

# THE HECKLER'S VETO TODAY

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## INTRODUCTION

The idea of a heckler's veto over disfavored speech has been familiar for more than half a century.<sup>1</sup> Roughly put, the heckler's veto doctrine holds that opponents of a speaker should not be permitted to suppress the speech in question through their own threatened or actual violence.<sup>2</sup> As it turns out, though, the meaning, status, and scope of the idea of a heckler's veto are today surprisingly far from clear.<sup>3</sup> Part II considers the relevant case law. Part III discusses related events and commentary. This Article concludes that American legal culture is unlikely to arrive at any consensual resolution of many of the conflicts and uncertainties

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1. *See, e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949) (holding that an ordinance outlawing speech that “stirred people to anger” was unconstitutional), *Cantwell v. Connecticut*, 310 U.S. 296, 308–11 (1940) (overturning a conviction for speech criticizing religion that offended listeners as “unduly suppress[ing] free communication of views . . . under the guise of conserving desirable conditions”).
2. *See Terminiello*, 337 U.S. at 4–5, (holding that that a conviction resting on the grounds that defendant's speech “invited public dispute” could not stand). *See infra* Sections II–III for numerous concurring authorities. For one recent case discussion, see *Bible Believers v. Wayne County*, 805 F.3d 228, 252–55 (6th Cir. 2015) (en banc) (reversing conviction of anti-Islamic proselytizing at an Arab Festival and holding that the local police effectuated a heckler's veto by failing to quell the crowds or protect the speakers).
3. *See infra* Parts II–III (describing the state of the heckler's veto in the law and in the context of the American education system).

in question. Understanding why no such consensual resolution of basic heckler's veto questions is likely to shed light on the nature of contemporary legal and political controversies more generally. The Conclusion below focuses in particular on the broad contemporary phenomenon of what might be called reduced forensic confidence.

If the status, scope, and meaning of the heckler's veto are indeed irreconcilably contested, there is probably no entirely neutral grounds on which to begin any analysis. Merely for the sake of setting this inquiry in motion, however, this Article begins with some provisional understandings of the basic idea. Typically, the possibility of a heckler's veto arises when there is, in one context or another, three elements: 1) a potential or actual speaker; 2) an audience, at least part of which is somehow hostile to the speaker or the speech; and 3) some actual or potential police or other security presence.<sup>4</sup> The possible variations on these three elements, and their interactions, are numerous.

One respected vision of how these elements of speaker, hostile audience members, and police may generate heckler's veto scenarios is that of the distinguished constitutional scholar Harry Kalven, Jr.<sup>5</sup> Professor Kalven discusses the idea of a heckler's veto most extensively in the context of a particular Supreme Court case that seems to accommodate, rather than disallow, a heckler's veto.<sup>6</sup> On Professor Kalven's account, the basic heckler's veto problem arises when the underlying speech, to which the presumed heckler objects, does not involve invidious epithets or what the law refers to as "fighting words."<sup>7</sup> The underlying speech is in itself legally permissible. In a heckler's veto case, "[t]he risk of disorder arises because the audience, or some of it, does not like what the [speaker] is saying and wishes to stop it."<sup>8</sup>

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4. For one variety of this general triadic scenario, see *Terminiello v. City of Chicago*, 337 U.S. 1, 3–5 (1949), in which the Court applied the doctrine of the heckler's veto to a speaker in an auditorium, protected by police, while a large protest formed outside.
  5. See HARRY KALVEN, JR., A WORTHY TRADITION 89–105 (1988) (analyzing the classic heckler's veto cases and freedom of speech in the context of what he calls the civil rights cases—*Edwards v. South Carolina*, *Cox v. Louisiana*, and *Gregory v. Chicago*).
  6. *Id.* at 89–92. See *Feiner v. New York*, 340 U.S. 315 (1951) (upholding a conviction of a speaker where police believed the speech was stirring the crowd to violence).
  7. KALVEN, *supra* note 5, at 89. The classic 'fighting words' case is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* allows the prohibition of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The ideas of injury, and perhaps even of incitement, are unclear and contestable in the context of fighting words as well as in heckler's veto cases.
  8. KALVEN, *supra* note 5, at 89–90.

Professor Kalven indicates that “[i]n the abstract, if the state did not like what [the underlying speaker] was saying, it would be powerless to silence him. In [the heckler’s veto] situation, however, it can claim neutrality.”<sup>9</sup> He then elaborates, pointing to what he takes to be a key dynamic of the heckler’s veto situation:

[B]y giving the police wide discretion to stop the speaker because of audience hostility, the state . . . in effect transfers the power of censorship to the crowd. Moreover, the police are likely to share the views of the angry audience; hence, their perception of the unrest may be colored by their assessment of the speaker’s message.<sup>10</sup>

Professor Kalven’s account offers a tentative mainstream account of the most basic nature of a heckler’s veto, and some of its implications.

For the sake of slightly greater convenience, this Article might focus as well on a simpler formulation of the idea of a heckler’s veto. Thus very roughly, “[a] heckler’s veto is the suppression of speech by the government . . . because of the possibility of a violent reaction by hecklers.”<sup>11</sup> The analysis below will involve an unpacking and critique of these basic mainstream formulations of the idea of a heckler’s veto, as it illustrates the fracturing and fragmentation of the superficially clear idea of a heckler’s veto.

## I. CLASSIC CASE LAW UNDERSTANDINGS OF THE HECKLER’S VETO

The historic case law of the meaning, scope, and status of the heckler’s veto has itself displayed a number of important conflicts and uncertainties. Below, this Part briefly considers some of the more noteworthy judicial markers in the evolution of heckler’s veto doctrine.<sup>12</sup>

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9. *Id.* at 90.

10. *Id.*

11. Brett G. Johnson, *The Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL’Y 175, 180 (2016) (quotations omitted). *But cf.* *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (raising the possibility of a heckler’s veto over speech uttered by the government itself). *See also* Geoffrey R. Stone, *Richard Spencer’s Right to Speak at Auburn*, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/opinion/richard-spencers-right-to-speak-at-auburn.html> [<https://perma.cc/QX3J-UZ49>] (defining the heckler’s veto).

12. These instances do not exhaust all the significant cases that might be considered to be heckler’s veto cases and not all of these cases need be universally recognized as raising genuine heckler’s veto issues.

For the sake of not pre-judging any important analytical issues—and for a sense of the doctrinal development over time—these cases are taken up in chronological order.

This Article could begin the historical exposition at any number of points, but the 1940 case of *Cantwell v. Connecticut*<sup>13</sup> provides an instance in which speech in what is called a traditional public forum,<sup>14</sup> is constitutionally protected despite the distinctly hostile reaction of the two relevant listeners to the speech in question.<sup>15</sup> Cantwell's two initially consensual listeners to his anti-religious and anti-Catholic speech "were in fact highly offended."<sup>16</sup> In this instance, offense at least momentarily threatened to transition into physical violence against the speaker.<sup>17</sup> Thus one of the two hearers "said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street."<sup>18</sup>

Cantwell's speech was in the end constitutionally protected, largely on the theory that even explicit criticism of a listener's own religion should not count as unprotected "abusive remarks directed to the person of the hearer."<sup>19</sup> The Court in *Cantwell* found an intent to persuade, and an absence of any personal epithets<sup>20</sup> or intentional discourtesy<sup>21</sup> on the speaker's part. If there is any "abuse" in Cantwell's speech, it is thought to operate at the level of abstract, generalized religious belief, as supposedly distinct from anything that would count as personal, or identity-threatening, abuse.<sup>22</sup>

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13. 310 U.S. 296 (1940).

14. Traditional public fora typically include government-owned streets, sidewalks, and parks open to a remarkably broad range of speakers and subjects. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2250 (2015) (holding that Texas's specialty license plates do not fall into the public forum framework); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45–46 (1980) (holding that teacher mailboxes are not public fora like streets and parks). As will become evident, not all speech subject to a heckler's veto need take place in a traditional public forum, or any other form of government-owned property.

15. *See Cantwell*, 310 U.S. at 308–10 (holding that inflammatory criticism of organized religion on a public street was protected speech).

16. *Id.* at 308–09.

17. *See id.* at 309 (noting that the offended listeners wanted to hit the speaker).

18. *Id.* No altercation took place, apparently because the speaker agreed to leave the scene. *Id.*

19. *Id.* *See also id.* at 310 (finding speaker only made an "effort to persuade").

20. *Id.* at 309–10.

21. *Id.* at 310.

22. *See id.* (finding that the speaker merely intended to persuade other people of what he thought was "true religion"). *Compare id. with* *Chaplinsky v. New*

The sense that hostile audience reactions to offensive speech should, generally, not legitimize the arrest or other forms of censorship of the speaker was then reinforced in *Terminiello v. City of Chicago*.<sup>23</sup> *Terminiello* involved indoor speech to a primarily, but not entirely, supportive audience of about 800,<sup>24</sup> with about 1,000 protestors outside the auditorium.<sup>25</sup> The police were not able to prevent several disturbances,<sup>26</sup> and the speaker was convicted of a breach of the peace.<sup>27</sup>

The Court in *Terminiello* noted that under the breach of the peace statute, as authoritatively construed, the speaker could have been convicted “if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest.”<sup>28</sup> The Court ruled this instruction constitutionally impermissible.<sup>29</sup> In now-classic terms, the Court declared that

[A] 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.<sup>30</sup>

As bracing as this language may be, it is unclear how concretely descriptive of the circumstances in *Terminiello* it really is. Generally, the protesters outside the hall did not hear, and thus could not have

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Hampshire, 315 U.S. 568, 572 (1942) (discussing the supposedly more personally directed insulting epithets and intentional offense).

23. 337 U.S. 1 (1949).

24. *Id.* at 2-3.

25. *Id.* at 3.

26. *Id.* This illustrates the point that a heckler’s veto situation has both a positive and a negative dimension. Police may have both a positive obligation to control an audience, or to protect speech, and a negative obligation to not arrest the speaker, or otherwise suppress the underlying speech. See Cheryl A. Leanza, *Heckler’s Veto Case Law As a Resource for Democratic Discourse*, 37 HOFSTRA L. REV. 1305, 1306 (2007) (“Heckler’s veto cases justify compelling (and prohibiting) state action”).

27. *Terminiello*, 337 U.S. at 3.

28. *Id.* at 5.

29. *Id.*

30. *Id.* at 4.

been reacting to, any words uttered inside by Terminiello.<sup>31</sup> The disruptive and disorderly conduct of the protesters outside the auditorium was clearly inspired by Terminiello's pre-existing reputation and by his language on other occasions, and was well underway long before Terminiello even began to speak.<sup>32</sup> In any event, the *Terminiello* Court sheds little light on issues of permissible provocation, agitation, precipitation, or inducement of a response, and on punishable direct incitement of a criminal response to speech.<sup>33</sup>

Nor is it clear that the Court's bracing references to the "high purpose"<sup>34</sup> of free speech, or the value of attacking "prejudices and preconceptions,"<sup>35</sup> relates especially well to much of Terminiello's actual language, which involved a combination of antisemitism and recourse to epithets<sup>36</sup> such as "'slimy scum,' 'snakes,' 'bedbugs,' and the like."<sup>37</sup> It would be entirely reasonable to think of Terminiello's literally dehumanizing, if rhetorical, references as something other than an attempt to persuade through candid and mutually responsive dialogue. Nor is the belief, at a literalist level, that one is not reducible to slimy scum, or to a snake, or to a bedbug, reasonably characterizable as a "prejudice[] or preconception[]"<sup>38</sup> of which one might be disabused through persuasive speech.

Finally, one might note that the bracing rhetoric<sup>39</sup> of the *Terminiello* opinion may not seem equally appropriate in all speech contexts, or even in all sorts of public fora.<sup>40</sup> At a minimum, it must be separately argued that the rhetoric of the *Terminiello* opinion should apply to public university contexts, where a range of distinctive values

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31. *See id.* at 8 (Vinson, C.J., dissenting) (noting that those outside did not hear the speech).

32. *See id.* at 14–16 (Jackson, J., dissenting) (observing that the protests had begun even as the speaker arrived).

33. For historic background, see the attempted distinction by Judge Learned Hand in *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). Judge Hand's distinction in *Masses* was constitutionally restored in the subversive advocacy case of *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

34. *Terminiello*, 337 U.S. at 4.

35. *Id.*

36. *Id.* at 20–22, 26 (Jackson, J., dissenting).

37. *Id.* at 26.

38. *Id.* at 4.

39. *See supra* note 30 and accompanying text.

40. *See supra* note 14 (citing authorities that explore the public forum doctrine).

are potentially at stake.<sup>41</sup> It is far from clear whether the logic and the rhetoric of the *Terminiello* opinion should typically apply to public elementary and high school speech that might well evoke a hostile audience response.<sup>42</sup>

Less than two years after deciding *Terminiello*, the Court reconsidered the interests at stake in the context of heckler's veto cases in *Feiner v. New York*.<sup>43</sup> *Feiner* involved speech promoting a forthcoming meeting and criticizing national and local public officials and organizations, with a general substantive speech theme of racial equal rights.<sup>44</sup> *Feiner's* oration, delivered on a public sidewalk, resulted in his disorderly conduct conviction,<sup>45</sup> ultimately upheld by a divided Supreme Court.<sup>46</sup>

*Feiner's* speech had drawn a crowd of approximately 75 to 80 listeners, of mixed sympathies, with a police presence consisting of two officers.<sup>47</sup> The crowd presence on the sidewalk and street required some passing pedestrians to use the street.<sup>48</sup> Perhaps more crucially, "[t]he crowd [became] restless and there was some pushing, shoving and milling around."<sup>49</sup> Having refused several police requests to cease speaking, *Feiner* was arrested for inciting a potential breach of the peace.<sup>50</sup> The Court emphasized the motivation of the arresting officers. In particular, the officers "were motivated . . . by a proper concern for the preservation of order and protection of the general welfare,

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41. See generally R. George Wright, *Campus Speech and the Functions of the University*, 43 J.C. & U.L. 1 (2017) (explaining the various potentially conflicting purposes underlying the institution of the modern university campus).

42. Consider the distinctive value of elementary student speech that stirs other elementary school students to anger. But see generally *Terminiello*, 337 U.S. at 4 (extolling speech that incites anger). For a discussion of political speech and what is thought to be offensive speech in public school contexts, see *infra* Section III.A.

43. 340 U.S. 315 (1951).

44. *Id.* at 317.

45. *Id.* at 316–18.

46. The major dissent was authored by Justice Hugo Black. *Id.* at 321 (Black, J., dissenting).

47. *Id.* at 316–17 (majority opinion).

48. *Id.* at 317.

49. *Id.*

50. *Id.* at 318.

and . . . there was no evidence . . . that the acts of the police were a cover for suppression of petitioner's views and opinions."<sup>51</sup>

Feiner's arrest was thus said to reflect not police or other official disapproval of the content or message of his speech,<sup>52</sup> but instead, listener physical reaction to the speech in question.<sup>53</sup> The Court concluded that "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."<sup>54</sup>

There is much to be said in response to the logic of *Feiner*. Justice Black's dissenting opinion—anticipating an eventual scholarly conclusion of Professor Kalven<sup>55</sup>—notes some of the strategic incentives established by the majority opinion.<sup>56</sup> Thus Justice Black observes that "[t]he end result . . . is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise . . . to the supervision and censorship of the local police."<sup>57</sup>

In heckler's veto contexts, the various strategic incentive effects of the possible rules are indeed crucial. But it should be emphasized that heckler's veto cases are not limited to those cases in which some official authority is itself hostile, or even vaguely unsympathetic, to any message content of the underlying speaker. The often more interesting heckler's veto cases are those in which the official authority is neutral toward—or even sympathetic with—the content of underlying speaker's

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51. *Id.* at 319. *See also id.* at 321 (noting that three New York courts approved the way in which the police chose to "preserve peace and order").

52. *Id.* at 319–20. Actually, we can think of the crowd spilling out onto the public street, thereby inconveniencing or endangering pedestrians or vehicle traffic, as more or less content-neutral grounds for restricting the speech. Crowd restlessness or disagreement can be considered content-based grounds for restricting the speech, even if the police and other public officials themselves had no objection to the content of the speech. *See generally* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 364 (2006) (discussing the muddy and arbitrary nature of jurisprudence on the distinction between content-based and content-neutral actions).

53. *See Feiner*, 340 U.S. at 320.

54. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

55. *See supra* note 5 and accompanying text.

56. *See Feiner*, 340 U.S. at 321–29 (Black, J., dissenting).

57. *Id.* at 323.

message, but opts, due to third-party manipulation, to reduce the perceived risk of violence by somehow silencing the speaker.<sup>58</sup>

The *Feiner* majority was reluctant to second guess on-the-scene choices among alternative police responses to actual or potential disorder, undertaken in the uncertainties of the moment.<sup>59</sup> What *Feiner* misses in this regard is that in typical heckler's veto cases, there will systematically be advantages of cost, convenience, simplicity, and conflict avoidance in simply taking the underlying speaker into involuntary custody, whether prosecution of the speaker follows or not. These systematic advantages are independent of the innocence of the speaker.

In other contexts, the Court has recognized that short-term considerations of cost, convenience, and simplicity may systematically outweigh more important long-term values in the minds of local decision makers.<sup>60</sup> In such cases, the governing legal rules should take proper account of these systematic biases toward choices that may not reflect the overall, long-term public interest.<sup>61</sup> In the *Feiner* case, only the dissenting justices showed much interest in a legal presumption that official silencing of an innocent speaker should be a last resort, undertaken only after all realistic possibilities of controlling disruptive audience behavior have been exhausted.<sup>62</sup>

Courts in general might choose to disagree with the *Feiner* majority on the doctrinal boundaries of illegal incitement, or on constitutionally mandated presumptions and priorities in maintaining public order. But it is also possible in this often fact-sensitive area to merely distinguish the circumstances of *Feiner*, perhaps through exaggerating the gravity of the threat to public order therein.<sup>63</sup> Later Supreme Court cases have often drawn upon some mixture of both strategies.

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58. After all, the phenomenon under scrutiny is referred to as that of a heckler's veto, rather than as a police veto.

59. *Feiner*, 340 U.S. at 319–20.

60. See, e.g., *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 411–13 (1971) (noting the systematic biases in favor of routing new highway construction through parkland already owned by the public at the eventual cost of insufficient remaining parkland, and recognizing a statutory requirement of the local government's exhaustion of less environmentally damaging alternatives).

61. See *id.* at 413 (“If the statutes [concerning how to select the location of a highway] are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.”).

62. See *Feiner*, 340 U.S. at 326–27 (Black, J., dissenting) (describing a similar presumption and prioritization among all possible police responses); see also *id.* at 330–31 (Douglas & Minton, JJ., dissenting).

63. See, for example, the classic civil rights case of *Edwards v. South Carolina*, 372 U.S. 229, 235–37 (1963), in which the Court noted that the threat to the public order in *Feiner* was more substantial than under the circumstances of *Edwards*

Thus the case *Cox v. Louisiana*<sup>64</sup> refers to a tense and jeering but non-threatening “small” crowd of onlookers, with 75 to 80 armed police officers interposing themselves between civil rights demonstrators and the largely hostile group of onlookers.<sup>65</sup> *Cox* also declares that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”<sup>66</sup> The problem is that hostility to speech is often not simple,<sup>67</sup> or mere hostility;<sup>68</sup> there may as well be some degree of potential or actual crowd violence and disorder.

“Mere” audience hostility, thus, presents only the relatively easy cases. The more difficult cases begin with arrested or otherwise censored speakers whose opponents credibly threatened or engaged in “unruly” behavior, or otherwise jeopardized the public order.<sup>69</sup> The relatively speech-protective cases, following *Terminiello*,<sup>70</sup> choose to protect speech by legally innocent speakers, at least as against some limited degree of otherwise controllable disorderliness on the part of hostile onlookers.<sup>71</sup> Degrees of potential violence, and the degree of greater or lesser controllability of such violence by less speech-restrictive means, will in many cases be fairly debatable.

This brief survey of some of the classic Supreme Court cases provides an initial sense of some of the basic features of heckler’s veto scenarios. Not surprisingly, though, many of the most interesting disputes over the nature, status, and scope of a heckler’s veto arise outside the context of Supreme Court cases. The Part below turns to some

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given the absence of any threats of violence, and the presence of ample police protection.

64. 379 U.S. 536 (1965).

65. *Id.* at 550. *See also id.* at 551 (analogizing the circumstances in this case to those in *Edwards* and seeking to distinguish *Feiner*); *supra* note 63 and accompanying text.

66. *Cox*, 379 U.S. at 551 (quoting *Watson v. Memphis*, 373 U.S. 526, 535).

67. *See, e.g., Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (noting that “[s]peech cannot be . . . punished or banned, simply because it might offend a hostile mob”).

68. *See, e.g., Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978) (“[M]ere public intolerance or animosity cannot be the basis for abridgement of . . . constitutional freedoms.” (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971))).

69. *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969).

70. *See supra* notes 23–42 and accompanying text.

71. *See, e.g., Gregory*, 394 U.S. at 111–13. The *Gregory* case did not specify whether taking the speaker into protective custody would be constitutionally impermissible if that course of action were deemed genuinely necessary to prevent some greater likelihood or greater severity of violence and disorder on the part of hostile onlookers.

recent lower-court cases that raise—even though they do not satisfactorily resolve—important issues bearing upon the idea of a heckler's veto.

## II. THE NATURE AND SCOPE OF THE HECKLER'S VETO: SOME EMERGING JUDICIAL ISSUES

Recent case law has explored heckler's veto scenarios in which any form of legal absolutism—whether of speakers' rights or of public safety—may seem misplaced. One recent case, *Bible Believers v. Wayne County*,<sup>72</sup> recognizes that particular circumstances may constrain familiar doctrine and any simplistic responses in heckler's veto cases.

The *Bible Believers en banc* majority recognized that what it judged to be an unconstitutional heckler's veto could indeed be “reimagined and repackaged”<sup>73</sup> as the protection of members of the public, or even the protection of the underlying speaker, from impending physical harm.<sup>74</sup> The majority avoided an unrealistic absolutism by prioritizing, but only presumptively, the ability to speak. Thus “before removing the speaker due to safety concerns, . . . the police must first make bona fide efforts to protect the speaker from the crowd's hostility by other, less restrictive means.”<sup>75</sup> Any police restriction of otherwise legitimate speech was then held to be properly subjected to a familiar constitutional test of strict scrutiny, under which the police may advance compelling public safety ends “by using only those means that are the least restrictive with respect to the speaker's First Amendment rights.”<sup>76</sup>

Significantly, the *Bible Believers* court recognized that there are circumstances in which a police restriction of otherwise protected speech may pass the strict scrutiny test. Thus, for example, if overwhelmed police officers “must retreat due to risk of injury, then retreat would be warranted.”<sup>77</sup> One problem, though, is that the number of police officers on the scene may itself reflect political biases and prior official strategic calculation. Officially, disfavored speakers cannot generally be charged fees in proportion to the supposed likelihood of hostile

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72. 805 F.3d 228 (6th Cir. 2015) (en banc). This case involved a Christian group's proselytizing at a large annual Arab International Festival focusing on cultural exchange. The Festival was open to the general public on temporarily closed public streets of Dearborn, Michigan. *Id.* at 234–35.

73. *Id.* at 255.

74. *Id.*

75. *Id.*

76. *Id.* at 253.

77. *Id.*

onlooker outbursts.<sup>78</sup> But local authorities could, on the other hand, consciously provide inadequate numbers of crowd-control officers, thereby increasing the likelihood of disorder, and the likelihood that censoring the underlying speaker will then seem reasonably necessary to preserve public safety. Many official judgments as to such necessity—unavoidably dependent upon speculation as to the likely effectiveness of alternative police responses—will be readily contestable.

An important further complication involves the relationship between a heckler's veto and the broad legal category known as content-based restrictions on speech.<sup>79</sup> It is often thought that all content-based restrictions on political speech should be tested by judicial strict scrutiny,<sup>80</sup> quite apart from whether the circumstances involve any threat to public safety. It is also often thought that all heckler's veto cases involve content-based restrictions on speech.<sup>81</sup> Whether a heckler's veto of speech should be tested by strict scrutiny may thus depend on how narrowly or broadly content-based restrictions of speech are defined.

The problem with classifying all heckler's veto cases as involving content-based restrictions on the underlying speech is that any such broad generalizations ignore arguably relevant differences in official motives. Some heckler's veto cases involve hostility to the underlying speech on the part of some audience members along with active or passive hostility of the relevant government officials.<sup>82</sup> Government disapproval of the ideas subjected to a heckler's veto, where the government is motivated in some degree by its own disapproval of the

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78. See generally *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–36.

79. See generally Wright, *supra* note 52; R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2015).

80. While the precise contours and limits of the majority opinion are unclear, this is the general thrust of *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015).

81. See, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) (“If the statute . . . would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the ‘heckler’s veto.’”); *Startzell v. City of Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008) (“A heckler’s veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience.”); *Rosenbaum v. City & Cty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007) (“A ‘heckler’s veto’ is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience.”).

82. Consider, for example, that a hypothetical early 1960s civil rights march focused on the injustice of officially endorsed public policies.

underlying speech, would present a relatively clear case of a content-based restriction of speech.<sup>83</sup>

But not all heckler's veto cases need involve any government disapproval of the underlying speech. The courts often hold that audience reaction—as distinct from any official reaction<sup>84</sup>—to the underlying speech is crucial to heckler's veto cases.<sup>85</sup> On this basis, one could easily argue that a heckler's veto case could involve the government's complete ignorance of, indifference to, or even support of the message of the underlying speaker.

Imagine a case in which the relevant government strongly supports the underlying message, as when a speaker wishes to endorse the reelection of the incumbent officials. With great reluctance, the government restricts this favored message because of its inability to control a hostile audience of such speech. The government's restriction of the speech could be classified as content-based, but at the price of ignoring that the government's views and the speaker's views are in perfect alignment.

A heckler's veto case could also be thought of as one in which the government is completely unaware of the content of the speaker's message, but must restrict the speech in question in order to prevent or minimize bystander injuries. Society might wish to apply strict scrutiny in some, or all, such cases. But one could also sensibly say that such speech restrictions are content-based only in a very broad and extended sense, in which government disapproval, or awareness, of the message is entirely absent.<sup>86</sup>

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83. See Reed, 135 S. Ct. at 2226–27 (discussing the requirement of content-neutrality and categories of content-based laws that require strict scrutiny).

84. Of course, sufficient police or other governmental action or inaction is necessary for a classic heckler's veto case. An audience's physical attack on the speaker would presumably silence the speech, amounting to a literal and direct heckler's veto. But classic heckler's veto cases involve First Amendment-based challenges to official action or inaction, and thus require sufficient state action. For background on the state action requirement, see, for example, *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that in a corporation-owned town the corporation cannot restrict fundamental liberties and enforce this restriction by application of a state statute).

85. See, e.g., *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1293 (9th Cir. 2015) (referring to the “listeners’ actual or anticipated hostility”); *Ctr. for Bio-Ethical Reform*, 533 F.3d at 787 (allowing or disallowing speech “depending on the reaction of the audience”); *Startzell*, 533 F.3d at 200 (stating that a heckler's veto occurs “where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience”); *Rosenbaum*, 484 F.3d at 1158 (stating that a heckler's veto occurs “where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience”).

86. For an example of a court's unwillingness to apply heckler's veto doctrine in the absence of any police knowledge of, agreement with, or disagreement with

The nature, status, and limits of a heckler's veto—and of proper judicial responses thereto—are contestable in other basic respects as well. It is, for example, unclear whether the idea of a heckler's veto should be extended to cover subconscious government motivations and decisions well in advance of the speech in question.<sup>87</sup> There is no present audience at the time of such decisions, and no audience, hostile or otherwise, may ultimately form.

Relatedly, it is also debatable whether a heckler's veto can be imposed through a broad, standing legislative enactment, as opposed to a narrower restriction on particular instances of speech.<sup>88</sup> Legislative heckler's vetoes might thus be imposed years in advance of any relevant speech. As well, one might argue that the heckler's veto doctrine should apply not only to pure speech,<sup>89</sup> and to symbolic speech or to mixed speech and conduct,<sup>90</sup> but as well to the politically controversial exercise of one's constitutional rights through pure conduct.<sup>91</sup>

The scope of the heckler's veto doctrine has also been variously contested in contexts of government, as opposed to private party, speech;<sup>92</sup> an individual's refusal to pay a government assessment aimed

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the message of either the speaker or the speaker's opponents, see *Rosenbaum*, 484 F.3d at 1159 (explaining that there is no heckler's veto if there is no evidence of official awareness of or response to anyone's views, as distinct from merely an unacceptable noise level).

87. See e.g., *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–36, (analyzing speech permit fees imposed well in advance of any speech or reaction thereto by any future audience).
88. Compare *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985) (explaining that most heckler's vetoes are imposed legislatively, and in response to “majority sensibilities,” as distinct from administratively, and in response to “the sensibilities of a minority”) with *Santa Monica Nativity Scenes*, 784 F.3d at 1293–94 (discussing repeated efforts to confine the scope of heckler's veto cases to restriction of particular speakers or of particular speech). Of course, who counts as a “majority” or as a “minority” in heckler's veto cases will often be subject to dispute, depending partly on the breadth of what one takes to be the relevant background population or background circumstances.
89. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949) (discussing the fact that freedom of speech, without action, that provokes a negative response may still be protected under the First Amendment).
90. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (analyzing whether burning a draft card is a protected form of symbolic speech).
91. See, e.g., *Roe v. Crawford*, 514 F.3d 789, 795–96 (8th Cir. 2008), (discussing whether protesters picketing in front of a Planned Parenthood office constituted a heckler's veto of protected conduct).
92. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)) (“To govern, government has to say something, and a First

at an industry's well-being;<sup>93</sup> children's misperceptions of otherwise appropriate government accommodation of religion<sup>94</sup> or of indecent Internet speech;<sup>95</sup> and in the case of an employer's racial discrimination in order to accommodate racial prejudices in the labor force.<sup>96</sup> The sheer variety of putative heckler's veto cases is thus remarkable.

The aim herein is not to take sides on any of the above unresolved issues as to the nature, status, and scope of the heckler's veto, or on the proper judicial responses to heckler's veto cases. This Article's aim is instead to document such unresolved conflicts,<sup>97</sup> and then to suggest that the United States is unlikely to arrive at any consensual resolution of many of the most significant such conflicts, and to explain the consensual, unsolvable nature of such conflicts.<sup>98</sup> Progress toward achieving these aims can best be made by attending to important putative heckler's veto issues in various more or less concrete and familiar educational contexts. Part III thus examines contested understandings of the idea of a heckler's veto in public education cases immediately below.

### III. THE HECKLER'S VETO IN THE AMERICAN EDUCATIONAL SYSTEM

#### *A. The Public School Context*

The image of a well-functioning public school classroom may seem distant from the violence, disorder, and threats to public safety manifested in the classic heckler's veto case of *Terminiello*.<sup>99</sup> But the leading

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Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

93. See *Johanns*, 544 U.S. at 468 (considering the necessity of some form of government speech inevitably supported in some way by taxes or exactions).

94. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (referring to a possible "modified heckler's veto . . . on the basis of what the youngest members of the audience might misperceive").

95. See *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down the federal Communications Decency Act).

96. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) (opining on the hypothetical situation in which an employer might discriminate in job assignments in deference to prejudice amongst the employees). Even more broadly, it has been said that "any lawsuit that stops the government from doing something that the majority wants can be labeled a 'heckler's veto.'" Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2213 (2008).

97. See *infra* Part III.

98. See *infra* notes 161–175 and accompanying text.

99. See *supra* notes 23–42 and accompanying text.

public school free speech case, *Tinker v. Des Moines Independent Community School District*,<sup>100</sup> explicitly links these two contexts.

The *Tinker* case involved a black armband Vietnam War protest by high school students.<sup>101</sup> The Court held that even in the public high school context, mere “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>102</sup> Similarly, “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”<sup>103</sup> will not suffice to restrict such speech.<sup>104</sup> More concrete evidence that the restricted speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”<sup>105</sup> is instead required.<sup>106</sup> Otherwise put, school officials must have “reason to anticipate”<sup>107</sup> that the speech to be restricted “would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>108</sup>

Of special interest for the purposes of this Article is the *Tinker* Court’s explicit reference to the heckler’s veto logic of *Terminiello*. The *Tinker* Court declares in particular:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength . . . in this relatively permissive, often disputatious, society.<sup>109</sup>

As for the requirement that we take the risk in question, the *Tinker* Court cites the heckler’s veto case of *Terminiello*.<sup>110</sup>

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100. 393 U.S. 503 (1969).

101. *Id.* at 504.

102. *Id.* at 508.

103. *Id.* at 509.

104. *Id.*

105. *Id.* (quotation omitted).

106. *See id.* (finding no such interference in *Tinker*).

107. *Id.*

108. *Id.* The nature, scope, and necessary weight of any such rights were understandably left unspecified in *Tinker*.

109. *Id.* at 508–09.

110. *Id.* at 508. The *Tinker* Court did not specify any particular passages from the *Terminiello* opinion.

The anticipated reaction to the black-armband protest in *Tinker* presumably fell short of a *Terminiello*-like rock-throwing mob. Thus, the *Tinker* Court need not have embraced *Terminiello* to the fullest extent. It is clear that the *Tinker* standards regarding student speech actually fall short of protecting otherwise appropriate student speech as against imminent or actual rock-throwing.<sup>111</sup>

What is less clear, however, is whether *Tinker* always protects otherwise permissible school speech against less extreme forms of what might be considered an attempted heckler's veto. Hostile reaction to actual or anticipated speech need not take the form of violent rock-throwing. It has been judicially held in non-school contexts that there is no exception in the case of an audience of minors from the general rule against judicially validating a heckler's veto.<sup>112</sup> In the public school case law, though, the permissibility of what is claimed to be a heckler's veto has been vigorously disputed.<sup>113</sup>

Thus in the student-speech context, it has been argued that “the government cannot silence a speaker because of how an audience might react to the speech,”<sup>114</sup> and that this principle is simply the heckler's veto doctrine.<sup>115</sup> The choice is said to be between ignoring possible audience reactions to speech and permitting “the will of the mob to rule our schools.”<sup>116</sup>

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111. *See supra* notes 102–108 and accompanying text (describing the requirements of *Tinker* and noting that permitting actual rock-throwing in a school environment presumably would be disruptive and interfere with the normal disciplinary processes of the school).

112. *See* *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 790 (declining to create a minors exception to the heckler's veto when anti-abortion activists displayed images of aborted fetuses across from a middle school).

113. *See* *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 766–67 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) (arguing that in allowing the heckler's veto in schools, the majority “creates a split with the Seventh and Eleventh Circuits and permits the will of the mob to rule our schools”). *See also* Katherine M. Portner, *Tinker's Timeless Teaching: Why the Heckler's Veto Should Not Be Allowed in Public Schools*, 86 *MISS. L.J.* 409 (2017) (discussing the circuit split on the heckler's veto in the context of public schools).

114. *Dariano*, 767 F.3d at 766 (O'Scannlain, J., dissenting from denial of rehearing en banc).

115. *Id.*

116. *Id.* More generally, the O'Scannlain dissent relies on *Zamecnik v. Indian Prairie School District*, 636 F.3d 874, 876 (7th Cir. 2011) (noting the otherwise realistic incentives with regard to offensive speech), and *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1259, 1294–95 (11th Cir. 2004) (protecting the symbolic speech of holding up a fist rather than reciting the Pledge of Allegiance). *See*

It is of course possible to argue that there are intermediate alternatives between ignoring possible audience responses, regardless of their likelihood, severity, motivation, degree of calculation, or reasonableness, and incentivizing mob rule and the intimidation of innocent speakers. On the other hand, most relevant school speech cases actually do not seem to be especially interested in whether school authorities have explored, or have reasonably exhausted, the possibilities of avoiding violence by warning, reasonably deterring, or somehow restraining potential opponents of the speech in question.<sup>117</sup> There are, for example, a number of appellate cases involving the wearing or display of Confederate flag regalia in public schools.<sup>118</sup> Most such cases do not seem to require that school officials exhaust all realistic possibilities of deterring audience violence before restricting the underlying speech.<sup>119</sup>

The Confederate flag cases may well illustrate the limits to a full-fledged speech-protective heckler's veto doctrine in the public school speech context. *Tinker* itself does not seem to require that the school explore the effectiveness of, say, temporarily reassigning supervisory administrative staff where there may be a substantial risk of disruption by counter-protesters. Nor, one might argue, should the law require such steps. For one thing, *Tinker* allows for student speech restrictions not merely given the likelihood of substantial disruption,<sup>120</sup> but also to prevent violation of the rights of other students.<sup>121</sup> One thus might well

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*Dariano*, 767 F.3d at 771–72 (O’Scannlain, J., dissenting from denial of rehearing en banc).

117. *See supra* notes 60–62; *Dariano*, 767 F.3d at 768 (O’Scannlain, J., dissenting from denial of rehearing en banc) (“The panel claims that the *source* of the threatened violence is irrelevant: apparently requiring school officials to stop the source of a threat is too burdensome when a more ‘readily-available’ solution is at hand . . . namely, silencing the target of the threat.”).
118. *See, e.g.*, *Hardwick v. Heyward*, 711 F.3d 426, 438 (4th Cir. 2013); *DeFoe ex rel. DeFoe v. Spiva*, 625 F.3d 324, 335–36 (6th Cir. 2010); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 222–23 (5th Cir. 2009); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554, 566–67 (6th Cir. 2008); *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1249 (11th Cir. 2003); *Denno v. Sch. Bd. of Volusia Cty.*, 218 F.3d 1267, 1274 (11th Cir. 2000); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000).
119. *See supra* note 118.
120. *See supra* notes 105–107 and accompanying text.
121. *See supra* note 108 and accompanying text. Again, the *Tinker* Court understandably did not undertake an analysis of which sorts of rights-claims might suffice in such cases. For limited further discussion, see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274–76 (1988), in which the Court focused on family and personal privacy rights, and did not require a more narrowly-tailored alternative restriction than simply refusing to print the two newspaper articles in question.

argue for a public school student's right against the officially approved display, by one's fellow students, of Confederate flag images.

If, however, one were to find no such right, it is still unclear that *Tinker* would uphold a student speech right to display a Confederate flag. The scope of reasonable adverse reactions by students to such displays may not be confinable to mere discomfort or displeasure.<sup>122</sup> Fundamental dignity concerns are not exhausted by considerations of mere discomfort or mere displeasure. Evocation of the Confederacy, in these public school contexts, may provoke more than abstract disagreement, and the emotions associated with mere abstract disagreements.<sup>123</sup> Not all significant student audience reactions to such displays may be visible. Crucially, even in the absence of any likely violent response, such displays may, in *Tinker's* language, "substantially interfere with the work of the school."<sup>124</sup> The work of the school, after all, involves allowing all students to equally concentrate, without distraction, on basic educational matters, and on inculcating responsible citizenship in a pluralistic society.

One might wonder about the permissible display of Confederate flags in schools in which there are relatively few minorities. But there is something perverse about more stringently protecting speech that distinctly targets groups who are too clearly outnumbered to be physically disruptive. One might explain this in terms of some relevant right of the outnumbered targeted group.<sup>125</sup> But it is again equally arguable that prohibiting typical Confederate flag clothing displays meets *Tinker's* requirements by preventing interference with the work of the schools.<sup>126</sup>

The important tasks assigned to public schools are multiple, and not always fully compatible.<sup>127</sup> The work of the public schools, for *Tinker's* purposes, is arguably broad. Even as of the time of *Brown v.*

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122. *See supra* note 103 and accompanying text.

123. For the underexplored idea of words which by their very utterance inflict judicially cognizable injury, see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Presumably, the point of excepting words "which by their very utterance inflict injury," is to cover cases in which the target of the speech is not likely under the circumstances to respond violently. *Id.*

124. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

125. *See supra* note 108 and accompanying text.

126. *See supra* note 118 and accompanying text (listing cases addressing school bans on clothing with the Confederate flag and the requirement from *Tinker* that the ban prevents speech that "substantially interfere[s] with the work of the school").

127. *See generally* R. George Wright, *Post-Tinker*, 10 STAN. J.C.R. & C.L. 1 (2014) (discussing the various purposes and values of schools and how "*Tinker*-protected speech" may serve some purposes while negating other values).

*Board of Education*,<sup>128</sup> the Court had recognized the importance of public school education to the construction and maintenance of a functioning democratic society.<sup>129</sup> In the language of *Brown*, education “is a principle instrument in awakening the child to cultural values, in preparing [the child] for later professional training, and in helping [the child] to adjust normally to [the child’s] environment.”<sup>130</sup> Presumably, this applies equally to all public school students.

It is certainly arguable that, at a minimum, a public school could prohibit typical displays of Confederate flags. Whatever the consciously intended meanings of such displays, they could be interpreted as interfering with the basic socialization functions of the schools. On this view, such displays could reasonably be said to substantially interfere with the work of the school,<sup>131</sup> even, and indeed especially, if minority representation at the particular school is quite limited. In such cases, one might well argue that *Tinker*’s requirements for restricting speech—even on the basis of the speech’s content<sup>132</sup>—have been met.

On this possible analysis, typical restrictions on student speech in schools aimed at protecting the school’s ability to carry out one or more of its basic functions would not reflect a heckler’s veto as the idea of a heckler’s veto is often understood. But it is also clear that any such analysis is deeply contested even at the level of the federal appellate courts.<sup>133</sup> The idea of a heckler’s veto, including its meaning, status, and scope, is here again fundamentally disputed.

The meaning and scope of a heckler’s veto is even more conspicuously and essentially disputed in the context of public and private university campuses. Arguable heckler’s veto cases in higher education contexts deserve separate attention. This Article attends to such cases immediately below.

### *B. The University Speech Context*

Of late, the question of a heckler’s veto, at least as rather loosely defined, has arisen conspicuously on a number of public and private

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128. 347 U.S. 483 (1954).

129. *See id.* at 493 (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to democratic society.”).

130. *Id.*

131. *See supra* note 124 and accompanying text.

132. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015) (discussing when regulations on speech are considered content-based and are thus subject to strict scrutiny).

133. *See supra* notes 113–116 and accompanying text.

university campuses. In such cases, the speaker may be either associated with the university in some capacity, or an outsider to the campus. One perspective on such cases, by University of California-Berkeley Chancellor Nicholas Dirks, illustrates one controversial dimension of the heckler's veto policy conflict.<sup>134</sup> Chancellor Dirks declares in particular that “[w]hile the school remains absolutely committed to ensuring that all points of view can be voiced and heard, we cannot compromise the physical safety of our students and guests in the process.”<sup>135</sup>

It may be possible to reconcile these two apparently conflicting goals, but only through certain essentially and persistently controversial definitions and assumptions. In the apparently straightforward declaration by Professor Richard Epstein that “[w]henver speech inspires violence, it should be shut down.”<sup>136</sup> This formulation requires a satisfactory account of what amounts to “inspiring”<sup>137</sup> or perhaps directly inciting violence, and as well of what counts as sufficient ‘violence’ in this context. The latter inquiry must consider whether the categories of speech and violence are themselves mutually exclusive. The broader point is that any view of any such matter is, in American culture, readily and sustainably contested.

The university-speech context in general highlights a number of distinctive and intractable heckler's veto problems. Should some instances of de-platforming<sup>138</sup> a potential speaker, disinventing a speaker, or non-platforming such a speaker at some earlier stage, count as the

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134. Nicholas Dirks, *Berkeley Is Under Attack From Both Sides*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/opinion/berkeley-is-under-attack-from-both-sides.html> [<https://perma.cc/WZ76-QMF7>].

135. *Id.*

136. Richard A. Epstein, *Mob Censorship on Campus*, HOOVER INSTITUTION (Mar. 13, 2017), [www.hoover.org/research/mob-censorship-campus](http://www.hoover.org/research/mob-censorship-campus) [<https://perma.cc/ZS7Z-3GN6>]. See *Nwanguma v. Trump*, No. 3:16-cv-247-DJH, 2017 WL 1234152, at \*3 (W.D. KY Mar. 31, 2017) (seeking to link criminal incitement to the concepts of provoking, stirring up, persuading, specific advocacy, and either explicit or implicit encouragement; apparently endorsing a relatively broad understanding of incitement, even in a speech context).

137. Epstein, *supra* note 136. See also *supra* note 33 and accompanying text.

138. For background on the complex phenomenon of university speaker de-platforming, and related analyses of controversial speakers, see, for example, Sarah Bell, *NUS 'Right to Have No Platform Policy'*, BBC (Apr. 25, 2016), [www.bbc.com/news/education-36101423](http://www.bbc.com/news/education-36101423) [<https://perma.cc/S9WY-UJQ7>] (noting the popularity among students of some such no-platform policies with regard to speaker access to student union premises). For example in the American context, see Aaron R. Hanlon, *Why Colleges Have a Right to Reject Hateful Speakers Like Ann Coulter*, NEW REPUBLIC (Apr. 24, 2017), <https://newrepublic.com/article/142218/colleges-right-reject> [<https://perma.cc/68AA-MF9V>] (discussing the logistical reality of inviting speakers to campus and the sometimes erroneous narrative of how and why dis-invitations occur).

exercise of an early stage heckler's veto? Or are such cases instead mere unavoidable reflections of a necessary, and occasionally awkward,<sup>139</sup> multi-stage process of selection from a broad pool of potential campus speakers, not all of whom deserve legitimization<sup>140</sup> by association with the university? Gatekeeping of university speakers on the basis of the perceived value of their earlier or anticipated speech seems inevitable. Thus it has been argued:

No-platforming may look like censorship from certain angles, but from others it's a consequence of a challenging, never-ending process occurring at virtually all levels of the university: deciding what educational material to present to our students and what to leave out. In this sense, de-platforming isn't censorship; it's a product of free expression and the foundational aims of a classically liberal education.<sup>141</sup>

It is hardly surprising, given the variety of "angles"<sup>142</sup> available, that the appropriateness of no-platforming and other forms of what some see as a complex, multistage, institutionalized heckler's veto is contested.

Nor is it possible to consensually resolve campus heckler's veto cases by classifying some audience reactions to actual or potential speech, or to the speakers in question, as either reasonable and appropriate, or else as merely hypersensitive and therefore unworthy of official validation. Analogous battles have long been waged, inconclusively, in the Establishment Clause context over whether particular adverse reactions to religious speech in public places should be classified as

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139. A loosely parallel set of problems arise in the traditional public school library context, in which non-required library books may inevitably be ordered without meaningful scrutiny for appropriateness, and some thereafter removed as educationally unsuitable. See *Bd. of Educ. Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 870–72 (1982) (plurality opinion).

140. See, e.g., Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 377 (2006) (citing the understanding of legitimacy as a generalized belief "that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions"); Cathryn Johnson et al., *Legitimacy as a Social Process*, 32 ANN. REV. SOC. 53, 57 (2006) (discussing the social processes underlying the establishment of legitimacy). For a surprising argument linking the permissibility of explicitly bigoted speech to political legitimacy, see Ronald Dworkin, *Even Bigots and Holocaust Deniers Must Have Their Say*, THE GUARDIAN (Feb. 13, 2006), [www.theguardian.com/world/2006/Feb/14/muhammadcartoons.comment](http://www.theguardian.com/world/2006/Feb/14/muhammadcartoons.comment) [https://perma.cc/VRJ7-FEA3].

141. Hanlon, *supra* note 138.

142. *Id.*

merely hypersensitive or excessive.<sup>143</sup> We should expect no greater consensus in the campus speech context.

A further dimension of inconclusiveness in the campus heckler's veto cases involves the contested notion of "violence." The basic problem here is that the scope of the idea of "violence" is not invariably confined to something like the direct application of physical force<sup>144</sup> or the immediate threat thereof, whether by dominant groups or by subordinated groups and insurgents.<sup>145</sup> Typologies of violence have in some cases incorporated ideas of structural, systemic, or symbolic violence, beyond the conspicuous, dramatic outbursts of sheer physical violence that more commonly seize public attention.<sup>146</sup>

In the campus speech context in particular, the idea of discursive violence, or violence inflicted via speech, has clearly been raised.<sup>147</sup> Roughly, discursive violence may involve language that discounts or dismisses personal or group experiences and sensibilities, even when

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143. *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 859 (7th Cir. 2012) (en banc) (Hamilton, J., concurring) (discussing the link between audience hypersensitivity with obtuseness and unreasonableness); *Nurre v. Whitehead*, 580 F.3d 1087, 1099 (9th Cir. 2009) (Smith, J., concurring in the judgment and dissenting in part) (deploring presumed audience hypersensitivity); *Books v. Elkhart Cty.*, 401 F.3d 857, 867 (7th Cir. 2005) (purporting to distinguish "an objective, reasonable person standard" from "the standpoint of the hypersensitive or easily offended") (citing, *inter alia*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring)); *Murray v. City of Austin*, 947 F.2d 147, 165 (5th Cir. 1991) (Goldberg, J., dissenting) ("Only through sensitivity to the nonadherent can we effect the constitutional values inherent in the Religion Clauses. . . . Yet, by insisting that the test be an objective one—a 'reasonable nonadherent' test—the endorsement inquiry retains the ability to discount the perceptions of a hypersensitive plaintiff."). For a series of doubts as to the value of references to 'objectivity' in this and many other legal contexts, see R. George Wright, *Objective and Subjective Tests in the Law*, 16 N.H. L. REV. (forthcoming 2017).
144. *See* HANNAH ARENDT, ON VIOLENCE 4 (1970) (distinguishing the idea of violence from the ideas of force and power).
145. GEORGES SOREL, REFLECTIONS ON VIOLENCE 277 (T.E. Hulme & J. Roth trans., The Free Press 1950) (1919).
146. *See, e.g.*, ETIENNE BALIBAR, VIOLENCE AND CIVILITY: ON THE LIMITS OF POLITICAL PHILOSOPHY 83 (2015); RICHARD J. BERNSTEIN, VIOLENCE: THINKING WITHOUT BANISTERS 176–77 (2013) (distinguishing among legal, structural, symbolic, totalitarian, and physical violence); SLAVOJ ŽIŽEK, VIOLENCE: SIX SIDEWAYS REFLECTIONS 1–2 (2008) (distinguishing subjective violence "embodied in language," systemic violence exerted by "the smooth functioning of our economic and political systems," and objective violence that is "invisible" in that it is incorporated into our baseline from which other forms of violence may be measured as a departure).
147. *See, e.g.*, Jade Schiff, *Violence Requires Multiple Definitions*, OBERLIN REV. (May 1, 2015), <https://oberlinreview.org/8174/opinions/violence-requires-multiple-definitions> [<https://perma.cc/AGW6-KCC6>].

those experiences and sensibilities may seem fundamental and well-grounded in history and culture.<sup>148</sup> Language, with no additional physical component, can clearly inflict meaningful injury.<sup>149</sup> Thus words that are thought to deny fundamental core experiences—and thus to dehumanize—are said to pose a direct danger to vulnerable targets of the speech in question.<sup>150</sup> On such a view, a heckler's veto of such speech may, at worst, respond to one kind of violence with another.

Of course, it is also possible to legally discount or dismiss target or audience responses to such dismissive speech.<sup>151</sup> The resulting sustained debate re-inscribes the unresolved conflict over what should count as audience "hypersensitivity."<sup>152</sup> The status of discursive violence, to which a heckler's veto, at some stage, might be a legitimate response, is clearly a continuing and unresolved debate.

Thus on a broad understanding, "[t]o do violence is to carry out an intention to behave in a manner likely to cause harm."<sup>153</sup> Such a view is certainly not without respectable historical support. Consider the observations of Sir James Fitzjames Stephen,<sup>154</sup> a well-respected

148. *See id.*

149. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1* (1993); Ulrich Baer, *What 'Snowflakes' Get Right About Free Speech*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/opinion/what-liberal-snowflakes-get-right-about-free-speech.html?mcubz=1> [<https://perma.cc/6YXV-5HSU>].

150. *See* Jonathan Haidt, *Intimidation Is the New Normal on Campus*, CHRON. HIGHER EDUC. (Apr. 26, 2017), <http://www.dartblog.com/image/Intimidation%20Is%20the%20New%20Normal%20--%20Jon%20Haidt.pdf> [<https://perma.cc/BTR9-3Q2B>].

151. *Id.*

152. *See supra* note 143.

153. BARRY L. GAN, *VIOLENCE AND NONVIOLENCE: AN INTRODUCTION* 19 (2013) (emphasis omitted). Note that this definition does not require that the speaker in question specifically intend the objectively likely harm. *See also* Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> [<https://perma.cc/K25A-9Z8X>] (seeking to distinguish the adverse physical stress effects of abusive speech from those of merely offensive speech). *But see*, Jonathan Haidt & Greg Lukianoff, *Why It's a Bad Idea to Tell Students Words Are Violence*, THE ATLANTIC (July 18, 2017), <https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970> [<https://perma.cc/4C2F-CFSV>] (arguing that banning stress-inducing speakers from college campuses will not make students safer).

154. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 121–22 (Univ. of Chicago Press 1991) (1874).

Victorian critic of the free-speech theory of John Stuart Mill.<sup>155</sup> Fitzjames Stephen interestingly argues that treating someone's opinions as false or denying the meaningfulness of such opinions "may cause intense pain, and this may be of many different kinds . . . ."<sup>156</sup> In Fitzjames Stephen's view, causing this intense pain is, crucially, an infringement of that person's own "liberty of thought."<sup>157</sup>

In sum, there is a sustained, undeniable lack of consensus on whether a heckler's veto can be a legitimate policy response to speech that is itself thought to embody violence, or that itself restricts in some measure the freedom of thought of the targets of such speech. Here again, there will be no voluntary consensus.<sup>158</sup>

Someone might be tempted to say, though, that at least if society could somehow set all these controversies aside, any heckler's veto of any controversial campus speaker, and any associated intimidation or deterrence of speech, must necessarily diminish the institution of free speech overall. This may seem intuitively clear, if not true merely by definition.

However, even this view is easily and persistently contested. Especially in the case of reasonably well-known outside speakers, one or more exercises of a heckler's veto typically does not meaningfully restrict the speaker's realistic ability to convey their ideas to any relevant audience. Most, if not all, such speakers will retain perfectly adequate alternative channels, including social media, through which to convey their message to any interested persons.<sup>159</sup> And in some cases, the publicity associated with the presumed heckler's veto will clearly

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155. See generally JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

156. STEPHENS, *supra* note 154, at 121.

157. *Id.* at 121–22.

158. In the context of at least some forms of pain, fear, and violence, see Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1629 (1986) ("[A]s long as legal interpretation is constitutive of violent behavior as well as meaning, as long as people are committed to using or resisting the social organizations of violence in making their interpretations real, there will always be a tragic limit to the common meaning that can be achieved.").

159. See, e.g., Hanlon, *supra* note 138 (stating that "[o]bviously, students can read, watch, and hear professional provocateurs like [Ann] Coulter without an institution of higher education hosting her speech"); Baer, *supra* note 149 ("Universities invite speakers not chiefly to present otherwise unavailable discoveries, but to present to the public views they have presented elsewhere."). For a broad discussion of why judicial review of free speech cases should consider the value of the speakers options to disseminate their message before and after the regulation on speech, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

draw increased public attention, over time, to the speaker or the message at issue.<sup>160</sup> It is thus entirely contestable whether the university campus heckler's veto must necessarily result in overall damage to the institution of free speech, even if the speech rights of those targeted by the speech in question are set aside.

### CONCLUSION

Reluctance to let a speaker's opponents suppress the speech in question directly or indirectly through their own violence seems to be reflected in the law. American society seems in particular to be reluctant to encourage or to incentivize<sup>161</sup> violence in the place of dialogue. But as shown in the classic Supreme Court cases,<sup>162</sup> and in more recent appellate case law in the contexts of public school education<sup>163</sup> and university campus speech,<sup>164</sup> Americans continue to be far from agreement on most of the interesting elements of definition, scope, and value in purported heckler's veto cases.

This may seem a curious state of affairs. After all, there is nothing finally at stake or ultimately decided merely in how the idea of a heckler's veto is defined, or other preliminary issues. Why can't the adherents of the more fundamental substantive legal or political doctrines involved stipulate to any reasonable understanding of the meaning of a heckler's veto, and then argue, on that reasonable basis, the substantive merits of their political or legal positions? It seems

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160. See Hanlon, *supra* note 138. Presumably most instances in which persons feel intimidated from speaking candidly have little to do with any form of a heckler's veto as discussed above. In any event there is also the counter-balancing possibility that a heckler's veto could be used disproportionately against those lacking the institutional political strength to defend their basic interests. See, e.g., Conor Friedersdorf, *Words Which By Their Very Utterance Inflict Injury*, ATLANTIC (Apr. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/04/words-which-by-their-very-utterance-inflict-injury/523344/> [<https://perma.cc/5PWV-8ESY>].

161. It is thought that some approaches to the disruption of speech incentivize disruptive violence, and in effect provide a legal roadmap of how to silence disfavored speakers. See, e.g., *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 274 (6th Cir. 2015) (en banc) (Rogers, J., dissenting). It is, however, equally arguable that more broadly protecting speech against a heckler's veto provides a corresponding legal roadmap to engaging in harmful, assaultive, or in some sense itself violent speech. See *supra* notes 149–158 and accompanying text (discussing that speech, even without conduct, can inflict harm); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (holding city ordinances unconstitutional in the historic Illinois Nazi demonstration case).

162. See *supra* Section II.

163. See *supra* Section III.A.

164. See *supra* Section III.B.

implausible to suppose that in the case of every legal concept, the bare definition of the concept decisively steers, if it does not actually dictate, case outcomes on the merits.

The full explanation for the various ongoing conceptual struggles over the scope, status, and meaning of a heckler's veto, doubtlessly includes various inseparable causal strands.<sup>165</sup> But it is worth calling attention to what seems to be one increasingly important cultural circumstance. This circumstance is, specifically, a general and continuing loss of confidence in our ability, as advocates of whatever legal or political position may be at stake, to reasonably persuade our opponents, or to convince those opponents of our substantive views on the merits. Let us call this general phenomenon reduced forensic confidence.

Given that reduced forensic confidence, this country cannot afford to settle for any understanding of the very idea of a heckler's veto that does not make one's persuasive task relatively easy, and an opponent's persuasive task correspondingly more difficult. We distinctively tend to lack confidence that from any reasonable preliminary understanding of the idea of a heckler's veto, the truth or rightness of our own preferred policy outcomes will gradually emerge and be widely recognized and appreciated.

The explanation, in turn, for this widespread contemporary loss of forensic confidence is also doubtless multi-faceted, and beyond any rigorous proof. Speculatively, though, a number of specific contemporary circumstances may play a role in the general loss of forensic confidence in question.

In particular, in an increasingly intensely polarized and mutually embittered legal and political culture,<sup>166</sup> resistance to one's own views may be more determined and implacable than it otherwise might be. Even if differences as to what should count as a heckler's veto are in some sense preliminary, there is no guarantee that such differences will

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165. See Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J., <https://www.city-journal.org/html/what-social-science-does%E2%80%94and-doesn%E2%80%99t%E2%80%94know-13297.html> [https://perma.cc/6GQU-DKLJ] (last visited Oct. 10, 2017).

166. See, e.g., Emily Badger & Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html?mcubz=1> [https://perma.cc/W6RP-K3MH] (identifying trends of increasing political polarization); see generally Jean M. Twenge, et al., *More Polarized but More Independent: Political Party Identification and Ideological Self-Categorization Among U.S. Adults, College Students, and Late Adolescents, 1970-2015*, 42 PERSONALITY & SOC. PSYCHOL. BULL. 1364 (2016) (identifying a correlation between early party-identification amongst Millennials and more extreme ideological self-categorization); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009).

not be magnified, maintained, and exploited to any length by the partisans involved.<sup>167</sup> In matters of law and politics, even apparently minor or preliminary matters may increasingly seem to be ideologically inseparable from other, more substantive issues,<sup>168</sup> thereby raising the stakes and the risks in every context. To make even a reasonable concession as to the bare meaning or the contextual scope of a heckler's veto may—under the circumstances of America's increasingly intensely polarized politics—appear to leave one at a perhaps permanent disadvantage. Even if someone believes that history is ultimately on his or her side,<sup>169</sup> that person can hardly be confident that history will involve no painful or disturbing detours or reversals.<sup>170</sup>

A sense that the stakes, in a given context, have increased, can under some circumstances clearly promote a reduced level of confidence in a favorable outcome. Consider, by loose analogy, a hypothetical parent's confidence that their child is in the fenced backyard. The parent may be subjectively confident of the child's current presence based on only limited evidence. Now suppose the parent now hears a report of coyotes in the neighborhood. The report naturally raises the parent's level of concern for the child's safety. Interestingly, such anxiety-provoking news might also by itself tend to reduce the parent's subjective confidence that the child is, in fact, in the fenced backyard.

More directly, though, a reduced confidence in one's ability to persuade one's legal and political opponents, from any reasonable starting point, may reflect an entirely justified sense that current debate on legal and political matters commonly tends to be disappointing or unsatisfactory in its quality. Advocates' confidence in the cogency and effectiveness of their arguments may even be limited by a vague sense that those arguments could somehow be better presented and defended.

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167. See Anton Blok, *The Narcissism of Minor Differences*, 1 EUR. J. SOC. THEORY 33, 33 (1998).

168. This is a matter of increased ideological awareness and attempts at ideological consistency. For recent trends, see *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RES. CTR. 1 (June 12, 2014), <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf> [<https://perma.cc/Y2KW-MFVV>].

169. Despite the idea's apparently deep metaphysical commitments, it is often thought that the universe is somehow oriented toward some presumably valid understanding of justice. See *The Arc of the Moral Universe Is Long, But It Bends Toward Justice*, QUOTE INVESTIGATOR <http://quoteinvestigator.com/2012/11/15/arc-of-universe> [<https://perma.cc/9ND4-KESD>] (last visited Oct. 19, 2017).

170. That any bending toward real justice need not be continuous and uninterrupted is confirmed as much by our history as by the logic of the concepts involved.

More typically, though, there is an increasing sense that one's opponents are, for one reason or another, not fully in a position to appreciate the cogency of one's arguments.<sup>171</sup>

That one's opponents are sufficiently empathetic, self-critical, practically wise, and also sufficiently well versed in history, culture, economics, logic, probability, and statistics to properly appreciate one's argument, in the heckler's veto area or otherwise, will often seem doubtful. Civic ignorance is today often thought to be pervasive and conspicuous.<sup>172</sup> Sufficient cultural competence or cultural literacy,<sup>173</sup> and critical-thinking-ability sufficient to follow and genuinely appreciate a controversial argument,<sup>174</sup> are also clearly not to be taken for granted.<sup>175</sup>

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171. In somewhat formal terms, we may decreasingly recognize our political antagonists as our genuine epistemic peers. *See, e.g.*, Bryan Frances, *Disagreement* 47–48 (2014) (defining epistemic peerhood); Nathan L. King, *Disagreement: What's the Problem?, or A Good Peer Is Hard to Find*, 85 *Phil. & Phenomenological Res.* 249, 251–53 (2012); R. George Wright, *Epistemic Peerhood in the Law*, 91 *ST. JOHN'S L. REV.* (forthcoming 2017).
172. *See generally* ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (2d ed. 2016) (pointing out that not all political ignorance, however otherwise dismaying, need be narrowly irrational). *See also* Karoli Kuns, *Justice David Souter On Civic Ignorance: 'That Is How Democracy Dies'*, (Oct. 22, 2016, 5:00 AM), CROOKS & LIARS, <http://crooksandliars.com/2016/10/justice-david-souter-civic-ignorance-how> [<https://perma.cc/HWV4-4LQ3>]; Reid Wilson, *Only 36 Percent of Americans Can Name the Three Branches of Government*, *WASH. POST* (Sept. 18, 2014), [https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/18/only-36-percent-of-americans-can-name-the-three-branches-of-government/?utm\\_term=.33313a3c9572](https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/18/only-36-percent-of-americans-can-name-the-three-branches-of-government/?utm_term=.33313a3c9572) [<https://perma.cc/4RJH-T2EE>].
173. *See, e.g.*, Shalini Chatlani, *Are Modern Standards Breeding a Decline in Cultural Literacy?*, *EDUC. DIVE* (June 30, 2016), <http://www.educationdive.com/news/are-modern-standards-breeding-a-decline-in-cultural-literacy/421401/> [<https://perma.cc/9MXY-CHS3>]. *See generally* E.D. HIRSCH, *WHY KNOWLEDGE MATTERS: RESCUING OUR CHILDREN FROM FAILED EDUCATIONAL THEORIES* (2016). We set aside any possible effects of the rise to prominence of what we might call short-form communications technologies.
174. *See generally* RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES I* (2011); Douglas Belkin, *Exclusive Test Data: Many Colleges Fail to Improve Critical-Thinking Skills*, *WALL ST. J.* (June 5, 2017), <https://www.wsj.com/articles/exclusive-test-data-many-colleges-fail-to-improve-critical-thinking-skills-1496686662> [<https://perma.cc/RB9V-47YQ>]. Even at the most elite levels, there are conspicuous problems of systematic cognitive and ego-defensive biases and a more general inability to exercise reasonable practical judgment. *See, e.g.*, CHRIS HAYES, *TWILIGHT OF THE ELITES: AMERICA AFTER MERITOCRACY* (2012); ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (rev. ed., 1993) (1936).
175. More speculatively, it may also be that many of us vaguely sense that however intense or unshakeable of our basic political or legal beliefs, no ultimately rock-solid foundations are available to undergird or validate those beliefs. *See the*

These considerations suggest that only a limited degree of confidence in the ability to reasonably persuade interlocutors from any reasonably fair starting point is appropriate. Together, this translates into an understandable lack of confidence in reasoned political and legal argumentation, in the heckler's veto context and elsewhere.

Under these circumstances, it is understandable that advocates would be reluctant to make concessions even as to the status, meaning, and scope of the heckler's veto doctrine. Nor should we expect any greater forensic confidence, or any greater willingness to make even preliminary, reasonable concessions, until the grounds for the current lack of such confidence have dissipated.

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variety of more or less unambitious meta-ethical programs discussed in, for example, ANDREW FISHER, *METAETHICS: AN INTRODUCTION* (2014); MARK VAN ROOJEN, *METAETHICS: A CONTEMPORARY INTRODUCTION* (2015). For a more specific discussion, see, for example, CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944) (referring to ethics discussions as an ultimate matter of emotivist appeals to approve or disapprove what the speaker approves or disapproves). This may in some perhaps subconscious way further limit our confidence in our ability to reasonably persuade others.