or culturally affiliated universities, across and even within particular religious denominations and cultural groups.

Any given university may be deeply convinced of the correctness of its own distinctive approach to campus speech. Or the university may find itself tentative, ambivalent, uncertain, or conflicted in that regard. Both approaches may be sensible for one university or another. The legislatures and courts should, given the obvious deep uncertainties and the lack of cultural consensus, hesitate to impose their own sense of the place of free speech among other important competing campus public values. The broader the jurisdiction of the legislature or court, the greater the value of legislative or judicial restraint. Legislators and courts should instead acknowledge the absence of anything even remotely like a current consensus, among public and private universities, as to the role of free speech on campus, given the remarkable polarization and fragmentation of political beliefs.¹³¹

The logic of legislative and judicial modesty, within broad limits, in the university speech context thus partly reflects the sheer absence of any relevant consensus in our polarized and fragmenting culture. Legislative and judicial reluctance, especially at broader jurisdictional levels, to impose any controversial approach to campus speech more positively promotes responsible experimentation among the competing understandings of campus speech.

Legally tolerating a reasonable range of campus speech policies thus encourages the testing, refinement, comparison in practice, and the evolution of competing campus speech policies. Such a legal policy usefully reduces the risks of broad and exceptionally costly cultural mistakes. Such a policy also encourages the development of

University of Chicago's statement, available at <https://odus.princeton.edu/protests/princeton's-commitment-freedom-expression> (last visited Feb. 1, 2023). For Princeton's own further qualifications, see RESPECT FOR OTHERS, OFFICE OF DEAN OF UNDERGRADUATE STUDENTS <https://odus.princeton.edu/protests/respect-others> (visited February 1, 2023).

131. See, e.g., the account and diagnosis in EZRA KLEIN, *WHY WE'RE POLARIZED* (2021).

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initially counterintuitive, but ultimately better models of speech on campus. In general, our collective uncertainty should encourage legislative and judicial tolerance for responsible institutional diversity.