

**THE FIRST AMENDMENT UNDER SIEGE: OR HOW TO
CENSOR WITHOUT REALLY TRYING**

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INTRODUCTION

The First Amendment as we know it is under siege. And it is under siege as we have rarely known it. Consider, as evidence of the siege, a sampling of Executive Branch orders and proclamations germane to free expression. The sampling may be first catalogued by subject—the viewpoints and perspectives disfavored by the Administration of President Trump. These include (among the highlights) desecrating the American Flag as a symbol of protest; expression promoting diversity, equity, and inclusion; advancing disfavored public health perspectives, such as disfavored views on vaccine policies; and advancing disfavored positions on environmental protection and climate change.¹ The sampling may secondly be catalogued by target—particular groups that have especially drawn the Administration’s ire and been threatened with retribution. These include major American law firms, American universities, and foreign nationals lawfully residing in the United States, among others.²

In this Article, I describe these attacks and critique their constitutionality. I conclude that, in many respects, the actions taken by the Administration violate existing First Amendment doctrines. On the optimistic side, I predict that when and if challenges to these actions reach the United States Supreme Court *on the merits*, the Supreme Court will declare many of the actions unconstitutional. On the pessimistic side, I fear that, nonetheless, much irreparable damage will already have been done.

In military terms, a “siege” is an operational tactic calculated to subdue or conquer an enemy by surrounding or isolating a fortified place, such as a city or fortress, without a direct attack, such as by starving the enemy into submission. The current attack on the First Amendment is such a “siege,” in that the Administration does not have to win all its battles in order to win the war. Many of the Administration’s actions are not “direct attacks,” to continue the military metaphor. Rather, through such tactics as cutting off federal funding or revoking other privileges, the Administration has often been able to coerce capitulation. Not everyone surrendered, to be sure. As will be seen, some law firms and universities relented to Administration pressure, reaching deals that often involved self-censorship, but other law firms and universities fought back.³ On the whole, however, capitulation breeds capitulation. If not total victory, the Administration has gained such momentum from the deals it has cut that free expression writ large has been

1. *See infra* Parts I, IV.

2. *See infra* Parts II–IV.

3. *See infra* Parts III, IV, V.

dealt a major blow, as more and more entities and individuals feel pressure to give up, lest the sword of Damocles should fall.

The damage has been exacerbated by delay. Time is on the government's side. Many federal district court judges have shown great courage in issuing preliminary injunctions against Administration policies that appear likely to violate the First Amendment. However, the Administration has been remarkably successful in overturning those injunctions, often by obtaining stays while the litigation continues, effectively putting off any final resolution on the merits for a year or more.⁴ In the interim, the retribution continues. A law firm or a university faced with the immediate loss of hundreds of millions of dollars may deem it more practical to just accede rather than fight the good fight. This is especially so when the outcome is not guaranteed, and resolution may take years—years in which the funding is lost. Even more powerfully, the leverage exacted against one particularly vulnerable group—non-citizens lawfully residing in the United States—has a particularly powerful *in terrorem* effect. In short, it is possible to accomplish real-world censorship simply by laying siege.

I. THE FLAG DESECRATION ORDER

President Donald Trump issued an Executive Order on August 25, 2025, entitled *Prosecuting Burning of the American Flag*.⁵ The Order recites that, “The American Flag is a special symbol in our national life that should unite and represent all Americans of every background and walk of life. Desecrating it is uniquely offensive and provocative.”⁶ It goes on to declare: “[Desecrating the Flag] is a statement of contempt, hostility, and violence against our Nation—the clearest possible expression of opposition to the political union that preserves our rights, liberty, and security.”⁷

Plainly aware that the Order would be in tension with First Amendment principles, it added the additional preamble:

Notwithstanding the Supreme Court's rulings on First Amendment protections, the Court has never held that American Flag desecration conducted in a manner that is

4. See Suzanne Monyak & Jacqueline Thomsen, *Trump Reigns Supreme in High Court Emergency Docket Decisions*, BLOOMBERG LAW (Jan. 27, 2026), <https://news.bloomberglaw.com/us-law-week/trump-reigns-supreme-in-high-court-emergency-docket-decisions>.

5. Exec. Order No. 14,341, 90 Fed. Reg. 42127 (Aug. 25, 2025).

6. *Id.* § 1, 90 Fed. Reg. at 42127.

7. *Id.*

likely to incite imminent lawless action or that is an action amounting to “fighting words” is constitutionally protected.⁸

The Order’s citation to *Texas v. Johnson* was political craftsmanship. *Texas v. Johnson* is the landmark decision holding that the First Amendment protects the burning of the American Flag as an act of symbolic expressive protest.⁹ Yet the Order acts as if *Texas v. Johnson* is on the Administration’s side.

Shortly after the issuance of the Order, Jay Carey, a 22-year Army veteran, burned the Flag in Lafayette Park outside the White House as a gesture of symbolic protest against the President’s Executive Order, declaring that President Trump’s order violated the First Amendment.¹⁰ Law enforcement immediately took him into custody.¹¹ The Administration claims that nothing in the Executive Order contradicts *Texas v. Johnson*.¹² Yet here we are with the likes of Jay Carey arrested for a symbolic act of protest against the Executive Order.¹³ Even so, let’s pose it as an even fight. Is the Order constitutional or not?

As a preliminary matter, the Order includes several boilerplate statements at the end that are plainly intended to inoculate the Order from judicial challenge.¹⁴ This language is a recurring leitmotif in virtually all of the Trump Administration’s Executive Orders or other “guidance” documents it has issued. It is a sort of “now you see it, now you don’t” approach to governance. The document in substance *seems* to dictate policy but then purports not to. The tactic is reminiscent of what Humpty Dumpty described: “‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”¹⁵ The Administration, conjuring “Alice in Trumpland,” on the one hand seeks to legislate and regulate through Executive Orders. On the other hand, when challenged, the mantra tends to be “well, never mind.” It is as if the Executive

8. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 408–10 (1989)).

9. *Johnson*, 491 U.S. at 407–10.

10. Khaleda Rahman, *Who is Jay Carey? Veteran Who Burned US Flag After Trump’s Executive Order*, NEWSWEEK (Aug. 26, 2025), <https://www.newsweek.com/jay-carey-veteran-burned-us-flag-2119229>.

11. *Id.*

12. Exec. Order No. 14,341 § 1, 90 Fed. Reg. at 42127.

13. Rahman, *supra* note 10.

14. Exec. Order No. 14,341 §§ 3–4, 90 Fed. Reg. at 42128.

15. *Broward Cnty. v. Fla. Carry, Inc.*, 313 So. 3d 635, 643 (Fla. Dist. Ct. App. 2021) (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 103 (1909)).

Orders are “[t]old by an idiot, full of sound and fury, [s]ignifying nothing.”¹⁶ First Amendment law, fortunately, is not so credulous:

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the State to punish or suppress disfavored expression.¹⁷

Let us assume, then, that the Order is “law” in the sense that courts know law.¹⁸ The Order contemplates three different forms of prosecutorial enforcement.

First, the Order asserts that unprotected conduct—such as an incitement to violence or a hate crime—committed while desecrating the Flag will receive prioritized enforcement.¹⁹

Second, the Order asserts that Flag desecration carried out incident to the violation of some content-neutral laws will be targeted and referred for prosecution.²⁰ It thus prioritizes enforcement of criminal and civil laws “to the fullest extent possible” against “acts of American Flag desecration that violate applicable, content-neutral laws, while causing harm unrelated to expression, consistent with the First Amendment.”²¹ Elaborating, the Order explains that this “may include, but is not limited to, violent crimes; hate crimes, illegal discrimination against American citizens, or other violations of Americans’ civil rights; and crimes against property and the peace, as well as conspiracies and attempts to violate, and aiding and abetting others to violate, such laws.”²²

Third, the Order targets non-citizens. Among other prosecutorial actions to punish those who engage in flag desecration, the Order states:

16. WILLIAM SHAKESPEARE, *MACBETH* act V, sc. 5, ll. 30–31.

17. *Nat’l Rifle Ass’n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024).

18. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (“[I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law . . .”).

19. Exec. Order No. 14,341 § 2(a), 90 Fed. Reg. at 42127.

20. *Id.* (“In cases where the Department of Justice or another executive department or agency (agency) determines that an instance of American Flag desecration may violate an applicable State or local law, such as open burning restrictions, disorderly conduct laws, or destruction of property laws, the agency shall refer the matter to the appropriate State or local authority for potential action.”).

21. *Id.*

22. *Id.*

The Secretary of State, the Attorney General, and the Secretary of Homeland Security, acting within their respective authorities, shall deny, prohibit, terminate, or revoke visas, residence permits, naturalization proceedings, and other immigration benefits, or seek removal from the United States, pursuant to Federal law . . . whenever there has been an appropriate determination that foreign nationals have engaged in American Flag-desecration activity under circumstances that permit the exercise of such remedies pursuant to Federal law.²³

To what extent are these three strategies for punishing flag desecration consistent with First Amendment principles? Begin with the unprotected conduct committed while desecrating the Flag. This poses a First Amendment conundrum.

But to set the baseline, let's start with the part that is not a conundrum. That baseline was set by the Supreme Court's 1989 decision in *Texas v. Johnson*.²⁴ This was a 5–4 decision, in which Justice Brennan wrote the opinion for the Court.²⁵ It is, along with his opinion for the Court in *New York Times Co. v. Sullivan*,²⁶ among Justice Brennan's two signature contributions to modern First Amendment law. Interestingly, the five Justices who comprised the majority in *Johnson* crossed ideological lines. Justice Brennan's opinion was joined by Justices Scalia, Kennedy, Marshall, and Blackmun.²⁷ The dissenters were Chief Justice Rehnquist, and Justices Stevens, White, and O'Connor.²⁸ There were liberals and conservatives on both sides.

The defendant in the case was Gregory Lee Johnson, who burned an American Flag as symbolic anti-war protest in Dallas in 1984, during the Republican National Convention, which nominated President Ronald Reagan for a second term.²⁹ Johnson was convicted of desecrating the Flag.³⁰ At the outset, Texas conceded (as it essentially had to concede) that Johnson's Flag-burning was "expressive conduct" that triggered some level of First Amendment scrutiny.³¹ In Gregory Johnson's

23. *Id.* § 2(d), 90 Fed. Reg. at 42127–28 (citing 8 U.S.C. §§ 1182(a), 1227(a), 1424, 1427, 1451(c) (2025)).

24. 491 U.S. 397, 408–10 (1989).

25. *Id.* at 398.

26. 376 U.S. 254, 256 (1964).

27. *Johnson*, 491 U.S. at 398.

28. *Id.*

29. *Id.* at 399.

30. *Id.* at 400.

31. *Id.* at 405–06.

own words: “The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time.”³² What was not conceded by Texas, however, was the appropriate level of First Amendment scrutiny. That turned, then and now, on whether the burden placed on Johnson’s expressive Flag-burning was “content neutral,” and thus subject to the intermediate level of scrutiny established in *United States v. O’Brien*,³³ or content-based, and subject to strict scrutiny.³⁴

O’Brien involved the burning of a draft card as a symbol of anti-war protest during the Vietnam War.³⁵ The Supreme Court ruled that only intermediate scrutiny was warranted because the federal law prohibiting destruction of a draft card was not based on disagreement with any message that might be conveyed.³⁶ Rather, it served important governmental interests unrelated to the suppression of expression.³⁷ The Court reasoned that Congress passed the law to ensure the Selective Service System functioned effectively—an interest the Court deemed content-neutral.³⁸ The Court thus upheld the draft-card burner’s conviction.³⁹

O’Brien has always been hard to swallow on its facts because the historical record seemed to indicate that Congress was motivated by a desire to suppress anti-war protests.⁴⁰ But while the application of intermediate scrutiny to facts in *O’Brien* may have been dubious, the core notion that laws that are content-neutral should be subjected only to intermediate scrutiny has endured. In the recent TikTok ban case, for example, the law requiring divestiture of TikTok from Chinese ownership was deemed content-neutral and upheld by the Court.⁴¹ Similarly, relying on *O’Brien*, the Court recently found that age-verification requirements for online pornography sites were content-neutral and upheld the requirements.⁴²

32. *Id.* at 406.

33. 391 U.S. 367, 376–77 (1968) (establishing intermediate scrutiny for incidental burdens on expressive conduct).

34. *Johnson*, 491 U.S. at 403.

35. *O’Brien*, 391 U.S. at 369.

36. *Id.* at 377.

37. *Id.*

38. *Id.*

39. *Id.* at 382.

40. RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 9:5 (2025 ed. 2025).

41. *TikTok Inc. v. Garland*, 145 S. Ct. 57, 72 (2025).

42. *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2309 (2025) (“In this respect, H.B. 1181 is analogous to the prohibition against destroying draft cards that this Court upheld in *United States v. O’Brien*. The prohibition may have had the effect of making it unlawful to protest the draft by burning one’s draft card. But, the ‘destruction’ of a draft card is not itself ‘constitutionally protected activity,’ because the card is a Government document that, among other functions, serves as proof of registration.

So, are laws prohibiting Flag desecration content-based or content-neutral? Or to put the point more pointedly, what's the difference between laws penalizing the burning of a draft card and the burning of the Flag? *Johnson* supplies the answer. While there are arguably content-neutral justifications for prohibiting destruction of a government document, such as a draft card, there are simply no conceivable content-neutral reasons for prohibiting the desecration of the Flag.

The Court rejected all of Texas's proffered interests to defend its law. Texas claimed that Flag desecration tends to encourage breach of the peace because many onlookers are likely to take serious offense in witnessing the spectacle.⁴³ This claim, the Court held, ran contrary to contemporary First Amendment principles because a major function of free speech is to invite dispute, even when the dispute is fraught with offense or anger.⁴⁴ The Court punctuated the point in a sentence that would achieve stature as a First Amendment classic, one of the most often quoted encapsulations of the very core of free speech principles: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁴⁵

Particularly significant for purposes of analyzing President Trump's Executive Order, the Court in *Johnson* roundly rejected the notion that the government may simply *presume* that certain highly offensive speech will automatically qualify as "incitement" or "fighting words."⁴⁶

The prohibition on destroying draft cards thus placed only an incidental burden on First Amendment expression, making it subject to intermediate scrutiny. So too here, because accessing material obscene to minors *without verifying one's age* is not constitutionally protected, any burden H.B. 1181 imposes on protected activity is only incidental, and the statute triggers only intermediate scrutiny." (citations omitted).

43. *Texas v. Johnson*, 491 U.S. 397, 408 (1989).

44. *Id.* at 408–09 ("Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) (citing *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988))).

45. *Id.* at 414 (citing *Hustler Mag.*, 485 U.S. at 55–56; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462–63 (1980); *Fed. Comm'n Comm'n v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63–65, 67–68 (1976); *Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142–43 (1966); *Stromberg v. California*, 283 U.S. 359, 368–69 (1931)).

46. *Id.* at 408–10.

Gregory Johnson's expression clearly qualified as neither. *Johnson* fully repudiated Texas's argument that there is something inherent in Flag desecration to qualify it as unprotected speech. Johnson's conviction was grounded entirely on the communicative impact of the expressive conduct, particularly the emotional reaction of onlookers.⁴⁷ Yet criminalizing "offensive or disagreeable" speech runs directly contrary to what the Court famously described as a "bedrock principle" in *Johnson*.⁴⁸

II. ATTACKS ON NON-CITIZEN LAWFUL AMERICAN RESIDENTS

President Trump's flag-desecration Executive Order illustrates one of the most powerful weapons in the federal government's current siege against freedom of speech: the threat of deporting persons who engage in disfavored speech. This includes non-citizens lawfully residing in the United States, such as foreign nationals on student or work visas.

The government's position is that entry into the United States is a privilege granted at the grace of the United States as a sovereign.⁴⁹ Entry may come with whatever conditions the government chooses to impose.⁵⁰ This includes the condition that the guest of this country not abuse the privilege of having been granted entry by presuming to criticize or protest against the guest's sovereign host.⁵¹

Opposing this view, non-citizen lawful residents of the United States argue that once lawfully admitted into the country, lawful non-citizens are entitled to the same First Amendment rights as citizens.⁵² These rights must of course include the right to engage in peaceful protest against official governmental policies and practices.⁵³ Distilled to its core, the issue thus joined is whether lawfully admitted non-citizens residing in the United States possess the same free speech rights as citizens enjoy. The issue has been central to a number of cases challenging Executive Orders that target noncitizens.

In *American Association of University Professors v. Rubio*, United States District Judge William Young held that foreign citizens lawfully within the United States possess "at least the core rights protected by the First

47. *Id.* at 412.

48. *Id.* at 414.

49. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952).

50. *Id.* at 586–88; *id.* at 596–97 (Frankfurter, J., concurring).

51. This is the position the government has taken with regard to non-citizens, law firms, and universities. See *infra* note 61 and accompanying text; *infra* Parts II–IV.

52. See *infra* note 57 and accompanying text.

53. See *infra* note 57 and accompanying text.

Amendment, chief among them the right to speak on political subjects.”⁵⁴ The government in *American Association of University Professors* relied on the Supreme Court’s decision in *Harisiades v. Shaughnessy*.⁵⁵ In *Harisiades*, the Supreme Court upheld the deportation of lawful-resident aliens because they were once members of the Communist Party.⁵⁶ In resisting deportation, the non-citizens made the claim that as lawful residents of the United States, they were entitled to the same rights as American citizens.⁵⁷ The Supreme Court rejected this contention, invoking the reasoning of the once-dominant *right-privilege distinction*.⁵⁸ In constitutional law, the *right-privilege distinction* applies when a person is granted a *privilege* by the government.⁵⁹ That privilege may be subject to conditions—or revoked entirely—at the will of the government because it was never a formally vested “right.”⁶⁰

As the Supreme Court in *Harisiades* put it: “Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government’s power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.”⁶¹

This statement from *Harisiades* essentially encapsulates the current position of the Trump Administration in a nutshell. The argument is pristine in its simplicity, boiling down to this: You are here as a guest of the United States as a matter of sovereign hospitality; you may be ejected for any reason that the ruling administration deems appropriate because, as a guest, you do not enjoy the rights of citizens. The question is whether the Trump Administration’s position—which appears backed by *Harisiades*—is sound constitutional law, or whether more contemporary developments in constitutional jurisprudence have superseded it.

The District Court in *American Association of University Professors* took the view that *Harisiades* is no longer valid.⁶² And for good reason.

54. 780 F. Supp. 3d 350, 382 (D. Mass. 2025).

55. 342 U.S. 580 (1952); *Rubio*, 780 F. Supp. 3d at 382.

56. *Harisiades*, 342 U.S. at 592.

57. *Id.* at 584 (“Their basic contention is that admission for permanent residence confers a ‘vested right’ on the alien, equal to that of the citizen, to remain within the country, and that the alien is entitled to constitutional protection in that matter to the same extent as the citizen.”).

58. *Id.* at 586–87.

59. Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 71 (1982) [hereinafter *Reemergence of the Right-Privilege Distinction*].

60. *Id.* at 71–72; see *Harisiades*, 342 U.S. at 586–87.

61. *Id.*

62. *Am. Ass’n. of Univ. Professors v. Rubio*, 780 F. Supp. 3d 350, 382 (D. Mass. 2025) (“The Public Officials’ reliance on case law from the height of the second Red Scare era, such as *Harisiades v. Shaughnessy* is misplaced, and this Court assumes instead that noncitizens lawfully present in the United

Harisiades was decided in 1952, well before modern First Amendment principles that provide robust protection for free speech. In that era, mere membership in disfavored organizations, such as the Communist Party, could be proscribed.⁶³ Under the now-dominant First Amendment regime, content and viewpoint discrimination are presumptively unconstitutional.⁶⁴ *Harisiades* was a child of the *Red Scare* epoch in American history, with its obsessive fear of communism and the notorious red-baiting tactics of McCarthyism.⁶⁵ Yet modern First Amendment doctrine has long since passed this epoch.⁶⁶

It is worth a brief interjection here to remind the reader what the Red Scare epoch was like, and how, even as quickly as just three years after *Harisiades*, the Supreme Court began to push back against it. The Supreme Court's 1955 decision in *Peters v. Hobby*⁶⁷ is an important exemplar. John P. Peters was a medical science professor at Yale.⁶⁸ He was an expert in the study of metabolism.⁶⁹ Because of his eminence in the field of medical science, he was employed as a Special Consultant in the United States Public Health Service of the Federal Security Agency.⁷⁰ Administrators drummed Professor Peters out of government service, finding that he was "disloyal" to the United States.⁷¹ The Supreme Court, in an opinion by Chief Justice Earl Warren, held that the actions taken against Peters were illegal and ordered that the finding of his disloyalty be expunged.⁷² Peters

States have at least the core rights protected by the First Amendment, chief among them the right to speak on political subjects at least where such speech poses no immediate threat to others.") (internal citation omitted).

63. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

64. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional . . ."); *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) ("Viewpoint discrimination,' as we have put it, represents 'an egregious form' of content regulation, and governments in this country must nearly always 'abstain' from it." (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

65. *Rubio*, 780 F. Supp. 3d at 382.

66. See cases cited *supra* note 63.

67. 349 U.S. 331 (1955). The United States was represented in the case by none other than Warren Burger, then an Assistant Attorney General, who would of course later become Chief Justice of the United States Supreme Court. *Id.* at 332.

68. *Id.* at 333.

69. *Id.*

70. *Id.*

71. *Id.* at 337.

72. *Id.* at 348–49 ("Initially petitioner is entitled to a declaratory judgment that his removal and debarment were invalid. He is further entitled to an order directing the respondent members of the Civil Service Commission to expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to petitioner's loyalty and to expunge from its records any ruling that petitioner is barred from federal employment by reason of that finding.").

was not reinstated because the job term had expired.⁷³ The majority opinion in *Peters* was based on perceived technical deficiencies in the procedures followed by the disloyalty board that impugned Dr. Peters.⁷⁴ Although the majority opinion by Chief Justice Warren was somewhat sterile in its reliance on technical procedural defaults, one passage in the opinion hinted at the deeper values at stake:

While loyalty proceedings may not involve the imposition of criminal sanctions, the limitation on the Board's review power to adverse determinations was in keeping with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not. This safeguard was one of the few, and perhaps one of the most important, afforded an accused employee under the Order. Its effect was to leave the initial determination of his loyalty to his co-workers in the department—to his peers, as it were—who knew most about his character and his actions and his duties. He was thus assured that his fate would not be decided by political appointees who perhaps might be more vulnerable to the pressures of heated public opinion.⁷⁵

This notion that “political appointees” might be influenced by the “pressures of heated public opinion” to brand Dr. Peters disloyal was clearly an important animating backdrop to the majority's opinion.⁷⁶ Two Supreme Court Justices, Justices Black and Douglass, however, saw deeper constitutional issues in the case. Justice Black saw potential separation of powers issues; he doubted Congress had authorized the disloyalty purge.⁷⁷ Justice Douglas's opinion, however, was the most prescient and germane to the fundamental civil liberties at stake when the government proclaims that

73. *Id.* at 349 (“His prayer for reinstatement, however, cannot be granted, since it appears that the term of petitioner's appointment would have expired on December 31, 1953, wholly apart from his removal on loyalty grounds.”).

74. *Id.* at 340.

75. *Id.* at 344–45.

76. *Id.* at 345.

77. *Id.* at 350 (Black, J., concurring) (“But I wish it distinctly understood that I have grave doubt as to whether the Presidential Order has been authorized by any Act of Congress. That order and others associated with it embody a broad, far-reaching espionage program over government employees. These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here. And of course the Constitution does not confer lawmaking power on the President.”).

public employees should be dismissed on accusations of disloyalty by “faceless informers.”⁷⁸ In a powerful passage, Justice Douglas wrote:

Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. . . . We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. . . . It is an un-American practice which we should condemn.⁷⁹

What was true in 1955 is true in 2026. The actions of the federal government today reprise the witch-hunt tactics of the Red Scare epoch. They are un-American practices “which we should condemn.”⁸⁰

III. ATTACKS ON LAW FIRMS

A number of President Trump’s Executive Orders targeted major American law firms. President Trump’s Administration sought to penalize those firms for taking positions—past and present—contrary to the views and agenda of the Administration. The prominent law firms so targeted took two opposite approaches. Many major firms settled with the Trump Administration, agreeing to cease the actions that drew the attacks and to provide hundreds of millions of dollars in pro bono legal services on behalf of President Trump’s favored causes.⁸¹

Other firms fought back against President Trump’s Executive Orders, filing federal court suits alleging that the Orders were illegal. The firms

78. *Id.* at 352 (Douglas, J., concurring).

79. *Id.* at 350–52.

80. *Id.* at 352.

81. According to *The New York Times*, major law firms that reached such deals with the Trump Administration included: Paul, Weiss, Rifkind, Wharton & Garrison; Skadden, Arps, Slate, Meagher & Flom; Willkie Farr & Gallagher; Milbank; Kirkland & Ellis, Latham & Watkins, A&O Shearman; Simpson Thacher & Bartlett; and Cadwalader, Wickersham & Taft. See Matthew Goldstein, *Five More Big Law Firms Reach Deals with Trump*, N.Y. TIMES (Apr. 11, 2025), <https://www.nytimes.com/2025/04/11/business/trump-law-firms-kirkland-ellis-latham-watkins.html>. The firms settled for various amounts, with many agreeing to provide as much as \$100 million to \$125 million in pro bono or free legal work to causes favored by President Trump. *Id.*

fighting back include Susman Godfrey,⁸² Perkins Coie,⁸³ Wilmer Cutler Pickering Hale & Dorr,⁸⁴ and Jenner & Block.⁸⁵ And that number may grow. The central claim in many of those suits was that the President's Executive Order violated the First Amendment.⁸⁶

In the preliminary stages of this law firm litigation, the law firms with the spine to challenge the Executive Orders have prevailed against President Trump. In the *Wilmer* litigation, United States District Judge Richard J. Leon granted in part and denied in part preliminary relief under the First Amendment.⁸⁷ In the *Susman Godfrey* litigation, United States District Judge Loren L. Alikhan issued a temporary restraining order barring the government from enforcing any actions against the firm.⁸⁸ In the *Perkins Coie* litigation, United States District Judge Beryl A. Howell declared President Trump's Executive Order against the firm unconstitutional.⁸⁹ Judge Howell opened with the observation that no President in American history had so brazenly attacked the independence of lawyers, noting that President Trump's actions channeled the tactics memorialized by the famous exhortation from William Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers."⁹⁰ And in the *Jenner & Block* litigation, United States District Judge John D. Bates, in an elegantly

82. *Susman Godfrey LLP v. Exec. Off. of President*, 2025 WL 1113408, at *1 (D.D.C. Apr. 15, 2025). [Author's Disclosure:] President Trump's attack on the Susman Godfrey firm was driven by that firm's leading role in its successful advocacy on behalf of Dominion Voting against Fox News, predicated on the false claims by Fox that Dominion was complicit in stealing the 2020 presidential election from President Trump, a claim debunked by the court in that litigation. I served as co-counsel with the Susman Godfrey law firm in representing Dominion in that litigation.

83. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 120 (D.D.C. 2025).

84. *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*, 774 F. Supp. 3d 86, 88 (D.D.C. 2025).

85. *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 88 (D.D.C. 2025).

86. *See infra* notes 87–88, 90, 92, 94 and accompanying text.

87. *Wilmer*, 774 F. Supp. 3d at 88.

88. *Susman Godfrey LLP v. Exec. Off. of President*, 2025 WL 1113408, at *1 (D.D.C. Apr. 15, 2025).

89. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 181 (D.D.C. 2025).

90. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 118–19 (D.D.C. 2025) ("No American President has ever before issued executive orders like the one at issue in this lawsuit targeting a prominent law firm with adverse actions to be executed by all Executive branch agencies but, in purpose and effect, this action draws from a playbook as old as Shakespeare, who penned the phrase: 'The first thing we do, let's kill all the lawyers.' When Shakespeare's character, a rebel leader intent on becoming king hears this suggestion, he promptly incorporates this tactic as part of his plan to assume power, leading in the same scene to the rebel leader demanding '[a]way with him,' referring to an educated clerk, who 'can make obligations and write court hand.' Eliminating lawyers as the guardians of the rule of law removes a major impediment to the path to more power." (citations omitted) (quoting WILLIAM SHAKESPEARE, *HENRY VI, PART 2*, act 4, sc. 2, ll. 74–75, 90, 106) (citing *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) ("disposing of lawyers is a step in the direction of a totalitarian form of government"))).

forceful opinion, issued a preliminary injunction against the Trump Administration's enforcement of actions against the Jenner firm.⁹¹ As Judge Bates eloquently put it:

In our constitutional order, few stars are as fixed as the principle that no official “can prescribe what shall be orthodox in politics.” And in our constitutional order, few actors are as central to fixing that star as lawyers.

This case arises from one of a series of executive orders targeting law firms that, in one way or another, did not bow to the current presidential administration's political orthodoxy. Like the others in the series, this order—which takes aim at the global law firm Jenner & Block—makes no bones about why it chose its target: it picked Jenner because of the causes Jenner champions, the clients Jenner represents, and a lawyer Jenner once employed. Going after law firms in this way is doubly violative of the Constitution. Most obviously, retaliating against firms for the views embodied in their legal work—and thereby seeking to muzzle them going forward—violates the First Amendment's central command that government may not “use the power of the State to punish or suppress disfavored expression.” More subtle but perhaps more pernicious is the message the order sends to the lawyers whose unalloyed advocacy protects against governmental viewpoint becoming government-imposed orthodoxy. This order, like the others, seeks to chill legal representation the administration doesn't like, thereby insulating the Executive Branch from the judicial check fundamental to the separation of powers. It thus violates the Constitution and the Court will enjoin its operation in full.⁹²

The early success of the law firms challenging President Trump's actions should, if extant First Amendment principles are conscientiously applied, end in final success as well. Democracy was not the signature contribution of the United States Constitution to the advance of human civilization. Democracy as an idea and a reality has existed for millennia in ancient Greece and Rome. The unique American contribution to the advance

91. *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 88 (D.D.C. 2025).

92. *Id.* (first quoting *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); and then quoting *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024)).

of human affairs was the idea of *rights*, enforceable *against* the government by an *independent* judiciary.⁹³ And the enforcement of those rights was entrusted to an independent judiciary and the vigorous advocacy of lawyers through an adversarial system grounded in fundamental values of due process and the rule of law. The Trump Administration’s retaliatory attacks on law firms who dare to represent clients and causes disfavored by the Administration are no less than a siege against the core principles upon which the nation was founded.⁹⁴ The stalwart federal judges who have stood up to those attacks should be commended. One hopes their courage will be vindicated as the cases proceed.

IV. ATTACKS ON UNIVERSITIES

The Trump Administration has also targeted American universities through a plethora of Executive Orders. The core of that targeting is a document entitled *Compact for Academic Excellence in Higher Education* (Compact).⁹⁵ The Compact addresses such topics as “equality in admissions,” “marketplace of ideas and civil discourse,” “nondiscrimination in faculty and administrative hiring,” “institutional neutrality,” “student learning,” “student equality,” “financial responsibility,” and “foreign entanglements.”⁹⁶ In exchange for adherence to the Compact’s directives, universities may keep their federal grant funding.⁹⁷ But universities that violate the Compact will lose access to “all monies advanced by the U.S. government.”⁹⁸

93. The importance of rights and the corresponding independence of the judiciary is a recurring theme in the messages of Chief Justice John Roberts. See CHIEF JUSTICE JOHN ROBERTS, 2025 YEAR END REPORT ON THE FEDERAL JUDICIARY 3–7 (2025).

94. *Jenner & Block*, 784 F. Supp.3d at 94 (“Jenner’s primary claim—and its most straightforward winner—is the First Amendment retaliation claim. To prevail, Jenner ‘must show (1) that it engaged in protected conduct, (2) that the government took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff’s position from speaking again, and (3) that there exists a causal link between the exercise of a constitutional right and the adverse action taken against him.’ At prong three, ‘[t]he improper motive must be a but-for cause of the government action, meaning that the adverse action . . . would not have been taken absent the retaliatory motive.’” (alteration in original) (first quoting *Scahill v. District of Columbia*, 909 F.3d 1177, 1185 (D.C. Cir. 2018); and then quoting Comm. on Ways & Means, U.S. House of Reps. v. U.S. Dep’t of Treasury, 45 F.4th 324, 340 (D.C. Cir. 2022))).

95. Exec. Off. of the President, *Compact for Academic Excellence in Higher Education* (Oct. 1, 2025) [hereinafter *Compact for Academic Excellence in Higher Education*] (available at: <https://www.washingtonexaminer.com/wp-content/uploads/2025/10/Compact-for-Academic-Excellence-in-Higher-Education-10.1.pdf>).

96. §§ 1–8.

97. § 10.

98. *Id.*

Of particular concern for the purposes of this Article are a number of provisions in the Compact that directly concern expressive activity. The Compact contains hortatory language with which it is impossible to disagree, proclaiming: “Truth-seeking is a core function of institutions of higher education. Fulfilling this mission requires maintaining a vibrant marketplace of ideas where different views can be explored, debated, and challenged.”⁹⁹ That is the good news. Here is the bad. The Compact also contains requirements that are brazenly tilted in favor of conservative viewpoints—the very antithesis of a “vibrant marketplace of ideas.” In one extraordinary sentence, for example, the Compact states: “Signatories commit themselves to revising governance structures as necessary to create such an environment, including but not limited to transforming or abolishing institutional units that purposefully punish, belittle, and even spark violence against conservative ideas.”¹⁰⁰ The Compact addresses the ongoing tensions at universities involving the *heckler’s veto* problem.¹⁰¹ It requires that:

Universities shall be responsible for ensuring that they do not knowingly: (1) permit actions by the university, university employees, university students, or individuals external to the university community to delay or disrupt class instruction or disrupt libraries or other traditional study locations; (2) allow demonstrators to heckle or accost individual students or groups of students; or (3) allow obstruction of access to parts of campus based on students’ race, ethnicity, nationality, or religion. Signatories commit to using lawful force if necessary to prevent these violations and to swift, serious, and consistent sanctions for those who commit them.¹⁰²

The Compact requires universities to adopt policies prohibiting “support for entities designated by the U.S. government as terrorist organizations.”¹⁰³ The Compact’s insistence on “institutional neutrality” requires that “all university employees, in their capacity as university representatives, will abstain from actions or speech relating to societal and political events except in cases in which external events have a direct impact upon the university.”¹⁰⁴ The Compact purports to distinguish what is forbidden—speaking on

99. § 2.

100. *Id.*

101. *Id.*

102. *Id.* (footnote omitted).

103. *Id.*

104. *Id.*

political or social events in an employee’s official capacity—from what is permitted—speaking as an individual: “All university members, including students, faculty, and staff, are encouraged to comment on current events in their individual capacities, provided they do not purport to do so on behalf of the university or any of its sub-divisions.”¹⁰⁵

On the issue of student equality, the Compact states: “Women’s equality requires single-sex spaces, such as bathrooms and locker rooms, and fair competition, such as in sports. Institutions commit to defining and otherwise interpreting ‘male,’ ‘female,’ ‘woman,’ and ‘man’ according to reproductive function and biological processes.”¹⁰⁶ The Compact then dictates quotas to universities on the number of international students they may admit, including limits on how many students may come from any one country.¹⁰⁷ The Compact is a curious document, speaking in doublespeak worthy of the sinister governments imagined by Franz Kafka’s *The Trial*,¹⁰⁸ George Orwell’s *1984*,¹⁰⁹ or Ray Bradbury’s *Fahrenheit 451*.¹¹⁰ For while paying lip service to ideals of academic freedom and the marketplace of ideas, the Compact engages in an insidious undermining of those ideas, part Machiavelli and part Mafia. As the Mafia patriarch Don Corleone (played by Marlon Brando) infamously quipped in *The Godfather*, “I’m gonna make him an offer he can’t refuse.”¹¹¹

Writ large, the Compact is a devious incursion on honored American traditions of academic freedom. To reprise *The Godfather*, by attempting to make universities accept an offer they can’t refuse, the Compact exerts an *in*

105. § 4.

106. § 6.

107. § 8.

108. See generally FRANZ KAFKA, *THE TRIAL* (1925) (*The Trial* is perhaps the most famous legal novel dealing with the terrifying experience of a person charged for reasons he cannot fathom and for which he can obtain no explanation. It is from that novel that the common pejorative “Kafkaesque” is so often used to critique governmental procedures that are deemed by judges or lawyers as lacking in transparency or accountability or otherwise devoid of rationality); see, e.g., *Riley v. Bondi*, 145 S. Ct. 2190, 2219 (2025) (Sotomayor, J., dissenting) (criticizing actions of the Administration of President Trump and Attorney General Pam Bondi as illogical and absurd, joined by Justices Kagan, Jackson, and Gorsuch, describing the actions as “Kafkaesque” (quoting Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colo., 145 S. Ct. 1497, 1513 (2025))).

109. See generally GEORGE ORWELL, *1984* (1949) (exploring themes of an omnipresent oppressive government, coining phrases such as “Big Brother” and giving rise to the common pejorative “Orwellian”); see, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 720 (2010) (referring to an “Orwellian explanation” pejoratively).

110. See generally RAY BRADBURY, *FAHRENHEIT 451* (1953) (The most famous work of American literature ever to explore themes of censorship and conformity); see also Rodney A. Smolla, *The Life of the Mind and a Life of Meaning: Reflections on Fahrenheit 451*, 107 MICH. L. REV. 895 (2009) (paying homage to the novel and exploring its themes of censorship and pressures of cultural conformity).

111. *THE GODFATHER* (Paramount Pictures 1972).

terrorem chill on students, faculty members, and others who comprise a university's community. As the Supreme Court recognized in *Keyishian v. Board of Regents of University of State of New York*,¹¹² striking down a plan to ferret "subversives" from state higher education institutions:

The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice."¹¹³

In *Sweezy v. New Hampshire*,¹¹⁴ the Supreme Court observed that the "essentiality of freedom in the community of American universities is almost self-evident."¹¹⁵ Emphasizing the "vital role in a democracy that is played" by universities, the Court warned that to "impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."¹¹⁶ More importantly, Justice Felix Frankfurter expressed similar sentiments in a concurring opinion.¹¹⁷ Justice Frankfurter, a professor at Harvard before joining the Court, quoted from statements from South Africa in expressing what might be called the *soul* of the very idea of what a university should be. "In a university," Justice Frankfurter wrote, "knowledge is its own end, not merely a means to an end."¹¹⁸ This ethos has consequences, the most important of which is safeguarding a university's essential *independence*. "A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest."¹¹⁹ Justice Frankfurter then described "the four essential freedoms of the university," which are the freedoms "*to determine for itself* on academic

112. 385 U.S. 589 (1967).

113. *Id.* at 601 (first quoting *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964); and then quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

114. 354 U.S. 234 (1957).

115. *Id.* at 250.

116. *Id.*

117. *Id.* at 263 (Frankfurter, J., concurring).

118. *Id.* at 262 (quoting THE CONF. OF REPS. OF THE UNIV. OF CAPE TOWN & THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10 (1957) [hereinafter OPEN UNIVERSITIES]).

119. *Id.* (quoting OPEN UNIVERSITIES, *supra* note 118, at 10).

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹²⁰

The Trump Administration’s Compact offends these traditions of academic freedom in countless ways. Most broadly, the Compact undermines the independence of universities. As Justice Frankfurter warned, a university cannot be true to its nature if the university becomes a “tool of . . . [the] State.”¹²¹ Yet the entire animating purpose of the Compact is to render American universities tools of the federal government, advancing the viewpoints the current administration favors. And make no mistake, the Compact is dripping with viewpoint discrimination. Universities are required to abolish units that “belittle . . . conservative ideas.”¹²²

The Compact denies universities the right to speak in their own voice on issues of political or social concern.¹²³ To be sure, there are many universities that have already adopted this policy of institutional neutrality, a policy that had its most famous genesis in the Kalven Report from the University of Chicago.¹²⁴ The gist of the Kalven Report is that a university should protect the freedom of students and faculty to speak out on issues, but not itself take institutional positions on such issues.¹²⁵ As an educator, I have personally favored the position adopted in the Kalven Report, and so on this score I actually agree with the position taken in the Compact. But many other educators disagree with the Kalven Report’s position, and that is their right. Critics include such estimable scholars as Yale Professor Robert Post, former Dean of Yale Law School.¹²⁶ The Compact thus forces universities to accept *one interpretation* of the proper institutional policy on taking official positions on public policies and events—an affront to the freedom of universities to decide such policies for themselves.

The Compact requires that universities ban “support” for terrorist organizations.¹²⁷ But while the Supreme Court has made it clear that the government may ban the provision of “material support or resources”¹²⁸ for

120. *Id.* at 263 (emphasis added) (quoting OPEN UNIVERSITIES, *supra* note 118, at 11–12).

121. *Id.* at 262 (quoting OPEN UNIVERSITIES, *supra* note 118, at 10).

122. *Compact for Academic Excellence in Higher Education*, *supra* note 95, § 2.

123. § 4.

124. KALVEN COMM., UNIV. OF CHI., REPORT ON THE UNIVERSITY’S ROLE IN POLITICAL AND SOCIAL ACTION (1967).

125. *Id.*

126. Robert Post, *The Kalven Report, Institutional Neutrality, and Academic Freedom*, in REVISITING THE KALVEN REPORT: THE UNIVERSITY’S ROLE IN SOCIAL AND POLITICAL ACTION (Keith E. Whittington & John Tomasi eds., forthcoming) (manuscript at 5–6) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4516235).

127. *Compact for Academic Excellence in Higher Education*, *supra* note 95, § 2.

128. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 7–8 (2010) (quoting 18 U.S.C. § 2339(B)(a)(1)).

terrorist organizations, it has also made clear that mere independent advocacy in favor of the causes advanced by such organizations is protected by the First Amendment.¹²⁹ The key case is *Holder v. Humanitarian Law Project*.¹³⁰ The law at issue in *Holder* banned the provision of “material support or resources” to designated terrorist organizations.¹³¹ Significantly, the Compact does not use that same term of art, “material support or resources,” but the far vaguer term “support.”¹³² As such, the Compact is in tension with the reasoning of *Holder*, which clearly distinguished between conduct orchestrated by a terrorist organization itself, and *independent advocacy*, which remained outside the statute’s scope and constitutionally protected: “The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”¹³³ The Compact’s vague use of the term “support” could force universities to prohibit students, faculty members, or others within the university community, including outside speakers, from expressions of sympathy or advocacy supportive of the causes of entities designated by the government as terrorist groups. The Compact could place universities in the unseemly position of being forced to censor the free speech that speakers would otherwise enjoy.

In a similar vein, the Compact’s restrictive and conservative positions on gender identity act to impose positions on universities, such as on transgender discrimination contrary to the positions the universities would themselves adopt.¹³⁴

In sum, by presuming to dictate policy on university governance structures, faculty appointments, and the composition of student bodies, the Compact stands as an insult to the “four essential freedoms of the university.”¹³⁵ Institutions of higher education are entitled to decide for themselves “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹³⁶

The Compact aligns with other missives from the Administration aimed at higher education since President Trump’s second term began. The

129. *See generally id.*

130. *Id.*

131. *Id.* at 7 (quoting 18 U.S.C. § 2339(B)(a)(1)).

132. *Compare* 18 U.S.C. § 2339(B)(a)(1) (“material support or resources”), *with Compact for Academic Excellence in Higher Education*, *supra* note 95, § 2 (“support”).

133. *Holder*, 561 U.S. at 31–32.

134. *Compact for Academic Excellence in Higher Education*, *supra* note 95, § 6.

135. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting OPEN UNIVERSITIES, *supra* note 118, at 11).

136. *Id.* (quoting OPEN UNIVERSITIES, *supra* note 118, at 12).

missives have consistently included claims by the government that programs dedicated to promoting diversity, equity, and inclusion constitute discrimination on the basis of race violating federal civil rights laws.¹³⁷ The Administration also claimed that the failure of American universities to crack down on students and faculty who sided with pro-Palestinian viewpoints in the aftermath of the October 7, 2023, Hamas terrorist attacks on Israel constituted anti-Semitism.¹³⁸

It is difficult to predict how many universities will agree to the Compact, and how many will reject it. Lawsuits challenging the Administration's attacks on universities' academic independence remain ongoing works in progress. What can be said, however, is that the position the Administration has taken runs afoul of the core values of academic freedom that have long dominated American free speech jurisprudence. In the words of the Supreme Court: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."¹³⁹ Academic freedom is "therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."¹⁴⁰

V. CONCLUSION: FIGHTING BACK AGAINST THE SIEGE

I conclude this Article by highlighting three First Amendment doctrines that I believe are especially important in fighting back against the siege: (1) the unconstitutional conditions doctrine; (2) the distinction between "jawboning" and "coercion"; and (3) the powerful doctrine prohibiting viewpoint discrimination.

A. Unconstitutional Conditions

Constitutional law was once dominated by what is typically called the "right-privilege distinction."¹⁴¹ The right-privilege distinction is grounded in the argument that while citizens may enjoy certain constitutional "rights," government benefits—which are "privileges"—are a different matter.¹⁴² The government may place conditions on the receipt of a government "privilege,"

137. See Exec. Order No. 14,173 §§ 1–4, 90 Fed. Reg. 8633, 8633–35 (Jan. 31, 2025).

138. See Exec. Order No. 14,188 § 1, 90 Fed. Reg. 8847, 8847 (Feb. 3, 2025).

139. *Keyishian v. Bd. of Regents of U. of N.Y.*, 385 U.S. 589, 603 (1967).

140. *Id.*

141. See generally *Reemergence of the Right-Privilege Distinction*, *supra* note 59, at 71–76 (describing history of the right-privilege distinction).

142. *Id.*

which may include the surrender of constitutional freedoms (such as free speech) that the recipient would otherwise enjoy.¹⁴³ For example, a visa is a privilege, not a right. Thus, the government can grant the privilege—a visa—on the condition that the recipient not engage in protest activity criticizing the positions of the government. Similarly, a law firm has no right to government business, which is a privilege. Thus, the government may pressure law firms seeking to transact business with government agencies to agree to the conditions imposed by the government. And above all, there is no right to government funding. Universities that receive government funding—a privilege—may thus be forced to accept conditions on that funding, such as the Compact’s imposed conditions, even if universities would be otherwise free to engage in the activities the Compact prohibits.¹⁴⁴

The right-privilege distinction is a recurring leitmotif of President Trump’s Administration. The three examples of the siege on free speech described in this Article—the attacks on the expressive rights of non-citizens, law firms, and universities—are all premised upon the right-privilege distinction.

The right-privilege distinction was a harsh doctrine.¹⁴⁵ Fortunately, the harshness of the doctrine has been mitigated by a counter-doctrine, known as the *unconstitutional conditions doctrine*.¹⁴⁶ The most famous repudiation of the right-privilege distinction, a repudiation embracing the countering unconstitutional conditions doctrine, comes from the Supreme Court’s 1972 decision in *Perry v. Sindermann*,¹⁴⁷ in which the Court proclaimed:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes

143. *Id.*

144. *Am. Ass’n of Univ. Professors v. Trump (AAUP v. Trump)*, No. 25-CV-07864, 2025 WL 3187762 (N.D. Cal. Nov. 14, 2025); *see infra* text accompanying notes 177–202 (discussing *AAUP v. Trump*).

145. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (describing history of the right-privilege distinction and critiquing it).

146. *See generally* *Reemergence of the Right-Privilege Distinction*, *supra* note 59; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) (describing evolution of the unconstitutional conditions doctrine); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1 (1988) (describing analytic groundings of unconstitutional conditions theory).

147. 408 U.S. 593 (1972).

his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.¹⁴⁸

Does this mean that *all* conditions placed on the receipt of government “privileges” restricting First Amendment freedoms are invalid? Not exactly. The First Amendment principles that have emerged are more complicated: sometimes conditions are permissible and sometimes not. The tensions between the right-privilege distinction and the unconstitutional conditions doctrine remain uneasy, and modern constitutional law is still a long way from completely working itself pure.¹⁴⁹ Yet even so, it is clear enough at present that for the government to simply declare, “your presence here is a privilege” will not on its own any longer cut it.

The best articulation of the divide between permissible and impermissible conditions was set forth by Chief Justice John Roberts in *Agency for International Development v. Alliance for Open Society International, Inc.*¹⁵⁰ Distilled to its core, *Alliance* explained the key First Amendment divide this way: “[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”¹⁵¹ To be sure, as the opinion in *Alliance* recognized, “The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition.”¹⁵² Yet at the end of the day, it is substance, not form, that matters. The government “cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”¹⁵³

The Trump Administration’s actions attacking non-citizens, law firms, and universities should be deemed to violate the First Amendment because they attempt to do precisely what the *Alliance* test forbids—seeking to

148. *Id.* at 597.

149. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 405 (1989) (“This process of reducing the gap between what the abstractions (rules) indicate and what direct application of the background justifications indicate is what Kalven saw as the law ‘working itself pure.’”).

150. 570 U.S. 205 (2013).

151. *Id.* at 214–15.

152. *Id.* at 215.

153. *Id.* (quoting *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 547 (2001)).

leverage funding to regulate speech outside the contours of the programs themselves—falling on the impermissible side of the First Amendment divide. Penalizing Diversity, Equity, and Inclusion (DEI) advocacy also violates existing First Amendment principles, falling on the forbidden side of the divide.

Whether this is where the Supreme Court lands on this issue, as cases challenging the Administration’s actions wend their way upward through the litigation process, remains to be seen. But there is hope. As an example, a federal district court in *National Association of Diversity Officers in Higher Education v. Trump*, applied the *Alliance* test in issuing preliminary injunctive relief in favor of plaintiffs challenging restrictions on DEI programming.¹⁵⁴ The court summarized the matter: “the government may not terminate government contracts or grants ‘because of the[] [contractors’ or grantees’] speech on matters of public concern.’”¹⁵⁵

In reaching this assessment, it is necessary to also reject the claim by the Trump Administration that DEI programming is itself a form of illegal race discrimination. The government’s position is that DEI programming is a form of “affirmative action,” which was declared unconstitutional and a violation of Title VI of the Civil Rights Act of 1964 by the Supreme Court’s anti-affirmative action decision in *Students for Fair Admission v. Harvard*.¹⁵⁶ The argument that DEI programming equals impermissible affirmative action race discrimination has been a pervasive leitmotif of the Trump Administration, surfacing in many of the cases challenging President Trump’s Executive Orders.¹⁵⁷ The argument is fundamentally

154. 767 F. Supp. 3d 243, 259 (D. Md. 2025).

155. *Id.* at 276 (alterations in original) (quoting *Bd. of Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (“Recognizing that ‘constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights,’ our modern ‘unconstitutional conditions’ doctrine holds that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.” (alterations in original) (first quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972); and then quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))).

156. 143 S. Ct. 2141 (2023).

157. *See Am. Ass’n of Colleges for Tech. Educ. v. McMahon*, 770 F. Supp. 3d 822, 837–38 (D. Md. 2025) (reciting from a government directive stating: “From the Supreme Court’s 1954 landmark opinion in *Brown v. Board of Education* to its 2023 decision in *Students for Fair Admissions, Inc. v. Fellows of Harvard College*, education has played a central role in this Nation’s fight against discrimination. It remains a priority of the Department of Education to eliminate discrimination in all forms of education throughout the United States. This includes ensuring that the Department’s grants do not support programs or organizations that promote or take part in diversity, equity, and inclusion (‘DEI’) initiatives or any other initiatives that unlawfully discriminate on the basis of race, color, religion, sex, national origin, or another protected characteristic. Illegal DEI policies and practices can violate both the letter and purpose of Federal civil rights law and conflict with the Department’s policy of prioritizing merit, fairness, and excellence in education. In addition to complying with the civil rights laws, it is vital

unsound. The decision in *Students for Fair Admission* banned race-conscious affirmative action policies in admission to colleges and universities.¹⁵⁸ The decision did not ban *academic discussion* of matters related to race, including matters relating to DEI. To equate curricular and extra-curricular academic programing relating to diversity with discrimination is an illogical and illegal leap.¹⁵⁹

B. When “Jawboning” Morphs into Coercion

In the fictional movie *The Godfather*, Marlon Brando as mafia boss Don Corleone made him an offer “he [couldn’t] refuse.”¹⁶⁰ Or, translated: relent or face a gun to the head. In the real-life world of the Trump Administration, Brendon Carr, the Chair of the Federal Communications Commission, disgruntled with commentary by late-night host Jimmy Kimmel in the aftermath of the Charlie Kirk murder, said publicly, “We can do this the easy way, or the hard way.”¹⁶¹ Even conservative Texas Senator Ted Cruz saw Carr’s remarks as similar to those of a mafioso boss.¹⁶² Once again, two truisms sign off in opposition. On the one hand, government officials are entitled to express themselves, including “jawboning” to encourage private actors, such as Jimmy Kimmel’s employer, ABC, to take

that the Department assess whether all grant payments are free from fraud, abuse, and duplication, as well as to assess whether current grants are in the best interests of the United States.” (quoting Directive on Department Grant Priorities, Denise L. Carter, Dep’t of Educ., Eliminating Discrimination and Fraud in Department Grant Awards (Feb. 5, 2025) (on file with the *Vermont Law Review*) (promulgated following Executive Order 14,151))).

158. *Students for Fair Admission*, 143 S. Ct. at 2166.

159. *See Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 149, 199–200 (D.N.H. 2025) (“The obligations imposed by the 2025 Letter are new. Indeed, as recently as 2023, the Department advised schools and regulated entities that DEI programs were not only lawful, but to be encouraged. Defendants’ argument that the 2025 Letter merely interprets Title VI obligations announced in the *Students for Fair Admissions* case is not persuasive. While the Supreme Court held in *Students for Fair Admissions* that the use of racial preferencing in admissions failed to satisfy strict scrutiny, the Court did not hold that the Constitution commands color-blindness. To the contrary: ‘nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.’ And in his concurring opinion, Justice Kavanaugh makes explicit that ‘governments and universities still ‘can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.’” (first citing *Nat’l Family Plan. & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992) (“[A] rule which ‘effect[s] a change in existing law or policy’ is legislative.” (alterations in original)); then quoting *Students for Fair Admissions*, 143 S. Ct. at 2176; and then quoting *id.* at 2225 (Kavanaugh, J., concurring)).

160. THE GODFATHER, *supra* note 111.

161. Kevin Brueninger, *Ted Cruz Compares FCC Chair Carr to Mafia Boss in Jimmy Kimmel Warnings*, CNBC (Sept. 9, 2025), <https://www.cnbc.com/2025/09/19/ted-cruz-jimmy-kimmel-fcc-carr-mafia.html>.

162. *Id.*

action that the government officials deem wise. Under the “government speech doctrine,”¹⁶³ the government can “say what it wishes”¹⁶⁴ and “select the views that it wants to express.”¹⁶⁵ “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others,” and thus does not need to “maintain viewpoint-neutrality when its officers and employees speak about that venture.”¹⁶⁶ And since “*the government*” is an abstraction, while “*government officials*” are not, it necessarily follows that government officials can “*jawbone*” to express their views on the government’s behalf:

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others.¹⁶⁷

But there are limits. Very important limits. There comes a point at which jawboning morphs into coercion. Call it the *Godfather* rule: a government official cannot “use the power of the State to punish or suppress disfavored expression.”¹⁶⁸

When government officials make coercive threats to exercise governmental power lest a speaker stand down, the First Amendment is violated.¹⁶⁹ And such coercive threats can include the withholding of government funding, which can, in many circumstances, be nothing less than a mafia-like “gun to the head.”¹⁷⁰

163. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

164. *Id.* at 467 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

165. *Id.* at 468.

166. *Matal v. Tam*, 582 U.S. 218, 234 (2017).

167. *Nat’l Rifle Ass’n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024).

168. *Id.*

169. *Id.* at 1332 (“Yet where, as here, a government official makes coercive threats in a private meeting behind closed doors, the ‘ballot box’ is an especially poor check on that official’s authority. Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.”).

170. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (“In this case, the financial ‘inducement’ Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head.”).

C. The Prohibition of Viewpoint Discrimination as an Uber Norm

Cutting across all arenas of First Amendment doctrine is the *uber norm* prohibiting viewpoint discrimination. The prohibition on viewpoint discrimination is so powerful that it can be invoked to invalidate government action that might otherwise be constitutionally defensible if not for the government's viewpoint discrimination.¹⁷¹ The prohibition on viewpoint discrimination is so uniquely dominant that courts, from the Supreme Court down, repeatedly invoke it to strike down governmental action that might otherwise have been permissible were it not infected by viewpoint bias.¹⁷²

Most importantly, this Article advances that the prohibition on viewpoint discrimination applies even to decisions based on the distribution of government benefits. The great decision establishing this principle is *Rosenberger v. Rector & Visitors of University of Virginia*.¹⁷³ In *Rosenberger*, the Supreme Court admirably held that the University of Virginia violated the First Amendment prohibition on viewpoint discrimination by refusing to disburse funding to a student group

171. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (“Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But ‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’ St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules.”).

172. *See, e.g., Cornelius v. NAACP*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“[T]he State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (holding that a city cannot deny Jehovah’s Witnesses permit to use a city park for bible talks when other religious and political groups had been allowed to use the park for similar purposes); *Baugh v. Judicial Inquiry and Review Comm’n*, 907 F.2d 440, 443–44 (4th Cir. 1990) (“Viewpoint-neutrality is concerned with limitations on speech on the basis of the viewpoint expressed and ‘the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’” (quoting *Vincent*, 466 U.S. at 804)); *Amato v. Wilentz*, 753 F. Supp. 543, 553–54 (D.N.J. 1990) (“However, even in a non-public forum the state cannot regulate protected speech on the basis of its viewpoint. ‘Viewpoint discrimination . . . is impermissible regardless of the nature of the forum.’ Indeed, the essence of the First Amendment is that the State cannot regulate speech ‘merely because public officials disapprove the speaker’s views.’” (alteration in original) (first quoting *Student Coal. for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 437 (3d Cir. 1985); and then quoting *Niemotko*, 340 U.S. at 282)).

173. 515 U.S. 819, 829–31 (1995).

proselytizing conservative political and religious views.¹⁷⁴ The Court emphatically emphasized that “[v]iewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”¹⁷⁵

The siege on the First Amendment orchestrated by the Trump Administration is shot through and through with such viewpoint discrimination. As the court found in *National Association of Diversity Officers*, the viewpoint discrimination inherent in the Executive Order at issue there all but dispositively determined the Executive Order’s constitutional infirmity.¹⁷⁶ You may pick your own cliché. Perhaps, “what goes around comes around,” or “what is good for the goose is good for the gander.” All that matters is that the constitutional principles at stake be applied with neutrality, without regard to whose ox is gored. It is as much a violation of First Amendment principles to restrict the funding of liberal viewpoints as it is a violation to restrict the funding of conservative viewpoints—full stop.

These counter-attacks against the siege wage on.

Among the most important battles is the ongoing fight against the Administration’s attack on the University of California, Los Angeles. In *AAUP v. Trump*,¹⁷⁷ the Administration engaged in an unapologetic attack on all things “woke” at UCLA.¹⁷⁸ District Judge Rita F. Lin of the United States District Court for the Northern District of California rebuffed the attack, issuing a preliminary injunction sternly rejecting the Administration’s efforts.¹⁷⁹ The preliminary injunction barred President Trump and various subordinate federal agencies and officials from proceeding with their threats to cancel some \$1.2 billion in federal funding to UCLA.¹⁸⁰ In this Article, I have referred to the Administration’s tactics as a “siege.” The court used the term “playbook,” and then described the Administration’s efforts in candid terms:

[T]he Administration and its executive agencies are engaged in a concerted campaign to purge “woke,” “left,” and “socialist” viewpoints from our country’s leading

174. *Id.*

175. *Id.* at 829 (citing *Perry*, 460 U.S. at 46).

176. *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp.3d 243, 282 (D. Md. 2025).

177. No. 25-CV-07864, 2025 WL 3187762, at *1 (N.D. Cal. Nov. 14, 2025).

178. *Id.*

179. *Id.* at *38.

180. *Id.* at *8, 38.

universities. Agency officials, as well as the President and Vice President, have repeatedly and publicly announced a playbook of initiating civil rights investigations of preeminent universities to justify cutting off federal funding, with the goal of bringing universities to their knees and forcing them to change their ideological tune. Universities are then presented with agreements to restore federal funding under which they must change what they teach, restrict student anonymity in protests, and endorse the Administration's view of gender, among other things. Defendants submit nothing to refute this.

It is undisputed that this precise playbook is now being executed at the University of California. Defendant Leo Terrell, who heads the Administration's Task Force to Combat Anti-Semitism, publicly stated in a news interview that the UC had been "hijacked by the left" and vowed to begin investigations.¹⁸¹

The court focused particularly on the words and actions of Leo Terrell, the head of the Administration's Task Force to Combat Anti-Semitism, the federal entity that has been the phalanx of the Administration's assault on progressive activities at American universities.¹⁸² The court stated: "As described by Terrell, the investigations and funding cuts aimed at UCLA were intended not only to 'eliminate anti-Semitism,' but also to eliminate the 'left' and 'Marxist' viewpoints at the UC."¹⁸³

Applying the Supreme Court's 2024 decision in *National Rifle Association of America v. Vullo*, which held that actions by government officials may trigger First Amendment scrutiny when they extend beyond mere jawboning expressing the government's views to threats of coercion,¹⁸⁴ the district court in *AAUP v. Trump* held that the threats from federal officials went beyond merely expressing criticism of the University's policies, to threats of regulatory action adverse to the University.¹⁸⁵ These threats, the court reasoned, were enough to cross the line into coercion and unconstitutional territory.¹⁸⁶ The court recognized, for example, the

181. *Id.* at *1. The court's reference to "UC" refers to the University of California System generally. *Id.*

182. *Id.*

183. *Id.* at *4.

184. 144 S. Ct. 1316, 1326 (2024).

185. 2025 WL 3187762, at *1.

186. *Id.* at *12.

pervasive regulatory authority federal agencies have that may be held over the head of the University.¹⁸⁷ The government and its officials are entitled to their viewpoints, the court opined, but the government’s “failure to persuade does not allow it to hamstring the opposition.”¹⁸⁸ It is one thing to take a position as the government, it is another to skew the marketplace of ideas. As the court put it, the government “may not burden the speech of others in order to tilt public debate in a preferred direction.”¹⁸⁹

The court in *AAUP v. Trump* found unpersuasive the government’s attempt to invoke the line of First Amendment precedent dealing with discipline against government employees, particularly the balancing test emanating from *Pickering v. Board of Education*.¹⁹⁰ It thus declined “to adopt the view that any university that accepts funds from the federal government becomes a ‘government contractor’ for First Amendment purposes, whose speech the federal government can regulate just as it would an at-will employee.”¹⁹¹ Elaborating, the court explained that even if the *Pickering* balancing test were applied, the government would still not prevail because “the evidence is overwhelming that Defendants’ motivation is their desire to penalize disfavored viewpoints.”¹⁹²

Most germane to a central thesis of this Article, the court in *National Association of Diversity Officers in Higher Education v. Trump* wisely applied the unconstitutional conditions doctrine and the *Alliance* test.¹⁹³ Both distinguished the permissible decisions of government to decide what programs to subsidize and what programs not to subsidize, when the government is defining the limits of a government spending program, and impermissibly imposing “conditions that seek to leverage funding to regulate speech outside the contours of the program.”¹⁹⁴ The court in *AAUP v. Trump*

187. *Id.* at *13 (“Second, the speakers have direct ‘regulatory authority’ over the UC. First, DOJ—which sent the August 8 Offer and on whose behalf Terrell spoke—has regulatory authority to bring enforcement actions under Titles VI, VII, and IX. The Attorney General has regulatory authority to oversee and coordinate enforcement of Titles VI and IX among federal agencies. Additionally, the Task Force Agencies and Funding Agencies have statutory authority to terminate federal funding for violations of Title VI and Title IX. Finally, the President, as the head of the executive branch, has authority to direct the Agency Defendants, meaning that he also has regulatory authority.”) (first citing 28 C.F.R. § 42.10; then citing 42 U.S.C. § 2000e-6; 28 C.F.R. § 54.605; then citing Exec. Order No. 12,250, 45 Fed. Reg. 72995 (Nov. 2, 1980); then citing 42 U.S.C. § 2000d-1; and then citing 20 U.S.C. § 1682).

188. *Id.* at *14 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011)).

189. *Id.*

190. *AAUP v. Trump*, 2025 WL 3187762, at *14; *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

191. *AAUP v. Trump*, 2025 WL 3187762, at *14.

192. *Id.*

193. 767 F. Supp. 3d 243, 276 (D. Md. 2025); see *supra* text accompanying notes 150–55.

194. *AAUP v. Trump*, 2025 WL 3187762, at *23 (quoting *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013)).

acknowledged that the government possessed the prerogative to preferentially and conditionally fund speech that advances the Administration's "preferred agenda."¹⁹⁵ Yet even so, the court held, "[T]he unconstitutional conditions doctrine prohibits the government from placing 'a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.'"¹⁹⁶ To be sure, the Supreme Court in *Rust v. Sullivan* held that the federal government could require that the grantee keep abortion-related speech separate and distinct from Title X activities, but only so long as the government did not force the Title X grantee to give up abortion-related speech altogether.¹⁹⁷ Yet, the court in *AAUP v. Trump* concluded: "That is precisely the line of which Defendants have run afoul here."¹⁹⁸

In an interesting final turn, the court in *AAUP v. Trump* invoked a line of constitutional jurisprudence outside the First Amendment to underscore the impermissibly coercive nature of the government's actions. In its landmark ruling on the constitutional issues surrounding the Affordable Care Act (often described as Obamacare), the Supreme Court in *National Federation of Independent Business v. Sebelius* struck down certain aspects of the Act by declaring them unconstitutionally coercive.¹⁹⁹ In *Sebelius*, the majority opinion of Chief Justice Roberts held that Congress exceeded its authority under the Spending Clause of the Constitution, and thus violated the Tenth Amendment when Congress conditioned the States' access to existing and future federal Medicaid funds on their agreement to expand Medicaid to cover additional categories of individuals.²⁰⁰ As previously noted, the Chief Justice in *Sebelius* colorfully opined that Congress had done more than merely incentivize the States' actions—it had presented them with a "gun to the head."²⁰¹ The court in *AAUP v. Trump* held that the actions of the federal government had the same coercive characteristics as those struck down in *Sebelius*, in that the government had "threatened to withhold potentially all federal funding from the UC unless it accept[ed] Defendants' demands to institute wide-ranging policy changes and pay for additional programs such as an external auditor."²⁰²

195. *Id.*

196. *Id.* (emphasis omitted) (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

197. *Sullivan*, 500 U.S. at 196.

198. *AAUP v. Trump*, 2025 WL 3187762, at *23.

199. 567 U.S. 519, 581 (2012).

200. *Id.*

201. *Id.*; see *supra* note 170 and accompanying text.

202. *AAUP v. Trump*, 2025 WL 3187762, at *24.

D. A Final Word

All in all, to channel the rock group *Pink Floyd*, it's "just another brick in the wall."²⁰³ As district court decisions, brick by brick, erect a wall against the Administration's siege on the First Amendment, there is room for guarded optimism that the wall may stand.

The stout First Amendment principles with which I have concluded here—the unconstitutional conditions doctrine, coercion, and viewpoint discrimination—have not been the exclusive pet agendas of either conservatives or liberals, in American thought generally or among the justices of the Supreme Court, throughout history or as presently constituted. Over time, these have proven to be enduring principles, embraced by Republicans and Democrats, conservatives and liberals. Let us hope and pray, much as Abraham Lincoln so hoped and prayed in the *Gettysburg Address*, that a Nation so dedicated to such principles can "long endure."²⁰⁴

203. PINK FLOYD, ANOTHER BRICK IN THE WALL, PART 2 (EMI 1979).

204. Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).