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Incentivizing Civic Engagement at Public and Private Universities: Tax Exemptions, Laws, and Critical Dialogues

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Abstract: What are the differences in how public and private institutions of higher education, with religious schools as a subset of private colleges and universities, approach on-campus protests in a framework of civic engagement? Unfortunately, public, private, and religious schools have all restricted opportunities of speech, assembly, and protest, despite in many cases state and federal courts ruling that this is against the law. With the goal of increasing the civic capacities of students at all institutions of higher education, we propose a mechanism of partial revocation of tax exemptions at universities that do not currently uphold a robust understanding of civic engagement opportunities for all students, which will apply to any college or university receiving federal funding, consistent with the constitutional tradition of free speech still exemplified by Brandenburg v. Ohio and the "national policy" test of *Bob Jones University* vs. *United States*. In doing so, we build on the critique of exemptions in the recent work of Vincent Phillip Munoz on religious liberty. By opting only for incentives and by not even incentivizing private institutions that continue to restrict civic engagement but that do not accept federal dollars, we affirm and support a mutually beneficial ongoing dialogue among public, private, and religious schools. This dialogue, as it is sharpened and maintained in place by our recommended policies, is also consistent with pluralism as conceptualized by Jacob Levy.

Keywords: freedom of speech; law; civic engagement; freedom of assembly; student activism; equity; justice

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1. Introduction

The attacks on Israel that took place on 7 October were traumatic in unspeakable ways for the victims, related family members, and involved parties in Israel and in the US and also, more broadly, for people attempting to respectfully discuss, in different contexts, the way forward in the Middle East. One population especially affected by the latter concern is university students, all the more so now as student protests of the war in Gaza spread across the nation and different administrations, police departments, and local, state, and national public officials respond in varying ways. In addition to condemning the horrific attacks on human life and dignity, we ask the following: what is the place of respectful dialogue related to Middle Eastern policy, in some cases expressing policy disagreements, on a college campus? Today, those who live and work at institutions of higher education recognize that this is a difficult and fraught question.

Indeed, it points to a broader concern: what is the state of *speech, expression, and assembly freedoms*, extending to peaceful civic unrest, at colleges and universities across the country? Americans are protected by constitutional guarantees in these areas, and both speech and assembly are integral to civic engagement that effects change. One might therefore expect universities to play a maximally supportive role: what is more basic than the right to protest? As it turns out, however, despite a diversity of policies across many different schools, the temptation to limit what students can say, what they can express in assembly, or how they can peacefully protest, is shared across public, private, and missional

institutions. This is demonstrated through speech codes at public universities and faith statements at religious institutions that, in many cases, accept federal dollars. Speech and expression, both critical to peaceful civic unrest, are thus restricted based either on safety and anti-harassment statutes or on consistency with the expressed values of the institution, respectively. Either way, and regardless of whether a rights violation has taken place (at religious institutions the answer in most cases is that it has not), students do not benefit from a robust set of civic experiences, which would include being exposed on campus to the speech, assembly, and at times peaceful civic unrest of those who disagree strongly with their perspective.

In our opinion and in light of unfolding participation and polarization crises in the US and around the world, this is a tragedy and a suitable subject of national policy. Informed by constitutional analysis, our article makes a case for keeping in place plural approaches to civic engagement. To this end, we investigate how to incentivize as many schools as possible to provide the full spectrum of occasions for civic growth for all. Of course, a free society allows for a diversity of institutions to make different kinds of choices, including (civically speaking) dubious or questionable ones, yet we nevertheless start by acknowledging the basic good of peaceful student speech and activism. The conversation moves from speech codes at public and established private universities, to various faith statements at religious schools, and to a history of Supreme Court decisions explicating the subtle difference between free expression and incitement to violence. Since a situation in which students, whether at public or private universities, are not afforded the full range of opportunities to practice citizenship is not ideal, we ask about steps that local, state, and national governments can take to encourage greater openness to student activism and protest across the board. In the end, through a policy of partial revocation of tax exemptions of institutions that do not uphold key speech and assembly opportunities for all *students*, we seek to move schools further in the direction of civic engagement without arbitrarily cutting off any part of their genuine disagreements about the value of different strategic priorities in the context of community. Interestingly, what we show by the end of the article is that not only have public and private universities engaged in a significant exchange throughout American history, disagreeing with and dialectically refining each other's views, but they will continue to deepen this dialogue under our pluralism-preserving policies.

First, we survey opportunities for students to speak, assemble, and peacefully protest—their ability to realize civic engagement potential—at different institutions of higher education in the US. We consider speech codes at public universities, faith statements and lifestyle covenants across private and religious institutions, and student responses to survey questions that give us a sense of how young adults in the US view possibilities of civic involvement on their campuses. Undoubtedly, there is a *general* problem. Secular and established private universities that adopt speech codes and free speech restrictions often do so in the name of safety, whereas religious schools generally seek to uphold specific missional commitments. Students continue to protest at a number of these institutions, from Azusa Pacific to Columbia, and many others. As documented by the Foundation for Individual Rights in Education (n.d.) (FIRE), explicit restrictions on free speech, assembly, and civic engagement do exist across the spectrum of public, private, and missional institutions. Occasions on which students can assemble to speak and protest freely hardly represent the full extent of available civic engagement opportunities (see below); it is also not the case that we are equating them with academic freedom broadly understood. Nevertheless, when students are not able to gather and express points of view on pressing matters of public significance, the students, institutions, and society itself all miss out on a chance to grow.

Second, we outline why this is a cause for concern. Measures of polarization in the US and around the world have risen to alarming levels, at the same time that participation rates have plummeted. Questions about the viability of the democratic or constitutional republican project that may have seemed extreme only a few years now ring true in the minds of experts and non-experts alike. If there were ever a time to consider the repair of

frayed bonds of trust through increased dialogue and the opening of more opportunities for civic interactions, it is now. The crises of polarization, combined with the record of both public and private universities simply not doing enough to train students as citizens, therefore represents an opportunity. Colleges and universities can step up in this vital area, increasing support for student speech, assembly, and peaceful protest, and one can see this priority as legitimately representing a vital matter of national policy in our day.

Third, we show that these general limitations on student civic engagement and expression in particular cut against the American tradition of constitutional free speech, which has a civic dimension. The spirit of the 1st Amendment should matter, regardless of whether the context is a public or private school. This constitutional tradition, which culminates in Brandenburg v. Ohio, supports maximal and robust freedom of speech, assembly, and protest for all, and it extends to the expression of noxious and abhorrent ideas. These ideas have been upheld even in the context of Neo-Nazis marching through Skokie, the burning of the flag, *and the release of classified information to a major newspaper.* Given the extent of the constitutional protection it has received, noxious speech would also seem relevant to civic engagement and freedom. Even if it is not a question of rights at private universities, the spirit of the 1st Amendment should apply across many more campuses—public, private, and missional.

Fourth, in exploring just how to encourage institutions of higher education to move in the direction of greater civic engagement for students, we suggest that it is possible to incentivize across the board, to include schools receiving any federal funding. To do so fully recognizes freedom of speech and protest as core civic engagement values, and it simultaneously upholds as vitally important, constitutionally, the rights of private academic communities to preserve associational liberty and autonomy in defining their mission and goals. To affirm all of the above goods, in pushing to expand freedom of speech and civic unrest opportunities on campus, we propose to use the tax code, as the IRS did in effectively pushing for policy change at Bob Jones University. Fee waivers will also merit ongoing and future research, even as this article focuses primarily on tax exemptions. In any case, Bob Jones was prevailed upon to drop its prohibition of interracial dating as late as the early 80s through prodding and incentivization. Now, even today, there is no *legal barrier to continuing the ban on interracial dating that Bob Jones previously maintained in place*. Legally speaking, then, it is all the more interesting to understand how the university moved to its current trajectory.

Fifth, we address possible objections. Would our approach not lead to a slippery slope? Would it not result in universities of different kinds experiencing coercive pressure to *hire* those at odds with their missions, as opposed to just expanding civic engagement opportunities for their students? And, most importantly, do institutions of higher education (especially private ones) not have a free speech right to present to their students a curated experience of invited speakers, in the context of campus guidelines governing speech and assembly as determined by the school itself, *and* to benefit from tax exemptions at the same time? The last counterargument is addressed especially with ongoing NetChoice litigation against the states of Texas and Florida in mind. And it will become apparent that the answer, in every instance, is "no". In this section, we also draw on Vincent Phillip Munoz's recent work on religious liberty. It is consistent with the legal and constitutional reality that there is no constitutional right to tax exemptions for religious affiliated colleges and universities; Munoz's work as a whole cuts against the idea of exemptions, even as it unapologetically affirms the existence of a natural right of religious liberty.

Sixth, our article proposes an *especially* fine-grained approach. The questions here need not involve an "all or nothing" approach; especially when it comes to contentious social issues around which there is not yet the society-wide agreement that existed on civil rights in the early 1980s, to build consensus in a sustainable way, we propose not a full, but a partial revocation of tax exemptions for civic engagement-restricting institutions that accept federal dollars. This signals agreement with the *Bob Jones* principle that tax exemptions should come into play for questions of "national policy", not culturally charged debates.

Partial tax exemptions already exist in parts of the US, and we look at the Texas homestead property rules to provide a better sense of the possibilities.

In addressing these pressing civic engagement issues, our article accomplishes multiple goals. It seeks to preserve the rights of individuals and organizations, in a liberal society, to make their own choices in the absence of coercion. At the same time, it encourages public, semi-public, and private entities, in every way, to effectively set their students on a path to better citizenship: speaking, assembling, and even protesting in the midst of those who disagree. The specific instrument used, in recognition of the constitutional history of free speech cases and competing laws in the US is, to repeat, a revocation of tax exemptions. Even more specifically, it is a *partial* taking back of the suspension of tax law as it applies to certain institutions, a suspension that is originally always made, arguably, in the context of national policy.

At the end of the day, our recommendations leave in place, or do not even attempt to incentivize against, policies that continue to restrict civic engagement at private religious schools that do not accept federal monies. In terms of implications, we outline why a more heavy-handed approach with missional schools is not advisable. From protests related to civil rights to the conduct of foreign policy in the 20th century, student voices have contributed critical perspectives that, in many cases, helped shift laws and policies for the better. It might be that civil rights for African Americans, voting rights for women, or needed changes to the conduct of American foreign policy would simply not have happened, absent young adults pursuing their education and declaring, through their speech and movements, that there was a burning need for changes in existing law. At times, it was the religious, not the secular, schools that achieved vindication. Our policy recommendations, therefore, even as they aim to increase civic engagement opportunities across the board, nevertheless also maintain pluralism as Jacob Levy understands the term.

2. Public University Speech Codes, Private Institutional Faith Statements, and the Absence of Civic Engagement Opportunities

Here, we illustrate the relative *lack* of freedom to engage in civic protest at many public, private, and confessional schools around the country. On one end of the spectrum, public universities have instituted speech codes and limited expression in the name of safety. Private schools, including religious institutions, on the other hand, curtail dissenting speech or other civic activities based on a commitment to maintaining the cohesion of their communities as understood with reference to a specific faith statement, etc. The effect of restriction at many different kinds of schools is the same.

But before showing the extent of this systemic problem, we move to legally and constitutionally distinguish public from private institutions of higher education. What is the difference? As we will see, some disagreement exists, with at least one commentator also allowing that there are *degrees* of whether a college or university is private or public. Whatever one's preferred definition, the larger point we make here is that it is definitely not a question, at private colleges and universities, of institutions depriving students of rights. Nevertheless, and especially in light of the polarization and participation crises that we discuss later in the article, private schools opening the door to greater civic participation of their students is consistent with a national policy of addressing our polarization and participation problems.

(a) Legal Distinctions between Public and Private Colleges and Universities

What is the legal status of public, private, and religious schools? As it turns out, religious schools, as we describe them, are a subset of private institutions, so the real contrast is public vs. private. Strikingly, it is difficult to find an official definition. Let us start with a few examples of what that difference is *not*. Thus, public universities are not distinguished from private ones based on incorporation status. It is also not a question of having a charter or not.

One might think that the divide between public and private universities corresponds to corporation status, with public universities not amenable to this classification, whereas

private schools qualify. As it turns out, it is possible to have a public university that is a corporation: "In 1995, OHSU [Oregon Health Sciences University] underwent a significant change as it became the first health sciences center in the country to convert from a state agency to a nonprofit public corporation" (Oregon Health and Science University n.d.). Now, it is true that, in the US constitution, there is no explicit use of the words, "corporation", "incorporation", or "University". But to the extent that both private and public universities can qualify as corporations, relevant legal considerations include those provisions of the US constitution, national law, and state law that deal with incorporation.

Indeed, in a free society, the agreement to become one person for purposes of representation (incorporation) is covered by and extends to broader freedoms of speech and assembly, which are projected in the 1st Amendment to the US Constitution. Multiple guarantees of non-interference for corporations (including universities) exist—this extends safeguards of due process, and the protections of the contract clause and the 14th Amendment. Especially recently, it seems that corporations have enjoyed just about all the liberties and privileges of individuals—significantly, in Citizens United, the Supreme Court held that corporations have speech rights, meaning, controversially, that they can support candidates for public office through essentially unlimited donations (Garrett 2014, pp. 110–33, 136–38). Many of the incorporation laws differ by state, so there is undoubtedly a state dimension to the legal apparatus setting up a college or university, even as there also exist federal incorporation considerations.

Thus, it is also not the case that private universities will need charters or "articles of incorporation", whereas public universities will not. Incorporation requires a charter; since public universities (as demonstrated through the example above) can qualify as corporations, it is conceivable that a public university would have its own charter. In any case, regardless of the exact legal status of the document, it stands to reason that different types of institutions (public and private), incorporated or not, will have a statement of principles, values, or goals.

Traditionally, as it turns out, what differentiates public from private universities is neither corporate status nor the existence of a charter; it is a matter of who owns the institution. Are those who legally control it the public, or the government—or are they a corporation or group of individuals? Ownership, as a recent article has pointed out, is also hardly straightforward, pertaining to "critical decision makers" in several areas. In this way, it can relate especially to (1) the level of the university budget and its allocation, where public universities see the state as taking primary responsibility, whereas their private counterparts bring in private donors, the university and its employees, and even students. Indeed, in the following areas of decision, public institutions of higher education also rely to a significantly greater extent on state guidance and resources: (2) the hiring and pay of professors, (3) admissions, (4) tuition, and (5) tenure. The point is that neither public nor private ownership is necessarily straightforward; but ownership is a highly relevant consideration (Psacharopoulos 2004, pp. 39–43).

Importantly, this is not a question of the source of a majority of the funding. There is no magical 50% budgetary threshold or cut-off, to one side of which an institution is private and to the other of which it is public. This does mean, theoretically, that a public university in any given year or cycle can receive most of its funds not from a state government, but from private donors (University of California Berkeley). That said, it is true that a public university receives guaranteed allocated funds out of a state appropriation.

Another definition, as those seeking to push back against the exclusive emphasis on ownership make clear, involves the *kinds* of goods that are provided by an institution. Does the college serve the public? Does it cater to a narrow sectarian agenda? That is also potentially a question of degree—there are very few *purely* public or private colleges left today. It is perhaps the case that all institutions can point to aspects that align more clearly with a public or private dimension (Marginson 2007, pp. 307–33).

There is one more major consideration when it comes to differences, and this involves what schools may or may not do in terms of discrimination. Broadly speaking, private

schools have the right to discriminate, whereas public institutions do not. This is highly significant in the context of our overall argument because *we are not claiming that private institutions take away student rights when we make the case for incentivizing more civic engagement opportunities through tax exemptions.* That is a question of policy—to emphasize again, we recognize that private institutions have a right to discriminate (O'Neil 1969).

(b) Public and Private Institutions (Especially Post 7 October 2023)

At public universities, there *are* legal protections of speech. At established private schools—think of the University of Pennsylvania, Yale, or Johns Hopkins (without a highly specific religious identity today)—it is true that these do not exist, but speech restrictions may still occasion surprise (Hertz 2020). This is because the idea, generally, at prestigious non-public institutions, as well as their public counterparts, is that a university does not exist to uphold a precisely defined mission, but to catalyze the ongoing discovery or in some cases the creation of knowledge, without reference to a metaphysical or ontological framework. If knowledge is pursued without reference to a framework of this kind, it would stand to reason that there is relatively greater openness to the expression of speech and ideas at odds with majority preferences, that there is more toleration of disruption, protest, and any other activities associated with Enlightenment ideals of publicity, transparency, and scientific progress. One might think, generally, that both public and private non-missional universities would wish to convey this image. Even without legal guarantees, then, one would expect that established private schools would uphold freedoms of speech, assembly, and civic engagement generally, to a comparable extent as public institutions bound by law to do so.

This is why, in light of recent Middle East developments, it is all the more remarkable to see students at both public and older private universities experience the reality of significant limitations on activities of peaceful protest and the expression of ideas. This has occurred precisely at those institutions where, in the popular imagination, one does not expect restriction or censorship, yet it is happening *both* as a result of official school policy, *as well as* informally, following pressure from other students or alumni of the given institution. Notably, and strikingly, in more than one case in which informal pressure against civic engagement has occurred, universities have not formally pushed back through the adoption of an articulated commitment to freedom, even of highly offensive speech, along the lines, say, of the Chicago Statement (Zimmer and Isaacs 2014).

Thus, as a matter of official or formal policy at public universities, the existence of *speech* codes is not in doubt. It is confirmed both by the existence of official investigations by the group FIRE (Freedom of Individual Rights in Education), as well as through a highly insightful article by Lica Hertz on "Conflicting Opinions: Speech Rights and Student Protests on College Campuses" (Hertz 2020). The piece is equally tough on many different kinds of institutions that restrict speech for a variety of ideological reasons. As Hertz details, examples of speech codes in recent years have included, to list just a few, the University of the Virgin Islands' forbidding any speech or conduct that leads to "emotional distress" (*McCauley v. University of the Virgin Islands*)[1]; Tarrant County College District's prohibition of students' carrying empty holsters, consistent according to the school with guidelines limiting symbolic speech (*Smith v. Tarrant County College District*[2]); and confinement by the University of Cincinnati of freedom of expression to a small part of campus *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*[3] (Foundation for Individual Rights in Education n.d.). Again and again, state and federal courts have struck down these and other restrictions on the ability of the very people to train as engaged citizens who we hope will one day serve as national and global leaders in the US. Justification of these and other restrictions at public institutions often occurs through a stated rationale of safety. And

[1] McCauley v. University of the Virgin Islands *618 F.3d 232 (3rd Cir. 2010)*.
[2] Smith v. Tarrant County College District 694 F. Supp. 2d 610 (N.D. Tex. 2010).
[3] University of Cincinnati Chapter of Young Americans for Liberty v. Williams No. 1:12-cv-155 (S.D. Ohio 12 June 2012).

despite courts' ruling again and again that the attempted constraints are impermissibly broad, it is estimated that some 28.3% of all public colleges and universities in the US in existence today maintain speech codes (Hertz 2020). This is nearly 1/3 of all American public universities, and so it is a shocking statistic, especially given how frequently one encounters the assumption that it is only private, and more specifically private religious, schools that restrict speech in any significant manner.

As a matter, not necessarily of formal or official school policy, but of on-campus atmosphere and free speech climate as reported by attending students, it is further evident that a number of both public *and* non-missional private schools do not support full civic engagement opportunities (of speech and assembly) for their learners. Thus, institutions, such as the University of South Carolina, Fordham, Georgetown, University of Pennsylvania, and Harvard rank from "Poor" to "Very Poor" and "Abysmal" in the university freedom of speech rankings released by the Foundation for Individual Rights in Education (FIRE) in 2024 (Stevens 2023). What goes into the rankings? FIRE describes its methodology as relying on a combination of subjective and objective factors, from student survey responses to questions about the general openness of the campus to differing viewpoints, to the perception of support from the administration for free expression, to the student and faculty view of whether disruptive activity aimed to shut down a speaker is likely to achieve success or not, and, on the objective side, to a number of attempted invited speaker disinvitations/deplatforming incidents (Ibid.).

A case in point is what happened at Stanford on 9 March 2023, when Kyle Duncan, an invited federal judge, was shouted down by student disruptors as Associate Dean of DEI Tirien Angela Steinbach disregarded his request for administrative help and instead delivered her own set of remarks (Moody 2023). Students who observe these and other ad hoc events *taking place*, depending on the university response, know where their school stands on the expression of controversial opinions in civic contexts. Stanford has since placed the Associate Dean on leave. Even so, it currently ranks "Below Average" on the FIRE list (Stevens 2023, p. 55).

Recent developments, of course, have made the whole question of civic engagement (including speech and assembly) relevant to different groups across the spectrum of schools, so that it is no longer plausible to present claims about the absence of speech exclusively as a gripe of conservatives at established colleges and universities. The related dynamics further demonstrate the reality of *informal* limitations on student speech, assembly, and protest at *both public and private* universities. This is the situation in which students, also at Stanford, who critiqued Israel and called for its erasure at a future and undetermined date, were singled out by professor of corporate law Steven Davidoff Solomon, who published an opinion in the Wall Street Journal calling on law firms *not* to hire his students if they had participated in the demonstrations (Solomon 2023). A professor who goes public in this way is, of course, an *informal* restraint on speech (however abhorrent the ideas expressed). Interestingly, there was no *formal* response from Stanford, likely making Solomon's editorial more potent as an informal constraint on the expression of terrible ideas (which is different from a rebuttal of the speech through reason). It is possible that something similar happened at the University of Pennsylvania. In response to the withholding of a large gift from the University if the President stayed in office, her tenure following clumsy comments in Congress about free speech and anti-Semitism came to an end.

For additional evidence of objective moves by public and established private universities to restrict protest and speech rights in the wake of 7 October, one can point to Columbia University's cancelling of two pro-Palestine student associations, George Washington doing the same with a group critical of Zionism, and Brandeis disbanding an organization that it claimed provides explicit support to Hamas (Toure 2023). Limitations on controversial speech and civic disruption in general are now clearly happening at institutions long associated with maximum freedom of speech/protesting rights (Columbia, Cornell, etc.). In this (limited) sense, one might suggest that there has been anti-civic engagement convergence among the Colorado Christian Universities of the world and established Ivies.

All of this, recently, has of course escalated into the most recent scenes from Yale, Columbia, MIT, and the University of Texas at Austin, among other established private and public schools. While there is no justification for damaging property or injuring individuals, as appears to have happened through the actions of the protesters, it is also the case that numerous administrations, and at least one state government, appear to have cracked down on the content of the offensive speech itself (i.e., related to whether it is pro or anti-Israel). The most prominent example, arguably, is Governor Gregg Abbott in Texas. Even before the appearance of tent cities on different campuses, he had issued guidance to public universities in Texas to reexamine campus speech guidelines. The fact that his move, as well as recent actions taken by the police at the University of Texas (Austin), have been condemned by FIRE as an undue infringement on student freedom of speech points to the universal dimensions of the problem, which defy easy ideological categorizations (Elbein 2024).

(c) Private (Missional) Schools

To arrive at a sense of the civic engagement "lay of the land" at this specific subset of private schools—religious ones with highly specific doctrinal statements—we propose *not* to look for actual instances of attempted protest or speech. Why? The answer is that at these schools, the liberties in question are likely limited, and the schools are on secure grounds in restricting them (Hertz 2020). The political culture of many of the incoming students may also mediate against activism, and so it is likely impossible to find multiple instances of certain kinds of speech or protest, precisely because students who engage in it may, as a consequence of doing so, experience disciplinary action. Interestingly, these institutions continue in many cases to receive federal funds, in the form of scholarships and support for veterans and students in current military service.

To assess the kinds of restrictions on student speech and assembly at these institutions, it helps to consider relevant parts of the schools' faith statements or "lifestyle covenants". An example, to which it is expected that all faculty and students will subscribe, is available on the Azusa Pacific University website. Thus, while the mission statement upholds academic freedom ("Azusa Pacific University seeks to maintain an academic community in which faculty are free to engage in rigorous scholarly inquiry and expression"), there is a context, as the rest of the sentence makes clear: academic freedom "within an intellectual context shaped by the evangelical Christian tradition". Notably, with respect to same-sex relationships, the expression of community values reads in the following way: "We hold that the full behavioral expression of sexuality is to take place within the context of a marriage covenant between a man and a woman and that individuals remain celibate outside the bond of marriage" (Azusa Pacific University n.d., n.d.). This means that members of the APU community who disagree peacefully with these commitments and who wish to express their disagreement as reflecting another possible interpretation of the sacred texts on which APU bases its guidelines, are *not* free to do so either in an individual or in an organized manner. At the very least, they are not explicitly protected by the university in any on campus assembly or peaceful protest in support of their opinions or commitments.

Yes, it appears that students and faculty who participated in recent marches at Azusa Pacific (orthodox Christian institution) in protest of hiring policies will not experience discipline (Yee 2018). But this is not a legal guarantee, as private and highly religious schools are not obligated by law to uphold 1st Amendment rights (Hertz 2020). There is not a need, to emphasize, to point to concrete examples of learners ejected for participating in a pro-BGLTQ+ or other protest; we can simply highlight the *Faith Statements* held up by schools in this category as a precondition of application, alongside the explicit lack of the protection of speech or protest rights. According to these lifestyle covenants, faith statements and other expressions of the university's overall mission (which does not necessarily leave a robust space for speech), speaking, assembling, and/or marching for expanded notions of civil rights, even if peacefully, goes against the University's core commitments. Therefore, and to underscore again in combination with a lack of explicit 1st

Amendment guarantees at private universities, students who do gather to speak about or advocate for specific identities are potentially subject to reprimand or disciplinary measures culminating in expulsion.

This is further illustrated by the Lifestyle Covenant that students sign at Colorado Christian University. As is true at Azusa Pacific, those who receive a CCU education are to abstain from sexual activity outside the covenantal boundaries of heterosexual marriage. But the CCU guidelines, which require students to sign pre-admission, seem to go further than those of APU: those in attendance are to use "good judgment" in how they enjoy different forms of entertainment, including movies and books (Colorado Christian University n.d.). Note that, without explicit protection of speech and civic protest rights, this means the administration can subject students and faculty to discipline not just for assembling to peacefully express support for the rights of BGLTQ+ identifying individuals, but also for any broadening of the curriculum to support the reading (even in an orthodox Christian framework) of books, say, by DH Lawrence ([1913] 1973), JD Salinger ([1951] 2001), or Alice Walker ([1982] 2011).

Yet another example is Cedarville College in Ohio. Known for its scholarly integrity and accomplishments, Cedarville's doctrinal statement nevertheless commits the university as a whole to a literal 7-day creation model. Even within evangelical communities, this may seem too controversial a position to insist on as the one official position of the school, but note the implication: in the absence of explicit guarantees that peaceful expression, individually or in assembly on campus, of dissenting views is protected, faculty who corporately protest university policies as they relate not to civil rights and sexuality, but to curriculum content and even overall institutional commitment to the literal 7-day creation . . . may, in theory, experience negative administrative repercussions (Cedarville n.d.).

Of course, "in theory" is key—a denominational or missional university might limit ways in which campus citizens can speak and even protest, but it is not necessarily the case that disciplinary consequences *will* follow for those who pursue robust civic engagement. At Azusa Pacific, for example, ongoing demonstrations related to the University policy on same-sex couples have continued. Even though this civic activity is not in line with historic Christianity as the school understands it, Azusa Pacific has allowed the protests to unfold and take their course. Regardless of their on-paper policies, then, it would seem the leadership wishes to avoid a larger controversy, *or* that it believes the mission of the school is refined, and/or that students grow and mature intellectually more quickly with dissent peacefully expressed in their midst.

That said, these consequences are not always theoretical at highly religious schools. A recent *Esquire* article details the departure of Journey Mueller, under threat of expulsion, from Colorado Christian University (Lee 2023) due to her pursuit of a romantic relationship with another female student. Admittedly, Mueller was not participating in organized speech or protest to highlight her differences with the official CCU position on same-sex relationships. But if she had, there is little doubt as to the University response, based on the lifestyle covenant and campus culture, as well as the response to her relationship from both students and the administration. To emphasize, several missional schools, based on their faith and doctrinal statements are able in theory—and sometimes in practice—to significantly restrict among students access to civic possibilities that are simply taken for granted by residents and citizens across the land. To repeat, institutions of higher education, such as CCU, can impact civic engagement possibilities in this way even as they continue to accept federal dollars.

So as not to contribute to bias against the idea of a faith statement or list of specific beliefs, it is perfectly conceivable that a highly specific faith statement could co-exist with robust free speech and civic engagement protections. Thus, one might stipulate that a missional school is committed to a complementarian theology and to a set of views about the age of the earth . . . *and* that it is a good, positive, and healthy freedom (in line with the authority of sacred texts) to *peacefully* protest and make known one's disagreement with the prevailing cultural or theological norms and/or policies adopted at the state or federal level.

There is no necessary contradiction. At the same time, where highly specific statements of belief *do* exist *and* where there is an absence of explicit and bona fide protections of protest rights, it is *also* conceivable that administrations can stifle dissent and arbitrarily shut down conversations.

The question is not just an academic one. All three of the above schools—Azusa Pacific, Colorado Christian, and Cedarville—accept federal assistance in the form of support for students on aid (Caputo and Marcus 2016). They are genuinely, therefore, supported by funds collected from *all* taxpayers. The equity issue of taxpayers of *all* viewpoints supporting an institution that makes it impossible to articulate specific viewpoints on campus is real.

And this begs the question: would it not be great to increase the freedom of speech, protest, and civic engagement rights at *all* schools across the board—and especially at the ones (this includes even private and missional colleges) that accept federal funds? How could we do that—and what is a viable policy instrument? As we continue to unpack the argument, we are intrigued to find areas of convergence between students who in many cases wish to have more freedom to protest on behalf of Palestinians, and Robert George, in his defense of free speech absolutism based on principle. Below, we propose a way to multiply free speech and civic engagement opportunities for *all* students. We happily proceed step by step.

3. Polarization/Participation

This matters because measures of polarization and participation show the US in a state of crisis. Pew's measure of polarization steadily declined from 1994, in 2017 reaching its lowest point since polling began in 2017 (Pew Research Center 2017). At that point, with the numbers at a nadir, the organization discontinued the questions. It is widely recognized that, by 2023, fewer than 20% of Americans thought government was trustworthy, which is a steep decline from the more than 75% who did in 1960 (Cooper 2024).

The participation numbers are equally grim. After reaching a high above 80% in the Gilded Age of the 1870s and 1880s before dipping, these turnout rates again moved up in the late 1940s. Paradoxically, with the passage of landmark civil rights legislation, they started to plummet, coming down to 50% in the 1990s. By 2012, the US was doing a bit better in presidential election turnout, with 60% of legally eligible voters making their voices heard on election day. Although the uptick since, strangely enough in the context of increased polarization, may represent a turning of the tide, it is too early to tell. Our current presidential election turnout number, close to 70%, is still significantly lower than the highs of the late 19th century (see here https://www.electproject.org/national-1789-present) (O'Neill 2022).

And even as the discourse around polarization and participation in America is rife with opportunities for hyperbole and overheated rhetoric, it strikes us as cause for grave concern that speculation about a civic rift or fracture of some kind appears to have spread from popular commentary and editorializing to academic circles. Thus, Liliana Mason believes that the threat of actual violence is very real (Kurtzleben 2021). Economist Jesse Shapiro clearly indicates that the US is polarizing faster than other countries (Shapiro 2020). And others working for the Carnegie Endowment, in comparing the US to other democracies in the 20th century that failed, also see the risks of rupture as increasing (McCoy and Press 2022). Our situation, as reflected in these numbers and assessments, is an emergency, and a national policy is needed to equip young people and citizens with engagement skills that they need now more than ever and that they are at risk of losing in this moment. Indeed, many of the contributors to this Special Issue are motivated by this same sense of urgency. Paul Carrese (2024) and Kody Cooper (2024) see the rationale for civic institutes on university campuses as very much tied to the renewal of citizenship, and our proposed use of the tax code (described below), to push all schools accepting federal funds in the direction of more opportunities for their students to speak and assemble freely, reflects many of the same priorities as do their articles.

4. The Inconsistency of Recent Civic Engagement Restrictions—At Both Mainstream Institutions and Federal Funds Accepting Religious Schools—With America's Constitutional Tradition of Freedom of Speech and Protest

Diverse institutions of higher education, whether restricting practices of civic engagement that involve speech, assembly, and/or protest due to a focus on highly specific mission imperatives, or out of a concern for safety and the consequences of harassment, should (wherever else they appeal) not attempt to ground their policies in the 1st Amendment. This is because the law and Supreme Court precedents are not in doubt. Politically disruptive speech, even speech that is unacceptable from a moral standpoint (see below), is still protected. This has been affirmed both by Supreme Court precedents and federal law.

Admittedly, this is, strictly speaking, only true at public universities. And in this respect, the restrictions by public universities of expression and assembly are especially egregious. But this bears on our article and the possibility of incentivizing greater civic engagement at *all* colleges and universities because the legal rationale for freedom of speech, in public settings, involves the training of citizens. For the sake of this civic pedagogy, the spirit of the 1st Amendment, which does not exist only to protect inoffensive and "safe" ideas, may apply more broadly. The expression of highly unpopular and even hateful concepts is protected *so that citizens can practice the art of defeating bad arguments, not through state or institutional coercion that often brings resentment in its wake, but through the power of better arguments that engage fellow citizens' minds and hearts.* As protesting students have recently articulated abhorrent ideas about the state of Israel and its people, these legal and political considerations clarify our reflections on civic unrest at both public and private universities. In fact, they support our specific argument for incentivizing further assembly and speech involvement for undergraduates, across a spectrum of colleges and universities accepting federal funds, *so that students everywhere can practice the art of citizenship.*

But why connect a discussion of free speech to the subject of civic engagement? Strikingly, the literature on university civic engagement makes little mention of the fact that it potentially involves controversial speech in an ongoing protest (Ekman and Amna 2012; Rudolph and Horibe 2016; Kaskie et al. 2008; Prentice 2007; Ostrander 2004; Stanton 2008). In this educational context, a recent analysis in *Religions* by Morrow et al. (2023) provided a typology of different uses of the term, "civic engagement". At the college or university level, many civic engagement programs in the US and around the world promote activism, deemphasizing traditional learning in the classroom. Others, aligned with conservative frameworks, focus on the sheer amount of knowledge retained (the latter approach would represent the view that, without specific information about the contents of the US and/or other constitutions, for example, it is impossible for a student to effectively navigate the political environment). Morrow et al. emphasized that other possibilities exist, with Tarleton State University's framework a good example of an "in-between" (Morrow et al. 2023) form of civic engagement. But none of the major ways of understanding this term (ibid.) really prioritize speech, often in tense situations and across differences, as a way to bring together fellow citizens.

To better understand the connection, in order to encourage private *and* public universities to provide greater opportunities where students can speak and protest freely, we ask the following: what is the difference between freedom of speech (which, we continue to make the case, is crucial in civic unrest/protest settings) and *incitement*, which legally represents making somebody feel unsafe? As it turns out, the bar is very high. It is not enough to call for the systemic overhaul or even overthrow of the state or a form of government around the world. Specifically, when the question is incitement, the bar does not even prohibit calling for *violence* as a tool to effect overthrow *at some future date*. The only issue is has the rhetorician advocated violence in a way that makes the physical threat *imminent?* This is the Brandenburg test, towards which we are headed, *on the way to making the case that protest and speech rights should stay broad at all universities.* On our constitutional journey to Bradenburg, let us consider steps the Supreme Court took to protect the most offensive speech. On campus, in civic engagement contexts, it will become apparent that there is *a*

reason why the 1st Amendment, more than anything, was designed to protect the most unpopular positions.[4]

We start with cases *merely* affirming the right of individuals to engage (in protest settings) in obnoxious speech that makes others uncomfortable, without explicit or implicit threats of violence. These are certainly on display in this teachable moment in academia. Of course, the core of contemporary controversy, which was also the occasion to write this article, is different. It involves implicit and explicit student calls for violence and genocide and related Supreme Court decisions.

The Court, it is important to emphasize, has found that burning the American flag is constitutional and protected speech (with even Antonin Scalia coming on board in the 1989 Texas v. Johnson[5]) (Goldstein 2000; Dyer 1990; Goines 1989). Earlier in 1971, when it was a question of Paul Robert Cohen walking through a courthouse in California with "F [spelled out] The Draft" on his shirt during the Vietnam war, the nation's highest tribunal also upheld the protected status of highly insulting speech (Krotoszynski 1995; Griffiths 2007). More recently in 2018, when the subject concerned the affirmation of a specific view of marriage, with the selective withholding of commercial artistic expression from those with another view of union, in vindicating Jack Phillips, the Supreme Court arguably upheld the right of those who speak and express themselves in a maximally offensive way[6] (Jensen 2017; Steenson 2019; Movsesian 2019). To zoom in on this, all of these decisions have implications for acceptable student speech in public on-campus protest settings: they point in the direction of very broad student assembly and speech (protest) rights at a public university.

Admittedly, the definition of freedom of expression, with implications for student speech and protest, has changed drastically over time. In previous eras, the Supreme Court would likely *not* have supported the regime we propose today. Thus, at the turn of the 19th century, the Adams administration repressively sent people to prison for mischievous cartoons based on the Alien and Sedition Acts. The Supreme Court never struck down the validity of this legislation (Halperin 2016; Berns 1970).

Fast forward to the 1940s and 1950s, when Communist agents and sympathizers were suspected of openly advocating the violent overthrow of the US government. In *Dennis v. United States*,[7] the Supreme Court sided with established authorities against the protesters/members of the Communist party. The majority did *not* align with the dissenting voices of Justices Black and Douglas, who emphasized that the convicted individuals were merely teaching Marxism, a theory that provides for a change of regime in the future, and that they should not have been understood as advocating for the violent overthrow of a government on those grounds alone (Gorfinkel and Mack 1951; Antieau 1951). To connect our theme to these earlier decisions, the ongoing validity of the standard upheld by the US Supreme Court in Dennis v. United States could mean that student protesters at public universities, in the wake of the 7 October attacks on Israel, and currently or recently occupying ground at Harvard, Columbia, or the University of Texas at Austin, *should* face expulsion. After all, they have advocated for the violent overthrow of a government allied with the US.

However, the standard affirmed in Dennis v. United States, reflecting as it did in part a more restrictive and security-focused early Cold War context, would *not* survive the 1960s. Thus, in the 1971 New York Times Company vs. United States,[8] sometimes known

[4] In a sense, this under-theorization of verbal expression in university civic engagement is perhaps a positive. Sharing lived experiences with marginalized groups, which prioritizes listening over speaking, is a beneficial development. It may denote an attitude of humility on the part of participating students. It would not seem warranted to assume, because civic engagement strategies do not theorize protests with controversial speech as the primary mode of interacting with communities for the sake of positive change, that they are all thereby condemned to ineffectiveness.

[5] Texas v. Johnson 491 US 397 (1989).

[6] Masterpiece Cakeshop v. Colorado Civil Rights Commission 584 U.S. 617 (2018).

[7] Dennis v. United States 341 U.S. 494 (1951).

[8] New York Times Co. v. United States, 403 U.S. 713 (1971).

as the "Pentagon Papers Case", the Court upheld the constitutionality, on free speech grounds, of the New York Times' publishing classified documents in the midst of the ongoing conflict in Vietnam. Strikingly, this information was sensitive, and its publication could have theoretically led to the loss of American lives. What became apparent was that consideration (even if the Justices did not explicitly reason in these categories) of "possible unintended physical harm to American soldiers and citizens", as a reason against publication, did not apply (Henkin 1971).

Now, it would be one thing to claim that Communists or socialists should have freedom to make their case, even in support of a disruptive change to the American system of laws at a future date, provided the discussion is theoretical and remains in the realm of teaching as opposed to advocacy. (Strikingly, the restrictive character of *Denis* is evident in how the majority recognized there was no immediate and specific call for violent or harmful action, apart from the general teaching of Marxism, yet it still confirmed the convictions of individuals found to have violated the Smith Act for reading classic Marxist texts).

The contrast between teaching the *future* overthrow of the regime, in general terms, and calling specifically for violence, or speaking in a way that inflicts harm in the here and now, was arguably implicit in an earlier speech case, *Schenck* vs. *United States* (1919) (famous for the example of yelling "fire" in a crowded theatre as an instance of unprotected speech). Maintaining a distinction between an immediate call for violence, on the one hand, and speculation on the possibility of inflicted harm at an unspecified point in the future, on the other, would provide defenders of speech with more certainty that the 1st Amendment never sanctions an outbreak of physical violence in the here and now (see below). To emphasize, Dennis v. US does not recognize this distinction.

In the Pentagon papers case, however-the majority significantly broadened the scope of constitutional speech. It now included information that *effectively, in the short term, and in the immediate context*, could increase the concrete risk of harm to American soldiers and civilians. Moving into the early 1970s, it seemed that it was therefore harder to justify the restriction of freedom of speech on any grounds whatsoever, including the real possibility of injury or worse in the immediate context (Godofsky and Rogatnick 1987). All of this, of course, has tremendous implications for the rights or opportunities of students engaged in protest and speech on a public university campus—it makes it harder, on constitutional grounds, to restrict their advocacy, which many see as a positive development.

This logic, with implications for student activism and speech on public university campuses, had actually received a significant boost in 1969. To emphasize, it is possible to interpret the Pentagon papers case as protecting the publication of information that, *incidentally*, may lead to physical harm. But the decision presently discussed, shockingly enough, saw the majority defend the right to advocate for actual violence (still to occur at an unspecified point in the future). This especially has implications especially for the campus civic engagement, protests, and riots of 2023 and 2024, during the course of which it has been credibly reported that violence against Jews is proposed. The case, in 1969, was *Brandenburg v. Ohio*.[9]

In the majority opinion, the justices held that *even direct calls for violence constitute protected speech.* What was the background? Brandenburg v. Ohio involved a member of the Ohio Ku Klux Klan speaking in 1964. In that year, as he stood up to voice opposition to civil rights measures, he made clear (interestingly enough given contemporary on-campus implications) that he was linking Jews and Blacks *and* that it was acceptable to call for violence against them. The direct quote is jarring, but it merits reproduction. It reads as follows: "if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken.". This is unnerving because, undoubtedly, the reference is to physical violence. "Revengeance" clearly enough does not refer to intellectual or moral jousting. It is also not understood in the context of anonymous Marxist laws of history; the physical violence

[9] Brandenburg v. Ohio 395 U.S. 444 (1969).

envisioned is intentional, voluntary, and very much perpetrated by individuals against other individuals (Strasser 2011; Sykes 2019; Siegel 1981).

How could the Supreme Court find that this was protected speech and *not* incitement meant to move the situation immediately into a domain of physical force? In a nutshell, the majority opinion concluded that the most relevant factor was the *immediacy and specificity* of the call. In other words, to advocate for violence *in a general sense, without specification of time or target* is (unbelievable though this may seem) protected speech. What would *not* pass constitutional muster, according to this Supreme court precedent, is a call for violence against an actual person or group of people at a specifically defined or indicated time and place.

Indeed, the three prongs of the Bradenburg test include intent, imminence of lawlessness, and likelihood that the speech will lead to an external impact. This may seem to err way too far on the side of speech, even at the risk of bringing about physical injury beyond the incidental possibility in the Pentagon papers case. Yet it is important to see the Court, at this time, lean into a maximalist understanding of verbal expression. Right or wrong—we will consider the rationale shortly—the point is implications for on-campus assembly and civic unrest.

To reiterate, students at established private schools have called for the end of Israel. Abhorrently, this genocidal language envisions violence inflicted on a vulnerable population. Where it does not meet the Brandenburg v. Ohio test is with respect to imminence and the likelihood that members of the audience will be moved, as a result of this student speech, to take up arms against a democratic nuclear state in the Middle East. Robert George may have shocked conservatives by sticking precisely to the Brandenburg standard on a recent podcast and addressing specifically the issue of the three University Presidents and their responses to anti-semitism on campus. But it is important to remember that the liberal and conservative legal thinkers who continue to support the three-pronged test do so not out of support for the substantive positions advocated, but out of a commitment to freedom of speech. (The Dispatch Podcast (2023): Sniffing Out Advocacy/Interview with Robert George, Dec 26).

Building on these examples of a truly maximalist understanding of freedom of speech, perhaps the most dramatic illustration of protected speech calling for violence, however—even violence that is potentially to happen as soon as a party displaying the symbols in question takes power—occurred in 1977, a few years after both Brandenburg v. Ohio and *New York Times Company* vs. *US*. The circumstances and rulings apply directly to concerns about hate speech and Jewish students on campus today. Disagreement originated out of the predominantly Jewish township of Skokie. Everything intensified when the local chapter of the American Nazi party announced its plans to march in the town, fully intending to do so in uniform and displaying the symbol of the swastika for everyone to see. The residents of Skokie filed in a local Illinois court, successfully requesting an injunction or halt to the march. When the Nazi party appealed, the Appeals and Supreme Courts in Illinois upheld the original decision (Downs 1984). Indeed, with the genocidal horrors of the Second World War only thirty years in the past, it seemed that American tribunals could well affirm the right of Jewish residents in a small town *not* to experience hate speech or see symbols that undoubtedly conveyed a willingness, if ever possible, to use state power to violently target a Jewish population (Strum [1982] 1999).

But with the ACLU representing the Nazis and having appealed to the nation's highest tribunal, the injunction against the march was stayed in what is considered a seminal 1st Amendment decision.[10] The Illinois Supreme Court subsequently requested the Illinois Appeals court to clarify its position. When the Illinois Appeals court held that a Nazi demonstration was not protected speech, the Illinois Supreme Court on appeal overturned this ruling, affirming speech protections even for abhorrent Nazi positions. In a companion

[10] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

case at the national level, the prohibition of the Nazi march was struck down, allowing the fascists to engage in protest, speech, and assembly.[11]

This they did, and, given that liberals in many cases supported the right of the Nazis to march, the cases are sometimes seen as a stark 20th century reminder that permissible and constitutionally protected speech is *not* indicative of agreement with abhorrent ideas. In some ways, since the Jewish survivors of the Holocaust would have understood the symbols to indicate an immediate intention of carrying out violence the moment the Nazis returned to power, this series of legal developments even goes beyond the Bradenburg test. *It* is possible to interpret the swastika as signifying violent intent, *right away*, in the *specific context* of a Nazi electoral win. The absolute commitment of the Supreme Court to a maximalist understanding of free speech, since the 1960s, in a way that makes the US a global outlier, would thus seem established beyond the shadow of a doubt (Rubin 1986).

Is there a logic that helps us to make sense of these extremely consistent free speech standards? An answer could help us connect the discussion back to contemporary developments on American campuses and to civic engagement in academia. As it turns out, a philosopher who provided such a rationale for free speech maximalism is John Stuart Mill. One of the Supreme Court justices was actually reading him, making this more than just a supposed connection (Kasper and Kozma 2020). Thus, in *On Liberty* (Mill [1859] 1978), John Stuart Mill articulated the harm principle and explained why you never seek to censor or push back against immoral, bad, or simply unsavory ideas using the power of the state: *the only way you defeat a bad idea is with good ones.* Even right and true ideas, according to Mill, can command assent in the spirit of a dogma. A concern for truth, in other words, is enough to justify letting ideas compete (Bollinger 1981; Rabinowitz 1978).

An additional reason exists, arguably, for why Mill supports free speech absolutism, which provides a rationale to insist on maximal free speech and assembly rights, especially for students on university campuses. Namely, since bad ideas will go down to defeat as a result of an individual or individuals speaking and the individuals who will have to communicate in this way may not yet have arrived at the desired stage of civic growth . . . the *practice of taking on unpleasant ideas, even if it means a grueling engagement with fellow citizens through some of the harshest possible conversations . . . itself makes for growth in the practice and applied knowledge of citizenship. The practice of verbal combat against noxious concepts promotes the maturing of citizens in communities.* Indeed, as Hugh Liebert has shown, Mill, who was well trained in the classics, took this civic growth/engagement dimension of free speech so seriously that he believed it potentially involved even heroism. And it was a heroism cultivated and exemplified, under modern conditions, by brave individuals willing to take on the crowd in argument and speech, not worrying about the wrath of the majority or risk to one's own reputation (Liebert 2001, pp. 60–74). Adopting this model of freedom of speech in a framework of civic engagement, in other words, would not only reflect current constitutional law, but it could plausibly make students more generous, understanding, and courageous citizens of a constitutional democracy (Kasper and Kozma 2020).

5. Policy Proposal: Restoring The Spirit of Constitutional Speech and Protest across the Board: At Public, Private, and Religious Colleges and Universities

Incentivizing all universities that accept money from the federal government and yet are not willing to support students in freedom, speech, and assembly/protest (1st Amendment) opportunities would resemble steps that the Internal Revenue Service (IRS) took in the 1970s and 1980s with respect to Bob Jones University in South Carolina. The IRS incentivized a change in Bob Jones University's policy on interracial couples, essentially forbidding them, by changing its own rules regarding the tax-exempt status of private schools with racially discriminatory educational policies. This action by the IRS was a strate-

[11] *Smith v. Collin*, 439 U.S. 916 (1978).

gic move. Its intent was to discourage such practices in private educational institutions, especially those with religious ties.

Initially, the IRS's tax-exempt status for private schools did not consider the schools' racial policies. However, in response to the growing concern about the rise of segregated private schools and their impact on efforts to achieve racial integration in education, the IRS revised its policy. This change was rooted in the broader national policy against segregation in education, following the Supreme Court decision in Brown v. Board of Education.

The revised IRS policy, formalized in the early 1970s, denied tax-exempt status to private schools that practiced racial discrimination. This move by the IRS meant that such schools would no longer benefit from the significant advantages associated with tax-exempt status, including exemption from federal income tax and potential exemptions from state and local taxes. Additionally, individuals and corporations would no longer receive tax deductions for contributions to these organizations, and the schools would face payroll tax obligations.

Bob Jones University, with its policies against interracial dating and marriage based on its religious beliefs, faced the revocation of its tax-exempt status under this new IRS policy. This decision was eventually upheld by the Supreme Court in 1983, in *Bob Jones University v. United States*.[12] The Court ruled that the IRS had the authority to deny tax-exempt status to institutions that were not in compliance with public policy against segregation in education.

Now, the IRS's policy change and the subsequent legal battles highlighted the interaction among the judiciary, the Congress, and the executive branch on this issue. By pushing Bob Jones University through the tax code in this way, the IRS effectively used its administrative power to bring about a reconsideration, on the part of the university, of its racially discriminatory policies, aligning with the broader goal of discouraging segregation in education. This approach was a clear demonstration of the government's commitment to combatting racial discrimination in educational institutions, even when such practices were supported by long-entrenched structures and, in this case, religious beliefs (Johnson 1984, 2010; Wheeler 2016).

But why suggest incentivization of *any* kind, when many of the schools denying civic engagement opportunities pursue highly specific religious missions? After all, there is no legal obligation for private schools to uphold any speech or assembly opportunities for students. Therefore, it is far from clear that we should push them in any direction whatsoever. But the reason tax incentivization towards more student experience in speech, assembly, and peaceful protest settings *should* happen is straightforward. It is *possible* to effectively encourage institutions in this way (as shown by resulting policy changes at Bob Jones University). And, given that the vast majority of universities (public, private, and religious) receive *both* federal aid and tax exemptions (Caputo and Marcus 2016), it is inequitable not to attempt this approach.

Indeed, most private religious or missional schools accept federal funds. Assistance of this kind does not just involve federal support for military or other groups of specially designated students. To emphasize and for the sake of clarity, the Supreme Court has ruled that religious colleges may receive loans and grants from the federal government for construction purposes; bonds issued by the state for construction; and capitation grants, which are both noncategorical and state-level (Davis 2009). Scholarships, certainly, represent a significant transfer of wealth from the federal government (and *all* taxpayers) to both public and private schools. But these do not represent the only forms of federal aid. Based, then, on the likelihood of success, equity, and a national policy imperative of encouraging engaged citizenship given the crises of polarization and participation mentioned above, it is reasonable to support tax exemption incentivization, which keeps in mind the goods of participation and political socialization in the commonwealth as a whole.

[12] Bob Jones University v. United States, 461 U.S. 574 (1983).

That said, how many schools *actually* do not rely on financial assistance from the federal government in any way? An Article in the *Atlantic*, "The Controversial Reason Some Religious Colleges Forgo Federal Funding" (Caputo and Marcus 2016), provides the numbers. Hillsdale is the first and foremost example of a missional school that foregoes all federal funding, and *The Atlantic* article expands on the list. To actually say "no" to federal support, the relevant part of the 1964 Civil Rights Act is Title IV. Schools can simply ask for a Title IV exemption, and Caputo and Marcus estimate that about 37 schools do so (ibid.). Another list assesses only 23 (Clancy n.d.) If there are 900+ religious colleges and universities in the US (Council for Christian Colleges and Universities) with specific missions, it follows that the vast majority are ok with the degree of church and state cooperation represented by federal aid. Those who insist on a financial wall of separation, as do Hillsdale and Crown College in Tennessee, are in the minority.

To clarify, our proposal does *not extend to this handful of schools in any way*. We wish to incentivize missional and religious schools *only if they accept federal dollars*. We stop short of pushing or encouraging colleges or universities that do not. Indeed, we do not "go there", even if those institutions are restricting civic engagement opportunities while fully enjoying tax exemptions. This is an important point, insofar as it shows us not insisting on uniformity, even in conditions that we characterize as a national crisis around civic training that is important for all students. Our proposed policy affirms a robust notion of pluralism, to the extent that it recognizes how, in a free society, organizations are still free to choose how to shape their communities even if their policies do not align with the preferences of the majority at any given moment.

6. Possible Objections

Critics will likely make several objections. These include that we unfairly single out private and especially missional universities; that the Bob Jones University case was intended as a one-time response to a specific situation, with no implications for the future application of tax incentive measures; and that by suggesting an adjustment of tax exemptions based on different school policies, we are setting federal treatment of education on a slippery slope to coercive interventions by Big Brother, which also result in missional universities forced to hire teachers and professors openly at odds with the mission of the school. Below, we take these objections one by one, demonstrating that they are all ill-founded. They do not adequately appreciate the complexity of our position.

(a) Are we singling out private religious (missional) schools?

First and evidently, we are *not* singling out private religious schools. The article starts with public universities; we begin by explicitly acknowledging the existence of speech codes and restrictions at *public* universities; we are happy to add that free speech abuses at public universities are arguably more serious than restrictions at missional schools, insofar as there is no ambiguity about those who attend the former enjoying the full constitutional rights of US citizens. Public universities, by definition, are not oriented towards a specific doctrinal or faith mission. They are, it stands to reason, supposed to represent *all* of society, in a way that religious schools do not. And, whereas the topic of religious schools with specific missions that accept federal funds and impose limits on peaceful assembly and expression feels legitimately as if it could represent a gray area, there is no mistaking the constitutional dissonance in literally existing as a part of government, representing *all* and denying basic constitutional rights to some (public university).

(b) "The Bob Jones precedent applies only to race"

Secondly, it is simply not the case that the Bob Jones decision was intended, in either the holing of the majority or the *dicta*, as a one-time response to the singular issue of racial discrimination. In fact, this is especially apparent in contrasting the holding of *Bob Jones* vs. *US* (1983) with earlier exemption and establishment decisions. One of these, the *Walz* vs. *Tax Commission of the City of New York*, articulated a standard of tax exemptions as "benevolent neutrality" (1970, pp. 13, 32). But this is clearly not the rule handed down by

the *Bob Jones* majority. Rather than simply extending tax exemptions as a matter of course, to anyone who asks, the more recent case holds that a tax exemption is justified through the provision, by the institution in question, of a genuine public good, *and* that the public good needs to reflect consistency with "national policy" (1983, pp. 8, 23, 55, 56, 71, 75, 87, 96, 98, 132, 135). Nowhere does the *Bob Jones* majority articulate its conclusion as applying only to the case of racial discrimination in the 1970s and 1980s. Indeed, based on the language, it is quite possible to imagine other issues, especially during moments of national crisis and exigency, that would necessitate a renewed look at whether a school enjoying a tax exemption is in fact providing a public good, consistent with national needs. We argue that our current participation and polarization crises (see above—Section 3) represent precisely such an opening for needed national policy, which it is possible to advance through the selective application of tax exemptions. Paul Carrese, in this issue, has also referred to the crisis in civics education as a national security imperative (Carrese 2024).

That the Bob Jones decision was not intended in this limited way further makes sense in light of the argument of Vincent Phillip Munoz in his recent *Religious Liberty and the American Founding* (Munoz 2022). In that insightful and powerfully argued case for religious liberty as a natural right, in which the author includes a method for interpreting both freedom of exercise and establishment when it is impossible to ascertain the Constitution's original meaning, Munoz also clarifies what a natural right of religious liberty does *not* mean: it does *not* bestow on religious believers, or anybody else, a freedom of exemption from otherwise generally applicable civil laws. Munoz is especially passionate in delinking the natural right of religious liberty, on the one hand, and exemptions from civil military service, on the other. But he shows how severing that assumed connection also applies in the areas of homeschooling and working as part of a general schedule set by the employer, even if those hours conflict with personal religious commitments.

Interestingly, Munoz does not spend significant time on the question of tax exemptions for religious schools. But the likely direction of his argument, were he to devote more attention to this subject, is clear: exemptions from civil taxes are no different than any other suspensions of generally applicable laws and regulations, no matter how many people receive them. Indeed, the one law journal article that Munoz references that discusses tax exemptions for churches and religious organizations is a comprehensive treatment in American history, the fine piece, "Tax Exemption Of Church Property: Historical Anomaly or Valid Constitutional Practice" by John Witte, Jr. (Witte 1990). Witte shows that there are *two* traditions of tax exemption, the establishment and common law strands, and that by the mid to late 19th century, before the current regime of universal tax exemptions, there was in fact a movement to do away with them—to bring religious institutions into closer alignment with civil law (thus, President Grant is known to have called attention to the danger of "vast amount of untaxed property" on the part of churches and affiliated organizations (p. 382). Nobody at the time would have considered this "anti-ecclesiastical" in any way.

Powerfully, as Munoz's book argues that there is no right (constitutional or otherwise) to a tax or policy exemption even when religion and natural rights are involved, it is hard, if not impossible, to see how tax exemptions for religious colleges would stand as the sole exception. And other legal commentators, referring to rulings by the Supreme Court, have pointed out that, whatever the wisdom or prudential benefit of extending tax exemptions to religious schools or not, they are *not* in fact enjoyed as a matter of constitutional right (Whitehead 1991, p. 565; Tracey 2015; King 1998, p. 978). Remarkably, Tracey acknowledges this even as he advises in the strongest possible terms against altering existing tax exemptions (pp. 105–6).

Erika King pushes in the same direction. She describes different property taxes, some of which did apply to churches at the end of the 18th century (p. 978). And John Witte, Jr. also makes a case to this effect. He does so in pointing out that despite the pronouncements of the *Walz* majority that church property tax exemptions are the rule in US history, "a

strong vein of criticism has long accompanied the practice in America" (p. 367). Taken together, this is powerful evidence.

But if tax exemptions are *not* a constitutional right and if in fact the Bob Jones standard is to adjust exemptions consistently with "national policy", the following considerations apply. The US finds itself in an era of historically high polarization, as documented by other contributors to this Special Issue. The time is also one in which it is still not clear if the US and other countries around the world have left behind the historically low turnout and participation numbers of the mid-twentieth century (see our Section 3 above). Would it not seem reasonable, in light of those facts, to view civic engagement, which requires training in the practices of free speech and assembly, as a pressing national policy? And if that makes sense, perhaps even to an extent that it did not 30–40 years ago, is it not also reasonable to ask why tax exemptions should not reflect this policy need? Their doing so, under our proposal, is in line with the clear position of the Bob Jones 8 justice majority on the legitimacy of connecting tax exemptions to national policy.

(c) Does our proposed policy lead to a slippery slope?

Third, it is false to say that pushing colleges and universities in this way in the areas of speech, assembly, and protest, as those apply to *students* on campus, will lead to a slippery slope that necessarily results in the further partial revocation of tax exemptions if missional and religious institutions, for example, do not hire *faculty and administrators* in line with federal and state anti-discrimination laws. According to that envisioned scenario, religious institutions would have to welcome transgender individuals onto their faculties. But to emphasize, the hiring of ministers, teachers, and instructors has historically been protected by what is known as the "ministerial exception" to state and federal anti-discrimination statutes. Affirmed most recently in the 2012 *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission* case,[13] this right of churches and religious affiliated institutions is to make decisions about the makeup of their leadership, without worry about discrimination in hiring. To illustrate, a woman not accepted into the Catholic priesthood cannot sue the Catholic church for gender-based employment discrimination. At a missional school, if the teachers are considered "ministers", the same civil protections do not have to extend to candidates interviewing for those positions.

It is also not necessary to disincentivize exemptions from Title IX admissions policies, generally, under the terms of our proposal. A recent fascinating article (Augustine-Adams 2016) shows how, since the mid-1970s, religious schools applying for Title IX exemptions have a perfect record of receiving them from the Office of Civil Rights. Especially in light of recent guidance issued to colleges and universities about gender expression as covered by Title IX, tax code incentivization to reduce Title IX exemptions could affect sports teams, dorms, and the overall campus atmosphere. However, nothing in our *suggested framework* extends to Title IX exemptions or implies any attempt to work against them.

In fact, under our proposal, both of those areas of discrimination in hiring, as well as sex discrimination on campus, are *separate* from whether an educational institution maintains its state and federal tax exemptions or not, consistent with the national policy imperative of expanding student speech, assembly, and protest opportunities. Thus, Colorado Christian University could continue to hire only faculty with whom it is 100% comfortable, *and* its tax exemption would stay in place. Cedarville could continue to successfully apply for Title IX exemptions, *and* its *tax* exemption would not be pulled. In this case, when it comes to the revocation of tax exemptions, we would emphasize *only* the critical importance of *student free speech, assembly, and protest opportunities.*

What is the internal logic? We hold that the question of student civic engagement (speech, assembly, and protest), among institutions receiving federal funding, is fundamental and, from a pluralist perspective, justifies the use of tax exemptions, in a way that questions of who religious institutions hire, or whether they continue with Title IX

[13] Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012).

exemptions, do not. This is because the identity and character of any educational institution is connected to the ability of its leadership, the head, to articulate the values and principles of the school. So long as teachers and administrators, relying on the ministerial exception, can screen who is admitted into their ranks and who is not, they can confidently continue to present this vision, and one can say that there is no direct external pressure applied to the ruling element or "regime" of the school. So long as the administration is able to continue to make on-the-ground decisions about dorms and sports teams, without fear of losing tax exemptions, direct incentivization pressure is not brought to bear on the actions of the university "head". The difference, if incentivization pressure *is* brought to bear on the head through tax exemptions, to allow students to *speak* (and assemble and peacefully protest), is that if administrators and/or teachers respond with care, concern, and patience to any dissenting speech or protest from the student body, it is an opportunity to strengthen the school's mission and win over more students, whether the institution is Liberty, CCU, or Grove City College.

In this sense, outside incentivization pressure on the college or university leadership team to hire differently or to set up the campus with an eye to sex discrimination differently may legitimately cause the "head" to feel direct pressure on its actions; a student body that has more opportunities to pursue peaceful civic engagement, including speech that respectfully disagrees with the positions of a missional school's leadership team, only applies the pressure of student body ideas to the head. From a public policy perspective, this is more respectful of the autonomy of the university leadership team; from a pluralism perspective (more in the conclusion below), our approach of incentivizing through tax exemptions only *student civic engagement* and nothing else remains more open to a greater institutional difference and diversity.

Clearly, these are judgment calls. Where to draw the line of full tax exemption revocation (Bob Jones University) or to put down the marker of partial revocation, or where to insist that tax exemptions not serve incentivization purposes at all, are questions that involve prudence. But acknowledging this does not take away the need for those judgment calls. As a Cumberland Law Review article demonstrates, particularly in the age of disestablishment at the beginning of the 19th century, judgment calls with respect to tax exemptions were made all the time (Whitehead 1991, pp. 538–39). The other article cited by Munoz also shows how a number of tax exemptions were dropped, forgotten, and in some cases resumed (Witte 1990, p. 374). Prudence was needed in the past, and, in this area, it is needed now. And the fact that a perfectly consistent standard may never be attainable does not mean in the moment that it is not necessary to make decisions. Again, at a time of polarization and participation crises in evidence in the US and around the world (see our Section 3 above), drawing the line at encouragement of student speech and dissent, while continuing to provide maximum flexibility for institutions with specific missions to hire whom they please into the ranks of teachers, strikes us as a reasonable position.

(d) What about the NetChoice cases?

An additional objection involves a specific interpretation of the *NetChoice* cases currently before the US Supreme Court (NetChoice vs. Paxton from Texas and Moody vs. NetChoice from Florida). What is the significance of this ongoing litigation? Texas and Florida are testing whether it is possible to restrict the content-moderation functions of social media companies, on the premise that they unfairly censor conservative voices. In Texas, where Ken Paxton is currently Attorney General, the relevant law is HB 20, and in Florida, where Ashley Moody serves in that office, it is SB 7072. Both laws go back to 2021. NetChoice, a trade association representing the interests of social media companies, is involved in both cases (Howe 2024).

These two laws, admittedly, are different. Thus, in Texas, Governor Abbott supported a condition according to which the company has to have 50 million users or more. In Florida, on the other hand, the legislation clearly has in mind protecting the autonomy of political candidates for office to a greater extent. And, just so that there is no doubt, it is also good to acknowledge that the way plaintiffs understand the injuries in Texas and

Florida also differs. The brief submitted by Texas focuses to a far greater extent on Section 238 than does the one in Florida, and the arguments in the Florida brief emphasize far more the significance of "common use".

In their brief submitted to the Supreme Court, the media companies in the Florida case forcefully note that "SB 7072 is entirely incompatible with the First Amendment", arguing that it seeks to compel speech. The brief points out that the Eleventh Circuit came to this conclusion, and, in its own reasoning, makes the case that the Florida legislation cannot survive scrutiny at any level. Furthermore, it argues against the applicability of any analogy to common carrier regulation.[14] Petitioners in the Texas case likewise argued on First Amendment grounds, specifically making the case that HB 20 cannot withstand strict scrutiny, critiquing, in the same way as petitioners in Florida, the notion that Facebook and Google are common carriers and zeroing in on Section 7 of the law, which they see as especially undermining of editorial discretion and involving viewpoint discrimination.[15]

Now, one could make the case that there is a not insignificant chance that the Supreme Court will side, at least to an extent, with the social media companies. The 11th Circuit Court of Appeals, which found the Florida legislation unconstitutional, is hardly known for its liberalism—in fact, it has been described as the second or third most conservative tribunal in the country (Rankin 2018). A review of the history of the Texas law suggests that several conservative jurists believe that it too has gone too far. Thus, after the US Western District Court of Texas issued an injunction against enforcement of the law (1 December 2021), the 5th Circuit Court of Appeals overruled the injunction, holding that the law would apply (1 April 2022). Remarkably, two months later, on 31 May 2022, the US Supreme Court *vacated the stay of the injunction issued by the 5th Circuit.* Even more strikingly, the members of the Supreme Court (both liberal and conservative) who agreed that the injunction should remain in place while litigation played itself out included Justices Sotomayor, Roberts, Kavanaugh, and Barrett. As Justice Alito, who believed, on the other side, that the Texas law should never have been prevented from going into place and who certainly opposed the vacating by the Supreme Court of the stay of the injunction by the 5th Circuit, wrote, the Supreme Court doing so in effect meant that a majority of the Court was convinced that the social media companies had demonstrated "a substantial likelihood of success on the merits."[16] Other commentary, not on the part of legal experts but supporting this apparently majority view of the Court, reinforced the likelihood that the US Supreme Court will eventually overturn the Texas law (Reed 2024; also, Ombres and Alvarez 2024). Even the editorial board of the Wall Street Journal critiqued the Texas and Florida laws (Wall Street Journal Editorial Board 2024, 25 February).

Yet despite these clues that suggest the US Supreme Court will rule in favor of the social media companies, it is *far from clear* to us that this is foreordained. We say this because of a cursory look at who is represented in the amicus curiae briefs. This includes Philip Hamburger at Columbia.[17] It also involves a student free speech group.[18] A recent editorial by Zephyr Teachout in the Atlantic, titled "Texas' Social-Media Law is Dangerous. Striking

[14] Moody et al. v. NetChoice LLC and the Computer & Communications Industry Association 2022, p. 2. Available online: https://www.supremecourt.gov/DocketPDF/22/22-277/291860/20231130111448519_2023-11-30%20Final%20NetChoice%20merits%20brief.pdf (accessed on 21 May 2024).

[15] NetChoice LLC D/B/A NetChoice and the Computer & Communications Industry Association D/B/A CCIA v. Paxton, 2022. Available online: https://www.supremecourt.gov/DocketPDF/22/22-555/291896/20231130135911119_No.%2022-555_NetChoice%20and%20CCIAs%20Brief.pdf (accessed on 21 May 2024).

[16] NetChoice LLC D/B/A NetChoice and the Computer & Communications Industry Association D/B/A CCIA v. Paxton, 2022: On Application to Vacate Stay, Alito dissenting 31 May 2022, p. 2. Available online: https://www.supremecourt.gov/opinions/21pdf/21a720_6536.pdf (accessed on 21 May 2024).

[17] (NetChoice LLC D/B/A NetChoice and the Computer & Communications Industry Association D/B/A CCIA v. Paxton: Brief of Professor Philip Hamburger as Amicus Curiae in Support of Respondent, 2022). Available online: https://www.supremecourt.gov/DocketPDF/22/22-555/298290/20240122141758929_Netchoice%20Amicus.pdf (accessed on 21 May 2024).

[18] (NetChoice LLC D/B/A NetChoice and the Computer & Communications Industry Association D/B/A CCIA v. Paxton: Brief of Amicus Curiae Students at Columbia Against Censorship in Support of Respondent, 2022). Available online: https://www.supremecourt.gov/DocketPDF/22/22-555/298392/20240123094443641_22-555%20Amicus%20Brief.pdf (accessed on 21 May 2024).

It Down Could Be Worse" (Teachout 2024), also argues as much. Further demonstrating that the NetChoice cases are making for strange ideological bedfellows; Teachout's article points out that this is not about freedom of speech, straightforwardly: whereas the social media companies are now pleading their role as editors, they have, over the last few years (and in fact going back to 1996), made the argument that they are *not* the equivalent of editors.

For the sake of a specific counterargument to the claims made by our article, however, let us assume that the Supreme Court will strike down the Florida and Texas legislation on free speech grounds. If this occurs, a takeaway will be that it is impermissible to coerce speech. But if it is unconstitutional to coerce social companies to speak (or to coerce the posting, without moderation, of content with which the companies vehemently disagree), why would it be any more conceivable, legally, to mandate that private universities permit specific forms of speech? This point would seem to apply to an even greater extent, insofar as requiring Colorado Christian University, for example, to allow for pro-gay marriage or anti-Israeli policy assembly on its campus, and feels coercive.

However, this thought experiment and counterargument just do not apply against our proposed policies. The reason is that incentivization is not the equivalent of a mandate or outright coercion (which, under the terms of the thought experiment, is what Florida and Texas are attempting with respect to social media companies). Thus, *incentivizing* the purchase of solar power through a tax credit is not tantamount to taking away anyone's right to buy it or not or to invest in other ways. Since, to emphasize and as shown above, there is no constitutional right to tax exemptions, incentivization of schools to provide more civic engagement opportunities through the partial revocation of tax exemptions *is not coercion.* The differences between these scenarios are more significant than the similarities.

(e) What about Perry v. Sindermann?

We consider one more counterargument, related to the remarkable 1972 case of Perry v. Sindermannn.[19] The point of using the decision in what follows is to ask the following: is it permissible to make a right conditional on the renouncing of other rights (freedom of speech)? Of course, it is not. That said, just as the attempted analogy to the NetChoice cases above does not ultimately undermine our case, neither does the analysis of Perry v. Sindermann. Working through the facts of that decision will again prove helpful in understanding the dynamics of free speech as they relate to tax exemptions.

Thus, Robert Sindermann, with one-year contracts his guarantee of employment, was not renewed as an Instructor at Odessa Junior College in 1969 after having taught at the institution for four years. Upon termination by the Board of Regents, accompanied by accusations of insubordination with no official reasons, Sindermann took Odessa Junior College to District Court. As he explained it to the judges, the actions of the University were retaliation for the exercise of his free speech rights, reflected in the expression of opinions about academic matters that did not match those of the Board. When the District Court sided with the College, not considering the matter of sufficient importance to hold a trial, Sindermann took his case to the 5th Circuit Court of Appeals. According to this tribunal, if termination by the University was related to freedom of speech, it was in fact unconstitutional. Ultimately, the dispute made it to the Supreme Court. The Supreme Court did not undo the decision to fire Sindermann, but it established the precedent that a right cannot be conditioned on the exercise of another right (here, freedom of speech). While Sindermann did not have tenure or an explicit property right to his position, given common law and other considerations, the Court held that it was possible to see his job as a form of quasi-tenure. With the District Court instructed by the Supreme Court to reconsider 1st Amendment remedies, the Board of Regents and Sindermann settled for approximately $48,000 (Vile [2009] 2024).

Analogously, the argument would go that schools that present their students with whatever curated experience of speakers the university deems desirable, combined with

[19] Perry v. Sindermann, 408 U.S. 593 (1972).

whatever on-campus protest or assembly the administration has put in place, should not have either its federal aid or tax exemptions yanked. This is because the university is exercising its freedom of speech. That freedom, consistent with the Sindermann principle, does not depend on the specific form of its expression.

But this analogy, as is true of the counterargument that depends on the NetChoice cases, also fails. Tenure or even quasi-tenure, if we follow the reasoning of the *Sindermann* majority, does refer to a right to a job. But the difference between even a very secure position, in which someone has a property right, and a tax exemption, is that the *tax exemption is not a right*. We have demonstrated and documented this above. Therefore, taking away a tax exemption, for incentivization purposes in the framework of a "national policy" as recognized by the *Bob Jones* decision, is not the same thing. And reducing a tax exemption in *part*, if the school (receiving federal funds) is not willing to take some steps towards a national policy objective, is still less objectionable. Again, as the counterexample has shown, it turns out that our proposed policy finds itself on firm constitutional ground.

7. A More Narrowly Tailored Way to Restore Civic Engagement Rights at Public, Private, and Religious Institutions: Why *Partial* Tax Exemption Revocation?

Having now described the tax exemption strategy that was employed to incentivize Bob Jones away from racial discrimination, we are ready to make an analogous policy recommendation. What if the same kind of pressure were applied to institutions today that, for various reasons, do not make available free speech and assembly opportunities to students in civic engagement contexts? What if a Liberty University or Colorado Christian University, in 2024, that wanted to get in the way of a BGLTQ+ assembly, or of four or five students peacefully championing the human rights of Palestinians, were to hear the following: "let them march/assemble peacefully, lest you lose the special treatment that society extends to you through the tax code, with an eye to the special educational mission of constituting citizens?" What if a more progressive or mainstream university were to receive the message, "Start treating conservative students fairly and upholding their free speech and assembly rights, or your tax exemptions will stay in doubt?".

Not every civil rights issue today is the equivalent of discrimination against African Americans in the early eighties. This is not to compare, in any way, the severity of different burdens of discrimination or degrees of unfair stigmatization. It *is* to suggest, however, that even every important social issue or question of human dignity involving respect for individuals in numerical minorities does not yet need to possess the same level of social consensus surrounding it that a ban on interracial dating commanded in the early eighties. At that point, well-meaning classic liberals and conservatives were confronted by the famous dilemma push hard and risk a toxic backlash that undoes years of hard-fought civil rights gains or go more slowly, for the sake of victories that are more meaningful over time.

We suggest the latter course. So as not to compare to former racist policies the well-intentioned prohibitions on vocal support of gay marriage or the well-intentioned speech codes at public universities that result in unfairness towards conservatives, we recommend the following option: not incentivizing with *total* revocations of tax exemption, but with *partial* tax exemptions. This signals recognition, on our end, that social consensus is still coming about. It makes clear, to those who might disagree with us, that a punitive approach is not the goal.

8. Partial Tax Exemptions: Where Do They Exist?

Interestingly, there is at least one prominent example of a *partial* tax exemption in the state of Texas, and by this, we refer to property taxes and how homestead properties are not fully subjected to them. It looks like this: in the state of Texas, unlike other states, there is no state property tax. However, there exist local property taxes utilized to fund schools, municipalities, and various local entities. The state of Texas provides a percentage of your local tax exemption mentioned in TAX § 11.132 of the Texas Tax code. Homeowners can

avail themselves of different property tax exemptions. For example, the General Residence Homestead Exemption offers a substantial $100,000 school tax exemption, implying that school taxes are calculated as if the home's appraised value is reduced by $100,000. Local Residence Homestead Exemptions, offered by some local governments, further reduce taxable amounts based on a percentage of the homestead value. For instance, a 20% local exemption, combined with the general exemption, can significantly lower the taxable amount. Elderly and Disabled Exemptions provide additional school tax relief, with qualifying individuals receiving $10,000 and potentially higher local exemptions. Veterans also have access to Homestead Exemptions based on disability ratings. These offer varying levels of relief depending on the percentage of service-connected disability. Collectively, these exemptions contribute to alleviating the property tax burden for eligible homeowners in Texas.

In summary, proposing homestead tax exemptions based on the percentage of the appraised property aims to suggest what the IRS should implement for private universities not aligning with federal policy. Rather than entirely revoking their charitable tax exemption, the proposal suggests informing these universities that, despite their charitable contributions in certain aspects of education, they will only receive 80% of their tax exemption. This approach adds the benefit of addressing universities with the severity of the violation while generating additional revenue for the federal government. Given that certain federal rules may not entirely meet the criteria for total tax revocation and might be perceived as an overreaction, a percentage deduction allows the IRS to generate revenue and respond to public and federal concerns about a lack of civic engagement opportunities at universities.

In the 1980s, Bob Jones University had its tax exemption revoked for prohibiting interracial couples on campus, eliciting almost unanimous dissent from the public and IRS. Today, very few subjects garner as much consensus. Despite this, the IRS remains a tool for enforcing constitutional principles. As we see it and especially in the context even of legal scholars who favor tax exemptions for universities admitting that those exemptions are not a constitutional right, a national situation exists that justifies a "national policy". In the midst of our crisis of participation and polarization (see above—Section 3), this policy is to incentivize schools to provide more civic engagement opportunities. The IRS should strive to be even-handed, upholding constitutional principles rather than favoring a specific ideology.

9. Conclusions

Above, we have pointed to a systemic issue currently besetting institutions of higher education—the *general* restriction of civic engagement opportunities for students on American university campuses. This is a problem that affects public, private, and religious/missional schools. It is not confined to any one type of institution. Indeed, even though one's first thought may be that it is private religious universities—with highly specific faith statements—that will do most to restrict speech and activism, as it turns out, public universities can accomplish the same goals under the guise of speech codes or overly broad anti-harassment guidelines, whose effect is to stifle civic speech. Since 7 October and into the ongoing demonstrations against the war in Gaza, this problem has grown more acute at established private colleges and universities, as students who wish to protest the steps Israel is taking in its defense have found that their institutions do not always act based on a robust commitment to free speech. What makes this all especially problematic, indeed, what justifies attempting to deal with the deficit as a matter of "national policy", to use the formulation in the *Bob Jones* vs. *USA* majority holding, is the twin crisis through which the US is currently passing: one of polarization, in which people with opposite partisan affiliations see themselves as further apart than ever before, and the other of participation, as a result of which citizens no longer make their voices heard on election day, even when they have every opportunity to do so. Students not participating, in other words, at a time of national civic crisis, makes a big problem even more acute.

To address our national civic crisis, in line with the Bob Jones majority acknowledgment that tax exemptions can be applied as a matter of "national policy", we propose the following policy mechanism: whether it is a question of a public, private, or religious/missional college or university, *any* school that restricts the ability of students to speak and assemble peacefully and that is also accepting federal funds will face a revocation of its national tax exemptions. Based on the recognition that not all issues, today, command the same level of consensus as civil rights for African Americans did in the 1980s, we adjust our proposal relative to that Bob Jones university example by stipulating that the incentivization can happen through a *partial* revocation of the tax exemption—the extent may be determined by Congress and the IRA, working together on a case-by-case basis.

In advancing this proposal, we meet several objections in also stressing the consistency of our work with the recent pro-religious liberty, anti-exemption research of Phillip Munoz at Notre Dame: based on Munoz's logic, but also as admitted even by legal scholars in lengthy articles making the case for the continued exemption of all universities from taxes, *there is no constitutional right to tax exemptions, either for public or religious universities.* Especially, as prudence is necessarily involved and there is no need for a general rule to cover all possible circumstances in advance, we show that the "slippery slope" argument involving the inevitability of forcing religious schools to hire trans faculty members or doing away with Title IX exemptions is ill-founded. We refer *only* to the incentivization of colleges and universities in the direction of allowing *student* speech and protest, regardless of the direction of that student activism. There is no pressure on an administration to change school policy.

What is the likely response of colleges and universities? It is hard to make exact predictions. But public universities who do not wish to pay more in taxes as a result of speech codes, about which even many administrators do not feel strongly, will likely move away from their restrictions on civic engagement and speech. Hillsdale, as well as the thirty or so religious schools that do not accept any federal money, will have little incentive to make major changes. As for many private and religious schools, all accepting federal scholarships or other funds, the results may be mixed. Many of these civic engagement-limiting institutions may ease up on their restrictions, not wishing to experience any financial consequences and/or contribute more revenues to government coffers. Other religious schools—it is hard to predict which ones—may decide to absorb those consequences as they continue to receive federal dollars but insist, on convictional grounds, that their missional prerogatives, including when it comes to how speech and protest are managed by their community, are worth it. Interestingly, as a consequence and as they take on some degree of financial hardship, these religious universities will also attract more social and media attention, potentially expanding their platform and opportunities to justify the limitations on autonomy and assembly in place. The result is then potentially increased awareness among donors to the school, those who might attend, and the public at large, as they take note of the university's position to stand its ground and resist incentivization.

We conclude with broad connections to the literature on pluralism, given that we see our proposed policy as supporting and further advancing it. Jacob Levy's *Rationalism, Pluralism, and Freedom* (Levy 2015) is especially interesting and relevant here, insofar as it contrasts two strands within liberalism: rationalism and pluralism. One of the two straightforwardly favors more uniformity, based on the application of justice grounded in individual rights and the social contract; whereas the other, at any given moment, is more comfortable with the upholding of group prerogatives whose internal dynamics do *not* always affirm justice understood as individual rights. These groups existed prior to the social contract, and the strand of liberalism that celebrates their diversity results in less uniformity. The latter, of course, is pluralism, and the former is rationalism.

Levy clearly sympathizes with the pluralist strand of liberalism throughout his book, even as he is acutely aware of its shortcomings (Ibid., pp. 71-86/337). One reason to acknowledge the negative side of pluralism is that groups take on a life of their own, exercising power and authority, and they are not at that point simply aggregations of

individual rights and choices. Thus, Levy dismisses what he calls the "pure liberal theory of freedom of association:" "The pure theory holds that, what individual persons are free to do singly, they ought to be free to do in association with one another; and rights that they are free to waive, they ought to be free to waive as against groups of which they are members" (Levy 2015, pp. 42/337). But what happens when existing groups control all physical (or social) space . . . making it impossible for individuals to exit? Groups at this point do not reflect a logic of individual rights and choices on a larger scale, and it may be that a centralized state has to weigh in on the side of individuals who are oppressed by the group. At the same time, what Levy refers to as the notion of "congruence" holds that any restriction of individual freedom by a group, as a condition of membership, must be analogized to a suspension of rights by the state that according to liberalism is supposed to protect them; and this is not a good account for Levy, either, insofar as applying it consistently, would result in no groups with meaningfully distinctive characters or community lives at all.

In the end, even as he acknowledges the downside of pluralism that gives groups arbitrary power over their members, Levy is more concerned about the dangers of a centralizing state. He therefore recovers figures in the history of political thought who idealized what they referred to as the medieval or German constitution. Levy acknowledges that the idea of a "medieval constitution" that applied in the same way across Europe is a construction. Nevertheless, he is happy to draw upon it and to mention other thinkers who did, most prominently Montesquieu, in resisting what he sees as excessive contemporary centralizing tendencies. Levy is explicit that the tension between rationalist social-contractarianism and medieval pluralism is not one that can be resolved, though it is *especially* necessary not to forget the "medieval constitutionalist" (pluralist) strand.

He ends with some intriguing recommendations, most notably applying to higher education. In favor of universities retaining the autonomy to structure clubs and student associations how they wish, in accordance with the priorities and goals of the university, Levy writes, "Insisting [on the part of the University] that clubs remain open to all students—political clubs to opponents, religious clubs to nonbelievers and dissidents, etc.—could be a way of ensuring genuine exchange" (Ibid., pp. 274/337). Levy does not want to insist on this as a general rule, and in fact, he seems more open to *universities allowing* clubs to stay closed, for the sake of cultivating more genuine intellectual exchanges; but he goes to lengths to emphasize that this is not a matter of liberal justice, but a prerogative of the university in an (overall) pluralistic setting. Fascinatingly, in a discussion of pluralism, Levy does not touch on the question of tax exemptions for universities as either contributing to or taking away from pluralism. But we see nothing in his work that would mediate decisively against adjusting tax exemptions in line with policy; and given Levy's omitting direct mention of the issue, incentivizing civic engagement opportunities for students in this way, at institutions that accept federal funds, strikes us as consistent with his understanding of pluralism and indeed with the notion that clubs *on* campus might be pushed to recognize other perspectives expressed in their ranks, for the sake of members not retreating into cocoons and actually benefiting from exposure to different and clashing ideas.

How does this connect to our argument? Straightforwardly, in moderately pursuing equity and incentivizing and making it harder for schools that accept federal money to restrict civic engagement opportunities (speech and assembly) of students at public *and* private universities, we are clearly pushing in the direction of uniformity, and in this way hitting rationalist notes as Levy describes them. At the same time, we clearly specify (unlike in the Bob Jones vs. USA case) that our potential revocations of tax exemptions are *partial*, so as not to come across as punitive and preserve the right and ability of institutions to *resist* our proposed incentivization; furthermore, we are perfectly fine with the 30+ schools who currently operate without any federal aid, the Hillsdale chief among them, continuing to stand apart without any impact, even partial, on their tax exemptions. At the end of the day, despite our rationalizing push for *more student civic engagement* at public *and* private universities, we support a genuine diversity of *deeply* different institutions, which are not

penalized for maintaining their institutional character and commitments. This is pluralism as Levy characterizes it.

Despite what could be seen as a rationalizing push towards more civic engagement across the board, then, our proposed policy keeps in place a robust dialogue among secular schools, religious schools, and different degrees and combinations of these forms. We consider this especially important: as the Cambridge Handbook of Service Learning and Community Engagement shows, the role of religion in motivating service learning in the 20th century has been foundational. Many of the early proponents of this form of education, as it turns out, could point to formative experiences in the Boy Scouts, YMCA, or other groups legitimately described as spiritual, religious, or powered by an ethic of compassion or care. Indeed, far from a narrow sectarian identity, "religion" can refer to a broader understanding of service and generosity, which drives people to reach beyond themselves in consideration of their neighbor. The associational resources of organized religion conceptualized in this way, as Alexis de Tocqueville, Sidney Verba, and Robert Putnam show, are not in doubt.

But will not pushing harder in a more rationalizing direction not result in greater injustice? In other words, do the partial, as opposed to total, revocations of tax exemptions on which we rely not provide a cover for continued discrimination? They allow, after all, inter-institutional dialogues to continue to flourish, keeping in place and even encouraging sharp contrasts among public, private, and religious schools, without insisting on more fundamental changes at private and religious schools. Some might make this suggestion. Indeed, Levy is aware of and explicitly acknowledges the possibility that his preferred strategy of pluralism, which does not insist on uniformity to the same extent as does rationalism, could result in the persistence of local pockets of injustice. This is a longer conversation, and it certainly merits further research—for now, though, it might be worthwhile to emphasize, as shown by still relatively recent works that include Stephen Jay Gould's *The Mismeasure of Man* (Gould [1981] 1996) and Thomas Leonard's *Illiberal Reformers* (Leonard 2017) that rationalism has contributed in its own way to the defense of injustice, with "scientific racism" and eugenics as only two examples of policies that were once considered scientific by credentialed experts in the US and Europe. To the extent that this is true, encouraging colleges to allow for more student debate and discussion through incentives, rather than attempting to force them in this direction through mandates, strikes us as reflecting and prioritizing the epistemological humility appropriate to our national crisis. Precisely at this time of polarization and low participation, what is most needful both on campuses and among campuses, on the part of students and the lifelong learners who are to come alongside them in journeys of growth and discovery, is perhaps the mutual acknowledgment that none of us may be entirely right, even about the matters of greatest importance to us.

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