
LISTENING ON CAMPUS: ACADEMIC FREEDOM AND ITS AUDIENCES

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INTRODUCTION

Current debates about campus speech often conflate two related but importantly distinct values: free speech and academic freedom. Both are widely perceived to be in crisis,¹ but they are not interchangeable, and slippage between the two makes it even harder to frame, let alone address, difficult questions about speech in university settings. Many of the most fundamental challenges—indeed, much of what makes campus speech

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1. Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. 218, 218 (2019) (“The claim that America’s campuses are in the midst of a free speech crisis has been made so often and so emphatically that it has widely become accepted as fact.”). *See generally* Thomas M. Keck, Academic Freedom and Democratic Backsliding in the Contemporary United States (Mar. 18, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4914871 [<https://perma.cc/L2VJ-9Z83>] (describing rise in threats to academic freedom, especially since 2020).

unique in the first place—arise from the need to accommodate both values. In doing so, defenders of academic freedom must, as advocates of free speech have, more clearly articulate an account of listener interests. The basic project of this Article is to frame that challenge and take a few initial steps toward answering it.

The most prominent (and successful, at least if success is measured by legislative and popular action) critics of the campus speech climate are invoking a free speech paradigm. Their central complaint is that faculty, administrators, and students are selectively silencing speakers and ideas. The paradigmatic victims are often isolated conservative voices,² faculty and speakers attacked for things they write or say,³ and students who find themselves inhibited from speaking their minds on campus.⁴

These critics have pushed for a range of purported remedies, including cutting funding for diversity, equity, and inclusion (“DEI”) programs; requiring intellectual diversity statements; weakening the protections of tenure and collective bargaining; forbidding the teaching of certain supposedly divisive concepts involving race, gender, and sexuality;⁵ and ousting university leaders.⁶ Though framed as protections of free speech

2. Keck, *supra* note 1 (manuscript at 9) (“The archetypical beneficiary of free speech in these statements is the lonely conservative dissenter from left-liberal campus orthodoxy.”).

3. See, e.g., Deirdre Bardolf, *Disturbing Audio Captures Anti-Racism Instructor Attacking Principal’s “White Supremacy” Before He Killed Himself*, N.Y. POST (Aug. 5, 2023, 3:15 PM), <https://nypost.com/2023/08/05/dei-teacher-mocked-principal-richard-bilkszto-who-later-killed-himself-audio/> [<https://web.archive.org/web/20230806093617/https://nypost.com/2023/08/05/dei-teacher-mocked-principal-richard-bilkszto-who-later-killed-himself-audio/>]; Stuart Kyle Duncan, *My Struggle Session at Stanford Law School*, WALL ST. J. (Mar. 17, 2023, 2:59 PM), <https://www.wsj.com/articles/struggle-session-at-stanford-law-school-federalist-society-kyle-duncan-circuit-court-judge-steinbach-4f8da19e> [<https://web.archive.org/web/20250119074715/https://www.wsj.com/articles/struggle-session-at-stanford-law-school-federalist-society-kyle-duncan-circuit-court-judge-steinbach-4f8da19e>]; Jon Sanders, *On Prof. Mike Adams’ Suicide, One Year Later*, CAROLINA J. (July 23, 2021), <https://www.carolinajournal.com/opinion/on-prof-mike-adams-suicide-one-year-later> [<https://perma.cc/DQM3-DRDV>].

4. FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, 2025 COLLEGE FREE SPEECH RANKINGS 23 (2024), <https://www.thefire.org/sites/default/files/2024/09/2025%20College%20Free%20Speech%20Rankings%20Report%20FINAL.pdf> [<https://perma.cc/SPD7-8G8R>] (“Overall, students reported low levels of comfort expressing their views on controversial political topics across five different contexts on campus.”); *id.* at 25–27 (reporting higher levels of self-censorship among conservative students).

5. A recent joint report of the American Association of University Professors (“AAUP”) and American Federation of Teachers (“AFT”) identify these as the four primary themes in recent legislative actions. AAUP & AFT, *THE RIGHT-WING ATTACKS ON HIGHER EDUCATION: AN ANALYSIS OF THE STATE LEGISLATIVE LANDSCAPE* 1, <https://www.aaup.org/sites/default/files/Higher-Ed-Legislative-Landscape.pdf> [<https://perma.cc/F2HP-S772>].

6. See *A Look at College Presidents Who Have Resigned Under Pressure Over Their Handling of Gaza Protests*, AP (Aug. 15, 2024, 2:02 PM), <https://apnews.com/article/college-president-resign-shafik-magill-gay-59fe4e1ea31c92f6f180a33a02b336e3> [<https://web.archive.org/web/20250112115803/https://apnews.com/article/college-president-resign-shafik-magill-gay-59fe4e1ea31c92f6f180a33a02b336e3>].

principles such as viewpoint neutrality, many of these efforts have the effect (and perhaps purpose) of restricting those very principles. In that sense, they invoke free speech but are not actually rooted in the free speech tradition.⁷ Sometimes the motivation seems to be nakedly punitive or political—a thumb in the eye of a liberal professoriate—or to make martyrs of provocateurs who have no business speaking in an academic setting to begin with.

But these critiques and purported reforms can also be understood in more principled terms as protecting listeners—most prominently the students and others who have an interest in hearing a range of ideas and speakers. Getting a handle on the campus speech debate therefore requires a clear account of listener interests, as this symposium invites. Doing so is especially important because many of the interventions flowing from the listener-based free speech critique are in tension with, and sometimes flagrantly undermine, the other essential element of campus speech: academic freedom. That freedom has many dimensions, each with its own value proposition: “freedom of research and publication, freedom in the classroom, freedom of intramural speech, and freedom of extramural speech.”⁸ For simplicity’s sake, I will call the expression associated with these freedoms “scholarly speech.”⁹

Such speech is governed not by the rules and principles governing public discourse (the free speech paradigm) but by the rules and principles of academic disciplinaryity. In the words of the AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure, which codified the principles and practices of academic freedom: “Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.”¹⁰ The search for and exposition of truth in scholarly settings are subject to the academic judgment of peers, not the broadly permissive principles that prevail in the marketplace of ideas.

7. Thanks to Ash Bhagwat for pressing me on this point.

8. MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 7 (2009).

9. Academic freedom often but not always directly involves expressive acts like publishing or teaching. But academic freedom is also a matter of universities’ institutional autonomy, which can be threatened by decisions that do not directly involve speech acts, such as hiring and firing faculty, establishing or de-establishing university centers, and so on. A listener-focused approach to academic freedom can help conceptualize the potential harms in those situations, which is the downstream impacts they have on scholarly speech—the production of knowledge and its dissemination to various audiences.

10. AAUP, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS 14 [hereinafter 1940 STATEMENT], <https://www.aaup.org/file/1940%20Statement.pdf> [<https://perma.cc/M567-NJNZ>] .

This does not mean that free speech and disagreement have no place on college campuses; to the contrary, they remain essential.¹¹ But in order to provide the essential benefits that are the core of their mission—the production and dissemination of knowledge¹²—universities must be tightly governed by *themselves*, not by donors and legislatures, and the relevant standards of research, publication, and teaching must be disciplinary, not political.

In short, the current debate has turned campus speech against itself, in part by leveraging listeners' free speech interests to undermine academic freedom. The free speech critique has a clear account of value and harm (one largely rooted in listener interests) and has the additional benefit of constitutional moorings that are more secure than those of academic freedom.¹³ By invoking the importance of students' exposure to a broad marketplace of ideas—a distinctly free speech-based frame—would-be reformers have justified a broad range of interference with universities' self-governance. The tension between those principles has asymmetrically favored free speech both rhetorically and conceptually. Defenders of academic freedom must respond with an account of its value¹⁴—as something that not only protects scholars-as-speakers but ultimately and more importantly serves “the common good,”¹⁵ which can only happen if scholarly speech reaches the right audiences.

The goal of this Article is to suggest that academic freedom and the scholarly speech that it protects would benefit, as its critics have, by better articulating a listener-based account. Centering threats to scholarly speakers

11. See, e.g., John Inazu, *The Purpose (and Limits) of the University*, 2018 UTAH L. REV. 943, 947 (arguing that “a central purpose, if not *the* central purpose, of the university is to be a place of facilitating disagreement across differences”).

12. There are other defensible ways to understand the mission of a university, and they might point in different directions with regard to the balance between free speech and academic freedom. But I suspect that all would recognize in one way or another that the rules of public discourse cannot be fully imported to a university setting.

13. HENRY REICHMAN, UNDERSTANDING ACADEMIC FREEDOM 153 (2021) (arguing that academic freedom is more grounded in “common law tradition and contractual protections” than in the First Amendment). This is not to say, of course, that the constitutional case is entirely lacking. See generally DAVID M. RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT (2024) (arguing for academic freedom as a distinctive subset of First Amendment law).

14. Louis Menand, *Academic Freedom Under Fire*, NEW YORKER (Apr. 29, 2024), <https://www.newyorker.com/magazine/2024/05/06/academic-freedom-under-fire> [<https://perma.cc/SEF5-ZCS6>] (“Academic freedom is an understanding, not a law. It can’t just be invoked. It has to be asserted and defended. That’s why it’s so disheartening that leaders of great universities appear reluctant to speak up for the rights of independent inquiry and free expression for which Americans have fought.”). The fact that academic freedom lacks the same legal foundation of free speech makes it, if anything, all the more important that it be defended. See also Jeannie Suk Gersen, *Academic Freedom and Discrimination in a Polarizing Time*, 59 HOUS. L. REV. 781, 781 (2022) (“[W]e desperately need explicit discussions about academic freedom.”).

15. 1940 STATEMENT, *supra* note 10 at 14.

is consistent with standard doctrinal approaches to freedom of speech, and descriptions of individual professors and students facing repercussions for their speech may be rhetorically effective, just as stories of “cancelled” speakers have supported the free speech critique.¹⁶ But following First Amendment scholarship’s increasing exploration of listener interests in theory¹⁷ and in doctrine,¹⁸ accounts of academic freedom can and must focus on the audiences of scholarly speech.

Part I illustrates how critics of the current campus speech climate are pitting the free speech and academic freedom paradigms against one another, in large part by leveraging listener interests—for example, by attempting to justify interference with university governance as necessary to protect the interests of students-as-listeners. This listener-based critique can and should be answered with a listener-based defense of academic freedom. Doing so is not only important as a matter of rhetorical strategy, but necessary for a full and accurate description of academic freedom’s value. Indeed, the very justification for academic freedom is less concerned with the interests of scholars-as-speakers than it is with their role in producing and spreading knowledge—an inevitably collective activity, and one whose contribution to the common good is broadly predicated on the presence and engagement of various listeners.

Part II explores the distinct interests of three such audiences: students, scholars, and the general public.¹⁹ Each raises important issues and challenges. Emphasizing the rights of students-as-listeners may help ground

16. GREG LUKIANOFF & RIKKI SCHLOTT, *THE CANCELING OF THE AMERICAN MIND: CANCEL CULTURE UNDERMINES TRUST AND THREATENS US ALL—BUT THERE IS A SOLUTION* 10 (2023).

17. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 528 (1979) (“Although ‘freedom of expression’ seems to refer to a right of participants not to be prevented from expressing themselves, theoretical defenses of freedom of expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders.”).

18. See, e.g., Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1663 (2021) (“Contemporary courts increasingly favor speakers over listeners when speakers’ preferences collide with listeners’ First Amendment interests in settings both inside and outside of public discourse . . .”); Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 411 (2019) (“Under current Supreme Court doctrine, the speaker is far and away the most powerful resident in Mr. Madison’s First Amendment neighborhood.”).

That is not to say, however, that listener interests have gone entirely unrecognized in the Court’s First Amendment caselaw. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–66 (1980) (protecting commercial speech that furthers listeners’ First Amendment interests, while permitting the government to regulate false or misleading commercial speech because it frustrates those interests); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

19. KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* 15 (2018) (“The fruits of research are to be shared, with other scholars, with students, and with the general public.”).

their still-murky claims to academic freedom,²⁰ even as it both confirms and confounds standard accounts of listener interests in the free speech paradigm. On the one hand, the freedom of teaching (one prong of academic freedom) is undeniably rooted in students' interests as listeners. On the other hand, students-as-listeners—despite being an arguably captive audience, lacking power vis-à-vis their professors—do not have a broad right *not* to listen, as many First Amendment principles suggest. Moreover, their rights as listeners vary significantly depending on the setting: classrooms and other curricular settings, guest speakers and other extracurricular events, and their dorm rooms.

Faculty are the prototypical speakers in the academic freedom paradigm, but they are also important listeners; the communal nature of knowledge production through research and publication requires as much. Moreover, individual scholars must constantly re-evaluate their own positions in light of others' work—what I have called elsewhere (in the context of free speech) the “virtue of persuadability,”²¹ and what in the context of academic freedom essentially means holding oneself to disciplinary standards.

Finally, and perhaps most crucially, there are the listening interests of the general public. In the words of the AAUP, universities exercise a “public trust” which requires that they be immune to the “tyranny of public opinion,” allowing them to serve as “an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become part of the accepted intellectual food of the nation or of the world.”²² That trust will only hold so long as the listening public believes it is indeed receiving something of value. Against a backdrop of growing skepticism about the very notion of scholarly expertise and a troubling rise

20. Robert Post, *The Kalven Report, Institutional Neutrality, and Academic Freedom*, in *REVISITING THE KALVEN REPORT: THE UNIVERSITY'S ROLE IN SOCIAL AND POLITICAL ACTION* (Keith E. Whittington & John Tomasi, eds., forthcoming) (last revised Aug. 19, 2023) (manuscript at 1, 1 n.1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4516235 [<https://perma.cc/V5QS-L5Y3>] (“In the United States, the academic freedom of students is a concept that has not received much in the way of intellectual or institutional development.”). See also Robert Post, *Theorizing Student Expression: A Constitutional Account of Student Free Speech Rights*, 76 *STAN. L. REV.* 1643 (2024).

21. Joseph Blocher, “*The Road I Can't Help Travelling*”: *Holmes on Truth and Persuadability*, 51 *SETON HALL L. REV.* 105, 110 (2020).

22. AAUP, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 293, 297 [hereinafter 1915 DECLARATION], <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> [<https://perma.cc/C5E3-E23H>]; Menand, *supra* note 14 (“Professors don’t work for politicians, they don’t work for trustees, and they don’t work for themselves. They work for the public. Their job is to produce scholarship and instruction that add to society’s store of knowledge. . . . In exchange, society allows them to insulate themselves—and to some extent their students—against external interference in their affairs. It builds them a tower.”).

of public and private attacks on research and teaching, defenders of academic freedom must persuade the public that their work is indeed furthering the common good.

I. USING LISTENER INTERESTS TO PUT FREE SPEECH AHEAD OF ACADEMIC FREEDOM

At the heart of current controversies about expression in colleges and universities²³ are two related but importantly distinct forms of expression: free speech and academic freedom. Both have important roles to play in a university, and I will refer to them collectively as “campus speech.” But to understand or address the perceived crisis it is essential first to be clear about the overlap and distinction between them—and, crucially, the ways in which listener interests are being invoked to turn free speech against academic freedom.²⁴

Many of the most serious concerns about the campus speech climate are about free speech as such. As Keith Whittington puts it in *Speak Freely: Why Universities Must Defend Free Speech*, “[f]ree speech on college campuses is perhaps under as great a threat today as it has been in quite some time.”²⁵ The reasons for and manifestations of these apparent threats take various forms whose propriety in any particular situation might of course be debated: shouting down speakers, students and faculty posting on social media, requesting or demanding trigger warnings, withdrawing job offers for students or faculty based on their speech, and more. The underlying conception of freedom being threatened in this paradigm is roughly akin to the freedom of speech protected by the First Amendment in the public sphere: a broadly libertarian marketplace of ideas in which expression must be “uninhibited, robust, and wide-open.”²⁶

23. I hold aside the important but distinct concerns involving K-12 education, where principles of academic freedom and free speech have very different valence. Even there, though, the Supreme Court has accorded some protection to students’ freedom to speak and listen. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that neither teachers nor students “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870–71 (1982) (striking down “narrowly partisan or political” curation of libraries).

24. Gersen, *supra* note 14, at 781 (“[T]hose who purport to champion academic freedom frequently end up attempting to restrict it.”); Keck, *supra* note 1 (manuscript at 14) (“One notable feature of these recent legislative threats to academic freedom is that their authors and advocates regularly defend them as efforts to protect free speech.”). Keck notes that FIRE, one of the most prominent organizations in the campus speech battles, in 2022 changed its name from the Foundation for Individual Rights in Education to the Foundation for Individual Rights and Expression. *Id.* (manuscript at 11 n.19). Its director’s most recent co-authored book is focused on “higher education because that’s where Cancel Culture originated and runs most rampant.” LUKIANOFF & SCHLOTT, *supra* note 16, at 10.

25. WHITTINGTON, *supra* note 19, at 4.

26. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The free speech paradigm and the familiar slate of First Amendment rules and principles accompanying it has an important role to play in many areas of university life. Most obviously and explicitly, many campuses have established various “free speech zones” in which students, faculty, and perhaps others can express themselves subject only to relatively narrow limitations for harassment, true threats, and the like. That same broad freedom might extend, whether declared or not, to other areas of a university campus such as open quads, streets, and other arguable analogues of public fora. Indeed, many universities claim to have broad or even absolute commitments to speech and are regularly evaluated or even ranked based on that basis.²⁷

The free speech paradigm also plays an important role in the scholarly enterprise that is at the heart of the university. In Whittington’s words, “[f]or universities, . . . free speech is valuable precisely because of its utility in generating, testing, and communicating ideas.”²⁸ This epistemological utility is only one of the values that free speech might serve in other contexts, like democratic participation or individual autonomy. Universities are not necessarily set up in opposition to values of democratic participation and individual autonomy, and indeed might well further them,²⁹ but their central mission is to generate and disseminate knowledge—to be “a space where ideas are held up to critical scrutiny and our best understanding of the truth is identified and professed.”³⁰ As the Supreme Court put it in *Sweezy v. New Hampshire*—a case often cited in the literatures involving both listener interests and campus speech—we “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”³¹ *Keyishian v. Board of Regents*, which likewise has a prominent place in both literatures, similarly declared that “[t]he 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.’ ”³²

27. See FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, *supra* note 4.

28. WHITTINGTON, *supra* note 19, at 30.

29. See ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 32, 35 (2012).

30. WHITTINGTON, *supra* note 19, at 7.

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

32. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Perhaps even more extreme, in *Healy v. James* the Court suggested that the full panoply of free speech principles apply on college campuses: “[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.” *Healy v. James*, 408 U.S. 169, 180–81 (1972).

But the university, let alone the classroom, is a “marketplace of ideas” in a very particularized sense. Surely, scholars must be free to attack shibboleths and to push the boundaries of knowledge beyond received academic orthodoxy. Moreover, the commitments to communication, reasoning, and persuasion in the classroom might make it an especially valuable site of the marketplace’s supposed truth-seeking capability, which has been subject to withering criticism elsewhere.³³ And yet even the most ardent champions of the free speech model would accept that scholarly discourse, including in the classroom, not only permits but requires speech regulations that would not be acceptable in the traditional public marketplace of ideas.³⁴ It would violate the First Amendment if a state were to fine its citizens \$50 for espousing flat earth beliefs in public discourse. It would not violate the First Amendment if a state university’s geology department were to deny tenure to a faculty member espousing such beliefs in her scholarship. In innumerable ways, communication in university settings is appropriately subject to restrictions that would be unthinkable under standard free speech principles.

Some of these limitations can be reconciled with the free speech paradigm on the grounds that they represent applications of well-worn First Amendment principles like time, place, and manner restrictions, but the underlying tension is fundamental. Time, place, and manner restrictions must be content-neutral,³⁵ but what is a curriculum except a restriction on the content of faculty and student speech? The prohibition on viewpoint discrimination is nearly ironclad in public discourse,³⁶ but not in scholarly settings.³⁷ How else to describe the situation of the geology professor, who after all is simply advocating a scholarly viewpoint? Or consider the fact that in public discourse, speaker equality is a fundamental principle.³⁸ In a

33. Many thanks to Greg Magarian for pressing this point.

34. See, e.g., POST, *supra* note 29, at 9 (“The continuous discipline of peer judgment, which virtually defines expert knowledge, is quite incompatible with deep and fundamental First Amendment doctrines . . .”).

35. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

36. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 695 (2011).

37. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 226, 240–41 (2021) (“Universities discriminate, pervasively, based on the content and viewpoint of the speech to which students are exposed, consistent with the pedagogical judgments of faculty and administrators. . . . They do so in part to ensure that the information conveyed to students is of high quality.”).

To be clear, the viewpoint discrimination that is acceptable in scholarly settings must be tied to disciplinary standards and not, for example, political beliefs. CASS R. SUNSTEIN, CAMPUS FREE SPEECH: A POCKET GUIDE 24 (2024) (“[T]he ban on viewpoint discrimination is *often* firm on campus—and essential.”).

38. POST, *supra* note 29, at 23 (“Whereas within public discourse the political imperatives of

scholarly setting, ideas and speakers should not be disregarded simply because they are politically unpopular, but it does not follow that all must be accorded equal respect.³⁹ Those that do not measure up to the relevant scholarly standards not only can but should be excluded, even if they must be accepted in public discourse.

The rules governing scholarly speech are fundamentally different than those governing free speech because they have different and sometimes conflicting accounts of value. Academic freedom is protected because of its role in generating and spreading *knowledge*, not speech as such.⁴⁰ That requires a different set of rules and principles than those that apply to public discourse, including that scholarly speech be governed by the relevant standards of scholarly disciplinarity. This is why universities' academic freedom policies often appear alongside their tenure policies; the two are deeply intertwined. In the realm of academic discourse, the right to "speak freely" looks very different than it does in public discourse, and it is not true that all "dissenting voices must be tolerated rather than silenced"⁴¹ in all campus settings. The central challenge is determining whether and how universities can regulate speech in service of their educational mission.⁴²

Many of the current battles over campus speech are playing out atop this tension, which has at least two potentially pernicious results. The first is evaluating matters of academic freedom—freedom of research and publication or freedom in the classroom, for example—according to the principles of public discourse. The second is prescribing remedies that not only ignore but might in fact undermine the institutional independence

democracy require that persons be regarded as equal and as autonomous, outside public discourse the law commonly regards persons as dependent, vulnerable, and hence unequal." (footnotes omitted)).

39. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1215 (2016) ("Outside of the realm of public discourse, the law drops its assumption that everyone is equally able, independent, and knowledgeable, and that everyone can equally fend for themselves." (footnote omitted)).

40. For more on the distinction, see Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019).

41. WHITTINGTON, *supra* note 19, at 7. To be clear, Whittington recognizes that "[t]here is a tension between the freewheeling spirit of debate that Mill and others advocated and the careful accumulation of knowledge that modern universities try to foster." *Id.* at 49.

42. In his recent book defending a broad view of speech on campus, Cass Sunstein says that universities can regulate speech when doing so "*is genuinely essential to their educational mission*," acknowledging that the phrase "is regrettably vague, might be criticized as too narrow or too broad, requires specification, and leaves a great deal open for discussion and debate." SUNSTEIN, *supra* note 37, at 17–18 (footnote omitted).

I do not have a better readymade standard, though it seems to me that this—acknowledging the tensions between free speech and educational mission—is *the* central challenge in campus speech debates. In her wonderful remarks at this symposium, Rebecca Brown suggested that one important framing question is which value provides the baseline: Is free speech only regulable when essential to the educational mission? Or should it only be embraced to the degree that it is?

necessary for academic freedom. When a state legislature declares that professors are failing to treat their classrooms like the marketplace of ideas, it risks committing the first error. When that legislature then shuts down (or for that matter creates) academic centers with the goal of achieving ideological balance,⁴³ it risks committing the second.

There are many facets to the tension between free speech and academic freedom—indeed, it might be taken as an overall description of the campus speech crisis⁴⁴—but for present purposes and in keeping with the theme of this symposium it will suffice to focus on one: the interesting, important, and generally under-appreciated role of listener interests. Broadly speaking, advocates of the free speech paradigm have consistently and effectively invoked listener interests to suggest that students are being deprived of important ideas and that they are being forced to listen to objectionable ones. The latter line has become particularly prominent in the wake of the October 7, 2023 attacks in Israel, and has led to allegations of inconsistency and even hypocrisy on all sides. Whatever one thinks about those complaints, the point is that both are rooted in audience impact. Defenders of the academic freedom paradigm, by contrast, have done little to articulate the listener interests at stake for scholarly speech. The result is that listener interests are being used to turn free speech against academic freedom.

This is perhaps most evident in the strenuous critiques, mostly but not exclusively from the political right, alleging that universities are systematically underprotecting freedom of speech. Some critics have focused on the harms to speakers,⁴⁵ occasionally making martyrs out of provocateurs and others whose potential contributions to knowledge-producing discourse are marginal at best.⁴⁶ That strategy has undoubtedly been effective, but it has also had the distorting effect of elevating the profiles of professional attention-getters rather than those with a genuine dedication and ability to contribute meaningful ideas—including unpopular

43. See, e.g., Ryan Quinn, *UNC 'Civic Life' Center Progressing, Over Faculty Objections*, INSIDE HIGHER ED (May 31, 2023), <https://www.insidehighered.com/news/faculty-issues/shared-governance/2023/05/31/unc-civic-life-center-progressing-over-faculty> [<https://perma.cc/8NUY-Y6HS>] (describing the 2023 creation of the School of Civic Life and Leadership at UNC, which according to its board chair is “an effort to try to remedy” an alleged lack of “right-of-center views” on campus).

44. My focus here is on the concepts and values at stake; I do not mean to minimize the enormously important issues of social, political, and economic power. For one account, see ISAAC KAMOLA, AM. ASS'N UNIV. PROFESSORS, *MANUFACTURING BACKLASH: RIGHT-WING THINK TANKS AND LEGISLATIVE ATTACKS ON HIGHER EDUCATION, 2021–2023* (May 2024), https://www.aaup.org/file/Manufacturing_Backlash_final_1.pdf [<https://perma.cc/K8LQ-79G2>].

45. See *supra* notes 3–6 and sources cited therein.

46. Franks, *supra* note 1, at 238 (“Milo Yiannopoulos, Ann Coulter, and their ilk are not experts, or professors, or intellectuals. They are Internet celebrities. Their appearance on college campuses is objectionable because they are simply not qualified to be there, and universities should not squander precious attention and resources on clowns and provocateurs.”).

or disfavored ideas—to campus discourse.

Alongside this speaker-focused critique, however, there is a deeper and more serious element that focuses on the interests of potential listeners, including students who are denied access to important voices and ideas (primarily conservative ones). That critique takes multiple forms as well. One emphasizes the danger that conservative students will be alienated and harmed in campus settings where they cannot hear voices like their own or that students who are not exposed to such ideas will be indoctrinated with liberal orthodoxy.⁴⁷ Some conclude that the appropriate solution is to impose more control from the outside. Often the diagnosis and prescription are explicitly political, as with the “Freedom from Indoctrination Act,” whose supporters say would—by “[r]eclaiming [a]cademic [f]reedom”—give students “the freedom to take coursework without a distinctive left-wing ideological valence.”⁴⁸

As a matter of education and pedagogy, the most fundamental risk is that listeners in an academic setting will be harmed if not given sufficient opportunity to hear and consider ideas different than their own.⁴⁹ As John Stuart Mill put it in *On Liberty*: “Both teachers and learners go to sleep at their post as soon as there is no enemy in the field.”⁵⁰ If a university community presents only one side, its thinking process is thereby distorted, just as “the thinking process of the community” can be distorted by restrictions on speech (to borrow a phrase from Alexander Meiklejohn).⁵¹

One might object to the predicate assumptions—perhaps conservative voices are not being silenced; perhaps students have access to all the viewpoints they need—but at the very least these are arguments, rooted in

47. See generally DAVID HOROWITZ, INDOCTRINATION U.: THE LEFT’S WAR AGAINST ACADEMIC FREEDOM (2007) (arguing that American universities have been hijacked by leftist radical pushing an ideological curriculum).

48. Matt Beienburg, *Rescue College Classrooms with the Freedom from Indoctrination Act*, AM. ENTER. INST. (Sept. 13, 2023), <https://www.aei.org/research-products/report/rescue-college-classrooms-with-the-freedom-from-indoctrination-act> [https://web.archive.org/web/20240316234150/https://www.aei.org/research-products/report/rescue-college-classrooms-with-the-freedom-from-indoctrination-act].

49. Students for Academic Freedom, a group sponsored by David Horowitz, adopted as its motto “You can’t get a good education if they’re only telling you half the story.” STUDENTS FOR ACADEMIC FREEDOM, <https://studentsforacademicfreedom.org> [https://perma.cc/JEB9-X4SC].

50. JOHN STUART MILL, ON LIBERTY 105 (Gertrude Himmelfarb ed., Penguin Classics 1987) (1859).

51. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960) (emphasis omitted). As then-professor Elena Kagan wrote (quoting Meiklejohn) in the course of describing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992): “The ordinance . . . restricted speech in a way that skewed public debate on an issue by limiting the expressive opportunities of one side only. . . . [T]he ordinance ensured that listeners would confront a distorted debate, thus interfering with ‘the thinking process of the community.’” Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 418 (1996) (quoting MEIKLEJOHN, *supra* note 51, at 27 (emphasis omitted)).

listener interests, that must be taken seriously. They have been used to “undermine[] the legitimacy” of universities⁵² and sometimes to directly threaten the institutional autonomy that is essential to academic freedom, for example by imposing restrictions on subject matter,⁵³ interfering with hiring decisions,⁵⁴ and weakening tenure.⁵⁵ The most prominent threats appear to be coming from the political right, but left-associated programs like DEI can present threats as well. As Khiara Bridges notes, “If institutions take it as their duty to ensure student comfort—and if antidiscrimination laws are wielded in a way to enforce that duty—then academic freedom surely will suffer.”⁵⁶

Defenders of the academy have rightly called out these ongoing attacks. But ringing the alarm bells is only part of the task. Proponents of academic freedom must be able to do at least two things: hold it out as something distinct from free speech, and provide a theory of value. These are not new tasks. Roughly coincident with the awakening of free speech in constitutional doctrine, academic freedom found its first and most important articulation of identity and value in the foundational texts and practices of

52. Franks, *supra* note 1, at 220 (“[T]he false narrative of the college free speech crisis is how it undermines the legitimacy of the university as a free speech institution.”).

53. See Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (Jan. 30, 2025), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [https://perma.cc/8RJS-Z24H].

54. See Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html> [https://web.archive.org/web/20250102032640/https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html].

55. This threat is especially acute for the more than two-thirds of faculty having contingent (i.e., not tenure/tenure-track) appointments—figures that are especially high for women and members of under-represented minority groups. GLENN COLBY, AM. ASS’N UNIV. PROFESSORS, DATA SNAPSHOT: TENURE AND CONTINGENCY IN US HIGHER EDUCATION 2 (Mar. 2023), <https://www.aaup.org/sites/default/files/AAUP%20Data%20Snapshot.pdf> [https://perma.cc/HUN9-QBCY]. See also Johann N. Neem, *The Subtle Erosion of Academic Freedom*, INSIDE HIGHER ED. (Apr. 15, 2019), <https://www.insidehighered.com/views/2019/04/16/three-subtle-forces-weakening-academic-freedom-opinion> [https://perma.cc/GJP6-AVXS] (“The most obvious and well-known threat to academic freedom is the decline of tenure and shared governance at many established institutions.”).

Legislative initiatives are already underway to weaken tenure. See, e.g., S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023) (“[H]iring authority is not bound by the recommendations or opinions of faculty or other individuals.”); AM. ASS’N UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE: UNIVERSITY SYSTEM OF GEORGIA 12 (Dec. 2021), https://www.aaup.org/file/Bulletin2022Final-2-USG_0.pdf [https://perma.cc/V7TT-HFQE] (describing University of Georgia Board of Regents policies that “effectively abolished tenure in Georgia’s public colleges and universities” (footnote omitted)).

56. Khiara M. Bridges, *Evaluating Pressures on Academic Freedom*, 59 HOUS. L. REV. 803, 807 (2022).

American academic freedom: the 1915 Declaration of Principles on Academic Freedom and Academic Tenure⁵⁷ and the 1940 Statement of Principles on Academic Freedom and Tenure.⁵⁸

At the time of the 1915 Declaration, the “philosophical birth cry” of academic freedom in the United States,⁵⁹ the major threats to faculty independence were triggered by professors’ speech, not by speech they were supposedly stifling. Today, the threat is often presented as being to free speech itself—a concept that was, as a constitutional matter, still in its infancy at the time of the AAUP’s original efforts.⁶⁰ Responding to that threat today, it seems especially worthwhile to attach the value of academic freedom to its manifestation in scholarly speech.⁶¹ In doing so, defenders of academic freedom would be well served to embrace the challenge posed by this symposium and articulate a value of listener interests akin to what defenders of free speech have done.

Indeed, there are good reasons to think that for universities—and thus for academic freedom—listener interests have always been central, even if (as with the freedom of speech) the freedoms themselves are articulated in terms of speaker rights. The very *raison d’être* for academic freedom, after all, is the production and dissemination of knowledge, which presupposes

57. FINKIN & POST, *supra* note 8, at 30 (calling the 1915 Declaration “[t]he first systematic articulation of the logic and structure of academic freedom in America, and arguably the greatest”).

58. *Id.* at 48 (“The 1940 Statement has since become the standard of academic freedom in the United States.” (italics removed)).

59. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 326 (1990) (quoting Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, in COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: A REPORT AND RECOMMENDATIONS 93, 148 (1973)).

60. David M. Rabban, *The State of Free Speech Doctrine in 1917*, 50 ARIZ. ST. L.J. 911, 911 (2018) (noting that courts were still overwhelmingly rejecting First Amendment claims in 1917).

61. I hold aside here the interesting and important question of whether and to what degree professors at public universities should be subject to the rule of *Garcetti v. Ceballos*, which holds that a public employee’s speech made pursuant to “official duties” does not receive First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410, 425–26 (2006). See Aaron Worthen, Note, *Think of the Children: How the Role of Students in the Classroom Informs Future Applications of Garcetti v. Ceballos in Academic Contexts*, 2014 BYU L. REV. 983, 1005–06 (2014) (concluding that scholarship, but not teaching, should be exempt from *Garcetti*); Michael A. Sloman, Note, *“A Kind of Continuing Dialogue”: Reexamining the Audience’s Role in Exempting Academic Freedom From Garcetti’s Employee Speech Doctrine*, 55 GA. L. REV. 935, 957 (2020) (concluding that both scholarship and teaching should be exempt from *Garcetti*).

This is undoubtedly an important issue, given that in the litigation over Florida’s Stop WOKE Act Florida’s lawyers argued that “the State has unfettered authority to limit what [public university] professors may say in class.” *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1233 (N.D. Fla. 2022). Striking down the law, the district court judge called it “positively dystopian,” and said that “[i]t should go without saying that ‘[i]f liberty means anything at all it means the right to tell people what they do not want to hear.’” *Id.* at 1230 (quoting George Orwell, *The Freedom of the Press*, THE ORWELL FOUND., <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/the-freedom-of-the-press> [https://perma.cc/EH45-6CW5] (First published: The Times Literary Supplement 1972)).

recipients. As Justice Brennan put it in another context (in a passage often cited by those expounding listener interests), “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”⁶² It is not coincidental that some of the clearest legal language supporting the listener-focused approach comes from cases involving educational settings.⁶³

Broadly speaking, universities might be a particularly special kind of institution in terms of listener interests—one in which speaker and listener interests are generally aligned. RonNell Andersen Jones has identified and explored this dynamic in the “constitutionally symbiotic relationship between the institutional speakers of the press and their public audiences,” which she calls the “most notable” example.⁶⁴ But much of what she says about the press is true of universities as well. Like the press, universities are “a specially protected institutional speaker with both a uniquely powerful speech relationship with listeners and a uniquely heightened threat of being targeted by government regulators.”⁶⁵ And like the press, universities are not mere conduits for speech, but rather play an active role along with their listeners in shaping that speech.⁶⁶

Of course, universities are not singular entities but institutions comprising a complex web of speakers and listeners, each with different interests, as the following Part explores in more detail.

II. THE AUDIENCES OF SCHOLARLY SPEECH

The discussion thus far has attempted to highlight connections between three concepts—free speech, academic freedom, and listener interests—that are themselves contested and hard to define. This Part attempts to make the analysis more concrete in at least two ways.

62. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

63. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (“This Court has recognized that [the right to receive information] is ‘nowhere more vital’ than in our schools and universities.” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (calling “the right to receive information and ideas” an “inherent corollary of the rights of free speech and press” (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969))); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (describing the classroom as a “marketplace of ideas” and stating that academic freedom is “of transcendent value to all of us and not merely to the teachers concerned”).

64. RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 499 (2019). Cf. *Red Lion Broad. Corp. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

65. Jones, *supra* note 64, at 515.

66. See *id.* at 500.

The first goal is to disaggregate some of the various audiences of the scholarly speech protected by academic freedom, including students, faculty, and the public.⁶⁷ Those audiences have different and sometimes-conflicting interests, which raises tensions for the concept of academic freedom and scholarly speech. The second goal is to try to identify particular—and difficult—campus speech issues and controversies that might be illuminated or better understood with attention to the listener interests involved. Recognizing listener interests will not and cannot provide simple solutions.⁶⁸ But it might help illustrate the challenge.

A. STUDENTS

Perhaps the most obvious and immediate audience for scholarly speech (which, again, I use as shorthand for the kind of speech that academic freedom enables) is students. And, as detailed above, their interests as listeners have been made central to the current debates over free speech on campus, so it makes sense to begin by considering how those interests as listeners relate to academic freedom.

1. Classrooms and Other Curricular Settings

Classrooms are a “peculiarly”⁶⁹ useful place to begin considering listener interests, though the lessons they provide in that regard are not straightforward. Indeed, it may be better to think of classrooms as peculiar not in the sense that they are *especially* a marketplace of ideas but—in keeping with the other meaning of peculiar—that they are an *odd* marketplace of ideas.

On the one hand, the interests of student-listeners provide a solid justification for instructors’ freedom of teaching, which has been a pillar of academic freedom for at least a century. When professors are prevented from teaching their best understanding of the subject matter in which they are expert, the most significant and concrete harm is likely to the students whose educations are hampered by denial of access to that information. This is fully consistent with the fact that it is typically professors, not students, who *assert* that freedom. After all, “speakers often have the job of asserting listeners’

67. Even this division is somewhat artificial, since of course the same person can at different times play all three roles—for example, “classrooms are a primary medium for the transmission of scholarly expertise to the public.” POST, *supra* note 29, at 88. Similar challenges of audience-identification arise for other listener-based accounts, though, and it still seems valuable to differentiate roles.

68. Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1798 (2017) (“Recognizing both speakers’ and listeners’ rights makes cases more complex and possibly creates divergent outcomes.” (footnote omitted)).

69. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’”).

rights” because they “are often best placed to challenge allegedly censorial governmental action.”⁷⁰

It does not follow, however, that freedom of teaching is bounded by students’ narrow and immediate preferences. Certainly faculty do not have unbridled freedom to teach students who do not wish to learn; the rights and duties of academic freedom do not work that way, and no one is obliged to attend university and be exposed to ideas they would prefer to avoid. But faculty must and do have control over the curriculum, even when that means teaching material that students—or for that matter legislatures or trustees—find boring, difficult, or otherwise objectionable.⁷¹ The relevant standards are those of academic disciplinary and good pedagogy, not what students or others prefer at any given moment. If those standards are satisfied, then students-as-listeners can be expected to give their attention, whether or not they reject the information or even find it despicable or threatening.⁷² Students who choose not to listen can legitimately face consequences (such as lower grades); students who disrupt the flow of information to other willing listeners can be disciplined.

This is the central reason why efforts to either forbid or require the teaching of certain subject matters is so troubling: Even as they invoke students’ interests in “free speech” or “academic freedom,” such efforts limit the institutional autonomy to make curricular choices, essentially turning academic freedom on its head and thus undermining students-as-listeners’ interests in being taught by experts.

That does not mean, of course, that individual faculty are free to teach whatever they like—that would be a different, but still inappropriate, use of a free speech paradigm. Attention to disciplinary standards is the core of academic freedom, and it imposes *limits* both on faculty as speakers and on students as listeners. As then-Judge Samuel Alito put it in a Third Circuit case rejecting a free speech claim brought by a professor who tried to teach

70. Kendrick, *supra* note 68, at 1778; *id.* (first citing LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 8–10 (2005); and then citing Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 222 n.80 (2004)) (“In asserting the First Amendment in their defense to a criminal, civil, or administrative action, speakers assert a form of third-party standing on behalf of listeners.”).

71. Sunstein suggests a possible exception for “the most egregious cases, in which viewpoint discrimination is unmistakable and cannot be defended by reference to, say, scientific consensus.” SUNSTEIN, *supra* note 37, at 68.

72. Cf. John K. Wilson, *The Tennessee Legislature’s Attack on Free Speech*, ACADEME BLOG (Feb. 12, 2017), <https://academeblog.org/2017/02/12/the-tennessee-legislatures-attack-on-free-speech> [https://perma.cc/8BQA-7GN7] (quoting a student from the University of Tennessee College Republicans, speaking at a press conference introducing Tennessee’s anti-campus protest bill: “Students are often intimidated by the academic elite in the classroom, Tennessee is a conservative state, we will not allow out of touch professors with no real world experience to intimidate eighteen-year-olds.”).

religious materials in contravention of curricular expectations, “a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”⁷³

The situation is therefore one in which the interests of students-as-listeners are paramount—the predicate for freedom of pedagogy—but universities (not outside bodies) must have control of the curriculum. This is in tension with some of the principles that emerge in standard accounts of listener interests within the free speech paradigm. After all, one “fundamental” value at issue in the free speech tradition is that “the state wrongs citizens by arrogating to itself the authority to decide what messages they ought to hear.”⁷⁴ But that is just what teachers do.

A variety of other listener-based principles also play out differently for students in classrooms than for people in public discourse. In most First Amendment settings it is generally accepted that “captive” audiences—those who cannot avoid a message and should not have to abandon a particular space in order to do so—have a greater right *not* to listen.⁷⁵ By contrast, those who can take steps to avoid an unwanted message are expected to do so,⁷⁶ especially in public places.⁷⁷ In *Cohen v. California*, the Supreme Court reasoned that unwilling viewers did not have privacy interests that would justify such speech suppression because, rather than being “powerless to avoid [the] conduct,” they “could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”⁷⁸

As Caroline Mala Corbin observes, “[l]ike employees at work, students on campus are often a captive audience.”⁷⁹ But it would be too much to conclude that students have a right to disregard—or, worse, interfere with others’ access to—pedagogically-appropriate lessons about the rule against perpetuities because they find it too difficult, or *Dobbs v. Jackson Women’s*

73. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

74. J.W. Howard, *Freedom of Speech*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 19, 2024), <https://plato.stanford.edu/entries/freedom-speech> [<https://perma.cc/3D4X-Y3NL>].

75. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943–50 (2009).

76. *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (rejecting “stringent prohibition” on all door-to-door soliciting when “leaving to each householder the full right to decide whether he will receive strangers as visitors” would protect the unwilling listener).

77. Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REFORM 489, 491 (1999); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) (invalidating a no-approach zone outside an abortion clinic); *see also Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 657 n.1 (1981) (Brennan, J., concurring in part and dissenting in part) (“[Fairgoers] have no general right to be free from being approached.”).

78. *Cohen v. California*, 403 U.S. 15, 21–22 (1971).

79. Corbin, *supra* note 75, at 962 (footnote omitted). *See also Bonnell v. Lorenzo*, 241 F.3d 800, 820–21 (6th Cir. 2001) (holding as much).

*Health Organization*⁸⁰ (or for that matter *Roe v. Wade*⁸¹) because they find it upsetting. Of course institutions and instructors might choose to provide exceptions and accommodations for pedagogical reasons (pedagogy has its own disciplinarity, which includes understanding one's listeners), but not simply to avoid relevant materials. Thus, even though it involves listeners who are in some sense captive, the classroom is an exception—or at least qualification—to the notion that “[s]tudents have a right to ignore speech that they find appalling and unpersuasive, or to take up the challenge to counter such speech with arguments of their own.”⁸²

Second, although law sometimes gives primacy to listeners' interests over those of speakers in contexts where speakers have more power or information,⁸³ the same is not true in the classroom. Helen Norton explains:

Even absent any relationship of trust, listeners become vulnerable to speakers when those speakers exert physical, legal, or economic control over them. The sorts of listeners subject to speakers' dominion in these ways include those in government custody, patients in certain health care settings, and many workers. Listeners in these settings are less likely—and sometimes entirely unable—to question, rebut, or escape powerful speakers.⁸⁴

Norton does not mention students, but there can be no doubt that in many ways (if not all⁸⁵) they have “less information or power”⁸⁶ than their professors, especially in the classroom setting.⁸⁷ This is akin to the danger of what Erin Miller has described in the context of media companies as the “skewing power” of an “epistemic funnel,” which can disrupt a person's epistemic rationality, or “ability to form rational, justified beliefs.”⁸⁸ A fundamental goal of teaching is to *further* epistemic rationality, not undermine it, but the imbalance and risk are ever-present.

And yet, as with the principle of captivity, it does not follow that students can invoke their interests as listeners to opt out of curricular

80. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

81. *Roe v. Wade*, 410 U.S. 113 (1973).

82. WHITTINGTON, *supra* note 19, at 111.

83. Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 446 (2019).

84. *Id.* at 449–50 (footnotes omitted).

85. Bridges, *supra* note 56, at 809 (noting that while the power inequality typically favors the professor, “there is a vulnerability that comes from being the intellectual author of a course,” and that the power dynamics do not equally favor “people of color, women, trans and gender-nonconforming individuals, gay and lesbian persons, and people with disabilities”).

86. Norton, *supra* note 83, at 441.

87. Bridges, *supra* note 56, at 808 (“In many of our discussions about academic freedom, the classroom figures as the site of an uneven power dynamic wherein the professor reigns as overlord and the student exists as defenseless liege, subject to the professor's whims.” (footnote omitted)).

88. Erin Miller, *Media Power Through Epistemic Funnels*, 20 GEO. J.L. & PUB. POL'Y 873, 875–76 (2022).

requirements or particular lessons. In that respect, the undoubted inequality between students as listeners and faculty as speakers does not lead to the outcome that it might in the free speech paradigm. In other ways, however, the two are not necessarily inconsistent. After all, in other contexts involving asymmetry of knowledge or power such as professional speech,⁸⁹ free speech principles tolerate various forms of regulation in order to ensure that listeners—even if they are at a disadvantage of power or information—are receiving information that satisfies the relevant professional standards.⁹⁰ In the context of teaching, these listener-protective standards are supplied and enforced by the relevant academic unit. For example, the AAUP's 1915 Declaration specifically warns faculty to “guard against taking unfair advantage of the student's immaturity by indoctrinating [them] with the teacher's own opinions” before the student is in a position to examine other opinions and “form any definitive opinion of [their] own.”⁹¹

Third, many standard listener-based accounts of free speech emphasize the *autonomy* interests of listeners. As Jones puts it:

If listeners, like speakers, have dignitary rights to self-fulfillment and self-definition, they “must also be free to shape their own identities and preferences.” Listening should be an independent source of legal right because a listener possesses not only “a powerful dignitary interest in shaping and defining the hearer's self,” but also “an instrumental interest in gaining access to information and ideals that will assist the hearer in making rational, informed choices,” and a legitimate “fear that government will abuse any power to cut the hearer off” from speech that meets these needs.⁹²

89. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1271 (2016) (“The professional relationship is typically characterized by an asymmetry of knowledge.”).

90. See Norton, *supra* note 83, at 460.

91. EDWIN R. A. SELIGMAN, CHARLES E. BENNETT, JAMES Q. DEALEY, RICHARD T. ELY, HENRY W. FARNAM, FRANK A. FETTER, FRANKLIN H. GIDDINGS, CHARLES A. KOFOID, ARTHUR O. LOVEJOY, FREDERICK W. PADEFORD, ROSCOE POUND, HOWARD C. WARREN, ULYSSES G. WEATHERLY & AM. ASS'N UNIV. PROFESSORS, GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE: PRESENTED AT THE ANNUAL MEETING OF THE ASSOCIATION 35 (1915).

92. Jones, *supra* note 64, at 503 (footnotes omitted) (first quoting BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 98 (2015); and then quoting Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 906–07 (2017)). See also Charles L. Black, Jr., *He Cannot Choose but Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 965 (1953) (“Why on earth should anyone committed to the central assumptions of our ethical life see anything picayune or petty in the claim of a man to dispose, as he will and as unavoidable circumstances allow, of his attention and of the faculties it marshals, as against the claim of a group of men to take this autonomy away from him for their own profit?”); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (“[M]y status as a rational sovereign requires that I be free to judge for myself what is good and how I shall arrange my life”); Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's “Democracy and the Problem of Free Speech”*, 62 U. CHI. L. REV. 423, 443 (1995) (arguing that hearers should not be viewed as weak and malleable creatures in need of widespread government protection).

Once again, a simple version of autonomous listener interests cannot account for curricular settings, at least not without modification. Students might earnestly believe that they should be free to shape their identity and preferences by avoiding particular information. But that will not excuse them from curricular requirements regarding those topics.

There are ways to blunt the tension. One might say that students have, by enrolling in a program with transparent requirements, autonomously pursued their “instrumental interest in gaining access to information and ideals that will assist the hearer in making rational, informed choices,” and that their objections to any particular steps along the way should be subsumed to the larger autonomous choice. This effectively treats the students’ choice to listen as a kind of rolling consent. After all, the student version of academic freedom traces itself to the German *Lernfreiheit*, or freedom to learn, which originally “referred simply to the freedom to choose one’s course of study.”⁹³

Of course, none of this means that students do or should have *no* say in the curriculum.⁹⁴ As Khiara Bridges notes, “a society that purports to value equality benefits when professors learn to experience this pressure not as a constraint on academic freedom but rather as an entreaty about the destination to which their exercise of academic freedom might lead.”⁹⁵ Good pedagogy not only licenses but requires attention to one’s audience. The point is not to describe knowledge but to convey it, and careful instructors therefore account for structure, presentation, and pacing, all of which depend in part on students’ abilities, interest, and experiences. Perhaps a broad mandate of trigger warnings and class exemptions hinders learning. But professors who stubbornly insist on teaching material without considering their students’ perspectives are simply abdicating the responsibility to teach well.

2. Campus Speakers, Events, and Other Extra-Curricular Settings

The analysis thus far has focused on the classroom, where the importance of students-as-listeners and demands of academic freedom as a form of disciplinarity seem most clear. Matters are more difficult when it comes to nominally extra-curricular campus speech like outside speakers and events.

93. Menand, *supra* note 14.

94. Bridges, *supra* note 56, at 810 nn. 21 & 22 (collecting sources showing how law students have been challenging curricular requirements and the content of other required courses).

95. *Id.* at 812.

It is one thing to say that students are obliged to listen and learn the prescribed material in a class for which they have registered or which is otherwise required by the curriculum. It is quite another to say that they are obliged to give their attention to any particular campus speaker or lunchtime event. To do so might be a virtue, but attention is a precious resource⁹⁶ and students-as-listeners retain substantial control over how they choose to spend it. In that regard, the autonomy principle plays a more important role when it comes to extra-curricular speech than it does in the classroom.

Most campus speaker controversies—which can serve as a stand-in for the broader category of on-campus, extra-curricular speech—do not involve students deciding not to listen, but rather efforts to protest or disrupt such speeches so that others cannot listen, either. Most (albeit not all⁹⁷) discussions, celebrations, and condemnations of these efforts have focused on either the protesting students or the “cancelled” speakers. This has had a number of unfortunate effects. One is distorting understandings of the campus speech climate by treating the actions of a few students at a few schools as if they are representative of the millions of students across the country. Another is amplifying the supposed interests of would-be speakers, some of whom are neither seeking nor likely to communicate anything of academic interest. Making the loudest of them into martyrs distorts the real issues of academic freedom at stake, as well as the valid audience-interests that generally count in favor of including controversial scholarly speakers.

Students who object to a speaker might be asserting their own interests as listeners—as they have every right to do—but they also risk interfering with the listening interests of others. Some degree of protest, aggressive questioning, or heckling might be appropriate and could even contribute to the educative value of the event.⁹⁸ But disrupting the match between a willing speaker and a willing audience is the essence of interfering with listeners’ interests.⁹⁹ Student-listeners’ opposition to a speech they are not

96. Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [<https://perma.cc/78KW-7LG8>] (“[I]t is no longer speech or information that is scarce, but the attention of listeners.”).

97. See, e.g., Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551, 554 (2019) (“A sound free speech analysis of campus speaker protests should begin with the insight that the student audience’s interest is paramount because the university’s defining purpose is to educate its students. That doesn’t mean students should simply dictate every decision about speaker invitations.”). I might define the mission more broadly to include the advancement and dissemination of knowledge beyond students, but the point—that students have valid audience interests—remains the same.

98. WHITTINGTON, *supra* note 19, at 119 (“Far better for students to be thoughtful participants in events on campus than idle spectators, and a robust culture of free speech on campus should give ample space to students to voice their discontents and disagreement with campus speakers.”).

99. James Grimmelman, *Listeners’ Choices*, 90 U. COLO. L. REV. 365, 366 (2019) (“The

required to attend cannot, without more, be a reason for either them or the university to unduly disrupt the event. This is generally consistent with First Amendment doctrine, which holds that “[l]isteners’ reactions to speech are not the type of ‘secondary effects’ ” that may insulate a regulation from heightened scrutiny¹⁰⁰—in this context, the protest or disruption would be the equivalent of a regulation.

As with classroom pedagogy, of course, this does not mean that student objections to a particular speaker or event should be ignored. Greg Magarian’s suggested solution is that a university has a “duty of faithful service to its students,” and that if it invites a speaker “for reasons that diverge from the interests of the student community” then the validity of the invitation should ultimately turn on “the university’s process for inviting the speaker.”¹⁰¹ This focus on listeners’ interests in the process of selection rather than with regard to the merits of an individual speaker raises an important potential framing question when it comes to listeners’ interests—namely, whether they should be measured at any one moment or across a broader time frame.¹⁰² Education, after all, is a process of development over time, many moments of which (exams, particular lessons, and for that matter particular ideas and speakers) might be objectionable to a listener.

3. Dormitories and Other Private Spaces

While it may be true that the primary mission of a university is the production and dissemination of knowledge, it does not follow that this mission is exclusive, nor even that it is primary in every corner of a campus. In some contexts, academic freedom is not the sole or even primary value, and standard free speech principles hold sway, including that of students-as-listeners to limit the speech of others.

Consider the dormitory. An Urban Institute study based on data from 2015 and 2016 found that nearly two-thirds of full-time students at private nonprofit four-year colleges and universities live in college housing, as do

paradigm case of free speech involves a matched pair of a willing speaker and a willing listener.”); Kendrick, *supra* note 68, at 1791 (“Professor T.M. Scanlon’s Millian Principle posited that it is wrong for the state to interfere with allegedly harmful messages, because doing so fails to treat listeners as autonomous beings capable of evaluating messages on their own.” (footnote omitted)).

100. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

101. Magarian, *supra* note 97, at 556–57.

102. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002) (“The results of constitutional cases turn on the location, size, and shape of often-invisible transactional frames that are positioned prior to any deliberation over the meaning or purposes of constitutional rights. This is the basic problem of ‘framing transactions’ in constitutional law.”).

about a third of those at public four-year college students.¹⁰³ Student housing occupies something of a liminal space in that it is undoubtedly part of a university, and yet is also at least equally the private home of an individual.¹⁰⁴

In the First Amendment context, courts and scholars have typically recognized a right to choose what one listens to in the home. That right can be affirmative, as in *Stanley v. Georgia*, which declared that the “right to receive information and ideas, regardless of their social worth, is fundamental to our free society” and that it gains “an added dimension” when exercised “in the privacy of a person’s own home.”¹⁰⁵ But it also encompasses a right *not* to listen to unwanted speech in the home,¹⁰⁶ even if that means interfering with the flow of ideas. As the Supreme Court put it in *Frisby v. Schultz*, upholding a restriction on picketing in residential neighborhoods, “[t]here simply is no right to force speech into the home of an unwilling listener.”¹⁰⁷ In *Rowan v. U.S. Post Office Department*, the Court upheld a federal law permitting homeowners to opt out of receiving mailed advertisements that the homeowner believed to be “erotically arousing or sexually provocative,”¹⁰⁸ invoking a similar rationale:

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even “good” ideas on an unwilling recipient.¹⁰⁹

The final line goes a bit too far—the government cannot always shut down speech on behalf of unwilling recipients—but it is generally sound in the context of homes and other locations that people cannot or should not have to leave.¹¹⁰

103. *Understanding College Affordability – Room and Board*, URB. INSTITUTE, <https://collegeaffordability.urban.org/prices-and-expenses/room-and-board> [https://web.archive.org/web/20240819224542/https://collegeaffordability.urban.org/prices-and-expenses/room-and-board/#/room_and_board_by_type_of_institution].

104. See Ashutosh Bhagwat & John Inazu, *Searching for Safe Spaces*, INSIDE HIGHER ED (Mar. 20, 2017), <https://www.insidehighered.com/views/2017/03/21/easily-caricatured-safe-spaces-can-help-students-learn-essay> [<https://perma.cc/N8DD-KVQV>].

105. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citation omitted).

106. For more on the structure of such choice rights, see Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761 (2012).

107. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

108. *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737–38 (1970).

109. *Id.* at 738.

110. *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (striking down a ban on door-to-door distribution of leaflets and the like, comparing it unfavorably with trespass-after-warning statutes and similar laws that “leave[] the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner”).

The same listener-focused principle applies to students in campus housing. Whether or not students are a captive audience in every campus context,¹¹¹ they have a valid claim to that categorization when in their own rooms. It follows that, just as with freedom of speech, others' claims of academic freedom do not entitle them to force messages, regardless of their merit, onto students in the privacy of their dorms. Again, this tracks basic listener-based approaches to the freedom of speech, including the Court's invocation of "the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors."¹¹²

It should go without saying that the distinctions between these categories are neither bright nor inevitable. Indeed, the boundaries of the "home" on campus are significantly contested, and many critics claim that students are over-using it to protect themselves from unwanted ideas.¹¹³ In a much-publicized incident at Yale in 2017, students confronted the master of Silliman residential college, with one of them saying to him that "[i]t is your job to create a place of comfort and home for the students that live in Silliman . . . Do you understand that?"¹¹⁴ When the master responded that he had a different view of the role, the student responded: "Then step down! If that is what you think about being a Master, then you should step down. It is not about creating an intellectual space! It is not! Do you understand that? It's about creating a home here! You are not doing that. You're going against that."¹¹⁵ Whatever one thinks of the student's conclusions or the context and tone in which they were delivered, the invocation of the residential college as a "home" is not unjustified. Universities are more than just classrooms; they are "communities whose members not only work and learn together but also live, eat, and socialize together."¹¹⁶

The lines between curricular and extra-curricular settings are similarly contestable. It might be easy in theory for a student to avoid listening to a lunchtime speaker, but what if the pressure from faculty, administrators, or

111. See *supra* notes 75–82 and accompanying text.

112. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975).

113. See, e.g., Conor Friedersdorf, *A College Is a Community but Cannot Be a Home*, THE ATL. (Sept. 24, 2016), <https://www.theatlantic.com/education/archive/2016/09/a-college-is-a-community-but-cannot-be-a-home/500882>

[<https://web.archive.org/web/20220707012447/https://www.theatlantic.com/education/archive/2016/09/a-college-is-a-community-but-cannot-be-a-home/500882>] ("Campus life is too diverse at most schools for dorms to serve as a place of respite from uncomfortable ideas.").

114. Katy Waldman, *Yale Students Erupt in Anger Over Administrators Caring More About Free Speech Than Safe Spaces*, SLATE (Nov. 7 2015, 5:50 PM), <https://slate.com/news-and-politics/2015/11/yale-students-protest-over-racial-insensitivity-and-free-speech.html> [<https://perma.cc/F44Q-LARA>].

115. *Id.*

116. WHITTINGTON, *supra* note 19, at 71.

classmates is so strong that it shades into compulsion?¹¹⁷ A student may be justified in claiming her dorm room as a private space where she has a freedom not to listen to controversial speech, but what about shared living rooms, quads, dining halls, and the like? What if her roommate *does* wish to discuss controversial topics? There is simply no way to give a single *ex ante* definition that will answer such questions, any more so than First Amendment doctrine can easily sort public from limited from nonpublic forums.

B. SCHOLARS

Students are in some sense the most obvious listeners on campus, but they are far from the only ones. Whereas faculty as *speakers* are often central to debates about campus speech, they are also a crucial *audience* when it comes to academic freedom and scholarly speech.

The scholarly pursuit of knowledge is a communal enterprise.¹¹⁸ This is true in the obvious sense that a scholar must publish, teach, or otherwise disseminate what she knows in order for others to hear and benefit from the knowledge-production that justifies her academic freedom. But it is also true in the sense that to acquire such knowledge in the first place she must be embedded in a functioning community of speakers and listeners; one that appropriately takes its cues from (i.e., listens to) disciplinary experts.

The point is that the *production* of knowledge—the process of scholarly inquiry itself¹¹⁹—involves scholars simultaneously speaking and listening to one another. It is a community-wide instantiation of what Seana Shiffrin has described in treating individuals as “thinkers,” rather than speakers or listeners.¹²⁰ The justification for academic freedom is not simply that universities are in possession of truths that others have a valid interest and perhaps right to hear. Rather, it is that academic freedom is necessary to pursue and identify such truths.

117. Cf. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310–12 (1999) (“Generally speaking, people are captive audiences for First Amendment purposes when they are unavoidably and unfairly coerced into listening. . . . Captivity in this sense is a matter of practicality rather than necessity. It is about the right not to have to flee rather than the inability to flee.”).

118. WHITTINGTON, *supra* note 19, at 15 (“Although the scholarly life is often imagined to be isolated, even hermetic, the scholarly enterprise is fundamentally communal.”).

119. Robert Post, *Debating Disciplinarity*, 35 CRITICAL INQUIRY 749, 751 (2009) (“When we speak of a discipline, therefore, we speak not merely of a body of knowledge but also of a set of practices by which that knowledge is acquired, confirmed, implemented, preserved, and reproduced.” (footnote omitted)).

120. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 79–81 (2014); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT 283, 283–84 (2011).

This makes it essential that faculty be able to listen to one another. The freedom of research and publication at the heart of the 1915 Declaration is not solely—nor perhaps primarily—for the benefit of the researcher or publisher, but for those who might read and perhaps respond to her work. Actions that prevent scholars from benefiting from one another’s work threaten academic freedom by undermining those listening interests; they are a form of what Meiklejohn called the “mutilation of the thinking process of the community.”¹²¹ Scholars must be able to hear one another in order to build on or for that matter repudiate one another’s work.¹²² This model of knowledge production relies on self-policing institutions, not individuality;¹²³ scholars using their expertise to question received orthodoxy are not the same as no-nothings on the internet “just asking questions.”

Faculty also have an important interest in listening to their students,¹²⁴ as two of the Court’s most distinguished former professors noted in opinions relating to campus speech. In Justice William O. Douglas’s words, “If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other.”¹²⁵ Justice Felix Frankfurter characterized the interaction between teachers and students as “a kind of continuing dialogue.”¹²⁶

The student connection goes deeper still. It is said that being a student “means being open to others in ways that allow one to expand one’s thinking, to enhance one’s capacities for appreciation, for empathy and for civic

121. MEIKLEJOHN, *supra* note 51, at 27 (emphasis omitted) (“It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.” (emphasis omitted)).

Meiklejohn was forced out of the presidency of Amherst after pushing an educational model that would, among other things, “substitute discussion for pure lecturing, the disposition to lead the students into original inquiry and speculation rather than to preach dogma to them.” WHITTINGTON, *supra* note 19, at 22 (quoting Raymond S. Tompkins, *Twelve Decline Their Degrees from Amherst*, BALTIMORE SUN, June 21, 1923, at 13).

122. Menand, *supra* note 14 (“Academic discourse is rigorously policed. It’s just that the police are professors.”).

123. For more on institutional approaches to the First Amendment, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 22 (2013); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

124. Magarian, *supra* note 97, at 578 (“[F]ree speech principles should lead us to conceptualize university students as members of a community that university administrators organize and manage but may not dominate.”).

125. *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

126. *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring) (quoting Testimony of Robert M. Hutchins, Assoc. Dir. of the Ford Found., Hearings before the House Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations (Nov. 25, 1952)).

participation.”¹²⁷ Such openness to growth and change surely should not be limited to students. Members of a university community “do not have the right to insist that others in fact find . . . arguments persuasive” but they do “have the right to expect that others in the community will be open to persuasion,”¹²⁸ and that expectation in turn can only be legitimate if faculty expect—and demand—the same of themselves. This does not mean wielding disciplinary standards as a cudgel, but working to shape justified beliefs; as Erin Miller observes, “[p]ersuasion *engages*, rather than subverts, epistemic rationality.”¹²⁹

I have argued elsewhere for the importance of persuadability as a First Amendment virtue.¹³⁰ In the context of scholarly speech, that virtue becomes something closer to a duty.¹³¹ A scholar who is not open to being persuaded is merely a speaker, not a listener, and in that sense is not genuinely involved in knowledge production—just dissemination of what that scholar takes to be the truth.

C. THE PUBLIC

Faculty’s interests as listeners are essential to the practice of scholarly disciplinarity, but the ultimate justification for academic freedom is rooted in the interests of another audience: the general public. As we have seen, academic freedom as a matter of self-governance—freedom from outside control—was originally justified and must be constantly re-defended on the basis that such disciplinarity is actually practiced and also that it serves “the common good.”¹³² Both of those essential propositions are under great stress.

First, much of the current critique of campus speech is based on the notion that professors are failing to apply the disciplinary standards that justify academic freedom.¹³³ Such a failure can be taken as a default on the

127. Michael S. Roth, *Academic Freedom Is More Important Now Than Ever*, TIME (Apr. 23, 2024, 12:06 PM), <https://time.com/6969851/academic-freedom-is-more-important-than-ever-now> [https://perma.cc/W8KJ-UJX3]. See also MICHAEL S. ROTH, *THE STUDENT: A SHORT HISTORY* (2023).

128. WHITTINGTON, *supra* note 19, at 98.

129. Miller, *supra* note 88, at 876.

130. Blocher, *supra* note 21, at 109. See generally Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567 (1999) (celebrating, inter alia, receptivity to change).

131. JOHN STUART MILL, ON LIBERTY 90–91 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (“The steady habit of correcting and completing his own opinion by collating it with those of others . . . is the only stable foundation for a just reliance on it . . .”).

132. 1940 STATEMENT, *supra* note 10, at 14.

133. Jeannie Suk Gersen points to former Harvard President Claudine Gay, saying that “[w]hat her embattled leadership couldn’t survive in the end was the drip-drip of plagiarism accusations, which allowed the public to question whether academic standards were relaxed for Gay in her rise to the presidency.” Jeannie Suk Gersen, *The Future of Academic Freedom*, NEW YORKER (Jan. 27, 2024), <https://www.newyorker.com/news/the-weekend-essay/the-future-of-academic-freedom>

obligations that in turn justify academic freedom. As the AAUP's 1915 declaration recognized, "[t]here are no rights without corresponding duties."¹³⁴ Or in the words of the Executive Director of Heterodox Academy, which is at the forefront of campus speech battles today, "this is a pretty fair bargain. Professors receive wide latitude to run their own affairs as experts, in exchange for a certain *professorial* ethos of fair-mindedness, intellectual humility, and self-restraint."¹³⁵

It is important that universities combat the impression of knowledge-stultifying homogeneity. One way to do so might be through modeling the virtue of persuadability described above—showing that scholars *are* in fact listening in meaningful ways. In their critique of cancel culture on college campuses (which is valuable, though it leans too heavily into the free speech paradigm), Greg Lukianoff and Rikki Schlott argue that, "[t]he antidote to an epistemic crisis is an expert class that exhibits epistemic humility. That means acknowledging when they might be wrong."¹³⁶ The perception and arguable reality of "epistemic crisis" and characterization of an over-confident ivory tower can only be addressed through an appreciation of the public's listening interests.

The second point of stress is that the listening public has increasingly come to doubt that academic expertise really does deliver value. A tendency to distrust the ivory tower is nothing new in American life, of course.¹³⁷ But in the current moment, that crisis of confidence is increasingly deep and partisan. A survey from 2022 found that only 37 percent of Republicans and 73 percent of Democrats believe that colleges and universities have a "positive effect" on society—numbers that have fallen precipitously.¹³⁸ This undoubtedly feeds into what Lukianoff and Schlott describe as one rule of "the right's Efficient Rhetorical Fortress"; namely that "[y]ou don't have to listen to experts (even conservative experts, if they have the 'wrong' opinion)."¹³⁹

[<https://web.archive.org/web/20240128014145/https://www.newyorker.com/news/the-weekend-essay/the-future-of-academic-freedom>].

134. 1915 DECLARATION, *supra* note 22, at 298.

135. Michael Regnier, *The Broken Bargain of Academic Freedom*, HETERODOX ACAD. (Oct. 26, 2023), <https://heterodoxacademy.org/blog/the-broken-bargain-of-academic-freedom> [<https://perma.cc/H4EA-VU6L>].

136. LUKIANOFF & SCHLOTT, *supra* note 16, at 91.

137. RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1963).

138. Rachel Fishman, Sophie Nguyen & Louisa Woodhouse, *Varying Degrees 2022: New America's Sixth Annual Survey on Higher Education*, NEW AM. (July 26, 2022), <https://www.newamerica.org/education-policy/reports/varying-degrees-2022/findings> [<https://perma.cc/A3XS-6QFP>]. See also *Sharp Partisan Divisions in Views of National Institutions*, PEW RSCH. CTR. (July 10, 2017), <https://www.pewresearch.org/politics/2017/07/10/sharp-partisan-divisions-in-views-of-national-institutions> [<https://perma.cc/PZR4-LGYN>].

139. LUKIANOFF & SCHLOTT, *supra* note 16, at 165.

There is no simple solution to this problem. In prior work, I have argued that the basic lodestar of an epistemic approach to the First Amendment might be reimagined not as truth but as knowledge—defined roughly as justified true belief.¹⁴⁰ To do so would mean focusing not just on the accuracy of information but the basis for believing it. And that, in turn, would direct attention to what ultimately is the underlying crisis of the “post-truth” society; not a failure to value or pursue individualized conceptions of truth, but a tendency to value and pursue *individualized* conceptions of truth regardless of justification. The crisis is one of social epistemology; of losing shared trust in the institutions that give us justified true belief. Any way out of that crisis must be rooted in the interests and perspectives of the listening public, who must be convinced that “[f]or society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible,”¹⁴¹ and that the university “will function for the benefit of society, provided it is a center of independent thought.”¹⁴²

CONCLUSION

In contexts as diverse as employer speech,¹⁴³ robotic speech,¹⁴⁴ amplified speech,¹⁴⁵ commercial speech,¹⁴⁶ and search engines,¹⁴⁷ scholars and judges have identified and explored the status and role of listeners in giving life to the freedom of speech and the rights of speakers. For doctrinal and technological reasons, those inquiries are as important today as they have ever been, and this symposium is an invitation to take them further. The goal

140. See Blocher, *supra* note 40.

141. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J. concurring).

142. *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring) (quoting Testimony of Robert M. Hutchins, Assoc. Dir. of the Ford Found., Hearings before the House Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations (Nov. 25, 1952)).

143. Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 38 (2016) (“[A] focus on employer speech as occurring within a listener-centered relationship better and more coherently furthers key First Amendment values than do efforts to force employer speech to fit within existing and often unsatisfactory constitutional categories”).

144. Helen Norton, *Robotic Speakers and Human Listeners*, 41 SEATTLE U. L. REV. 1145, 1149 (2018) (arguing, *inter alia*, “that we understand the First Amendment to permit the government to privilege listeners’ interests by requiring the truthful disclosure of expression’s robotic origin”).

145. Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 58 (2021) (analyzing amplified speech in part through the prism of listener interests, for example in arguing that “courts should review interventions designed to assist listeners under the lower bar of intermediate scrutiny”).

146. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (“If there is a right to advertise, there is a reciprocal right to receive the advertising . . .” (footnote omitted)); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015) (“Ordinary First Amendment doctrine . . . focuses on the rights of *speakers*, not listeners,” but the “constitutional value of commercial speech lies in the rights of *listeners* to receive information so that they might make intelligent and informed decisions.” (footnote omitted)).

147. James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 894 (2014).

of this Article has been to suggest some ways in which consideration of listener interests might illuminate current debates about campus speech. Students' interests as listeners are essential to justifying the freedom to teach, and yet students do not have the full panoply of listener-associated interests one might find in other speech contexts. Faculty, meanwhile, are generally treated as the paradigm speaker in campus speech controversies, but also have essential rights and duties as listeners; the production of knowledge through disciplinarity requires as much. And the academy's authority to govern itself according to disciplinary standards is fundamentally predicated on convincing the public—a broad but essential audience—that the scholarly enterprise is in fact generating valuable knowledge.

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