

THE (RE)DEFINITION OF FREE SPEECH

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INTRODUCTION

The largely unwritten civic constitution is shaped by legislators, judges, bureaucrats, and others including ordinary citizens and social movement groups.¹ I contend that it is also shaped by college and university presidents when they speak publicly about constitutional values such as free speech. Over the past decade, college and university presidents have issued statements about free speech and other controversial matters with increasing frequency.² In this Article, I analyze how university presidents describe the concept of free speech to their campuses and thus engage in the work of constitutional development. As part of this analysis, I also examine how distinct meanings of free speech articulate with understandings of equality.

Most American college and university presidents say they want to nurture campuses where free speech and equality—both core constitutional values—are realized in a robust manner.³ Yet, media headlines and the literature about campus free speech controversies from the past several years illustrate the difficulties of doing so. Prior to the COVID-19 pandemic, many of the most prominent campus speech controversies involved controversial

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¹ E.g., ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* (2014); JOHN E. FINN, *PEOPLING THE CONSTITUTION* (2014); Kathleen S. Sullivan, *The Civic Constitution*, 50 *TULSA L. REV.* 441 (2015); Emily Zackin, Book Review, 130 *POL. SCI. Q.* 390 (2015) (reviewing ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* (2014)).

² See Jon McNaughtan & Elisabeth Day McNaughtan, *Engaging Election Contention: Understanding Why Presidents Engage with Contentious Issues*, 73 *HIGHER EDUC. Q.* 198 (2019); Blake Smith, *Do Administrators Think They're Spiritual Healers?*, *CHRON. HIGHER EDUC.* (Oct. 12, 2022), <https://www.chronicle.com/article/do-administrators-think-theyre-spiritual-healers>.

³ Lorelle L. Espinosa et al., *Free Speech and Campus Inclusion: A Survey of College Presidents*, *HIGHER EDUC. TODAY* (Apr. 9, 2018), <https://www.higheredtoday.org/2018/04/09/free-speech-campus-inclusion-survey-college-presidents>; see also Pareena G. Lawrence, *When Core Values Collide: Diversity, Inclusion, and Free Speech*, 104 *AAC&U LIBERAL EDUC.*, Iss. 2, 14, 14-16 (2018); JEFFREY C. SUN & GEORGE S. MCCLELLAN, *STUDENT CLASHES ON CAMPUS: A LEADERSHIP GUIDE TO FREE SPEECH* 17-18 (2020).

right-wing speakers, trigger warnings, and debates about safe spaces.⁴ More recently, disagreements about critical race theory have brought concepts of free speech and equality to the fore.⁵ When free speech controversies occur on campus, university presidents may struggle with whether and how to respond publicly, and when leaders do respond explicitly, some responses are viewed as ineffectual from the perspective of the harmed or targeted students.⁶

Additionally, much of the literature about free speech on campus that has emerged over the past several years has assumed a conceptual and practical tension between free speech and equality, an assumption that is reinforced by anecdotal examples.⁷ Assuming that a tension between free speech and equality exists often suggests that one value, either free speech or equality, must trump the other. To be sure, this zero-sum approach grows out of the dominant way of understanding free speech. Yet, as university presidents' statements reveal, there is more than one way of understanding free speech.

Developing a more nuanced understanding of the multiple meanings of free speech and their implications is essential, both for university campuses and for our society. Thus, in this Article, I ask how university presidents define "free speech" in public statements to their campuses, and what this discourse illuminates about American constitutional development. To answer these questions, I analyze 58 statements about free speech on campus made by 28 sitting college and university presidents. I conduct this analysis at the level of the discursive micro-process, meaning that I examine the ways

⁴ See SIGAL R. BEN-PORATH, *FREE SPEECH ON CAMPUS* 7-22 (2017).

⁵ Sylvia Goodman, *Researchers Did a Deep Dive into Efforts to Restrict Critical Race Theory. Here's What They Found*, CHRON. HIGHER EDUC. (Aug. 3, 2022), <https://www.chronicle.com/article/researchers-did-a-deep-dive-into-efforts-to-restrict-critical-race-theory-heres-what-they-found>; Wyatt Myskow, *Legislation to Limit Critical Race Theory at Universities Has Reached Fever Pitch*, CHRON. HIGHER EDUC. (June 8, 2022), <https://www.chronicle.com/article/legislation-to-limit-critical-race-theory-at-colleges-has-reached-fever-pitch>.

⁶ See Eddie R. Cole & Shaun R. Harper, *Race and Rhetoric: An Analysis of College Presidents' Statements on Campus Racial Incidents*, 10 J. DIVERSITY IN HIGHER EDUC. 318, 330 (2017); Liliana M. Garces et al., *Repressive Legalism: How Postsecondary Administrators' Responses to On-Campus Hate Speech Undermine a Focus on Inclusion*, 58 AM. EDUC. RSCH. J. 1032, 1034 (2022); Crystal E. Garcia et al., *Institutional Responses to Events Challenging Campus Climates: Examining the Power in Language*, 13 J. DIVERSITY IN HIGHER EDUC. 345, 346-47 (2020) (summarizing the literature); Wendy L. Moore & Joyce M. Bell, *The Limits of Community: Deconstructing the White Framing of Racist Speech in Universities*, 63 AM. BEHAV. SCIENTIST 1760, 1770-71 (2019).

⁷ See BRADLEY CAMPBELL & JASON MANNING, *THE RISE OF VICTIMHOOD CULTURE: MICROAGGRESSIONS, SAFE SPACES, AND THE NEW CULTURE WARS* (2018); Thomas Healy, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063 (2019); Lawrence, *supra* note 3; KEITH E. WHITTINGTON, *SPEAK FREELY* (2019); Monica T. Williams, *Adverse Racial Climates in Academia: Conceptualization, Interventions, and Call to Action*, 55 NEW IDEAS IN PSYCH. 58 (2019).

in which speakers use language to accomplish a goal such as framing a problem, shifting a group's self-perceptions of its shared identity, or soliciting support for a proposed solution.⁸ This is part of the broader analytical framework of sensegiving, which examines how leaders use speech to attempt to influence the meaning-making of those in their organization.⁹ Finally, I also draw on legal theory to present various meanings of free speech and equality, and to elaborate on the concept of civic constitutionalism.¹⁰

I find that university presidents describe free speech in divergent ways. What I identify as the "Traditionalist" approach hews closely to First Amendment doctrine, including an institutional role focused on neutrality and often institutional silence. What I identify as the "New Democratic" approach focuses more on lived experience of campus community members and requires a greater institutional role to ensure all have meaningful access to spaces of learning and knowledge creation. A handful of presidents' statements also adopt elements of both approaches which is not so much a compromise as a conflation of these approaches; I describe these statements as employing a "Mixed" approach. These varying approaches enact distinct understandings of free speech, align with different understandings of equality, and illustrate the consequences of employing one meaning of free speech over another.

Identifying the different ways that university presidents understand free speech, and exploring the conceptual and practical implications of differing approaches, can lead to a better understanding of what we truly disagree about when we disagree about free speech. Additional nuance in our thinking also may empower college and university leaders—only half of whom said in a 2018 study they felt well-prepared to address free speech conflicts¹¹—to identify the implications of adopting alternative understandings of free speech and thus respond more intentionally, and

⁸ Linda Rouleau, *Micro-Practices of Strategic Sensemaking and Sensegiving: How Middle Managers Interpret and Sell Change Every Day*, 42 J. MGMT STUD. 1413, 1413 (2005).

⁹ See *id.*; Dennis A. Gioia & Kumar Chittipeddi, *Sensemaking and Sensegiving in Strategic Change Initiation*, 12 STRATEGIC MGMT. J. 433 (1991).

¹⁰ See *id.* at 442 (1991) (describing sensemaking); BEAUMONT, *supra* note 1 (theorizing and applying civic constitutionalism); FINN, *supra* note 1, at 5-27 (explaining civic constitutionalism); RACHEL F. MORAN, *Contested Meanings of Equality: The Unrealized Promise of the Anti-Discrimination Principle and the Uncertain Future of a Right to Education*, OXFORD HANDBOOK OF US EDUCATION LAW 215 (Kristine L. Bowman ed., 2021); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1474 (2004); Ryan Smerek, *Sensemaking and Sensegiving: An Exploratory Study of the Simultaneous "Being and Learning" of New College and University Presidents*, 18 J. OF LEADERSHIP & ORG. STUD. 80, 80-82 (2011).

¹¹ Espinosa et al., *supra* note 3.

possibly more effectively, to harmful speech on their campuses and in the world.

Furthermore, for the first time, these findings confirm empirically that, in addition to their legal standing as *state* actors bound by law, leaders of public colleges and universities are contributing to the evolving social meaning of constitutional values, and thus functioning as *constitutional* actors who help to shape constitutional change. Although leaders of private colleges and universities are not state actors, I contend that they join their public counterparts as civic constitutional actors. Understanding these individuals and groups as constitutional actors shifts our perspective away from considering public colleges and universities merely as subjects of the law, bound by courts' pronouncements if public and outside constitutional law if private, to active participants in constitutional meaning-making who help weave the fabric of our democracy.

Finally, examining the contested meaning of free speech in the context of university leaders' statements invokes broader questions about liberty and equality, and thus illuminates a time of rapidly growing polarization in American society.¹² For all of these reasons, this Article enriches the story of American constitutional development by revealing a previously unrecognized aspect of the politics of free speech.

I. CIVIC CONSTITUTIONALISM AND CORE CONSTITUTIONAL VALUES

This section will explain and discuss several concepts that, together, form the theoretical foundation of this Article. First, the theories of popular constitutionalism and civic constitutionalism depart starkly from the formalist tradition that assumes American constitutional development occurs only when U.S. Supreme Court doctrine changes.¹³ Rather, the "civic constitution" *includes* the written Constitution but is, more broadly, also an aggregation of our core constitutional values, shared civic identity, and lived experiences.¹⁴ Civic constitutional actors are not only lawyers and judges, but also those who shape the civic constitution by contributing to the evolving meaning of constitutional values. Second, I discuss the theory of

¹² Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TRUSTS (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide>; Yascha Mounk, *The Doom Spiral of Pernicious Polarization*, THE ATLANTIC (May 21, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/us-democrat-republican-partisan-polarization/629925/>.

¹³ See Zackin, *supra* note 1, at 390-91.

¹⁴ See *infra*, Part I.A.

sensegiving, which focuses on leaders' communications to their communities, because it provides a structured way to study the constitutional meaning-making process in which constitutional actors engage. Third, I draw out the contested meanings—perhaps surprisingly contested meanings—of the core constitutional values “free speech” and “equality” which are both at the heart of so many disputes about free speech on campus. Taken together, this section lays the groundwork for understanding the ways in which university presidents—sensegiving agents and constitutional actors—help to shape the constitutional values of “free speech” and “equality.”

A. Understanding Civic Constitutionalism

“Popular constitutionalism” is an idea that emerged in the 1990s and rejected the long-held assumption that courts are the only actors who participate in constitutional development in favor of the idea that constitutional change is the result of many actors interacting in a multifaceted “regime.”¹⁵ The key contribution of popular constitutionalism was to recognize the work of constitutional actors in other branches of government such as elected officials and administrative agencies. Later, it grew to include the study of social movements and engaged citizens.¹⁶ This focus—on those who have not traditionally been thought of as constitutional actors but who have, in fact, shaped constitutional meaning—became known as “civic constitutionalism.”

Historically, scholars and lawyers have embraced what political scientist John Finn memorably described as the “juridic Constitution”—the idea that the Constitution is the written document, and its interpretation is within the purview of lawyers and judges.¹⁷ Finn contrasted the juridic Constitution with the “lowercase ‘c’” “civic constitution,” which he described as a

¹⁵ Keith E. Whittington, *Law and the Courts*, THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 319 (Richard M. Valelly, Suzanne Mettler, and Robert C. Lieberman eds., 2014) (describing the literature using the term “regime change”). See generally ACKERMAN, *supra* note 11; see also Beienberg & Frymer, *supra* note 11; Mark Graber, *The Non-Majoritarian Difficulty*, 7 STUDIES IN AM. POL. DEV. 35, 35-73 (1993); 1 BRUCE ACKERMAN, WE THE PEOPLE, FOUNDATIONS, *passim* (1993) (Ackerman’s book is one of the seminal pieces in this literature); Sean Beienberg & Paul Frymer, *The People Against Themselves: Rethinking Popular Constitutionalism*, 41 L. & SOC. INQUIRY 242, 242-266 (2016); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW *passim* (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS *passim* (1999).

¹⁶ 1 ACKERMAN, *supra* note 11, *passim*; Beienberg & Frymer, *supra* note 11, *passim*; BEAUMONT, *supra* note 1, at 1-28; FINN, *supra* note 1, *passim*; Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PENN. L. REV. 1783, 1898-902 (2019); Whittington, *supra* note 15, at 317.

¹⁷ FINN, *supra* note 1, at 1-4.

“constitutive political act” by citizens.¹⁸ Others have also theorized the civic constitution. One legal scholar, Robert Tsai, described it as “American society’s all-purpose repository of legal ideas, relationships, and institutions”¹⁹ and another, Kathleen Sullivan, framed it as happening “on the ground,” “start[ing] with citizens’ lived experience . . . [as they] engage with each other and with constitutional questions.”²⁰ Political scientist Elizabeth Beaumont further explained that civic constitutional questions “do not reduce to questions of legality, technicality, or judicial interpretation, but instead are questions about who we are and to what we are committed.”²¹ While those who study the juridic Constitution focus on questions about legality and doctrinal interpretation, those who study the civic constitution (an extra-juridic constitution that may also include the written Constitution) focus on the larger, more amorphous process of constitutional values coming to life and evolving in a dynamic fashion.

A key insight of popular constitutionalism is that the category of “constitutional actors” stretches beyond those involved in the judicial system, and a core tenet of civic constitutionalism is that those outside the government can influence constitutional culture in important ways. Building on these ideas, Beaumont demonstrated that American social movements throughout the 19th and 20th century changed broader social understandings of equality, influencing norms and everyday practices related to constitutional values.²² Beaumont thus illustrated how to identify when those who are not traditionally considered constitutional actors are engaging in the work of constitutional development. She drew on written archival sources including private letters and diaries; published speeches, sermons, pamphlets, and essays; newspaper editorials and articles; public petitions; and fundraising documents to extrapolate what she called “observable constitutional vocabularies, practices, and norms at work in the world,” thus documenting the work of civic constitutional development through specific practices.²³

¹⁸ *Id.*, at 1-4, 16, 30-32.

¹⁹ Robert L. Tsai, Book Note, 15 CONTEMP. POL. THEORY 33, 33 (2016) (reviewing ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY*).

²⁰ Sullivan, *supra* note 1, at 447.

²¹ FINN, *supra* note 1, at 123.

²² BEAUMONT, *supra* note 1, at 12-14.

²³ *Id.* at 5, 9, 11, 239-305.

B. Sensegiving and the Civic Constitution

So, how might it be possible to examine whether and how university presidents seek to shape the meaning of constitutional values as part of the politics of free speech? Within the broader theory of sensemaking, I argue that the concept of sensegiving provides a structured way to study the meaning leaders attempt to convey at the level of the discursive micro-process.

When confronted with a complex or uncertain situation, individuals engage in a process of constructing their reality.²⁴ When this type of situation occurs in an organizational context, individuals ask and answer questions about the organization's identity, such as "who are we," "what are we doing," and "why does it matter?" This process has been theorized as "sensemaking."²⁵ Organizational theorist Karl Weick's 1995 publication²⁶ is both the core of and catalyst for this body of work.²⁷ Sensemaking focuses on linguistics and discourse rather than individual cognition.²⁸

While sensemaking is a reactive process of constructing meaning, sensegiving is a proactive process of seeking to influence others' meaning-making; the two concepts fit together iteratively.²⁹ That is, a leader's sensegiving seeks to influence the sensemaking of individuals in the organization; individuals' understandings change potentially or partially from the leader's sensegiving; the leader engages in further sensegiving that incorporates individuals' new understandings and seeks to shape them further; and on it goes. From its beginning, sensegiving has been used to study leaders in various contexts, ranging from public administration to higher education.³⁰ Importantly, sensegiving is not about enticing others to accept a change in how something happens but rather about "talk[ing] an alternative conceptualization of an institution into being."³¹ This occurs through the strategic use of specific micro-level discursive tactics, such as

²⁴ Andrew D. Brown et al., *Making Sense of Sensemaking*, 36 *ORG. STUD.* 265, 266 (2015); Anna Kraft et al., *Giving and Making Sense about Change: The Back and Forth Between Leaders and Employees*, 33 *J. BUS. PSYCH.* 71, 71 (2018).

²⁵ Karl E. Weick et al., *Organizing and the Process of Sensemaking*, 16 *ORG. SCI.* 409, 416 (2005).

²⁶ KARL E. WEICK, *SENSEMAKING IN ORGANIZATIONS* (1995).

²⁷ See, e.g., *id.*; Brown et al., *supra* note 24, at 266; Lise Degn, *Sensemaking, Sensegiving and Strategic Management in Danish Higher Education*, 69 *HIGHER EDUC.* 901, 903 (2015).

²⁸ Brown et al., *supra* note 24, at 268.

²⁹ Smerek, *supra* note 10, at 81.

³⁰ Marianne Audette-Chapdelaine, *Sensemaking and the Political-Administrative Interface: The Challenges of Strategically Steering and Managing a Local Public Service*, 82 *INT'L REV. ADMIN. SCIS.* 454 (2016); Joshua T. Brown, *The Language of Leaders: Executive Sensegiving Strategies in Higher Education*, 127 *AM. J. EDUC.* 265 (2021); Gioia & Chittipeddi, *supra* note 9; Smerek, *supra* note 10.

³¹ Mirjam D. Werner & Joep P. Cornelissen, *Framing the Change: Switching and Blending Frames and Their Role in Instigating Institutional Change*, 35 *ORG. STUD.* 1449, 1450 (2014).

how the sensegiving agent characterizes the problem, whether they highlight values that drive the proposed solution, or whether they attempt to shift the organization's self-perception from a past sense to a different future vision.³² Such sensegiving can include shaping the meaning of institutional values.

C. Defining "Free Speech" and "Equality"

"Free speech" and "equality" are both core institutional and constitutional values. The use of these terms on campuses and in society is ubiquitous, and yet their familiarity can mask different, sometimes conflicting, meanings. In particular, "free speech" can be understood either as a negative right or as a compound right (a negative right with positive, redistributive dimensions). Similarly, "equality" can be understood to mean pursuing the goal of anti-classification or anti-subordination.

1. Free Speech

A negative right is a right to be free from government restriction of individual action.³³ First Amendment doctrine conceives of free speech as a negative right, reflecting the text of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech."³⁴ The way in which First Amendment doctrine understands free speech is closer to an absolutist approach than the understandings of free speech in other democracies.³⁵ This near-absolutist understanding of free speech is built around the goal of maximizing individual speakers' opportunities to express their ideas. At its heart is the concept that when ideas compete in a marketplace—a metaphor coined in Justice Holmes' 1919 dissent in *Abrams v. United States*³⁶—truth emerges and democracy is more robust.³⁷ Under this approach, the state should not participate in controversies, but instead should be resolutely neutral. In this context, state neutrality is often used interchangeably with state silence.³⁸ For example, the way the Supreme Court and scholars have

³² Brown, *supra* note 30, at 269; Peer C. Fiss & Edward J. Zajac, *The Symbolic Management of Strategic Change: Sensegiving via Framing and Decoupling*, 49 *ACAD. MGMT. J.* 1173, 1174-75 (2006); Gioia & Chittipeddi, *supra* note 9, at 446; Werner & Cornelissen, *supra* note 31, at 1450.

³³ Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 *HARV. L. REV.* 2300 (2022); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Examination of Constitutional Salience*, 117 *HARV. L. REV.* 1765 (2004).

³⁴ U.S. CONST. amend. I.

³⁵ Danielle K. Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 *NOTRE DAME L. REV.* 1035 (2017).

³⁶ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

³⁷ ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUSES*, 38-40 (2017).

³⁸ Kristine L. Bowman & Katharine Gelber, *Responding to Hate Speech: Counterspeech and the University*, 28 *VA. J. SOC. POL'Y & L.* 248, 257-61 (2021).

theorized the forum analysis doctrine—a sliding scale that recognizes the more “open” a forum is, the less the state can restrict speech that occurs there—understands the state to be a neutral, silent moderator.³⁹

This approach contained in First Amendment jurisprudence and culture is formalist in that it focuses on what, when, and where speech is permitted or restricted by rules, policies, laws, or procedures. It also implicitly assumes that all speakers have the same ability to speak and access the marketplace of ideas and, furthermore, that the marketplace itself is fair. In this way, the marketplace metaphor contains assumptions about what equality means and how opportunity operates in the world.⁴⁰ As a result, free speech controversies are framed as focusing on the liberty of the speaker without attention to dynamics of group-based power and privilege at work in the world, including the destructive consequences unfettered speech can have for democracy.⁴¹

The ubiquity of the near-absolutist approach may cause us to overlook an alternative way of understanding free speech: as a negative right which *also* has positive, affirmatively-guaranteed dimensions, also known as a compound right.⁴² Over the past few decades, and especially the past few years, some political scientists and philosophers have applied a more redistributive approach to free speech.⁴³ This grows out of seeking to maximize substantive access to speech spaces and engagement in democracy by deeply understanding both the lived experience of speech harms and the ways those harms may function to limit such access.⁴⁴ It also seeks to maximize *both* individual liberty in speaking and social utility so that all

³⁹ Kristine L. Bowman, *University Speech and the First Amendment*, 90 NEB. L. REV. 896, 906-18 (2021).

⁴⁰ Kristine L. Bowman, *Exploring an Epistemic Conflict Over Free Speech on American College and University Campuses, and the Promise of the New Democratic Model*, 65 NOMOS (forthcoming 2023); Nathan P. Kalmoe et al., *Racial Conflict: Analyzing Public Comments During Live-Streamed News of Racial Justice Protests*, 20 PERSPS. ON POL. 1226, 1227 (2022).

⁴¹ Citron, *supra* note 35; Richard Delgado, *Legal Realism and the Controversy Over Campus Speech Codes*, 69 CASE W. RES. L. REV. 275 (2018).

⁴² See, e.g., David Lewis, *Rights to Rights*, 69 THEORIA 160, 163 (2003) (describing “rights to rights” as “compound rights”); see also Richard W. Miller, *Rights and Reality*, 40 PHILOSOPHICAL REV. 383, at 383-85 (1981) (problematizing the idea of absolute rights by juxtaposing them with the messy reality of differential lived experiences).

⁴³ These scholars include: Katharine Gelber, *Differentiating Hate Speech: A Systemic Discrimination Approach*, 24 CRITICAL REV. INT’L SOC. & POL. PHIL., Iss. 4 (2019); MARY KATE MCGOWAN, RESPONDING TO HARMFUL SPEECH: THE MORE SPEECH RESPONSE, COUNTER SPEECH, AND THE COMPLEXITY OF LANGUAGE USE 182-99 (2018); Lynne Tirrell, *Toxic Misogyny and the Limits of Counterspeech*, 87 FORDHAM L. REV. 2433, 2434 (2019); JEREMY WALDRON, THE HARM IN HATE SPEECH (2012); Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L. J. 200 (2012).

⁴⁴ Garces et al., *supra* note 6, at 1040.

voices are included, not just formally but also substantively.⁴⁵ For example, employing a critical race theory approach, which is an outgrowth of legal realism, sociologists Wendy Moore and Joyce Bell critiqued the absolutist approach as privileging an abstract, decontextualized notion of rights over the lived experience of speech harms, thus operationalizing color-blind racism.⁴⁶ Additionally, as legal scholar Genevieve Lakier has carefully documented, a somewhat different approach is present in American history and in recent literature.⁴⁷ For over two hundred years, American states have regulated free speech to protect other democratic goods.⁴⁸ Finally, other scholars have noted that various democracies employ approaches to free speech that are more redistributive than the United States.⁴⁹

Unlike the traditional approach, this compound rights approach also recognizes that historical and ongoing interactions of power and privilege actively shape individuals' abilities to access and participate in speech spaces in disparate ways.⁵⁰ These disparities will not vanish overnight, however. So, in this emerging approach to free speech, the role of the state is greater. In the context of a conflict about free speech on campus, this means that a college or university proactively nurtures access to spaces where speech, knowledge creation, and knowledge transfer occur.⁵¹ Thus, when a robust free speech environment is defined as one where the historically marginalized and minoritized have the same substantive ability to speak as the historically privileged and powerful—in other words, one where the democratic ideal is realized, and is not just abstractly possible—then the concepts of free speech and equality do not compete, but rather can fit together in a mutually reinforcing way, like a double helix.

2. Equality

Like the concept of free speech, the concept of equality is complex and can be understood to have two dominant definitions: a traditional, decontextualized, formalist approach, and a substantive, contextualized approach that focuses on lived experience and awareness of systemic as well as individual power and privilege. In a notable article, legal scholar Reva

⁴⁵ Bowman, *supra* note 40; BEN-PORATH, *supra* note 4, at 1-5, 29-46 (providing an example of this approach).

⁴⁶ Moore & Bell, *supra* note 6, at 1760.

⁴⁷ Lakier, *supra* note 33, at 2303-05.

⁴⁸ *Id.* at 2353.

⁴⁹ Bowman, *supra* note 40; Citron, *supra* note 35, at 1040-49.

⁵⁰ See, e.g. BEN-PORATH, *supra* note 4, at 33-36; Kalmoe et al., *supra* note 35, at 1227.

⁵¹ Chemerinsky & Gillman, *supra* note 37, at 150-152; Moore & Bell, *supra* note 6, at 1771-72.

Siegel teased apart these two meanings, their historical roots, and the legal and social consequences that flow from each, while also synthesizing larger debates in the legal and political theory literature.⁵² Anti-discrimination (which Siegel termed “anti-classification”) may be the most common way of describing the concept of equality at play in *Brown v. Board of Education*.⁵³ Under this approach, the central harm in *Brown* was that the state classified children based on their race; the corresponding remedy was thus for the state to be colorblind.⁵⁴ Today, in the context of education, anti-discrimination dominates discourses around racial equality, and as a general matter, courts assume color-blindness to be far preferable to color-consciousness.⁵⁵

As Siegel also illustrated, although *Brown* may be best known for the anti-discrimination principle, it also contained an anti-subordination understanding of equality in which the central harm was not the state’s lack of colorblindness, but rather the state’s creation and perpetuation of conditions that oppressed historically marginalized groups. In the case of *Brown*, this was Black Americans.⁵⁶ If the harm was systemic racial oppression, then the remedy was both systemic and color-conscious so that root causes of disadvantage could be addressed. Today, being trait-conscious is well-accepted as the crux of the necessary remedy in some areas of education law, such as when considering whether students with disabilities or English learners are receiving the education they are guaranteed by law.⁵⁷ Being trait-conscious is increasingly disfavored when considering racial equality, however.⁵⁸

3. *The Relationship between Free Speech and Equality*

These understandings of free speech and equality are important on their own, and the ways in which they can and cannot fit together are equally significant. On one hand, the traditional, near-absolutist understanding of

⁵² Siegel, *supra* note 10, at 1474.

⁵³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁵⁴ Siegel, *supra* note 10, at 1470, 1472.

⁵⁵ Rachel Moran, *Contested Meanings of Equality: The Unrealized Promise of the Anti-Discrimination Principle and the Uncertain Future of a Right to Education*, OXFORD HANDBOOK OF US EDUC. L. 215 (Kristine L. Bowman ed., 2021).

⁵⁶ Siegel, *supra* note 10, at 1472-73.

⁵⁷ Moran, *supra* note 55, at 215-16.

⁵⁸ The Supreme Court’s school desegregation and higher education affirmative action cases from the past two decades are representative of this trend. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Gutter v. Bollinger*, 539 U.S. 306 (2003) *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Fisher v. Univ. of Tex.* 570 U.S. 297 (2013); *Fisher v. Univ. of Tex.* 579 U.S. 365 (2016); *Students for Fair Admissions v. President and Fellows of Harvard Coll.* (oral argument Oct. 31, 2022); *Students for Fair Admissions v. Univ. of N.C.*, (oral argument Oct. 31, 2022).

free speech articulates easily with the anti-discrimination view of equality; both are focused on formalism and neither embraces the legal realist perspective that engages the lived experience of the law. The marketplace of ideas metaphor anchors the near-absolutist view of free speech and it also contains assumptions about (in)equality: namely, that the marketplace of ideas permits equal access to all speakers and ideas, and that harm occurs only when speakers and ideas are formally excluded from the marketplace.⁵⁹ This understanding of the marketplace also aligns with the views that the government should play a minimal, neutral (presumably silent) role in the regulation of speech. That view suggests that a more active government role creates inequality rather than ameliorates it. Finally, the near-absolutist understanding centers the individual as the holder of rights and remedies rather than attending to societal or systemic factors.

On the other hand, the compound right understanding of free speech and the anti-subordination understanding of equality are bound together. They share a focus on individuals' lived experiences, including experiences of formally equal opportunities (speech and otherwise) manifesting in substantively unequal ways. The compound rights approach to free speech recognizes the marketplace of ideas as being shaped by social forces that create inequality for individuals and ideas, and the goal of the compound rights approach—consistent with the goal of the anti-subordination approach—is to root out the systemic factors that have led to the inequality. Thus, under the compound rights approach to free speech and the anti-subordination approach to equality, the state or institutional role is greater and may be perceived as non-neutral because the state's role includes influencing the ecosystem in a way that broadens the group of individuals who have substantive access to speech and thus creates greater substantive equality.

Because these two pairs of definitions are anchored to fundamentally incompatible ways of understanding law (formalist versus legal realist), these two pairings are the only options that are conceptually consistent. Put differently, mixing a formalist definition of one concept and a legal realist definition of the other is like mixing oil and water: the two do not—indeed cannot—blend.

⁵⁹ Bowman, *supra* note 30.

II. THE SPEECH OF COLLEGE AND UNIVERSITY PRESIDENTS

Within an individual college or university, the campus president or chancellor (I use “president” for simplicity) is the chief executive officer, the public face of the institution, and the primary sensegiving agent.⁶⁰ As education scholar Eddie Cole’s work illuminates, college and university presidents’ public statements have a long but mostly neglected history.⁶¹ In a key contribution to the recent literature, law and education scholar Liliana Garces and colleagues find that university leaders who wish to speak publicly about controversial issues, including free speech conflicts, do so in a politically complex environment, potentially including pressure from state legislatures and the threat of litigation.⁶² For these reasons and others, speaking in this way is risky and can cost a president their job.⁶³ Yet, when college and university leaders respond to harmful speech by engaging in effective counterspeech, they can help create and sustain campus communities in which all have access to shared spaces of learning and knowledge creation.⁶⁴ Such attempts are not always effective, though, and sometimes create further harm.⁶⁵

The nascent body of literature focused on college and university presidents’ speech has employed varied theoretical and analytical frameworks.⁶⁶ This literature is small but rapidly growing, in part because presidents’ communication with their campuses (and, through social media, with the public) has increased exponentially in recent years.⁶⁷ Additionally, the significance of their speech has not been broadly recognized.

⁶⁰ Brown, *supra* note 30, at 268; Gioia & Chittipeddi, *supra* note 9, at 445.

⁶¹ Eddie R. Cole, *College Presidents and Black Student Protests: A Historical Perspective on the Image of Racial Inclusion and the Reality of Exclusion*, 93 PEABODY J. EDUC. 78, 79 (2018); EDDIE R. COLE, *THE CAMPUS COLOR LINE: COLLEGE PRESIDENTS AND THE STRUGGLE FOR BLACK FREEDOM* 4 (2020).

⁶² Garces, *supra* note 6, at 1036.

⁶³ See Cole & Harper, *supra* note 6, at 319.

⁶⁴ Bowman & Gelber, *supra* note 38, at 266-74.

⁶⁵ Cole & Harper, *supra* note 6, at 320-21, 330; Garces et al., *supra* note 6, at 1034; Garcia et al., *supra* note 6, at 346-47 (2020); Moore & Bell, *supra* note 6, at 1770-71.

⁶⁶ See Bowman & Gelber, *supra* note 38, at 251-5252; Cole & Harper, *supra* note 6, at 320; Garcia, *supra* note 6, at 347; Jon McNaughtan et al., *An Institutional North Star: The Role of Values in Presidential Communication and Decision-Making*, 41 J. HIGHER EDUC. POL’Y & MGMT. 153, 155 (2018); Jon McNaughtan & Elisabeth Day McNaughtan, *Engaging Election Contention: Understanding Why Presidents Engage with Contentious Issues*, 73 HIGHER EDUC. Q. 198, 201-02 (2019); Moore & Bell, *supra* note 6, at 1762; Elizabeth Vitullo & Jason Johnson, *University Presidential Rhetoric and the 2008-2009 Economic Crisis*, 32 J. HIGHER EDUC. POL’Y & MGMT. 475, 476 (2010).

⁶⁷ See, e.g., Cole & Harper, *supra* note 6; McNaughtan et al., *supra* note 66; McNaughtan & McNaughtan, *supra* note 66.

To date, this literature analyzes various leaders' responses to a particular event or type of event, such as the 2008-2009 economic crisis, the 2016 presidential election, or racial incidents on campus. Education scholars Eddie Cole and Shaun Harper analyzed 18 statements by university presidents made between 2012 and 2015 in response to racial incidents on campus, finding these statements were "consistently safe, ambiguous," and an extension of racial avoidance.⁶⁸ Sociologists Moore and Bell analyzed statements in response to 199 "incidents of racist activity," between 1991 and 2011, finding that "in offering the [ubiquitous] solution of more speech, administrators deploy a false equivalency between structurally nonequivalent forms of expression."⁶⁹ Education scholars Crystal Garcia and colleagues analyzed senior administrators' responses to campus and societal climate issues between 2016 and 2018, finding that leaders were more likely to address off-campus issues than those directly impacting the campus; their statements were often vague; and many "seemed reluctant to be proactive, possibly for fear of local retribution."⁷⁰ Education and law scholars Garces and colleagues conducted an embedded case study of university responses to hate speech at a large research university, exploring these dynamics in depth;⁷¹ one of their key findings was that university leaders felt pressured to maintain "neutrality"—meaning not censoring or denouncing harmful speech.⁷² This focus on institutional "neutrality" operationalized the concept of "Repressive Legalism" which Garces et al. introduced to explain the "interpretation and application of legal norms and other facets of the legal environment that shuts down a focus on other approaches (e.g., institutional responses promoting inclusion for students of color)."⁷³ Overall, this emerging literature demonstrates that university leaders regularly speak about free speech and equality, although they rarely identify these ideas as constitutional values.

* * *

Taken together, this literature informs the research design in important ways. First, recall how the theories of sensegiving and civic constitutionalism both seek to illuminate social practices of meaning-

⁶⁸ Cole & Harper, *supra* note 6, at 320-21, 330.

⁶⁹ Moore & Bell, *supra* note 6, at 1763, 1769.

⁷⁰ Garcia et al., *supra* note 56, at 352.

⁷¹ Garces, *supra* note 6, at 1040-41.

⁷² *Id.* at 1049-50.

⁷³ *Id.* at 1059.

making by analyzing archival documents. Employing sensegiving as an analytical framework allows for an analysis of university presidents' statements at the level of the micro-process and enables the identifications of patterns among these complete texts—particularly, patterns in how the leaders define “free speech.” Second, drawing on legal theory to interrogate the meanings of free speech and equality provides a nuanced understanding of both concepts. Third, coupling these pieces with civic constitutionalism as a theoretical framework allows for a nuanced examination of discourse that may constitute constitutional development because if college and university presidents' statements seek to shape the meaning of a core constitutional value such as free speech, those leaders operate as constitutional actors. This approach thus allows for deep engagement with the research questions: How do college and university presidents define “free speech” for their communities, and what does that discourse illuminate about the role these leaders might play in the development of the civic constitution?

A. Methods

As with other empirical studies of civic constitutionalism and sensegiving strategies, I engaged in archival research, studying extant, publicly available texts, and employing qualitative content analysis.⁷⁴ This allowed me to systematically capture how university presidents sought to explain the meaning of free speech, and to identify the micro-level discursive strategies they used to do so.

B. Data Source

In creating parameters for this study, two major criteria were important: the focus of this study is on the language sitting university presidents use to describe free speech, and if this language is to “give sense” in any meaningful way, it must be readily available to the campus community. Guided by those criteria, data collection followed three sequential steps and was completed between September 30 and November 1, 2020.

First, I established a parameter by institutional type. Because many prominent free speech conflicts on campus have occurred at large,

⁷⁴ Brown, *supra* note 30, at 266-67 (describing the study's methodology, in particular studying archival texts (university alumni magazine), and the use of sensemaking and sensegiving theory); He Gao et al., *The Use of Public Language in Strategy: A Multidisciplinary Review and Research Agenda*, 42 *J. MGMT.* 21, 23 (2016) (describing the study's methodology for examining “public language”: studying the texts of formal statements issued by an organization or those who can be understood to speak on behalf of it, and further studying only language that is publicly available).

comprehensive universities,⁷⁵ the 131 American universities identified by the Carnegie Institute in 2018 as doctoral-granting institutions with “very high research activity” (“R-1 institutions”) provided a useful starting point for data collection.⁷⁶ R-1 institutions are nearly always comprehensive universities with robust, residential undergraduate as well as graduate programs. Additionally, they are geographically diverse and include a substantial portion of both public (72%) and private (28%) institutions. In 2017, they enrolled nearly 6.6 million students.⁷⁷ Focusing on these institutions allowed me to hold the institutional-type variable constant.

Second, among the universe of institutions identified as the focus of this study, I searched online for information to which the relevant campus community would easily have access, specifically statements about free speech that likely would be understood as the speech of “the institution.” The search protocol was as follows: use the search engine on each institution’s home page to search for the terms “free speech,” “free speech policy,” and “free expression;” review the first thirty entries generated for each; review documents to which the first thirty entries linked; and collect all relevant primary sources. I did not use quotation marks around the terms so that the search engines would not be bound by specific language and instead would also return entries of which the search terms were a part, for example with the search term “free speech” being included in the related term “freedom of speech.” Reviewing the first thirty entries usually meant reviewing the first three pages of search results. This was consistent with the goal of collecting documents to which the campus community would have easy access. Relevance often dropped off significantly after the first ten entries.

Relevant sources included statements by current and former senior campus leaders, such as campus presidents/chancellors, provosts, boards of trustees or regents, and multi-campus system presidents; institutional policies and institution-generated summaries of relevant policies; state law; free speech “landing page” text, including FAQs; and statements of community values. I excluded secondary sources such as media reports, event announcements, and faculty scholarly work because none of these

⁷⁵ AMERICAN COUNCIL ON EDUC., *TO THE POINT: CAMPUS INCLUSION AND FREEDOM OF EXPRESSION: CONTROVERSIAL SPEAKERS* (2018), <https://www.acenet.edu/news-room/Documents/To-The-Point-Controversial-Speakers.pdf>.

⁷⁶ THE CARNEGIE CLASSIFICATION OF INSTITUTES OF HIGHER EDUCATION PUBLIC DATA [hereinafter CCIHE-2018 Public Data] <https://carnegieclassifications.iu.edu>, (last visited April 3, 2023).

⁷⁷ *Doctoral Universities*, DATA USA, <https://datausa.io/profile/university/doctoral-universities#enrollment>, (last visited April 3, 2023).

directly reflect the position or policy of the institution. Overall, this protocol resulted in the collection of 444 relevant documents from 117 institutions, all of which I reviewed.⁷⁸ These documents varied greatly in purpose, audience, length, content, and speaker.

Third, I restricted the dataset to statements by university presidents. The analytical framework of sensegiving and much of the literature applying it see university presidents as representatives of their institutions.⁷⁹ Presidents' statements also discussed the meaning and purpose of free speech more frequently and in greater depth than other categories of documents, such as institutional policies or institutions' website text. Although many presidents' statements responded to a particular event, others appeared to be proactive communications to the campus community—importantly, both approaches conceivably seek to help those communities make sense of constitutional values. All of this supported restricting the dataset to presidents' statements.

Finally, I excluded statements by former presidents still posted on the website of the institution where they previously served as president, as those individuals no longer spoke for the institution, and it was unclear whether the continued inclusion of their statements on the university website was intended to be significant or an oversight. For consistency, I also excluded statements signed by both the president and other senior leaders on campus. This protocol yielded 58 statements signed by 28 university presidents.

C. *Data Analysis*

I analyzed the presidents' statements by employing standard qualitative content analysis research methods which combine an inductive and deductive approach.⁸⁰ I began by creating an initial coding scheme and, to develop initial topic-specific sub-categories, I piloted the initial coding scheme with a subset of the statements, revised the scheme, and then applied the revised scheme to all statements. During this first full round of coding, I continued to employ inductive thematic analysis to incorporate and refine sub-categories that emerged from the data.⁸¹ I then consolidated some sub-categories, refined others, and applied the final coding scheme during a

⁷⁸ Of the 131 universities, 14 produced no data. For 12 of these, the search protocol did not identify any relevant documents. The two additional institutions had a missing or nonfunctional search engine. The 14 institutions were distributed across the country and roughly 60% of them are public; no obvious patterns emerged when comparing these institutions to the larger group of 131 R-1 institutions.

⁷⁹ Brown, *supra* note 30; Gioia & Chittipeddi, *supra* note 9.

⁸⁰ Brown, *supra* note 30, at 273-277; see also JOHNNY SALDANA, *THE CODING MANUAL FOR QUALITATIVE RESEARCHERS* (3d ed. 2016) (explaining standard approaches to conducting qualitative coding).

⁸¹ SALDANA, *supra* note 80, at 67-78, 211-33 (explaining first cycle coding methods).

second round of coding of the entire data set.⁸² During both rounds of coding, I used qualitative research software; rechecked and, as needed, re-coded earlier work to validate the codes and their application; and generated analytic memos.⁸³ The totality of this approach allowed me to capture with nuance the substantive meanings presidents sought to convey. It also allowed me to compare speech across leaders.

To further establish reliability, and consistent with standard practices in content analysis, an independent coder with no prior involvement in the research project coded 81 excerpts, testing the application of 27 codes.⁸⁴ I provided a codebook and training to the independent coder, including jointly conducting a test coding. During the test that followed, 99% of the independent coder's results were consistent with mine, well above the broadly accepted 80% agreement calculation indicating reliability.⁸⁵

D. Limitations

Inevitably, this study has multiple limitations. First, the focus on sensegiving means this study attends to the messages presidents sent out rather than how those messages were understood or their impact. Second, each statement by a university president is a snapshot of a moment in time. Such snapshots cannot tell us about the dynamic nature of sensegiving and sensemaking about free speech in individual campus communities, especially if the search protocol identified only one relevant statement for an institution (which was the case for most institutions). Third, because some statements are relatively short—just a paragraph, or two or three—it seems highly unlikely that the statements capture the full nuance of an individual leader's views or the complexity of a campus environment. Fourth, because the research was archival, previously existing documents are the only source of information employed in this study. Going forward, case studies that deeply examine individual campuses and triangulate multiple sources of data (i.e., interviews, campus climate surveys, policies, and statements) could help to answer many of the questions that are beyond the scope of this article and the limitations resulting from the research design.⁸⁶

⁸² Brown, *supra* note 30, at 274-77; SALDANA, *supra* note 75, at 233-72 (explaining second cycle coding methods).

⁸³ SALDANA, *supra* note 80, at 43-66 (explaining analytic memos).

⁸⁴ Cliodhna O'Connor & Helene Joffe, *Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines*, 19 INT'L J. QUALITATIVE METHODS 1, 2, 8 (2020).

⁸⁵ *Id.* at 9.

⁸⁶ See Garces et al., *supra* note 6, passim (presenting an embedded case study).

Finally, it also may be that institutions of higher education are sufficiently different than general purpose governments such as cities that free speech should function somewhat differently in these contexts. Whether or not this is the case, I suggest that colleges and universities are sufficiently integrated with society so that free speech conflicts on campus are still likely to revolve around the same underlying tensions as free speech conflicts in society.

III. RESULTS

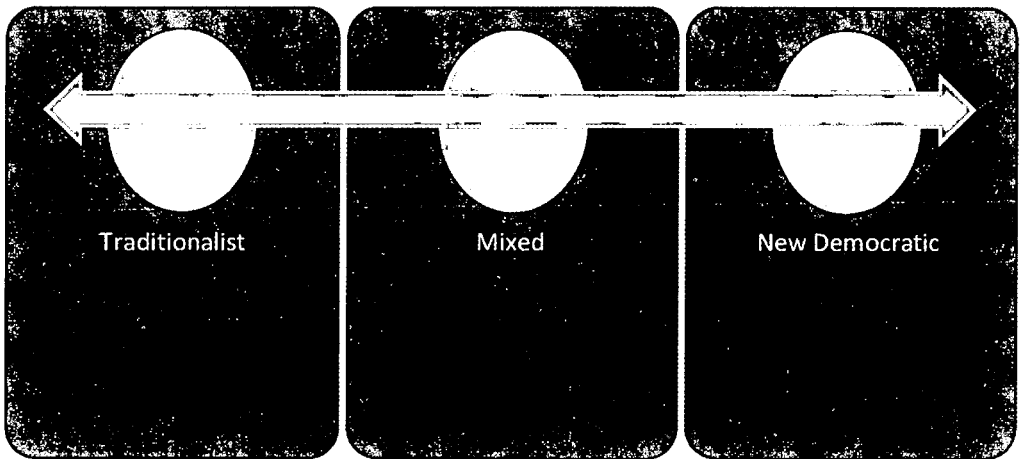
Before discussing the data, three items are relevant to note. First, the data collection protocol searched for statements about free speech and expression; statements were not included or excluded based on discussing equality. However, in the statements analyzed, four out of every five statements discussed both free speech and equality, underscoring the connection between these two concepts. Second, because college and university presidents are speaking in their official capacities in these statements and thus speaking *as* the institution, I refer to presidents and their institutions interchangeably. I do not, however, suggest that characterizing an institution in a particular way reflects the experience of all those within the institution. Third, throughout this section I anonymize institutions and their presidents but use actual quotations, consistent with standard qualitative research practices.

During the process of analysis, two alternative ways of understanding “free speech” emerged. As I will discuss in more detail below, some presidents employed what I call the “Traditionalist” approach, a legalistic, negative rights understanding of free speech, where individual speech is largely free from restriction and the institutional role is minimal. Other presidents employed what I call the “New Democratic” view of free speech, a compound rights understanding in which the goal of free speech is for all to be able to fully access and participate in speech spaces; in colleges and universities this means environments of learning and knowledge creation. Although the baseline of legally protected speech remains the same across both views, the institution plays a greater role in opening up opportunities for speech in the New Democratic view, and considerations of how one’s speech impacts the community are more significant. The Traditional and New Democratic understandings are best understood as different ways of conceptualizing free speech. Most institutions in this study adopt one of these approaches. Additionally, a small number of institutions adopt elements of both approaches; I classify these institutions as “Mixed.” Of the 28 presidents whose statements are analyzed here, only two did not contain

sufficiently detailed views to substantiate classifying them as Traditionalist, New Democratic, or Mixed.

To be clear, I am not proposing a conceptualization that distinguishes between “more” and “less” free speech. Rather, I am proposing a relationship between two distinct *ways* of understanding free speech—a Traditionalist approach and a New Democratic approach. Figure 1 captures this idea:

Figure 1. Understanding Free Speech, Part 1



A. The Traditionalist View: Free Speech as a Negative Right

Thirteen of the 28 university presidents employed a Traditionalist approach as they sought to give sense to their community about free speech. A Traditionalist approach can be identified by the presence of a number of specific ideas about the role of the institution and the role of individual speakers and hearers in creating and maintaining a robust free speech environment.

The institutional role. Under a Traditionalist approach, an institution’s role in creating robust free speech on campus is quite limited. This manifests in assorted ways.

First, neutrality is the cornerstone of the institutional role. In a Traditionalist approach, institutional neutrality is essential because it enables individuals to more easily share and develop their thoughts, free from institutional influence. Institutional regulation of speech, not to mention speech of the institution itself, would disrupt this intellectual

openness. A statement by Jacaranda University's president illustrates this approach:

The University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.

Second, the university is to be the neutral arbiter of a marketplace of ideas. This is grounded in the assumption that a neutral moderator enables a more robust marketplace, and the more robust the marketplace, the more likely that truth will emerge. The emergence of truth is especially important in universities because they are places of learning and knowledge creation. Traditionalist presidents frequently describe their campuses as being, or seeking to be, marketplaces of ideas, with multiple Traditionalist presidents quoting Supreme Court justices on this topic. Relatedly, the presence of ideological diversity is normatively desirable in a Traditionalist institution, especially as ideological isolation can dampen the marketplace of ideas.

Third, although Traditionalist institutions maintain neutrality by not aligning with substantive views, they do express concern about the tone of speech, calling for "respect"—sometimes "mutual respect"—and "civility." This is so even if the speech itself may be "unwelcome, disagreeable, or even deeply offensive." Relatedly, Traditionalist presidents sometimes explain why protecting controversial and "even potentially harmful speech" is normatively good: Fir University's president explained that broad speech protections are necessary

to create the conditions for innovative thinking—and because we have learned it is even more harmful to give officials the extraordinary (and inevitably abused) power to punish people for expressing views they do not like. Throughout history, speech that challenges conventional wisdom has been a driving force for progress. Speech that makes us uneasy may compel us to reconsider our own

positions. Hearing offensive or even hateful viewpoints provides opportunities for those sentiments to be exposed, engaged and rebutted.

Fourth, woven throughout all of these other aspects, and also standing independently, is the assumption that institutions are relatively hands-off when it comes to regulating speech, consistent with the First Amendment (which only applies to public institutions). Traditionalist presidents regularly underscore this point.

The role of individuals. Like the Traditionalist approach to the institutional role, the Traditionalist approach to the role of the individual bears a strong connection to First Amendment language and culture. In particular, the Traditionalist approach echoes Justice Brandeis's oft-cited concurrence in *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁸⁷

In Traditionalist institutions, individual speech and counterspeech is strongly encouraged and robustly protected. Conflicts often center on whether particular speech can be restricted. As speakers, individuals are encouraged to focus on whether they can (legally) engage in speech, rather than also considering other, broader issues. As hearers, individuals are encouraged to disagree respectfully and to protest peacefully. They also bear responsibility for learning about the history of free speech and developing skills to engage in difficult conversations. As the president of Locust University explained:

Some constitutionally protected speech attacks the very identity of particular groups of individuals in ways that are deeply hurtful. However, the right response is not the heckler's veto, or what some call platform denial. Call toxic speech out for what it is, don't shout it down, for in shouting it down, you collude in the narrative that universities are not open to all speech. Respond to hate speech with more speech.

Traditionalist institutions regularly expect individuals to become comfortable with views with which they disagree—some include legally

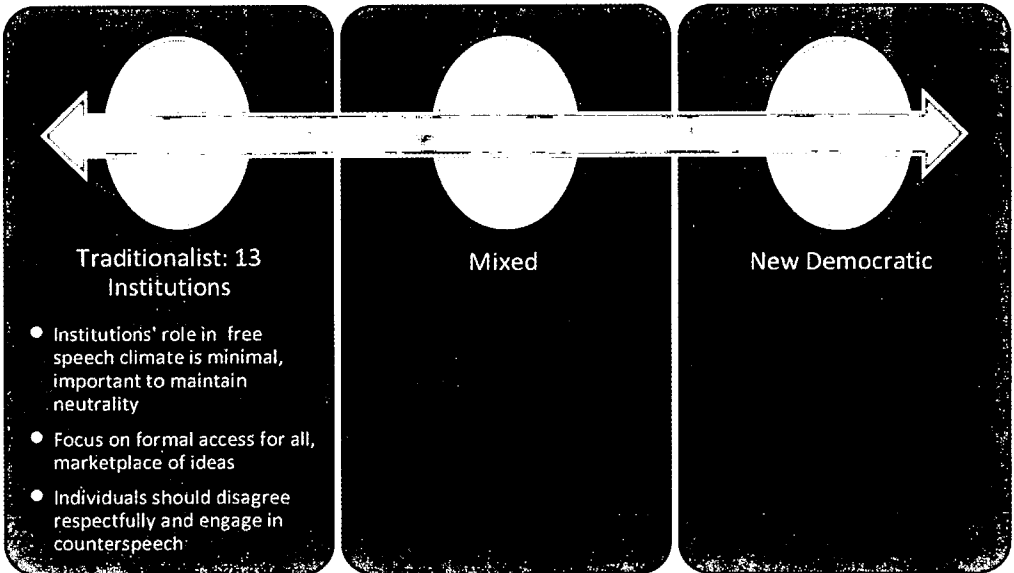
⁸⁷ 274 U.S. 357, 377 (1927).

permissible speech targeting marginalized or minoritized hearers in this category—so they can engage in debate about those views including when individuals are the targets of exclusionary speech. Here, although almost never explicit in the presidents' statements, I note an important distinction between views that are perceived to challenge an individual's presence in the academic community, such as Richard Spencer's white supremacy challenging the presence of Black members of a campus community, and views about social policies such as the appropriate extent of social welfare provided by the state.⁸⁸

In sum, Traditionalist institutions are bound together by the view that an institution's obligation to proactively create and maintain a robust environment of free speech is minimal, and this responsibility and the related rights are instead vested in the individual members of their campuses (usually students). Of the 28 college presidents whose statements are the subject of this study, at least six are trained as lawyers; four of these six advanced a Traditionalist approach (one employed New Democratic and one a Mixed approach).

Figure 1a. summarizes the Traditionalist approach.

Figure 1a. Understanding Free Speech, Part 2



⁸⁸ David Jesse, *White Supremacist Richard Spencer will speak at Michigan State after all*, DETROIT FREE PRESS (Jan. 18, 2018), <https://www.freep.com/story/news/local/michigan/2018/01/18/richard-spencer-michigan-state-university/1044354001/>.

B. The New Democratic View: Free Speech as a Compound Right

Of the 28 presidents whose statements are analyzed here, nine described free speech as what I term the “New Democratic” approach. Like the Traditionalist approach, the New Democratic approach is a compilation of specific views about institutional and individual responsibilities in a robust free speech environment that, taken together, create a picture of what free speech means.

The institutional role. New Democratic institutions are defined in large part by the view that the institution’s responsibility is to create an environment where all members of the community (in these statements, usually meaning all students) can participate fully in learning and knowledge creation, despite the fact that power and privilege impact individuals’ lived experiences differently. That is not to say that New Democratic institutions flout the First Amendment. Presidents of these institutions often explicitly acknowledge legal requirements as binding and as a starting point for discussing free speech and equality, although they also regularly state that legal rights and responsibilities are not the only relevant considerations. For example, the president of Sweetgum University acknowledged that the Constitution provides boundaries for “what we *cannot* do” but “it provides no guidance on what we *can* do or how to do it.”

New Democratic institutions also tend to assume responsibility for helping to create and maintain a robust environment of free speech. For example, Cedar University’s president explains:

Given the broader social and political climate, it should come as no surprise then that students and members of our community can falter when they try to have healthy debates, whether inside or outside the classroom. On our own campuses, I’ve found that the best of those discussions must often be facilitated and mediated, as is generally the case in our Race & Equity dialogues.

Similarly, Sweetgum University’s president noted that while hosting speakers and creating spaces for speech and counterspeech is helpful, “the university must commit itself to the long-term and evolving mission of inclusivity and harness it to the spirit of inquiry that is the very life-blood of a university.” After identifying some examples of this already happening at Sweetgum, the president called for focusing “not on whether we can stop

anyone from saying anything but on how we can—through dialogue—solve hard problems, make big decisions, and shape our world.”

The New Democratic approach also involves the institution itself—through its president—speaking up to support minoritized members of the community who are targeted by harmful speech. When this happens, the institution is not neutral but instead affirmatively aligns itself with targeted individuals or groups. For example, when Richard Spencer came to Cottonseed University, Cottonseed’s president engaged in frequent, direct counterspeech to reject the discrimination Spencer sought to advance, and thus to support members of the Cottonseed community who experienced Spencer’s speech as targeting them. A typical statement Cottonseed’s president made in that situation was: “I find the racist rhetoric of Richard Spencer and white nationalism repugnant and counter to everything the university and this nation stands for.” Similarly, Beech University’s president stated:

Most speech that promotes ideologies of hate is protected free speech under the First Amendment. As a community, we are all threatened by these ideologies of hate, as it is in stark contrast to our Principles of Community. Let me state without equivocation that [Beech’s] administration and the Board of Visitors find the ideology encompassed by white supremacy, neo-fascism, neo-Nazism, and others to be abhorrent and to have no place in modern society.

Like Traditionalist institutions, New Democratic institutions may chafe at the idea of viewpoint discrimination and embrace the marketplace of ideas metaphor, but they do so from a different foundation. A New Democratic approach assumes that not all speakers (in particular, members of minoritized groups) have the same starting point for participating in speech opportunities, and seeks to correct that imbalance. This can even be part of how the discourse is framed. For example, one institution’s president explained the choice to avoid the term “civil discourse” because some see the concept of civility as “benefit[ing] only those with power and privilege.”

Both Traditionalist and New Democratic institutions are concerned with political polarization on campus or in the world, but for different reasons. In Traditionalist institutions, ideological isolation is dangerous because it may reduce open debate and decrease activity in the marketplace of ideas. In New Democratic institutions, ideological isolation is harmful because individuals

talk “past” not “with” one another and are thus prevented from engaging deeply across their differences.

The individual role. New Democratic institutions are not top-down, however. They share the work of creating and maintaining a robust free speech environment with individuals in the campus community. Like Traditionalist institutions, New Democratic institutions also want students to develop skills that enable them to engage in difficult conversations and learn about free speech history, but New Democratic institutions assume substantial responsibility at the institutional level for scaffolding such opportunities. The president of Birch University illustrates what this can look like:

As a campus community, we will provide several opportunities in the coming months to explore together the long history and true limits of free speech as well as providing models for engaged, civil discourse. One of those activities is the Common Read, which sparks conversation about important issues of intellectual, social, and moral significance. We are also hosting a Freedom of Expression series with an opening event on Sept. 27. Details on these events will be shared with you soon.

Relatedly, New Democratic presidents may think more broadly about a range of differently-situated people engaging in counterspeech, as opposed to focusing on the targets of harmful speech as the ones bearing the burden of speaking back. Prior to Richard Spencer speaking on the campus of Cottonseed University, Cottonseed’s president said,

Mr. Spencer’s message is disproportionately hurtful to members of our [] community who are targets of hate and violence simply because of their skin color, religion, culture, sexual orientation or beliefs. Those of us in the majority must speak up for those in the minority and make our voice of love and support heard.

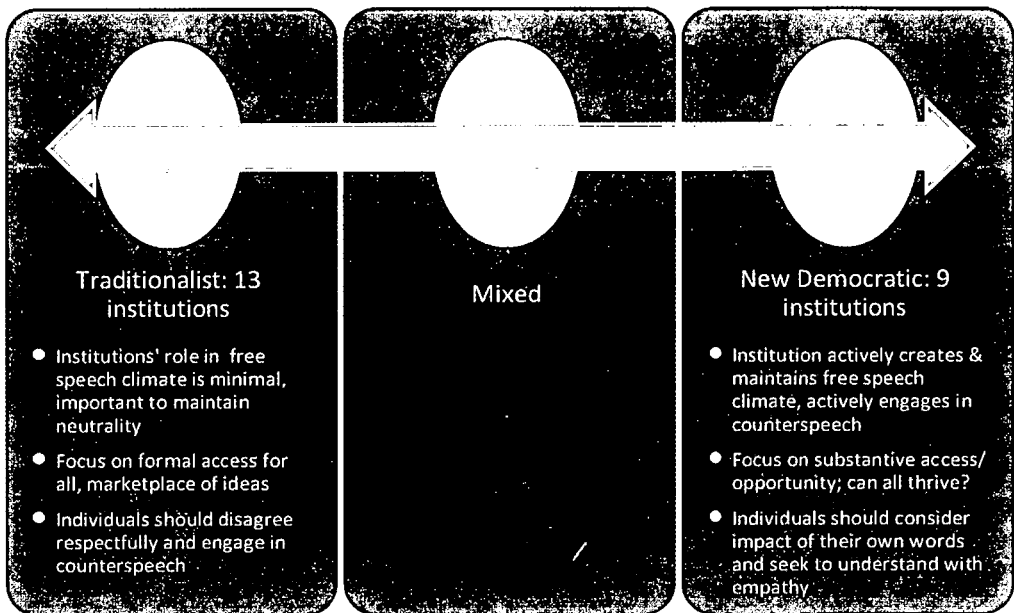
When presidents call for inclusion in this way, particularly in the context of a free speech conflict, they focus on recognizing marginalized and minoritized community members’ right to be present and participate in the environment of learning and knowledge creation on the same terms as those

historically privileged and powerful. In the words of the Maple University president, “it is not enough to increase the number of students of color or first-generation students. All of our students need to know that they belong, that they are valued, that they are critical to our academic mission and that they are among friends.”

In these and other New Democratic institutions, the institutional role in creating and maintaining a robust free speech environment is substantial, and so is the role of individuals.

Figure 1b adds to the visualization of this concept.

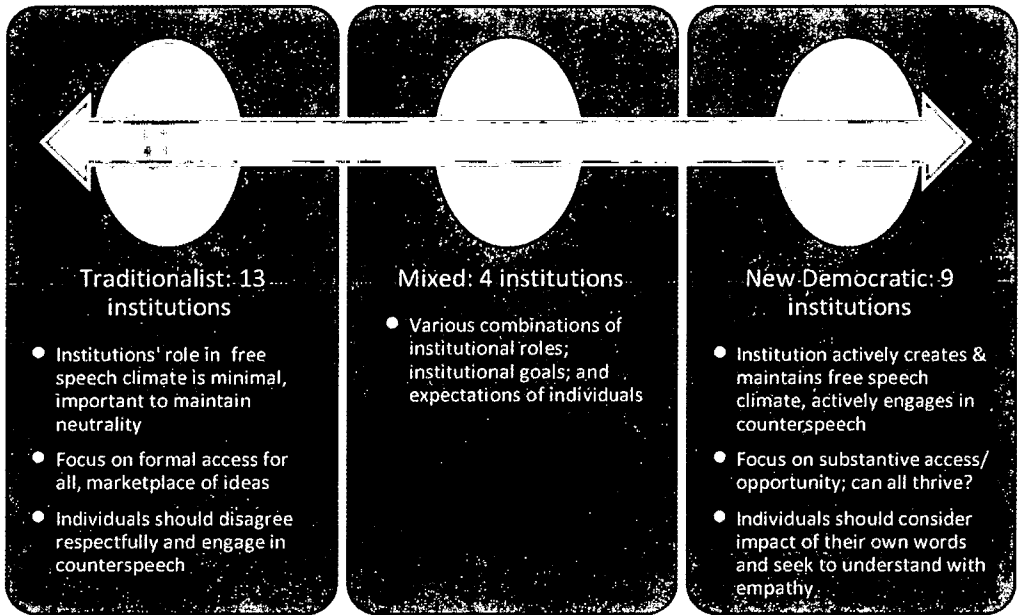
Figure 1b. Understanding Free Speech, Part 3



C. *Mixed Understandings*

While most institutions in this study employ Traditionalist or New Democratic understandings of free speech, a small number of institutions (n = 4) conflate Traditionalist and New Democratic understandings without reconciling the two. I call this approach “Mixed.”

Figure 1c. Understanding Free Speech, Part 4



Willow University's president invokes both the Traditional and New Democratic approaches, thus providing an example of the Mixed approach:

As stated in our charter, [Willow] is measured not by whom it excludes, but by whom it includes and how they succeed. . . We can speak and behave in ways that serve to inform and enlighten without threatening or intimidating others. We can and should learn from perspectives different from our own. And we should embrace the opportunity we have to do this in a safe environment here at the university, free from hostility and fear.

This statement exemplifies an approach common in the New Democratic view: recognizing the complicated power dynamics of any speech environment and assuming an institutional duty to help create a speech environment where all have substantive access to learning and knowledge creation. However, Willow's president followed this by touting Willow's "green light" rating by the Foundation for Individual Rights in Education, a conservative libertarian organization that has promoted the view that campuses have been gripped by a "free speech crisis" silencing conservative students, and has prepared model legislation to advance its cause.⁸⁹ In the absence of information that disruptive protest had occurred at Willow, this suggests that Willow's president is sympathetic to FIRE's views. This combination of deep engagement with core elements of both the Traditionalist and New Democratic approaches, as demonstrated by Willow's president, is what characterizes a Mixed approach.

IV. IMPLICATIONS

The findings above have two significant implications. First, understanding these two ideas of free speech enables us to understand conflicts about free speech on campus—and in society—with greater nuance. Second, empirically identifying university presidents' sensegiving about constitutional values allows us to see these leaders as constitutional actors, which adds to the discourse on civic constitutionalism and can shift how we think about the public role of colleges and universities.

A. Theorizing Free Speech

The conventional wisdom in the United States is that the meaning of free speech is defined by First Amendment doctrine and jurisprudence—no more and no less. For various reasons, some of which are more disputed than others, this is not true in a technical, legal sense.⁹⁰ Additionally, as I demonstrate in this Article, it is also not true empirically.⁹¹ University presidents, when communicating with non-legal language, help shape the meaning of free speech on their campuses by employing two meanings of free speech—Traditionalist and New Democratic. These approaches contain different understandings of the individual and institutional role in and

⁸⁹ THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <https://www.thefire.org> (last visited Apr. 3, 2023).

⁹⁰ See, e.g., Lakier, *supra* note 33.

⁹¹ See *supra*, Part III.B.

responsibility for maintaining free speech; as such, they present different understandings of what free speech *is*.

The Traditionalist approach understands free speech as a negative, individual right. During free speech conflicts, institutions should maintain neutrality. Individuals bear the burden of speaking out, and of engaging in counterspeech; the institution does not share in the obligation to affirmatively foster an environment of robust speech. This approach is consistent with the anti-discrimination understanding of equality, which focuses on formal equality. When applied to free speech campus conflicts, individuals are understood to have equal access to speech spaces if their formal access to those spaces, as regulated by laws and policies, is the same. Because the Traditionalist approach is so dominant in American law and culture, it may seem unusual to describe this as one of two approaches, rather than the only approach.

Identifying the Traditionalist approach as distinct from the New Democratic approach invites comparison between the two, which highlights the consequences of the Traditionalist approach that result from its formalism. Most significantly, the Traditionalist approach is not able to recognize the impact of power and privilege on the translation of an abstract concept into a lived reality. Thus, under a Traditionalist approach, questions about harmful speech and its impact are largely irrelevant unless the speech falls into a narrow category where it is unprotected legally, such as types of harassing or threatening speech.⁹²

Additionally, by putting the burden of creating and maintaining a robust free speech community on individual speakers and limiting the institutional role to a regulatory one such as enforcing time, place, and manner restrictions, the Traditionalist approach arguably reinforces systemic inequalities.⁹³ This is because the Traditionalist approach prioritizes institutional neutrality and expects such neutrality to take the form of institutional silence.⁹⁴ As the literature has documented, the discourse about institutional neutrality often lacks a deep understanding of harm, specifically the negative consequences of some speech on minoritized and marginalized groups.⁹⁵ Additionally, institutional silence is a key feature of the Repressive Legalism that Garces describes and cautions against.⁹⁶

⁹² CHEMERINSKY & GILLMAN, *supra* note 37, at 82-97.

⁹³ Garces et al., *supra* note 6; Moore & Belle, *supra* note 6.

⁹⁴ Bowman & Gelber, *supra* note 38 (arguing that silence is not neutrality).

⁹⁵ *Id.*; Garces et al., *supra* note 6; Garcia et al., *supra* note 56.

⁹⁶ Garces et al., *supra* note 6, at 1058-61.

While the Traditionalist approach applies a negative-rights understanding of free speech, the New Democratic approach embraces a “compound rights” understanding of free speech in which free speech is a negative right with positive dimensions, meaning the right must be broadly available and that this availability must be a reality, not just an abstract possibility.⁹⁷ This is significant because it means that equality is at the definitional heart of free speech. Furthermore, legal realism animates the positive dimension of free speech, focusing on individuals’ lived experiences. The understanding of equality compatible with this conceptualization is anti-subordination, which focuses on the substance of individuals’ lived experiences, in particular the systemic factors that operate to exclude them from opportunities.⁹⁸ In the literature, this approach is most prominent outside law, in political science and philosophy (Lakier’s work is a notable, recent exception).⁹⁹

The New Democratic approach means the institution has some obligation to ensure that all have access to the speech environment (here, the learning and knowledge creation environment) on the same terms.¹⁰⁰ It thus invites different, deeper conversations about power and privilege, speech and counterspeech, and the importance of how these concepts translate into individuals’ lived realities as participants in spaces of learning and knowledge creation. And in the context of the university, this translates to the idea that the core missions of learning and knowledge creation are better and more robust because minoritized, marginalized voices are included. While both the Traditionalist and New Democratic views may pursue this goal, the New Democratic view would contend that the Traditionalists’ formalism limits the ability of the Traditionalist view to achieve this goal.

Identifying the New Democratic approach in university presidents’ statements is a substantial contribution, which may depart from earlier findings in the literature. Specifically, Moore and Bell found that the “more speech” approach dominated 199 university leaders’ responses to racist incidents from 1991-2011;¹⁰¹ Cole and Harper documented racial avoidance in 14 of 18 university presidents’ statements from 2012-2015;¹⁰² and Garces introduced the concept of Repressive Legalism to explain an institution’s responses in free speech and equality controversies from 2016-2019.¹⁰³ The

⁹⁷ See *supra*, Part I.C.

⁹⁸ *Id.* at 1036-39 (surveying the literature); Siegel, *supra* note 10, at 1470-74.

⁹⁹ Lakier, *supra* note 33.

¹⁰⁰ Moore & Bell, *supra* note 6, at 1769-70 (discussing “the call for administrators to enforce civility and remove emotion from the discussion” to encourage more speech).

¹⁰¹ *Id.* at 1763.

¹⁰² Cole & Harper, *supra* note 6, at 323.

¹⁰³ Garces et al., *supra* note 6, at 1036, 1043.

58 statements I analyzed overlapped in time with the focus of Cole and Harper's research as well as Garces' (but not Moore and Bell's), though they extended until September 2020.¹⁰⁴

Multiple potential explanations for these different findings are possible: First, the small number of 2020 statements in my dataset may have been influenced by the 2020 killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, and the dramatic increase in anti-racist solidarity statements during mid-2020.¹⁰⁵ Second, while much of the literature cited above asks whether statements by college and university presidents and others enact anti-racism, the present Article asks complementary questions and thus conducts a different analysis. Third, it may be that a Traditionalist approach cannot conceptually support an anti-racist approach, but that a New Democratic approach is necessary but not sufficient to support one. Making such a claim is beyond the scope of this Article, but worthy of further consideration, especially because the New Democratic approach may be growing in prominence.

B. University Presidents as Constitutional Actors

Because free speech is a core value of American colleges and universities, the juridic Constitution, and the civic constitution, it is understandable that university presidents regularly speak about it. Even if they are intending to do so merely as the leader of a campus community, however, their speech is part of the broader conversation about what free speech means, thus contributing to the discourse that sustains and continues to shape the civic constitution. As this study has shown, university presidents regularly engage in sensegiving about the core civic constitutional value of free speech. This is the work of civic constitutional actors.¹⁰⁶

Viewing college and university presidents as constitutional actors means that we see, for the first time, that they have a role in shaping the civic constitution. We no longer think of them as outside that process, reacting to and accommodating the meaning of constitutional law decided by courts if they are public institutions and responding only to social pressures if they are private institutions. Rather, we see colleges and universities, through the

¹⁰⁴ Cole & Harper, *supra* note 6 at 321; Garces et al., *supra* note 6, at 1036; *but see* Moore & Bell, *supra* note 6, at 1763.

¹⁰⁵ Dawna Ballard, et al., *Diversity, Inclusion, and Disconnection*, 34 *MGMT. COMM'N Q.* 590, 593-96 (2020).

¹⁰⁶ BEAUMONT, *supra* note 1; FINN, *supra* note 1; Sullivan, *supra* note 1; Tsai, *supra* note 19.

speech of the presidents who embody those institutions, as actively engaged in constitutional meaning-making.¹⁰⁷

This shift has multiple implications: First, it expands our view of the role of colleges and universities in society. We often talk about universities as sites of knowledge generation and transfer, and sometimes as contributing to the economic health of the country or a region.¹⁰⁸ On occasion we discuss them as institutions that contribute to our democracy by helping create the next generation of citizens.¹⁰⁹ However, we do not think about them as institutions that, through their presidents and possibly others, help shape the constitution outside the courts. Recognizing this public good of constitutional protection both broadens and deepens the value that colleges and universities contribute to democracy. Especially in the current context of what some call a multi-decade “war” on higher education, this shift is important.¹¹⁰

Second, recognizing college and university presidents as potential civic constitutional actors directly connects *private* colleges and universities to constitutional values even though they are not state actors. Recognizing the public good—the work of constitutional protection—performed by private universities which do not receive any state funding underscores their connection both to other social institutions and to democracy. Although scholars of politics and law who lead private institutions are likely cognizant of the culture and context of the First Amendment, private institutions led by scholars from various other disciplines or by those with professional rather than academic backgrounds may not have had much reason to think about the connection between constitutional values and institutional values. Recognizing private institutions’ presidents as civic constitutional actors could influence this.

Third, seeing the work of constitutional protection these presidents undertake reveals a previously invisible thread of American constitutional development reminiscent of the story Beaumont’s research unveiled.¹¹¹ This helps to create a more nuanced, powerful picture of the civic constitution and American constitutional development. We regularly describe colleges and universities as the site of creation and transfer of knowledge; this happens both through research and through the formal curriculum,

¹⁰⁷ BEAUMONT, *supra* note 1, at 1-28 (describing civic constitutionalism).

¹⁰⁸ CHEMERINSKY & GILLMAN, *supra* note 37, at 1; UNIVERSITIES AND COLLEGES AS ECONOMIC DRIVERS (Jason E. Lane & Bruce Johnstone eds., 2012).

¹⁰⁹ RONALD J. DANIELS, WHAT UNIVERSITIES OWE DEMOCRACY, 1-28, 86-130 (2021).

¹¹⁰ Ellie Shrecker, *The 50-Year War on Higher Education*, CHRON. HIGHER EDUC. (Oct. 14, 2022), <https://www.chronicle.com/article/the-50-year-war-on-higher-education>.

¹¹¹ BEAUMONT, *supra* note 1.

respectively.¹¹² However, an informal curriculum also operates through which students learn about citizenship and being a member of a community.¹¹³ I suggest that presidents' statements about constitutional values, through which they seek to give sense to their campus, are also part of this informal curriculum. And, given the relatively greater financial, political, and social capital held by college graduates, this work of constitutional protection may have an outsized impact in the long term.

V. CONCLUSION

The nuanced ways in which university presidents give sense about the meaning of free speech are important in a very real way because of these leaders' influence on the millions of students, faculty, and staff who are a part of their campus communities and also because of the role these leaders play in shaping the evolving meaning of civic constitutional values. By analyzing university presidents' statements to their communities about free speech, I empirically document and also theorize a deep-seated disconnect in the meaning of "free speech." Understanding the disconnect between the Traditionalist and the New Democratic approaches illuminates conflicts about free speech on campus and in society. This study also lets us see university presidents, for the first time, as civic constitutional actors, thus shifting our view of the public role of institutions of higher education and enhancing our understanding of the process of civic constitutional change.

¹¹² See, e.g., CHEMERINSKY & GILLMAN, *supra* note 33, at 49-81, 154-55; DANIELS, *supra* note 108, at 131-186; Martin Johnson & Dominika Majewska, *Formal, Non-Formal, and Informal Learning: What Are They, and How Can We Research Them?*, CAMBRIDGE UNIV. PRESS AND ASSESSMENT, 4-5 (Sept. 2022) (defining formal, non-formal, and learning).

¹¹³ Johnson & Majewska, *supra* note 111, at 4-5; JAAP SCHEERENS, ED., *INFORMAL LEARNING OF ACTIVE CITIZENSHIP AT SCHOOL* 1-24 (2009).