

# Will We Ratify the Constitution of Knowledge?

DANIEL CULLEN\*

## ABSTRACT

*The commitment to free speech and academic freedom or, more comprehensively, to what Jonathan Rauch calls “the constitution of knowledge” is not compatible with “inclusion” as the latter is understood in administrative initiatives on its behalf. But a reconciliation comes into view once we pose the naïve question: “Inclusion in what?” The answer proffered here is: an academic community of inquirers, inclusion in which is as expansive as possible but for reasons independent of identity. Parsing the meanings of free speech and academic freedom brings the impersonal character of academic community into the foreground and clarifies the ethical demands associated with free inquiry.*

## TABLE OF CONTENTS

I. RECONCILING FREE SPEECH AND INCLUSION . . . . .	959
II. FREE SPEECH VERSUS FREE EXPRESSION . . . . .	961
III. THE VIRTUES OF THE CONSTITUTION OF KNOWLEDGE . . . . .	963
IV. THE CONSTITUTION OF KNOWLEDGE AND INCLUSIVE FREEDOM. . .	966
V. FREE SPEECH AND OPEN INQUIRY AS A PATH OF INCLUSION . . . . .	968
VI. THE FIRST AMENDMENT IS NOT ENOUGH . . . . .	970
VII. CONCLUSION . . . . .	972

## I. RECONCILING FREE SPEECH AND INCLUSION

Is free speech threatened by the colleges and universities that ought to be its guardians or is college education threatened by *it*? While the question has been debated in higher education circles since the 1980s, the public was taken aback in 2017 by the spectacle of students demanding freedom *from* speech and using disruption and force to achieve it. At Middlebury College the “free speech under

---

\* Daniel Cullen is Professor of Philosophy, Rhodes College. His writings include *Freedom in Rousseau’s Political Philosophy*; *Liberal Democracy and Liberal Education (ed.)*; and various essays on political philosophy, democratic theory, and liberal education. © 2022, Daniel Cullen.

assault” storyline moved beyond metaphor and seemed to bring the matter to an inflection point. The details are well known: having successfully prevented a public talk by a controversial speaker, student protestors descended on the bunker that had been arranged as a secure fallback position for a livestreamed interview conducted by a Middlebury professor. Banging on windows and setting off fire alarms, a determined remnant of the protestors (including some masked demonstrators believed to be non-students) did its best to disrupt plan B, and completed the trifecta by physically harassing the speaker, a senior administrator, and the professor (Alison Stanger, who was injured in the process) as they tried to leave campus. The evening ended safely enough for the trio, but only after literally being chased out of town.

The provocation was an appearance by Charles Murray, the wonkiest provocateur imaginable, but branded by the Southern Poverty Law Center (SPLC) as a “white nationalist” nonetheless. The evening began with the friendliest reminder of college policies regarding the disruption of invited speakers, a message immediately laughed off by the students. Next, Middlebury president Laurie Patton took the stage, expressed sympathy with Murray’s critics and belabored the obvious: that his appearance did not entail an institutional endorsement of his views. To her credit, Patton urged the crowd to suffer through Murray’s talk, reminding them that “the very premise of free speech on this campus is that a speaker has a right to be heard.”<sup>1</sup> The protestors responded with disdain and, when Murray took the podium, ritually turned their backs and chanted a prepared statement, which ran: “This is not a respectful discourse or a debate about free speech. These are not ideas that can be fairly debated. There is no potential for an equal exchange of ideas. . . . We see this talk as hate speech.”

Leave aside that Murray had yet to say a word, that his topic had nothing to do with his notorious 1994 co-authored book, *The Bell Curve*, and that what the students knew of Murray’s ideas derived from a cheat sheet provided by the SPLC, the sententious indictment helpfully illuminates the complex rationale for the shout down. On one hand, the problem is inequality. Murray’s ideas had an unfair advantage, the benefit of a “platform” that literally and figuratively elevated his ideas above dissenting views, notwithstanding that his argument would be subjected to scrutiny by a professor unsympathetic to his perspective and who had come, as she said, “loaded for bear.” On the other hand, Murray’s words would be “hate speech,” not words expressive of ideas but weapons designed to injure, an intention (or an effect) that provided sufficient warrant to suppress rather than rebut them. The arguments were reiterated the next day in a self-exculpatory message from the protest leaders to the Middlebury campus: “The administration’s support of a platform for white nationalist speech was an intense act of aggression towards the most marginalized members of the Middlebury community.” This extraordinary charge echoed one made in a joint letter from several hundred

---

1. Will DiGravio, *Students Protest Lecture By Dr. Charles Murray at Middlebury College*, YOUTUBE (Mar. 2, 2017), <https://www.youtube.com/watch?v=a6EASuhefel>.

Middlebury alumni protesting Murray's appearance before the fact. Murray's ideas, it was said, had been discredited and were thus "not worth engaging," but more importantly, his views were a "threat," and "a message to every woman, every person of color, every first-generation student, every poor and working-class person, every disabled person, and every queer person that not only their acceptance to and presence at Middlebury, but also their safety, their agency, their humanity and even their very right to exist are all up for 'debate.'"<sup>2</sup> In sum, "hate speech" is an act of "violence" and Murray's ideas are not merely erroneous but pose an existential threat to the most vulnerable members of the college community. To listen to Murray would be an act of surrender in a straightforward war of ideas with harmful consequences. No wonder the joint letter dismissed in advance "hollow appeals to tolerance and dialogue," or that the student protestors were prepared to meet "violence" with violence. To give Murray a hearing would, in their view, violate Middlebury's commitment both to "intellectual rigor" and "compassionate inclusivity."

In what follows, I examine this "both/and" affirmation which happens to be shared by the very administrators who were the secondary target of the protestors' ire, although the former's preferred conjunction is "free speech and inclusion." I will argue that the commitment to intellectual rigor, free speech, and academic freedom or, more comprehensively, to what Jonathan Rauch calls "the constitution of knowledge" is not compatible with "inclusion" in the now dominant sense of identity-affirmation.<sup>3</sup> A reconciliation comes into view when we raise the naïve question: "Inclusion in what?" The answer, I suggest, is a community of inquirers in which students' membership is independent of their identities and rests on what they think rather than who they are. I suggest, too, that the meanings of free speech and academic freedom point toward that non-identitarian understanding of membership and the cognitive role of an impersonal ethical ideal.

## II. FREE SPEECH VERSUS FREE EXPRESSION

One reason free speech is poorly understood is the reduction (or perhaps, the expansion) of "speech" to "expression." As Harvey Mansfield has emphasized, in the political realm, while the right of speech legally extends to the protection of symbolic expression, something crucial about its character is lost when speech is regarded as but one form of expression. Speech is an appeal to fellow human beings who are presumed to share a rational capacity. A reason I offer for my opinions must be justifiable to another who does not currently share them. That is to say, insofar as speech consists in the giving of reasons, it presumes an addressee who is capable of understanding and open to persuasion. But in making

---

2. *Charles Murray at Middlebury: Unacceptable and Unethical, Say Over 500 Alumni*, BEYOND THE GREEN: COLLECTIVE OF MIDDLEBURY VOICES (Mar. 2, 2017), <https://beyondthegreenmidd.wordpress.com/2017/03/02/charles-murray-at-middlebury-unacceptable-and-unethical-say-over-500-alumni/> [<https://perma.cc/58T4-LXFM>].

3. JONATHAN RAUCH, *THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH* (2021).

an argument that is not a mere “rationalization” we do more than express our private feelings; the exercise of our rational faculty is an implicit acknowledgement of reason’s authority over ourselves even as we seek to convert others to our point of view. As Mansfield puts it, “speech is the rational that rises above the animal” by lifting communication above one’s private feeling.<sup>4</sup> Of course, speech can be turned to purposes other than rational agreement, but even the abuse of speech by the clever rhetorician testifies to reason’s power.<sup>5</sup> “Expression,” by contrast, is one-sided or self-referential. I may find value in expressing myself or my feelings without bringing you into the picture. Meaning has to be imputed to expressive conduct or symbols because symbolic gestures themselves are not rational arguments. “When speech is taken as expression and ‘expression’ becomes the general category of which speech is one type, then the rational in speech is subordinated to the irrationality of symbolic expression.”<sup>6</sup>

On this understanding, “free speech” is more than uninhibited expression; speech is free insofar as it is rational. We like to think that the self discovers its innermost essence or identity by choosing it, and it follows that the expressive self is free to be reasonable or not in its self-legislation.<sup>7</sup> Having to give a reason, however, involves some measure of detachment from one’s own concerns in order to convince another to identify with them: “All speech,” Mansfield writes, “comes from the self, but as speech, it rises above the self when one has to give a reason.”<sup>8</sup> It is this detachment from immediate needs in the process of thinking and speaking that confers the freedom *in* or *of* speech. In transcending private feeling or self-interest, the act of communication reveals freedom as “the power of the self to cause its own action and reflection as opposed to the slavery of being under the power of necessity, when one is only being caused.”<sup>9</sup> The freedom in free speech thus involves an act of self-limitation even as it “expresses” self-assertion.

Mansfield’s connection of free speech with the giving of reasons puts us in the vicinity of academic freedom. The purpose of speech in a community of scholars expands speech’s intrinsic reason-giving to truth-seeking, while preserving the aspect of self-regulation. As Keith Whittington has noted, while scholarly speech is unfettered, “it is not ‘free’ in the sense of anything goes”—to the contrary, it is highly disciplined by professional standards.<sup>10</sup> A free society should accommodate an individual’s desire for self-expression, and a campus overlaps the larger society and provides its own spaces for free expression; however, “free speech on

---

4. Harvey C. Mansfield, *The Value of Free Speech*, 51 NAT’L AFFS. 164–66 (2018), <https://nationalaffairs.com/publications/detail/the-value-of-free-speech> [<https://perma.cc/ZH73-YTGS>].

5. *Id.*

6. *Id.* at 168.

7. HARVEY C. MANSFIELD, *THE SPIRIT OF LIBERALISM* 64 (1978).

8. MANSFIELD, *supra* note 7, at 169.

9. *Id.* at 172.

10. KEITH WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* 7, 49–50 (2018).

campus” is centrally justified by the university’s truth-seeking mission.<sup>11</sup> Professors are left free to conduct research, but scholarly peers unknown to them eventually judge the quality of the findings and may inhibit their publication. Conclusions are disseminated so that they may be critically analyzed, debated, endorsed, or perhaps refuted. The progress of knowledge thus requires more than academic freedom. As Rauch emphasizes, it depends heavily on a network of institutions that create and enforce norms, associations of professionals that train and induct new members into its practices, and impersonal standards of evaluation. Because human beings are not “wired” for truth-seeking, we must hack our mind’s tribal operating system to outwit our cognitive biases, which default to groupthink. From an evolutionary perspective, what matters is not whether an individual forms true beliefs so much as beliefs that succeed at inclusion in the community. In the words of psychologist Dan Kahan, human beings come equipped with an “identity-protection cognition” that “protect[s] us from changing our minds when doing so might alienate us from the group.”<sup>12</sup> When facts challenge identity commitments, identity wins. But while it may be rational for individuals to adjust their beliefs to stay in tune with the group, the collective effect is disastrous. To avert an “epistemic tragedy of the commons,” countervailing institutions are necessary.<sup>13</sup>

### III. THE VIRTUES OF THE CONSTITUTION OF KNOWLEDGE

Like the American Constitution, the constitution of knowledge is designed to supply the defect of better motives. Conventions like peer review force us to accede to the unique sovereignty of critical persuasion. The only way to succeed in the reality-based community is to run arguments through its procedures and submit to the outcome of its neutral processes. We cannot prevail by getting a majority on our side or by appealing to privileged insight. Rauch boasts that if we internalize and institutionalize the virtues of the republic of science, the constitution of knowledge can work the same magic as the American Constitution, “mak[ing] pluralism a source of stability and conflict a source of dynamism” and “convert[ing] the heat of disagreement into the light of progress.”<sup>14</sup>

On the matter of “internalization,” however, Rauch seems to equivocate. On one hand, just as, according to *Federalist No. 55*, the American constitutional framework depends on a residual civic virtue, the constitution of knowledge depends on its own version of habits and norms like lawfulness, truthfulness, self-restraint, and forbearance. The rights of academic freedom entail correlative responsibilities and the latter, Rauch says, are “heavy” and thus “tempting to shirk.” On the other hand, “the best way to think of rationality and objectivity is

---

11. *Id.*

12. RAUCH, *supra* note 3, at 30, 32.

13. *Id.* at 37.

14. *Id.* at 113.

not only as attributes of individuals but also and *primarily* as attributes of a network.”<sup>15</sup> The knowledge system does not explicitly dispense with individual intellectual virtue but neither does it depend on it. “We must behave as if truth exists and evidence matters and preferably feel that way too.”<sup>16</sup> And if we do not feel a concern for truth? The knowledge system will channel us to behave as if we did subscribe voluntarily to its norms. If men were angels, no constitution of knowledge would be necessary and the system neither expects nor requires that individuals transcend their biases. Like the Madisonian remedy for the problem of faction, what matters for the knowledge community is not that individuals be unbiased but that they have different biases so that “I see your mistakes and you see mine.”<sup>17</sup> “In a world of conflicting certitudes,” Rauch explains, “we must accept and even embrace pluralism.”<sup>18</sup> Like the feeling for truth, *embracing* intellectual pluralism involves a virtue independent of the constitution of knowledge itself. Political pluralism benefits from an ineffable loyalty or love of country that civic education in some measure cultivates. It is difficult to imagine a love for a rolling consensus that merely expresses the vector sum of competing opinions. In any case, since inside the knowledge community we cannot avoid being constrained by constitutional standards that will be enforced whether we like it or not, the “republican virtues of the republic of science” are less arduous than they originally appeared. In the final analysis, the virtue we need is not “that everyone . . . be truth-seeking; [but only that] most people[] be[] truth-friendly.”<sup>19</sup>

One reason a moderate virtue suffices is that participation in the reality-based community is only “a part-time job.” The constitution of knowledge, Rauch explains, will neither “run your life” nor “control your brain.” The knowledge community makes room for tradition, identity, and rootedness, “room to be our own . . . spiritual, embodied selves, each with our own lived experience and subjective outlook.” But insofar as we are indeed “(in principle) interchangeable when debating objective reality,” there is a real sense in which we do “dissolve ourselves” when we participate in the knowledge community.<sup>20</sup> It is noteworthy, then, that while Rauch holds the philosopher C. S. Peirce in high regard, he stops short of endorsing Peirce’s exacting standard of intellectual probity: “The scientific spirit requires a man to be at all times ready to dump his whole cartload of beliefs, the moment experience is against them.”<sup>21</sup> Or, more accurately perhaps, Rauch elides the matter of individual virtue by emphasizing Peirce’s communal theory of truth in which the social network of inquirers validates knowledge.<sup>22</sup>

15. *Id.* at 75 (emphasis added).

16. *Id.* at 113.

17. *Id.* at 73.

18. RAUCH, *supra* note 3, at 56.

19. *Id.* at 113, 115.

20. *Id.* at 113–14.

21. *Id.* at 58.

22. *Id.* at 61 (“Unless truth be recognized as *public*—as that of which any person would come to be convinced if he carries his inquiry, his sincere search for immovable belief, far enough—then there will be nothing to prevent each one of us from adopting an utterly futile belief of his own which all the rest

Nor, in this regard, does Rauch follow John Locke, who otherwise deserves to be recognized as the father of the constitution of knowledge. Locke portrayed the conduct of the understanding as a personal virtue, not merely a systemic one. In his *Thoughts Concerning Education* he wrote: “There cannot be anything so disingenuous, so misbecoming a gentleman or anyone who pretends to be a rational creature, as not to yield to plain reason and the conviction of clear arguments.”<sup>23</sup> Similarly, in the *Conduct of the Understanding*, Locke emphasized the need of the knower to slough off the power of custom and submit to the authority of reason.<sup>24</sup> Expounding the virtue of toleration, Locke proposed something quite different from an agreement in which “I see your mistakes and you see mine.” Rather, “every man should let alone others’ prejudices and examine his own. Nobody is convinced of his by the accusation of another.”<sup>25</sup> Each of us, Locke, insists, must examine *himself* impartially and the test is manifestly a personal one:

He that is strongly of any opinion, must suppose (unless he be self-condemned) that his persuasion is built upon good grounds, and that his assent is no greater than what the evidence of the truth he holds forces him to, and that they are arguments and not inclination or fancy that make him so confident and positive in his tenets.<sup>26</sup>

But this means too that he must not object to criticism, for “[i]f his opinion be not settled upon a firm[] foundation, if the arguments that support it and have obt[ained] his assent be clear, good and convincing, why should he be shy to have it tried whether they be proof or not.”<sup>27</sup> Verification is the virtue of the process, but freely submitting to it is a personal virtue, which Locke describes this way:

An equal[] indifferency for all truth[,] I mean[,] the receiv[ing] it in the love of it as truth, but not lov[ing] it for any other reason before we know it to be true. And in the examination of our principles and not receiv[ing] any for such nor building on them until we are fully convinced as rational creatures of their solidity[,] truth[,] and certainty.<sup>28</sup>

---

will disbelieve.”) (quotation omitted). For a Peircean argument that stresses the need for individual intellectual virtue, see Susan Haack, *Concern for Truth: What It Means, Why it Matters*, in *THE FLIGHT FROM SCIENCE AND REASON* 61 (Paul R. Gross, Norman Levitt & Andrew W. Lewis eds., 1996).

23. JONATHAN MARKS, LET’S BE REASONABLE: A CONSERVATIVE CASE FOR LIBERAL EDUCATION, at ix (Peter Dougherty & Alena Chekanov eds., 2021) (quotation omitted).

24. See Ruth Grant, *John Locke on Custom’s Power and Reason’s Authority*, 74 *REV. POL.* 607, 621 (2012).

25. JOHN LOCKE, *OF THE CONDUCT OF THE UNDERSTANDING* 175 (Ruth W. Grant & Nathan Tarcov eds., 1996) (1706).

26. *Id.* at 176.

27. *Id.*

28. *Id.* at 178.



Nothing less is required of a *sincere* search for truth. For Locke, as for Peirce, human dignity is most visible in the virtue of the knower who stands ready to abandon all cherished beliefs associated with tradition, identity, and rootedness for the sake of reason. It is some such virtue, I suggest, that must prevail if the constitution of knowledge is ratified.<sup>29</sup>

#### IV. THE CONSTITUTION OF KNOWLEDGE AND INCLUSIVE FREEDOM

But let us descend from these heights and consider from another angle the limits of the constitution of knowledge, which Rauch rightly stresses. Rauch is correct that it would be unreasonable to extend the austere demands of knowing described by Locke and Peirce to every corner of our lives. Those lives overlap numerous domains: family, church, our occupation, and the myriad associations that contribute to our definition as concrete selves. “All that the Constitution of Knowledge says is, ‘Do this here. Do other things in other places. And yes, by all means, do both.’”<sup>30</sup> How might Rauch’s motto apply to the contemporary campus where the traditional demands of knowledge production now clash with the free expression of identities, and where it is no longer agreed just what we are expected to “do here?”

College administrators increasingly refer to the need to “balance” the values of free speech and inclusion. The need for balance suggests a conflict of values, and the tension administrators typically have in mind is the problem that “hate speech” is protected by the First Amendment but is utterly incompatible with an inclusive and diverse academic community.

Sigal R. Ben-Porath has coined the term “inclusive freedom” to describe a synthesis rather than a tradeoff, a framework that seeks the broadest protection for campus speech compatible with the assurance that “all members of the campus community are recognized—and know they are recognized—as members in good standing.” But there lies the rub, for the composite goal “becomes harder to realize when instructors, speakers, and students express views that some members of the community see as undermining their basic dignity, casting them as less than full members.”<sup>31</sup> The idea of inclusive freedom denies any essential incompatibility between free speech and respect for identity, but its *practice* takes an

29. Following Peirce, Haack distinguishes the genuine inquirer from the “sham” or “fake” reasoner as follows:

The genuine inquirer, by contrast, wants to get to the truth of the matter that concerns him, whether or not that truth comports with what he believed at the outset of the investigation, and whether or not his acknowledgment of that truth is likely to get him tenure or make him rich, famous or popular. He is motivated, therefore, to seek out and assess the worth of evidence and arguments thoroughly and impartially; to acknowledge, to himself as well as others, where his evidence and arguments seem shakiest and his articulation of problem or solution vaguest; to go with the evidence even to unpopular conclusions or conclusions that undermine his formerly deeply held convictions; and to welcome someone else’s having found the truth he was seeking.

See Haack, *supra* note 22, at 58.

30. RAUCH, *supra* note 3, at 114.

31. SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS 56–57 (2017).



alarming turn. Free speech serves democracy, but democracy is never served by anything less than more democracy. And insofar as the progress of democracy is measured by increasing respect for identity, the latter functions as a measure of freedom itself. It follows that “[a] call for creating an inclusive environment in which all members are respected and where all voices can be heard should be framed and recognized as furthering rather than impeding the realization of a free and open campus.”<sup>32</sup> And thus spoke the Middlebury protestors whose point was precisely that unequal freedom is not genuine freedom. As they framed it, the campus problem was not about striking a balance between equality and liberty interests; their practice of inclusive freedom was predicated on the idea that freedom itself is limited when the vulnerable are “effectively barred” from speaking their minds out of fear of ridicule, “or when they do not feel that they belong or that they are appreciated.”<sup>33</sup> Giving credit where she believes credit is due, Ben-Porath praises the Middlebury protestors for their “effort to expand the democratic reach of speech to groups they see as harmed and silenced,” where they might have sought merely “to protect themselves within a liberal cocoon.”<sup>34</sup> But it is hard to fathom how the exclusion of the rare conservative thinker from a left-leaning campus expands either democracy or free speech.

The conviction that inclusion will do the work of freedom seems to be both a cause and effect of a metamorphosis in academic culture at Middlebury and beyond.<sup>35</sup> The now-fraying predecessor culture, exemplified by the Kalven and Woodard reports, was, however, nurtured by the converse proposition: genuine freedom would do the work of inclusion.<sup>36</sup> For the humane concern for others is warranted on intellectual as well as compassionate grounds. As we have seen, even the most vehement speaker implicitly accepts that his speech expresses not mere grunts but an argument, thereby conceding that even his target is a rational agent capable of receiving it.<sup>37</sup> This inadvertent tribute that intellectual vice pays to virtue bears interestingly on the fraught matter of punishing hate speech.

It is the denial of equal social standing that is said to constitute the harm sufficient to exclude hate speech from legal protection.<sup>38</sup> The philosopher Bernard

32. *Id.* at 37.

33. *Id.* at 62.

34. *Id.* at 53.

35. Consider the widespread invocation of a new goal: “inclusive excellence” which is typically ambiguous about the meaning of excellence and whether inclusiveness modifies it or embodies it. *See, e.g.,* Damon A. Williams, et al., *Toward a Model of Inclusive Excellence and Change in Postsecondary Institutions*, ASS’N AM. FOR COLLS. & UNIVS. (2005), <https://inclusionandbelongingtaskforce.harvard.edu/publications/toward-model-inclusive-excellence-and-change-postsecondary-institutions> [<https://perma.cc/HM92-2D42>].

36. *Report of the Committee on Freedom of Expression at Yale*, YALE UNIV. (1974), <https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale> [<https://perma.cc/HX6L-AQWS>]; *Report on the University’s Role in Political and Social Action*, UNIV. OF CHI. (Nov. 1967), <https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action> [<https://perma.cc/ZVH2-7HQR>].

37. *See* MANSFIELD, *supra* note 7.

38. *See* JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012).

Williams once remarked on the curious fact that even those bent on social domination strangely feel the need to invent what they assume to be a morally relevant reason for the denial of equality. Hence the Nazis cultivated bizarre theories about the inferiority of the Jews as a way of making themselves believe in it.<sup>39</sup> All stripes of “supremacists” follow the same pattern, submitting themselves unwittingly and, for their “cause,” quite disastrously, to the bar of reason—they would do better to stick to grunting. It is this faith in the intrinsic discipline of reason that underwrites the liberal confidence that exposure to argument is the best response, even to pernicious ideas.

The principal weakness of the inclusive freedom framework is that there is no arguing with people’s subjective feelings, and *a fortiori* with their identities. Few would deny that we should be mindful of the feelings of others, and that the history of exclusion of minorities and women warrants an emphatic message that all groups are not only admitted but welcome on every campus. It also bears remembering that, while professors work on campus, students also live there and the “community function” of a college cannot simply be divorced from its intellectual functions.<sup>40</sup> Still, on the view of Kalven and Woodward to which I am appealing, we are welcoming new groups of students to an academic community in which their membership and standing are understood to be independent of their identities. To put it bluntly, as Alan Ryan does, in the academic realm professors should not be focused on who the student is “as a person” but on what the student thinks: “The point of insulating the classroom from the forum is to allow, indeed to force, participants to leave their identities as whatever it might be that is most salient to them outside the door.”<sup>41</sup>

Civic life requires the equal protection of the laws and in that way assures respect for different identities, but a crucial assumption of academic life has been that our beliefs are separable from our identities. To equate negative appraisals of ideas with attacks on personhood blurs the distinction between who one is and what one thinks and risks putting beliefs beyond the bounds of criticism. To avoid that outcome, while making a spirited case for recognizing an actionable harm in hate speech, Jeremy Waldron cautions against conflating attacks on one’s social standing with criticism of one’s beliefs. “If I identify my *self* with my beliefs,” Waldron warns, “then criticisms of them will seem like an assault on me.”<sup>42</sup>

## V. FREE SPEECH AND OPEN INQUIRY AS A PATH OF INCLUSION

Insofar as academic culture depends on boundaries between the classroom and the forum, and distinctions between ideas and identities, the well-intentioned excesses of diversity and inclusion rhetoric ought to be resisted. To valorize

---

39. BERNARD WILLIAMS, *PROBLEMS OF THE SELF* 233 (1973).

40. Ryan Muldoon, *Free Speech and Learning from Difference*, 54 *SOCIETY* 331 (2017).

41. Alan Ryan, *Academic Freedom and the “Truth Function,”* in *WHY ACADEMIC FREEDOM MATTERS: A RESPONSE TO CURRENT CHALLENGES* 63 (Cheryl Hudson & Joanna Williams eds., 2016).

42. WALDRON, *supra* note 38, at 135.

students' "lived experiences," or to suggest that their academic work involves the expression of their extra-academic identities is, in this perspective, to send precisely the wrong message about inclusion in the university and their eligibility for it. Of course, men and women, whites and Blacks, gays and straights have different experiences and perspectives on the world, but the intersectional insight that identity is always a complex amalgam itself supports the conclusion that in the final analysis we can speak only for ourselves.

My argument about the intrinsic character of an academic community has been deliberately ahistorical. It is worth remembering that whatever free inquiry obtained in the medieval university was subordinated to the clarification of orthodoxy and the exposure of heresy. It was a radical change to redefine the mission of the university as the advancement of enlightenment, generally. The emergence of the research university and the secular liberal arts college we know today represent still further shifts. Nevertheless, there is reason to think that what I have described advisedly as a "liberal" academic culture offers better guidance on free speech and academic freedom than the professedly more "democratic" culture of inclusive freedom that associates "free speech" with epistemic injustice, with the power not merely to silence objections but to silence others.<sup>43</sup> In the former view, academic freedom is the freedom of inquiry and such investigation is rigorous, disciplined and self-effacing in the Rauchian or Peircean sense. Strictly speaking, what the teacher is after is not the student's "opinion" but his or her critical appraisal of a book or an argument, and the intellectual training of students emphasizes developing those critical capacities in everyone.<sup>44</sup> Academic freedom is the fence against illegitimate interference with research and teaching, or with the ability to express one's ideas and hypotheses; but it includes the correlative right to challenge the conclusions of anyone. Precisely because it focuses on the argument and not the individual making it, academic speech is highly structured, constrained as much as it is free. At every juncture, the expression of students and professors is graded, vetted, scrutinized for error; and individuals themselves are promoted, demoted, or excluded along with their more or less successful exposition of ideas.

The university is hardly a "marketplace of ideas" if one means a mall where every intellectual product can be offered for consumption. As Stanley Fish puts it, the academy "is in the business of excluding what it has judged to be unworthy."<sup>45</sup> Far from being democratic, the academic community appears pervasively authoritarian. Whereas government can neither authorize nor de-authorize anyone's voice, the academic community does it all the time because the advancement of knowledge depends on carefully wrought structures of exclusion. This ethos of exclusion applies even more strenuously to political demands: "A

---

43. See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).

44. This is a point stressed in Alan Ryan, *Free Inquiry: Easy Times Can Be Difficult Too*, 76 *SOC. RES.* 943 (2009).

45. STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM* 148 (2014).

passion for justice is of course a good thing; it's just not an academic good thing," says Fish, and the infiltration of "causes necessarily" subverts academic culture.<sup>46</sup> In an acerbic flourish, Fish admonishes progressive students to "save the world on your own time." He is equally caustic in dismissing affirmative action for "conservative" viewpoints on grounds of intellectual pluralism, despite their well-documented underrepresentation in academia. Equal representation, Fish retorts, is a political not an academic principle: "[T]he business of the academy is to sort the wheat from the chaff and discard, not represent, points of view it judges unworthy; it does not give points of view a place at the table simply because someone out there is asserting them."<sup>47</sup>

The purpose of academic freedom is the preservation of the authority of communities of inquiry, and that authority in turn presupposes the possibility of disinterested scholarship. Contrary to the rhetoric of admissions brochures, good professors can be dispassionate about their subject and skeptical of the urgencies of the here and now invoked on behalf of the "socially relevant" curriculum. Self-preservation requires that they find a way to be "relatable," and good teachers are indeed aware that each student is a "whole person," but in their professional capacity they are, as Ryan argued, primarily interested in the head, and they are keenly aware that the future of knowledge depends on the constant recruitment of new minds capable of preserving and expanding it.

## VI. THE FIRST AMENDMENT IS NOT ENOUGH

Enough has been said perhaps to indicate why "free speech on campus" is a more complex problem than meets the eye and why the conflation of First Amendment freedoms and academic freedom is to be avoided. Freedom of thought and discussion are endangered on campus, but our political free speech principles necessarily protect the kind of thoughtless expression academic norms seek to exclude. The challenge is illustrated in a recent and worthy effort by Erwin Chemerinsky and Howard Gillman to reconcile free speech protections with the creation of "inclusive learning environments for all students."<sup>48</sup> A noteworthy ambiguity about what inclusion requires runs throughout their argument. All arguments for hate-speech bans fail, Chemerinsky and Gillman insist, and it follows that colleges cannot legitimately *prohibit* any ideas or views "no matter how offensive or how uncomfortable they make people feel."<sup>49</sup> They defend the right of administrators to "sensitize students and faculty to the impact that certain words may have, as part of an effort to create a respectful work and learning environment," but without yielding ground on the fundamental guarantee of academic freedom: "the ability to express all ideas and viewpoints, no

---

46. *Id.* at 17.

47. *Id.* at 72.

48. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS*, at x (2017).

49. *Id.* at 19.

matter how offensive.”<sup>50</sup> In the final analysis, an inclusive environment is associated with one “conducive for learning,” and the measure of which is “nondiscriminatory.”<sup>51</sup> Their bright line between advocating norms of civility in expression and “enforcing these norms by censorship or punishment” will not impress those demanding “safety” from the likes of Charles Murray.<sup>52</sup> To their credit, Chemerinsky and Gillman distinguish legitimate and illegitimate demands for intellectual safety: the first seek protection *for* the expression of one’s ideas, the second protection *from* exposure to the offensive ideas of others. But mounting qualifications blur the distinction. It is wrong, the authors say, for universities to *require* faculty to issue trigger warnings about potentially offensive material; but if a *recommendation* such as Oberlin’s—that faculty, as they prepare to teach, “Be aware of racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of privilege or oppression”—can pass muster, is the distinction between prohibition and sensitizing any longer meaningful?<sup>53</sup> Such a checklist of macroaggressions is a not-so-friendly reminder of the burgeoning number of topics on which there is no “other side.”

And here a deeper problem manifests itself in Chemerinsky and Gillman’s otherwise compelling defense of the freedom of speech on campus. Their primary argument is that free speech is essential to free thought, without which “a person cannot develop an independent point of view about the world,” and without which no true diversity of identities is possible.<sup>54</sup> More importantly, such diversity is nothing without the freedom to express those identities: “To hide who you are and what you believe” out of fear is “an exceedingly cruel and oppressive circumstance.”<sup>55</sup> All of this is doubtless true as a conclusion about equal citizenship in the social and civic spheres, but the emphasis on freedom as the expression of one’s unique identity is the very notion that threatens to displace freedom for the pursuit of truth when carried into the academic realm.

The Oberlin faculty guide mirrors the Middlebury alumni protest letter, minus the latter’s existential dread. Oppression is everywhere yet distributed unequally across different identities such that the naïve observer who might acknowledge discrimination in one regard misses its “multidimensionality” and thereby “theoretically erases” the victim. This was the thought that stood behind the earnest belief that Charles Murray’s wonky arguments put various identities at risk. The implication is that to suggest, as Murray does, that culture counts, that responsibility is a neglected virtue, that a class divide has arisen on behavioral rather than economic lines, threatens the safety, agency, and humanity of each and every marginalized group. Could any of Murray’s propositions be true? That there is a choice to be made among better or worse proposals to advance the public good,

---

50. *Id.* at 140, xi.

51. *Id.* at 19–21, 23, 111.

52. *Id.* at 141.

53. *Id.* at 126.

54. *Id.* at 24.

55. *Id.* at 25.

that markets and the rule of law might benefit the entire social order, or that power might be exercised through institutions that constrain personal domination? Such considerations are so at odds with the narrative of powerlessness as to make dialogue impossible. Such at least was the view of the Middlebury protestors; it is ascendant on our campuses and the justification of free speech for the sake of free expression makes little headway against it.

In oppressive conditions, Marcuse explained, tolerance does not and cannot fulfill “the civilizing function” attributed to it by liberals.<sup>56</sup> When there is no “other side,” he added, “tolerance cannot be indiscriminate and equal with respect to the contents of expression, neither in word nor in deed; it cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation.”<sup>57</sup> “Inclusive freedom” might seem to solve the problem of balance by denying the zero sum relation, but for the fact that inclusion has become associated with demands for recognition and epistemological privileges at odds with the impersonal requirements of the constitution of knowledge.

## VII. CONCLUSION

Happily, another view is available, an understanding of intellectual autonomy in which thinking for ourselves is neither thinking what we please nor “saying whatever comes into our heads next.”<sup>58</sup> As Alan Ryan puts it, “A condition of thinking for oneself is that we subordinate our wills to the demands of logical coherence and sound evidence . . . .”<sup>59</sup> Such academic discipline has virtually nothing to do with self-expression as the latter is usually understood. Free inquiry is thinking for ourselves by subjecting our thoughts to scrutiny and abandoning them when they fail the test. Insofar as our thoughts are indeed *considered* judgments and not mere reflexes, they are ultimately not our own but are available to others with minds open to receive them. In this way, the deeply private activity of thinking includes an element of generosity. Its self-effacing tendency is also manifest in the vulnerability that accompanies “allowing another’s thoughts to re-enact themselves in one’s own mind.”<sup>60</sup> The strange reality of intellectual freedom is that it is ultimately not for our own sake but that of others, which is another way of saying: for the sake of truth. In an academic setting there is nothing significant about my opinions flowing from the fact that they are contingently mine; and strictly speaking, I have no right to my opinion other than the freedom to offer arguments on its behalf. Should those arguments fail, I ought reasonably to revise or abandon my opinion. Similarly, no damage is done to *me* if I lose an

---

56. Herbert Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 81, 88 (Robert Paul Wolff, Barrington Moore, Jr. & Herbert Marcuse, eds., 1970).

57. *Id.*

58. Alan Ryan, *Free Inquiry: Easy Times Can Be Difficult Too*, 76 *SOC. RSCH.* 943, 951 (2009).

59. *Id.*

60. MICHAEL OAKESHOTT, *THE VOICE OF LIBERAL LEARNING: MICHAEL OAKESHOTT ON EDUCATION* 68 (Timothy Fuller ed., 1989).

argument; I remain standing when I stand corrected. But if my thoughts and my opinions are indissolubly linked to my “identity,” they become mechanisms of self-protection or “validation” and argument necessarily becomes charged with personal risk.

The tenacity of our opinions is indicative of our need for intellectual comfort, and there is no gainsaying that the truth often hurts. Precisely because of such personal stakes, the justice that obtains in an academic community is justice to the argument, and the only force tolerable is the force of argument. If we made justice in this sense our virtue, we might accomplish all that we hope for by the pursuit of compassionate inclusivity. Students would owe (and might be better able to show) one another mutual respect, not because of their unchosen identities, but insofar as their arguments were sincere attempts to clarify the truth of things. Discussions would remain heated—it bears remembering that to “discuss” means to break apart, the destruction making possible the examination of minute parts of things. But our challenges to one another would be motivated by a desire to “get it right;” they would be attributions of error, made tolerable by the common interest in escaping the burden of bad ideas.

““School,”” Michael Oakeshott remarked, “is an emancipation achieved in a continuous redirection of attention,” where the learner is animated “not by the inclinations he brings with him, but by intimations of excellence and aspirations he has never yet dreamed of.”<sup>61</sup> We cannot but bring our identities with us to school, but our purpose is the cultivation of reason. Fortunately, “[i]nclusion in the wellsprings of knowledge and culture is a great privilege and the truest form of inclusion that college makes possible.”<sup>62</sup>

---

61. *Id.* at 69.

62. James Stoner, *Free Speech, Diversity and Inclusion: Is There a Balance?*, JACK MILLER CTR., <https://jackmillercenter.org/constitution-day/constitution-day-conversation-2017/#essay> [https://perma.cc/7MNE-WMER].