

Speech on Campus: How America's Crisis in Confidence Is Eroding Free Speech Values

by JOSEPH RUSSOMANNO*

Introduction

When Thomas Jefferson founded the University of Virginia, he wrote of the philosophy that not only that institution would follow, but one that many other universities and colleges would practice: “This institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.”¹ This multilayered pronouncement captures several attributes of a free and democratic society, many which universities typically seek to embody. These institutions and their campuses are often viewed as the quintessential marketplaces of ideas within which beliefs and viewpoints of all kinds may be expressed. In turn, ideas may be refuted, not by silencing them, but through rational debate. In this way, the “freedom of the human mind” about which Jefferson wrote may be expanded through learning.

However, Jefferson's ideal has faced significant pushback, particularly in early 2017.² On various U.S. college and university campuses, would-be speakers were silenced, either through protests turned violent or by threats of such violence. This occurred at, among other locales, the University of California, Berkeley. Ironically, it was there where many ideals of the 1960s, including the free speech movement, had germinated. The Berkeley campus was to be the site of separate speeches in 2017 by right-wing provocateurs,

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1. Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820) (on file with the Library of Congress).

2. It is acknowledged that while this “pushback” accelerated in 2017, its history precedes that year. See, e.g., Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Student Protests*, N.Y. TIMES, May 3, 2014. See also ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS xi (2017) (“The issue of free speech on college campuses is as old as universities and as current as the daily news.”).

Milo Yiannopoulos and Ann Coulter. A speech by the former was cancelled when violent protests erupted on the night it was scheduled. Damage from rocks, fireworks, and Molotov cocktails was estimated at \$100,000.³ Two months later, Coulter's on-again, off-again speech was ultimately cancelled under a cloud of threatened violence from both those who opposed her rhetoric and, when cancellation appeared likely, her supporters.⁴ Though recognizing that, as Alexander Tsesis writes, university administrators must "walk a tightrope" between providing for free expression and safety concerns,⁵ the cancellation was characterized as a "blow to the institution's legacy and reputation as a promoter and bastion of free speech."⁶

Between the two Berkeley incidents were others in early 2017 at other colleges and universities where controversial speakers were opposed. First, at Vermont's Middlebury College, a crowd attacked Charles Murray, a political scientist and coauthor of "The Bell Curve,"⁷ which makes the argument that differences in I.Q. scores across races may have genetic bases. Middlebury professor Allison Stanger, who was there to moderate the speech and to challenge Murray, wrote, "this was a chance to demonstrate publicly a commitment to a free and fair exchange of views."⁸ She was injured in the attack.⁹

3. Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Cause \$100,000 in Damage*, (Feb. 2, 2017) CNN, <http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/>. See also Chris Quintana, *Berkeley Pays a High Price for "Free Speech,"* CHRON. OF HIGHER EDUC., Oct. 20, 2017, at A16 (describing the aftermath of a Sept. 2017 Yiannapolous speech at Berkeley, including campus unease and questions surrounding the estimated \$800,000 cost); Aaron Hanlon, Commentary, *What Stunts Like Milo Yiannapolous's 'Free Speech Week' Cost*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/opinion/milo-yiannopoulos-free-speech-week-berkeley.html> (questioning whether "public institutions should be spending taxpayer money allocated for higher education on speakers [and security] who aren't there for teaching and learning").

4. Nicholas Dirks, Commentary, *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> ("People describing themselves as anarchists and anti-fascists openly threatened to prevent Ms. Coulter's talk "by any means necessary." Right-wing groups threatened to appear on campus armed to ensure the opposite—they declared the event would be held "by any means necessary.").

5. Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1863, (2017).

6. Thomas Fuller, *Berkeley Cancels Ann Coulter Speech Over Safety Fears*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/us/berkeley-ann-coulter-speech-canceled.html>.

7. CHARLES A. MURRAY & RICHARD HERRNSTEIN, *THE BELL CURVE* (1994).

8. Allison Stanger, *Understanding the Angry Mob at Middlebury That Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html>.

9. Katherine O. Seelye, *Protesters Disrupt Speech By "Bell Curve" Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html>.

Second, a federal district judge issued a preliminary injunction against Auburn University when it cancelled a scheduled speech by Richard Spencer, “a white nationalist member of the far right who subscribes to what he describes as ‘identitarian’ politics.”¹⁰ The speech was allowed to proceed. “Discrimination on the basis of message content cannot be tolerated under the First Amendment,” wrote Judge W. Keith Watkins, “and [l]isteners’ reaction to speech is not a content-neutral basis for regulation.”¹¹ While a “brief scuffle” led to three arrests outside the speech, protests were characterized as generally peaceful and the event took place.¹²

Some believe these incidents were choreographed efforts by conservative organizations such as the Young America’s Foundation—an extremely well-funded group with chapters in more than two hundred and fifty high schools and colleges. These organizations are accused of baiting those opposed to the provocative ideas expressed by invited speakers—speakers who by design, writes Stephanie Saul, have become “edgier, more in-your-face and sometimes even meanspirited.”¹³ According to Jeremy Peters, this plan is a “rapidly escalating effort by conservatives to fight liberals on what was once the left’s moral high ground over free speech on campus.”¹⁴ In other words, while there is no dispute over the right to protest, when the opposition to these “heat-seeking speeches”¹⁵ crosses a line from peaceful to violent, it plays into the hands of those seeking to divide.

The attention these incidents attracted was symbolized by the U.S. Senate Judiciary Committee dedicating a hearing to the topic in June 2017, “The Assault on the First Amendment on College Campuses.” In his opening statement, committee chair Charles Grassley was overwhelmingly supportive of free speech on campus: “[O]n too many campuses today, free speech appears to be sacrificed at the altar of political correctness.”¹⁶ Among

10. Padgett v. Auburn University, Case No. 3:17 CV-231-WKW-WC (M.D. Ala. 2017), at 2.

11. *Id.* at 3.

12. Travis M. Andrews, *Federal Judge Stops Auburn From Canceling White Nationalist Richard Spencer Speech*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.b12f5fd0ef32.

13. Stephanie Saul, *The Conservative Force Behind Speeches Roiling College Campuses*, N.Y. TIMES (May 20, 2017), <https://www.nytimes.com/2017/05/20/us/college-conservative-speeches.html>.

14. Jeremy W. Peters, *In Coulter’s Free Speech Battle, The Right’s Latest Rallying Cry*, N.Y. TIMES (Apr. 26, 2017), at A1.

15. Saul, *supra* note 13.

16. *Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the Sen. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Senator Chuck Grassley of Iowa, Chairman). Grassley continued:

those who testified before the committee was UCLA professor Eugene Volokh who described the incidents as an “assault” and “a serious threat to American liberty and democracy, as well as to excellence in education and research.”¹⁷ He concluded by reflecting on the situation, “too many people in the academy are not focusing on it, or are coming down on the wrong side.”¹⁸ Also appearing before the committee was attorney Floyd Abrams, who characterized the issue as the single greatest threat to free speech in the nation.¹⁹

It has been suggested that the dramatic increase in on-campus provocation-leading-to-intolerance seen in early 2017 did not occur in a vacuum.²⁰ Instead, with a growing movement already present at many universities to limit speech that offends or triggers traumatic memories,²¹ conservatives were emboldened by a backlash against what some view as excessive political correctness. Combined with a presidential candidate—then later president—who happily took up their fight, the movement was buttressed. As Peters writes, the conservative point within this context “resonates far beyond academia, and in many ways echoes some of the most bitter undercurrents of the 2016 presidential election.”²² He continues:

President Trump’s victory was, to many of his supporters, a defiant uprising against what they saw as a cultural and political elite that told them their values were wrong and their beliefs bigoted. And Mr. Trump, who has routinely used racially charged controversies and social movements like Black Lives Matter to his political benefit, has leapt to their defense, ready to fan the flames.²³

Many administrators believe that students should be shielded from hate speech, whatever that is, as an exception to the First Amendment. Unfortunately, this censorship is no different from any other examples in history, when speech that authorities deemed to be heretical has been suppressed based on its content. Even more unfortunate, this anti-constitutional attitude is so pervasive that students are being socialized and possibly indoctrinated into favoring censorship at odds with the First Amendment.

Id.

17. *Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the Sen. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Eugene Volokh, professor, UCLA).

18. *Id.*

19. *Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the Sen. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Floyd Abrams, senior counsel, Cahill Gordon & Reindell LLP).

20. See Peters, *supra* note 14, at A1 (“liberals and conservatives agree that the situation on campuses is something far more corrosive than mere hypersensitivity by eighteen-year-olds”).

21. See *infra* notes 89–97 and accompanying text.

22. Peters, *supra* note 14, at A1.

23. Peters, *supra* note 14, at A1.

Even if the provocations described above were orchestrated, the fact remains that protesters—some who turned violent—took what may have been “bait” and exhibited intolerance of ideas being expressed with which they disagreed. As Sen. Bernie Sanders, hardly a political ally of Coulter, said in defense of her scheduled speech at Berkeley, “What are you afraid of—her ideas?”²⁴ This is at the heart of the free speech defense—tolerance even of ideas contrary to one’s beliefs or values, accepting the possibility that an open mind could lead to new understanding. This is at the core of Justice Oliver Wendell Holmes’ opinion that the Constitution calls for the principle of free thought—“[N]ot free thought for those who agree with us but freedom for the thought that we hate.”²⁵ This approach has been echoed repeatedly, including in a 2017 U.S. Supreme Court ruling that characterized this as a “bedrock First Amendment principle” and stated, “Speech may not be banned on the ground that it expresses ideas that offend.”²⁶

This Article analyzes the increasing intolerance of the expression of certain views, primarily represented by one element within the growing issue of free speech on some of the nation’s university campuses—opposition to invited speakers. This Article is divided into two sections. In the first, this trend of silencing speakers on campus is set against the backdrop of free speech doctrine, summarized through the lens of political philosophers and jurists whose works are traditionally linked to the foundation and advancement of speech freedom. This juxtaposition reveals how free speech principles address this intolerance on America’s campuses. As former Cal-Berkeley chancellor Nicholas Dirks acknowledged, violence is a silencing tactic: “It is the antithesis of open inquiry and of all the university represents.”²⁷

In the second section, this Article offers an explanation for this trend of intolerance: a crisis in confidence in the United States, its institutions, and in the foundational faith in the idea that within the arc of history, freedom—particularly freedom of speech—ultimately produces a result superior to a culture that constrains. Declining confidence manifests itself in some as behavior that might be characterized as rebellious or mutinous—methods that cast aside traditionally accepted norms with the

24. Peters, *supra* note 14, at A1.

25. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). *See also* *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) (“freedom of thought . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.”).

26. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

27. Dirks, *supra* note 4. It should be noted that Dirks and his university supported the cancellation of Ann Coulter’s scheduled speech.

hope of achieving results radically different from the status quo. Moreover, this article posits that this crisis in confidence, while long developing, was accelerated by social and political developments that both immediately preceded and were concurrent with these 2017 campus incidents against speech freedom.²⁸ It is further suggested that this confluence of events—which includes a movement to protect students from offensive, hurtful speech—is at the root of the erosion of speech freedom on America’s campuses.

I. Campus Speakers and Free Speech Doctrine

At the core of the free speech on campus issue is the debate about the purposes of higher education. Among the authoritative resources are two university-generated reports. First, a committee commissioned by Yale University in 1974 produced the Woodward Report.²⁹ It embraced free speech as central to university goals, starting with its first words:

The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.³⁰

Second, the 2015 Report of the Committee on Freedom of Expression at the University of Chicago may be viewed as a sort of 21st century corollary to the Woodward Report. First Amendment scholar and former law school dean Geoffrey Stone helmed the committee appointed to produce this report. To the extent that the report speaks to higher education’s purpose generally,

28. See Katy Steinmetz, *Fighting Words: A Battle in Berkeley Over Free Speech*, TIME (June 12, 2017), <http://time.com/4800813/battle-berkeley-free-speech/> (referring to a time of toxic politics and quoting Berkeley Mayor Jesse Arreguin: “This level of political violence is something we have not seen before.”).

29. C. VANN WOODWARD ET AL., YALE, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1974), http://yalecollege.yale.edu/sites/default/files/files/woodward_report.pdf (the report commonly takes the name of its committee’s chair, history professor C. Vann Woodward.)

30. WOODWARD ET AL., *supra* note 29.

it does so with an eye firmly focused on the role that free speech ought to play in serving that purpose. For example, rather than shielding individuals from ideas they may find unwelcome, disagreeable, or offensive, the report flatly states that that is not the university's proper role: "[E]ducation should not be intended to make people comfortable, it is meant to make them think," and it should do so by providing conditions conducive to hard thought and strong disagreement.³¹ There is a fundamental commitment to the principle that debate or deliberation may not be suppressed because ideas put forth are thought by some to be unacceptable. "Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission."³² In a passage that directly addresses the issues examined herein, while supporting the right to criticize and contest views expressed on campus, the report mandates that no one may "obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe."³³

When Middlebury College officials agreed to host Charles Murray, they were adopting many of these principles. Fully cognizant that his views were controversial and that protests had been organized, precautions were taken. However, the educational element of his appearance and the opportunity not only to hear his words, but also to challenge them, was prioritized. Debate was built into the event, with a respondent who disagreed with Murray's views. As if taken directly from the University of Chicago's policy advocating education's role making people think, not making them comfortable—that debate and deliberation should not be suppressed simply because ideas are thought to be unacceptable—the show went on. More accurately, it tried to; protesters derailed the event, overpowering even strategies meant to deal with disruptive protesters. Reflecting on the event a few days later, Murray noted how a relative few (but violent) protesters were able to upend the best intentions of the college: "A campus where a majority of students are fearful to speak openly because they know a minority will jump on them is no longer an intellectually free campus in any meaningful sense."³⁴

31. GEOFFREY R. STONE ET AL., UNIVERSITY OF CHICAGO, FREE SPEECH ON CAMPUS: A REPORT FROM THE UNIVERSITY FACULTY COMMITTEE (2015), <http://www.law.uchicago.edu/news/free-speech-campus-report-university-faculty-committee>.

32. *Id.*

33. *Id.*

34. Charles Murray, *Reflection on the Revolution in Middlebury*, AEIDEAS (Mar. 5, 2017), <https://www.aei.org/publication/reflections-on-the-revolution-in-middlebury> (Murray was the invited speaker at the center of the Middlebury College protest in March 2017). See also *Bell Curve Author Says Students Today Are Too Easily 'Triggered,'* VICE NEWS (Oct. 13, 2017),

In passionate praise of the University of Chicago's defense of free speech and recognition that "free speech is what makes educational excellence possible," Bret Stephens captured in a paragraph what many have found elusive:

If you can't speak freely, you'll quickly lose the ability to think clearly. Your ideas will be built on a pile of assumptions you've never examined for yourself and may thus be unable to defend from radical challenges. You will be unable to test an original thought for fear that it might be labeled an offensive one. You will succumb to a form of Orwellian double-think without even having the excuse of living in physical terror of doing otherwise.³⁵

By definition, those who demand that speakers be silenced are rejecting not only the values of universities like Chicago, but also U.S. free speech doctrine. Discussion of that doctrine begins with perhaps the most fundamental of free speech perspectives, the marketplace of ideas.³⁶ As in education itself, the pursuit of truth is prioritized. John Milton is generally credited with first articulating the virtues of an environment in which all ideas are accessible.³⁷ He opposed prepublication censorship, concerned that it would prevent free discussion and the search for truth.³⁸ This opposition to prior restraint and conformity was, in turn, support for the diversity of ideas, dissent, and toleration.³⁹ Milton did not fear that truth might be challenged: "Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"⁴⁰ The view that comparing and

<https://news.vice.com/story/bell-curve-author-says-students-today-are-too-easily-triggered> (quoting Murray about students today: "They are much more ready to be offended, ready to be upset, ready to be triggered than they were before.").

35. Bret Stephens, Opinion, *Our Best University President*, N.Y. TIMES (Oct. 21, 2017), at A21.

36. See MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 124 (N.Y.U. Press 2017) (calling the marketplace of ideas "the first and perhaps still most prominent First Amendment theory").

37. JOHN MILTON, *AREOPAGITICA* (Floating Press ed. 2009) (1644); Blair Hoxby, *The Trade of Truth Advanced: Areopagitica, Economic Discourse, and Libertarian Reform*, 36 MILTON STUDIES 177 (1998); Stanley Fish, *Driving from the Letter: Truth and Indeterminacy in Milton's Areopagitica* in RE-MEMBERING MILTON (Mary Nyquist & Margaret Whitney Ferguson eds., 1988).

38. J. Max Patrick, *Introduction* to THE PROSE OF JOHN MILTON (J. Max Patrick ed., 1967), reprinted in VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* 43 (2d ed. 2012).

39. See, e.g., David Lowenstein, *Toleration and the Specter of Heresy in Milton's England*, in MILTON & TOLERATION 45–46 (Sharon Achinstein and Elizabeth Sauer eds., 2007). See also John Milton, *Areopagitica*, in THE COMPLETE POEMS AND MAJOR PROSE 748 (Merritt Y. Hughes, ed. 1957) (writing how new information provides the ability to "go on some new enlightened steps in the discovery of truth").

40. MILTON, *supra* note 37, at 69.

contrasting ideas is a virtue—allowing a specific view to be strengthened or refuted—is one that would be rearticulated over the coming centuries.⁴¹

Milton's torch was most notably taken up two centuries later by John Stuart Mill. Like Milton, Mill targeted the state, the goal being to minimize regulation that limited human capacity to discover the truth. His *On Liberty* remains seminal in describing liberalism, its role in free thought and the relationship between authority and freedom.⁴² Fundamental to Mill's view was that power over others is unacceptable.⁴³ Similar to other icons of free expression who either before (e.g., Thomas Jefferson) or after (e.g., Louis Brandeis) emphasized the role of education, Mill underscored the role of learning in the development of the individual.⁴⁴ Thus, those who would exert power over people who want to express their viewpoints—as well as those who would deprive others access to those views—violate this basic tenet of free speech philosophy. In settings within which deeply seated views are widely held, Mill's "tyranny of the majority" is particularly applicable. Mill gave voice to the notion that protection is necessary against the "tyranny of the prevailing opinion and feeling; against the tendency of society to impose . . . its own ideas and practices as rules of conduct on those who dissent from them."⁴⁵

As a rationale for his open marketplace philosophy, Mill was also instrumental in invoking the concept of infallibility. Because "there is no such thing as absolute certainty"⁴⁶ that an opinion is without fault, there is no reason that opinion should not be challenged by comparing it to others. Here, the torch is passed again, this time to U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. As part of his intellectual evolution—one that came to rely on empirical evidence to reach logical conclusions⁴⁷—Holmes

41. See, e.g., Thomas Jefferson, *First Draft of the Inaugural Address* (Mar. 4, 1801), in 8 THE WORKS OF THOMAS JEFFERSON 3 (Paul Leicester Ford ed., 1897) ("[e]rror of opinion may be tolerated where reason is left free to combat it").

42. JOHN STUART MILL, *ON LIBERTY* (Pelican Books ed. 1980).

43. WENDY DONNER, *THE LIBERAL SELF: JOHN STUART MILL'S MORAL AND POLITICAL PHILOSOPHY* 129–30 (Cornell Univ. Press, 1st ed. 1991).

44. See, e.g., JOHN STUART MILL, *UTILITARIANISM* 22 (Oskar Piest ed. 1957) ("education and opinion, which have so vast a power over human character, should so use that power to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole").

45. JOHN STUART MILL, "ON LIBERTY" AND OTHER WRITINGS 8 (Stefan Collini ed. 1989) ("[i]f all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."). *Id.* at 20.

46. *Id.* at 8.

47. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 795 (1989) ("[m]uch of Holmes' legal thought can be explained in terms of . . . scientific positivism—what

embraced this notion: “Certitude is not the test of certainty,” he wrote. “We have been cock-sure of many things that were not so False Men to a great extent believe what they want to.”⁴⁸ According to Vincent Blasi, as a student of Mill, Holmes utilized the scientific method of seeking and evaluating information, in turn justifying speech as a means of challenging accepted truths:

A key tenet of that tradition is that all propositions are subject to perpetual testing. And that process of testing . . . must always hold out at least the possibility that prior understandings will be displaced. Time, after all, has upset many scientific laws. In short, no matter how elegant and coherent the explanation and supportive the current data, we might be wrong.⁴⁹

“Thanks to Mill,” writes Thomas Healy, there is recognition that “free speech is the necessary predicate on which our bets about the universe must be based.”⁵⁰ That is, speech is an instrument within the context of fallibilism, exposing falsity in order to reach the truth. Holmes accepted the notion that absent the ability to access a variety of ideas, the foundation of this structure crumbles.

Within U.S. jurisprudence, the landmarks of Holmes’ contributions include his invocation of the marketplace metaphor. In his groundbreaking dissenting opinion in *Abrams v. United States*,⁵¹ he wrote, “[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”⁵² Blasi writes that Holmes’ greatest contribution here may have been less in using the marketplace metaphor, and more in invoking competition: “[W]hat is needed for ideas is a vibrant, brutal weeding-out

Holmes himself called ‘the scientific way of looking at the world.’ From this outlook followed his legal positivism and a version of utilitarianism tempered by skepticism about the practical possibilities of measuring utility.”) (internal citation omitted).

48. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918). See also *Letter from Learned Hand to Oliver W. Holmes, Jr.* (Nov. 25, 1919), in REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 80 (Constance Jordan ed., 2013) (“[f]ormen who are not cock-sure about everything and especially for those who are not damned cock-sure about anything, the skies have a rather sinister appearance.”).

49. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 19 (2004). See also THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013) (“Holmes . . . respected [Mill’s] scientific approach to philosophy and reread his work from time to time.”).

50. HEALY, *supra* note 49, at 45.

51. *Abrams v. United States*, 250 U.S. 616 (1919).

52. *Id.* at 630 (Holmes, J., dissenting).

process analogous to the function markets for goods and services perform in killing off inefficient enterprises and forcing unproductive workers to be fired.”⁵³ In short, ideas need to be tested. That occurs through not merely an acceptance of various ideas, but encouragement that they be expressed. Some would note that symbolically, if not also tangibly, there is no more appropriate locale for this than institutions whose primary purposes include the exchange, debate, and consideration of ideas in order to produce knowledge—college and university campuses⁵⁴—and that speech freedom is key to knowledge creation.⁵⁵ Diversity across many areas, including ideas, enhances the opportunity for the creation and sharing of knowledge.⁵⁶

The marketplace metaphor is sometimes criticized for what Robert Post characterizes as its “various imperfections, inefficiencies, and internal contradictions.”⁵⁷ However, the marketplace metaphor is particularly useful within the context of campus speech when viewed through a perspective provided by Blasi. Blasi maintains that while the marketplace of ideas does not offer “the prospect of wisdom through mass deliberation, nor that of meaningful political participation for all interested citizens,” it does offer “a much needed counter weight . . . to illiberal attitudes about authority, and the type of change on which the censorial mentality thrives.”⁵⁸ Blasi continues:

It honors certain character traits—inquisitiveness, capacity to admit error and to learn from experience, ingenuity, willingness to experiment, resilience—that matter in civic adaptation no less than economic. It devalues deference and discredits certitude, and in the process holds various forms of incumbent authority accountable to standards of performance. It offers a reason to interpret the First Amendment to protect some gestures of opposition and resistance that have nothing to do with dialogue or dialectic.⁵⁹

53. Blasi, *supra* note 49, at 24 (internal citation omitted).

54. See, e.g., Jason Stanley, *The Free-Speech Fallacy*, CHRON. OF HIGHER EDUC. (Feb. 26, 2016), <http://www.chronicle.com/article/The-Free-Speech-Fallacy/235520> (“[a] central purpose of the university is to allow disputes about significant moral and political issues to take place in the classroom instead of on the battlefield. Free speech is essential to that mission”).

55. James Weinstein, *How Theory Matters: A Commentary on Robert Sedler’s “The ‘Law of the First Amendment’ Revisited,”* 58 WAYNE L. REV. 1105, 1112 (2013) (“speech theory promotes the essential academic goals of knowledge creation”).

56. *But see* ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 61–66 (2012) (noting the distinction between a marketplace perspective that permits all ideas and the freedom necessary to create knowledge in academic settings—what he calls disciplinary or expert knowledge).

57. *Id.* at xi.

58. Blasi, *supra* note 49, at 46.

59. Blasi, *supra* note 49, at 46.

Whether or not they are fully implemented on college and university campuses, each of these elements is engrained in the spirit and purpose of higher education. Moreover, while there are flaws in the marketplace metaphor, colleges and universities are among the institutions best positioned to remedy them—i.e., by ensuring that they are truly open and free—are colleges and universities.

In the aftermath of the Middlebury College incident, during which she was injured, Professor Stanger wrote of two schools of thought on the purpose of universities. “One side sees the free exchange of ideas as fundamental and nonnegotiable. The other side sees inclusivity and social justice as the supreme value.”⁶⁰ These groupings are not mutually exclusive, however. In fact, each contributes to the achievement of the other. Therefore, as Stanger writes, attaining social justice will not be achieved by shutting down speech.⁶¹

This view that the pursuit of social justice can coexist with a fervent defense of free speech is at odds with that represented by, for example, Ulrich Baer, an administrator at New York University. Baer believes that because “certain topics restrict speech as a public good,” they are “unmentionable and undebatable.”⁶² That is, Baer claims the ability to ascertain the correct viewpoint with regard to certain issues, and in doing so claims the kind of infallibility rejected by Mill and Holmes. Baer’s approach is also problematic in at least two other ways. First, it creates a significant slippery slope, by creating the burden to decide which topics are “mentionable,” and which are not. Second, in writing that with certain topics, “there is no inherent value to be gained from debating them in public,”⁶³ Baer is wrong.⁶⁴ The inherent value in such discussion is that it will often serve to further strengthen one side and further weaken the other. This is at the core of the marketplace perspective articulated by Milton and others—a continual testing of ideas, even those generally accepted as

60. Allison Stanger, *Middlebury, My Divided Campus*, N.Y. TIMES, Apr. 3, 2017, at ED22.

61. *Id.*

62. Ulrich Baer, *What the ‘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>.

63. *Id.*

64. See, e.g., Conor Friedersdorf, *What an NYU Administrator Got Wrong About Campus Speech*, ATLANTIC (Apr. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/04/what-an-nyu-administrator-got-wrong-about-campus-speech/524442>; Tom Lindsey, *NYU Administrator Goes Full Orwell: Violating Free Speech “Ensures the Conditions of Free Speech,”* FORBES (Apr. 30, 2017), <https://www.forbes.com/sites/tomlindsay/2017/04/30/nyu-administrator-goes-full-orwell-violating-free-speech-ensures-the-conditions-of-free-speech/#6bdeb79e3718>.

truthful.⁶⁵ Furthermore, such discussion is not only how progress is made, it is also the only way by which what we presume to be correct may be verified.

Mill and Homes also intersect with respect to the concept of harm. In *On Liberty*, Mill articulated what is referred to as his “harm principle,” by stating that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁶⁶ The principle only employs the force of law to punish conduct that is harmful to others. Furthermore, the principle is also an exception to Mill’s general preference of liberty from state regulation. In the early twentieth century, Holmes and some of his contemporaries—e.g., Learned Hand, Harold Laski, Zechariah Chafee—began to consider the harm of speech.⁶⁷ When it came to speech that had traditionally been punishable by law because of its harmful effects, a different perspective began to develop. If speech actually does not harm, since it does not directly incite violence or cause treasonous behavior, then, laws that punish such speech may be illegitimate in the face of the First Amendment.

The relevant point within the context of the present analysis is the recognition that while words may be offensive, hateful, or hurtful, rarely do the ideas expressed reach the level of harm that can be prevented by law.⁶⁸ Casting doubt on the notion that there is a direct effect between words and behavior, Holmes later noted, “Every idea is an incitement.”⁶⁹ Because the expression of ideas may potentially lead to a behavioral response in some people is not a sufficient justification for banning those words. The words of even the most provocative speakers warrant protection, not merely by law but also by moral force. Allowing them to be uttered is not tantamount to accepting the ideas embedded within them, nor does it mean the ideas will poison the minds of others, particularly when those opposed have an equal right to respond.

This ability to respond invokes the philosophy of a Holmes contemporary, Justice Louis Brandeis. According to Brandeis, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech,

65. See *supra* notes 46–50 and accompanying text.

66. JOHN STUART MILL, *ON LIBERTY* 22 (London, John W. Parker & Son 2d ed. 1859).

67. See, e.g., HEALY, *supra* note 49, at 128 (“Holmes saw something in these men that reminded him of himself when he was young: a fire, a curiosity, a disregard for received wisdom.”); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 7 (1997); ZECHARIAH CHAFEE JR., *FREEDOM OF SPEECH* 66–69 (William S. Hein & Co., Inc. 1996).

68. *But see, e.g.*, MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (critiquing First Amendment orthodoxy and claiming that words can be assaultive).

69. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

not enforced silence.”⁷⁰ The preferred rejoinder to “bad” speech, therefore, is to resist the inclination to eliminate it and to instead respond to it with more (and presumably better) speech. Debate should be allowed to flourish—not be prevented.

Brandeis lived in an era that, according to Justice Felix Frankfurter, was “dominated by fears—the fear of change, the fear of new ideas.”⁷¹ In turn, the expression of those new ideas was feared and, in some instances, criminalized.⁷² Rooted in those fears were concerns over the effects of speech.⁷³ Brandeis sought to address this fear, recognizing that speech often was not the problem, but the solution. Rather than seeing it as something to be feared, Brandeis believed speech should be seen as a liberator from fear:

Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.⁷⁴

This approach may be applied easily to the campus speech setting. The words alone of undesirable speakers should not engender fear. As illustrated by the incidents of violent protest, the only imminent danger is not created by the speech, but by those who wish to prevent it. “To those who would justify censorship on the ground that purveyors of evil ideas can manipulate public opinion,” Blasi writes, “Brandeis almost surely would answer that it is incumbent upon the defenders of good ideas to learn how to influence

70. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988) [hereinafter *The First Amendment and the Ideal of Civic Courage*] (describing Brandeis’ opinion as “arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment”); PHILIPPA STRUM, *SPEAKING FREELY: WHITNEY V. CALIFORNIA AND AMERICAN FREE SPEECH* 130 (2015) (“Justice Brandeis’s concurrence in *Whitney* changed the course of American speech law.”); MELVIN I. UROKSKY, *LOUIS D. BRANDEIS: A LIFE* 489 (2009) (“there are few cases in American constitutional history that can match the powerful rhetoric of his opinion in the *Whitney* case”).

71. Felix Frankfurter, *The Supreme Court and the Public*, 83 FORUM 329, 333 (1930).

72. See, e.g., Sedition Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553, 553 (1918) (prohibiting willfully publishing disloyal, profane, or abusive language about the United States government, the flag, or the military); Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (1917) (codified as amended at 18 U.S.C. § 792) (prohibiting willfully interfering with the military draft).

73. See Joseph Russomanno, *Cause and Effect: The Free Speech Transformation as Scientific Revolution*, 20 COMM. L. & POL’Y 213, 214–15 (2015) (linking a limited view of speech freedom in the early twentieth century to the limited view that speech directly affects behavior).

74. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

public opinion even more skillfully.”⁷⁵ It is necessary that those who oppose ideas not only tolerate their expression, but also exercise their own freedom of speech by responding in kind. Jeffrey Herbst and Geoffrey Stone invoke this Brandeisian philosophy in pointing out a shortcoming in an approach that accepts suppression:

Although censoring others may appear to be a courageous sign of strength, it is actually an indication of weakness. Those who resort to censorship do so in no small part because they lack confidence that they can compete effectively with the ideas of their opposition. Allowing others to speak and then challenging them in a forthright and open manner with more persuasive ideas is the way to win in the long-term. . . . It is through debate, argument, and courage—not censorship—that truth will win out.⁷⁶

This begs the question of protesters’ First Amendment rights. Indeed, protesters possess speech rights of their own as well as the right to *peaceably* assemble.⁷⁷ However, protesters’ rights do not include the ability to abridge the speech of others. In addressing this “heckler’s veto,” the U.S. Supreme Court has been clear that the “objections of a hostile audience cannot be allowed to silence a speaker.”⁷⁸ Cheryl Leanza explains that the law in this area not only serves to deal with the potential of speech suppression by protesters, but also affirms the importance of speaker rights:

The relevance of heckler’s veto case law lies in its strong commitment to fulfilling the First Amendment’s ultimate goal of allowing viewpoints to be expressed, even when violence is in the offing. . . . [I]n heckler’s veto cases the courts have required the state to ensure dissemination of clashing and unpopular views. Heckler’s veto cases do not permit the state to hide behind the unpleasant reaction of some portions of the public in order to silence a speaker.⁷⁹

75. *The First Amendment and the Ideal of Civic Courage*, *supra* note 70, at 675.

76. Jeffrey Herbst & Geoffrey R. Stone, *The New Censorship on Campus*, CHRON. OF HIGHER EDUC. (June 5, 2017), <http://www.chronicle.com/article/The-New-Censorship-on-Campus/240269>.

77. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

78. *Feiner v. New York*, 340 U.S. 315, 320 (1951). *See also* *Street v. New York*, 394 U.S. 576, 592 (1969) (“[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers”).

79. Cheryl A. Leanza, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: Heckler’s Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1308 (2007) (internal citation omitted).

Thus, the doctrine surrounding the heckler's veto places a burden on law enforcement or other security personnel to protect the speech rights of an invited speaker at the expense of those who seek to disrupt him or her. In short, when the speech rights of a speaker and protesters clash, those of the speaker should prevail.⁸⁰

Education was a significant tenet of Brandeis' philosophy. He believed that democracy could not exist without education as a means of preparation for citizenship.⁸¹ After all, education is at the center of his statement extolling the virtues of speech rather than censorship—the utilization of the expression of ideas as a means of learning. Particularly within the context of campus speakers, it is important to recognize that the learning that occurs from the expression of ideas can take the form of rejecting certain ideas rather than embracing them. At the heart of this concept, however, is also an appreciation of the rationality and independent decision-making ability of listeners. But they require access to ideas for learning to occur.

It is not surprising that the preliminary injunction that prevented Auburn University from denying Richard Spencer the right to speak cited Brandeis' opinion in *Whitney v. California*:⁸²

[A]ll fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute.⁸³

80. See *Roe v. Crawford*, 514, F.3d 789, 796, n.3 (2008) (“The ‘heckler’s veto’ involves situations in which the government attempts to ban protected speech because it might provoke a violent response. In such situations, the mere possibility of a violent reaction to protected speech is simply not a constitutional basis on which to restrict the right to speak.”) (internal citations omitted). See also Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler’s Veto?*, 28 DEPAUL L. REV. 259, 274–75 (1979) (distinguishing the heckler’s veto from the fighting words doctrine, calling one the “logical converse” of the other given that fighting words addresses incitement by a speaker). See also Leanza, *supra* note 79, at 1307 (“The heckler’s veto cases are an outgrowth of the fighting words doctrine, which creates a narrow exception to the First Amendment for words that are so vile as to ‘incite an immediate breach of the peace.’ Outside of the small exception for fighting words, the heckler’s veto doctrine holds.”).

81. PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 400–01 (1984).

82. *Whitney v. California*, 274 U.S. 357 (1927).

83. *Padgett v. Auburn University*, Case No. 3:17-CV 231 WKW (M.D. Ala. 2017) (citing *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (internal citations omitted)).

Another benefit of adopting the Holmes/Brandeis framework of tolerating the expression of even undesirable ideas lies in the potential for marginalization. That is, by allowing speakers to express their ideas, they expose and sometimes marginalize themselves. They may become their own worst enemies, and in turn assist protesters in proving *their* points. Conversely, silencing speakers' speech may victimize them.⁸⁴ This is an approach now embedded in First Amendment doctrine. This "Westboro model"—utilizing the name of the radical church whose members picket military funerals with signs and chants offensive to most people—is applicable. Listeners are afforded the opportunity to dismiss or accept speakers' ideas, but only by hearing their words. Indeed, in its ruling on claims against church members, the U.S. Supreme Court said that their speech, though upsetting to most, should be protected. Rather than punishing such speech, the Court said, "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."⁸⁵ Full and open debate is a vital democratic value, one to which the United States has a "profound national commitment," but also while recognizing that the debate process "may well include vehement, caustic, and sometimes unpleasantly sharp attacks."⁸⁶ This national commitment is one that requires both patience and confidence in the notion that protecting speech ultimately leads to outcomes preferable to those under a regime of censorship.

This path is not unlike the one historically taken by many of the nation's colleges and universities. Doing so creates and shapes a particular kind of national consciousness that favors liberty and autonomous decision-making. In this way we are taught, Lee Bollinger writes, to deal calmly with differences of opinion and scathing dissent. We redefine tolerance "as a

84. See Herbst & Stone, *supra* note 76 ("[T]o censor the expression of offensive and odious speech often backfires, because it makes those they oppose into ever-more famous martyrs, giving them larger audiences and growing book sales. Little has helped the brand of the likes of Ann Coulter and Milo Yiannopoulos more than their exclusion from speaking on college campuses."). See also Barrack Obama, *Remarks by the President at Howard University Commencement Ceremony*, (May 6, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/05/07/remarks-president-howard-university-commencement-ceremony>:

There's been a trend around the country of trying to get colleges to disinvite speakers with a different point of view, or disrupt a politician's rally. Don't do that—no matter how ridiculous or offensive you might find the things that come out of their mouths. Because as my grandmother used to tell me, every time a fool speaks, they are just advertising their own ignorance. Let them talk. Let them talk. If you don't, you just make them a victim, and then they can avoid accountability.

Id.

85. *Snyder v. Phelps*, 561 U.S. 443, 461 (2011).

86. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

matter of courage rather than weakness and signify[] the importance of developing a democratic temperament.”⁸⁷ Bollinger continues:

The point is to shift our focus from seeing the value of speech itself to seeing the need to deal with the problems revealed in the *reactions* to speech. The extraordinary zone for freedom of expression tests our ability to live in a society that is necessarily defined by conflict and controversy; it trains us in the art of tolerance and steels us for its vicissitudes.⁸⁸

In short, tolerating a diversity of views is itself a teaching opportunity, and thus should be accordingly approached—even embraced—by universities and colleges.

II. “Coddling” and a Crisis in Confidence

Tolerance for the expression of a wide variety of viewpoints on campus was in decline prior to 2017’s backlash against speakers. In “The Coddling of the American Mind,”⁸⁹ Greg Lukianoff and Jonathan Haidt described in 2015 a movement, “undirected and driven largely by students, to scrub campuses clean of words, ideas, and subjects that might cause discomfort or give offense.”⁹⁰ Terms such as trigger words, micro-aggressions, and safe spaces became more common on campuses as those fearful of offense and oppression sought to limit how ideas could be expressed. It was as if some were asserting a right not to be offended, and that controlling the speech of others was inherent in that right. Limiting speech was legitimized, but now the rationale was emotional well-being rather than political correctness that blossomed in the 1980s.

In a section of their article entitled, “How Did We Get Here?,” Lukianoff and Haidt explore reasons for the rise of this phenomenon. Among them, they write, is a generational divide. There is evidence: In answering a Pew Research Center question about whether government should be able to prevent people from saying offensive things about minority groups, forty percent of millennials said yes, whereas twenty-four percent of

87. LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR NEW CENTURY 50 (2010).

88. *Id.* at 48 (emphasis in original).

89. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356>.

90. *Id.*

baby boomers responded affirmatively.⁹¹ Those millennials, wrote Lukianoff and Haidt, “got a consistent message from adults: life is dangerous, but adults will do everything in their power to protect you from harm, not just from strangers but from one another as well.”⁹² Thus arose this movement that produced what some call “softness,” intolerance of anything offensive or bothersome, including a sense of entitlement to environments absent of anything “damaging,” including some words.

The criticism of the “coddling” movement includes the idea that college life is a transition period for young adults. “For many, a college campus is the last stop on the train to true adulthood,” writes ACLU attorney Lee Rowland.⁹³ “Part of being an adult in America means living our constitutional values—foremost among them, our First Amendment rights to make our opinions heard—and to listen to others speak.”⁹⁴ For Rowland, however, the transition to adulthood and the role of free speech does not stop there: “Controversial, critical, confrontational and challenging speech is an essential part of any successful college education. Without it, institutions of higher education cannot truly be said to be preparing students for the world outside of the ivory tower.”⁹⁵

Lukianoff and Haidt concur, and have been highly critical of approaches that fail to prepare young adults for their post-formal education environments: “Rather than trying to protect students from words and ideas that they will inevitably encounter, colleges should do all they can to equip students to thrive in a world full of words and ideas that they cannot control.”⁹⁶ They continue:

91. Jacob Poushter, *40% of Millennials OK With Limiting Speech Offensive to Minorities*, PEW RESEARCH CTR. (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities>.

92. Lukianoff & Haidt, *supra* note 89.

93. Lee Rowland, *Controversy Is Curriculum*, INSIDE SOURCES (Apr. 21, 2017), <http://www.insidesources.com/controversy-is-curriculum>.

94. Rowland, *supra* note 93. See also Bret Stephens, Commentary, *The Dying Art of Disagreement*, N.Y. TIMES, (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/opinion/dying-art-of-disagreement.html>:

Intelligent disagreement is the lifeblood of any thriving society. Yet we in the United States are raising a younger generation who have never been taught either the how or the why of disagreement, and who seem to think that free speech is a one-way right: Namely, their right to disinvite, shout down or abuse anyone they dislike, lest they run the risk of listening to that person—or even allowing someone else to listen. The results are evident in the parlous state of our universities, and the frayed edges of our democracies.

Id.

95. Rowland, *supra* note 93.

96. Lukianoff & Haidt, *supra* note 89.

Attempts to shield students from words, ideas, and people that might cause them emotional discomfort are bad for the students. They are bad for the workplace, which will be mired in unending litigation if student expectations of safety are carried forward. And they are bad for American democracy, which is already paralyzed by worsening partisanship. When the ideas, values, and speech of the other side are seen not just as wrong but as willfully aggressive toward innocent victims, it is hard to imagine the kind of mutual respect, negotiation, and compromise that are needed to make politics a positive-sum game.⁹⁷

In 1943, Justice Robert Jackson expressed a similar viewpoint. Though primarily addressing pre-college education, he wrote of the importance of students experiencing the Constitutional principles that had been fleshed out by some of his Supreme Court predecessors: “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁹⁸

The roots of the growing intolerance on America’s college campuses extend beyond a twenty-first century “coddling.” It includes a general decline in confidence in all American institutions.⁹⁹ Several surveys are instrumental in producing relevant data. First, the General Social Survey, one of the oldest and most comprehensive recurring surveys of American attitudes, shows that trust and confidence in public institutions has declined over the last fifty years.¹⁰⁰ Second, Pew Research shows confidence in U.S. government institutions has dropped steadily for seventy years: In 2015, nineteen percent of Americans said they trust the federal government, compared to seventy-three percent of respondents in 1958.¹⁰¹ In October

97. Lukianoff & Haidt, *supra* note 89. See also CHEMERINSKY & GILLMAN, *supra* note 2, at 154 (“[T]he effort to create inclusive learning environments cannot proceed at the expense of free speech and academic freedom.”); Quintana, *supra* note 3 (quoting University of California-Berkeley chancellor Carol Christ: “Free speech isn’t free by a long shot.”).

98. *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943).

99. See Gretel Kauffman, *US No Longer a “Full Democracy” in 2016 Democracy Index*, CHRISTIAN SCI. MONITOR (Jan. 26, 2017), <http://www.csmonitor.com/USA/2017/0126/US-no-longer-a-full-democracy-in-2016-Democracy-Index-Where-do-we-go-from-here> (“the steady decline in confidence in government—kickstarted by the Vietnam War in the 1960s and fueled by events such as the Watergate Hotel break-in and the energy crisis of the 1970s—has gone hand-in-hand with a rise in political polarization, a phenomenon that experts say further inhibits a healthy democratic system.”).

100. Alia E. Dastagir, *People Trust Science. So Why Don’t They Believe It?*, USA TODAY (Apr. 20, 2017), <https://www.usatoday.com/story/news/2017/04/20/science-march-war-truth-political-polarization/100636124/>.

101. Kauffman, *supra* note 99.

2016, forty percent of registered voters said they had lost faith in American democracy. Gallup has measured levels of confidence in an array of institutions for forty years. Most institutions—within and outside government—are at or near historic lows.¹⁰² Conclusions based on an October 2016 *Washington Post* survey included, “Large numbers of Americans across party lines have lost faith in their democracy.”¹⁰³ In that same survey, less than one-third of respondents said that most people could be trusted.¹⁰⁴ According to Professor Robert Denton, “When there’s a lack of confidence and trust then you lose those values that hold society together and we lose sight of the common good. That erodes the fabric of democracy.”¹⁰⁵

David Bornstein and Tina Rosenberg concur that these developments have been “corrosive” to the social fabric, adding that what people see beyond their direct experience, “is a world of unchecked pathology, and it makes it all too easy to fear and demonize others.”¹⁰⁶ Declining confidence in institutions results in a waning belief that long-term solutions will prevail, even when temporary setbacks may occur. Very importantly, Bornstein and Rosenberg write, “many Americans today have difficulty imagining, valuing, or even believing in the promise of *incremental system change*, which leads to a greater appetite for revolutionary, smash-the-machine change.”¹⁰⁷ The patience required for the benefits of the marketplace of ideas to emerge has eroded. The same may be said for any comfort that may be provided in recalling Holmes’ defense of freedom for the thought we hate or Brandeis’ urging for more speech rather than censorship. One may discern how these factors contribute to the growing intolerance toward speakers and

102. Nathaniel Persily & Jon Cohen, *Americans are Losing Faith in Democracy—and in Each Other*, WASH. POST (Oct. 16, 2016), https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.9d1eb217d248. See also GALLUP, KNIGHT FOUND., AND NEWSEUM INST., *FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS 12* (2016), (suggesting a declining rate for support of free speech among college students, and support for specific steps taken to restrict certain kinds of speech).

103. Persily & Cohen, *supra* note 102.

104. Persily & Cohen, *supra* note 102.

105. Persily & Cohen, *supra* note 102. See also Jennifer J. Freyd, *Betrayal Trauma* in THE ENCYCLOPEDIA OF PSYCHOLOGICAL TRAUMA 76 (Gilbert Reyes, Jon D. Elhai & Julian D. Ford eds. 2008) (“betrayal trauma may occur when the people or institutions on which a person depends significantly violate that person’s trust.” Individuals who perceive betrayal often dissociate from, or rebel against, the source of the betrayal.).

106. David Bornstein & Tina Rosenberg, *Commentary, When Reportage Turns to Cynicism*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/opinion/when-reportage-turns-to-cynicism.html>.

107. *Id.* (emphasis added).

their views on American college campuses¹⁰⁸ by combining these with the fact that the mistrust of others noted above is most acute in eighteen-to-twenty-four-year-olds—seventy-nine percent surveyed said people should be wary of others.¹⁰⁹

The political dynamics of 2016-17 are noted by several analyses as both a cause and effect of this trend in confidence erosion. As noted, the crisis in confidence preceded this period. Years of buildup, however, seemed to culminate in the months surrounding the 2016 election. Donald Trump's presidential campaign was well under way when across the Atlantic in June 2016, a majority of United Kingdom voters opted for their nation to leave the European Union in what came to be called "Brexit." Both campaigns exploited what Jennifer Rubin described as, "waves of alienation, dissatisfaction, and anger"¹¹⁰ directed at status quo values, what was perceived as political correctness run amok, and specific issues such as immigration. Trump's campaign not only exploited these feelings, but also fueled them.

Trump legitimized a variety of positions and approaches. His contempt for American institutions and values is apparent.¹¹¹ Many of his supporters

108. Poushter, *supra* note 91 ("American Millennials are far more likely than older generations to say the government should be able to prevent people from saying offensive statements about minority groups, according to a new analysis of Pew Research Center survey data on free speech and media across the globe."). See also SPEAKING FREELY: WHAT STUDENTS THINK ABOUT EXPRESSION AT AMERICAN COLLEGES, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (reporting the results of a survey of 1250 students conducted between May 25 and June 8, 2017, including that more than half believe that there are times when a college or university should withdraw a guest speaker's invitation after the event has been announced).

109. Persily & Cohen, *supra* note 102.

110. Jennifer Rubin, *Commentary: After Brexit, Reason To Be More Sensible*, PHILA. INQUIRER (June 26, 2016), http://www.philly.com/philly/opinion/commentary/20160626_. See also Sheryl Gay Stolberg & Caitlin Dickerson, *Hangman's Noose, Symbol of Racial Animus, Keeps Cropping Up*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/05/us/nooses-hate-crimes-philadelphia-mint.html> (noting an "uptick" in hate crimes that was "fueled by the coarsening of public conversation that began during last year's presidential campaign and that has continued amid bitter divisions over the election outcome").

111. See, e.g., Steve Erlanger, *China Sees Opening Left by Trump in Europe, and Quietly Steps In*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/05/world/europe/xi-merkel-trump-china-germany.html> (writing of Trump's "open disdain for multilateral institutions"); Moshik Temkin, *Commentary, Historians Should Not Be Pundits*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/opinion/trump-nixon-history.html> (comparing Trump to dictators of the past due to his "jingoism and contempt for democratic institutions"); Kevin Riordan, *Trump Is No Working-Class Hero*, PHILA. INQUIRER, Nov. 10, 2016, http://www.philly.com/philly/news/politics/presidential/20161110_Trump_is_no_working-class_hero.html (writing Trump "has gut-level disdain for the institutions and mechanisms of governance"); Editorial, *Why Is It Close?*, BALT. SUN (Nov. 9, 2016), at A22 (writing of Trump's "evident disdain for bedrock institutions from the free press to the independent judiciary"); Editorial, *You Must Remember This*,

feel the same way. Robert Reich, a former Secretary of Labor and current professor at U.C. Berkeley, articulates the president's role in the divide. Reich speaks of a narrative "that assumes a cultural plot against the free expression of right wing views in which academe, mainstream media—every facet of the establishment—is organized against them."¹¹² Noting the parallels to Trump's message, Reich added, "[t]hat's a narrative Trump used to get into the White House."¹¹³

Allison Stanger, the Middlebury College professor injured in the attack against an invited speaker there, wrote in the aftermath of the boiling point politics and discourse have reached in the United States, adding that "nowhere is the reaction to that more heightened than on college campuses." Her analysis includes the role played by Trump:

Throughout an ugly campaign and into his presidency, President Trump has demonized Muslims as terrorists and dehumanized many groups of marginalized people. He declared the free press an enemy of the people, replaced deliberation with tweeting, and seems bent on dismantling the separation of powers and 230 years of progress this country has made toward a more perfect union. Much of the free speech he has inspired—or has refused to disavow—is ugly, and has already had ugly real-world consequences. College students have seen this, and have taken note: Speech can become action.¹¹⁴

Moreover, action *against* speech becomes a viable act.

None of the above is meant to suggest that it was Trump supporters who opposed on-campus speakers such as Yiannopolous and Coulter, quite the contrary, in fact. Instead, it was those who feel victimized by a system that they believe went off the rails. They saw what happened when Trump's ability to speak freely was protected. Hate, bias, and anger came out of the closet. Many felt emboldened by a candidate who shared their views. Under his model, it was okay not only to be angry, but also to direct that anger toward various "others."¹¹⁵ Fear of others is encouraged, as are

WASH. POST (Nov. 3, 2016), at A18 (writing of Trump's "contempt for the country, its institutions and its values.").

112. Peters, *supra* note 14, at A1 (quoting Robert Reich).

113. Peters, *supra* note 14, at A1 (quoting Robert Reich).

114. Stanger, *supra* note 8. See also *The 11th Hour with Brian Williams: Kushner Family Biz Deal Raises Ethics Questions for Team Trump*, MSNBC (May 8, 2017), <http://www.msnbc.com/brian-williams/watch/kushner-family-biz-deal-raises-ethics-questions-for-team-trump-939332675978> ("There is a sense that we're living in an era of transactional politics and transactional foreign policy where everything can be treated like a deal. And that's breeding a sense of cynicism and it's eroding a lot of values that America has championed.").

115. See, e.g., Dan T. Carter, *What Donald Trump Owes George Wallace*, N.Y. TIMES (Jan. 10, 2016), at SR7 "[Trump] learned how to exploit the deepest fears and hatreds of white Americans

certain tactics to deal with them, including bullying. When these approaches are successful—i.e., Trump was elected—people take note. “What worked for ‘them’ can also work for ‘us.’” Moreover, *because* their tactics worked, we need to prevent their wrongheaded views from even being expressed in the future. They bully, we bully.” Attempts to shut down speakers, often through intimidation, are nothing short of a form of bullying.

As noted, the Trump phenomenon was not only a result of the erosion in confidence, but also a cause. Evan McMullin believes that weakening trust in democratic institutions is a common strategic ploy by authoritarians: “Eroding confidence in voting, elections and representative bodies gives them a freer hand to wield more power.”¹¹⁶ The results, according to McMullin, are that people attribute less importance to the laws, norms, and principles that uphold the government.¹¹⁷ That is, trust in the values embedded in the Constitutional regime will ultimately prevail, and the idea that “it will all work out in the end” diminishes. Those who conclude that our democracy’s checks and balances are weakened to the point of being nonfunctional—and that a marketplace approach in which more speech is preferable to censorship no longer seems viable¹¹⁸—are more likely to take matters into their own hands. Some on college campuses prefer silencing “bad” ideas to tolerating their expression.¹¹⁹

Protesters bully their opponents. Granted, some claim that some invited campus speakers improperly legitimize racism, classism, or other undesirable traits.¹²⁰ A Berkeley protestor who took satisfaction in

frightened about the present and despairing of the future.”). See also James Hohmann, *Trump’s Islamophobia Resonates With Base, Not Others*, WASH. POST (Dec. 9, 2015), at A15 (“He’s merely tapping into the very palpable fear that already exists in the heartland.”).

116. Evan McMullin, Commentary, *The Constitution In Danger*, N.Y. TIMES (Dec. 5, 2016), at A23. See also Clay Routledge, *Millennials Are Wary of Freedom*, N.Y. TIMES (Oct. 15, 2017), at SR6 (suggesting that a “wariness of democracy and free speech” on the part of millennials is rooted in fear, which stems from over-protective upbringing, or coddling).

117. McMullin, *supra* note 116, at A23.

118. See David Shih, Commentary, *Hate Speech and the Misnomer of “The Marketplace of Ideas”*, NPR (May 3, 2017), <http://www.npr.org/sections/codeswitch/2017/05/03/483264173/hate-speech-and-the-misnomer-of-the-marketplace-of-ideas> (“The ‘marketplace of ideas’ fails when we cannot make objective choices . . . [a]sking student protesters to tolerate racist hate speech is to ask them to trust in free speech laws that have historically exempted the powerful and punished the vulnerable. When it comes to racism, the ‘marketplace of ideas’ is not laissez-faire and never was.”).

119. See Allison Arief, *Solving All the Wrong Problems*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/10/opinion/sunday/solving-all-the-wrong-problems.html> (“[A] distrust of institutions combined with unabashed confidence in one’s own judgment shifts solutions away from fixing, repairing or improving and shoves them toward destruction for its own sake.”).

120. See, e.g., Samantha Lamont, *When Flamethrowers Like Ann Coulter Come to Campus*, N.Y. TIMES, (May 2, 2017), <https://www.nytimes.com/2017/05/02/opinion/a-controversial-speaker-comes-to-campus-what-do-you-do.html>.

shutting down the scheduled Yiannopolous speech said it was about sending a message: “We aren’t about to allow white supremacist views to be normalized.”¹²¹ In situations such as these, the “Westboro model,”¹²² described above, may be a preferred method. However, it requires time and patience, attributes that, like confidence, seem to be fading in our society.¹²³

On campuses, the requisite patience is no different. The Woodward Report addressed the challenges that First Amendment doctrine presents:

We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that results of free expression are to the general benefit in the long run, however unpleasant they may appear at the time. The validity of such a belief cannot be demonstrated conclusively. It is a belief of recent historical development, even within universities, one embodied in American constitutional doctrine but not widely shared outside the academic world, and denied in theory and practice by much of the world most of the time.¹²⁴

Thus, in addition to patience—“believing in the promise of incremental system change”¹²⁵—recognizing and seeking the “general benefit” is important. A worldview beyond one’s self interest is required to understand the benefits of free expression, particularly when it comes to the speech we hate.¹²⁶ Absent that, a kind of “social estrangement” may result, which in turn may be conducive to a politics of rebellion.¹²⁷

121. Matt Saincome, *Berkeley Riots: How Free Speech Debate Launched Violent Campus Showdown*, ROLLING STONE, (Feb. 6, 2017), <http://www.rollingstone.com/culture/features/berkeley-riots-inside-the-campus-showdown-over-free-speech-w465151>.

122. See *supra* text accompanying note 85.

123. See generally Peter Schmidt, *State Lawmakers Seek to Force Public Colleges to Protect Speech Rights*, CHRON. OF HIGHER EDUC., (Feb. 10, 2017), <http://www.chronicle.com/article/State-Lawmakers-Seek-to-Force/239171> (reporting these incidents helped “fuel a new wave of state legislation aimed at ensuring that public colleges safeguard free speech” and that one Tennessee legislator called such a proposal “the Milo bill”). See also S.B. 723, 110 Reg. Sess. (Tenn. 2017).

124. WOODWARD ET AL., *supra* note 29.

125. See *supra* text accompanying note 107.

126. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

127. Jennifer Senior, *Review: In “Hillbilly Elegy,” a Tough Love Analysis of the Poor Who Back Trump*, N.Y. TIMES (Aug. 10, 2016), <http://www.nytimes.com/2016/08/11/books/review-in-hillbilly-elegy-a-compassionate-analysis-of-the-poor-who-love-trump.html>. See also J. D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016) (portraying disaffected, working-class Americans in Greater Appalachia); Mona Charen, *What Hillbilly Elegy Reveals About Trump and America*, NAT’L REV., (July 28, 2016), <http://www.nationalreview.com/article/438426/hillbilly-elegy-jd-vances-new-book-reveals-much-about-trump-america>;

Conclusion

This Article has endeavored to analyze the phenomenon of intolerance to speech on America's campuses—primarily within the context of opposition to invited speakers—within the framework of free speech doctrine, and also to explain why the expression of ideas and the use of words have elicited such extreme responses. Some answers and recommendations reveal themselves by returning to that free speech doctrine, specifically to Brandeis.

As noted, education was among the pillars that buttressed Louis Brandeis' philosophy. Lifelong learning, he advocated, is a vital necessity to a democracy's ability to function. More than needing debate and discussion, it must be *informed* debate and discussion. The exchange of ideas is necessary for learning and intellectual growth and, in turn, for the democracy itself. Disabling that ability is antithetical to enhancing those desired outcomes. Undeniably, violence is not a desired outcome, but shutting down speech as a preventative measure is not a proper approach. As Brandeis wrote, in societies that consider themselves free, "the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."¹²⁸

When Judge Watkins ordered Auburn University to rescind its cancellation of Richard Spencer's speech,¹²⁹ he included a requirement that the university "provide security for Mr. Spencer, event attendees, peaceful protestors, and all other persons on the Auburn University campus."¹³⁰

Amanda Erickson, *A Hillbilly's Plea to the White Working Class*, WASH. POST (Aug. 7, 2016), https://www.washingtonpost.com/opinions/a-hillbilys-plea-to-the-white-working-class/2016/08/04/5c1a7a56-51ca-11e6-b7de-dfe509430c39_story.html?utm_term=.ea0ca4ff0f03. See also Alec MacGillis, *This Land, Trump's America: Ohio*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/interactive/2016/11/20/magazine/reflections-from-donald-trumps-america.html> ("2016 was the year when people who were not used to being taken seriously had to be taken very seriously indeed, even in Ohio. This was true of Donald Trump, of course, but it was also true of the people who had fueled his campaign.").

128. *Whitney v. California*, 274 U.S. 357, 378 (Brandeis, J., concurring). It is acknowledged here that the presence of laws that may subsequently punish speech within certain categories—e.g., true threats, libel, obscenity—may create a chilling effect on would-be speakers. Nonetheless, this is a preferable approach to prior restraint, i.e., censorship. See WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (William Draper Lewis, 2007) (1765–69) ("The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.").

129. See *supra* notes 10–12 and accompanying text.

130. *Padgett v. Auburn University*, Case No. 3:17 CV-231-WKW-WC at *4 (M.D. Ala. 2017).

Moreover, he added that security personnel could not interfere with anyone's speech "except as a last resort to ensure security or to prevent violence or property damage, and only after first making *bona fide* efforts to protect the speaker from hostility by other, less restrictive means."¹³¹ It is posited here that all universities and colleges should construe this order as applicable to them. That is, it is their responsibility to refrain from abridging speech, and doing so only as a last resort. Equally important, the need to provide adequate security to protect speech rights, as well as safety, is mandatory.

Additionally, this Article offers another suggestion to universities and colleges: Events should be structured with at least two speakers who either oppose one another or are at least qualified to challenge the views expressed. Including real time debate with intellectual counterweights, and promoting the events accordingly, advances the goal of discussion. Not only would this create a point-counterpoint framework, it is precisely in line with Brandeis' "more speech" philosophy. Moreover, such an approach could help to defuse violent protesters whose views would be given a voice within the event itself. It would also demonstrate the importance that an institution of higher education places in civic discourse, which is itself a democratic value.

Brandeis was not oblivious to the dissemination of what he called "noxious doctrine."¹³² He invoked the courage of America's founding generation throughout his concurrence in *Whitney*, including that they did not fear the expression of "noxious" words, knowing that open discussion affords protection.¹³³ Embedded within Brandeis' words were not only the virtues of free speech, but also an indictment of those intolerant of speech and too willing to silence it. "Those who won our independence," Brandeis wrote,

knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion,

131. *Id.* at 4–5 (internal citation omitted). See also *supra* text accompanying notes 79–80 (explaining "heckler's veto").

132. See *The First Amendment and the Ideal of Civic Courage*, *supra* note 70, at 675 (writing that when the opponents of noxious doctrine "lack the personal qualities of wisdom, creativity, and confidence. And those qualities, [Brandeis] suggests, are best developed by discussion and education, not by lazy and impatient reliance on the coercive authority of the state.").

133. *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring).

they eschewed silence coerced by law—the argument of force in its worst form.¹³⁴

These attributes—encouraging thought, hope and imagination; discussing grievances and remedies; and believing in the power of reason—are strikingly similar to the purposes of higher education.¹³⁵ It is important to recognize not only this congruence, but that it reveals the role that American universities and colleges can play in contributing to the health and enhancement of democratic values in the United States and throughout the world. That role is fulfilled not through silence or violence, but by promoting and adhering to these values.

134. *Whitney*, 274 U.S. at 375–76. *See also* Stanger, *supra* note 8 (“[F]or us to engage with one another as fellow human beings—even on issues where we passionately disagree—we need reason, not just emotions. False Looking both within and without, it seems to me, the real enemy is ignorance empowered.”).

135. *See supra* text accompanying notes 29-33.