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ON TRADITIONALISM IN FREE SPEECH LAW

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INTRODUCTION

The idea of tradition evokes our ambivalence. We have never made up our collective mind about the proper role of tradition in society, in law, in constitutional law, or in free speech law in particular.[1] For every endorsement of the importance of tradition,[2] there is a sharp critique.[3] For every expression of the indispensability of tradition,[4] there is a denunciation of tradition's supposed arbitrariness or undue constraint.[5]

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[1] This ambivalence is displayed even in what we might casually think of as largely traditionalist cultures. *Compare* LIN YUTANG, THE WISDOM OF CONFUCIUS 215 (Random House Inc. 1936) (c. 500 B.C.E.) ("Just as people who think that they can destroy an old dam because they think it is useless will certainly meet a flood disaster, so will a people who do away with the old principle of social order because they think it is useless certainly meet a moral disaster."), *and* CONFUCIUS, THE ANALECTS bk. 12, § 1 (Raymond Dawson trans., 1993) (c. 500 B.C.E.) ("Do not look at what is contrary to ritual, do not listen to what is contrary to ritual, . . . and make no movement which is contrary to ritual."), *with* HAN FEIZI, BASIC WRITINGS § 18 (Burton Watson trans., Colum. Univ. Press 2003) (c. 220 B.C.E.) ("Those who have no understanding of government always tell you, 'Never change old ways, never depart from established custom!' But the sage cares nothing about change or no change; his only concern is to rule properly. Whether or not he changes old ways, whether or not he departs from established customs depends solely upon whether such old ways and customs are effective or not."), *and* MOZI, BASIC WRITINGS 78–79 (Burton Watson trans., Colum. Univ. Press 2003) (c. 400 B.C.E.) ("[T]hose who advocate elaborate funerals and lengthy mourning say: 'If elaborate funerals and lengthy mourning are in fact not the way of the sage kings, then why do the gentlemen of China continue to practice them and not give them up?' . . . Mozi said: This is because they confuse what is habitual with what is proper, and what is customary with what is right."). Perhaps, one might add, the sage also takes transition costs into account when assessing the value of following tradition.

As well, ambivalence toward tradition is displayed even in what we might casually think of as largely revolutionary cultures. *See, e.g.*, CARL L. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS 95 (New Haven & London, Yale Univ. Press 1932) ("Did the [18th century] Philosophers . . . wish to 'break with the past?' Obviously, they wished to get rid of the bad ideas and customs inherited from the past; quite as obviously, they wished to hold fast to the good ones, if any good ones there were.").

[2] *See, e.g.*, ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION (1990). For discussion of Professor MacIntyre's conception of tradition, see, for example, Brenda Almond, *Alasdair MacIntyre: The Virtue of Tradition*, 7 J. APPLIED PHIL. 99 (1990); Tom Angier, *Alasdair MacIntyre's Analysis of Tradition*, 22 EUR. J. PHIL. 540 (2011); Julia Annas, *MacIntyre on Traditions*, 18 PHIL. & PUB. AFFS. 388 (1989); Micah Loft, *Reasonably Traditional: Self-Contradiction and Self-Reference in Alasdair MacIntyre's Account of Tradition-Based Rationality*, 30 J. RELIGIOUS ETHICS 315 (2002); and J.B. Schneewind, *MacIntyre and the Indispensability of Tradition*, 51 PHIL. & PHENOMENOLOGICAL RSCH. 165 (1991).

[3] Most familiarly, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

[4] *See, e.g.*, Douglas B. Klusmeyer, *Hannah Arendt On Authority and Tradition*, *in* HANNAH ARENDT: KEY CONCEPTS 138, 142 (Patrick Hayden ed., 2014); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066 (1990); and J.W.N. Watkins, *Political Tradition and Political Theory*, 2 PHIL. Q. 323, 331 (1952) ("' Ceaseless' criticism of moral habits will tend to destroy confidence in the moral tradition and so paralyse moral behaviour.").

[5] *See, e.g.*, THOMAS PAINE, REPRESENTATIVE SELECTIONS 209 (Henry Hayden Clark ed., 1944) (1791) ("Government by precedent, without any regard to the principle of the precedent, is one of the vilest systems that can be set up."); G.W.F. Hegel, letter to C.G. Zellman of January 23, 1807, *in* John Glassford, Nihilism and Modernity: Political Responses in a Godless Age 92 (Nov. 20, 1998) (Ph.D. dissertation, The Open University), http://oro.open.ac.uk/57953/1/268258.pdf

Assessing the limitations of a traditionalist approach to constitutional law, and to free speech law in particular, is a more manageable enterprise. This Article contrasts constitutional traditionalism, and free speech traditionalism in particular, with what might be called constitutional and free speech purposivism.[6] The overall preferability of purposivism to traditionalism in these contexts is explored and developed below. The comparison between traditionalism and purposivism involves, first, a critical exposition of the scholarly defense of traditionalist constitutional methodologies. This exposition is followed by a critique of the Supreme Court's use of traditionalism in free speech contexts, and then by an elaboration of the relative deficiencies of traditionalism in some important public forum speech cases in particular.

I. THE SCHOLARLY DEFENSE OF CONSTITUTIONAL TRADITIONALISM

Whatever its distinctive elements, free speech traditionalism[7] nests within constitutional traditionalism[8] more generally. The leading contemporary exponent of constitutional traditionalism, Professor Marc O. DeGirolami, has said that "[t]raditionalist constitutional interpretation takes political and cultural practices of long age and duration as constituting the presumptive meaning of the text."[9] In this sense, the primary focus of traditionalist constitutionalism is on the text of the relevant constitutional provision,[10] particularly as distinct from some sort of abstract moral or political principle.[11] More substantively, constitutional traditionalism holds that the sustained traditionality of a practice that interprets a

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[https://perma.cc/R7YB-EMZS] ("Thanks to the bath of [its] [r]evolution, the French Nation has freed [itself] of many institutions which the human spirit had outgrown like the shoes of a child" and which therefore weighed on it, as others still do, as fetters devoid of spirit.).

[6] Constitutional purposivism, and free speech purposivism, can be contrasted not only with traditionalism, but with various sorts of formalism. *See, e.g.*, Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). For a sense of legal purposivism in general, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 102 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958). In the criminal law context, see Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958). The distinct practice of statutory purposivism tends to focus, understandably, on the statutory text, in ways we do not follow below. See, for example, John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011). For a useful further discussion, see John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70 (2006).

[7] *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020).

[8] *See* Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2024), (https://ssrn.com/abstract=4205351) [https://perma.cc/D2HC-A5S7]; Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020).

[9] DeGirolami, *supra* note 7, at 1653. *See also* Louis J. Virelli, III, *Constitutional Traditionalism in the Roberts Court*, 73 PITT. L. REV. 1, 1 (2011) ("traditionalism . . . looks for meaning in present manifestations of longstanding practices or beliefs. . . .").

[10] *See* DeGirolami, *supra* note 7, at 1653.

[11] *See id.* at 1653; DeGirolami, *Traditionalism Rising*, *supra* note 8, at 7.

constitutional text tends to bestow political or legal legitimacy on that practice.[12] The most relevant such practices, on Professor DeGirolami's theory, tend to be ground-up rather than top-down, decentralized rather than centralized in character, sustained rather than intermittent or sporadic, long-established rather than relatively novel, popular rather than elite-imposed, widely instantiated rather than geographically limited, and frequent or dense in their manifestations.[13]

On this view, the interpretative authority, and any other kind of moral or legal authority, of a tradition is presumptive, or defeasible.[14] In particular, a traditional practice loses its text-interpreting force if the practice in question is somehow deemed to violate, or conflict with, the relevant text,[15] or else if it is deemed to be overridden "by a very powerful moral principle that runs against the tradition."[16]

Any theory of constitutional traditionalism would ultimately require a book-length exposition and defense. In particular, we would eventually need the best realistically available theory of what would count as a very powerful moral principle, in contrast with the content of a traditional practice. Could a cost in sheer utility that is lost by following a tradition ever count as a matter of a powerful moral principle? But then, perhaps traditionalism should defer to a very powerful moral principle only in the absence of any other moral principle, of whatever gravity, that may support or align with the tradition in question.

The most important context in which an arguably well-established constitutional tradition has evidently conflicted with moral principle is that of equal protection and non-discrimination. As Professor DeGirolami clearly appreciates, "many traditions . . . are vile and pernicious."[17] In particular, "[a]partheid, antisemitism, racism of all sorts are, after all, highly traditional practices."[18] American "racial segregation was a multigenerational project that depended . . . on the next generation . . . to preserve it . . . ."[19]

More broadly, a well-established tradition may itself "reinforce or facilitate dominance and alienation."[20] We should expect dominant groups, whatever their moral character, to reinforce popular traditions that operate to sustain and legitimize those dominant groups. The irony in American constitutional law is that "some provisions of the Constitution were enacted in order to *destroy* long-

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[12] *See* DeGirolami, *supra* note 7, at 1656. Something of the democratic populist element of Professor DeGirolami's approach is captured by the view that "the history of tradition requires that we listen to the choruses and not only to the soloists." JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 17 (1984).

[13] *See generally* DeGirolami, *Traditionalism Rising*, *supra* note 8.

[14] *See id.* at 32; DeGirolami, , *supra* note 7 and accompanying text.

[15] *See* DeGirolami, *First Amendment Traditionalism*, *supra* note 7, at 1659.

[16] *Id.*

[17] Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 261 (1986).

[18] *Id.*

[19] David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1056 (1991). Classically, see the separate but equal case of Plessy v. Ferguson, 163 U.S. 537 (1896).

[20] Felipe Jimenez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMAN. 59, 70 (2022).

standing traditions"[21] in areas bearing upon individual rights.[22] In this respect, then, determining the value of a traditionalist approach to any particular constitutional provision will require a comparison with some at least equally well-developed alternative approach.

As Professor DeGirolami recognizes, traditionalism, like most alternative approaches, must confront problems of indeterminacy, manipulability, and arbitrariness in identifying, characterizing, and applying the most relevant traditional practices.[23] The Supreme Court has yet to successfully address the classic problem of the proper level of generality or specificity with which to formulate any potentially relevant tradition.[24] Of course, the specific alternative to traditionalism of a more or less open-ended, multi-part, largely intuitive constitutional balancing test[25] can hardly claim a decisive advantage over traditionalism in this respect.

As well, the Supreme Court has done little to meaningfully distinguish between recognizing a tradition and, in contrast, choosing to judicially prefer tradition on extrinsic, substantive value grounds. Thus, it has been argued that

> the Court doesn't say how many historical laws and regulations are necessary to establish a tradition, how old examples can get before they are too old, or where to draw the line between founding or Reconstruction-era laws that clarify . . . meaning versus those that are unacceptably modern. This failure to provide guidance isn't an accident. It gives the Court the flexibility to treat the evidence in a manner that supports its desired conclusion.[26]

One might wonder whether the Supreme Court should ever take into account, to any degree, what it believed to be the likely consequences of its recognizing a tradition, or the lack thereof. Perhaps recognizing a tradition may tend to legitimize, and further entrench, that tradition.[27] But it is also possible that judicially recognizing and giving constitutional effect to that tradition may catalyze opposition to—and hasten the demise of—that very tradition.[28] As a result of a hostile cultural and legal response, a future Court might later reverse

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[21] Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami's Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2024), (https://ssrn.com/abstract=4383680) [https://perma.cc/3PKC-H386].

[22] *See id.*

[23] *See* DeGirolami, *Traditionalism Rising*, *supra* note 8, at 28, 30.

[24] *See id.* at 28 nn.121–22.

[25] In the free speech context, see United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring in the judgment).

[26] Michael Smith, *Choosing History*, MICHAEL SMITH'S L. BLOG, (Aug. 10, 2022, 8:35 AM), https://smithblawg.blogspot.com/2022/08/choosing-history.html [https://perma.cc/4ZWR-4W7N]. For an elaborate critique of the purported guiding and constraining power of tradition in substantive due process cases, see Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006).

[27] *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023).

[28] *Id.* at 1482.

its own traditional precedent.[29] Perhaps all of this should be irrelevant to a conscientiously traditionalist Court. But one might wonder about the likelihood, in practice, of such judicial indifference to consequences.

Much more fundamentally, though, traditionalism as a method of interpreting constitutional texts raises a variety of concerns. To begin with, it would seem that the value of traditionalism as a way to interpret constitutional texts must vary dramatically with the nature of the particular constitutional text in question. Suppose we have a question about whether Congress is empowered to engage in some general kind of activity. In such a case, the text of the Constitution[30] may not be decisive. But specific constitutional, textual elaborations will, for many kinds of such possible activities, provide a substantial degree of determinateness.[31]

In contrast, though, suppose that we have a question about whether Congress, or any other federal or state agency, is textually empowered to abridge, or otherwise restrict, a private party's freedom of speech. Whatever the status of free speech as a constitutional tradition, the constitutional text of the Free Speech Clause tells us little about such a constitutional tradition, or the proper limits thereof.[32]

Admittedly, some free speech cases are indeed about the meaning of "speech" in the Free Speech Clause,[33] and one possible way to make such a determination is to look to constitutional tradition.[34] But most free speech cases are not crucially about the constitutional text, and traditionalism in textual interpretation is irrelevant in all such cases.

Where constitutional traditionalism does come into play, it is, again, contrasted with comparable level appeals to abstract general moral rule and principle.[35] The distinction, though, between constitutional traditionalism and constitutional level abstract principle is not exhaustive. Other approaches, descriptive or normative, to constitutional adjudication are also possible.

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[29] *Id.*

[30] See the specific textual elaborations in U.S. CONST. art. I, § 8.

[31] Merely for example, coining money, adopting bankruptcy laws, and building post roads are all clearly authorized by the text, whatever the inevitable further interpretive controversies. *Id.*

[32] U.S. CONST. amend. I; *see*, classically, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1st ed. 1988).

[33] See, for example, the house architectural style case of Burns v. Town of Palm Beach, 999 F.3d 1317, 1335 (11th Cir. 2021) and the provision-of-food-as-speech cases of Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 910 F.3d 1235, 1240–41 (11th Cir. 2018) and Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1032 (9th Cir. 2006) (en banc). For broad elaboration of speech versus non-speech problems, see, for example, MARK TUSHNET ET AL., FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT (2017); R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010) (emphasizing the basic purposes or values justifying the scope and limits of the free speech clause, along with useful general rules, mid-level heuristics, and contextual sensitivity, etc.).

[34] *But see* Wright, *supra* note 33 (emphasizing alternative approaches, with an emphasis on the purposes or values animating the constitutional status, at any historical point, of freedom of speech).

[35] *See* DeGirolami, *Traditionalism Rising*, *supra* note 8.

In particular, one might seek to decide constitutional cases in general, or free speech cases specifically, in accordance with what one took to be the relevant purpose, or purposes, underlying the Constitution or the constitutional provision in question. Call this purposivism. By contrast, traditions, legal and otherwise, need not have any purpose. In some instances, the purpose or purposes of a provision might be reducible, without distortion or oversimplification, to matters of abstract principle. In the simplest case, one might argue that the Equal Protection Clause is about the principle of equality, in one context or another. Or that the Free Speech Clause is about the principle of liberty, again, in context.

But in many constitutional cases, the purposes that are thought to underlie the provision in question are not reducible to any single abstract principle, or to any set of such principles. Of course, the idea of an abstract principle could be stretched so that even the congressional power to coin money could be said to embody some abstract principle.[36] But the more natural account of that provision would instead be that the provision was somehow intended to, or does in fact serve, with whatever degree of success, one or more purposes. And not all purposes are reducible to matters of principle.

On this approach, the provision would be purposive, rather than principle-driven, or at least more the former than the latter. One might, controversially, think of the Constitution as a whole as more purposive than principled. We need not herein take sides on that particular question. But we can at least say, for example, that ordinary contracts, entered into by two or more parties, are typically less a matter of abstract principle, and more a matter of the purposes of the parties involved. And by the term 'purposes,' we may include the goals, points, aims, aspiration, or values of parties, apart from any abstract principle.

Ordinary life also exhibits voluntary conduct—think of a social get-together, for example—that is undertaken either for its own sake, with no real purpose, or less mysteriously, for one or more unarticulated purposes, such as sheer collegiality, comradeship, or fun. No abstract principle is necessary to explain or justify the social get-together.

On our approach, the Free Speech Clause in particular fits the purposive model. The clause was, is, or should be, somehow a matter of purpose, as distinct from either abstract principle or tradition. It is possible to say that the Free Speech Clause should, as a matter of abstract principle, or else of purpose, embody some tradition. But it is clearly possible to hold that the purposes of the Free Speech Clause are not exhausted by—and need not even include—any concern for any tradition.

What the purposes—as distinct from either abstract principles, or traditions—underlying the Free Speech Clause actually are, or should be, is a separate question, discussed elsewhere herein.[37] But whatever the purposes of the Free Speech Clause may be, a traditionalist critic might well request a justification for choosing those purposes rather than others. Justifying one's chosen purposes, in any context, is of obvious importance. Similarly, of course, choosing to be guided by tradition, however ultimately ennobling or embarrassing, also requires a justification. For our purposes herein, though, the question of the underlying

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[36] U.S. CONST. art. I, § 8.

[37] *See infra* note 89 and accompanying text.

justification for one set of purposes rather than another in the free speech context can, actually, be largely set aside.

It is certainly proper to critique any set of purposes thought to underlie the Free Speech Clause. But suppose we assume, presumably along with the constitutional traditionalist, that the Constitution, and the Free Speech Clause itself, are somehow sufficiently morally justified. It is then hard to see how no set of purposes, in adopting the Constitution, or in adjudicating free speech cases, could possibly be morally justifiable.[38] If, more prosaically, it is proper for someone to, say, make a dental appointment, it is then hard to see how there could be no proper purpose in doing so.

Identifying some satisfactory set of purposes underlying the Constitution, or the Free Speech Clause, may be more, or less, difficult than identifying some relevant constitutional tradition. The complications are almost endless. Merely for example, there may be traditions with counter-traditions, and conflicts within a tradition.[39] But we may, on the other hand, cling to a set of purposes thought to underlie the free speech clause even after the real cultural meaningfulness of those purposes has evaporated.[40] Some constitutional traditions are worthy, and others profoundly shameful. A purposive analysis, in contrast, has the potential to minimize elements of shamefulness. We can revise our official understanding of the purposes of a right or practice faster than we can revise any sustained underlying tradition. As soon as the Court recognizes the shamefulness of a purpose, it can abandon that purpose, and rely on other purposes. Traditions, in contrast, carry great momentum.

On this basis, we can begin to consider the case law on free speech and tradition.

II. THE SUPREME COURT ON SPEECH REGULATION TRADITIONS VERSUS THE LOGIC OF PURPOSE

The Supreme Court's devotion to tradition, and to traditional practice, in many free speech contexts, is conspicuous. Consider, as an initial example, the question of whether speech in public airport terminals should be regulated only in ways consistent with the regulation of speech in public parks, sidewalks, or streets.[41]

Given such a question, the Court might conceivably have focused on the relevant purposes, or uses, of the various sorts of public properties under consideration. Perhaps even a large airport terminal is, given its purpose or purposes, relevantly distinguishable from, say, a public sidewalk. And the Court has, indeed, taken the government's purpose, or intention, in operating airports into account.[42]

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[38] Both purposivists and traditionalists would have to make appropriate accountings of the risks and costs of their respective normative approaches.

[39] See classically, the free exercise, child-raising, and autonomy case of Wisconsin v. Yoder, 406 U.S. 205 (1972).

[40] *See* R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235 (2020).

[41] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

[42] *Id.* at 680–81.

But the Court's more fundamental concern has, instead, been that public airports are a relatively recent historical phenomenon.[43] Unlike public parks, sidewalks, or streets, airports have not, through long tradition,[44] or "immemorially . . . time out of mind,"[45] been purposed for expressive activity by the public.[46] Thus, "there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice,"[47] favors the airport speaker. In this public forum context, tradition, in more than one sense, undermines the constitutional claim of the would-be speaker.

Elsewhere, Justice Scalia emphasized the dual nature of the focus on tradition in many public forum doctrine cases.[48] In particular, per Justice Scalia, "the category of a 'traditional public forum' . . . must remain faithful to its name and derive its content from *tradition* . . . . [R]estrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot."[49]

Recourse to traditional practices in restricting speech is certainly not confined to public forum cases. Thus, for example, "anonymous pamphleteering is . . . an honorable *tradition* of advocacy and of dissent."[50] Much more broadly, the Court has recently and repeatedly focused on traditionality in determining the scope and limits of governmental authority to regulate speech.[51]

Thus, in the animal cruelty video case of *United States v. Stevens*[52] the Court declared that traditionally, and from the 1791 founding in particular,[53] free speech

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[43] *Id.* at 680.

[44] *See id.*

[45] *Id.* (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

[46] *See id.*

[47] *Id.* at 681.

[48] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment).

[49] *Id.*

[50] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1992) (emphasis added). This language is quoted in the anonymous public university student speech case of Just. For All v. Faulkner, 410 F.3d 760, 764 (5th Cir. 2005). In contrast, though, consider the assertion by Justice Thomas that the judicial requirement in libel cases that "public figures . . . establish actual malice bears 'no relation to the text, *history*, or structure of the Constitution.'" Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of cert.) (emphasis added) (quoting Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)). One problem is that the longer and more consistently the actual malice rule is cooperatively applied, the more clearly the actual malice rule becomes a constitutional tradition.

[51] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–69 (2010), *superseded by statute*, Preventing Animal Abuse and Torture Act, Pub. L. No. 116-72 133, Stat. 1151 (2019) (animal cruelty is not obscene for the purposes of unprotected speech); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) (nor are violent video games); United States v. Alvarez, 567 U.S. 709, 717–18, 722, 723 (2012) (nor are false statements); City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464, 1469 (2022) (sign regulations are not automatically content based); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022) (private flags on city flagpoles are not government speech). *See also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (free speech case in which the Court addressed historic and traditional practices as the crucial element of an Establishment Clause inquiry).

[52] 559 U.S. at 468.

[53] *Id.*

law has permitted content-based restrictions of speech in only a few traditionally-recognized,[54] limited contexts and categories, including obscenity, defamation, fraud, incitement to violence, child pornography, speech that is inseparable from criminal activity, and 'fighting words.'[55] The Court in *Stevens* found no similar traditional exception for speech that depicts cruelty to animals.[56] The Court rejected an alternative approach in the form of a very broad categorical balancing of speech benefits and harms.[57] But no further inquiry into any set of purposes, or aims, that might animate free speech protection and its limits was undertaken.[58]

The Court in *Stevens* did consider that there might be other categories of speech, beyond those recognized above, that have historically been unprotected from regulation,[59] but not yet formally or explicitly recognized as unprotected.[60] But in any event, the speech category of depicting animal cruelty was said not to constitute any such traditionally unprotected category.[61] And the cases after *Stevens* have reinforced the approach to speech regulation adopted therein.[62]

The Court's focus on traditions of regulation raises the controversial question of a one-way ratchet in the free speech cases. Let us simply assume that a category of speech cannot be regulated unless there is a sustained tradition of doing so. Let us also assume that the particular category of speech in cases such as *Stevens*,[63] *Brown*,[64] and *Alvarez*[65] has not traditionally been thus regulated. Thus, speech within all such categories cannot be regulated on the basis of its content, perhaps apart from some overriding moral principle or some moral emergency.

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54 *Id.* (quoting R.A.V. v. St. Paul, 505 U. S. 377, 382–83 (1992)).

55 *Id.* at 468–69, 471. The *Alvarez* case added the unprotected category of "true threats." 567 U.S. at 717.

56 *Stevens*, 559 U.S. at 469. Correspondingly, in *Brown*, the Court declared that "California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none." 564 U.S. at 795. Voluntary, if uniform, movie theater rating systems, including depictions of violence, presumably did not count as a social or legal tradition of the relevant sort, however longstanding or consistent.

57 *Stevens*, 559 U.S. at 470–71.

58 *Id.* at 472.

59 *Id.*

60 *Id.*; *e.g.*, *Brown*, 564 U.S. at 792; *Alvarez*, 567 U.S. at 722.

61 *Stevens*, 559 U.S. at 472.

62 *See supra* note 51. Even the cases that do not explicitly require a broad traditional speech regulatory practice emphasize the role of tradition in context. *E.g.*, *City of Austin*, 142 S. Ct. at 1469 ("American jurisdictions have regulated outdoor advertisements for well over a century."); Shurtleff v. City of Boston, 142 S. Ct. 1583,1589–90 (2022) (in distinguishing between government speech and private party speech in a public forum, "the history of the expression at issue" is one of three considerations). For further discussion, see, for example, Girgis, *supra* note 27, at 1512–18; Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 906 (1993); Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical Free Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1346 (2015); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023).

63 559 U.S. at 468–69.

64 564 U.S. at 791.

65 567 U.S. at 717–18, 721, 723.

This would mean, most crucially, that no court could ever ask, of any traditionally unregulated category of speech, whether that category, or general kind, of speech ever promotes, to any degree, any one or more of the purposes, goals, or interests thought by anyone to underlie the constitutional protection of speech in general. Or whether a category of speech once had some positive relation to some set of free speech purposes, but no longer does. Or whether the particular category of speech actually undermines those purposes, or impairs the speech of others, without violating any overriding moral principle. Questions of purpose-fulfilment or nonfulfillment, in the absence of any overriding moral principle, are thus deemed irrelevant.

But the other side of the one-way ratchet question has to do with the openness of any tradition-oriented speech analysis with respect to well-established, perhaps even exceptionlessly invoked traditions of speech restriction of any given sort. We know that in general, traditionally unregulated speech categories should not be subject, now, to content-based restrictions. But how much, if at all, should a traditionalist respect, or defer to, a strong tradition of legal restrictions on a category of speech? Wouldn't it be awkward for the traditionalist to recur to any possible purposes for protecting speech only in that context, and not elsewhere?

Think, for example, of the well-established tradition of allowing severe restrictions on speech that is thought to amount to subversive advocacy. Such cases might include, classically, *Schenck v. United States*,[66] *Frohwerk v. United States*,[67] *Debs v. United States*,[68] *Abrams v. United States*,[69] *Gitlow v. New York*,[70] *Whitney v. California*,[71] and *Dennis v. United States*.[72] One might deny that this line of cases amounts to, or recognizes, a tradition of restricting subversive advocacy. But the price of that denial would be one of increased murkiness as to how we are to recognize a tradition in the first place.

In any event, as of 1969, in *Brandenburg v. Ohio*,[73] the Court was willing to set an apparent speech-restrictive tradition aside in the subversive advocacy context.[74] Was there, in 1969, a well-established constitutional tradition of treating speech-restrictive traditions less deferentially than speech-protective traditions in the subversive advocacy cases? This seems unlikely.

Perhaps one could instead try to argue that the one-way ratchet tradition operated at a much more general level, such that liberty-restrictive traditions were more suspect than no better-established liberty-protective restrictions. But this response would, again, re-open the problem of how, and at what level of generality, traditions are to be envisioned.

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66 249 U.S. 47 (1919).

67 249 U.S. 204 (1919).

68 249 U.S. 211 (1919).

69 250 U.S. 616 (1919).

70 268 U.S. 652 (1925).

71 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

72 341 U.S. 494 (1951).

73 395 U.S. 444 (1969).

74 *Id.* at 449.

Or one might say instead that by 1969, courts had identified some overridingly important moral principles bearing upon subversive advocacy in particular that we had not recognized until then. But it is unclear just what overriding moral principle was recognized in *Brandenburg* in 1969 that was not already articulated in, merely for example, Justice Brandeis's stirring concurrence in *Whitney*.[75] One might much more justifiably claim that Justice Brandeis's *Whitney* opinion focuses, rather, on the logic of the crucial purposes, or values, underlying freedom of speech itself.[76]

In fact, one might argue that to the extent that the Court in free speech cases refers to tradition, the logic and justification for doing so inevitably points to the acknowledged or unacknowledged purposes that freedom of speech might be thought to serve. For example, the Court in *McIntyre* focused on the vitality of the tradition of anonymous pamphleteering,[77] or anonymous election-related speech.[78] But the Court in this instance recognized that the value of such a free speech tradition is not fundamental, or independent of more basic animating and motivating considerations. The underlying value of a free speech tradition is, in the main, one of purpose-fulfillment.[79]

In particular, the anonymous pamphleteering tradition "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[80] Much more generally, "it is surely fantastic to cut moral rules adrift from purposes . . . ."[81] All the more is this true of clearly purposive social institutions such as; social contracts,[82] the Constit-

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[75] 274 U.S. at 372–80 (Brandeis J., concurring).

[76] *See id.*

[77] McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 357 (1995).

[78] *Id.*

[79] *Id.* While traditions need not have purposes, they may well have functions, including latent functions.

[80] *Id. See, e.g.*, Nathan W. Kellum, *If It Looks Like a Duck . . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 24 (2005) ("[t]radition itself offers no reason and fails to recognize the reality that those in the past maintained a rationale for allowing speech in certain areas and not in others"). For an influential discussion of tolerance as a fundamental value, and of the inculcation of tolerance as a First Amendment purpose and practice, see LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

[81] H.J.N. Horsburgh, *Purpose and Authority in Morals*, 31 PHIL. 309, 310 (1956).

[82] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 124 (C.B. MacPherson ed., Hackett Publ'g. Co. 1980) (1690) ("The great and chief end . . . of men's . . . putting themselves under government, is the preservation of their property [including their lives, liberties, and estates, *id.* at § 123]); *id.* §§ 95, 222.

ution in general,[83] constitutional rights and the Bill of Rights,[84] and the First Amendment and freedom of speech.[85]

It has been thoughtfully observed in particular that the essence of the defense of freedom of speech is not a "nostalgic regard"[86] for esteemed free speech practices, but a sensitivity to past, current, and future constitutional value.[87] The descriptive and normative questions of the most crucial purposes underlying freedom of speech have clearly attracted substantial attention among scholars.[88] There is something of a consensus as to the most commonly cited purposes of protecting freedom of speech. Something like the optimal social pursuit of truth; the effective functioning of meaningfully democratic self-government; and the value of self-realization or self-fulfillment are most typically cited.[89] Admittedly, some prominent theorists focus on, or even deny the relevance of, one or more such possible purposes.[90] And the consensually prominent such purposes may well lose their cultural meaningfulness over time.[91]

So, on this basis, one might conclude that there is a workable consensus on the basic reasons that are, or should be, recognized as justifying constitutional protection of speech. But it is certainly possible to deny that there is any sufficient consensus on the purposes underlying freedom of speech.[92] Perhaps one could

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[83] *See, e.g.*, U.S. CONST., Preamble; THE FEDERALIST NO. 45 (Alexander Hamilton, James Madison, and John Jay) (Terence Ball ed., 2003) (on the constitutional purpose of promoting the public happiness); *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts'") (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

[84] For cases explaining the purpose of the Bill of Rights, see Fulton v. Phila., 141 S. Ct. 1868, 1917 (2021); McCreary Cnty. v. ACLU, 545 U.S. 844, 884 (2005); Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring), *superseded in statute*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796; *Barnette*, 319 U.S. at 638 (referring expressly to "[t]he very purpose of a Bill of Rights").

[85] *See infra* note 88 and accompanying text.

[86] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988).

[87] *See id.* The volume's editor, the son of Harry Kalven, Jr., reported that the relevant tradition, in the author's mind, resided "not in one or another set of contending views, but in the controversy itself."

[88] *See*, classically, GERTRUDE HIMMELFARB, ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL (Random House, 1974) (1859). For documentation, defense, and critique of the most prominently cited such purposes, see THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–54 (1982); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687 (2016); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015 (2015).

[89] See the sources cited *supra* note 88. Of course, purposes may be more or less complex. *See* John Laird, *"It All Depends Upon the Purpose . . ."*, 1 ANALYSIS 49, 49 (1934). And our purposes certainly may evolve over time. *See* Morris Ginsberg, *The Category of Purpose in Social Science*, 23 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 245, 246 (1923).

[90] *See* KALVEN JR., *supra* note 86.

[91] *See* Wright, *supra* note 40.

[92] Certainly, a critic might work through the rationales cited in Greenawalt, *supra* note 88, denying or minimizing one or more, and endorsing one or more others.

then say that we have no cultural agreement on the most fundamental purposes of constitutionally protecting speech.

And if so, one might then conclude that in this respect, if not elsewhere, the free speech purposivist is no better off than the free speech traditionalist. That is, the determinacy of any recourse to the presumed basic purposes underlying free speech protection is no greater than the determinacy in identifying and applying tradition. Perhaps judicial inquiries into speech traditions are indeed typically doubtful. But is this any worse than seeking a consensus on basic free speech purposes that may well not exist?

Actually, yes. A traditionalist approach to free speech needs a consensus on the most relevant tradition, or traditions, more than a free speech purposivist approach needs a consensus on underlying free speech purposes. Traditionalist and purposivist approaches are not roughly parallel in this respect.

Crucially, the traditionalist must, on the traditionalist's own understanding, somehow find, or discover, and characterize the most relevant historic traditions. Such traditions are thus to be identified or recognized by, and not generated by, the court. The court's own independent normative preferences as to good and bad traditions do not, at this stage, enter into detecting and characterizing the most relevant traditions. To the degree that a court's own normative preferences dictate, or even inform, the process of identifying the most relevant traditions, the court is not employing traditionalism.

In contrast, a free speech purposivist court may, but, crucially, need not feel at all analogously bound to seek out, successfully or not, any consensus on underlying free speech purposes. There is nothing logically illegitimate in a free-speech purposivist court's embracing any sufficiently plausible understanding of such purposes, with or without any traditional or contemporary descriptive or normative consensual support.

Suppose that a court simply invented, out of whole cloth, and in the current year, the notion that freedom of speech is necessary for meaningful democracy. The court could certainly do so, consistent with purposivism, even in the absence of any supportive consensus. If other courts disagree, they may all offer their own alternative free speech purposive-interpretive jurisprudential products in the marketplace of ideas.[93] The legitimacy of such an approach could be preserved if the court in question could reasonably said to be responsibly interpreting and promoting the constitutional free speech text.

As it happens, though, the typically cited free speech purposes, however they might be ranked, tend with remarkable consistency to support, or at least not materially contradict, one another in practice. Where the courts find, say, the pursuit of truth, they also tend to find, if only minimally, the value of democracy, and of self-realization,[94] where any such purposes are relevant.

In contrast, the recent traditionalist constitutional cases, including the abortion case of *Dobbs*,[95] the gun permitting case of *Bruen*,[96] the sign regulation

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[93] *See* Abrams v. United States, 250 U.S. 616, 624, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

[94] See the authorities cited *supra* note 88.

[95] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[96] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

case of *City of Austin*,[97] and the Establishment Clause public meeting invocation case of *Town of Greece v. Galloway*,[98] among other cases, amount largely to a battle of conflicting, and unreconciled, accounts of the most relevant traditions. There is a greater sense of diametric opposition, and of basic incompatibilities, among the purported traditions than one ordinarily finds in the typically more mutually compatible, if not mutually supportive, purposive free-speech cases.[99]

The complication is that often the same or some alternative free speech-related traditions, as well as commonly cited free speech purposes, can actually be found on both the speaker's side, as well as the regulating government's side, of the free-speech case.[100] Such complications would thus seem to afflict both traditionalist and purposive approaches to the free-speech cases.

Finally, though, judicial inquiry into the nature and limits of traditions across decades, if not centuries, can pose formidable research problems, naturally calling upon the expertise of typically divided specialists.[101] It is not clear that lower federal courts, or state courts, can realistically draw on sufficient dispassionate professional expertise. But no comparable problems arise for any purpose-oriented court. There is, again, certainly ongoing professional debate over the purposes underlying freedom of speech.[102] But any court, at any level, can get a sufficient sense of the commonly cited such purposes, and apply the most plausible such purposes, in an afternoon of ordinary, open-access research.[103]

III. FREE SPEECH TRADITIONS IN CONTEXT: THE UNIVERSITY CAMPUS PUBLIC FORUM DOCTRINE CASES

The idea of tradition strikingly presents itself at several points in the campus public forum doctrine cases. Most obviously, courts may have to decide whether the campus space in question should count as a 'traditional' public forum[104] or instead as some other type of forum for speech purposes.[105] Also, judicially determining the type of forum at issue may turn on how the university has traditionally treated the space in question.[106] Courts may then look, as well,

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97 City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464 (2022).

98 572 U.S. 565 (2014).

99 It is worth bearing in mind that even very different and conflicting traditions may, within limits, be fairly compared and evaluated. *See* ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY 145–46 (1990).

100 For discussion, see R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335 (2001). The extent to which any designated free speech purposes actually appear on both sides of the free speech case will inevitably vary.

101 *See*, classically, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

102 *See supra* notes 88–89, and accompanying text.

103 A Google search for references to Greenawalt, *supra* note 88, for example, would typically suffice.

104 *See, e.g.*, Keister v. Bell, 29 F.4th 1239, 1251–52 (11th Cir. 2022).

105 *Id.* at 1252.

106 *Id.* But it is also held that a traditional public forum, in the form of a public street or sidewalk, can be briefly transformed into a limited public forum by a new and specific government intent. *See, e.g.*, Sessler v. City of Davenport, 640 F. Supp. 3d 841, 857 (S.D. Iowa Nov. 10, 2022) (citing Powell v. Noble, 798 F.3d 690, 700 (8th Cir. 2015)).

to long-established traditional legal tests, or else to untraditional legal tests, in addressing the campus public forum doctrine cases.[107] Finally, courts must bear in mind that a legal test that has traditionally been applied need not itself focus on tradition, as distinct from, say, contemporary interest balancing. And a new or non-traditional test, conversely, may focus substantively on the value of tradition.[108]

Among the most recent, intriguing, and illuminating of the public university campus public forum doctrine cases is the Eleventh Circuit case of *Keister v. Bell*.[109] The *Keister* case raises each of the potential roles for tradition noted above.[110] *Keister* thus seeks to distinguish a 'traditional' public forum from, respectively, "the designated public forum, the limited public forum, and the non-public forum."[111] In particular, the *Keister* court sees the forum classification question as whether a particular sidewalk within or adjacent to the public university campus is "a traditional public forum or [a] limited public forum."[112]

Tradition may then play a role in determining whether the public space, in this case a particular sidewalk, should be classified as either a traditional or as a limited public forum.[113] Specifically, "[a]ssessing the type of forum of a particular piece of government property may be requires us to consider "the traditional uses made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics."[114]

One might suppose that the traditional uses made of the particular space in question would reflect, at least generally, the purposes of the government owning and controlling that space. But these two considerations are treated

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107 *See Keister*, 29 F.4th at 1251.

108 Thus, one might argue that the Supreme Court's recently adopted tests emphasizing the role of tradition were not themselves traditional, and not continuous with the Court's prior approaches to adjudicating such cases. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–47 (2022) (tradition of abortion regulation as a crucial constitutional focus); New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–33 (2022) (emphasizing history and traditions of regulation rather than levels of scrutiny, means-end analysis, or balancing tests); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2248 (2022) (emphasizing history and tradition at the expense of a more analytical focus on the purposes or effects of government practices that bear upon religious freedom); City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464, 1474–75 (2022) (emphasizing tradition regarding local governmental regulation of various sorts of signs near public highways). In contrast, the by now well-established, traditional test for subversive advocacy refers not to history and tradition, but to several contemporaneous circumstances. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam). For background on the distinction between a test being traditionally applied and the non-traditional substance of that test, see Edward Shils, *Tradition*, 13 COMPAR. STUD. SOC'Y & HIST. 122, 133–34 (1971).

109 29 F.4th at 1239.

110 *See supra* notes 104–109 and accompanying text.

111 *Keister*, 29 F.4th at 1251. The number of categories and subcategories, terminology, and distinctions among fora have been chronically muddled and indeterminate. *See, e.g.*, Turning Point USA at Ark. State Univ. v. Rhodes, 973 F.3d 868, 876 (8th Cir. 2020) (referring explicitly to a "limited designated public forum").

112 *Keister*, 29 F.4th at 1252.

113 *Id.* at 1251. For a critical treatment of the jurisprudence of a limited public forum, see Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009).

114 *Keister*, 29 F.4th at 1251 (quoting Bloedorn v. Grube, 631 F.3d 1218, 1233 (11th Cir. 2011)).

differently by the case law.[115] Herein, our concern is to analytically separate the idea of tradition from any other possible underlying justification in deciding public forum cases, and all other sorts of free speech cases.

Keister refers to the category of the traditional public forum as encompassing "fully"[116] municipal streets, parks, and sidewalks.[117] Traditional public fora have been held "immemorially,"[118] or "time out of mind,"[119] for use by the general public in speaking, among other activities.[120] Restrictions on speech in a traditional public forum are disfavored to one degree or another.[121]

Somewhat misleadingly, the Court in *Keister* then declares that "[w]hen we evaluate a government regulation on speech in a traditional public forum, we apply strict scrutiny."[122] More accurately, courts typically apply strict scrutiny only to content-based restrictions of speech in traditional public fora.[123]

Keister conceives of a mid-level scrutiny test in such cases, as requiring, in contrast, a "significant"[124] governmental interest, narrow tailoring of the restriction to serve that significant interest,[125] and, as well, the further condition that the speech restriction "leave[s] open ample alternative channels of communication."[126] Any difference between the degrees of narrow tailoring required by strict scrutiny and by mid-level scrutiny is therein left judicially unclarified.[127]

Among the contrasts to traditional public fora, and the type that turns out to be of distinctive interest to the court in *Keister*, is the "limited public forum."[128] A limited public forum, as its name implies, is not open to discussion of any and

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115 *See id.*

116 *Id.* at 1252. The qualifier of being 'fully' public evidently plays a role in the court's disposition of the case.

117 *Id.* at 1252–53. Noting that in certain situations, those typically traditional places can be deemed limited as was in this case.

118 *Id.* (quoting Walker v. Tex. Div. Sons of Confederate Veterans, Inc., 576 U.S. 200, 215 (2015)).

119 *Id.*

120 *Id.*

121 *See id.*

122 *Id.* (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983)).

123 Thus "[a] content-based restriction on speech within a traditional public forum must be necessary to serve a compelling government interest and be narrowly drawn to achieve that interest." Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) (citing *Perry*, 460 U.S. at 425.) *Keister* itself recognizes a form of mid-level scrutiny as appropriate for content-neutral restrictions in traditional public fora. *See id.* For background, see R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

124 *See Keister*, 29 F.4th at 1252.

125 *See id.*

126 *Id.* (quoting Bloedorn v. Grube, 631 F.3d 1218, 1233 (11th Cir. 2011); Students for Life USA v. Waldorf, 162 F. Supp. 3d 1216, 1222 (S.D. Ala. 2016). The real need for narrow tailoring, if ample alternative speech channels are indeed left available for the regulated speaker, is left undiscussed. For background, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

127 *See* Wright, *supra* note 126; Wright, *supra* note 123.

128 29 F.4th at 1252.

all subjects or by any and all possible speakers.[129] Instead, a limited public forum is available to either a defined class of speakers such as university students, or for discussion by anyone of some more or less officially pre-defined topic—university events and policies, perhaps.[130]

Assuming that a court can accurately determine the scope of the limited public forum in question, *Keister* then declares the test for speech restrictions that are thought to fall within that scope is modest. Specifically, restrictions of speech within the scope of the limited forum must only be "reasonable" and "viewpoint neutral."[131] Thus both content-neutral and content-based restrictions within the limited forum are permissible, apparently without regard to tailoring, or alternative available speech channels, if the speech restriction is reasonable and not based on any relevant viewpoint.[132]

What this means, doctrinally, is that the modest constitutional test for restrictions on speech in limited public fora should be the same as that for speech in what are called non-public fora, or non-forums.[133] The same degree, or rigor, of speech protection thus applies to many public sidewalks on a state university campus as would be applied in the case of groups seeking to demonstrate in the White House War Room, a meeting room of the National Security Agency, or a corridor between offices of the CIA. No doubt what counts as a 'reasonable' restriction in all such cases may vary. But it is hardly clear that the same free speech test should be applied both to all limited fora and to non-public fora.

Regardless, though, the crucial point is that in this and other contexts, "the traditional uses made of the property,"[134] along with any other reference to tradition, lead either to dubious legal conclusions or to no meaningfully determinate outcomes at all.

It is possible that a public university may have a long and consistently sustained intention with regard to how a particular limited forum, such as a public street, within or adjacent to the campus, is to be used and by whom, with regard to speech. In any such case, the university intention may come to be known, or inferred, through its own developing practices in regulating speech or in a developing tradition of regulating speech in the space in question.

But even in such cases, tradition serves mostly as a marker, whether accurate or not, of a supposedly consistent intention on the part of the university. We can, however, understand intention only by reference to one or more purposes

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129 *Id.*

130 *Id.* (citing Barret v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1224 (11th Cir. 2017); *Bloedorn*, 631 F.3d at 1231.

131 *Keister*, 29 F.4th at 1252 (citing *Bloedorn*, 631 F.3d at 1232). *Bloedorn* in turn cites Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Restrictions based on viewpoint are at least strongly disfavored, if not absolutely prohibited, in any type of forum. *See, e.g.*, Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1178 (9th Cir. 2022).

132 For discussion, see, for example, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678–80 (1998); *Cornelius*, 473 U.S. at 809–10; Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45–46; Bourgault v. Yudof, 316 F. Supp. 2d 411, 420 (N.D. Tex. 2004) (making no reference to alternative speech channels).

133 See Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 216 (2015), the authorities cited *supra* notes 131–132, and *Keister*, 29 F.4th at 1251.

134 *Keister*, 29 F.4th at 1251.

or goals that the university assumedly seeks to further through its speech policy. A tradition in this context is thus, at best, an indicator, more or less accurate, of an assumed university intention or purpose in regulating speech in the space in question.

Typically, there will be many public streets and sidewalks on or adjacent to a public university campus for which a tradition is either non-existent, mixed, uselessly unclear, or unrecognized, and thus realistically, hardly a tradition at all.[135] No doubt traditions can emerge without clear starting points,[136] and can, at least within limits, evolve over time.[137] But realistically, a court may have no, few, or apparently random, data points with regard to campus policy as to a particular forum. In such cases, either no relevant tradition exists, or the tradition is at best unclear or contested.

Even if we might, in some cases, wish to say that a tradition regarding the use of a particular campus speech forum has somehow crystallized, and that a court can, through inductive reasoning, determine the scope of that speech tradition, we would even then have made little progress. The courts have been clear that limited-purpose fora, as well as designated public fora, cannot be created by tradition, or by a number of instances, in the absence of the government's intention precisely to create a designated or limited-purpose forum.[138] Such fora cannot be created by government inadvertence, inattention, or neglect of an emerging speech-use pattern.[139] Intention on the part of the government with regard to the scope and limits of the forum is required. And ultimately, intention can be intelligible only in light of purposes or goals.

Public universities, in particular, are purposive institutions.[140] They have purposes, whether such purposes are universal, more or less widely shared with other universities, controversial, contested, evolving, or multiple.[141] Hierarchies, and priorities, among public university purposes may be difficult to identify.[142] But clearly, public universities in general, and each public university in particular, seek, however effectively or ineffectively, to pursue some set of basic purposes, values, goals, or missions.[143] Because of this, intention on the part of the

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[135] *See* Shils, *supra* note 108, 126, 145. Interestingly, Shils considers law schools to be among "those institutions . . . established to maintain and stabilize traditional beliefs on the basis of the study of sacred texts." *Id.* at 154.

[136] Consider that while public school student recitation of one version or another of the Pledge of Allegiance may have been statutorily adopted, that practice's status as a tradition might pre-date or post-date any such formal adoption.

[137] *See, e.g.*, Shils, *supra* note 108, at 151–52.

[138] Note the discussion of governmental intent to create a designated, as well as a limited, public forum in *Walker*, 576 U.S. at 215–16 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[139] See the authorities cited *supra* note 138.

[140] *Keister*, 29 F.4th at 1252 (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).

[141] For discussion, see R. George Wright, *Campus Speech and the Functions of the University*, 43 J. COLL. & U. L. 1 (2017).

[142] For discussion, see R. George Wright, *University Missions and Legal Limitations on Campus Speech*, 52 J.L. & EDUC. 222 (2023).

[143] *Keister*, 29 F.4th at 1252; Wright, *supra* note 141.

government with regard to the scope and limits of the forum is required. And ultimately, intention can be intelligible only in light of purposes or goals.

Uncontroversially, public university purposes are generally incomparable with setting aside all of its spaces, physical and cyber, for speech by anyone, on any topic, within the bounds of criminal and civil law more generally. A public university's purposes are not as open-ended as those of, say, a public auditorium or a civic meeting hall. A public university's policies and intentions,[144] however effectively or ineffectively pursuing university purposes, will inevitably result in distinctions among free and open public fora, designated fora, limited public fora, and non-public campus fora.[145]

The university's relevant purposes may vary in particular with respect to whether a particular space is thought to be at the "heart"[146] or core of the campus, or within a distinctive campus enclave,[147] or instead at the periphery or boundary of the campus and non-campus public territory.[148] Or there may be a university policy intent to reserve, even at the heart of the campus, a wall or a board for more or less uninhibited speech.[149]

In the *Keister* case, the Eleventh Circuit concluded that the relevant sidewalk was "unambiguously within campus,"[150] and that the university had no intent "to open the [sidewalk in question] up to unchecked expressive activity by the public at large."[151] On this basis, the sidewalk in question, as distinct from barely off-campus sidewalks,[152] was deemed to be only a limited public forum,[153] and thus subject to reasonable regulation not based on viewpoint.[154]

It is certainly possible to object to *Keister* not on the grounds that it pays too much attention to tradition, in one sense or context or another, but that it pays too little attention to tradition. Consider the Supreme Court's declaration, with respect to spaces near its own building: "[t]raditional public forum property occupies a special position in terms of First Amendment protection and will not

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144 *Keister*, 29 F.4th at 1248.

145 *Id.* at 1251.

146 *Id.* at 1254.

147 *Id.* at 1249, 1254.

148 *Id.* at 1253, 1255 (referring to places on the perimeter of, or abutting, the government property in question).

149 *See, e.g.*, *Freedom Wall*, CMTY. PEPP. UNIV., https://community.pepperdine.edu/seaver/studentactivities/sga/freedom-wall.htm [https://perma.cc/YQ79-NEY2] (last visited Apr. 1, 2023), for an example of a specifically constructed "free speech" board or wall policy adopted by the private Pepperdine University.

150 29 F.4th at 1256.

151 *Id.* at 1255. In contrast, a public university might also decide, in light of how it understood its own purposes or institutional mission, to more broadly extend free speech protection in campus spaces. *See, e.g.*, Just. For All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005). A purposive state statute may require a similar result. *See* Hershey v. Curators of Univ. of Mo., No. 2:20-CV-04239-MDH, 2022 WL 1105743 (W.D. Mo. Apr. 13, 2022).

152 *Keister*, 29 F.4th at 1256.

153 *Id.* at 1256–57. *But see* McGlone v. Bell, 681 F.3d 718, 732 (6th Cir. 2012) (campus perimeter sidewalks as traditional public fora, with other campus open areas being classified as designated public fora).

154 *See Keister*, 29 F.4th at 1257; *accord* Gilles v. Garland, 281 F. App'x 501, 511 (6th Cir. 2008) (unpublished opinion).

lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression."[155]

Thus traditional use of a traditional public forum should, on such a view, count for more than just one consideration among others.[156] A distinctive focus on First Amendment tradition, more broadly, is taken up in Keister's own petition for a writ of certiorari.[157] That petition poses the crucial issue in these terms: "[w]hether the status of a public sidewalk as a protected traditional public forum should be determined by the text, history, and tradition of the First Amendment rather than by an indeterminate multi-factor balancing test."[158]

Presumably, the objection here is actually to any test, whether multi-factor, or interest-balancing, or not, that does not focus on the First Amendment's text, history, and tradition. While a focus on the university's purposes or mission would not necessarily involve a multi-part balancing test, any such consideration of university purpose, apart from tradition, would still be thought irrelevant for free speech purposes.[159] A court might choose to emphasize traditional elements of a university's basic purposes. But the best reason to do so is not that the university's purpose is historic or traditional, but that the university's purpose is instead appropriate, socially worthy, or otherwise legitimate. Thinking about the university's traditions may or may not contribute to that later inquiry.[160]

Thus, the distinction between First Amendment history or tradition and a multi-factor balancing test in the campus public forum cases hardly exhausts the range of defensible approaches to campus forum cases. Public fora that are left undefined cannot possibly embody any specific campus speech tradition. The constitutional weight of any broader free speech tradition a court may choose to embrace should crucially reflect the broad purposes underlying free speech protection in general.[161]

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155 United States v. Grace, 461 U.S. 171, 180 (1983). For discussion of *Grace*, see Brister v. Faulkner, 214 F.3d 675, 681–82 (5th Cir. 2000).

156 As in Bloedorn v. Grube, 631 F.3d 1218, 1233 (11th Cir. 2011) on which *Keister* relies, ("[W]e look to the traditional use made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics.").

157 *See* Petition for Writ of Certiorari, *Keister*, 29 F.4th 1239 (No. 22-388), *cert. denied*, 2022 WL 14813879.

158 *Id.* at *i.

159 *See id.* at *15 ("[T]he Eleventh Circuit irrelevantly emphasized the 'educational mission' of [the university] and its adjacent buildings.").

160 Often, the real contours, scope, and boundaries of a limited public forum remain underdeveloped, and unclarified, over time. In such cases, there may be no objectively ascertainable campus tradition that would be of any use in deciding the case. And there may well be cases in which a public university seeks to abolish, or clarify the scope of, a vaguely defined limited forum solely to exclude an undesirable speaker or an undesirable topic. *See, e.g.*, Krasno v. Mnookin, 638 F. Supp. 3d 954, 963–66 (W.D. Wis. 2022). Merely opportunistic attempts to crystallize forum policy, after the fact, are unlikely to reflect either any distinctively relevant campus tradition or the fundamental purposes of either the university or of the First Amendment. Perhaps the most authoritative case in this context is Koala v. Khosa, 931 F.3d 887, 903 (9th Cir. 2019) ("If the government could define the contours of a limited public forum one way at its [sic] inception, then redefine its scope [or abolish the forum] in response to speech it disfavors, the government would be free to zero-in and selectively silence any voice or perspective.").

161 Including, typically, the pursuit of truth, democracy, and self-realization.

The campus public forum case law thus cannot be convincing if it ignores the most basic purposes of the university as a social institution.[162] A public university is inescapably and fundamentally a purposive institution. Put negatively, "a university's function is not to provide a forum for all persons to talk about all topics at all times."[163] More positively, and very generally indeed, we might say that a public university's most basic purpose, however it may be further elaborated, is "education and the search for knowledge."[164] The university's basic purposes, along with the purposes of freedom of speech itself, should be decisive in the campus public forum cases.[165] Campus practices, whether fleeting, or well-established and traditional, may in some cases create reliance interests.[166] But even if they are traditional, campus practices themselves cannot be constitutionally decisive.

CONCLUSION

All else equal, then, we seem to be better off with a purposive, as distinct from a traditionalist, approach to the scope and limits of freedom of speech. Setting aside all the other problems we have seen with traditionalism, this is the bare minimum concern: our free speech traditions may indeed embody greater wisdom than we can grasp and articulate. But it is also possible that our established free speech traditions, even insofar as they do not violate any overridingly important moral principle, are in need of critique and reform in many respects, in light of our most fundamental values. Even if courts can consistently pick out and articulate the most relevant free speech traditions at stake in a given case, we must then further ask whether those traditions reflect our most basic values, as constrained by the constitutional text. In contrast, our purposes in protecting freedom of speech may well reflect our best considered judgments, again, as constrained by the text, as to why speech should, ultimately, be protected or not. At the very least, then, free speech purposivism, unlike free speech traditionalism, steers our attention directly and immediately to what most essentially matters.

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162 At some level of specificity, the purposes underlying public universities vary, and are typically thought to be multiple. For background, see Wright, *supra* note 141.

163 Bowman v. White, 444 F.3d 967, 978 (8th Cir. 2006).

164 *Id. See* ACLU v. Mote, 423 F.3d 438, 445 (4th Cir. 2005) ("[T]he purpose of the University is the education of the students."); Spears v. Arizona Bd. of Regents, 372 F. Supp. 3d 893, 911 (D. Ariz. 2019) (referring to "an institute of higher learning that is devoted to its mission of public education."); Gilles v. Blanchard, 477 F.3d 466, 470 (7th Cir. 2007) (referring generally to a public university's "educational mission").

165 Professor Robert C. Post has observed that "universities are not Hyde Parks. . . . [T]hey can support student-invited speakers *only* because it serves university purposes to do so. And these purposes must involve the purpose of education." Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests [https://perma.cc/WNY3-3AHR].

166 Imagine a student group that has bought, at its own expense, an expensive structure for display, temporarily or permanently, on a campus space it was clearly led to believe would be available for such speech.