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Disappearing Act: Are Free Speech Rights Decreasing?

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BOOK REVIEW

DISAPPEARING ACT: ARE FREE SPEECH RIGHTS DECREASING?

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The Disappearing First Amendment
by Ronald J. Krotoszynski, Jr.
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I. INTRODUCTION

This is a critical analysis of Ronald J. Krotoszynski, Jr.'s new book, *The Disappearing First Amendment*.[1] Krotoszynski lays out the main thesis of the book as follows: "Free speech rights have contracted, rather than expanded, in areas where the decisions of First Amendment claims requires open-ended balancing of the interests of would-be speakers, on the one hand, and the government, on the other."[2] This book provides a strong counter narrative[3] to the claim that modern free speech rights have been on a universal upward trajectory.[4] Krotoszynski provides examples to support this claim ranging from valid (e.g., the modern public forum doctrine reducing access to government property for speech activity)[5] to misguided (e.g., decreased academic freedom).[6]

Krotoszynski is up-front about how this is not a neutral assessment of the issue.[7] This is both a blessing and a curse.[8] His passion for the subject makes for a more engaging read.[9] However, the one-sided nature of the book will likely leave the reader wanting to hear the other side.[10] Furthermore, Krotoszynski makes some dubious claims in the furtherance

1. RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT (Cambridge Univ. Press 2019).

2. *Id.* at xiv.

3. *See generally id.* (countering the common view that free speech rights are on the rise).

4. *See, e.g.*, Eric M. McLeod & Joseph S. Diedrich, *John Doe II and Political Speech: A Constitutional Perspective*, 90 WIS. L., Jul. Aug 2017 at 28, 32 (stating "one can map a trajectory of expanding free speech protection, especially when *political* expression is at stake").

5. *See* KROTOSZYNSKI, *supra* note 1, at 24 (stating, under the *traditional* public forum doctrine, there existed "a general duty on the part of government to make public property available for First Amendment activity", but today, "the burden has shifted to would-be speakers to show that government property constitutes a traditional public forum or a designated public forum").

6. *See id.* at 99–100 ("The erosion of protection for academic freedom in the contemporary United States has more to do with university practices that do not, strictly speaking, seek to punish academics for their speech but rather use other, constitutionally permissible policies to discipline or fire academics who prove troublesome.").

7. *See id.* at xiv ("Whether or not the pages that follow [my thesis] adequately prove it out will be up to its readers to decide for themselves.").

8. *See* Robert J. Condlin, *"Cases on Both Sides": Patterns of Argument in Legal Dispute-Negotiation,* 44 MD. L. REV. 65, 86–87 (1985) (stating an "[a]rgument needs focus" and encouraging "emphasiz[ing] certain points above others", but also expressing a "[g]ood argument is rarely one-sided").

9. *See* HEIDI K. BROWN, THE MINDFUL LEGAL WRITER: MASTERING PERSUASIVE WRITING 110 (Wolters Kluwer 2016) (stating "good lawyers . . . inject personality and passion into the legal writing . . . to captivate and engage the reader").

10. *See, e.g.*, Brief for Defendant-Appellant at *5, People v. Herring, No. 345/02, 2004 WL 3253031 (N.Y. App. Div. April 21, 2004)("[I]t is human nature, *everyone wants to hear both sides of the story.*").

of his point.[11] While Krotoszynski is not shy about expressing his support for advancing free speech, he does so in a manner that is politically viewpoint neutral.[12] He never gives even the slightest intimation that his support for free speech is contingent upon his personal views about the speech in question.[13]

This review is a critique of some of the claims from the book. It reaches the conclusion that, despite some valid examples of free speech rights decreasing in specific categories,[14] free speech rights overall have increased in modern years, not decreased.[15]

II. THE SELMA MARCH COULD NOT HAPPEN TODAY

Krotoszynski poses the thought-provoking question: could the Selma March take place today?[16] Viewing modern free speech jurisprudence through this lens[17] is an engaging thought experiment and a brilliant tactical move by Krotoszynski because, as he makes clear, the march would likely not be allowed under similar circumstances today.[18] Pointing out that one of the most celebrated demonstrations in United States history[19] might not

11. *See* KROTOSZYNSKI, *supra* note 1, at 99–103 (asserting the majority opinion in Garcetti v. Ceballos, 547 U.S. 410 (2006), contracted faculty speech established in "the Supreme Court's prior academic freedom precedents").

12. *See id.* at xiii ("[I]t is essential to the process of democratic self-government 'that everything worth saying shall be said,' an approach that empowers more ordinary citizens to speak—and thereby to contribute to the process of democratic deliberation—should be preferred to an approach that generates predictable results but less speech.").

13. *See generally id.* (omitting personal, political viewpoints which might cloud the objectivity of the thesis).

14. *See generally id.* (providing examples throughout indicating decreasing free speech rights).

15. *See, e.g.*, Jennifer R. Huddleston, *Free Speech in the Age of Political Correctness: Removing Free Speech Zones on College Campuses to Encourage Civil Discourse*, 8 ALA. C.R. & C.L. L. REV. 279, 285–86 ("In *Roberts v. Haragan* [346 F. Supp. 2d 853 (N.D. Tex. 2004)], the [court] found certain elements of [the] University's speech regulations to be facially unconstitutional because they . . . limit[ed] students' potentially controversial speech and printed materials to a designated area . . . on the basis that colleges and universities could not limit speech to specific areas of campus, because a public university would be considered a public forum.").

16. KROTOSZYNSKI, *supra* note 1, at 7.

17. *Id.*

18. *See id.* at 7 ("[A] march of the same majestic scale and scope could not take place—at least if the government now, like Alabama's state government then, did not wish to permit such a large-scale protest event using a main regional transportation artery.").

19. *See id.* ("In March 2015, major celebrations took place to mark the fiftieth anniversary of the Selma-to-Montgomery March. To be sure, Selma was a defining moment in the nation's long road to equal citizenship for all.").

be allowed today[20] is likely to evoke strong reactions from readers. The Selma March was a part of the National Association for the Advancement of Colored People's (NAACP) Selma Project and occurred over a period of five days in 1965.[21] The march required a multiday commandeering of a federal highway[22]—or, as Krotoszynski creatively refers to it, a "non-obvious venue[] . . . for First Amendment activity."[23]

The Selma March comparison is highly effective, but its ultimate relevance for measuring current free speech protections is minimal.[24] The decision that led to the march, *Williams v. Wallace*,[25] is rife with questionable constitutional reasoning.[26] Krotoszynski asserts: "The crux of Judge Johnson's opinion in *Williams v. Wallace* rested on the proposition that the right to protest on public property should be commensurate with the scope of the constitutional wrongs being protested."[27] This is the "proportionality principle"[28] and was viewed even by civil rights proponents as a novelty in the law,[29] an "unusual opinion,"[30] and as "interpret[ing] existing doctrine imaginatively."[31] Krotoszynski acknowledges that the Selma March required the First Amendment to be "creatively read" to justify the court's "remarkably broad" order.[32]

The main problem with the reasoning in *Williams* is that it was not content neutral.[33] Krotoszynski acknowledges that the decision "does involve

20. *See id.* (postulating the current government could prevent such a large scaled demonstration if desired).

21. *Id.*

22. *Id.* at 41.

23. *Id.* at 9.

24. *See id.* at 22 (stating that although "collective public protest retains salience . . . . Unfortunately, under the Roberts and Rehnquist Courts, the general public's access to public property for collective speech activity has consistently diminished.").

25. Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

26. *See, e.g.*, RONALD J. KROTOSZYNSKI, JR., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1413, 1413 n.15 (1995) ("Most courts have not been willing to apply the broader proportionality principle that Judge Johnson enunciated [in *Williams v. Wallace*], however.").

27. KROTOSZYNSKI, *supra* note 1, at 8 (footnotes omitted).

28. *Id.*

29. *See* Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785, 788–89 (1965) (stating the Court utilized the proportionality principle—"articulated, so far as [the author] know[s], for the first time in that decision").

30. Nicholas DeB. Katzenbach, *Protest, Politics, and the First Amendment*, 44 TUL. L. REV. 439, 443–44 (1969).

31. *Id.*

32. KROTOSZYNSKI, *supra* note 1, at 7.

33. *See id.* at 41 (arguing *Williams* was content- and viewpoint-based).

content-, and perhaps even viewpoint-, based factors."[34] Krotoszynski reassures the reader that the issues of content- and viewpoint-based discrimination are not fatal flaws because First Amendment doctrine contains such content-based distinctions—as in how pornography and commercial speech receive less free speech protections than political speech.[35] Even "the broadly speech-protective decisions of the [Supreme Court during the time of the Selma March] might well have had as much to do with the identity of the speakers seeking access to public property for speech activity as with the generic requirements of the First Amendment."[36] But this history lesson as to 1960s First Amendment jurisprudence[37] does not address whether the federal courts *should* engage in this level of content-based discrimination.[38]

Krotoszynski's position on the matter could be summarized as an "ends justify the means" approach. It can logically be reduced to: *The Selma March was good. The Selma March necessitated this particular view of free speech; therefore, this particular view of free speech is good.*[39] This, however, only looks at how the proportionality principle provided a favorable outcome in this one instance.[40] The negative outcomes that would follow from this constitutional standard are not addressed.

It is also important to note that the decision in *Williams* is not an example of the judiciary taking a principled stand against public opinion in order to protect the free speech rights of a minority view. The Selma March was more popular in 1965 than many people may realize today.[41] A Gallup poll

34. *Id.*

35. *See id* at 41–42 ("Pornography and commercial speech receive less robust First Amendment protection than political speech.").

36. *Id.* at 23.

37. *See supra* notes 25–36 and accompanying text.

38. *Cf.* Dan V. Kozlowski & Derigan Silver, *Measuring* Reed's *Reach: Content Discrimination in the U.S. Circuit Courts of Appeals after* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191 (2019) (discussing the ambiguity of the content discrimination doctrine and how it is applied in various federal courts).

39. *See, e.g.*, KROTOSZYNSKI, *supra* note 1, at 231 (citation omitted) ("Historians have generally credited the Selma Project, and the Selma-to-Montgomery March, with catalyzing the legislative process and securing enactment of the Voting Rights Act.").

40. *See id.* at 2 ("The outcome in any given case [applying the proportionality principle] would depend on how the scale came to rest. Of course, this . . . proportionality[] approach meant that . . . cases with very similar facts would, from time to time, and place to place, receive different judicial outcomes.").

41. Lydia Saad, *Gallup Vault: Americans Side with Voting Rights Reforms*, GALLUP (Mar 23, 2016), https://news.gallup.com/vault/190259/gallup-vault-americans-side-voting-rights-reforms.aspx [https://perma.cc/C67D-FW77].

found 76% support for the equal rights voting law—a main reason for the Selma March.[42] Other polls in 1965 showed significant support for the Selma March.[43] Even among whites, 46% supported civil rights groups, compared to just 21% who sided with the state of Alabama.[44]

III. NECESSITY OF MODERN PUBLIC PROTESTS

Krotoszynski wisely predicts the objection that, with the advent of the internet and social media, large-scale public protests such as the Selma March are less relevant today.[45] Krotoszynski disagrees by claiming online advocacy does not have the same power to promote a message as public protests, whereas online advocacy faces a greater risk of viewpoint discrimination, and public protests do not face the same problem of "siloing" as social media.[46]

The success of the #MeToo movement is a powerful counterargument to Krotoszynski's claim regarding the inferiority of online advocacy. In the first year, "#MeToo" was tweeted 19 million times,[47] and the movement brought down over 200 powerful men.[48] And this is all despite the #MeToo movement being less popular than the Selma March.[49]

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42. *Id.*

43. *E.g.*, Andrew Kohut, *From the Archives: 50 Years Ago: Mixed Views About Civil Rights but Support for Selma Demonstrators*, PEW RES. CTR. (Jan. 16, 2020), https://www.pewresearch.org/fact-tank/2020/01/16/50-years-ago-mixed-views-about-civil-rights-but-support-for-selma-demonstrators / [https://perma.cc/H8LE-SMDN].

44. *See id.* ("[T]he balance of opinion among whites was also clearly with [the Selma Demonstrators] rather than with the state of Alabama (46% to 21%).").

45. *See* KROTOSZYNSKI, *supra* note 1, at 22 ("Moreover, this holds true even in the age of the internet.").

46. *See id.* ("[P]ublic protests . . . permit the effective targeting of a particular audience and also . . . open[] up a wider dialogue within the body politic as a whole . . . [a] Facebook post or Twitter "tweet" lacks these important characteristics[,] . . . need not permit speech that they would prefer to censor[,] . . . [and] are not cabined by constitutional proscriptions against viewpoint or content discrimination.").

47. *The #MeToo Hashtag Has Been Used Roughly 19 Million Times on Twitter in the Past Year, and Usage Often Surges Around News Events*, PEW RES. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ft_18-10-11_metooanniversary_hashtag-used-19m_times/ [https://perma.cc/5LER-Q6TN].

48. Audrey Carlesen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html (last visited May 3, 2020).

49. *See* Ariel Edwards-Levy, *Here's What America Thinks About the #MeToo Movement Now*, HUFFINGTON POST (Aug. 22, 2018) https://www.huffpost.com/entry/poll-me-too-sexual-harassment_n_5b7dcbdde4b07295150f7e5e [https://perma.cc/LHM5-XJFJ] (reporting on a survey that found less than half of Americans hold a favorable view of #MeToo).

Krotoszynski rightly points out that social media platforms such as Facebook, Instagram, and Twitter are privately owned and are consequently free to engage in viewpoint discrimination.[50] Therefore, Krotoszynski continues, this new virtual town square is not an adequate replacement for the traditional town square.[51] But it is unlikely that any message so abhorrent that it would be barred from social media would have enough supporters willing to participate in a public demonstration comparable to the Selma March.

"Siloing of audiences" is when listeners and viewers "filter speech they do not wish to hear."[52] Krotoszynski claims that siloing is more of a problem in online advocacy than in public demonstrations. Social media companies do utilize complex algorithms to help ensure that consumers see more of the messages they agree with and less of what they do not.[53] Nevertheless, it is unclear if public demonstrations are any better. Using the author's own illustration, it seems unlikely that protestors in the Selma March directly confronted anti-voting rights activists in debate. One might claim that, while the march itself was not designed to directly stop people on the highway and engage them in a conversation, the media coverage of the event would have sparked conversations at schools, dinner tables, and water coolers. While valid, applying this logic to the modern-day news environment results in a circular argument. Namely, if the benefit of public demonstrations is increased media coverage, then that coverage will ultimately end up in the exact same internet-filtered silos that are being criticized.

Finally, the benefits of government-vetted public demonstrations must be weighed against the dangers of government being entrusted with the power to pick and choose which messages to promote. Krotoszynski largely touts the benefits of the former, while ignoring the dangers of the latter.

Krotoszynski is strikingly up-front with how far he wants to extend the right to public protest. He even promotes the notion of military bases, which are generally closed to the public due to safety concerns and the

50. KROTOSZYNSKI, *supra* note 1, at 22.

51. *Id.*

52. *Id.* at 42.

53. Lisa Schmeiser, *The Effect of Facebook's Social Media Silo on Itself and You*, OBSERVER (May 3, 2017), https://observer.com/2017/05/facebook-social-media-silo-effect-social-discourse/ [https://perma.cc/H2RC-NBUS].

presence of classified information, being required to open up for public protests.[54]

Discussing the pros and cons of the Rehnquist and Roberts Courts' limiting of free speech rights in the public square is a legitimate conversation to have. Unfortunately, Krotoszynski does not provide a balanced analysis of the issue. Equally unfortunate is that he occasionally ventures off into hyperbole. For example, "ownership of property should not be a de facto precondition of participating in the process of democratic deliberation."[55] Statements like these are more reminiscent of the rhetoric a disingenuous politician would use to gain support from an uneducated electorate than an intellectually honest assessment of an issue. Those without property are not barred from participating in democratic deliberation, as Krotoszynski incorrectly asserts. To the contrary, with the advent of social media, their ability to participate has increased.

IV. WHISTLEBLOWING SPEECH

Krotoszynski does an excellent job of framing whistleblower protections as an efficient mechanism for creating more well-informed voters, which is necessary for a successful democracy.[56] In order for the press to play its vital role, he explains, it must be able to "obtain and disseminate accurate information about the government's activities."[57]

Krotoszynski is clear that "federal courts should deploy the First Amendment as a shield for whistleblowing speech."[58] He also makes it clear that, in his opinion, current protections are not "robust" or "reliable" enough.[59] He proposes the creation of a new "whistleblowing" category of speech.[60] This would offer heightened protection to employees in the government, but not the private sector.[61]

Krotoszynski presents a powerful analogy in support of more whistleblower protections by pointing out that government employees are

54. KROTOSZYNSKI, *supra* note 1, at 42.
55. *Id.* at 26.
56. *Id.* at 75.
57. *Id.*
58. *Id.* at 76.
59. *Id.* at 77.
60. *Id.*
61. *See id.* at 78 (stating "only government employee speakers can engage in whistleblowing speech because they are uniquely situated to provide the body politic with the information it must have to ensure government accountability through the democratic process").

provided near-absolute protection against their employment being contingent upon partisan loyalty.[62] "If the potential disruption of a government office is not a sufficient predicate for firing an employee based on her partisan identity, the same logic would suggest that government should be equally debarred from firing a government employee who speaks out on a matter of public concern."[63] Another illustrative analogy presented in support of increased whistleblower protections is that of the Westboro Baptist Church (WBC).[64] The WBC is the group that protests soldiers' funerals, among other events, with signs that read, for example, "Thank God for dead soldiers" and "Fags die, God laughs."[65] Krotoszynski points out that if the Supreme Court maintains that the WBC's message is "speech about a matter of public concern," then whistleblowing speech that implicates government policy certainly is as well.[66]

V. FACULTY AND STUDENT FIRST AMENDMENT RIGHTS

As with the section on Freedom of the Press, this section presents a strong case for the necessity of academic freedom in a democracy. Unfortunately, this section is also similar to other sections in the book in that it engages in hyperbolic claims. Krotoszynski claims that the Rehnquist and Roberts Courts have "significantly"[67] reduced First Amendment protections for faculty and students.

It is unclear how much the current state of free speech on college campuses is the fault of the Rehnquist and Roberts Courts. Yes, colleges in the twenty-first century have adopted "bureaucratic solutions such as safe spaces, speech codes, and free-speech zones,"[68] but Krotoszynski is unable to link these practices to the Rehnquist and Roberts Courts directly. He provides the peculiar example of the University of Oklahoma President, David Boren, expelling students for engaging in a racist chant at an off-

62. *See id.* at 77 (describing a freedom from a "spoils system in which government officials condition government employment on partisan loyalty").

63. *Id.*

64. *See id.* at 90 (purporting "Westboro Baptist Church's lunacy compris[ing] speech about a matter of public concern" opens the door for nearly anything else tangentially related to government policy to meet that standard).

65. *Signs*, WESTBORO BAPTIST CHURCH, https://www.godhatesfags.com/signs/index2.html [https://perma.cc/9MH2-TQKZ].

66. KROTOSZYNSKI, *supra* note 1, at 90.

67. *Id.* at 95.

68. *Id.* at 96.

campus fraternity event.[69] Leading constitutional law scholars point out that this was a violation of the students' free speech rights.[70] However, this does nothing to support the claim that the Rehnquist and Roberts Courts have "significantly" reduced free speech rights on campus. The expelled students never sought legal action, so there was never adjudication regarding the legitimacy of the university's behavior. Therefore, presenting the University of Oklahoma incident as evidence of the Supreme Court "significantly" reducing free speech rights is misguided.

To strengthen the claim that academic freedom is decreasing, Krotoszynski also presents the example of Gene Nichol.[71] Specifically, Krotoszynski employs the Nichol example to support the claim that academic freedom is "less robust" now than it was during the Red Scare of 1917–1920.[72] An honest assessment of the facts leading to Nichol's contract not being renewed—which Krotoszynski omits from the book—does not support this conclusion. While serving as President of the College of William & Mary, Nichol allowed student funds to pay for a sex worker show on campus.[73] The show included nude dancing and sex toys.[74] Nichol also removed a cross from the campus chapel, where it had been located for over 60 years.[75] These actions led to threats to revoke promised donations, including a $12 million gift from a wealthy donor.[76] The 2008 financial crisis exacerbated the risk of significant loss of endowment and the subsequent looming state budget cuts.[77] The board elected not to renew Nichol's contract in 2008.[78]

In order to present the Nichol incident as evidence that free speech protection is "less robust" now than in 1917–1920, it must be shown that a

69. *Id.* at 97.

70. Manny Fernandez & Erik Eckholm, *Expulsion of Two Oklahoma Students Over Video Leads to Free Speech Debate*, N.Y. TIMES (Mar. 11, 2015), https://www.nytimes.com/2015/03/12/us/expulsion-of-two-oklahoma-students-leads-to-free-speech-debate.html [https://perma.cc/EXT8-QPAQ].

71. KROTOSZYNSKI, *supra* note 1, at 96.

72. *Id.*

73. *College of William and Mary Hosts Sex Worker Show on Campus*, FOX NEWS (Feb. 23, 2007), https://www.foxnews.com/story/college-of-william-and-mary-hosts-sex-worker-show-on-campus [https://perma.cc/YY5H-8ZUH].

74. *Id.*

75. *Id.*

76. Max Fisher, *When the Campus PC Police are Conservative: Why Media Ignored the Free Speech Meltdown at William & Mary*, VOX (Nov. 11, 2015, 2:30 PM), https://www.vox.com/2015/11/11/9715194/college-speech-censorship [https://perma.cc/X39Y-4W47].

77. *Id.*

78. *Id.*

similarly-situated college professor would have received constitutional protection at that time. Krotoszynski never presents any reason to believe that this would be the case. Furthermore, the state of First Amendment jurisprudence in 1917–1920 does not support the claim. A college president in 1917–1920 who significantly reduced the college endowment by removing a cross from the chapel and allowing student funds to be spent on a performance that included nude dancing and dildos would almost certainly not receive wrongful termination protection, just as in 2008.

Krotoszynski anticipates the objection that there is no good evidence to believe that the Rehnquist and Roberts Courts significantly reduced academic freedom. He attempts to address this objection by stating:

> The erosion of protection for academic freedom in the contemporary United States has more to do with university practices . . . . In this sense then, the diminution of academic freedom in the college and university context has not been because of subsequent judicial decisions . . . but rather because of a failure to expand on them . . . .[79]

This admission contradicts the explicit accusation that opens this section of the book: "The Rehnquist and Roberts Courts, however, have significantly reduced the scope of First Amendment protection available to faculty and students alike in the nation's public schools, colleges, and universities."[80]

Elsewhere in the book, Krotoszynski claims that the effort to extend academic freedom principles to primary, middle, and secondary public schools has been a process of "one step forward, two steps back."[81] But the primary example to support this claim is inadequate. Krotoszynski presents *Tinker v. Des Moines Independent Community School District* (1969)[82] followed by *Bethel School District No. 403 v. Fraser* (1986)[83] in an attempt to illustrate his "one step forward, two steps back" claim. *Tinker* held students had a right to wear black armbands to protest the Vietnam War.[84] In *Fraser*, the Supreme Court held a student did not have a First Amendment right to give a speech filled with blatant sexual innuendos at a school event.[85] This

79. KROTOSZYNSKI, *supra* note 1, at 223–24.
80. *Id.* at 95.
81. *Id.* at 103.
82. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
83. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
84. *Tinker*, 393 U.S. at 514.
85. *Fraser*, 478 U.S. at 686.

is hardly "one step forward, two steps back." *Bethel v. Fraser* did not move First Amendment protections behind where they were after *Tinker*.

The current state of academic freedom is a relevant free speech issue to discuss—and a strong case can certainly be made that more protections should be implemented in that area. But to instead focus on the dubious narrative that the Rehnquist and Roberts Courts have "significantly" reduced free speech protections in this area does not promote healthy debate on the topic.

VI. NET GAIN OR LOSS?

Krotoszynski focuses on the areas where, allegedly, free speech is in decline. But in order to assess whether there has been a net loss in free speech rights, both sides of the equation must be considered—meaning, the areas where free speech has decreased must be proportionately weighed against the areas where they have increased. This is the only way to assess the net effect. An honest assessment of this equation should lead the rational observer to conclude that free speech rights have *not* decreased under the Rehnquist and Roberts Courts, as Krotoszynski claims.

As previously discussed, there has been a slight reduction in free speech rights in the area of demonstrations on public property. However, this is more than compensated for with significant increases in other free speech areas:

- *Hustler Magazine v. Falwell*[86] held public figures must show actual malice to recover on a theory of intentional infliction of emotional distress.[87]
- *Texas v. Johnson*[88] held burning the flag is a constitutionally protected act.[89]
- *Citizens United v. Federal Election Commission*[90] held labor union and corporate spending on certain electioneering communications is protected free speech.[91]

86. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
87. *Id.* at 56.
88. Texas v. Johnson, 491 U.S. 397 (1989).
89. *Id.* at 420.
90. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
91. *Id.* at 319.

- *Snyder v. Phelps*[92] held that even the extreme messages of the Westboro Baptist Church are considered speech of a public concern and, therefore, cannot be the basis for tort liability under a theory of intentional infliction of emotional distress.[93]
- *Janus v. AFSCME*[94] held mandatory public-sector union fees violated the free speech rights of objecting employees.[95]

VII. CONCLUSION

As mentioned in this review, the book makes some prescient points about areas where free speech has been decreasing. This is a worthwhile endeavor because these areas of decreasing free speech rights—such as reduced access to government property for speech activity—receive less media attention than areas of increased free speech, such as those in *Janus* and *Citizens United*. However, Krotoszynski engages in hyperbole by claiming that, overall, free speech protections have been decreasing. The case could be made that previous Supreme Court rulings have produced more significant gains for free speech than under the Rehnquist and Roberts Courts. But the claim that there are, on net, significantly less free speech protections under the modern Supreme Court is a largely untenable position.

Despite its flaws, the book provides a very thorough and highly referenced account of often-overlooked free speech topics. Those who already possess a working understanding of free speech jurisprudence, and who can assess the book's claims with a skeptical mind, will no doubt benefit from reading the book.

92. Snyder v. Phelps, 562 U.S. 443 (2011).
93. *Id.* at 458–59.
94. Janus v. Am. Fed'n of State, Cty., and Mun. Emps. Council 31, 138 S. Ct. 2448 (2018).
95. *Id.* at 2486.