THE TRADITIONAL UNIVERSITY AND THE FREE SPEECH UNIVERSITY

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> *We are like a religious monastery insisting upon all the affluence of a free-booting capitalism; an aristocracy masochistically tormenting itself with the slogans of revolutionary democracy; a community of pacifist contemplatives riding off in all directions at once to do battle with the enemy; an enclave of intellectual autonomy privileged to remake the entire social order through permanent politics . . . .*
>
> —*Robert A. Nisbet*[1]

The American university has hit hard times, but on one thing there is general agreement: Free speech is at the heart of its mission. The conventional wisdom about free speech as the central purpose of the university, one that crosses many other perspectival divides, is so commonly accepted as to seem platitudinous. Even the Supreme Court affirms it.

But it is wrong. In its origins and for much of its history, the university's core purpose was never free speech, but its academic function: to shape students and teachers through constrained conversation and the controlled discovery and transmission of truth and knowledge. For 800 of the 900 years of the university's existence, academic expression in the university was never conceived as controlled or especially influenced by any external norms of public expression. In the traditional university, free speech, if that is the right term (it is not), was as much a constraint as a freedom—that quantum of liberty necessary for the academic task, and no more. Universities fulfilled their function when they prevented people from speaking freely. That changed in the twentieth century. The culture of the university became highly permeable to constitutional free speech law. Even the commonplaces of the First Amendment from that era—the "free

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1 ROBERT A. NISBET, THE DEGRADATION OF THE ACADEMIC DOGMA 8 (Transaction Publishers 1997) (1971).

trade in ideas" and the forums for democratic deliberation or autonomous identity formation—penetrated the university. This Essay explores the contrast between the traditional university and the contemporary university as forums of free speech. The object of the traditional university was to pursue, sustain, and transmit what this Essay, following Robert Nisbet, calls "the academic dogma," the conviction that truth and knowledge were precious, even sacred. In the contemporary university, by contrast, free speech has become a supreme end, both a necessary element of academic freedom and the manifestation of its fulfillment. The breakdown of the academic dogma helps to explain the decline of the traditional university and the rise of the free speech university.

The core point of this Essay is not that the traditional university is good, though I believe it to be good. It is that the traditional university was a specific kind of institution, with a unique function, supported by distinctive cultural assumptions. One may believe that this institution, this function, and these assumptions are archaic and should be replaced. If I resist this view, I can still see its coherence and respect its honesty. What is not coherent or honest, however, is to think that the traditional university and the free speech university are the same thing.

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INTRODUCTION

The American university has hit hard times, but amid the turmoil, there is at least one point of general agreement: Free speech is at the heart of its mission. New controversies within its walls are often judged by some type of First Amendment ideal, whether they concern campus protests; graduation speakers; invitation revocations and cancellations; heckling; heated classroom exchanges; "institutional neutrality"; "academic boycotts"; DEI statements; faculty hiring; the Trump Administration's "compacts," endowment taxes, and other exertions of influence; the murder of the conservative political commentator and activist, Charlie Kirk; and many more.

Distinguished scholars of the university as well as advocates for free speech generally concur in this judgment. Professor Keith Whittington, for example, argues that "we should understand free speech as central to the mission of a modern university."[2] Likewise, Greg Lukianoff, president of the Foundation for Individual Rights and Expression, and Professor Jonathan Haidt contend that "college is quite possibly the best environment on earth in which to come face-to-face with people and ideas that are potentially offensive or even downright hostile."[3] In their view, universities should never "chill speech." They must "[e]ntwine [their] [i]dentity" around a "commitment to free speech" as understood under the First Amendment.[4] Christopher Eisgruber, the president of Princeton University, probably disagrees with Whittington, Lukianoff, and Haidt on various matters of substance, but he also believes that "free speech" on university campuses is crucial for fostering the conditions of "mutual respect" he contends are essential in "a country whose citizens must reestablish faith in their civic institutions": "At their best, colleges and universities model forms of discourse that are at once unfettered and inclusive."[5] This common account of free speech as the crowning function of the university has

2 KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 6 (2018).

3 GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE 8 (2018); *see also* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 22 (paperback ed. 2018) ("The controversy over free speech on campuses can be understood only in the context of the history of free speech. In the United States, that context is inseparable from the First Amendment."); CASS R. SUNSTEIN, CAMPUS FREE SPEECH: A POCKET GUIDE (2024) (studying the university through a free speech lens, defining its scope, and recommending limits).

4 LUKIANOFF & HAIDT, *supra* note 3, at 228; *see also* AMY LAI, IN DEFENSE OF FREE SPEECH IN UNIVERSITIES: A STUDY OF THREE JURISDICTIONS 34 (2023).

5 CHRISTOPHER L. EISGRUBER, TERMS OF RESPECT: HOW COLLEGES GET FREE SPEECH RIGHT 5 (2025).

even been connected by the Supreme Court with the university's medieval origins. As Justice Kennedy once put it for a majority of the Court:

> [A]s Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak . . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.[6]

The conventional wisdom about free speech as the central purpose of the university, one that crosses many other perspectival divides, is so commonly accepted as to seem platitudinous.

But it is wrong. It has little historical warrant and suffers from deep misconceptions about the place of speech in the university. In its origins and for much of its history, the university's raison d'être has never been free speech. Its core purpose was its academic function: to shape students and teachers through constrained conversation and the controlled discovery and transmission of truth and knowledge.[7] To be sure, because universities are places of academic inquiry, a certain freedom of thought and speech was necessary—a freedom internal and instrumental to the university's core purpose. But this was never conceived, until the twentieth century, as "academic freedom" grounded in, protected by, or even conceptually related to the First Amendment or any broader political or civic norms about speech. For good reason, because there is a gulf between the values served by today's constitutional law of free speech, on the one hand, and the values of academic inquiry, on the other.

For about 800 of their 900 years of existence, universities in Western Europe and America embraced the latter but not the former. There was, in this period, no relationship at all between these concepts. Medieval universities, of course, were not governed by the First Amendment, but neither were they formally nor informally controlled by whatever external norms of public expression obtained at large in the societies in which they existed. Colonial and early American universities were likewise neither bound by the law of free speech nor particularly influenced by the ambient cultural norms of First

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6 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) (Kennedy, J.).

7 Some of what could be called "late Stanley Fish" has influenced this Essay, though I have some differences with Professor Fish about the nature of the academic enterprise. *See, e.g.*, STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (2008) [hereinafter FISH, SAVE THE WORLD]; STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION (2014) [hereinafter FISH, VERSIONS OF ACADEMIC FREEDOM].

Amendment law, in whatever form these may have existed. Indeed, there is a startling continuity about the nature and ends of expressive liberty in the university as it moves across the centuries, notwithstanding many other significant differences and developments in the university's life. "From the thirteenth to the twentieth centuries," as Robert Nisbet has observed, "the essential structural elements of the university have remained largely the same," and this is nowhere truer than in the university's status "as an enclave of privilege and authority" in which speech was tightly controlled.[8]

That changed in the twentieth century. The culture of the university became highly permeable to constitutional free speech. Influenced by the American Association of University Professors (AAUP), American universities steadily adopted free speech language as well as free speech ideals that also appeared in early-mid-twentieth century constitutional law, even when they were not legally obligated to do so. They absorbed the culture of legalistic free speech. Even the commonplaces of First Amendment freedom from that era—the "free trade in ideas" (a metaphor of political economy only dubiously relevant to the university)[9] and the forums for democratic deliberation or autonomous identity formation—penetrated the university.

But universities were for many centuries never thought to be mercantile associations, democracies, or sites for freewheeling self-realization, political critique, or personal authenticity.[10] Most legal accounts of the university begin in the early twentieth century when the AAUP produced its *Declaration of Principles of Academic Freedom and Academic Tenure*. While there is some reason to choose that period for "academic freedom," it sometimes feels in reading this literature as if there were no universities worth any notice before the twentieth century. The free speech university of the twentieth century, however, is a modern development unknown for most of the university's history. Free speech, as conceived in modern constitutional law, would have been thought damaging to the university's traditional function.

This Essay explores the contrast between the traditional university and the contemporary university as forums of "free speech." It takes two snapshots of the traditional university—in its origins in medieval Europe and in colonial and early America—to make its case. In the traditional university of the medieval era, expression was conceived as a tailored means for students and teachers to acquire, discover, and

8 NISBET, *supra* note 1, at 15, 15–16.

9 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For acute reflections on the metaphor in this context, see Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 857–60 (2008).

10 For one classic discussion of this ideal, see CHARLES TAYLOR, A SECULAR AGE 473–504 (2007).

transmit true knowledge, the premises of which were grounded in Scholastic thought. For all of their differences, the medieval university and the American university up until roughly the early twentieth century shared this basic understanding, plus or minus the Scholasticism depending on the institution in question.

Free speech in the traditional university, if that is the right term (it is not), was ordered toward these pursuits. It was as much a constraint as a freedom.[11] It was that quantum of liberty necessary for the academic task, and no more. It was the university's freedom, not that of its individual constituents, and this distinction mattered greatly for its limits. In the contemporary university, by contrast, free speech has become an independent end, both a necessary element of academic freedom and the manifestation of its fulfillment. Academic freedom is now understood as an unconstrained freedom to speak in the university and outside it—the freedom of students, teachers, administrators, and others as individual expressive, not academic, agents.

But with all due respect to Justice Kennedy and other First Amendment advocates, free speech, in this second sense, was never an end of the university for most of its history. Indeed, universities were believed to fulfill their academic mission when they *prevented* people from speaking—stopped them from expressing themselves non-academically, let alone obscenely, scandalously, cruelly, recklessly, and fraudulently. It is no objection that these qualifiers do not have fixed definitions: They may be contested, change over time, and vary even among institutions, but they were once real, providing necessary limits on the freedom to speak in the academic context in order to make possible the pursuit of the academic function. The transformation in the university followed a similar evolution in the law of free speech—from free speech as a means to a greater end, to free speech as an intrinsic end.[12] The final part of the Essay speculates about just why free speech has assumed such a central place in the contemporary American university. The answer has to do with the possibly irremediable breakdown of what this Essay, following Nisbet, calls the university's core academic dogma (both within and outside the university's walls), the devaluation of its essential creeds, and the need to find alternative justifications for the special privileges enjoyed by university denizens that will satisfy an increasingly skeptical and distrustful world.

A few disclaimers. First, my purpose is to describe and diagnose the transformation in the significance of free speech across time for the university. It is not to recommend any particular reform.

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11 *See* Robert Post, *The Structure of Academic Freedom*, *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 61, 63–64 (Beshara Doumani ed., 2006).

12 On this transformation, see Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465 (2016).

Universities face many challenges today, in part because they serve many incompatible ends.[13] I do not address those miscellaneous challenges and purposes.[14] Second, I focus on the Western university. There are of course universities in other parts of the world with their own histories, but the distinctive form of the university that exists in the United States owes most to that heritage. Finally, I do not dispute that in the current moment, given the imbalances of power and the ideological capture that is pervasive in many universities, the rhetoric of free speech may be helpful to political conservatives and objectionable to those who would like to continue to exclude conservatives from universities. That may be true, though the matter is contestable, but it is beside the point. On the traditional understanding of the university I describe, political progressives today are in a sense correct that the university once had (and still must have) other, more foundational, dogmas than free speech or even "academic freedom," depending on its meaning. That dogma was once academic, but the academic *dogma* and the *liberty* to pursue it are very different things.

The primary point of this Essay is not that the traditional university is good, though I believe it to be good. The primary point is that the traditional university was a specific kind of institution, with a unique function, supported by distinctive cultural assumptions. One may believe that this institution, this function, and these assumptions are all archaic and deserve to be replaced by free markets, democracies, or arenas of self-actualizing political debate or crusade. If I oppose this view with every ounce of my strength (and I do), I can still see its coherence and respect its honesty. What is not coherent or honest, however, is to think that we can have both the traditional university and the free speech university tethered together, let alone amalgamated as one.

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13 For a penetrating discussion of these variegated ends, see CHAD WELLMON, AFTER THE UNIVERSITY: HIGHER EDUCATION AND THE FUTURE OF INTELLECTUAL WORK (2026).

14 The historian of early modern culture, Willem Frijhoff, has written that:

> Learning, virtue, utility: the advancement of knowledge, preparation for the observance of a code of social, moral and religious conduct, and training for high office or the professions are the three great purposes that all through history and with constant changes of emphasis are repeatedly cited in discussion of the purposes of universities.

Willem Frijhoff, *Patterns*, *in* 2 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN EARLY MODERN EUROPE (1500–1800) 43, 43 (Hilde de Ridder-Symoens ed., 1996) [hereinafter 2 A HISTORY]. This Essay also relies on many papers in 1 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES (Hilde de Ridder-Symoens ed., 1992) [hereinafter 1 A HISTORY]. I do not dispute that these are important and enduring university aims, and yet it seems to me that today, a plethora of others could be added as well.

I. THE TRADITIONAL UNIVERSITY

This Part takes two snapshots of the university, one in the medieval era and another in the early American period. Its object is not a comprehensive history of the university in the periods and places that it discusses, an immense task that would be impossible in an essay of this length. It says very little about the Western university in the period from about the fifteenth century to the early seventeenth century, during which many things about university life changed. It focuses on these two chronologically separated periods and physically separated parts of the world to draw a discrete and limited, rough but real, parallel between them, respecting the function that free speech played in them, notwithstanding many other differences.

A. Snapshot 1: The Medieval University

In their beginnings, medieval universities were shaped by, and sometimes even creatures of, popes, kings, and emperors. They have been called one of the three "mysterious powers" of the Middle Ages "by whose harmonious co-operation the life and health of Christendom" were sustained: *sacerdotium*, *imperium*, *studium*.[15] Most universities, including arguably Europe's first, the University of Bologna, were law schools.[16] It was during Pope Alexander III's pontificate in the twelfth century that the teaching of law was promoted, to the advantage of Bologna, which became the premiere place for the study of Roman and canon law.[17] The coming of these two types of law—rediscovered (Roman law) and collected for the first time (canon law)[18]—were coordinated efforts in promoting concepts of right and duty at a time when Western Europe was "on the verge of relapsing into barbarism."[19]

The University of Paris, though it purported to trace its lineage to Charlemagne, probably followed Bologna in time and was the other major university of the medieval world and the elite place for the study

15 1 HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 2 (F.M. Powicke & A.B. Emden eds., 1936) (1895).

16 *See* Walter Rüegg, *Themes*, *in* 1 A HISTORY, *supra* note 14, at 3, 5–6; Antonio García y García, *The Faculties of Law*, *in* 1 A HISTORY, *supra* note 14, at 388, 388–89. The other core disciplines were medicine, theology, and "artes," the humane arts. *See* Rüegg, *supra*, at 25 (emphasis omitted).

17 Paolo Nardi, *Relations with Authority*, *in* 1 A HISTORY, *supra* note 14, at 77, 80.

18 *See* R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 14–15 (2015) (describing the texts contained in the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici* as the core of the legal curriculum through the seventeenth century).

19 García y García, *supra* note 16, at 404.

of theology and, later, the arts.[20] Papal formation of the university developed and accelerated in the late twelfth century during the pontificate of Pope Innocent III, "a theologian, jurist, and politician of great acumen and indisputable authority," as churchmen began to receive funding as prebendaries for study in the emerging academic centers.[21] It was, in fact, what Harold Berman has called the "Papal Revolution" of the eleventh and twelfth centuries and the Hildebrandine reforms—the assertion of independent power by the Church vis-à-vis the civil authority—which was "a motive force in the creation of the first European universities."[22] Many of Bologna's and almost all of Paris's students were clerics who attended the university with the aim of promotion in the Church.[23] The masters of these universities could decide what to teach and how to teach it, "but they were expected to be responsible members of Christian society and not tolerate teaching that was dangerous to the faith."[24] Indeed, it would have been counterproductive for them to be renegades, since the Church would have been reluctant to employ heretics.

The civil powers got in on the university game shortly thereafter. The University of Naples was founded in the early thirteenth century by Frederick II to compete with Bologna, and to train the jurists whom the emperor required.[25] Oxford University, which emerged around 1185 and began to organize as a corporate body at the beginning of the thirteenth century, is often thought to be Europe's "third . . . university" (though the evidence here is disputed) and was in many ways typical of other northern European universities—in its structure as a "privileged corporation of masters," schools of instruction, curriculum, and so on.[26] In other ways, however, it was distinctive: It focused on the common law rather than the civil law, for example, it was located in a small market town, and it eventually developed a high intellectual reputation, second only to Paris among the universities of northern Europe.[27] Many more universities were established in the

20 Jacques Verger, *Patterns*, *in* 1 A HISTORY, *supra* note 14, at 35, 43; JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS 221–22 (2008). Bologna and Paris differed in several ways, including the question of whether students (Bologna) or masters (Paris) held primary power. *See id.* at 230–31.

21 Nardi, *supra* note 17, at 82; BRUNDAGE, *supra* note 20, at 277–79.

22 HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 100 (1983).

23 *See* BRUNDAGE, *supra* note 20, at 223, 234, 270. This began to change somewhat by the fifteenth century. *See* García y García, *supra* note 16, at 403.

24 1 ALLEN C. GUELZO & JAMES HANKINS, THE GOLDEN THREAD: A HISTORY OF THE WESTERN TRADITION 1060 (2025).

25 *See* Verger, *supra* note 20, at 54.

26 L.W.B. BROCKLISS, THE UNIVERSITY OF OXFORD: A HISTORY 4, 8 (2016).

27 *See id.* at 8–9, 13–15; BRUNDAGE, *supra* note 20, at 237–38.

fourteenth and fifteenth centuries under similar auspices. Medieval Scholastics were, in fact, primarily trained as lawyers and judges, not theologians, reflecting the fact that "most careers available to school and university graduates were in lay or ecclesiastical institutions."[28]

What were the prevailing purposes and assumptions in these new institutions of learning? The medieval university was created to regulate intellectual freedom and to impose order on what was thought to be the disorder of heterodox thought and learning in local parishes and other small centers.[29] As James Brundage puts it, "[s]tudents and teachers at preexisting schools created these corporate bodies in part to foster more systematic teaching and learning than had previously been available."[30] "[T]he formation of the university," Walter Rüegg observes, "was above all due to the efforts of the masters, supported by the king and the pope, to loosen local ecclesiastical supervision and, through the exercise of joint responsibility, to bring order into the anarchic arrangements for studies."[31] The universities thus were born of a need for order and authority in knowledge, and to control local dissent in teaching and learning.[32] Their founders and members were trying to rein in heresy while giving some space for the legitimate training of the intellect.[33] All of the early universities—including the major ones in Bologna, Paris, and Oxford, as well as others such as Cambridge, Orleans, Padua, and Vercelli that arose as a result of migrations from the larger universities[34]—relied on recognition by papal or civil

28 GUELZO & HANKINS, *supra* note 24, at 1055.

29 *See* BERMAN, *supra* note 22, at 160 ("A learned profession of jurists emerged in western Europe . . . in response to the need to reconcile the conflicts that raged within the church, between the church and the secular authorities, and among and within the various secular polities.").

30 BRUNDAGE, *supra* note 20, at 219.

31 Rüegg, *supra* note 16, at 12; *see also* GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY REVISITED: FROM PROTESTANT TO POSTSECULAR 30 (2nd ed. 2021) ("Despite the major achievement of some autonomy, these scholars' guilds or universities were ultimately under the control of the church.").

32 The most prominent alternative to the study of theology in the university was provided by the mendicant orders—the Dominicans (Preachers) and the Franciscans (Minors), and then later other religious orders. *See* Monika Asztalos, *The Faculty of Theology*, *in* 1 A HISTORY, *supra* note 14, at 409, 414. The Dominicans, too, had been founded in part to "combat heresies and preach orthodox doctrine." *Id.*

33 *See* GUELZO & HANKINS, *supra* note 24, at 1059 ("The universities came into existence only after 1190, in the context of the high medieval papacy's concern with the eradication of heresy . . . ."); ALASDAIR MACINTYRE, GOD, PHILOSOPHY, UNIVERSITIES: A SELECTIVE HISTORY OF THE CATHOLIC PHILOSOPHICAL TRADITION 64 (2009) (observing that the "centralization of authority and power in both church and secular government" was a major motive force in the formation of universities).

34 Cambridge University emerged as a *universitas magistrorum et scholarum* as a result of the dispersion of masters from the Oxford schools in 1209, following Oxford's closure after several students murdered a townswoman. *See* BRUNDAGE, *supra* note 20, at 239.

authority "to legitimize and protect the rights and privileges that their members coveted."[35]

The overarching academic ideal of the traditional university was *amor sciendi*—love of learning—that fused pagan and Christian learning[36] in Scholastic thought and whose achievement demanded the implementation and replication of various sets of foundational assumptions and hierarchical systems that rendered the process of true knowledge acquisition and transmission orderly.[37] These included:

(1) the belief in a world order created by God and accessible to human reason, which was to be disclosed and explained in the university and which provided the essential justification for scientific and scholarly research;[38]

(2) the conviction that human beings were fallen and imperfect, which explained the need for collegial cooperation in a common project coupled with modesty, reverence, and self-criticism as core features of university life;[39]

(3) the imperative of "scientific" truth, which was thought entirely compatible with the freedom required to pursue the academic vocation, inasmuch as the latter demanded "the subjection of one's own assertions to the generally valid rules of evidence, openness to all possible objections to one's own argument, and the public character of argument and discussion";[40]

(4) the recognition of scientific and scholarly knowledge as a public good and a gift from God, with a comparatively minor interest in the use of scientific knowledge for economic ends;[41] and

(5) the activity of *reformatio*: the scientific efforts of masters were supposed to renew and develop previously established knowledge—the emphasis being on established patterns of thought in older, canonical authors, which were tested and scrutinized so as to sharpen one's own knowledge.[42] University teachers regarded themselves as dwarfs standing on the shoulders of giants, which allowed them to see further than

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Oxford re-opened only after receiving absolution from the papal legate, Cardinal Nicholas de Romanis, and most (though not all) of its students and masters returned. *See id.* at 237–39. Others moved to Paris or remained at Cambridge. *See id.*

35 *Id.* at 241.

36 *See* MARSDEN, *supra* note 31, at 30–31.

37 *See* Rüegg, *supra* note 16, at 32–33.

38 *Id.* at 32.

39 *Id.* at 32–33.

40 *Id.* at 33.

41 *Id.*

42 *Id.*

> their forebears as the process of *reformatio* continued in perpetuity.[43]

"From the start," observes medievalist Catrien Santing, "academic intellectuals embraced the ideal of the *amor sciendi*."[44] The masters of the university therefore "imposed, through the bias of the university institutions themselves," as manifested in these and other principles and processes of the *amor sciendi*, "and, more especially, through the distinctions between the various faculties, a respect for the classifications and hierarchies upon which Christian knowledge had been traditionally based."[45]

It is important not to romanticize the commitment to *amor sciendi* or to conceive it as synonymous with "academic freedom" in the modern sense. The twelfth-century Scholastic bad boy, Peter Abelard, is reputed to have confessed that he taught "only from *pecuni[a]e et laudis cupiditas*"—from the love of money and praise.[46] And, as has already been indicated, a great many university students and masters (whose terms of teaching were generally limited in time) were most interested in securing offices in the church or the imperial courts.[47] They needed jobs or wanted promotions.[48] Nevertheless, *amor sciendi* and its associated assumptions, procedures, and principles did represent the ideal, and this in turn entailed extensive control over the university. The papacy generally regulated the uniform substance of the university curriculum (the *studium generale*),[49] the issuance of teaching licenses (*licentia ubique docendi*, the right to teach anywhere, an antecedent of our modern academic degrees),[50] and the administration and content of examinations (an exercise unknown in the West before this time).[51] Instruction was delivered primarily through *lectio* (lecture) and *disputatio* (a formal exercise in framing and debating oral arguments and legal issues overseen by masters).[52] *Universitas* was a legal term for a

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43 *Id.*

44 Catrien Santing, *Diogenes' Tub and the Double Bind of Science and Vocation in the Late Middle Ages*, 48 ENDEAVOUR, Mar. 2024, art. no. 100912, at 2. For an earlier and somewhat different account of the *amor sciendi*, see the comments of the medieval historian Herbert Grundmann in HERBERT GRUNDMANN, VOM URSPRUNG DER UNIVERSITÄT IM MITTELALTER 36–39 (1957).

45 Verger, *supra* note 20, at 51.

46 Rüegg, *supra* note 16, at 10.

47 *See supra* note 23 and accompanying text.

48 *See supra* note 23 and accompanying text.

49 *See* RASHDALL, *supra* note 15, at 15–19; BRUNDAGE, *supra* note 20, at 220.

50 *See* BRUNDAGE, *supra* note 20, at 226; MACINTYRE, *supra* note 33, at 65 (referring to "*ius ubique docendi*").

51 *See* BRUNDAGE, *supra* note 20, at 257–62.

52 *See id.* at 248–57; Rüegg, *supra* note 16, at 33; García y García, *supra* note 16, at 398–99 (describing an exam in the law school context as a "public discussion of a legal subject chosen at random or taken from real life or the courts," *id.* at 399).

group of persons organized on these terms as a corporate entity, possessing rights and duties separate from whatever each of its members possessed.[53]

How did freedom of thought and expression fit into the medieval university model? It fit as a means to achieve these several purposes, or this "ideal of life,"[54] within rather rigid hierarchical strictures and regulations of ordered learning and the pursuit of truth. "The crucial idea was that the teacher was a man of authority,"[55] and this authority had two key facets. It was first intellectual: "A doctor was a scholar, endowed with a science that was at once perfect and finished."[56] "Science" here meant something like an integrated body of true knowledge. "The *primary* purpose of this kind of science," Frank Rexroth has noted, "was to produce intellectual results"—to know "'the nature of things' and of truth itself"—and not any other kind of external cultural or political objective such as the improvement of society, the exercise of rights, the inculcation of hygienic civic values, increased international competitiveness, and so on.[57] Intellectual liberty as well as expressive liberty were required only insofar as they enabled a person to access academic truths that existed, that were given, but that were nevertheless difficult and recondite.[58]

But the scholar's authority was also moral. Though a given science was perfect, a scholar's knowledge of it was not. The recognition of this imperfection imposed a duty on scholars to be zealous in their work and to "seek to make [their] formulations approximate ever more closely to the truth."[59] That meant an attitude of humility, as well as a strong sense that scholars should not stray far from their intellectual domain. They should not be reckless in their public opinions, particularly when these did not concern their core academic expertise. Scholars needed to be mindful that their "[s]cience was indissociable . . . from the uses to which it was put in the social world," and they were in consequence expected to be responsible with it, "practis[ing] all the

53 *See* GUELZO & HANKINS, *supra* note 24, at 1059; BRUNDAGE, *supra* note 20, at 221 n.9. A university was initially "a self-governing ecclesiastical corporation of masters and students whose existence and organization were usually given initial legal recognition by the local municipal, state, or ecclesiastical authorities, and then confirmed by the pope or emperor, the highest authorities of all, through a grant of statutes." BROCKLISS, *supra* note 26, at 5.

54 RASHDALL, *supra* note 15, at 3.

55 Jacques Verger, *Teachers*, *in* 1 A HISTORY, *supra* note 14, at 144, 162.

56 *Id.*

57 FRANK REXROTH, KNOWLEDGE TRUE AND USEFUL: A CULTURAL HISTORY OF EARLY SCHOLASTICISM 11–12 (John Burden trans., Univ. of Pa. Press 2023) (2018).

58 *See* CHARLES HOMER HASKINS, THE RISE OF UNIVERSITIES 25 (Cornell Univ. Press 1957) (1923).

59 Verger, *supra* note 55, at 162.

Christian virtues" appropriate to their condition (impartiality, goodwill toward colleagues and students, keenness in work) and avoiding the vices of financial rapacity, negligence, and vanity—particularly the vanity of pursuing projects outside the moral order of the *amor sciendi* of their proper discipline.[60] These two kinds of academic authority—intellectual and moral—formed the foundation of the university's mission, and they justified whatever academic liberties, including whatever freedoms of speech, were granted to teachers and students.

Of course, these were ideals, and students as well as masters often failed to live up to them. For students, then as today, it was often the diversions and seductions of town life that attracted them to the university, not the love of learning:

> From the thirteenth to the fifteenth century the same laments are heard again and again from all quarters. Students are bawling and brawling, carousing and whoring, singing and dancing, playing cards and chess, are addicted to dice and other games of chance, are up and about town day and night, are swanking around in inappropriate, fashionable clothing, are behaving provocatively to burghers, guild members, and town law-and-order forces, are carrying arms, and are even making use of them.[61]

Still, students and teachers were regulated by, and generally obeyed, an extensive array of general statutes applicable to all members of the university, "from the doctor of theology to the beginner in grammar."[62] While these "often elaborate commandments and prohibitions" governing virtually every aspect of university life, very much including extensive regulation of what could and could not be spoken and written, might "seem to be grotesque coercion when viewed against the backdrop of modern academic freedom," they had the salutary effect of focusing the matriculants' and masters' attention on *amor sciendi* as the essential academic function of the university.[63] Nor did these strictures, which we today might experience as repressive or stifling, inhibit intellectual creativity and debate.[64] Quite the opposite. The medieval university fostered the greatest flowering of knowledge since the Hellenistic era more than 1500 years before—in philosophers that included Thomas Aquinas, Duns Scotus, and William of Ockham, for example, in constant conversation with the pagan

60 *Id.* at 163, 163–65.

61 Rainer Christoph Schwinges, *Student Education, Student Life*, *in* 1 A HISTORY, *supra* note 14, at 195, 223.

62 *Id.* at 225.

63 *Id.*

64 *See* GUELZO & HANKINS, *supra* note 24, at 1063.

philosopher Aristotle, aided by the translations of Muslim philosophers such as Avicenna and Averroës.[65]

The written and verbal expression of university citizens was extensively regulated in this period. One of the most common speech prohibitions, and one of the most serious, was against offensive and insulting speech toward fellow students and professors.[66] This was to be avoided as a matter of personal honor but also to preserve the internal cohesion of the university so that its essential projects, which were never about free expression *simpliciter*, were not compromised.[67] The University of Prague was probably fairly typical in enumerating a list of common insults with an associated scale of graduated fines for their utterance.[68] Naturally, these proscriptions were often violated, and sometimes offenses went unpunished, but universities maintained a considerable number of officials employed as watchdogs to enforce these rules, an early form of student life administrator.[69] Some of these rules went well beyond the regulation of offensive speech to include restrictions on certain types of speech and uses of language.[70] A particularly colorful example of a university speech enforcer was the "notorious *lupus* (wolf), whose duty it was to watch over the use of Latin in the student hostels and colleges."[71]

In a more serious vein, speech at the medieval university was not designed to liberate the student or to facilitate the scholar's pursuit of radically open-ended inquiry. Rather, as Rainer Christoph Schwinges says: "The student of whatever level . . . was . . . introduced to a tradition of knowledge accumulated and commented on by recognized authorities. To acquire, absorb, and transmit this knowledge as a firm, secure stock of insight were the tasks of teacher and student alike."[72] Students did not generally attend universities to hear the brilliant speeches and novel ideas of their teachers.[73] In fact, the personal genius of the teacher mattered far less than it does today. What was important was the content of the knowledge and its faithful transmission, and this also meant that teachers were far more interchangeable and their time in the university far shorter than they are today, especially in the arts curriculum.[74] Universities exalted scholars not for their wit

65 *See* Gordon Leff, *The* Trivium *and the Three Philosophies*, *in* 1 A HISTORY, *supra* note 14, at 307, 318–19.

66 *See* Schwinges, *supra* note 61, at 226.

67 *See id.*

68 *See id.*

69 *See id.* at 227.

70 *See id.* at 226.

71 *Id.* at 227.

72 *Id.* at 231.

73 *See id.* at 227.

74 *See id.* at 231–32.

or brilliance, but for their learnedness and their skill at textual exposition, interpretation, and instruction.[75] "The general medieval paradigm of knowledge was an inheritance, to be jealously purified of alien accretions and misunderstandings, and then commented on and passed on."[76] Apart from law, medicine, and theology, the content of that knowledge included the seven *artes*, a somewhat heterogeneous but nevertheless relatively unified grouping that was in direct descent from Greek philosophy and centered on the traditional arts of expression of the *trivium* (grammar, rhetoric, and logic) and the mathematical *quadrivium* (arithmetic, geometry, astronomy, and music), but which in time added other subjects such as natural, moral, and metaphysical philosophy.[77]

The coming of humanism changed many things in the university, but not much changed respecting the core academic ideals and the instrumental role of the speech of teachers and students in striving for knowledge and truth. What changed most significantly as an initial matter was the coming apart of Scholastic and humanistic models of learning. One of R.W. Southern's key insights was that the earliest universities brought about a fusion of "scholastic humanism" of "systematic thought and action," which extended into the later medieval and early Renaissance periods, but that this project began to falter as of about the mid-fourteenth century when "the hope of universal order faded."[78] Professor James Hankins has likewise suggested various ruptures, though again not in the core commitment to the academic mission: Renaissance humanists of the fourteenth and fifteenth centuries believed that the rigid strictures of legal study in the universities, and their overly rule-based curriculum and procrustean intellectual scaffolding, had systematically sidelined the ancient virtues of personal character.[79] The formalities of scholasticism—and especially of law, "the yawning science"—had evacuated university learning of moral content, and great reforms of Christian culture were needed.[80] The humanist solution was to revive the neglected authors of classical antiquity and, as a rule, to teach them as not only consistent with Christianity but also as complementing it.[81] Humanistic study was from the

75 *See* BERMAN, *supra* note 22, at 162.

76 John North, *The Quadrivium*, *in* 1 A HISTORY, *supra* note 14, at 337, 337.

77 *See* Leff, *supra* note 65, at 308.

78 1 R.W. SOUTHERN, SCHOLASTIC HUMANISM AND THE UNIFICATION OF EUROPE 20, 56 (1995).

79 *See* JAMES HANKINS, VIRTUE POLITICS: SOULCRAFT AND STATECRAFT IN RENAISSANCE ITALY 9–12 (2019).

80 *See id.* at 14–19, 22.

81 *See id.* at 25.

beginning a new type of university moral education, an *eruditio moralis*.[82] And science and scholarship in the humanist period came to be conducted on the model of a voyage of discovery—"science" as the investigation and transmission of new knowledge, of realities unknown to the ancients.[83]

One set of canonical materials, and one conception of *amor sciendi* in the university, was therefore exchanged for another in the service of strengthening the moral legitimacy, virtues of character, and fund of true knowledge necessary for sound political rule. The humanists "held that training in the classics, especially the language arts of grammar and rhetoric, plus poetry, history, moral philosophy, and other humane studies, would instill noble mores, *ingenui mores*, and practical wisdom, *prudentia* . . . qualities needed for excellence in government."[84] In this new focus, education for politics was education in "soulcraft"[85] and the training of elites for a virtuous and sagacious *vita activa* in the public interest.[86]

As for "free speech," this was neither a right protected by government nor a foundational scholarly or educational norm. In the university, the wise use of speech was merely one element in a carefully developed quality of character "closely related to the virtue of courage" and prudence about which one required instruction and which needed integration into a well-ordered whole.[87] "To advocate what was the best course of action required a special kind of wisdom," Hankins observes, "and a prudent understanding of human motivations, not merely knowledge of what one wanted for oneself."[88] "The Ciceronian form of . . . dialogue" became prevalent in the university as a means of teaching, learning, and confronting "various points of view or doctrines" and this represented a change from the earlier, more technical method of scholastic instruction, but its purpose stubbornly remained "the furtherance of scientific and scholarly knowledge."[89]

In sum, the academic ideal of the medieval university was not its "freedom," or the freedom of the people in it, let alone its or their "freedom of speech," but the love and pursuit of true knowledge, which scholars and students were, in fact, free to access in their thought and their expression (through speaking or writing). The

82 *See* Walter Rüegg, *Epilogue: The Rise of Humanism*, *in* 1 A HISTORY, s*upra* note 14, at 442, 446.

83 Walter Rüegg, *Themes*, *in* 2 A HISTORY, *supra* note 14, at 3, 6–7.

84 HANKINS, *supra* note 79, at 42.

85 *See id.* at 57.

86 *See* Rüegg, *supra* note 83, at 17.

87 HANKINS, *supra* note 79, at 57.

88 *Id.*

89 Rüegg, *supra* note 83, at 24, 26, 28.

academic function was to know and assert true propositions, "not true in this or that domain, not true for this or that group of human beings, but true."[90] The attainment of truth was intimately connected with the love of learning and the desire for understanding, traits shared by all human beings, but which the university made its central point or purpose.[91] It was this conception of truth in the university that bound the domains of knowledge to one another, "presupposing in its curriculum a conception of the unity of knowledge and understanding, of the relationships between the disciplines."[92] Liberty of thought and speech operated within this formidable academic superstructure, refined and greatly delimited by these severe constraints—so as "to encourage the life of the mind while showing proper respect for authority."[93] Indeed, the structures of the medieval university were intended both to encourage intellectual inquiry and "to curtail the kind of intellectual liberty that had been enjoyed by Abelard and other masters of the twelfth century."[94] It was the freedom that a feudal corporate body enjoyed "to act in proportion to the honor of its mission" and that the body granted to its members in light of what was regarded culturally as the importance of its mission.[95] To draw another analogy to constitutional law: The university's freedom in the medieval and Renaissance periods was more akin to the ancient freedom of the church than to contemporary free exercise law.[96] A freedom for, not a freedom from.[97]

B. Snapshot 2: The Colonial and Early American University

What had changed by the mid-seventeenth century in the colonial and then the early American university from its medieval predecessors? Perhaps the better question is how so much remained largely the same. One might have supposed that the post-humanist, post-Reformation university would have reflected radically altered presuppositions concerning freedom of speech, but the modifications were far more subtle: "The structures of medieval universities . . . scarcely changed in the sixteenth and seventeenth centuries."[98] Professor George Marsden

90 MACINTYRE, *supra* note 33, at 67.

91 *See id.* at 68–69.

92 *Id.* at 68, 94.

93 GUELZO & HANKINS, *supra* note 24, at 1064.

94 *Id.* at 1061.

95 NISBET, *supra* note 1, at 61.

96 *See, e.g.*, Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

97 *See generally* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996) (arguing that liberty is properly understood as a right to act for good, rather than merely a right to be free from interference).

98 Rüegg, *supra* note 83, at 13, 13–14.

observes that the Puritans of the 1630s were "still in many ways people of the Middle Ages," and "the problems they addressed were still largely those of medieval Christendom"[99]—never more so than in the universities that they inaugurated. "Congregationalists and Presbyterians," Professor John Thelin observes, "had definite ideas about collegiate education as part of a large, important social, religious, and political vision."[100]

Harvard's (1636) founders intended to "re-create a little bit of old England in America," and they did so on the model of medieval Oxford and Cambridge, training clergy and other "leaders disciplined by knowledge and learning."[101] "Concern for [religious] orthodoxy," Marsden continues, "was set as part of the early Yale's [1701] identity," one that would continue through the American Revolution.[102] These and other early schools, like the College of William and Mary (1693) and the College of New Jersey (1746) (later Princeton), were in part sites for the training of clergy—Anglican training in the south, and Calvinist and, later, New Light training in the north.[103] Somewhat later, the training of republican statesman, which also was thought to require a theologically rich education, was added.[104]

One feature of the universities of the colonies and early America that stands out through at least the early-mid nineteenth century was the significant role of Christian theology in general, and in particular in the clash between the so-called "Old Lights" and the "New Lights" of the First Great Awakening. Yet apart from these internecine theological forces of ferment and disagreement, and because "[p]olitics and religion were inextricably linked in the [thought of] the mid-eighteenth century," this confluence of forces deeply impacted the ordinary regulation of American universities.[105] "[T]he traditional way to promote habits of good behavior" in young people was thought to be coercion, which included severe restrictions on speech both written and oral.[106] Students caught in various transgressions, including "slandering" one another or anyone else in the university, were heavily fined.[107]

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99 MARSDEN, *supra* note 31, at 29.

100 JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 23 (3d ed. 2019).

101 FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY 4, 7 (2d ed. 1990). For discussion of the continuities as well as the differences between Oxbridge and the early colonial colleges, see also THELIN, *supra* note 100, at 7–12.

102 MARSDEN, *supra* note 31, at 46, 46–47.

103 *See id.* at 47–53.

104 *See id.* at 60.

105 *Id.* at 51–52.

106 *Id.* at 52.

107 *Id.*; *see also* JOHN R. THELIN, ESSENTIAL DOCUMENTS IN THE HISTORY OF AMERICAN HIGHER EDUCATION 22 (2014). Brown University's 1783 code of student conduct

Speech was, in consequence, highly limited and tightly controlled. For the following century, the regulation of student behavior in the universities, Marsden explains, combined an Enlightenment moral universalism with religious revivalism: "[I]n the late eighteenth and the early nineteenth centuries . . . these two programs generally were not seen as in conflict, but more often as complements in the task of Christianization."[108] In the thought of Princeton's John Witherspoon (whose student was James Madison[109]) in the late eighteenth century, for example, "[s]cientific method could thus both confirm Christianity and support the moral foundations necessary to the republic."[110]

Harvard's curriculum, in the colonial period, sifted "the new learning of the renaissance [through] . . . the old scholastic curriculum."[111] Indeed, as James J. Walsh has documented at length, "Scholastic philosophy and medieval methods of teaching it survived in all the colleges of the English colonies until well beyond the American Revolution and indeed on into the first quarter of the nineteenth century."[112] Harvard, Yale, Princeton, and Brown University, among others, all used so-called "thesis sheets" as part of their regular curriculum, which were "a set of propositions to be demonstrated, that is, proved syllogistically, by any of the candidates for the degree, and then . . . defended . . . against any objections that might be urged in contradiction or impugnment of them."[113] Just as in the medieval universities, "[c]ollege students were subject to a fine if they talked anything but Latin in college, except during those hours set aside for recreation,"[114] and the traditional subjects of the trivium and quadrivium

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prohibited the "use [of] obscene or idle words," and the student was expected, on and off campus, to

> shew all due honour & reverence, both in words & behaviour, to all his superiors, viz, to Parents, Magistrates, Ministers; and, especially to the Trustees, Fellows, President & Tutors of the College; nor shall in any case use any reproachful, reviling, disrespectful or contumacious language; but shall show them all proper tokens of reverence and obedience.

Id.

108 MARSDEN, *supra* note 31, at 53.

109 *See id.* at 60.

110 *Id.* at 59.

111 RUDOLPH, *supra* note 101, at 28 (quoting SAMUEL ELIOT MORISON, THE FOUNDING OF HARVARD COLLEGE 58 (1935)).

112 JAMES J. WALSH, EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC: SCHOLASTICISM IN THE COLONIAL COLLEGES 1–2 (1935).

113 *Id.* at 5–6. Many other universities of the early period are known to have used these sheets as well, even though the sheets themselves have been lost. *See id.* at 1.

114 *Id.* at 8. Some concessions to the vernacular began to be made by some colleges by the late eighteenth century. *See* THELIN, *supra* note 100, at 19; *see also* THELIN, *supra* note 107, at 21 (drawing once again from Brown's code of conduct: "10. It is not permitted any

in addition to philosophical instruction constituted the curriculum in most colonial colleges.[115] "Scholasticism," in Walsh's view, "the philosophy of the medieval schools, formed the minds of the Fathers of the Republic"[116]:

> These men who received their degree of Bachelor of Arts had had an excellent introduction to the classics in Latin but also in Greek, knew more than a little about Hebrew, and had been trained in the college curriculum of those days in rhetoric, grammar, logic and the three philosophies—mental (metaphysics), natural (physics) which included some physiology, and moral (ethics) as well as in natural theology, with mathematics which included some astronomy.[117]

And this was as true for many of the northerners (John Hancock and Samuel Adams, for example) as it was for southerners, including George Wythe, Thomas Jefferson, John Marshall, and Henry Clay.[118]

Other scholars of American education—Thelin, for example—take a more qualified view of the place of Scholasticism in the colonial and early American colleges, and are more skeptical that the religious training functions of the universities were paramount after the very early period.[119] Yet even Thelin observes that the colonial college curriculum consisted of "a mix of classroom recitations and oral disputations" in the medieval subjects just discussed.[120] Whatever the role of scholastic thought, and however important ministerial training may have been over the early period of the American university, it is possible to say that "[d]uring the seventeenth, eighteenth, and early nineteenth centuries, American colleges were conceived and operated as pillars of the locally established church, political order, and social conventions."[121]

By the mid-late nineteenth century, there was certainly a great multiplication of universities in America, serving a much broader and more diverse constellation of educational subcultures and career

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one, in the hours of study to speak to another, except in Latin, either in the College, or College Yard").

115 *See* WALSH, *supra* note 112, at 7–11.

116 *Id.* at 14; *see also id.* at 30 ("So it was by medieval methods and largely through the study of medieval subjects that the men were educated who signed the Declaration of Independence—for the majority of the signers were college men—but also formed the minds of the men who gave us the Constitution of the United States and of the various States of the Union.").

117 *Id.* at 35.

118 *See id.* at 36–39.

119 *See* THELIN, *supra* note 100, at 28–29.

120 *Id.* at 18.

121 CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 1 (Transaction Publishers, 2d ed. 2002) (1968).

interests across the country. First, in some of the early state universities, and then later in New England's "hilltop colleges,"[122] universities reflecting "Western culture," agricultural and technical colleges, teachers' colleges, medical colleges, military colleges, women's colleges,[123] "Black" colleges, universities forging a "Catholic counter-elite comparable to the Anglo-Saxon upper-middle class," and so on.[124] The university was becoming gradually democratized, as happens to so many hierarchical institutions in America. Nevertheless, the role of student and faculty speech within them did not vary substantially from the older models. Indeed, boards of trustees and university donors were much more involved in the internal management and regulation of the schools than is typical today, and tenure seldom existed.[125] Critically, "[t]he vision of a college professor as an independent expert with a mission transcending the college where he happened to teach was almost unknown."[126] The professor was an agent of the university and a representative of its larger mission, not an independent operator or contractor who happened to be at one or another place.

What of free speech? Through the nineteenth century, this was not really a concern of the colleges writ large, and to the extent that it was ever thought of or discussed in the elite colleges, it was at best instrumentally useful in what Thelin has described as the shaping in students of "a character of balance and measure, quietly liberal and outwardly reserved. . . . building character and promoting distinctive habits of thought."[127] This understanding of a liberal education is not one which "liberates" or is inherently "liberatory" but instead which forms and shapes a student in accordance with certain fixed standards of character.[128] Students largely continued studying the traditional curriculum well into the nineteenth century, not merely because they were compelled to (though in many cases they were) but because demand

122 THELIN, *supra* note 100, at 53, 52–53.

123 On these, see HELEN LEFKOWITZ HOROWITZ, ALMA MATER: DESIGN AND EXPERIENCE IN THE WOMEN'S COLLEGES FROM THEIR NINETEENTH-CENTURY BEGINNINGS TO THE 1930S (1984).

124 JENCKS & RIESMAN, *supra* note 121, at 4, 3–5.

125 *See id.* at 6; THELIN, *supra* note 100, at 40 ("[T]hey had taken the Oxford-Cambridge corporate structure and turned it inside out by shifting control from faculty to an external board of trustees and a president.").

126 JENCKS & RIESMAN, *supra* note 121, at 6.

127 THELIN, *supra* note 100, at 64.

128 Compare this with the very different understanding of a liberal education in ANTHONY T. KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE 147 (2007) (describing the "liberation" that a liberal arts education is supposed to promise). Kronman acknowledges that liberal education in the antebellum college was supported by a very different understanding than the one he advances. *See id.* at 157.

for that curriculum remained strong (an intransigence to change that confounded reformers) and several attempts at modernization were met with uneven success.[129] "The soul gains freedom," A.L. Chapin, president of the private, liberal arts college, Beloit College, could still proclaim in 1872:

> [N]ot by breaking away from all law, not by declaring its independence of all external authority, not by casting aside, as of no account, the results of human thinking, accumulated through the ages; but by a full understanding of the laws of its own being and the free exercise of its powers in conformity with those laws, by willing subjection to the rightful authority of God, its moral governor, and by the grateful acceptance of that which the world's masterminds have wrought out as food for its thinking.[130]

Thus, even after the Civil War through the end of the nineteenth century, when curricula at many universities were altered after the Morrill Land Grant Act of 1862 (which gave to various western states land on which to build new schools) and modernized in a variety of ways,[131] especially to integrate agriculture, engineering, and other "useful education," there was little real change in either students' or professors' conception of the uses of their expression, or the freedom with which they should exercise it, at university.[132]

True, these developments represented important democratizing trends in American higher education, as access for previously excluded native populations (as well as for new waves of immigrants) greatly increased and more students were beginning to demand a utilitarian rather than a liberal education.[133] But that access was not, at least at this point, coupled with the sense that universities should *themselves* be central sites of democracy, self-expression, personal liberation, or individuated opinion-giving and exchange. There was, in these technical or specialized schools, simply another type of knowledge to be learned and mastered—the knowledge that would make for a productive and capable professional contributor to the industrial age. These new fields were chosen for representation in the required curriculum on the basis of intellectual or academic value. In fact, one of the principal developments in the late nineteenth century American university was

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129 *See* THELIN, *supra* note 100, at 68.

130 As reported in LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 47 (1965) (quoting A.L. Chapin, *Beloit College: Its Origin and Aims*, 31 NEW ENGLANDER 334, 340 (1872)).

131 *See* First Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C.§ 301 (2018)).

132 *See* THELIN, *supra* note 100, at 75–83.

133 *See* VEYSEY, *supra* note 130, at 87–90, 113. These new kinds of curricula generally supplemented, but did not supplant, the traditional curricula. *See id.* at 108, 113.

toward greater specialization, as universities began to offer advanced degrees like the Ph.D.—first at Yale in 1861 and later elsewhere, including Johns Hopkins University and the University of Chicago—all modeled on the German university's ideals of advanced scholarship.[134] Free speech—whether of students or professors—was hardly the point of teaching and training for these advanced degrees. To the contrary.

II. THE FREE SPEECH UNIVERSITY

The largest difference, for this Essay's purposes, between the American university of the last century or so and of the many centuries before, early American and medieval, concerns the new, outsized conception of free speech as a self-standing good—and eventually, in some accounts, as *the* central object of the university's intellectual life. It was the coming of the phrase "academic freedom," as it began to be used in the twentieth century, and as it was incorporated into and subsumed by the constitutional law of free speech, that marked an important point of transition and change.

A. The Hypertrophy of "Academic Freedom"

The year 1900 saw the formation of the Association of American Universities by the presidents of what were then regarded as the fourteen chief research universities.[135] Their collective aspiration was, as the Progressive-era economist Thorstein Veblen once put it, that they and their universities would become the "captains of . . . erudition" for the new educational era to match the "captains of industry" in business.[136] The AAU was a kind of quality control association, responding to concerns about the variegated standards of higher education in the United States that had blossomed with the great increase in the numbers of universities in the late nineteenth century, especially after the First Morrill Act.[137] In its way, the AAU was actuated by the same type of centralizing, standardizing purpose that had motivated the engineers of the medieval university.

But it was also during this period that the phrase, "academic freedom," came into its own, as not merely one vague or undifferentiated idea among many others in the service of the academic function, but as a distinctive, "sacred concept" and the central animating purpose of the American research university.[138] In the late nineteenth century, at

134 *See id.* at 50, 125–26, 171.

135 *See* THELIN, *supra* note 100, at 110.

136 *Id.* at 110, 110–12; *see also AAU History*, ASS'N. AM. UNIVS., https://www.aau.edu/aau-history [https://perma.cc/3XJK-NM7K] (last visited Feb. 25, 2026, at 01:08 ET).

137 *See* VEYSEY, *supra* note 130, at 312–13.

138 MARSDEN, *supra* note 31, at 219.

least as late as 1874 and even at elite universities such as Columbia, "the question of academic freedom did not even arise."[139] Yet as Marsden says, "[w]hen the American Association of University Professors (AAUP) was organized" about fifteen years after the AAU, "its founders proclaimed an ideal of academic freedom as essential to the definition of a university."[140] By the mid-1950s, academic freedom would become an unquestioned, cornerstone commitment that was associated by many advocates with an ancient university principle.[141] But what did it mean?

Some components of it had a longer history, evoking President Thomas Jefferson's arguments in favor of "liberty in education" at the University of Virginia, though his own object was principally to substitute Unitarian Christianity for the older Puritan ethic, one religious sensibility replacing another.[142] But other meanings were quite different and novel. For example, from the modern emphasis on the neutrality of the hard sciences to ground the objectivity of university learning sprang the view that the university also was a kind of neutral scientific institution—indeed, *itself* neutral territory "in which all views would have an even chance to be judged on their intellectual merits alone."[143]

This "scientific" valence of academic freedom was thought to have been imported from the nineteenth-century German university, which had gained independence from ecclesiastical control, but which was also nevertheless subject to the close regulation and oversight of the Prussian state.[144] In Germany, academic freedom at places like the University of Berlin was hardly a democratic ideal. The German concept of *Lehrfreiheit* (the freedom of the teacher to pursue knowledge and teach without undue interference) was protected by an autocracy against any sort of interference by the rest of civil society.[145] It was not a liberal democratic, market-driven ideal, but an aristocratic one (Wilhelm von Humboldt, who spearheaded the so-called Humboldtian model of higher education, was a minor Prussian nobleman and philosopher[146]). In the new German universities of this period, "non-utilitarian learning" and Hegelian idealism, not naturalistic empiricism or

139 VEYSEY, *supra* note 130, at 47.

140 MARSDEN, *supra* note 31, at 219.

141 *See id.* at 220.

142 *See id.*

143 *Id.*

144 *See id.* at 221.

145 *See id.*

146 *See* Kurt Mueller-Vollmer & Markus Messling, *Wilhelm Von Humboldt*, STAN. ENCYCLOPEDIA PHIL. (May 24, 2022), https://plato.stanford.edu/entries/wilhelm-humboldt/ [https://perma.cc/NA3C-UC8S].

common utilitarian considerations, were thought to make the best and most elite citizens:[147]

> In a society far more hierarchical and more conscious of status than the United States, *Lehrfreiheit* was not an extension of any general commitment to freedom for all citizens, but one of the prerogatives of professorial status, suggesting the precedent of much more limited professorial immunities going back to the Middle Ages.[148]

Yet as Professor David Rabban rightly points out, "the German conception of academic freedom did not adapt easily to the United States,"[149] and in America, the concept of academic freedom rapidly expanded outside its original confines.[150] In time it became a kind of specially prized variant of the ordinary citizen's freedom of speech. It was first blended together with the citizen's freedom in a kind of egalitarian appeal (why, after all, should professors have "less freedom" to speak than anybody else?) and then elevated beyond it, granting to university professors heightened freedoms of contract and other status that were thought to be essential to their work and that were not enjoyed by other people.[151]

An important question at the turn of the twentieth century, and a critical difference between the nineteenth century German and

147 *See* VEYSEY, *supra* note 130, at 126–28.

148 MARSDEN, *supra* note 31, at 221; *see also* NISBET, *supra* note 1, at 66.

149 DAVID M. RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT 17 (2024).

150 The German model has always inspired "extravagant excitement and admiration" in American academics, even today, but some of these admirers may not have adequately appreciated the political realities that motivated the German model and made it possible. VEYSEY, *supra* note 130, at 128, 126–128. So, for example, Professor Matthew Finkin writes that "institutional 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." Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 825 (1983). This is true, and entirely reasonable as far as it goes, but in the Germany of the late nineteenth century, this freedom looked very different than it does in the United States today. It was both hierarchical and tightly managed by the Prussian state. *See* MARSDEN, *supra* note 31, at 91–92.

151 *See* Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 913 (2006) (arguing that we should ask "whether academics should, by virtue of their academic employment and/or profession, have rights (or privileges, to be more accurate) *not possessed by others*" (emphasis added) (footnote omitted)); Keith E. Whittington, *The Assassination That Broke Campus Free Speech*, CHRON. HIGHER EDUC.: REV. (Sep. 15, 2025), https://www.chronicle.com/article/the-assassination-that-broke-campus-free-speech [https://perma.cc/8HK8-N3AK] ("Professors have traditionally enjoyed greater constitutional protection than any other government employee."). For claims that academics should enjoy enhanced First Amendment rights, see J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J. COLL. & U.L. 79, 138 (2004) (suggesting that professors should have greater free speech rights than anybody else because "academic freedom exist[s] not for the benefit of the professors themselves but for the good of society").

American models of academic freedom, was how much freedom professors should enjoy, as part of their academic function, to speak *in public* about matters outside their expertise, especially on political or social questions. In Germany, regarded by many American higher education reformers as the *beau ideal*,[152] this was no part of academic freedom. The model in Germany was one of pure scientific disinterestedness, and professors were not protected by academic freedom when they took controversial political or social positions in public.[153] They had no academic freedom to speak on matters "financial, administrative, political, and so on."[154]

But in the United States, freedom to engage in public, political speech eventually became a central part of academic freedom. John Dewey, the AAUP's first president, took the view that there must be total freedom to "educate the public" in the teachings of the emerging social sciences (psychology, for example, as well as sociology, political science, and others), qualified by "care on scholars' parts not to speak dogmatically on subjects on which they were not scientifically expert."[155] In the early days of the AAUP, freedom of expression was limited to a scholar's areas of scientific competence, and "Dewey quoted approvingly a statement of [University of Chicago] President William Rainey Harper in 1900 that declared that professors abused academic freedom . . . if they preempted scientific inquiry with partisan politics or sensational methods."[156]

Nevertheless, the AAUP took the startling position in its 1915 *Declaration of Principles: Academic Freedom and Tenure* that the professor's responsibility was "primarily to the public itself,"[157] something that had never been the case in any prior conception of the academic function. "Academic freedom," it held, "comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action."[158] As Rabban documents, John Wigmore, an early exponent of academic freedom and the second president of the AAUP after Dewey, recognized the

152 *See* VEYSEY, *supra* note 130, at 125–33.

153 *See* RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 389–91 (1955). For classic remarks on professors' obligation not to speak on questions of "value," but to confine themselves "to state facts, to determine mathematical or logical relations or the internal structure of cultural values," see MAX WEBER, *Science as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 146 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

154 NISBET, *supra* note 1, at 66.

155 MARSDEN, *supra* note 31, at 223.

156 *Id.*

157 AM. ASS'N UNIV. PROFESSORS, *The 1915 Declaration of Principles: Academic Freedom and Tenure*, *in* POLICY DOCUMENTS AND REPORTS 3, 6 (11th ed. 2015).

158 *Id.* at 4.

unseemliness and immoderacy of a new freedom that granted professors *both* special protections for intramural speech not enjoyed by any other citizens (their "university immunity") *and* full-fledged privileges of extramural political speech together with insulation from adverse employment action for such speech.[159] But other influential academics and drafters of the Declaration, including Arthur Lovejoy and Edwin R.A. Seligman, strenuously disagreed and overrode Wigmore's reservations.[160]

It is also in this document that one of the earliest and most prominent invocations of "freedom of speech" appears as a narrowly academic, university ideal, and as a core component of academic freedom. In contrasting the university with "proprietary institutions" such as those "used as an instrument of propaganda in the interests of the religious faith professed by the church or denomination creating it," the authors[161] claim that "[g]enuine boldness and thoroughness of inquiry, and freedom of speech, are scarcely reconcilable with the prescribed inculcation of a particular opinion upon a controverted question."[162] The authors, in fact, went even further—well beyond what Dewey had recommended: "[I]t is not, in this committee's opinion, desirable that scholars should be debarred from giving expression to their judgments upon controversial questions, or that their freedom of speech, outside the university, should be limited to questions falling within their own specialties."[163] From that time, the freedom of extramural professorial political speech became a central concern of the AAUP. As the years passed, the organization would receive and investigate thousands of alleged violations of academic freedom, the majority of which were brought by professors in precisely the social sciences whose insights Dewey had hoped would enlighten the American populace.[164]

The AAUP revised its declaration of principles in 1940, and while academic freedom remained the organization's overriding commitment, it is interesting that the phrase "free speech" dropped out in this

159 *See* RABBAN, *supra* note 149, at 23. Wigmore even "compared professors to clerics in the Middle Ages, who received immunity from military service and civil taxation in return for confining themselves to their religious obligations." *Id.* He might have simply compared them to medieval university professors.

160 *See id.* at 23–24.

161 AM. ASS'N UNIV. PROFESSORS, *supra* note 157, at 5. The authors of the document were composed of "15 prominent scholars—10 social scientists, 3 humanists, 1 lawyer, and 1 natural scientist," though Arthur Lovejoy was known to be a principal drafter. EVERETT CARLL LADD, JR. & SEYMOUR MARTIN LIPSET, THE DIVIDED ACADEMY: PROFESSORS AND POLITICS 107 (1975); *see also* RABBAN, *supra* note 149, at 23–24.

162 AM. ASS'N UNIV. PROFESSORS, *supra* note 157, at 5.

163 *Id.* at 10.

164 *See* LADD & LIPSET, *supra* note 161, at 107.

iteration. Nevertheless, the new statement of academic freedom principles seamlessly blended the professor's academic and citizenly identities, introducing the previously unknown notion that academics were also to be protected in their activities as public provocateurs. Professors were now said by the AAUP to be "entitled to full freedom in research and in the publication of the results," and to "freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject," and "[w]hen they speak or write as citizens, they should be free from institutional censorship or discipline."[165]

The last feature of this reconceived academic freedom deserves special notice, as it simultaneously does two things that appear to be in some tension: first, it appeals in egalitarian fashion to the freedom of professors to "speak or write as citizens" just like any other member of the political community; second, it purports to insulate professors from private censorship or discipline (including by their employers) after a fashion not enjoyed by any other member of the political community. In 1970, the AAUP clarified that it did not intend to "discourage what is 'controversial,'" because "[c]ontroversy is at the heart of the free academic inquiry which the entire statement is designed to foster."[166] This was yet another new feature of academic freedom—the freedom to be a controversialist, a polemicist, a public agent of critique, and a "change agent"—for which free speech would become essential.

I do not mean to suggest that the entire history of academic freedom in the United States in the twentieth century may be gleaned from looking at these AAUP documents. There were many other trends and developments, and I am putting to the side, for example, the expressive freedom of students and the unrest in the 1960s and 70s, since this type of activity is not generally supposed to be part of academic freedom (though even here there is disagreement). Yet if we take simply the function of university professors, largely following from the premises the AAUP laid out, academic freedom would be flattened out, extended like a piece of taffy,[167] and amalgamated with an assortment of public ends and purposes that had never been features of the academic function in the traditional university. The scholar was still the paragon of the "truth" finder, but his domain had been stretched beyond those limits. Indeed, the status of truth had itself begun to change, and this

165 AM. ASS'N UNIV. PROFESSORS, *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*, *in* POLICY DOCUMENTS AND REPORTS, *supra* note 157, at 13, 14.

166 *Id.* at 14 n.4.

167 For this phenomenon in contemporary conceptions of religious freedom, see Philip Hamburger, *More is Less*, 90 VA. L. REV. 835 (2004).

would mean that the scholar's portfolio became more wide-ranging, but also more theoretically precarious and in consequence more difficult to justify.

These new extensions especially included the values of democracy, freedom, and service to the common political good. "Academic freedom is but a facet of freedom in the larger society," wrote Professor R.M.O. Pritchard in 1998.[168] Or here is Sjur Bergan, the former Head of the Education Department at the Council of Europe, in 2002: "[A] democratic society is hardly conceivable without . . . academic freedom."[169] Or again, here is the historian of the Hapsburg Empire and prominent longtime dean at the University of Chicago, John W. Boyer: Academic freedom is "[t]he sacred trust of the universities . . . to carry the torch of freedom."[170] Professor Robert Post, one of the most distinguished scholars of academic freedom, has argued that the purposes of academic freedom and democracy, which seem in serious tension if not outright conflict,[171] may be reconciled and even merged under the rubric of "democratic competence"—that democracies require the leavening touch of elite expertise in order to function well.[172] Professor Paul Horwitz has likewise argued that universities are "First Amendment institutions" whose personnel contribute to "public discourse" that works to the benefit of democratic politics, "laboratories *for* democracy" even if not "laboratories *of* democracy," though this last phrase suggests that he sees a complicated (to put the matter mildly) relationship between the university and democracy.[173] I will return to this tension shortly. Princeton's President Eisgruber rests his defense of the university on its ostensible capacity to "model" free speech for the rest of the "angry world."[174] Just as in the Progressive era,

168 Rosalind M.O. Pritchard, *Academic Freedom and Autonomy in the United Kingdom and Germany*, 36 MINERVA 101, 120 (1998).

169 Sjur Bergan, *Institutional Autonomy Between Myth and Responsibility*, *in* AUTONOMY AND RESPONSIBILITY: THE UNIVERSITY'S OBLIGATIONS FOR THE XXI CENTURY 49, 49 (2002).

170 JOHN W. BOYER, ACADEMIC FREEDOM AND THE MODERN UNIVERSITY: THE EXPERIENCE OF THE UNIVERSITY OF CHICAGO 42 (2002).

171 The AAUP's 1915 declaration recognized as much in describing the needed "check" on the "unconsidered impulses of popular feeling" provided by the professoriate. AM. ASS'N UNIV. PROFESSORS, *supra* note 157, at 9.

172 ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 34, 55 (2012).

173 PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 113, 120 (2013); *see also* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1548 (2007).

174 *See generally* EISGRUBER, *supra* note 5 (arguing that the form of discourse modeled by universities is essential in our fractured society). For interesting criticism of what is charged to be Eisgruber's "hollow" commitment to free speech in the university, see Len Gutkin, *A Princeton President's Evasions*, CHRON. HIGHER EDUC.: REV. (Oct. 3, 2025), https://

democratic opinion is thought, in this particular justification for academic freedom, to be in need of tempering guidance by scientifically informed experts, and the university's professors are supposed to be the class of experts to perform this task.[175]

Some academics and scholars of higher education instead emphasized the AAUP's extramural, polemicist, political activist side of academic freedom as its key—and perhaps even its only remaining—pillar. The historian Professor Joan Scott, for example, once wrote that "[a]cademic freedom protects those whose thinking challenges orthodoxy," solitary heroes who speak truth to power not only within the university's walls but also, or perhaps especially, outside them.[176] The feminist philosopher Professor Judith Butler has argued that

> an anthropologist who works in Kenya and Sudan may write essays on the genocide in Sudan and criticize his own country's polic[ies] . . . , or a professor of constitutional law may write briefs regarding the legality of the war tribunals established for detainees at Camp Delta in Guantanamo . . . [and tenure] reviewers would be hard pressed to distinguish between academic and extramural.[177]

Or again: "[T]he operation of critique takes place not only in the identifiable domains of philosophy and within the walls of the university but every time and any time the question of what constitutes a legitimate government command or policy is raised."[178]

This view of academic freedom as a kind of roving privilege to speak, write, advocate, protest, and so on—in unconstrained "open inquiry"—on behalf of assorted extramural political causes has been embraced by many contemporary academics, where it is at times both fused with the democracy-enhancing feature of academic freedom and extended to students.[179] And it has been reaffirmed by the AAUP itself,

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www.chronicle.com/article/a-princeton-presidents-evasions [https://perma.cc/ME35-Z3MB].

175 *See* MARSDEN, *supra* note 31, at 234 ("Science provided the means whereby democracy could be saved from itself, and hence for the sake of society universities must be sacred preserves."). Even if the leavening of expertise is, in fact, necessary for democracies to function (a debatable point), it would not necessarily follow that the university would be the institution tasked with this function.

176 Joan W. Scott, *Academic Freedom as an Ethical Practice*, *in* THE FUTURE OF ACADEMIC FREEDOM 163, 166 (Louis Menand ed., 1996).

177 Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, *supra* note 11, at 107, 124–25.

178 Judith Butler, *Critique, Dissent, Disciplinarity*, 35 CRITICAL INQUIRY 773, 780 (2009).

179 For a small sampling of an enormous literature, see, for example, Anton Ford, *The Chicago Principles Are Undemocratic*, CHRON. HIGHER EDUC.: REV. (May 6, 2024), https://www.chronicle.com/article/the-chicago-principles-are-undemocratic [https://perma.cc/M55M-KS6Q]; DANIEL GORDON, WHAT IS ACADEMIC FREEDOM? A CENTURY OF DEBATE, 1915–PRESENT, at 1 (2023) (tellingly choosing to begin his account of "academic freedom" at 1915 and treating the line "separating academic inquiry from political activism" as a

which has taken the view that academic freedom requires the protection of "academic boycotts"—the shunning of scholars who are associated in some way (including by mere institutional affiliation) with policies that other academics find objectionable on political grounds—as a "legitimate tactic"[180]; that universities need not be "institutionally neutral" when it comes to adopting and expressing overtly political positions, because taking such positions reflects the democratic end of "properly shared governance";[181] and that the use of politicized "diversity statements" by academic institutions to evaluate teaching and research is to be encouraged.[182]

Whatever one thinks of the substance of these and other policies, the only point I want to make here is that the core functions of the university and the university professor were fundamentally transformed in the twentieth-century free speech university, in the distinctive concept of "academic freedom." Indeed, as to many of these policies, and because of the rapid inflation, muddling, and (now perhaps) essential contestation of the concept of academic freedom, it is difficult any longer to know whether they are examples of academic freedom or instead examples of its violation.[183] As for free speech, academic freedom required expanded speech prerogatives for its protection, but it was also thought to be fulfilled in the exercise of that speech, particularly in extramural speech on matters of public, nontraditionally academic concern. Academic freedom became an "extra prop for the constitutional freedoms" that university professors share

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recurring, unresolved question); MICHAEL BÉRUBÉ & JENNIFER RUTH, IT'S NOT FREE SPEECH: RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM 10 (2022) (arguing that the university ought not simply produce knowledge but instead should strive for "the ethical production of knowledge in service of a diversely situated humanity"); and JULIA SCHLECK, DIRTY KNOWLEDGE: ACADEMIC FREEDOM IN THE AGE OF NEOLIBERALISM 79 (2022) (arguing that universities should discard the myth of impartiality in the pursuit of knowledge and truth and that they should instead "proudly proclaim that the university is a profoundly politicized arena in which what exactly might constitute the good and who gets to define it are vigorously argued across and within fields of knowledge").

180 *See* AM. ASS'N UNIV. PROFESSORS, STATEMENT ON ACADEMIC BOYCOTTS (2024).

181 *See* AM. ASS'N UNIV. PROFESSORS, ON INSTITUTIONAL NEUTRALITY 4 (2025).

182 *See* AM. ASS'N UNIV. PROFESSORS, DIVERSITY, EQUITY, AND INCLUSION CRITERIA FOR FACULTY EVALUATION (2024).

183 *See, e.g.*, Keith E. Whittington, *Diversity Statements, Academic Freedom, and the First Amendment*, 103 NEB. L. REV. 643, 644 (2025) (arguing that the use of these statements in "current practice" violates principles of academic freedom); Peter Schmidt, *Faculty 'Diversity Statements' Are Called Threats to Academic Freedom*, CHRON. HIGHER EDUC.: TICKER (Mar. 30, 2017), https://www.chronicle.com/blogs/ticker/faculty-diversity-statements-are-called-threats-to-academic-freedom [https://perma.cc/87UL-UZRS]. For externally imposed requirements of "viewpoint diversity" as arguably incompatible with academic freedom, see Eugene Volokh, *"Viewpoint Diversity" Requirements as a New Fairness Doctrine*, 33 GEO. MASON L. REV. 97 (2026).

with other citizens under the First Amendment, and it was even sometimes extended to students who would claim analogous privileges inside and outside university premises.[184] Professor Tom Ginsburg recently, and reasonably, observed that "the freedom to protest, like free speech generally, is not academic freedom."[185] Similarly, Professor Matthew Finkin contends, again reasonably, that the AAUP has "cast its lot in with antinomianism" and that some of the more outré social media utterances of professors should not properly be understood as protected by academic freedom.[186] And yet it was developments in the very concept of academic freedom that gave rise to, and perhaps even mandated, these and other conflations.

B. Legalistic Free Speech Creep

The free speech university's model of the "professor-democrat-polemicist" also happened to fit nicely with the conception of free speech that the Supreme Court was busy inventing in the early-mid twentieth century, one that did not at all match conceptions of free speech at the founding.[187] As Horwitz aptly puts it: "In a culture in which the First Amendment has colonized thinking about public discourse, it was perhaps inevitable that the professional concept of academic freedom would eventually be absorbed into constitutional doctrine."[188] Yet the permeability worked in both directions: Free speech legal doctrine and concepts steadily infiltrated the university, too, as what was a private, professional norm took on the public, marketized, democratized, polemicized norms of legalistic speech applicable to the population at large.

It is only since the 1950s that the Supreme Court has been talking about academic freedom as a part of the constitutional law of free speech, and it is still uncertain just how academic freedom fits into the doctrine, though in the view of eminent scholars of academic freedom including Professors Frederick Schauer and David Rabban, it is not an

184 NISBET, *supra* note 1, at 65.

185 Tom Ginsburg, *Can Academic Freedom Survive the AAUP?*, CHRON. HIGHER EDUC.: REV. (Feb. 18, 2025), https://www.chronicle.com/article/can-academic-freedom-survive-the-aaup [https://perma.cc/4MCS-7FRU].

186 Matthew Finkin, *Non-Disciplinary Professorial Speech: The First Amendment and the Decay of Professional Norms*, 50 J. COLL. & U.L. 219, 241, 243 (2025).

187 *See generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) (arguing that Founding-era thinkers had certain shared understandings of speech freedoms that no longer exist in American constitutional thought); Marc O. DeGirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 751 (2019) (discussing the shift in the mid-twentieth century toward understanding freedom of speech as maximizing individual autonomy).

188 HORWITZ, *supra* note 173, at 110.

undifferentiated right but a feature of the freedom of speech.[189] The first of the Supreme Court's constitutional cases vaguely gesturing at academic freedom was *Sweezy v. New Hampshire*, where the Court in 1957 held that the state could not jail a professor for contempt for refusing to answer questions about class lectures he had given at the University of New Hampshire.[190] This, the Court found, was a violation of the Fourth Amendment, but in dicta it also said that the state's questions were "an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which the government should be extremely reticent to tread."[191] Chief Justice Warren continued: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding," but these features of university life were important, he felt, because of the "vital role in a democracy that is played by those who guide and train our youth."[192]

This democracy-enhancing role of academic freedom was very much of a piece with certain influential academic defenses of free speech of the period, especially in, for example, the work of the great mid-century speech scholar, Alexander Meiklejohn.[193] Meiklejohn's "model" of First Amendment free speech was the town meeting, in which "the people of a community assemble to discuss and to act upon matters of public interest" and accept abridgements on their speech to fulfill the core democratic purposes of free speech.[194] The town meeting, he continued, "is not a Hyde Park. It is a parliament or congress. . . . It is not a dialectical free-for-all. It is self-government."[195] Academic freedom was, in consequence, accommodated to this more general conception of the democratic value of free speech. True or proper democracy—the people's arrival at "wise" decisions—consists in protection against the "*mutilation of the thinking process of the community.*"[196]

It was academic freedom, in the AAUP's view, that could perform this great anti-mutilative function. Professor Philip Hamburger has observed that theologically liberal assumptions and purposes were often at work in defining what counted as rational political decisions, as compared with those thought to depend upon irrational or blind

189 *See* Schauer, *supra* note 151, at 908–09; RABBAN, *supra* note 149, at 9.

190 Sweezy v. New Hampshire, 354 U.S. 234, 249–50, 255 (1957).

191 *Id.* at 250.

192 *Id.*

193 *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT (1948).

194 *Id.* at 22.

195 *Id.* at 23.

196 *Id.* at 26.

adherence to received doctrine or authority.[197] Thus, "propaganda"—often a "code word" for the speech of religious organizations and institutions—was not regarded as worthy of the same protection in the law as other putatively healthier varieties of political speech.[198] These very assumptions may be seen in the distinction that Dewey and the AAUP made between private, "proprietary" religious universities and what they regarded as the public-spirited, genuine article that merited all kinds of new privileges and protections.

It was also during this period that the Court applied the free speech metaphor of the marketplace to universities and their academic freedom. While Justice Holmes had first used the metaphor of trade for free speech in 1919,[199] it was Justice Brennan who, in 1967, explicitly tied universities not only to the marketplace of ideas, but also to a species of anti-foundationalist, anti-orthodoxy, liberationist ideal:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[200]

There are several notable conceptual moves in this astonishing pronouncement. First, that "academic freedom" should be of "transcendent value to all of us." This bit of hyperbole only makes any sense on the assumption that academic freedom has an overriding political importance in a democracy, itself not an obvious proposition. Even if one were inclined to agree with Post that academic freedom contributes something of worth to democratic governance, it seems grossly out of proportion and delusively grandiose to call it a "transcendent value" for "all of us." Nevertheless, Horwitz is right that in *Keyishian*, academic freedom seems to have been made over as citizen "train[ing] in . . . democratic dialogue," with the academic function of the university at best a kind of uncertain "by-product" of that training.[201] But (second), there is something else that is new in this defense of academic

197 *See* PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH 21–36, 73–97 (2018).

198 *See id.* at 95.

199 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

200 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (alteration in original) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

201 HORWITZ, *supra* note 173, at 112.

freedom. In the Court's view, the academic "marketplace" is no ordinary forum in which truth, traditions, and customary knowledge might play a significant role. It is rather described by Justice Brennan as a "peculiar" kind of marketplace in which academic freedom is supposed to disrupt "orthodoxy" whose "pall" it is also free speech's core function to throw off.

In fact, freedom of speech during the course of the twentieth century took on a more general anti-orthodoxy function reflected in Justice Brennan's vision.[202] Verbal expression was believed to go to the essence of what it means to be human, protecting not only the development of individual thought but also the self-realization or self-actualization of the speaker. Thus, free speech was reconceived as intrinsically valuable because it is a prerequisite for complete autonomy of thought, not so much a university marketplace of knowledge as a sledgehammer that university professors should use to smash up all existing knowledge. Free speech was now supposed to disrupt collective wisdom and tradition, to throw off "orthodoxy." The "dialectical free for all" deplored by Meiklejohn was now the central object of free speech. As Justice Douglas put it in *Terminiello v. Chicago*,[203] the crucial role of free speech is "to invite dispute. . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[204] It was also Justice Douglas who wrote the first opinion to mention the phrase "academic freedom," and the thematic connections with his *Terminiello* opinion for the Court are striking. In *Adler v. Board of Education* (decided five years before *Sweezy*), Justice Douglas dissented from the Court's decision upholding a New York law that provided for the dismissal of any employee of a state educational institution who "deliberately advocates, advises or teaches" that the U.S. government should be "overturned by force, violence or any unlawful means."[205] In Justice Douglas's view, "[t]here can be no real academic freedom" or "adventurous thinking" in an environment where "suspicion fills the air and holds scholars in line for fear of their jobs," though it was never plain just how Justice Douglas thought that heterodox political views were in the same category as advocacy for the violent overthrow of the government.[206]

And yet it is something like Justice Douglas's and Justice Brennan's vision of academic freedom that has prevailed in the free speech

202 For critical discussion of this turn, see DeGirolami, *supra* note 187, at 769–81.

203 Terminiello v. Chicago, 337 U.S. 1 (1949).

204 *Id.* at 4.

205 Adler v. Bd. of Educ., 342 U.S. 485, 487 n.3, 496 (1952), *abrogated by*, *Keyishian*, 385 U.S. 589.

206 *Id.* at 510, 508–11 (Douglas, J., dissenting).

university. Disputatiousness, controversialism, polemic, disruption, and an aggressive "debate-me-bro" culture—all of these became the central function of free speech in the late twentieth and twenty-first centuries, a function that matched both the Court's and, increasingly, the academy's view of the core purpose of academic freedom. The object was to establish one's own orthodoxy, and the rest of us, as Professor Gerhart Niemeyer once put it, are expected to acknowledge the "recognized truth" of the individual to say whatever he wills, provided, of course, that what he says is anti-orthodox.[207] Free speech cases of the later twentieth century emphasized the individual's rights to be unconstrained in proclaiming his anti-orthodoxies. Perhaps Paul Robert Cohen intended to contribute to democratic self-government and the exchange of ideas by wearing a jacket with the words, "Fuck the Draft," inside a courthouse corridor.[208] Perhaps his expression was so received. But the terms in which the Court justified Cohen's speech rights—the vindication of his "inexpressible emotions" that sound to those around him like a "verbal cacophony," or to "lyric[ize]" in whatever vulgarities suited his "taste and style"—suggest that the Court's true justification was not democratic governance but anti-orthodoxy.[209]

We still live with this account of free speech today, one which has resulted in massive expansion of the varieties of speech that merit constitutional protection, and which has also helped to cement a distinctively modern account of academic freedom unknown for most of the history of the university. The right of speech is now conceived primarily as validating or authenticating the autonomous self. Speech that is "outrageous,"[210] that is used as an instrument of "aggression and personal assault,"[211] that is cruel and sexually arousing because of the torture that it inflicts,[212] that glories in the wanton slaughter of African-Americans and Jews,[213] that is personally abusive and intended to "inflict great pain"[214]—is now protected by the First Amendment.

The constitutional law of academic freedom has remained undeveloped, even somewhat stagnant, in the wake of these free speech developments, though there has been more activity in the lower courts

207 Gerhart Niemeyer, *A Reappraisal of the Doctrine of Free Speech*, 25 THOUGHT 251, 256, 259 (1950) ("[T]he question which concerns us is whether the doctrine of free speech admits of any criterion by which utterances may be recognized as either belonging to the circle of mutual loyalty or denying the basic community." *Id.* at 259.).

208 *See* Cohen v. California, 403 U.S. 15, 16 (1971).

209 *See id.* at 25–26.

210 *E.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 53 (1988).

211 *E.g.*, Time, Inc. v. Hill, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting).

212 *See, e.g.*, United States v. Stevens, 559 U.S. 460, 465–66, 482 (2010).

213 *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 798–99 (2011).

214 *E.g.*, Snyder v. Phelps, 562 U.S. 443, 461, 460–61 (2011).

than the Supreme Court.[215] The Supreme Court has mentioned a turn in academic freedom toward autonomy—now conceived as "educational autonomy." So, for example, in *Grutter v. Bollinger*, the Court stated that "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition" which entitled them to special deference not enjoyed by any other institution.[216] But the Court has never really explained just why the university must, by constitutional right, luxuriate in a special kind of autonomy not granted to any other actor.[217] And the Court has gestured at concerns about the free speech rights of public university professors, as government employees, though it has largely sidestepped these.[218] Yet if the constitutional law of academic freedom has remained undeveloped, the same cannot be said for the university's absorption of constitutional rules in its own self-conception. Universities—private no less than public—have, in fact, adopted many of the norms of constitutional free speech law, themselves opting voluntarily to fuse academic freedom to legalistic free speech values. Princeton's President Eisgruber speaks for most university leaders when he writes that "many private universities, including my own, have adopted free speech rules that largely mirror the Supreme Court's understanding of the First Amendment."[219]

III. EXPLAINING THE FREE SPEECH APOTHEOSIS

What can explain the transition from the traditional university to the free speech university? Academic freedom, if grounded in the ascendant anti-orthodoxy justification for free speech, *cannot* be an "institutional" or university freedom, because its very purpose is to facilitate and hasten the dismantling of the "norms, practices, and traditions" of universities.[220] Nor can academic freedom rooted in the benefits of free speech for democratic self-government, since the key function of academic freedom in that case seems to be about how Americans speak to one another in public, not how the rarefied class of people who happen to inhabit universities teach and study.

Nor can academic freedom, conceived as a market competition or free trade association where the shifting and changeable preferences

215 For discussion of these cases, see RABBAN, *supra* note 149, at 81–135.

216 Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

217 *See id.* at 328–29.

218 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Garcetti v. Ceballos, 547 U.S. 410, 417–20 (2006). On these issues, see Whittington, *supra* note 183, at 664–69.

219 *See* EISGRUBER, *supra* note 5, at 16.

220 HORWITZ, *supra* note 173, at 113; Horwitz, *supra* note 173, at 1497.

of consumers (students? the public?), explain what is valuable about it. University professors certainly have no principled objection to being handsomely compensated. They are not monks and have undertaken no vows of poverty. Indeed, today, with the coming of centers, institutes, projects, government and private grants, and new administrative officers devoted to the cultivation and acquisition of great sums of money, professors have assumed the role of entrepreneurs and industrial innovators as was never before quite the case in the long history of the university. Whole new classes of university denizens have been created in the administrator, and the business of the academy, particularly after the Second World War, has become business.[221] Yet as in all aristocracies (see, for example, the prince's general attitude toward the merchant as late as the nineteenth century at least[222]), there has always been in the university something of a disdain for the person whose sole mark of distinction was how much money he made or how successfully he traded with others. What all of these contemporary approaches to academic freedom seem to be missing is any coherent account of the nature of the university as a distinctive institution.

A. The Free Speech University as Anti-Institution

The term "institution" can be defined in nearly limitless ways, as the political scientist Hugh Heclo has shown—collections of rules, for example, or collections of functions, or channels for the exercise of power and authority.[223] But if we understand academic institutions as repositories of the durable forms of our common academic life, the frameworks for how we think deeply together about academic matters, then academic freedom will be valuable insofar as it promotes these university ends. That it is *durable* is an essential feature of a university. It may change, though, as we have seen, the changes across hundreds of years are very slow. But its *form* over time must exhibit continuity, and the people who work in universities must *conform* themselves to distinctive roles, with attendant privileges and obligations, that they carry out in perpetuating its form across time. University academics are molded by the enduring form of the university, a shaping that

221 NISBET, *supra* note 1, at 82.

222 The examples are legion. For one vivid literary description of the relationship of the nobility to the mercantile class, see GIUSEPPE TOMASI DI LAMPEDUSA, THE LEOPARD (Archibald Colquhoun trans., Harvill Press 1996) (1958).

223 *See* HUGH HECLO, ON THINKING INSTITUTIONALLY 11–44 (2008); *see also* MARY DOUGLAS, HOW INSTITUTIONS THINK (1986) (describing the way in which our thinking is shaped and improved by institutions).

constrains their choices,[224] structures them, but also empowers them and gives them the freedom to perform certain discrete functions. University professors are made into a particular kind of person. If they break the mold, if they shake loose the constraints and destroy the form, then they cease to be what they were.

To see this formative function of the university is already to explain why it has met with such fierce resistance, and even mockery and disdain, in contemporary accounts that make the free market or prodemocracy or anti-orthodoxy view of free speech the central aim of academic freedom. The university plays a role that many people—perhaps especially many in the professoriate—would prefer to believe is not necessary, because they are generally of the view that we are already fully formed, autonomous agents. What we require is liberation from the structure and forms of university knowledge, not submission and conformity to them. Anything less would be to yield to inauthentic forms of mediation. This rebellious, anti-orthodoxy strain has always been strong in America, as Tocqueville keenly observed: "Since they customarily rely on their own witness, they like to see the object that occupies them very clearly . . . . This disposition of their minds soon leads them to scorn forms, which they consider useless and inconvenient veils placed between them and the truth."[225]

To think about truth and knowledge in these immediate, self-authenticating ways is profoundly at odds with the premises of the university as the necessary incubator of enduring truths and knowledge. The overwhelming power of this disposition in America may help to explain why suspicion of the university is often a bipartisan affair: The left tends to scorn all mediated, universal truth and knowledge, preferring its own self-created "truths," while the right tends to speak of individual achievement and abstract principle, distrusting the elite institution. For both, it is the choosing, liberated individual that accesses truth and real knowledge, achievable by Everyman. Not the elite, university professor encrusted with centuries of clotted, traditionary knowledge.

The point was brought home to me with crude acuity when, in recently perusing the social media platform "X," I saw that a prominent commentator noted for both his social conservatism and economic progressivism wrote: "I love how Max Weber wrote a book on religion, covering all the major faiths, and his citation section was: MY

224 On the constraint in the types of discussion, or speech, that occurs in universities, see John Inazu, *Law, Religion, and the Purpose of the University*, 94 WASH. U. L. REV. 1493 (2017).

225 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 404 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840).

OWN MIND, BITCHES."[226] Purity of brilliant insight, untutored illumination of reality: in this way of thinking, these are the sources of knowledge. Not cumulative, corporate learning. One can understand and even sympathize with this view, particularly when one is compelled to sift through dull or sterile or leaden scholarship. And it is almost certainly true that universities have produced many hundreds more uninspired nobodies than geniuses, scores more Edward Casaubons than Albert Einsteins. But how anti-institutional the view is. And how American.

In the traditional university, truth and knowledge were considered too vast, too recondite, too difficult, and too dispersed for any individual to possess. They could only really be housed in, cultivated through, and transmitted by a university. For modern people, and likely for many denizens of the free speech university, these are realities that run hard against the grain of the American democratic, egalitarian, do-it-yourself and express-it-yourself spirit. University knowledge is in important ways anti-democratic knowledge, pursued by anti-democratic actors. That is why in America (and with apologies to Robert Frost) "something there is that doesn't love a" university.[227] Universities are in their bones deeply inegalitarian, hierarchical, and exclusive. Consider only their standards of selectivity in admission; their "classes" and "grades" of students; their highly reticulated "ranks" of faculty; their "chaired" professorships (whose etymology may be traced to the "cathedra" of bishops); their "honor codes" to punish the academically dishonorable; their overt and unapologetic, even prideful, intellectual discrimination; their utterly anachronistic robes, which still make their appearance on ceremonial occasions. To these, many more examples might be added. "From the very beginning in the West, aristocracy has pervaded the realm of letters. There has never been any pretense of equality or democracy of ideas."[228]

Universities arose in a medieval social structure, were nurtured by the communal assumptions of that structure, and are in many ways inseparable from the specialized roles that were elements of that structure. The eminent early twentieth-century scholar of the university Hastings Rashdall once evocatively likened the guilds of university scholars to the guilds of knights:

> The original conception of knighthood was the solemn reception of the novice into the brotherhood of arms. The blessing of the priest was required by the knight bachelor as the scholastic bachelor required the licence of the chancellor . . . . Both of these great

226 Sohrab Ahmari (@SohrabAhmari), X (Nov. 23, 2025, at 11:25 ET), https://x.com/sohrabahmari/status/1992630623400264167?s=46 [https://perma.cc/4FYE-GM6E].

227 ROBERT FROST, *Mending Wall*, *in* NORTH OF BOSTON 11, 11–13 (1914).

228 NISBET, *supra* note 1, at 29.

> institutions arose from the transference to the military and the scholastic life respectively of one of the most characteristic social and political ideas of the age—the idea of a guild or sworn brotherhood of persons following a common occupation.[229]

The knight of the study and the knight of the classroom may be suffering the same fate as the knight of the battlefield.

And yet, if Friedrich Hayek was even partly right that true freedom is made possible by esteem for tradition and custom and grown institutions,[230] then the free speech university, and academic freedom that takes its justifications from contemporary free speech law, is bound to miss something critical—*the* critical thing—about what universities are for. What tradition does is to form us,[231] and what the traditional university did was to form academics. The free speech university cannot do that because it operates from fundamentally different premises about the essential purpose of the university. In this way, the free speech university is not an institution, but an *anti-institution*, a place committed to the degradation (in the etymologically correct sense of the grading down or devaluation) of this particular form of institutional knowledge. The substitution of the free speech university for the traditional university will result in the loss of the knowledge and truth that were once the hallmarks of the old way.

B. Restoring the Traditional University?

Is the traditional university recuperable? I began this Essay insisting that I was not going to offer any prescription for reform, and I hold to that promise. Yet even to begin to answer the question of recovery, it might be necessary to know just why the free speech university replaced the traditional university. I want to propose tentatively that the primary reason has little to do with free speech, but instead with the cultural status of knowledge and truth. The free speech university is replacing the traditional university because what Nisbet once called the "academic dogma" of the university has been steadily eroded. "The university," Nisbet wrote, is "the last of the great institutions formed during the Middle Ages: the last, that is, to suffer in full sweep the kind of changes and buffets that earlier were the lot of monastery, fief, guild, and parish."[232]

What is that dogma, that set of beliefs regarded as unquestionably good and right? It is that truth and knowledge are precious—*more*

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229 RASHDALL, *supra* note 15, at 287.

230 *See* F.A. Hayek, *Freedom, Reason, and Tradition*, 68 ETHICS 229, 234–35 (1958).

231 *See generally* MARC O. DEGIROLAMI, THE CONSTITUTION OF PRACTICE: ON LAW AND TRADITION (2026).

232 NISBET, *supra* note 1, at 13.

precious than free markets, democracy, or personal political self-realization. One might say that on this dogmatic view, truth and knowledge are *sacred*. Indeed, it was once the more essential dogma that knowledge and truth—theological, philosophical, humanistic, scientific, mathematical, historical, and so on—serve God. This prior dogma gave true knowledge its elevated status and privileged position. Not useful knowledge, or relevant knowledge, or practical knowledge. True knowledge *simpliciter*, though this is not to deny that hierarchies existed and continue to exist, as well as more and less valued truth and knowledge. The degradation of this academic dogma, inside and outside university walls, renders the recovery of the traditional university unlikely.

Consider two thoughtful, though diametrically opposed, proposals to defend the university against the criticism it now receives internally and externally—two plans of action to protect it against the potent and sustained attack it is now enduring. On one side, Professor Stanley Fish has argued that university professors should defend the castle keep of the academic function by acknowledging that their work is simply one kind of work, one kind of job. "It's just a job," Fish insists, like any other job, with its own internal standards of merit and achievement, its own "immanent intelligibility" impervious to external evaluation.[233] Professors should take refuge within the university's once sturdy walls, Fish contends, battening down the hatches and recommitting themselves to purely academic work, forswearing other ambitions.[234] This concerted re-immurement, Fish argues, or this "deflationary" and "academicized" account of the university professor, can renew the guild-like quality of the academic profession that has been tarnished by the free speech university.[235] This is his strategy to protect the university and its academics.

On the other side, Professor Joseph Blocher has suggested to me that the most troublesome feature of academic freedom is extramural speech because it triggers the most attention and resistance, and because it is the most difficult to justify.[236] It is also the component of academic freedom most similar to constitutional free speech, because being a university professor does not deprive one of the general right to free speech in a private capacity (though it does provide greater

233 FISH, VERSIONS OF ACADEMIC FREEDOM, *supra* note 7, at 20, 22.

234 *See id.* at 20, 32; *see also* FISH, SAVE THE WORLD, *supra* note 7, at 12.

235 *See* FISH, VERSIONS OF ACADEMIC FREEDOM, *supra* note 7, at 20, 32; *see also* FISH, SAVE THE WORLD, *supra* note 7, at 12.

236 *See* Email from Joseph Blocher, Distinguished Professor of L. & Vice Dean, Duke Univ. Sch. of L., to Marc O. DeGirolami, Professor of L., Columbus Sch. of L. (Oct. 31, 2025, at 18:36 ET) (on file with author). Professor Blocher has kindly permitted me to share his insightful note and proposal.

protections than are typically enjoyed by private actors). Somewhat counterintuitively, however, Blocher's view is that extramural speech is *both* especially troublesome *and* an especially crucial way that professors communicate their value to the public, which he regards as particularly important given the current wave of extramural attacks on the universities. If universities are to restore the public faith that is necessary to sustain academic freedom, Blocher believes they must prove that they are worth it—demonstrate to the wider world, that is, that they are *not* insulated from it like certain medieval guilds.[237] That will require that professors engage in *more* extramural speech, even if they must do so precisely at the moment when such speech is most under strain. He recognizes that there may be a bit of a spiral wherein professors engaging in this speech would in consequence be making things worse for their institutions.[238] But in the end, he believes, and I think he is quite correct about this, that the only "protection" of academic freedom is that the public believe that it is worth protecting—"that professors should be left to govern themselves according to the standards of scholarly discipline."[239]

Will these plans restore the traditional university or shore it up against attack? I have my doubts. Fish's proposal seems to be trying to recapture a past that never existed. The university professor was never "just a job" like any other, whether in the medieval period, or in early America, or even today. Until recently, there was, as I suggested earlier, something of the quality of the sacred in the university professor, the person of true knowledge, and this quality was as powerful in the general public's imagination as anywhere else. The university professor began by studying actually sacred things, the sacred texts of Christianity, theology being regarded as the queen of the disciplines for this reason, among others. Though in due course secular subjects were added, all of them retained the aura of the sacred, derived from this original. From the view that knowledge of the sacred is sacred, came the subsequent view that genuine knowledge, all true knowledge, is sacred.

Without that sense of sacrality, that vital mystique in the popular consciousness, the secure place, the prestige, and the many attendant privileges that the university professor acquired and enjoyed over the centuries would never have come to pass. The uneducated, no less than the well-educated, once believed in the sacrality of learning: To be graduated with a university degree, and to be a person of learning, meant to have participated, if only for a time, in that greater world.

237 *See id.*
238 *See id.*
239 *Id.*

This is the very reason that college graduations persist today in being the occasions of such pomp and familial pride.

But there is no reason that truth and knowledge must enjoy the benefit of this cultural aura in perpetuity, and no consequent reason that professors must inevitably enjoy the great prestige and immense privileges historically accorded to them simply in virtue of their university association. Why, after all, should people who know about Cervantes or Hegel or Frederick II or mathematical category theory or anything else that is basically useless for keeping humanity alive receive the honors and the status that they have historically? Is it not exceedingly odd that even among those who know little or nothing of philosophy and history, the philosopher and the historian have enjoyed such prestige and respect?

Once the university has lost this aura, it will be lost; once the academic dogma is gone, it will be gone. No belated, strategic, rearguard retreat behind university walls to refortify the guild, with an apologetic cry that "it's just a job," will save it. It is a feature of guilds that they work to produce and protect a certain kind of product or craft that may be judged by internal metrics. In the traditional university, that product was scholarship in almost entirely Western ideas. In the free speech university, what is the guild's product or its craft? A guild that makes its living on the hermeneutic of suspicion and diagnoses of bad-faith power politics is going to be hard to sell to the public, and it is a further irony that such a guild may have difficulty seeing its own precarious position. As Professor Roberto Unger once put it, it is "like a priesthood that ha[s] lost their faith and kept their jobs."[240] Perhaps, as Unger hoped, the guild will become the high priesthood of destabilization, of political critique. But this future for academia also seems implausible. In the first place, social media and other technology handles disruptive politics perfectly competently on its own. And in the second, who in their right mind would want to pay for an aristocracy of this kind?

As for Blocher's intriguing proposal, one might ask why professors should expect the public to listen to them under present conditions, or, as he rightly points out, why they should hope to gain the public trust by speaking out more. It was one thing for the public to accept university professors' quasi-feudal privileges, tenure, and academic freedom when they spoke and wrote narrowly, as physicists or linguists or historians. All of these trappings of medieval mystique could be tolerated because the public was persuaded, not that academic freedom sprung from the First Amendment, which in any event it did not, but

240 Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 675 (1983). Thanks to Professor Jeffrey Pojanowski for the reminder about Unger.

that physics and linguistics and history had innate value, beauty, and even sacrality. But it is quite another to expect the public to accept the privileges of medieval hierarchy when academic freedom is applied wholesale to every utterance that comes out of a professor's (or a student's, or an administrator's) mouth on any conceivable subject. And it is yet a further thing again if the public believes—rightly or wrongly—that the core of academic speech, and not only the extramural periphery, has been compromised. The medieval professoriate guarded against extra-academic pronouncements in part because it may have recognized that nothing can so quickly weaken rightful authority as the effort to extend it indiscriminately into non-rightful spheres.[241] If the public believes that the professoriate has extravagantly overextended its authority not only in extramural contexts, but also within university walls—in the essential subjects of academic inquiry—why should it pay any attention?

More broadly, whatever service to democracy, politics, or civil society the traditional university once provided, it was at best oblique. The traditional university served the political order—predominantly the non-democratic political order—by exposing young minds to the scholarly enterprise through the learning of the traditional curriculum. But until the coming of the free speech university, it never did so directly. Nothing was said until the arrival of the free speech university about individual expression or personal self-actualization; or unconstrained debate; or market models, efficiencies, and impacts; or the "needs of our students" if those needs were not otherwise aligned with the academic dogma. If the universities have forgotten themselves, it seems improbable to me that they are now in a position to gain the public's confidence by encouraging their professors to exercise their free speech even more.

CONCLUSION

It would not be grossly unfair to read this Essay as a piece of fatalism or a gloomy lament for inexorable decline. And I will admit to feeling a little downhearted sometimes about the prospects for the academic dogma of the traditional university. But it seems unbalanced, and perhaps also historically imperceptive, to conclude on a note of unmitigated pessimism. So, I will indulge here, at the end, in a little hopefulness. It may be that knowledge, truth, and the transmission of both will endure in some altered way or medium. Just as they did before the advent of the university, and as they have even at times during the university's long reign.

241 *See supra* Section I.A.

In the first place, there may be renegade universities or academic departments that persist in being, or newly aspire to be, traditional in consciously countercultural fashion. Some may even do this actuated by religious commitments that were in the early twentieth century decried by the likes of the AAUP as "propaganda,"[242] but that turn out on reflection to be a necessary assumption for continued adherence to the academic dogma.[243] Second, the traditional university as it has existed for just a few centuries shy of a millennium is only one of a possible number of ways of meeting the perennial social problem of keeping the springs of truth and knowledge alive and flowing. If the free speech university is the only one to endure, truth and knowledge will find another way.

242 *See supra* Section II.A.

243 I know of no better defense of the university on these terms than ST. JOHN HENRY CARDINAL NEWMAN, THE IDEA OF A UNIVERSITY (Martin J. Svaglic ed., Univ. of Notre Dame Press 1982) (1852).