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Charles Adside III

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# Shutting Down Speech 101: Saving Campus Free Speech from the Heckler's Veto and the Speech Gerrymander

*Charles Adside, III\**

## ABSTRACT

*Professors cannot teach and students cannot learn without the freedom of speech. First Amendment jurisprudence demands that universities allow their students the exposure to multiple viewpoints which is so necessary for their development as future leaders; this educational mission is fulfilled when the university serves as a forum for diverse ideas. To this end, college diversity bureaucrats attempt to construct an accommodating learning environment for all. Ironically, their actions impose barriers to the educational benefits that flow from classroom diversity. Several types of speech-inhibiting policies, such as safe spaces, racially themed housing, microaggression guidelines, and free speech zones stifle the robust exchange of ideas. These policies create a speech-gerrymander on campuses, empowering self-appointed speech regulators to intellectually intimidate students from entertaining other viewpoints. In fact, speakers are often disinvented or even banned from campuses with college administrators evoking the heckler's veto to shut down speech perceived as threatening. This article examines the ways the heckler's veto has been evoked constitutionally to protect campus safety, but also identifies occasions when administrators evoked the veto unconstitutionally. This article proposes educational reforms to create a more inclusive environment where it is less likely that the heckler's veto would be evoked. These solutions include "We Listen Centers" and mini-colleges focused on intellectual exchanges. With these solutions, instructors can freely challenge students from diverse backgrounds to evaluate different views while respectfully disagreeing with each other.*

## I. INTRODUCTION

"Diversity," "inclusion," "multi-culturalism," "pluralism," and "critical mass" are goal-oriented concepts that colleges and universi-

ties employ in programs, initiatives, and literature to describe the “diversity bureaucracy” mission.<sup>1</sup> That mission seeks to “maximize opportunities for exchange between students,” partly through the recruitment of students and faculty who are members of minority groups.<sup>2</sup> They believe this exchange happens in diverse campuses and classrooms, where exposing students to different views and experiences of their peers provides educational benefits. On that front, universities like the University of Michigan pursue this benefit by encouraging their faculty to employ “inclusive teaching strategies” in their instruction.<sup>3</sup> These attempts to increase diversity have prompted universities to hire diversity bureaucrats, whose job it is to influence their institution and its students to prioritize and value certain types of diversity. They work for the admissions committee, the multicultural office, and the hiring team, promoting goals that are simple to describe in theory but difficult to implement in practice.<sup>4</sup> Diversity bureaucrats’ jobs are made even more difficult by a judicially imposed constitutional tightrope; they must balance First Amendment and Equal Protection principles.<sup>5</sup> Either directly through admissions or the faculty development office, or indirectly through other means, the diversity bureaucrat attempts to create a classroom dynamic where an open-minded professor teaches students to learn from one another through the “robust exchange of ideas”; respectful conversations with those of different backgrounds, with the goal being mutual

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\* Lecturer, University of Michigan, Department of Political Science, University of Michigan–Ann Arbor; General Counsel, Michigan Great Lakes Second Ecclesiastical Jurisdiction, Church of God in Christ, Inc.; J.D., Michigan State University College of Law; B.A., University of Michigan–Ann Arbor. I am grateful to my parents, Rev. Charles and Jacqueline J. Adside. I thank other family members, such as my grandmother, Lovie D. Johnson, and my uncles and aunts, Paul and Kim Minor and Romie and Laurie Minor. I sincerely thank Jacob Chludzinski and Nick Tomaino. For two years, they encouraged me to write this article and provided indispensable intellectual and research support to this project. This article would not have been written without them. Michelle Kraus and Gabe Slater performed data mining for me. Seamus Lynch is an editor extraordinaire, helping me revise manuscripts in warp speed.

1. Charles Adside III, *Replay That Tune: Defending Bakke on Stare Decisis Grounds*, 64 CLEV. ST. L. REV. 519, 542-52 (2016) (discussing the college diversity bureaucracy).

2. *Id.* at 549.

3. *Id.* at 550.

4. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003). Diversity admissions programs have been invalidated or remanded for implementing a race-based quota system, for imposing a race-based point system, and for misunderstanding strict scrutiny rules.

5. *Bakke*, 438 U.S. at 312-16.

understanding.<sup>6</sup> This free exchange supposedly has a ripple effect across the student body, where students and faculty members facilitate experimentation in an array of disciplines: “the bureaucracy does not necessarily operate in a top-down . . . fashion; students [with supportive staff] possess creative license to develop activities designed to establish . . . exchange.”<sup>7</sup> In this learning environment, instructors, through “inclusive teaching,”<sup>8</sup> do not tell students what to think, but rather, how to think about the problems they are studying to solve.<sup>9</sup>

This supposed attempt to make universities hubs for productive contention has support in the First Amendment of the Constitution. In holding that requiring an English professor to renounce his communist affiliations violated free speech, *Keyishian v. Board of Regents* forbade practices that imposed an “orthodoxy over the classroom.”<sup>10</sup> Some universities take *Keyishian’s* teachings seriously. The Center for Research Learning and Teaching at the University of Michigan, for example, encourages its instructors to avoid passing on narrow worldviews by including unpopular or multiple perspectives in their course curriculum.<sup>11</sup> Ideally, students are not engineered as ideological robots that march in lock-step to a campus mantra. Rather, they flourish as free spirits molded to be Renaissance men and women: “[S]tudents must always remain free to inquire, to study and to evalu-

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6. *Id.* at 312-13 (quoting *U.S. v. Associated Press*, 52 F.Supp. 362, 372 (1943)). As to how this is accomplished, examples come from the University of Michigan’s DEI Year Three Plan Report. On the admissions end, the DEI office at the Law School, for example, seeks “[t]o assemble an exceptional community of talented and interesting students with diverse backgrounds, identities and perspectives . . . [by doing such things as creating] videos that address specific identity groups.” On the faculty development end, the University of Michigan’s Office of University Development is trying to “Provide all staff and leaders the opportunity to develop intercultural knowledge, skills and mindset . . . [by i]mplement[ing] targeted trainings based on individual needs. Most simply, on the hiring end, the University of Michigan’s School of Pharmacy has attempted to “Increase the number of URM and female members [on] faculty” by having all hiring committee members complete anti-bias training. UNIV. OF MICH. OFFICE OF DIVERSITY, EQUITY & INCLUSION, STRATEGIC PLAN PROGRESS REP., <https://diversity.umich.edu/strategic-plan/progress-report/> (last visited Mar. 4, 2020).

7. Adside, *supra* note 1, at 551.

8. CTR. FOR RES. ON LEARNING AND TEACHING, OVERVIEW OF INCLUSIVE TEACHING AT MICHIGAN, <http://crlt.umich.edu/overview-inclusive-teaching-michigan> (last visited Feb. 8, 2020).

9. Adside, *supra* note 1, at 550.

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

11. CTR. FOR RES. ON LEARNING AND TEACHING, *supra* note 8; Adside, *supra* note 1, at 550.

ate, to gain maturity and understanding . . . .”<sup>12</sup> This is not a romanticized view of the classroom—rather, these free speech principles are rooted in constitutional law.

Universities are First Amendment playgrounds, allowing students to partake in expression and to discover themselves, personally and intellectually, “through wide exposure . . . out of a multitude of tongues.”<sup>13</sup> In *Sweezy v. New Hampshire*, Justice Frankfurter recognized that the First Amendment grants faculty members and students academic freedom to engage in these intellectual pursuits on campus: “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.”<sup>14</sup> Since having academic freedom requires that colleges provide this atmosphere, administrations have constitutional latitude in how they hire professors, adopt curriculum, implement pedagogical methods in the classroom, and select students.<sup>15</sup> “The goal is “[a]n atmosphere in which there prevail ‘the four essential freedoms’ of a university,” with Justice Frankfurter declaring, “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>16</sup> Justice Frankfurter’s concurring opinion is the foundation upon which a line of affirmative action decisions now stand.<sup>17</sup> Though colleges are given freedom in the four areas described by Justice Frankfurter, administrative discretion is not unlimited. In certain cases, strict scrutiny, the most rigorous standard in constitutional law, governs to ensure that admissions programs do not plan classroom demographics to reflect illegitimate agendas.<sup>18</sup>

An instance of such judicial oversight happened in *Regents of the University of California v. Bakke*. There, Justice Powell’s decisive opinion held that a race-conscious admissions program promotes a compelling state interest if it advances the “educational benefits that

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12. *Keyishian*, 385 U.S. at 603 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

13. *Keyishian*, 385 U.S. at 603.

14. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

15. *Id.*

16. *Id.*

17. See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (*Fisher II*); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (*Fisher I*); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

18. Adside, *supra* note 1, at 549 n. 188.

flow from an ethnically diverse student body.”<sup>19</sup> However, when admitting students, universities and colleges do not consider one factor, like race or ethnicity, alone, but instead evaluate many kinds of diversity.<sup>20</sup> To obtain “educational pluralism in the classroom,” the ideal admissions program considers a number of factors in an applicant’s profile, such as geography, “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”<sup>21</sup> Considering individual traits along with comparing an applicant against other candidates provides the “robust exchange of ideas” on campus; it supposedly means that many perspectives will be represented in classroom discussions. Considering these traits also supposedly ensures that admission decisions are guided by equal protection principles. While intellectual classroom diversity is an organizing principle for colleges and universities, *Fisher v. University of Texas at Austin* required these institutions to prove that they cannot manifest these “educational benefits” without the use of a suspect category.<sup>22</sup> A college could do so by submitting a principled, reasoned explanation with studies, interviews, and analysis proving that it can only have the educational benefits by considering race as a factor in admissions.<sup>23</sup> That is what Fisher I demands: “The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>24</sup> The Court wants to ensure that these educational benefits are measurable to permit judicial review.<sup>25</sup> So long as colleges satisfy strict scrutiny rules, colleges around the nation are given the constitutional greenlight to form diversity bureaucracies with policies, admissions programs, offices, residences, recruitment and attrition efforts, hiring practices, and initiatives focused on steering applicants with diversity-enhancing characteristics to apply.<sup>26</sup> In so doing, applicants become

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19. *Bakke*, 438 U.S. at 306.

20. *Id.* at 314–15.

21. *Id.* at 317.

22. *Fisher II*, 136 S. Ct. at 2208.

23. *Id.* at 2211–12.

24. *Fisher v. Univ. of TX*, 570 U.S. 297, 10–11 (2013) (*Fisher I*).

25. *See Fisher II*, 136 S. Ct. at 2203.

26. *See Adside*, *supra* note 1, at 550.

students who can contribute to and benefit from dynamic class discussions.

Although there are benefits created from the diversity bureaucracy, administrators now implement policies that unintentionally counteract the educational benefits they desire to manifest on campus. “[U]niversity campuses have increasingly experienced,” one think tank observed, “restrictions on academic freedom and the expression of controversial views by both students and faculty.”<sup>27</sup> In fact, diversity administrators work toward an inclusive environment, but they lullaby students, all of whom are adults, from social discomforts. For example, students are told to avoid “microaggressions,” defined as “a comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group.”<sup>28</sup> As shown in the University of Michigan’s Strategic Plan, perceived microaggressions can relate to one’s “race/ethnicity, gender, sexual orientation, and/or disability status.”<sup>29</sup> These microaggressions often emphasize “micro” more than “aggression,” like when one scholar described a microaggression as “mistaking a female physician for a nurse.”<sup>30</sup> Since whether a statement or action is a “microaggression” is so difficult to determine, it is a risky tool in determining what speech may be subject to the black mark of censorship. Those attempting to create inclusive environments should be wary of a label which turns innocuous comments into pathogens of bigotry. Diversity bureaucrats fall off the constitutional tightrope by sacrificing free speech on the altar of equal protection.

As the focus on microaggressions shows, administrators implement speech-inhibiting policies that limit First Amendment freedoms on campuses in a well-intentioned effort to not offend students, par-

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27. Home Page, DIFFICULT DIALOGUES NAT’L RESOURCE CTR., <https://www.difficultdialogues.org/> (last visited Mar. 4, 2020).

28. *Microaggression*, MERRIAM-WEBSTER (2020), <https://www.merriamwebster.com/dictionary/microaggression> (last updated Apr. 1, 2020).

29. UNIV. OF MICH. OFFICE OF THE PROVOST, DIVERSITY, EQUITY, AND INCLUSION COMM., REP.: ACHIEVING EQUITY & INCLUSION AT MICHIGAN (2014), <https://www.provost.umich.edu/reports/div-equity-inclusion.html>.

30. Alia E. Dastagir, *Microaggressions Don’t Just ‘Hurt Your Feelings’*, USA TODAY (Feb. 28, 2018), <https://www.usatoday.com/story/news/2018/02/28/what-microaggressions-small-slights-serious-consequences/362754002/>; MARQUETTE UNIV. OFF. OF STUDENT DEV., HARASSMENT POLICY (2019), <http://www.marquette.edu/osd/policies/harassment.shtml>.

ticularly those from protected classes.<sup>31</sup> While it seems that efforts like these are made with good intentions, they have often overstepped in ways that risk damage to their students. For example, some colleges implement racial harassment policies that are written too broadly. This not only puts a damper on the whole freedom of exchange which gives universities the right to make decisions like this, but also could ruin lives. If a student is labeled a racist by their university thanks to a poorly written policy, that ‘scarlet R’ will have lifelong social and professional consequences. If a student is improperly subjected to disciplinary action or expulsion on the grounds of so-called racism, they would be hard-pressed to move forward academically or professionally. For example, Marquette University labels racial harassment as any action that “has the effect of unreasonably interfering with that individual’s work or academic performance, or that creates a hostile working, educational or living environment.”<sup>32</sup> Another example is the University of Chicago, where racial harassment is described as, “verbal or physical conduct or conduct using technology that is so severe or pervasive that it has the purpose or effect of unreasonably interfering with an individual’s work performance or educational program participation, or that creates an intimidating, hostile, or offensive work or educational environment.”<sup>33</sup> One could have a different interpretation about what is “intimidating, hostile, and offensive.”<sup>34</sup> Unlike Marquette University, the University of Chicago attempted to explain its policy by stating, “A person’s subjective belief that behavior is intimidating, hostile, or offensive does not make that behavior harassment. The behavior must be objectively unreasonable.”<sup>35</sup> No explanation is provided, in either case, on what conduct is considered to be “unreasonable.” Such an explanation is too broad and can stifle protected speech.

In *R.A.V. v. City of St. Paul*, the Court struck down an ordinance that banned any symbol that “arouses anger, alarm or resentment in

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31. David Hudson, *Explainer: How Campus Policies Limit Free Speech*, THE CONVERSATION (May 31, 2016), <https://theconversation.com/explainer-how-campus-policies-limit-free-speech-58974>.

32. MARQUETTE UNIV. OFFICE OF STUDENT DEV., *supra* note 30.

33. UNIV. OF CHI., HARASSMENT POLICY (2018), <https://harassmentpolicy.uchicago.edu/policy/> (last updated Sept. 15, 2019).

34. *Id.*

35. *Id.*



others on the basis of race, color, creed, religion or gender.”<sup>36</sup> The Court found that “the government may not regulate [speech] use based on hostility—or favoritism—towards the underlying message expressed.”<sup>37</sup> One may view a statement they disagree with as unreasonable, whereas another may view that same statement as reasonable. Whether the phrasing used creates a “hostile environment” or is “objectively unreasonable” lies in the eyes of the beholder, and ignores the Court’s ruling that the government cannot “prohibit . . . otherwise permitted speech solely on the basis of the subjects the speech addresses.”<sup>38</sup> These vague policies permit subjective interpretation, and university administrators employ them to regulate speech that is otherwise protected under the First Amendment. While individuals may express themselves offensively, the First Amendment prohibits laws that suppress speech content; even so-called hate speech is protected.<sup>39</sup>

This is a simple principle for college students, America’s future leaders, to adopt to ensure dialogue in the boardroom, classroom, or legislative chamber: a high bar for using the cudgel of the law to restrict speech, in accordance with the value of speech and the speed with which would-be-autocrats attempt to eliminate it. Unfortunately, they have not adopted it. “Four-in-ten Millennials say the government should be able to prevent people publicly making statements that are offensive to minority groups . . . .”<sup>40</sup> In fact, a study revealed that a majority of college students in every demographic incorrectly believed that the First Amendment does not protect “hate speech.”<sup>41</sup> It does protect such speech, to protect Americans from corrupt leaders who would so label any speech which threatened their power. Such a concept cannot be neutrally defined in our free speech jurisprudence or consistently applied in similar cases.<sup>42</sup> The same study

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36. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378 (1992).

37. *Id.* at 386.

38. *Id.* at 381.

39. *See Snyder v. Phelps*, 562 U.S. 443 (2011).

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

41. Niraj Chokshi, *What College Students Really Think About Free Speech*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/college-students-free-speech.html>.

42. *Snyder*, 562 U.S. at 443.

also reported that students broadly “supported safe spaces for those who feel upset or threatened and free speech zones where protests or partisan proselytizing is explicitly allowed.”<sup>43</sup> While Millennials who hold these views are the minority in the population today, they may become the majority tomorrow. After all, it tends to be the loudest, not the wisest, who gain power. We risk their future imposition of legislation that regulates protected speech, not only offensive speech.<sup>44</sup> From where does this quickness to cast free speech out, the bloody prize of a thousand years of struggle against repression, come from? The culprit is not the traditionally maligned sources of teenage disorder, the rock bands, rappers, and video games. Rather, it is the nation’s leading universities who have produced this time-bomb in democracy. Many of the students who devalue speech were placed under a speech-inhibiting regime as students. These students will one day become graduates. As proud alumna, they are baptized by diversity bureaucrats as speech-inhibiting disciples washed in misguided diversity programs that now inform their First Amendment beliefs.<sup>45</sup>

As noted earlier, other policies that inhibit speech include safe spaces which cater to underrepresented minorities, based on ideology, race, ethnicity, religion, or even gender.<sup>46</sup> Some oppose the creation of these safe spaces. Opponents, who believe in racial integration on campus, claim that these areas foster division among groups and intolerance for opposing viewpoints; deliberation among different groups in the same space is necessary for solving common problems.<sup>47</sup>

Others view the integrated campus as either a failed mission or an unfilled promise to minority students that actually benefits white privilege.<sup>48</sup> Safe spaces can create a number of social problems, particularly racial ones. First, they motivate white students to avoid discussing racial issues with minority students for fear of being labeled

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43. Chokshi, *supra* note 41.

44. Poushter, *supra* note 40.

45. *See* Chokshi, *supra* note 41.

46. Vinay Harpalani, ‘Safe Spaces’ and the Educational Benefits of Diversity, 13 DUKE J. CONST. L. & PUB. POL’Y. 117, 124–25, 128 (2017).

47. Nicholas A. Schroeder, *Avoiding Deliberation: Why the “Safe Space” Campus Cannot Comport with Deliberative Democracy*, 2017 BYU EDUC. & L.J. 325 (2018).

48. Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 600, 616–22 (2011); *see* Derrick Bell, *Racial Realism*, 24 U. CONN L. REV. 363, 369–70 (1992).

racists.<sup>49</sup> Second, this white avoidance reinforces the perception among minority students that the white campus is a racially hostile place.<sup>50</sup> One can easily imagine the thought process: if they need a safe space for me, then everywhere outside of that must somehow be unsafe! Lastly, “safe spaces” afford to white students an implicit privilege “to be closed off and unhearing” about the racial discrimination experienced by their non-white peers.<sup>51</sup>

The occurrence of racial isolation within these spaces include the diversity bureaucrat-led implementation of race-based housing on campus. Segregation of this nature is an increasingly common phenomenon. A study of 173 top universities found that “[a]bout 46 percent [offer] segregate[d] student orientation programs; 43 percent . . . offer segregated residential arrangements; and 72 percent . . . [offer] segregate[d] graduation ceremonies.”<sup>52</sup> This safe space policy deserves focused analysis because it influences the full range of student life, where students wash clothes, socialize, dine, date, and even sleep.<sup>53</sup> Of course, the diversity housing official is not enforcing an overtly segregationist policy where, for example, a black student must live with black roommates in the “blacks only residence hall.” But the diversity official permits, or even encourages, students to self-segregate in dorms where different students, with a variety of life experiences, are not welcome to live.<sup>54</sup> The dorm is not couched within incendiary terms like “colored only,” but the bureaucracy markets these houses by employing euphemistic language like “interest”-based housing or themed “learning communit[ies]” One example is the African Black Diaspora Living-Learning Community at the University of California San Diego Sixth College. Its mission is to “establish an environment of personal and academic excellence through

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49. Adside, *supra* note 1, at 563.

50. *Id.*; Leah Shafer, *Safe Spaces vs Free Speech?*, HARV. GRADUATE SCH. OF EDUC. (May 18, 2016), <https://www.gse.harvard.edu/news/uk/16/05/safe-space-vs-free-speech>.

51. Shafer, *supra* note 50; May Kuykendall & Charles Adside III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1078 (2014).

52. DION J. PIERRE & PETER W. WOOD, NAT’L ASS’N OF SCHOLARS, NEO-SEGREGATION AT YALE (Apr. 2019), [https://www.nas.org/storage/app/media/Reports/NeoSeg%20at%20Yale/NeoSegregation\\_at\\_Yale.pdf](https://www.nas.org/storage/app/media/Reports/NeoSeg%20at%20Yale/NeoSegregation_at_Yale.pdf).

53. Ana Hernández, *Success Lives Here: The Impact of the Residential Experience on Student Success*, STUDENT AFFAIRS FACULTY AND STAFF PUBLICATIONS (2011), [http://scholarcommons.usf.edu/sa\\_facpub/2](http://scholarcommons.usf.edu/sa_facpub/2).

54. Kuykendall & Adside III, *supra* note 51, at 1078.

the affirmation and celebration of Blackness in its various expressions.”<sup>55</sup> Although it is meant for “African Black Diaspora students and their *allies*,” the school’s newspaper reported that the living community is “a place where black students can express themselves freely around students who share their ancestry.”<sup>56</sup> In other words, non-black students need not apply. In addition, the University of California Los Angeles has three living learning communities dedicated to race: Afrikan Diaspora, Chicana/Latina, and Pilipinx.<sup>57</sup> Although focused on the individual races, it is stated that “all students, regardless of cultural heritage or major, are invited to join in on the rich exploration” of these communities.<sup>58</sup> Interest-themed houses that profess to include all students are common around the nation. But these inclusive statements are half-hearted attempts to conceal these houses’ racial focus. These housing programs are cause for concern. Indeed, the self-segregation is entirely voluntary, but this housing arrangement has the potential to maintain an intra-group orthodoxy in the residence halls, preventing residents from interacting with differing viewpoints. Courts have said that universities may prioritize protecting racial minorities only so far as doing so promotes the beneficial *inter-group* exchange of ideas; but if each group is permitted—or encouraged, as it seems—to stick to themselves, this benefit vanishes. If things continue in this direction, every conceivable identity will have its own house or center, and nobody will ever leave them, producing an almost Balkan mindset. In this way, the themed house becomes a pseudo-free-speech zone.

Universities have also created the depressingly named “free speech zones.” Free speech zones are designated areas where students express ideas that are restricted to specific areas on campus.<sup>59</sup> Although some free speech zones have been upheld due to security and

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55. *Living-Learning Communities, African Black Diaspora LLC*, UCSD SIXTH COLLEGE (2019), <https://sixth.ucsd.edu/residential-life/housing/LLC.html#African-Black-Diaspora-LLC>.

56. Gary Warth, *UCSD Opens Housing Based on Race, Sexual Identity*, THE SAN DIEGO TRIBUNE (Sept. 26, 2016) <https://www.sandiegouniontribune.com/news/education/sd-me-ucsd-diverse-20160926-story.html> (emphasis added).

57. *UCLA Residential Life, Living Learning Communities*, UNIV. OF CAL. L.A. (2019), <https://reslife.ucla.edu/livinglearning/>.

58. *Id.*

59. Emilie Kraft, *Free Speech Zones*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/960/free-speech-zones> (last visited Mar. 5, 2020).

safety concerns, many other zones have been ruled unconstitutional.<sup>60</sup> For example, West Virginia University created seven small areas on their campus in June of 2002 designated as free speech zones.<sup>61</sup> These seven areas made up less than 5% of the total campus.<sup>62</sup> A lawsuit claiming the unconstitutionality of these zones caused the school to remove the policy in December of 2002.<sup>63</sup> As shown, these “free speech zones” have adverse consequences on campus discourse, and also have the unintended consequence of empowering self-interested, and possibly intellectually abusive, campus members.<sup>64</sup>

Groupthink at times controls group members that occupy safe spaces, residence halls, or free speech zones. It instructs group members to adhere to a group-based ideology and to reject other views.<sup>65</sup> As a result, students lack the tools to discuss or disagree productively.<sup>66</sup> This has created a “speech gerrymander” on college campuses in which certain views are monopolized or distorted in the university forum. Not all views, however persuasive, are given a fair hearing.

Outside guests, who share the ideas of the intellectual minority, are disinvited or protested to the point where they are unable to safely speak on college campuses.<sup>67</sup> This use of protest filled with violence and intimidation causes administrators to react with campus safety in mind. Administrators take authoritarian steps, which include canceling some events or banning speakers from campus altogether, while claiming public safety concerns. In January 2019, for example, Portland Community College had to cancel an “evening . . . teach-in for economic rights and climate justice because of threats from [a] right-wing street gang.”<sup>68</sup> Other examples include what happened to white supremacist Richard Spencer. Following violent protests in Charlottesville in April of 2017, colleges, such as the Pennsylvania

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60. See *United for Peace & Justice v. Mayor of New York*, 243 F. Supp. 2d 19 (S.D.N.Y. 2003); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).

61. Kraft, *supra* note 59.

62. *Id.*

63. *Id.*

64. Kuykendall & Adside, *supra* note 51, at 1079 n.392–96.

65. *Id.*

66. Adside, *supra* note 1, at 564.

67. See discussion *infra* Part II Section B.

68. Katie Shepherd, *Portland Community College Cancels Event After Right-Wing Group Threatens to Show Up on Campus*, WILLAMETTE WEEK (Jan. 25, 2019), <https://www.wweek.com/news/schools/2019/01/25/portland-community-college-cancels-event-after-right-wing-group-threatens-to-show-up-on-campus/>.

State University (PSU) and the Ohio State University (OSU), cited safety concerns to stop Spencer from speaking.<sup>69</sup> Citing to safety in the abstract is a way for administrators to suppress speech, effectively giving the heckler a veto over speech that he or she finds offensive. But this was not the first time that public officials used public safety as an excuse to continue unconstitutional policies.

Southern politicians also evoked the doctrine of interposition to thwart desegregation. In 1957, Arkansas Governor Orval Faubus, for example, claimed that “blood would run in the streets of Little Rock” if nine African American students entered into the whites only Central High School.<sup>70</sup> The governor argued that public school desegregation would risk “disorder and violence that could result in the loss of life—perhaps yours.”<sup>71</sup> The Southern Manifesto echoed the governor’s sentiments.<sup>72</sup> The manifesto claimed that *Brown v. Board of Education*, which invalidated racially segregated public schools, prohibited the states from regulating an area that the Court “restated time and again, became a part of the life of the people of many of the states and confirmed their habits, customs, traditions and way of life.”<sup>73</sup> Such an action would inevitably lead to “chaos and confusion.”<sup>74</sup> The eighty-two representatives and the nineteen senators who signed the manifesto argued that *Brown* created an “explosive

69. Nick Capri, *Penn State Students React to University Lawsuit Surrounding White Supremacist Richard Spencer*, THE DAILY COLLEGIAN (Oct. 23, 2017), [https://www.collegian.psu.edu/news/campus/article\\_27a91588-b79b-11e7-81874ff0e2da19ee.html](https://www.collegian.psu.edu/news/campus/article_27a91588-b79b-11e7-81874ff0e2da19ee.html); Gabe Rosenberg, *Ohio State Will Be Sued for Not Allowing Richard Spencer To Speak on Campus*, WOSU PUBLIC MEDIA (Oct. 20, 2017), <http://radio.wosu.org/post/ohio-state-will-be-sued-not-allowing-richard-spencer-speak-campus#stream/0>.

70. DAISY BATES, THE LONG SHADOW OF LITTLE ROCK 61 (1962).

71. (1958) Orval E. Faubus, “Speech on School Integration”, BLACKPAST, (Jul. 26, 2010), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1958-governor-orval-e-faubus-speech-school-integration/>.

72. In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court held that Governor Faubus’s actions were unconstitutional. The unanimous opinion made it clear that states must follow the decisions of the Supreme Court and reiterated its superiority created in *Marbury v. Madison*. As the Court denied Arkansas’ ability to delay desegregation due to threats of violence, it hindered other Southern governors from being able to do the same. However, Southern governors, such as George Wallace in Alabama and Ross Barnett in Mississippi continued to defy court orders demanding black students be admitted into white-only schools. Claude Sitton, *Alabama Admits Negro Students; Wallace Bows to Federal Force; Kennedy Sees ‘Moral Crisis’ in U.S.*, N.Y. TIMES (Jun. 12, 1963), <http://movies2.nytimes.com/library/national/race/061263race-ra.html>.

73. “The Southern Manifesto”, AM. PUB. MEDIA, <http://americanradioworks.publicradio.org/features/marshall/manifesto.html> (last visited Mar. 17, 2020).

74. *Id.*

and dangerous . . . [environment] . . . inflamed by outside meddlers.”<sup>75</sup>

Just as states cannot use public safety to maintain Jim Crow laws, college administrators cannot use the same justification to prevent the expression of controversial viewpoints on campus. Such a result disrupts the college’s role in our First Amendment traditions. Quoting from *Keyishian*, Justice Powell’s *Bakke* opinion stated, “the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples,” meaning a free exchange of ideas (internal quotations omitted).<sup>76</sup> He states this as the reason why there is a “national commitment to the safeguarding of these freedoms within university communities.”<sup>77</sup>

At times, the heckler’s veto has been used as an administrative tool to silence certain viewpoints. First Amendment scholar Harry Kalven, Jr. coined the term “heckler’s veto,” describing situations when government restricts speech to achieve a greater purpose.<sup>78</sup> A heckler’s veto does not ban speech because of its verbal content—rather, the government prevents the speech from being made because of the response, or anticipated response, it may produce.<sup>79</sup> That said, it must be used strictly and within limits lest the doctrine be used to suppress views that the government simply dislikes. An individual’s freedom of speech may not be banned based on speech content, unless those words incite violence. Should an individual’s words create safety concerns, then that individual could also be banned from speaking.

This article identifies recent occasions when college administrators constitutionally evoked the heckler’s veto. While colleges have appropriately evoked the veto in some cases, administrators have used the doctrine to shut down protected speech on their campuses. Moreover, college administrators bear some responsibility for recent violent episodes that have diminished the freedom of speech on their

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75. *Id.*

76. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

77. *Id.* at 312.

78. *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); Ruth McGaffey, *The Heckler’s Veto*, 57 MARQ. L. REV. 39 (1973).

79. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008).

respective campuses. I conclude that colleges and universities implemented policies that created an atmosphere in which unpopular speakers and viewpoints are met with hostility and even violence. Such an atmosphere prevents the exchange of ideas, innovation, and experimentation that is the hallmark of higher education. This article offers solutions designed to foster meaningful dialogue, in and outside the classroom, so colleges and universities can maintain their constitutional function under the First Amendment to provide a forum for the “robust exchange of ideas.”<sup>80</sup>

This article proceeds as follows. Part I explains the heckler’s veto doctrine and identifies occasions in which colleges evoked the doctrine in both constitutional and unconstitutional ways. Part II points to speech-inhibiting policies at universities that have empowered extreme voices to dominate campus speech. Part III offers hope; it submits major educational proposals designed to enhance the freedom of speech on campus.

## II. FREE SPEECH, ORIGINAL PRINCIPLES, AND THE HECKLER’S VETO

### *A. Consent of the Governed: Free Speech and Political Participation*

#### *1. Founding First Amendment principles*

The Founding generation overthrew the British Crown for suspending rights entitled to them as Englishmen.<sup>81</sup> King George III, for example, did not afford the colonists representation—a voice—in how they would be governed. He routinely dissolved legislative sessions, prevented elections, and denied the colonies representation in Parliament.<sup>82</sup> Grievances like these inspired the colonies to rebellion with the rallying cry: “No taxation without representation.”<sup>83</sup> A new

80. *Keyishian*, 385 U.S. at 603 (1967).

81. J.R. POLE, *PATHS TO THE AMERICAN PAST* 77 (1979) (explaining that the “revolutionaries never claimed to be fighting for new principles. They asserted repeatedly that they were engaged in the defense of ancestral English rights and privileges . . . [relying] on rights . . . older than those of Englishmen.”).

82. DECLARATION OF INDEPENDENCE (1776).

83. *On This Day: “No Taxation Without Representation!”*, NATL. CONST. CTR. (Oct. 7, 2019), <https://constitutioncenter.org/blog/250-years-ago-today-no-taxation-without-representation>.



government, the Framers hoped, would foster, not suppress, political discussion. The First Amendment, along with the Bill of Rights, would be the antidote against tyrannical government.<sup>84</sup>

The Free Speech Clause commands that “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>85</sup> At the very least, the Clause forbids government from placing either executive or legislative controls on expression aimed against government policy.<sup>86</sup> No longer can the king’s soldiers pre-screen communication prior to publication or arrest an individual for passing out anti-government leaflets.<sup>87</sup> Its protective reach is expansive. Notably, the Framers wrote the Clause in broad terms; it does not identify any preferred speaker or activity; rather, it simply protects the “freedom of speech.”<sup>88</sup> Today, speech includes the full range of human expression, such as artistic, literary, and scientific activities.<sup>89</sup> Freedom of speech also consequentially recognizes other non-textual rights, such as “the right to association,” the right to persuade, and the right to be left alone from unwanted communications.<sup>90</sup> Since the First Amendment protections are broad, content-based regulations do not survive judicial scrutiny. Government cannot disable speech because it either disapproves of the speaker or the message.<sup>91</sup> Therefore, the constitutional default is that speech, however offensive, is protected.

This said, the freedom of speech is not absolute. Speech on college campuses is protected, but violent or threatening language is not. Just as one is unable to yell “fire” in a movie theatre, one is unable to use words to incite violence on college campuses.<sup>92</sup> Administrators should be able to use the heckler’s veto when campus safety is at

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84. *See* *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 636–37 (1943).

85. U.S. CONST. amend. I.

86. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

87. *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372–73 (2010) (Roberts, C.J., concurring).

88. U.S. CONST. amend. I.

89. Bork, *supra* note 86.

90. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 717–18 (1997).

91. *Citizens United*, 558 U.S. at 342–43.

92. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (“The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theater.”).

risk, but not because they dislike the speaker's message.<sup>93</sup> Administrators that evoke the heckler's veto walk a fine line between protecting campus safety and restricting the educational expressions that others have a right to hear.

## 2. *The heckler's veto*

From the founding and until today, the Court has identified areas historically outside First Amendment protection, such as obscenity, fraud, defamation, incitement, child pornography, and speech integral to criminal activity.<sup>94</sup> Another exception to free speech is the heckler's veto—our primary focus.<sup>95</sup> In *Roe v. Crawford*, the Eighth Circuit, observed that “the heckler's veto involves situations in which the government attempts to ban protected speech because it might provoke a violent response.”<sup>96</sup> Violence short-circuits the “consent by the government” principle as it has a chilling effect on the free exchange of ideas, the protection of which is the hallmark of an open society. No one feels safe to express their views in the face of an angry mob carrying torches and pitchforks.<sup>97</sup> While the threat of violence is a legitimate concern, government officials cannot employ this doctrine *carte blanche*. The doctrine is not solely based on the speaker's actions. The occurring or anticipated responses of others are an equal factor in whether or not a heckler's veto is used.<sup>98</sup> Indeed, the doctrine cannot be employed simply because the audience is “hostile,” “murmuring,” or expresses “objections.”<sup>99</sup> The heckler's veto therefore has strict limitations. Two contrasting cases illustrate the contours of this doctrine: *Feiner v. New York* and *Glasson v. City of Louisville*.<sup>100</sup>

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93. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008).

94. *United States v. Stevens*, 559 U.S. 460, 469–71 (2010).

95. *See* *Feiner v. New York*, 340 U.S. 315 (1951).

96. *Roe*, 514 F.3d at 796 n.3; McGaffey, *supra* note 78.

97. *See* FEDERALIST PAPERS No. 10 (J. Madison).

98. *Feiner*, 340 U.S. at 320.

99. *Id.*

100. *Id.* at 315 (1951); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975).

### 3. *Heckler's veto cases*

In *Feiner v. New York*, the Court enforced the veto against a defendant who was convicted for breaching the peace when he stood before a biracial crowd on a wooden box with loudspeakers; he delivered a fiery performance, calling President Truman a “bum” and declaring that “[N]egroes don’t have equal rights; they should rise up in arms and fight for their rights.”<sup>101</sup> The Court found that the police did not arrest him to silence his message or to break up a lawful assembly; rather, his arrest arose from inciting the crowd to riot. There was “pushing, shoving and milling around” among the listeners.<sup>102</sup> The police intervened when “onlookers made remarks . . . about their inability to handle the crowd and at least one threatened violence [against the speaker] if the police did not act.”<sup>103</sup> Because there is minimal evidence of disorder, *Feiner's* conclusions are dubious.

First, the case carries strong, negative racial connotations with police pulling a college student away from a public forum as he speaks against racial discrimination.<sup>104</sup> Second, one could argue that there was no threat to public safety at all. As Justice Douglas observed in dissent: “There was some pushing and shoving in the crowd and some angry muttering. That is the testimony of the police. But there were no fights and no ‘disorder’ even by the standards of the police. There was not even any heckling of the speaker.”<sup>105</sup> This raises the question of whether *Feiner* correctly applied the veto in this case.

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101. *Feiner*, 340 U.S. at 330 (1951) (Douglas, J., dissenting).

102. *Id.* at 317.

103. *Id.*

104. *Id.* at 330–331 (Douglas, J., dissenting).

105. *Id.* at 330.

Whether or not the veto was permissible is a discussion for another occasion. Notably, the decision stressed limitations on the doctrine:

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. "A State may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions."<sup>106</sup>

In other words, the government cannot evoke public safety in the abstract to suppress speech content. The veto can be used to uncover illegitimate motives when it appears that the threat of violence is either low or even non-existent.<sup>107</sup> *Feiner* warned there is a "possible danger" that the doctrine could give "overzealous police" authority to shut down lawful assemblies.<sup>108</sup> The Court also recognized that silencing a speaker simply because the audience is "hostile" is not a sufficient reason for silencing the speaker.<sup>109</sup> These principles serve as workable guidelines for analyzing whether events that were cancelled on college campuses for safety reasons violated the Free Speech Clause. The Sixth Circuit adhered to these principles in *Glasson*.

*Glasson* is a model case for illustrating when a heckler's veto is unconstitutional.<sup>110</sup> In this case, the Sixth Circuit ruled that a police officer violated the freedom of speech when he destroyed a protester's poster for criticizing President Nixon where the officer believed that the content was "detrimental" or "injurious" to the President of the United States.<sup>111</sup> *Glasson*, a young woman, stood peacefully on a public sidewalk, waiting for the President's motorcade to pass by with a sign, which read: "Lead us to hate and kill poverty, disease and ignorance, not each other."<sup>112</sup> A group of Nixon supporters became an-

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106. *Id.* at 320 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

107. *Id.* at 330-331 (Douglas, J., dissenting).

108. *Id.* at 320 (Douglas, J., dissenting).

109. *Id.*

110. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975).

111. *Id.* at 901.

112. *Id.*

gry at the sign “pointing and [hollering] across the street . . . .”<sup>113</sup> The court concluded that the government could not suppress content simply because it provoked a hostile reaction from a crowd; the First Amendment protects, the court concluded, “expression of unpopular as well as popular ideas . . . hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker’s message so long as the speaker does not go beyond mere persuasion and advocacy of ideas and attempts to incite to riot.”<sup>114</sup> Here, Glasson communicated her views to the President “in a place where she had a right to be, at a time that was appropriate, and was conducting herself peacefully and lawfully.”<sup>115</sup> A heckler’s veto cannot be constitutionally evoked to target content when the speaker’s message does not incite.

While the veto is intended to protect the public from violent incitement, the current climate on college campuses may empower self-appointed speech regulators to use the doctrine as a weapon against speech they dislike. Colleges and universities occupy a unique role in our First Amendment traditions because, as speech-enhancing institutions, they prepare students for democratic participation. This point is explored in Part III. That said, recent episodes of violence on college campuses have had administrators scrambling to quell the discord over provocative speakers that are invited to speak on their campuses. The controversies have led some colleges to cancel events due to claimed safety concerns. This presents an opportunity to evaluate whether recent event cancellations under the veto were merited. The next section discusses such incidents.

### *B. Free Speech Red Flags: Canceled Events and Banned Speakers*

In April 2017, conservative commentator Ann Coulter was set to speak at the University of California at Berkeley. Following threats of violence in retaliation of Coulter, the university canceled her event.<sup>116</sup> Administration stated they would accommodate her for a future date and time when tensions were not as high and fewer students were on

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113. *Id.* at 903.

114. *Id.* at 905.

115. *Id.*

116. Susan Svrluga, William Wan & Elizabeth Dwoskin, *Ann Coulter Speech at UC Berkeley Canceled, Again, Amid Fears for Safety*, WASH. POST (Apr. 26, 2017, 3:16 PM), <https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/>.

campus.<sup>117</sup> Despite the cancellation, Coulter insisted that she speak on campus during the school year.<sup>118</sup> The hosts, UC Berkley College Republicans and Young America's Foundation (YAF), ended discussions with Coulter, because they were unable to accommodate both her and campus safety. In response, Berkley's chancellor explained, "While our commitment to freedom of speech and expression remains absolute, we have an obligation to heed our police department's assessment of how best to hold safe and successful events."<sup>119</sup> Here, administrators claimed that safety, not speech, motivated the decision to cancel.

Similarly, New York University (NYU) stopped Milo Yiannopoulos, a conservative provocateur, from speaking at its campus. NYU invited Yiannopoulos, who is frequently associated with the "alt-right" movement, to present his lecture series against political correctness entitled, "The Dangerous Faggot Tour."<sup>120</sup> The university canceled the event after citing to altercations on other campuses involving Yiannopoulos and "serious safety concerns."<sup>121</sup> In addition, the university cited the event's proximity to NYU's Islamic Center, LGBTQ Center, and the Center for Multicultural Education and Programs.<sup>122</sup> Some students argued that Yiannopoulos speech was not productive conversation, but rather "violence inciting hate speech."<sup>123</sup> Other alt-right speakers had their events canceled as well.

Richard Spencer, popularly known leader of the alt-right, was denied speaking opportunities at Ohio State University (OSU), Pennsylvania State University (PSU), and Michigan State University (MSU).<sup>124</sup> At OSU, the administration denied three requests from a graduate student to host Spencer. These denials were made due to concerns of public safety and concerns that Spencer's speech would

117. *Id.*

118. *Id.*

119. *Id.*

120. Diamond Naga Siu, *Milo Yiannopoulos Talk Canceled Due to Security Concerns*, WASH. SQUARE NEWS (Oct. 16, 2016), <https://nyunews.com/2016/10/16/milo-yiannopoulos-talk-canceled-due-to-security-concerns/>.

121. *Id.*

122. *Id.*

123. *Id.*

124. Susan Svrluga, *Michigan State Agrees to Let Richard Spencer Give a Speech on Campus*, WASH. POST (Jan. 18, 2018, 1:36 PM), <https://www.washingtonpost.com/news/grade-point/wp/2018/01/18/michigan-state-agrees-to-let-richard-spencer-give-a-speech-on-campus/>; Rosenberg, *supra* note 69.

cause “material and substantial disruption to the work and discipline of the University.”<sup>125</sup> The resulting lawsuit claimed that the university denied Spencer’s First Amendment rights because of his beliefs and the assumption that he would advocate for violent conduct. Spencer eventually dropped the suit.<sup>126</sup>

PSU denied Spencer’s request as well. After requesting to speak, the university consulted with campus, state, and federal law enforcement officials.<sup>127</sup> The university denied Spencer’s request to speak in a formal letter also upholding its support for free speech.<sup>128</sup> PSU claimed that this denial was not derived from the content of his speech, but rather from the danger that was likely to come.<sup>129</sup> The court dismissed his lawsuit for failure on procedural grounds for Spencer failing to serve complaints to the defendants.

Lastly, Spencer’s successful lawsuit against Michigan State University allowed him to speak on campus.<sup>130</sup> The university denied his original request to speak in August of 2017 due to public safety concerns.<sup>131</sup> Following a lawsuit, MSU was required to provide Spencer a place to speak and pay for security costs.<sup>132</sup> This event occurred during spring break and in a location that “minimize[d] the risk of violence or disruption to campus.”<sup>133</sup>

Far right speakers are not the only speakers shut down. For example, DePaul University prevented Ben Shapiro, a libertarian commentator, from speaking on campus because he was not “preapproved.”<sup>134</sup> The university did not even allow Shapiro to enter the venue.<sup>135</sup> Elsewhere, PSU administrators claimed that he was not properly approved as a speaker or guest under university guidelines.<sup>136</sup> Notably, the university did not assert a security reason to jus-

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125. Rosenberg, *supra* note 69.

126. *Id.*

127. Capri, *supra* note 69.

128. *Id.*

129. *Id.*

130. Svrluga, *supra* note 124.

131. *Id.*

132. *Id.*

133. *Id.*

134. Marwa Eltagouri, *DePaul University Turns Down Conservative Speaker, Citing Security Concerns*, CHI. TRIB. (Aug. 03, 2016, 3:45 AM), <https://www.chicagotribune.com/news/ct-ben-shapiro-depaul-met-20160802-story.html>.

135. *Id.*

136. *Id.*

tify silencing him. This represents an about-face for PSU. Several months prior, the university denied an event with Shapiro and Yianopoulos, citing security and safety concerns.<sup>137</sup>

In 2014, Brandeis University decided to invite Ayaan Hirsi Ali, a Dutch-American politician and female activist, to its commencement ceremony to receive an honorary degree from the university.<sup>138</sup> A month before commencement, a controversial comment made by Ali surfaced. Ali, a well-known critic of Islam, referred to the religion as “a destructive, nihilistic cult of death.”<sup>139</sup> After administration learned about this comment, they revoked Ali’s invitation.<sup>140</sup> The university clarified the difference between inviting a speaker to discuss a topic and providing an individual with an honorary degree. The school welcomes speakers who have “unpopular or provocative views.”<sup>141</sup> However, granting an honorary degree means, the school reasoned, the school is affirming the work of that individual.<sup>142</sup> The Brandeis University President made clear, however, that Ali was not banned from “campus in the future to engage in a dialogue.”<sup>143</sup> The article now turns to apply the heckler’s veto to the speakers previously discussed.

### *C. Case Studies: Can the Heckler Veto the Speaker’s Speech?*

#### *1. Constitutional heckler’s vetoes*

As previously explained, a heckler’s veto may only be evoked in situations where speech incites violence; speech cannot be restricted simply because the audience is hostile towards the speaker or the message.<sup>144</sup> One extreme example where the heckler’s veto may be enforceable is Richard Spencer’s attempts to speak at Michigan State University, and his lawsuits to that end. Spencer’s National Policy In-

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137. *Id.*

138. Richard Pérez-Peña & Tanzina Vega, *Brandeis Cancels Plan to Give Honorary Degree to Ayaan Hirsi Ali, a Critic of Islam*, N.Y. TIMES (Apr. 8, 2014), <https://www.nytimes.com/2014/04/09/us/brandeis-cancels-plan-to-give-honorary-degree-to-ayaan-hirsi-ali-a-critic-of-islam.html>.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Feiner*, 340 U.S. 315, 320 (1951).



stitute seeks to hold events at colleges across the nation.<sup>145</sup> However, MSU President Lou Ann Simon rejected Spencer's original request to speak at the university, explaining that the university did not permit his event "not because of [the National Policy Institute's] hateful views, but because public safety is our first obligation."<sup>146</sup> There was mass violence in the wake of a past Spencer event. Most notably, he led a "Unite the Right" rally at the University of Virginia in Charlottesville, where 250 demonstrators carried tiki torches and yelled slurs.<sup>147</sup> At a local park, white nationalists clashed with counter-protesters, while "carrying large shields and long wooden clubs."<sup>148</sup> Later that day, a rallygoer plowed his Dodge Challenger into a crowd, injuring nineteen pedestrians and killing one.<sup>149</sup> The threat of violence from Spencer's racially charged events are not imagined but real.

In response to Spencer's suit, MSU announced that it would accommodate his right to speak while keeping students safe.<sup>150</sup> The parties agreed to hold the event during spring break "at a venue that minimizes the risk of violence or disruption to campus."<sup>151</sup> Despite these efforts, administrator's worst fears came true—total chaos. A fight broke out between Spencer supporters and counter-protesters.<sup>152</sup> Counter-protestors attacked police "often preceded by a few thrown water bottles and rocks, screaming at the supporters, who often screamed back. Then, a protester or two would try to break through the police to get at the supporter, who sometimes fought back."<sup>153</sup> The police arrested twenty-four people, some of whom were armed.<sup>154</sup>

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145. Svrluga, *supra* note 124.

146. *Id.*

147. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesvilletimeline/>.

148. *Id.*

149. *Id.*

150. Rick Fitzgerald, *U-M Will Consider Renting Space to White Supremacist Speaker*, THE U. REC. (Nov. 21, 2017), <https://record.umich.edu/articles/u-m-will-consider-renting-space-white-supremacist-speaker>.

151. *Id.*

152. *Id.*

153. *Id.*

154. Jeremy W. Peters & Thomas Fuller, *Ann Coulter Says She Will Pull Out of Speech at Berkeley*, N.Y. TIMES (Apr. 26, 2017), [hereinafter Peters & Fuller] <https://www.nytimes.com/2017/04/26/us/ann-coulter-berkeley-speech.html>.

Another example of permissible use of the heckler's veto is when New York University (NYU) canceled Milo Yiannopoulos' scheduled talk. In an email sent to attendees, the university stated: "On other campuses his events have been accompanied by physical altercations, the need for drastically enlarged security presence, harassment of community members both at the event and beyond and credible threats involving the presence of firearms or explosives."<sup>155</sup> The "physical altercations" triggered from Yiannopoulos' past events substantiate the heckler's veto.<sup>156</sup> An important point is raised by the group who planned this event, the NYU College Republicans. In a statement against the university's decision, the group stated, "that the overwhelming majority of physical altercations and violence at Mr. Yiannopoulos' past events have been directed at him and the audience, not carried out by them."<sup>157</sup> Although this point is accurate, it does not preclude the veto.

But Yiannopoulos's events go beyond provoking hostility, inciting actual violence. For example, Berkeley officials canceled a Yiannopoulos talk because a riot erupted two hours before the event started.<sup>158</sup> The university faced a serious security emergency—total chaos broke out. One hundred and fifty "masked agitators" descended onto the campus.<sup>159</sup> "The violent protesters tore down metal barriers," one news outlet reported, "set fires near the campus bookstore and damaged the construction site of a new dorm."<sup>160</sup> Black-clothed protestors with masks "threw commercial-grade fireworks and rocks at police. Some even hurled Molotov cocktails that ignited fires."<sup>161</sup> Six people were injured and the incident left \$100,000 in damage.<sup>162</sup> With this track record, Milo Yiannopoulos might be the poster child for the heckler's veto.

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155. *Id.*

156. *Id.*

157. *Id.*

158. Peters & Fuller, *supra* note 154.

159. *Id.*

160. Lori Falce, *Ohio State Responds to Spencer Suit, Cites Safety as Reason for Denial*, CENTRE DAILY TIMES (Jan. 7, 2018) <https://www.centredaily.com/news/local/education/pennstat/article193483689.html>.

161. *Id.*

162. *Id.*

Berkeley has also employed the heckler's veto to guarantee the speaker's safety.<sup>163</sup> After Berkeley canceled the Yiannopoulos talk, the Berkeley College Republicans and the YAF invited Ann Coulter to campus. The university wanted to accommodate the request, preferring to hold the event the following week when the student body was on break to reduce the likelihood of "violent outbreaks."<sup>164</sup> Moreover, the university was concerned with Coulter's safety, wanting her to speak in an "indoor, 'protectable' venue."<sup>165</sup> Berkeley's security concerns were based on compelling evidence. The police chief described the campus as a meeting site for extreme groups to come "armed and prepared to fight." He explained that a Coulter-like event would involve considerable risk: "[Police] [i]ntervention requires a major commitment of resources, a significant use of force, and carries with it the strong likelihood of harming those who are not committing a crime."<sup>166</sup> The hosting groups withdrew their participation from the event because they did not want to "jeopardize the safety of its staff or students." Coulter eventually relented and withdrew from the engagement. But she believed Berkeley violated her freedom of speech. "Even the most lefty, Coulter-hating judge," she proclaimed, "would probably have had to order Berkeley to let me speak."<sup>167</sup> In light of actual violence occurring at Berkeley, Coulter's constitutional assessment sounds more based in hyperbole than law. Nevertheless, there are instances where universities have used the heckler's veto to shut down protected speech.

## 2. *Unconstitutional heckler's vetoes*

OSU unconstitutionally evoked the heckler's veto, arguing that Spencer's presence presented a public safety risk. OSU based its decision in part on Spencer's appearance at the University of Florida, calling his visit there "a de facto closing of the campus."<sup>168</sup> Government officials and law enforcement reacted aggressively to his visit. The governor declared a state of emergency, costing \$500,000 in ad-

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163. Peters & Fuller, *supra* note 154.

164. *Id.*

165. *Id.*

166. Peters & Fuller, *supra* note 154.

167. *Id.*

168. *Id.*

ditional security.<sup>169</sup> Hundreds of police officers “patrolled the city, and officials blocked key roadways using cement barricades, dump trucks and other large obstacles.”<sup>170</sup> At the event, there were heated exchanges between Spencer and the audience. “I feel sorry for you. Do you know how this is going to be read?,” he asked, “[d]o you think this is going to be read as, ‘Great victory for U of F?’ No.”<sup>171</sup> There were crowd outbursts. Some attendees shouted: “Go home, racist, go home!” Others chanted: “Say it loud! Say it clear. Nazis are not welcome here.”<sup>172</sup>

Still, this event was not a sufficient reason for OSU to prevent Spencer from speaking. Verbal attacks between the audience and Spencer are emblematic of what occurs when individuals express fervent disagreement in the public square. As Justice Douglas wrote in *Feiner*, “When unpopular causes are [in] the public platform, there will commonly be mutterings and unrest and heckling from the crowd. When a speaker mounts a platform it is not unusual to find him resorting to exaggeration, to vilification of ideas and men, to the making of false charges.”<sup>173</sup> Heated exchanges between an offensive speaker and a heckling crowd do not justify banning that speaker from the public forum under the First Amendment.<sup>174</sup> OSU officials, unlike University of Florida officials, could point to “three white nationalists who were arrested for attempted murder after firing shots at protesters following Spencer’s speech.”<sup>175</sup> However, there is no evidence that Spencer incited the assailants to violence. Therefore, the heckler’s veto should not be used here. Spencer’s disgusting beliefs are the “vegetables” we have to stomach to preserve the health of democracy.

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169. *Id.*

170. Rick Neale, ‘Go Home, Racist!’ Richard Spencer Shouted Down at University of Florida Speech, USA TODAY (Oct. 19, 2017, 9:25 PM), <https://www.usatoday.com/story/news/nation-now/2017/10/19/richard-spencer-shouted-down-university-florida-speech/781966001/>.

171. *Id.*

172. *Id.*

173. *Feiner*, 340 U.S. at 320.

174. *Id.*

175. Falce, *supra* note 160.

PSU announced that it consulted with state and federal law enforcement in its decision to invite Spencer to its campus.<sup>176</sup> However, statements from PSU President Eric Barron indicate that the ultimate decision to deny Spencer on security grounds was pretextual. In truth, it was the content of Spencer's message that motivated the decision. Barron explained that Spencer would not speak because there is "no place for hatred, racism or bigotry in our society or on our campuses."<sup>177</sup> He further stated that "I disagree profoundly with the *content* that has been presented publicly about this speaker's views which are abhorrent and contradictory to our University's values."<sup>178</sup> Strikingly, Barron's statement does not discuss recommendations from law enforcement or campus police about additional security measures, nor does it cite to past appearances as evidence to support the university's safety concerns; however, similar to the police officer in *Glasson*, Barron objected to the "content" of Spencer's message.<sup>179</sup> University officials cannot engage in content-based action against a speaker under the Free Speech Clause.<sup>180</sup> Because Spencer espouses bigoted and racist opinions, Barron's statement reveals that PSU employed security as a means to suppress the free communication of his offensive, yet protected, views.<sup>181</sup>

Ben Shapiro's ban from DePaul University represents a reactionary, and patently unconstitutional, exercise of the veto. The university cited "the experiences and security concerns that some other schools have had with Ben Shapiro speaking on their campuses" as its reason for banning him.<sup>182</sup> The main example DePaul cited to was California State University, Los Angeles (CSULA). That university violated Shapiro's free speech as well.

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176. Ramsey Touchberry, *Penn State Becomes Fifth University to Deny White Nationalist Richard Spencer*, USA TODAY (Aug. 23, 2017, 5:35 PM), <https://www.usatoday.com/story/news/college/2017/08/23/penn-state-becomes-fifth-university-deny-white-nationalist-richard-spencer/595100001/>.

177. Falce, *supra* note 160.

178. Eric J. Barron, *Richard Spencer is Not Welcome to Speak at Penn State*, Penn State University, (Aug. 22, 2017), <https://news.psu.edu/story/478590/2017/08/22/administration/richard-spencer-not-welcome-speak-penn-state> (emphasis added).

179. *See Glasson*, 518 F.2d at 899.

180. *Id.*

181. *Id.*

182. John Minster, *Breaking: DePaul University Bans Shapiro*, THE DAILY WIRE (Aug. 1, 2016), <https://www.dailywire.com/news/7864/breaking-depaul-university-bans-shapiro-john-minster>.

YAF invited Shapiro to give a lecture entitled “When Diversity Becomes a Problem” at CSULA.<sup>183</sup> Later, the college president cancelled his lecture. I believe this decision was made not because of security concerns, but simply because the college president did not like the speaker lineup. Shapiro could not be the only voice on stage; the event needed additional speakers “with different viewpoints [who] could also talk and allow ‘the free exchange of ideas.’”<sup>184</sup> Shapiro attended the event anyway and spoke for an hour until an agitator pulled the fire alarm. Protesters met Shapiro at the student union and blocked entrances to the event. There was “intense interactions” between pro- and anti-Shapiro attendees, with some “shouting and pushing.”<sup>185</sup> And yet, there were no reports of violent outbreaks, fights, or riots. Any “intense interactions” were minor scrimmages that could easily be managed by police.<sup>186</sup>

Lastly, the Ayaan Hirsi Ali incident is different from a heckler’s veto case. Brandeis University invited Ali to receive an honorary degree at commencement.<sup>187</sup> As noted earlier, administrators withdrew their invitation because Ali made an anti-Islam remark.<sup>188</sup> Disinviting a speaker is valid under the First Amendment, because schools are not required to sponsor speech or individuals that they disagree with.<sup>189</sup> A school granting an honorary degree is the school’s decision to affirm and support the work of that individual. The school, as a faculty and administration, is allowed to decide who to support and honor with an honorary degree.<sup>190</sup> Had a student organization invited

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183. Sid Garcia & Tim Rearden, *Ben Shapiro Escorted by Police from CSULA Due to Angry Protestors*, ABC7 NEWS (Feb. 26, 2016), <https://abc7.com/news/ben-shapiro-escorted-from-csula-due-to-angry-protestors/1219358/> [hereinafter Garcia & Rearden].

184. Eugene Volokh, *Cal State L.A. Cancels Speech by Conservative Writer Ben Shapiro [UPDATE: Cal. State L.A. Is Allowing Shapiro to Speak After All]*, WASH. POST (Feb. 25, 2016, 11:30 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/25/cal-state-l-a-cancels-speech-by-conservative-writer-ben-shapiro/>.

185. Garcia & Rearden, *supra* note 183.

186. *Id.*

187. Douglas Belkin, *Brandeis Backtracks on Honor for Activist Ayaan Hirsi Ali, Critic of Islam*, WALL ST. J. (Apr. 9, 2014, 8:00 PM), <https://www.wsj.com/articles/brandeis-backtracks-on-honor-for-activist-ayaan-hirsi-ali-critic-of-islam-1397088011>.

188. *Id.*

189. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

190. *Id.*

Ali and the university banned her from coming because of her remarks on Islam, the heckler's veto would violate First Amendment.<sup>191</sup>

### 3. *Liberals and disruptive protesters*

This section discussed universities who banned “conservative” or “far right” speakers,<sup>192</sup> but conservatives are not the only ones whose events are shut down due to disruptive protests. Liberal speakers also experience backlash. In October 2017, the California Attorney General Xavier Becerra and Assembly Majority Leader Ian Calderon spoke at Whittier College.<sup>193</sup> Both individuals are members of the Democratic Party. Their event was shut down after Trump supporters, wearing “Make America Great Again” hats, lambasted Becerra with “boos, slogans, and insults.”<sup>194</sup> These protestors opposed Becerra's lawsuit against the Trump administration over the Deferred Acting Program for Childhood Arrivals.<sup>195</sup> The protesters repeatedly interrupted Becerra with chants, such as “lock him up,” “build that wall,” “obey the law,” “respect our president,” “Americans first,” and “You must respect our president!”<sup>196</sup> Even though Whittier scheduled the event to last an hour, it concluded only after thirty-four minutes.<sup>197</sup>

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191. *Id.*

192. The Oxford Dictionary defines a “conservative” as someone who, “is averse to change and holds traditional values.” *Conservative*, LEXICO.COM, <https://en.oxforddictionaries.com/definition/conservative> (last visited Mar. 5, 2020). These values include, “free enterprise, private ownership, and socially conservative ideas.” *Id.* Conservatives should not, however, be lumped with those on the “far right” of the political spectrum. The “far right” includes “right-wing political, social and religious movements that exist outside of and are more radical than mainstream conservatism.” *Extreme Right/Radical Right/Far Right*, ANTI-DEFAMATION LEAGUE <https://www.adl.org/resources/glossary-terms/extreme-right-radical-right-far-right> (last visited Mar. 5, 2020). It includes the “white supremacist movement, including its various submovements, such as neo-Nazis, racist skinheads, and the alt right, among others.” *Id.* One subgroup includes those who identify as “alt-right” (short for “alternative right”), which “is a segment of the white supremacist movement consisting of a loose network of racists and anti-Semites who reject mainstream conservatism in favor of politics that “embrace implicit or explicit racism, anti-Semitism and white supremacy.” *Id.* This movement has provocative leaders like Richard Spencer and Milo Yiannopoulos.

193. Adam Steinbaugh, *Hecklers Shout Down California Attorney General, Assembly Majority Leader at Whittier College*, FIRE (Oct. 13, 2017), <https://www.thefire.org/hecklers-shout-down-california-attorney-general-assembly-majority-leader-at-whittier-college/>.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

Similarly, Illinois State Attorney Anita Alvarez, a Democrat, spoke at the Institute of Politics at the University of Chicago. After twenty minutes, the event ended due to protests from students and community members. Black Lives Matter (BLM) opposed her, because the group found Alvarez responsible for “state violence against Black and brown people in the City of Chicago” and for not charging police officers for brutality.<sup>198</sup> Alvarez left the room when protesters held up signs chanting: “Anita Alvarez does not believe that Black lives matter.” Although the event did not continue, administrators admonished protestors to “listen even when they deeply disagree with the issue and do so . . . substantively.”<sup>199</sup> Comparably, an event at the University of Pennsylvania with then-CIA Director John Brennan ended early due to interruptions from protestors.<sup>200</sup> Protesters were continuously removed from the audience, exclaiming their discontent with Brennan and the CIA’s use of drones. Exclamations heard throughout the event included “the CIA is a terrorist group” and “drones kill kids.”<sup>201</sup> Penn Law Dean Theodore Ruger had to enter the talk several times in an attempt to end the distracting protests. He stated, “We’ve heard your views, we respect your views. . . What you’re doing now is silencing speech.”<sup>202</sup> His comments had no beneficial effect. After the third major interruption, the moderator decided to end the event. It is clear that respect for differing opinions was a lost value at the University of Chicago and the University of Pennsylvania events. Unfortunately, it continues to be a lost value among college students across many of the nation’s universities today.

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198. Jaehoon Ahn, *Speaker Driven from IOP by Black Lives Matter Protesters*, CHIC. MAROON (Feb. 19, 2016), <https://www.chicagomaroon.com/2016/02/19/speaker-driven-from-iop-by-black-lives-matter-protesters/>.

199. *Id.*

200. Ally Johnson, *Protests Shut Down CIA Director’s Talk at Penn*, THE DAILY PENNSYLVANIAN (Apr. 1, 2016, 10:25 PM), <http://www.thedp.com/article/2016/04/protests-shut-down-cia-director-john-brennan-talk>.

201. *Id.*

202. *Id.*



### III. THE FREE SPEECH CRISIS: THE COLLEGES' FIRST AMENDMENT ROLE, SPEECH-INHIBITING POLICIES, AND DIALOGUE-FACILITATING PROPOSALS

#### A. *The Ideal Classroom: The University's First Amendment Role*

The violent, anti-speech wave that consumed campuses raises the question: how did college campuses develop environments hostile towards unpopular viewpoints? Part II identifies those speech-inhibiting policies that create a vacuum in the public forum that extreme voices now occupy. I conclude that the current climate on the nation's campuses presents a free speech crisis: hostility towards minority views disables the college's First Amendment function in cultivating a marketplace of ideas.

College campuses ideally provide a fertile environment where different perspectives are appreciated, evaluated, and valued. As Justice Powell reasoned, campus diversity is achieved when free expression of beliefs and opinions are voiced in the classroom.<sup>203</sup> In *Grutter v. Bollinger*, Justice O'Connor explained the educational benefits that arise from classroom diversity. Students, through their experience and personal history, inform a livelier discussion.<sup>204</sup> Ideally, the classroom provides a forum for information exchange and challenge to the status quo where students and faculty break down stereotypes and prove that there is no minority viewpoint.<sup>205</sup> *Grutter* also found that diversity enhances individual enlightenment and society as a whole. When students are exposed to various views, they become prepared for work and democratic participation as informed citizens.<sup>206</sup> College can acclimate students to a life which includes and requires "all types." With hard workers and productive citizens, the "fabric of society" is maintained, protecting our nation's liberties and democracy for future generations.<sup>207</sup> Justice O'Connor states that universities, "represent the training ground for a large number of our Nation's

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203. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

204. *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003).

205. *Id.*

206. *Id.*

207. *Id.*

leaders.”<sup>208</sup> But certain policies can turn this training ground into an intellectual desert.

*Sweezy v. New Hampshire* illustrates the dangers presented by a free college environment. In the 1950s, the New Hampshire Legislature adopted the Subversive Activities Act, defining a subversive person as someone who engages in actions to overthrow the government.<sup>209</sup> Teachers were contractually obligated to not fall astray of these restrictions. Paul Sweezy, a lecturer at the University of New Hampshire and a proponent of Socialistic ideals, presented his views to the class.<sup>210</sup> An investigation was conducted and the Attorney General questioned Sweezy on the Progressive Party, the Wallace campaign, and the purposes of his lecture.<sup>211</sup> Sweezy declined to answer and was charged with contempt. He then filed a claim to the New Hampshire Supreme Court, asserting that the interrogation violated his speech rights.<sup>212</sup>

This case remains integral to the ongoing discussion today. The decision boldly affirms the necessity for a free marketplace of ideas in society, especially in academia. Students and school administrators must not underestimate the essentiality of classroom freedom. “Strait-jacketing” intellectuals jeopardizes our future leaders. As Sweezy puts it, teachers and students must remain free from government policies that would restrain their ability to investigate different views or else society will be intellectually dead.<sup>213</sup> At the higher education level, the free and open exchange of ideas is central to the academic mission. Even private institutions, which can theoretically censor speech, should enact policies protecting free speech.

Still, this “strait-jacketing” occurs in schools today with campus policies that hinder students and instructors from expressing their original, sometimes minority-held, thought. *Sweezy* correctly overturned a law that prohibited a communist from teaching at a public university.<sup>214</sup> Another chilling example of government speech restrictions is *Mayer v. Monroe County Community School Corpora-*

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208. *Id.*

209. *Sweezy v. State of N.H.* by Wyman, 354 U.S. 234, 236–37 (1957).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

tion.<sup>215</sup> There, the Seventh Circuit affirmed the firing of a public school teacher over her vocal opposition to the Iraq War in the classroom. Deborah A. Mayer, a teacher, used a *TIME for Kids* article to discuss the then ongoing conflict between the U.S. and Iraq.<sup>216</sup> Students asked if she participated in peace marches, and Mayer revealed that she “honked for peace” while driving by such rallies. Mayer explained that it was important “for people to seek out peaceful solutions to problems before going to war.”<sup>217</sup> After many complaints from parents about her position, her teaching contract was not renewed. Citing to *Garcetti v. Ceballos*, Mayer held: “When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>218</sup> Should our nation’s secondary schools prevent productive, opinionated discussion, colleges may follow suit.

*B. Speech-Inhibiting Policies and the Speech Gerrymander on Campus*

*1. Speech-inhibiting practices: safe spaces, racialized housing, disinvitations, and free speech zones*

Different opinions are not always allowed in the university forum. Universities themselves are often complicit in producing this environment. This has led to a speech deficit on college campuses. In an effort to create an inclusive environment, administrators have implemented speech-inhibiting policies and programs that counteract the educational benefits that arise from campus diversity. Such policies include safe spaces, race-based housing, and free speech zones. It is noteworthy that there is a distinction between these policies and their alternatives. For instance, programs offered based on “interest” in a particular race, gender, or sexual orientation might meet legal muster as students are not coerced to occupy a themed space or residence hall. However, diversity bureaucrats guide certain students to live and

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215. *Mayer v. Monroe Cty. Cmty. Sch. Dist.*, 474 F.3d 477 (7th Cir. 2007).

216. *Id.*

217. Mark Walsh, *Teacher’s Free Speech Case Denied*, EDUC. WK. (Oct. 5, 2007), [https://www.edweek.org/tm/news/profession/2007/10/05/ew\\_freespeech\\_web.h19.html](https://www.edweek.org/tm/news/profession/2007/10/05/ew_freespeech_web.h19.html).

218. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

learn around those who look, feel, or live like they do. The University of Missouri's Gaines/Oldham Black Culture Center, for example, serves as a resource center for African American students. The center's goals include, "support for higher retention and graduation rates of Black students" and "leadership development opportunities and . . . a safe space for students."<sup>219</sup> These goals are laudable and are not facially prohibitive. If utilized correctly, these spaces can foster mutual understanding and respect among people of differing ethnicities and experiences. However, these programs can inhibit intergroup dialogue and encourage students, particularly white students, to remain comfortable with people who look and believe like them. Intellectual curiosity is not banned, but it is not encouraged either. These programs short-circuit speech, leaving campuses marred in group-based division.

*a. Safe spaces.* Conflict between students is inevitable. What's more, such discussions may range from a variety of topics, all differing in severity. When conversations lean towards the latter, however, student groups progressively begin to advocate for speech codes and safe spaces. Such policies offer a space in which like-minded and same-race individuals can join together on campus. At their core, these policies proffer certain criteria for involvement—a set of rules. The University of Michigan's the Office of Diversity, Equity, and Inclusion, for example, created a "Strategic Plan" to ensure diversity initiatives campus wide.<sup>220</sup> This plan mandates that all programs create guidelines for communication. These guidelines include having students think before they speak, discuss their sense of harm in response to a variety of social issues, and remain emphatic to others. The School of Environment and Sustainability at the University of Michigan aims to "sensitize members of our community to the ways that seemingly innocent utterances or gestures may be experienced as insulting or demeaning by others whether or not such an effect was intentional."<sup>221</sup> This guideline

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219. University of Missouri, *Mission*, GAINES/OLDHAM BLACK CULTURE CTR. <https://gobcc.missouri.edu/about/mission/> (last visited Mar. 5, 2020).

220. University of Michigan, *Strategic Plan*, U. OF MICHIGAN DIVERSITY, EQUITY AND INCLUSION (2018), <https://diversity.umich.edu/strategic-plan/> (last visited Mar. 17, 2020).

221. U. of Michigan School for Env't and Sustainability, Diversity, Equity and Inclusion, *Strategic Plan*, U. OF MICHIGAN DIVERSITY, EQUITY AND INCLUSION (2018), [https://seas.umich.edu/sites/all/files/documents/Y3%20DEI%20Plan%20SEAS%20July%202018\\_FINAL\\_Oct5%20%283%29.pdf](https://seas.umich.edu/sites/all/files/documents/Y3%20DEI%20Plan%20SEAS%20July%202018_FINAL_Oct5%20%283%29.pdf).

discourages microaggressions and other triggering words in classroom discussion. Such words are not, however, explicitly defined.<sup>222</sup> Similarly, the university's School of Nursing's Strategic Plan provides an "identity based micro-aggressions and unconscious bias training."<sup>223</sup> These microaggressions are not allowed in so-called safe spaces. Some schools have attempted to define microaggressions, but their definitions remain subjective. For example, the University of Minnesota created a list of microaggressions that students should not say. These include asking a student for biographical information, such as "Where are you from?" or "Where were you born?" In addition, the list includes statements like, "I believe the most qualified person should get the job."<sup>224</sup> Simmons College in Boston listed the benign phrase "God bless you" after a sneeze as a microaggression.<sup>225</sup> Diversity officials aim to erase these microaggressions from classroom discussion. And yet, no evidence is available on how these universities define "microaggression".<sup>226</sup> This turns the concept into a loaded gun during classroom discussion. Because the term is ill-defined, any utterance can be labeled as bigoted and thus shot down as a legitimate ground for discussion.

Elite universities not only aim to sanitize classroom discussion, but diversity officials also provide "safe spaces" for students to discuss sensitive issues. These spaces foster an environment free from dis-

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222. *Id.* ("Microaggressions in and outside of the classroom among students and between students, microaggressions between faculty and staff and microaggressions from supervisory staff to staff continues to be an issue at SEAS in year 2. Faculty including tokenism and a lack of understanding resulting in uncomfortable situations continue to be an issue in SEAS. More workshops on implicit bias and microaggressions may help to address and mitigate these commonplace moments.").

223. U. of Michigan School of Nursing, *Diversity, Equity and Inclusion Strategic Plan*, U. OF MICHIGAN DIVERSITY, EQUITY AND INCLUSION (2018), [https://nursing.umich.edu/sites/default/files/content/diversity/doc/sn\\_y3\\_dei\\_strat\\_plan\\_fy19.pdf](https://nursing.umich.edu/sites/default/files/content/diversity/doc/sn_y3_dei_strat_plan_fy19.pdf).

224. U. MINNESOTA, *Examples of Racial Microaggressions*, <https://sph.umn.edu/site/docs/hewg/microaggressions.pdf> (last visited Mar. 17, 2020).

225. Bradford Richardson, *College Lists 'God Bless You' as a 'Microaggression'*, WASH. TIMES (March 15, 2018), <https://www.washingtontimes.com/news/2018/mar/15/college-lists-god-bless-you-microaggression/>.

226. Apparently, people can be microaggressions. There is a petition with over 3,500 signatures to fire Justice Brett Kavanaugh from the faculty at George Mason Law School, demanding that he not teach a constitutional law course during the 2019 summer term, because many students argue that his presence negatively triggers the mental health of students and faculty. Walter E. Williams, *Justice Kavanaugh and the GMU Snowflakes*, TOWNHALL (Apr. 24, 2019), <https://townhall.com/columnists/walterewilliams/2019/04/24/justice-kavanaugh-and-gmu-snowflakes-n2545163>.

comfort.<sup>227</sup> This physical space is needed, particularly for racial minorities, it is argued, because a body of research suggests widespread feelings of loneliness and isolation on predominantly white university campuses.<sup>228</sup> Safe spaces reduce this isolation threat by giving minority students leeway to create a community free from stereotype, stigma, or microaggressions.<sup>229</sup> These spaces promote claimed educational benefits with better academic performance and graduation rates from, for instance, black students who live with other blacks and participate in African American student groups.<sup>230</sup> Theoretically, safe spaces serve as a secure platform for minority students to express sensitive opinions. Some safe spaces at the University of Michigan are called multicultural centers. These rooms, mainly in undergraduate dorms, “recognize the activism and accomplishments of underrepresented groups.”<sup>231</sup> The National Center for Institutional Diversity at the university claimed that these centers are “for the safety of the students staying in the dorms.”<sup>232</sup> The University of Michigan’s information is unclear as to how students gain access to these lounges.

While some universities deny these types of spaces, others follow the University of Michigan and submit to student demands. For example, the Black Student Union at University of California Irvine requested a “Black Scholars’ Hall.” This was accepted in 2015, and became a space where “Black history, culture, and intellectual thought is celebrated.”<sup>233</sup> These spaces are supported by administrators. For example, Northwestern President Morton Schapiro wrote in 2016 that “[w]e all deserve safe spaces . . . and black students had every right to enjoy their lunches in peace.” Schapiro cited to Northwestern “Hillel House” that ensures Jewish students could eat lunch without “worry[ing] about being interrogated by non-Jews about Is-

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227. Raeann Pickett, *Trigger Warnings and Safe Spaces are Necessary*, TIME (Aug. 31, 2016), <https://time.com/4471806/trigger-warnings-safe-spaces/>.

228. Harpalani, *supra* note 46, at 128.

229. *Id.* at 129-31.

230. Adside, *supra* note 1, at 563 n. 267.

231. *Lounges*, U. MICHIGAN (2019), <https://housing.umich.edu/multicultural-lounges-and-spaces/>.

232. Dr. Stephen Ward, Dr. Lee Gill, and Sena Adjei-Agbai, *Safe Spaces*, U. MICH. NAT’L CTR. FOR INSTITUTIONAL DIVERSITY (Nov.13, 2017), <https://sites.lsa.umich.edu/m-visible-voices/2017/11/13/safe-spaces/>.

233. Frank Furedi, *Campuses are Breaking Apart into Safe Spaces*, L.A. TIMES (Jan. 5, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-furedi-safe-space-20170105-story.html>.

raeli politics or other concerns.”<sup>234</sup> In this view, minority students need to be shielded from unwanted questioning and discussions from other inquisitive students.

Although these areas are intended to benefit minority students, these spaces permit students to inhibit discussion by, ironically, other minorities. These spaces are vulnerable to groupthink.<sup>235</sup> Groupthink was studied in the corporate executive context and defined as a cohesive in-group that blindly adopts a line of reasoning to seek social acceptance from its peers and to secure unanimity in its collective decision-making.<sup>236</sup> In this environment, alternatives are not evaluated because “self-appointed regulators” reinforce group think by treating dissenters harshly.<sup>237</sup> Often, they warn group members to disassociate with the dissenting member, branding him or her with “verbal scarlet letters, singling them out for shunning or disrespect.”<sup>238</sup> The phenomenon has been observed among African-Americans, where a scholar found that the so-called “Soul Patrol” police a race-based criteria where it “tries to decide who is Black and who is not.”<sup>239</sup> More broadly, some students learn in a “polarized campus” where sensitive conversations take place within small, insular groups where outsiders are shamed for not falling into a pre-ordained category.<sup>240</sup>

These spaces not only burden intragroup discussion, but also discourage interracial exchange; white students are either excluded or dissuaded from entering into them or from participating in the areas’ forums all together.<sup>241</sup> Racialized conflicts cause many white students, who are often identified as racial oppressors in such events, to “distance themselves from minority students to avoid controversial discussions that may result in them being labeled as racist.”<sup>242</sup> Such safe spaces, unfortunately growing on campuses, encourages both group retreat and exclusivity along racial lines.

Concern about safe spaces is bipartisan. The case for unfettered free expression on college campuses is by no means a distinctively

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234. *Id.*

235. Kuykendall & Adside, *supra* note 51, at 107.

236. *Id.* at 1079 n.392.

237. *Id.* at 1079 n.393.

238. *Id.* at 1079–80.

239. *Id.* at 1079 n.393.

240. Adside, *supra* note 1, at 564.

241. *Id.* at 563.

242. *Id.*

conservative one. Indeed, countless progressive figureheads have begun advocating for similar principles and practices. In February 2017, for instance, liberal political commentator Van Jones voiced his apprehension about safe spaces.<sup>243</sup> With David Axelrod moderating, Jones explained two ascendant views on safe spaces—one in favor, and one against. The former is one where there should be safe spaces on campus where students are free from physical assault. The latter, however, is one where students are protected “ideologically.”<sup>244</sup> According to this perspective, students should be insulated from perspectives that merely offend them.<sup>245</sup> To this, Van Jones noted that “[he] do[es] not want [students] to be safe, ideologically.”<sup>246</sup> “I’m not going to take all of the weights out of the gym; that’s the whole point of the gym. This is the gym” he remarked.<sup>247</sup>

*b. Disinvitations and withdrawals.* In an environment where students can retreat into spaces where they are shielded from opposing views, they do not develop the analytical skills necessary to objectively evaluate such opinions; this is evidenced in notable speaker disinvitations and withdrawals from campus events.

Condoleezza Rice, the first female African American Secretary of State, withdrew as the 2014 Rutgers’s University commencement speaker. Rice made this decision after several weeks of protest against her “involvement in the Iraq war.”<sup>248</sup> She concluded that her address would be a “distraction for the university community at this very special time.”<sup>249</sup> Similarly, in 2013, former neurosurgeon Ben Carson withdrew his invitation to speak at the Johns Hopkins University graduation ceremony. Carson’s invitation received push back due to his prior comments supporting traditional marriage. He decided that

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243. Jonathan Haidt, *Van Jones’ Excellent Metaphors About the Dangers of Ideological Safety*, HETERODOX ACADEMY (Mar. 2, 2017), <https://heterodoxacademy.org/van-jones-excellent-metaphors/>.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Students Protests*, N.Y. TIMES (May 3, 2014), <https://www.nytimes.com/2014/05/04/nyregion/rice-backs-out-of-rutgers-speech-after-student-protests.html>.

249. *Id.*



his presence would “distract from the true celebratory nature of the day.”<sup>250</sup>

Even religious organizations are hesitant to include speakers with different viewpoints. Wajahat Ali, a well-known Muslim journalist, lawyer, and playwright, was disinvited from speaking at the Islamic Society of North America conference. Ali, who expressed he is “neither a Zionist nor a supporter of Israel’s occupation,” was disinvited after speaking with Zionists and publishing an article about it.<sup>251</sup> The disinvitation letter stated that conference speakers are expected to espouse the organization’s values, especially “support for the Palestinian people of all faith traditions, in their struggle against occupation and dispossession.”<sup>252</sup> Transgender activist Janet Mock experienced a similar cancelation at Brown University. The Students for Justice in Palestine circulated a petition to cancel Mock’s speech that was expected to raise awareness about “violence against LGBTQ+ individuals and communities.”<sup>253</sup> The content of her expected speech did not warrant the petition, but rather the event’s connection to Hillel, a prominent Jewish student organization, aroused offense.<sup>254</sup> Because many students refuse to engage different views, administrators and students create a “speech gerrymander” on campus, where certain views monopolize and distort discussion.<sup>255</sup> In fact, some views are stigmatized as anathema to consider in academic society, galvanizing

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250. Aaron Blake, *Ben Carson Withdraws as Johns Hopkins Graduation Speaker*, WASH. POST (Apr. 10, 2013), [https://www.washingtonpost.com/news/post-politics/wp/2013/04/10/ben-carson-withdraws-as-johns-hopkins-graduation-speaker/?utm\\_term=.3fd730bbe1cd](https://www.washingtonpost.com/news/post-politics/wp/2013/04/10/ben-carson-withdraws-as-johns-hopkins-graduation-speaker/?utm_term=.3fd730bbe1cd).

251. Wajahat Ali, *I Talked to Zionists—Then I was Disinvited by a Major Muslim Group*, THE ATLANTIC (May 30, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/i-talked-to-zioniststhen-i-was-disinvited-by-a-major-muslim-group/561575/>.

252. *Id.*

253. Emily Shire, *Brown Students Shut Down Trans Activist’s Speech—Because Israel*, DAILY BEAST (Mar. 25, 2016), <https://www.thedailybeast.com/brown-students-shut-down-trans-activists-speechbecause-israel>.

254. *Id.*

255. To speech gerrymander is to create specific areas or zones where only certain viewpoints and ideas can be discussed. As political gerrymandering is described to favor specific political parties or interests, speech gerrymandering does the same, but by favoring the expression of specific ideologies or views. Individuals who create the speech gerrymandered zones have a monopoly on the viewpoints that are discussed within them, oftentimes at the expense of minority and diverse viewpoints. See *Gerrymandering & Fair Representation*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/issues/gerrymandering-fair-representation> (last visited April 13, 2020); Brian Daignan, *Gerrymandering*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/gerrymandering> (last visited April 13, 2020).

the majority of students to abuse those with unpopular views.<sup>256</sup> Consequently, classrooms are now the only non-safe-space in the university; students cannot speak honestly about tough issues without fear of being accused of either possessing suspect intentions or shameless values. Such a state of affairs stifles free expression and thus thwarts any process by which mutual understanding might arise through respectful perspective-sharing. An intellectually diverse campus we have not.

*c. Racially themed housing: living learning communities.*

Interest- and racially-based housing promotes de facto segregation, which inhibits intellectual diversity. By design, these communities are restrictive, effectively creating echo chambers in which ideological opposition is perceived as harmful rebuke. At UCLA, for example, students are given a choice to live in race-based housing called “Malcolm X.” These accommodations are made with the intent of avoiding racial conflict and promoting dialogue between cultures. In 1964, Malcolm X stated that “The Negro is better off by himself, so he can develop his character and his culture in accord with his own nature.”<sup>257</sup> This is consistent with the goals of race-based housing. No university can train students to learn from each other when they are both divided along ideological lines and physically separated along racial ones, too.

The diversity bureaucrat employs soft language, labeling such housing arrangements as “interest” based programming or as an ef-

256. This is evident on a number of college campuses, including a recent incident at the University of California, Berkeley. On February 19, 2019, a conservative activist reported that he was attacked while recruiting university students for his chapter of Turning Point USA—a conservative student organization. According to a statement from the University of California Police Department, the victim said that two men approached him, and after a verbal altercation, he began recording the interaction on his phone. Video recordings and reports indicate that one of the men slapped the phone out of the victim’s hands and proceeded to knock over the table the victim was standing at. Subsequently, the victim and the man began struggling over the phone, and, after a few moments, the man punched the victim, causing injury to his eye and nose. Following the incident, it was reported that the victim was not a student at the university, but rather, a field representative for the Leadership Institute, an organization that helps train conservative leaders. Dan Mogulof, a campus spokesman, stated that: “The fact that the victim was not a campus affiliate has no bearing on this case. He had every right to be on campus, and every right to express his point of view.” Dakin And one & Sarah Moon, *Conservative Activist Allegedly Attacked on UC Berkeley Campus*, CNN (Mar. 2, 2019), <https://www.cnn.com/2019/02/22/us/conservative-activist-assault-uc-berkeley/index.html>.

257. *Now It’s a Negro Drive for Segregation*, U.S. NEWS & WORLD REP. (Mar. 30, 1964), <https://www.usnews.com/news/articles/2008/05/16/now-its-a-negro-drive-for-segregation>.

fort to construct “living learning communities” for students.<sup>258</sup> Although these communities encourage “all” students to join, they are designed to make students of a certain race or background feel comfortable.<sup>259</sup> The University of Iowa, for example, is explicit in its race-conscious housing mission with one community called “Young, Gifted, and Black.”<sup>260</sup> Along with Iowa, the University of Minnesota’s

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258. “Michigan State University’s living-learning, academic and special interest programs allow students who share similar academic interests or interests in multi-cultural living experiences to live together in a designated residence hall or on a particular residence hall floor.” *Living-Learning Communities and Residential Colleges*, MICH. STATE U., <https://liveon.msu.edu/campus-life/living-learning-communities-and-residential-colleges>.

259. At California State it is called the Hali Scholars Black Living-Learning Community, that is “designed to enhance the residential experience for students who are a part of or interested in issues of concern to the Black community living on campus by offering the opportunity to connect with faculty and peers and engage in programs that focus on academic success, cultural awareness, and civic engagement.” Department of Pan-African Studies, *Hali Scholars Black Living-Learning Community*, CAL STATE L.A., <http://www.calstatela.edu/academic/pas/hali-scholars-black-living-learning-community>. At University of Massachusetts Amherst, students can apply for “defined” residential communities. The communities include Asian/Asian American Student Community, Harambee: African/African American Student Community, and Spectrum: LGBTQIA+ Student Community. Harambee is a hallway in a dorm that describe itself as “an inclusive and supportive community that honors African/African American/Black identities and provides intentional space for African/African American/Black cultures. In Harambee, students will have opportunities to share and learn from one another’s cultural experiences and backgrounds, as well as connect over current events related to Black identity. *Living at Umass Amherst*, U. AT UMASS AMHERST, <https://www.umass.edu/living/learning/drc> (last visited April 13, 2020) (“Students will participate in programming that explores multiple facets of African/African American/Black life and have the option of taking courses linked to the community’s mission and values.”). At University of Connecticut there are several learning communities that have been developed. *Learning Community Program*, UCONN, <https://lc.uconn> (last visited April 13, 2020) (“La Comunidad Intelectual (LCI) recognizes and critically examines Caribbean and Latin American cultures, customs and traditions as they exist at UConn and beyond. In collaboration with El Instituto and PRLACC, LCI nurtures intellectual diversity, inclusivity, and social activism. Additionally, through rigorous interdisciplinary study, active, and community-based learning LCI students enhance their comprehension of global citizenship”). One such house is devoted exclusively for black males. The community calls itself the SchOLA<sup>2</sup>RS House. It describes itself as “a Learning Community designed to support the scholastic efforts of male students who identify as African American/Black through academic and social/emotional support, access to research opportunities, and professional development.” *SCHOLARS House*, UCONN, <https://lc.uconn.edu/schola2rs/house/#> (last visited April 13, 2020).

260. The University of Iowa’s learning community, Young, Gifted, and Black, states that “[c]ulture and traditions are often the foundations upon which one builds their black identity and its intersectionality. In collaboration with the African American Studies program, you will be challenged to understand the various experiences among the African/black diaspora, encouraged to learn and develop critical thinking skills outside the classroom, relate your passions to your academics, and better Iowa’s Black Community through campus involvement.” A note states that “[t]his community was founded by Iowa black students with the objective to aid with the transition of incoming black students at the University of Iowa. This community is for students who seek to strengthen knowledge and empowerment of black students.” *Housing Uni-*

housing mission is racialized as well.<sup>261</sup> Golden Gophers can sign up for Casa Sol if they desire to connect with Latino or Latina students or reside in the American Indian Cultural House. First- and second-year black women can live in the Charlotte's Home for Black Women if they choose. And if you are an Ivy League student at Cornell, who "celebrates the rich and diverse heritage of Black people in the United States, Africa, the Caribbean, and other regions of the world" then reside in the Ujamaa house.<sup>262</sup> In these housing arrangements, the diversity bureaucrat employs vocabulary for students to use in order to discuss their housing choices. In their language, the term "interest" or "identity" can be code for a student's race.<sup>263</sup> Dartmouth University, for instance, provides "identity-based communities" with housing organized around the following racial categories: Asian American, Hillel, Native America, and Latin American/Latino/Caribbean. Apparently, Dartmouth had an AfroDiaspora community, but it closed in 2017.<sup>264</sup> Students are thus encouraged to

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*versity Housing & Dinning*, THE U. OF IOWA, <https://housing.uiowa.edu/communities/young-gifted-and-black>.

261. Among the many communities that can be found are CASA SOL ("connect with Latinos and Latinas"), American Indian Cultural House, and Charlottes Home for Black Women. *Housing and Residential Life*, U. MINNESOTA, <https://housing.umn.edu/lcs/first-year> (last visited April 13, 2020).

262. In addition to the Ujamaa house, which "celebrates the rich and diverse heritage of Black eole in the United States, Africa, the Caribbean, and other regions of the world," there is the American Indian House (Akwe:kon) and the Latino Living Center. *Program Houses*, CORNELL U., <https://scl.cornell.edu/residential-life/housing/campus-housing/upperlevel-undergraduates/program-houses> (last visited April 13, 2020).

263. Dartmouth University has "identity-based communities" that "serve the social needs" of Asian and Asian Americans, Hillel, Native American, and Latin American, Latino, and Caribbean students. *Living Learning Communities*, DARTMOUTH U., <https://students.dartmouth.edu/residential-life/undergraduate-housing/residential-communities/living-learning-communities> (last visited April 13, 2020).

264. *Id.*

self-segregate through coded messaging.<sup>265</sup> When making housing choices, students can join communities, as one Big Ten college puts it, to make “connections” with “students who share similar interests.”<sup>266</sup> Diverse opinions are not heard at these residences. They are not heard by design.

The diversity bureaucrat envisions the living community as maintaining a monopoly over dialogue between students that sign up to live together in the same “safe and open space for discussion of personal experiences and current events.”<sup>267</sup> Here, the conversations that take place are practically planned because the speakers have been primed to join. The forum is rigged, because in such an environment, students are not exposed to other types of students that represent a “multitude of tongues.”<sup>268</sup> In fact, these communities indoctrinate residents “as subjects, not empowered as speakers and listeners in a vibrant learning community. Students of all racial backgrounds lose a sense of agency that goes with membership in an authentic community or exposure to the unplanned diversity of the world outside the university.”<sup>269</sup> In theory, diversity officials claim that these communities serve as “centers” where students can “engage in meaningful con-

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265. Gary Warth, *UCSD Opens Housing Based on race, sexual identity*, THE SAN DIEGO UNION-TRIBUNE (Sept. 26, 2016), <https://www.sandiegouniontribune.com/news/education/sd-me-ucsd-diverse-20160926-story.html> (“While having separate communities based on race or sexual orientation might hint at segregation, [Mark Cunningham, assistant vice chancellor of housing and dining at UC San Diego] said he doubts any students would see it that way because they were the ones who choose to live with one another.”); Andy Campbell, *CSU Defends ‘Segregated’ Housing Offer After Conservative Backlash*, HUFFPOST (Sept. 7, 2016) (alteration in original), [https://www.huffpost.com/entry/csu-black-student-housing\\_n\\_57d03c69e4b03d2d4597b491](https://www.huffpost.com/entry/csu-black-student-housing_n_57d03c69e4b03d2d4597b491); Shirin Rajaei, *Segregation or Sanctuary? Black-Only University Housing Draws Criticism*, CBS SACRAMENTO (Sept. 8, 2016), <https://sacramento.cbslocal.com/2016/09/08/segregation-or-sanctuary-black-only-university-housing-draws-criticism/>.

266. The University of Maryland asserts that one of the reasons to join Living learning communities is to make “connections that are made with students who share similar interests.” Department of Resident Life, *Living and Learning Programs*, U. OF MD., <http://reslife.umd.edu/llp/>.

267. The University of Florida has a “Black Cultural LLC” that “create a safe and open space for discussion of personal experiences and current events.” The website states that all students are welcome to apply, although no white students are shown in any pictures. Black Cultural, UF HOUSING & RESIDENCE EDUCATION, <https://www.housing.ufl.edu/programs-services/living-learning-communities/black-cultural/>.

268. *Keyishian v. Bd. of Regents of the Univ. of New York*, 385 U.S. 589, 603 (1967).

269. Kuykendall & Adside, *supra* note 51, at 1027.

versations” about their identity with students diverse perspectives.<sup>270</sup> But in practice, these communities create an isolated and exclusive forum devoid of collaborative, cross-race dialogue.<sup>271</sup> Although not entirely contingent on race, these “race-based” programs result in egregious self-segregation. In its early stages, race-conscious housing led to conflict when the UCLA decided to assign nine white students to the Malcolm X house because other spaces were not available due to an unexpectedly large freshman class.<sup>272</sup> Some black students at the Malcolm X house objected to living with white students; the school “solved” the problem by “consigning several white students to the

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270. *Undergraduate Students*, DARTMOUTH, <https://students.dartmouth.edu/living-learning/get-involved/how-get-involved/undergraduate-students> (last visited Apr. 9, 2020).

271. Interest-based residences might offer the possibility for increased cross-cultural dialogue. Race-based housing “can address a number of different subjects that are sometimes connected to work in the classroom, and other times operate independently of the students’ coursework,” James Baumann, director of communications and marketing at the Association of College and University Housing Officer said. It can “bring together students that share an interest, area of study, or an identity. They can act as a support network that helps students build community and assist one another.” Dan E. Way, *Segregated Student Housing: Exclusion in the Name of Inclusion*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Sept. 4, 2017), <https://www.jamesgmartin.center/2017/09/segregated-student-housing-exclusion-name-inclusion/>. One such example is the W.E.D. Du Bois College House at the University of Pennsylvania. The program’s mission is to inform its participants of the heritage and experiences of black students. It has always been open to interest students, irrespective of race. Though few white students lived there during its earlier years, they report having remarkable experiences. In 1999, a white student, Alessandro Rimoldi, penned a letter to *The Daily Pennsylvanian*, detailing his time in the residence. He writes, “I chose to live in DuBois College House because I thought it would be an excellent opportunity to immerse myself in an environment where I could learn about a new culture by meeting new people, participating in activities, etc. Now in my second year living in the house, I have had a fantastic experience, to say the least. I have met a lot of wonderful people from whom I have learned a great deal about the African-American experience, and I have made some great friends.” Alessandro Rimoldi, *LETTERS: Want Diversity? Look Around*, DAILY PENNSYLVANIAN (Oct. 28, 1999), [https://www.thedp.com/article/1999/10/letters\\_want\\_diversity\\_look\\_around](https://www.thedp.com/article/1999/10/letters_want_diversity_look_around). While this is a 20-year-old anecdote, it illustrates that when genuine “interest” in different cultures is identified by diversity-housing officials, educational benefits have a ripple effect outside the classroom. While DuBois College struggled with diversity in its infant stages, by the 2012–2013 academic year “46 percent of . . . residents reported a racial identity other than African American.” Rachel Estrada Ryan, *Turmoil and Transformation: Du Bois House Turns 40*, GAZETTE (Apr. 2013), <http://www.upenn.edu/gazette/0313/gaz05.html>. In order to ensure that interest-based housing is productive, they cannot be inherently exclusive. Residences built on a foundation of interest — one that celebrates and explores cultures — and open to all students are the way forward. Study the racial housing system at Berkeley. Prospective residents must enroll in classes and do community service. *Housing: Theme Programs*, BERKELEY U. OF CALIF., <https://housing.berkeley.edu/theme> (last visited Apr. 9, 2020). But diversity-housing officials that simply claim that residences are “interested” in themed housing will only serve a bureaucratic line.

272. Kuykendall & Adside, *supra* note 51, at 1077 n.381.

basement of the philosophy building.<sup>273</sup> At the themed house, race matters, not diversity. Ironically, the diversity official and the white supremacist share the same method in achieving their social agendas: racial segregation.

Officials that promote racially themed housing play with fire. On the one hand, these racialized communities address culturally specific problems connected with the classroom, and can give students a supportive network that can aid the student in applying for graduate programs and the workplace.<sup>274</sup> But on the other hand, this hyper-race-consciousness serves to academically and emotionally damage the students that supposedly benefit from these programs. Racially themed learning communities are often an ill-advised means to an end. Diversity bureaucrats, at these multicultural or inclusion offices, desire increased interracial dialogue, but the means often lead to increased resentments among racial groups.<sup>275</sup> Alienation breeds contempt.<sup>276</sup> Likewise, administrators desire public safety on campus; however, free speech zones are a constitutionally suspect means to achieve this end.

*d. Free speech zones.* One tool that administrators use to manipulate speech is the time, place, and manner restrictions ironically named free speech zones. Administrators believe these policies help promote campus safety, but they regulate only the law-abiding. Sometimes policies can unconstitutionally regulate speech, too. West Virginia University (WVU) originally instituted two free speech zones. These zones made up maybe 1% of campus, so the other 99% of campus did not permit speech at all (WVU eventually revoked the zone policy).<sup>277</sup> Such zones, therefore, must be carefully crafted. The First Amendment forbids neutral policies designed to suppress speech. Free speech zones are logically no different than a restriction that on its face is racially neutral but in truth is actually not. While colleges and universities cannot impose content-based rules, they can implement restrictions crafted to limit “secondary effects” of speech, such as trash, crime, or ills that diminish quality of life; such rules are valid “if the incidental restriction on [speech] is no greater than is essential to the

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273. *Id.*

274. Way, *supra* note 271.

275. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

276. Adside, *supra* note 1, at 563.

furtherance of that interest.”<sup>278</sup> Time, place, and manner regulations, therefore, cannot restrict speech more than is necessary to curtail the effects the rule aims to target.<sup>279</sup> The below hypothetical illustrates how speech zones, if allowed to arrive to their logical conclusion, can unconstitutionally suppress expression.

*e. Hypothetical.* Say BAMN (By Any Means Necessary) invites Shaun King to speak at the University of Michigan; in response, YAF invites Ben Shapiro. Due to these two speakers being labeled “controversial,” administrators are nervous about campus safety and enacted the following rule:

Student groups may hold events during November 23–28 or whenever the campus is on Thanksgiving break between 6–10 p.m. These groups can hold these events during these specified available times at the Union, which will serve as a free speech zone. All other academic buildings, administrative offices, dorms, quads, squares, pathways, roads, sidewalks, and other university property cannot hold any non-university demonstration, protest, or event of any kind. The union room can hold fifty people. Groups must pay for overtime compensation for five police officers and two sanitation workers. Electronic devices are banned from the speech zone. BAMN and YAF agree to split the costs.

## II. ANALYSIS

This is an invalid regulation. Facially, it regulates speech more than necessary to address secondary effects. Here, free speech (e.g., protesting administration, distributing brochures about contraception, or voter registration efforts) is outlawed on nearly all university property, like the WVU zone. When speech is permitted, it is difficult, if not impossible, for students to take advantage of the only free speech zone on campus—the Union. The Union is open to all student speech when students are not on campus and at home for Thanksgiving breaks. In addition, students must bear the costs, such

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277. *West Virginia University: Limit on Speech to Campus “Free Speech Zones,”* FIRE, <https://www.thefire.org/cases/west-virginia-university-limit-on-speech-to-campus-free-speech-zones/> (last visited Apr. 9, 2020).

278. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

279. *Id.*



as compensation for police and sanitation. In this case, students can express themselves in only one room on a campus with about 580,250 rooms.<sup>280</sup> Furthermore, cell phones are an imperative form of communication today. Over nine out of ten Americans own a cell phone.<sup>281</sup> Security checking for weapons or other hazardous items is reasonable but limiting cell phones exceeds public safety concerns; the school has not made any case that electronic communication is a threat to public safety.

With these policies, the ideal classroom of productive exchange cannot come into reality, because campus speech is gerrymandered. Administrators designate acceptable spaces for favored groups to express views outside the presence of non-favored ones. Sometimes speech is not allowed at all in the oxymoronic, free speech zone. The zone empowers another group, which the administration may or may not give authority, to police ideological purity either in themed houses or safe spaces. In such an environment, moderate, or even agnostic, views are overwhelmed by strident speakers. Students are not taught how to engage in thoughtful discussion with those with whom they disagree. Classroom discussion becomes sterile too, because the lecturer does not want to offend any student with an ill-defined microaggression or posit a hypothetical that can be framed as culturally insensitive. More chillingly, violent voices can easily shut down debate with yelling and violence. Moderates and agnostics, who are still formulating their opinions, are no match. Raising your hand, and even common courtesy are no longer followed. Bullying controls the forum.

### *A. Extreme Voices, Moderate Opinions, and the Free Speech Take-over*

#### *1. Extreme voices, moderate opinions*

Though the First Amendment protects offensive expression, intimidation and intolerance have created an environment which justifies uncivil disruption on college campuses. Organizations like Black

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280. Univ. of Mich., *Campus Map*, STUDENT LIFE CAMPUS INFORMATION (2019), <https://maps.studentlife.umich.edu/preview>.

281. Monica Anderson, *Technology Device Ownership: 2015*, PEW RESEARCH CTR. (Oct. 29, 2015), <https://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/>.

Bloc now rely on raucous strategies that force the hand of the universities and their apparent political foes. In many cases, certain groups use violence and intimidation to challenge speakers with whom they disagree. The intense environment has caused administrative reactionism in which some colleges have taken the authoritarian step to either cancel an event or even ban a speaker for public safety reasons. Indeed, it appears as if silence or violence are now the binary choices on college campuses—which restricts any hope that productive dialogue might enhance appreciation of divergent views.

On campuses, organizations have adopted a new set of tactics. These practices are disorderly and dangerous. One such tactic is “black bloc.” In an interview with Lacy MacAuley, a member of the D.C. Antifascist Coalition, she mentions that “black bloc is . . . not under some sort of hierarchy or leadership structure . . . Most black blocs are people who are temporarily masking themselves because they fear retribution—either now or at some point in the future—due to their fighting injustices through violence.”<sup>282</sup> Black bloc espouses anarchism. It involves coordinated groups of protesters who are willing to commit property destruction or violence.<sup>283</sup> These protestors use weapons, such as shields, body armor, projectiles, spray-paint, and Molotov cocktails.<sup>284</sup> In January 2017, protests erupted at the University of California, Berkeley ahead of a planned appearance by right-wing commentator Yiannopoulos. Indeed, these protests were raucous, causing \$100,000 worth of damage to the campus. Additionally, two Berkeley College Republicans were “attacked while conducting an interview” on campus.<sup>285</sup> Black bloc protestors threw commercial-grade fireworks and rocks at police, and hurled Molotov cocktails that ignited fires. More than 1,500 protestors gathered,

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282. Peter Schmidt, *Host a White Supremacist, Risk Chaos from Anarchists*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 28, 2017), <https://www.chronicle.com/article/Host-a-White-Supremacist-Risk/239339>.

283. *Id.*

284. Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>.

285. Gretchen Kell, *Campus Investigates, Assesses Damage from Feb. 1 Violence*, UC BERKELEY NEWS (Feb. 2, 2017), <https://news.berkeley.edu/2017/02/02/campus-investigates-assesses-damage-from-feb-1-violence/>.

holding signs that read: “No safe spaces for racists” and “This is war.”<sup>286</sup>

One group that popularized the above-mentioned strategy is Antifa. While Antifa does not have official student organizations on college campuses, there are organizations across the country that associate with it, such as Direct Action Alliance in Portland.<sup>287</sup> It is dedicated to the idea that fascists, white supremacists, and neo-Nazis do not respond to legal mechanisms; therefore, Antifa does not rely on legislative efforts or police to prevent these groups from recruiting and organizing.<sup>288</sup> In the documentary “The Invisible Revolution,” one member notes that “racism is an idea, but fascism is an idea mixed with action . . . When you cross that threshold, you negate your rights to a calm, collective conversation.”<sup>289</sup> Similar organizations—namely, Black Lives Matter (BLM) and By Any Means Necessary (BAMN)—have similar mission statements and employ comparably raucous strategies.

BLM is an organization, a movement, and a slogan. The official BLM organization has about 25 chapters in cities across the U.S. and Canada.<sup>290</sup> In fact, student groups across many college campuses have taken part in different types of activism as a part of the BLM movement.<sup>291</sup> A primary tactic is reactionary demonstrations, in which BLM responds to perceived acts of state violence against black people with protests and marches.<sup>292</sup>

A second tactic involves interrupting debates, speakers, or other functions. This was done at the University of Michigan, when students halted a Michigan Political Union debate.<sup>293</sup> Similarly, at

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286. Park & Lah, *supra* note 284.

287. Scott Simon & Wes Enzina, *A Look at Antifa*, NPR (Aug. 26, 2017), <https://www.npr.org/2017/08/26/546323215/a-look-at-antifa>; see also Shane Burley, *Antifascist Organizing Explodes on US College Campuses*, WAGING NONVIOLENCE (Feb. 15, 2018), <https://wagingnonviolence.org/2018/02/antifascist-organizing-explodes-college-campuses/> (reporting about Antifa tactics on universities).

288. *Id.*

289. *Id.*

290. *Chapters*, BLACK LIVES MATTER, <https://blacklivesmatter.com/take-action/find-a-chapter/> (last visited Jan. 26, 2020).

291. Blake Neff, *Michigan BLM Activists Crash Debate, Say Questioning BLM Is Not Acceptable*, THE DAILY CALLER (Sept. 28, 2016), <http://dailycaller.com/2016/09/28/michigan-blm-activists-crash-debate-say-questioning-blm-is-not-acceptable/>.

292. *Id.*

293. *Id.*

Charles Murray's visit to the University of Michigan, students attempted to interrupt the speech.<sup>294</sup> Jesse Arm, Chairman of the American Enterprise Institute Executive Council at Michigan, later described that series of events in the *New York Times*.<sup>295</sup> Arm writes, "Chants of 'racist, sexist, K.K.K., Charles Murray go away,' indecipherable shouting, earsplitting cell phone alarms and 'The Imperial March,' Darth Vader's theme in 'Star Wars,' drowned out his words."<sup>296</sup> Furthermore, at several points throughout the lecture, protestors flipped the light switch off and displayed a projection with the words, "white supremacist" on the wall with an arrow, pointing down at Murray.<sup>297</sup> During this hour of pandemonium, a university spokesperson, Rick Fitzgerald, took to the stage calling on the protestors to stop shutting down the lecture, lest further measures be taken.<sup>298</sup> Afterwards, the chaos continued and no such "measures" were taken. The extremists took over the discussion.

BAMN is a self-proclaimed civil rights organization striving to "employ whatever means are necessary to oppose and defeat . . . attacks on the democratic and egalitarian aspirations and struggles of our people."<sup>299</sup> Their goal is to continue the movements that were started by individuals like Frederick Douglas, Martin Luther King, Jr., and Malcolm X who inspired the organization's name.<sup>300</sup>

Recent tactics used by BAMN have included protesting Donald Trump's immigration policy. This was done by blocking the entrance to a United States Immigration and Customs Enforcement Office in Detroit, Michigan.<sup>301</sup> The main goal of the protest was to "enforc[e]

294. Jesse Arm, *We Brought Charles Murray to Campus. Guess What Happened*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/opinion/charles-murray-michigan-speech.html>.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *BAMN Principles*, BAMN, <https://www.bamn.com/bamn-principles> (last visited April 14, 2020).

300. "We want freedom by any means necessary. We want justice by any means necessary. We want equality by any means necessary." Malcolm X, *Speech at The Founding Rally of the Organization of Afro-American Unity*, BLACKPAST (Oct. 15, 2007), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1964-malcolm-x-s-speech-founding-rally-organization-afro-american-unity/>.

301. The protest also called for a "national mass mobilization" to shut down Texas detention camps, free immigrants who have been detained, and reunite separated families. Von Lozon, *BAMN, Other Organizations Shut Down Detroit ICE Office with Protests*,

Detroit's sanctuary city status."<sup>302</sup> In a more aggressive fashion, a neo-Nazi event, formed from the cancellation of speaker Ann Coulter at UC Berkeley, was shut down due to BAMN. Ten individuals at the protest were sent to the hospital.<sup>303</sup> A leader within the organization, Yvette Felarca, stated that after the event, "We will do it again. The Nazis had to run and hide behind the police."<sup>304</sup> Felarca was charged with a felony assault.<sup>305</sup> In addition, BAMN leaders asked individuals to "fill the courtroom"<sup>306</sup> to "defend . . . five local heroes" who were being charged with misdemeanors.<sup>307</sup>

This said, BLM and BAMN employ different tactics in their opposition to speakers they disagree with. While they engage in disruptive behavior that takes over the speech forum, they do not engage in violent actions or intimidation (i.e., assaults or property damage) against the speakers they are protesting as a matter of policy. Regardless of the distinction in tactics among these groups, their methods impose great costs to public safety.

## 2. *Free speech take-over*

Again, at UC Berkeley, officials canceled conservative commentator Ann Coulter's appearance, citing safety concerns as the reason. One response to this has been the increased militarization of campus police. In the face of Coulter-like events, UC Berkeley campus security increased intelligence sharing with law enforcement, purchased enhanced barricade equipment, and equipped officers with crowd control tools, such as pepper spray.<sup>308</sup> This has been expensive to say

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CLICKONDETROIT (Jun. 25, 2018), <https://www.clickondetroit.com/news/2018/06/25/bamn-other-organizations-shut-down-detroit-ice-office-with-protests/>.

302. *Id.*

303. Christopher Wallace, *UC Berkeley Riots: Violence Looms as Mayor Questioned Over Ties to Extremist Group*, FOX NEWS (Apr. 25, 2017), <https://www.foxnews.com/politics/uc-berkeley-riots-violence-looms-as-mayor-questioned-over-ties-to-extremist-group>.

304. *Id.*

305. Patrick Strickland, *Trump's America: Where Activists Face Felony Charges*, ALJAZEERA (Aug. 14, 2017), <https://www.aljazeera.com/indepth/features/2017/07/trump-america-activists-face-felony-charges-170730073018529.html>.

306. *Id.*

307. *Id.*

308. *Id.*

the least. Similarly, ahead of Ben Shapiro's visit to Berkley, the university spent half a million dollars on security alone.<sup>309</sup>

Increased policing to prevent violence and enforcement of lawful conduct will be critical strategies in the short term. In the longer term, administrative leaders, professors and students, must agree on and communicate acceptable norms of behavior. Beyond this, they must model equanimity and empathy so that disorderly conduct learns it has no place on university grounds. Students who feel empowered to disrupt free exchange must be held to account, lest First Amendment traditions be moot. Faculty and students alike must champion fair process—active listening, civil communication, and productive conflict management. In the absence of fair process, silence or violence will limit progressive thought and collaboration. Nevertheless, there are students who model behavior consistent with First Amendment norms.

### III. SPEECH-ENHANCING SOLUTIONS DESIGNED TO PROMOTE FREEDOM IN CAMPUS SPEECH

College students are seizing the initiative, addressing the lack of dialogue among themselves in and outside the classroom. The “educational pluralism” that these students were promised to experience from classroom diversity is not manifesting in practice.<sup>310</sup> The ideal campus where “speculation” abounds is now controlled by sterile classrooms with little interaction between professor and students. Our supposed future leaders simply listen to lectures, memorize their notes from the lecture slides, and regurgitate information on exams. This is not an intellectually rewarding atmosphere. Courses provide little space for students to challenge one another or the professor on an array of issues, including politics and public policy. Therefore, students lack the tools to disagree with each other constructively.<sup>311</sup>

An instructive counterexample exists at the University of Michigan. Students have created an organic group, free from university

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309. Mike McPhate, *California Today: Price Tag To Protect Speech at Berkeley: \$600,000*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/us/california-today-price-tag-to-protect-speech-at-berkeley-600000.html>.

310. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978).

311. “Indeed, a classroom is a place that has the potential to be sterile or what has been called a non-place, meaning a ‘space which cannot be defined as relational, or historical, or concerned with identity.’” Kuykendall & Adside, *supra* note 51, at 1027.

guidelines or red-tape, that brings students with differing political opinions together to have productive conversations.<sup>312</sup> This group called WeListen was formed in response to the divisiveness observed between students during and following the 2016 presidential election.<sup>313</sup> WeListen's founders saw students unwilling to partake in discussions with individuals who thought differently than they; moreover, they observed students make false assumptions about why someone thought differently. Through small group discussions on controversial topics, WeListen helps students understand the underlying values and experiences that drive political beliefs through non-political ice-breakers to ease discussion among students: "At WeListen, participants from across the political spectrum—Democrats, Republicans, or neither—engage in facilitated discussion (not debate!) on topics like gun control, free speech, abortion, and immigration."<sup>314</sup> They claim that the difference between WeListen sessions and other discussions on campus is that the small group must sit through a presentation on the topic so everyone can discuss the matter with a shared set of facts.<sup>315</sup> WeListen's structures discussions to encourage students to challenge their own views without sitting in an echo-chamber where their own views are repeated by individuals that agree with them: "WeListen gets people talking. Face to face. We're fostering small-group discussion between unlikely conversants to change the American political climate—campus by campus."<sup>316</sup>

I believe that WeListen is a good model. It makes the *Sweezy* campus a reality.<sup>317</sup> It is bringing students from diverse backgrounds together to robustly converse about ideas.<sup>318</sup> *Bakke* announced that there were educational benefits that flowed between diverse students,<sup>319</sup> and *Grutter* instructed that these educational benefits ranged from breaking down stereotypes to ensuring a livelier classroom discussion.<sup>320</sup> It is not enough to have a campus that is aestheti-

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312. *Student Discussions*, WELISTEN, <https://www.welistenusa.org/um-students> (last visited Mar. 17, 2020).

313. *Id.*

314. WELISTEN, <https://www.welistenusa.org/>.

315. *Id.*

316. *Id.*

317. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

318. *Id.*

319. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978).

320. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

cally pleasing—the classroom must also facilitate discussion and not be afraid of debate or disagreement. President Trump intends to withhold funding from universities that implement policies that the administration considers speech-inhibiting.<sup>321</sup> It is wise that colleges should revise their policies before the federal government does it for them. This section briefly presents four ideas for colleges to consider. Intellectual diversity is at the core of these programs. Some of the ideas listed below can be incorporated into admissions programs, financial aid programs, curriculums, and syllabi of colleges, departments, and courses across this country.

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321. President Trump sought to address the issue via executive order. In a March 2 speech to the Conservative Political Action Conference (CPAC) he declared that he would soon issue an executive order “requiring colleges and universities to support free speech if they want federal research dollars.” Michelle Hackman, *Trump to Issue Order Tying Federal Grants to Free Speech on Campus*, WALL ST. J. (Mar. 20, 2019), <https://www.wsj.com/articles/trump-to-issue-order-tying-federal-grants-to-free-speech-on-campus-11553127214>. Shortly thereafter, on March 21, President Trump signed the executive order, which “instructs agencies including the Departments of Education, Health and Human Services and Defense to ensure that public educational institutions comply with the First Amendment, and that private institutions live up to their own stated free-speech standards.” *Id.* “Free inquiry is an essential feature of our Nation’s democracy, and it promotes learning, scientific discovery, and economic prosperity,” the order reads. *Id.* “We must encourage institutions to . . . avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning.” *Id.*



<p><b>WeListen Centers</b></p>	<p>Unlike Free Speech Zones that limit speech to certain times and places, “WeListen centers” are areas designed to encourage students or student groups to schedule debates without charge on any matter, i.e, race-relations, transgender rights, foreign policy and so on. These centers do not limit speech to these areas but rather serve to attract students to these meeting areas for productive conversations. The goal may not be to persuade someone, but rather to help students understand and humanize the other side. Schools should be as unrestrictive as possible in the times and places where these centers are allowed. Each event should have a designated moderator agreed-to by both sides, who will maintain a respectful tone in the discussion. The audience should be given either a fact sheet or shown a clip that will objectively educate them about the subject matter. This encourages students of all backgrounds and academic focuses to participate in the discussions and feel comfortable doing so. These centers can use the WeListen program at University of Michigan as a model. Other grounds, such as Civic at Tufts University, has developed a similar model.</p>
<p><b>Small Colleges Organized Around Intellectual Exchanges</b></p>	<p>Small colleges could admit students with a strong interest in political dialogue and action along an array of issues. Administrators, after considering student input, would evaluate the personal statements or interview prospec-</p>

	<p>tive students who will demonstrate how they will contribute a unique perspective to the intellectual environment of this small school. These small colleges can be organized around particular political themes or issues, such as the environment, history, or public policy.</p>
<p><b>Pre-Law Colleges or Mini Law Schools</b></p>	<p>This residential college (a focused school within a larger school) provides students with a legal curriculum for interested undergraduates; it requires students to analyze issues through neutral, objective principles; in doing so, students must explore perspectives different from their own, discuss issues openly, and defend their legal-based assessments before instructors and classmates. Students are required to take introductory doctrine courses on torts, constitutional law, contracts, and so on. Instructors are encouraged to facilitate discussion through the Socratic Method. Each course has a writing component so students can reflect on their positions on certain issues.</p>
<p><b>Diversity College Program: Student-Led Race Conscious Admission Programs and Diversity-Oriented Learning Communities.</b></p>	<p>Colleges can establish “an experimental residential college, created to establish learning communities and set pedagogical goals around racial awareness . . . .”<sup>322</sup> Admissions offices will offer seats to applicants who meet minimum standards and submit an essay describing how their personal qualities will be “important in an overall evaluation of how she will con-</p>

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322. Kuykendall & Adside, *supra* note 51, at 1081.

	tribute to the learning community goals.” <sup>323</sup> Such programs can also serve as a social petri dish in which interaction between students can inspire new ideas that can establish programs that can either enrich the learning community or can be employed into larger programs that facilitate dialogue between the races campus-wide. <sup>324</sup>
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## V. CONCLUSION

Speech-inhibiting policies have created a vacuum in which extreme voices push out moderate opinions through screaming, shouting, and even violent conduct. Not all speech regulators protest opposing views by marching with tiki torches or by throwing Molotov cocktails. Some control enclaves on campuses in which they police group orthodoxy, stigmatizing those who refuse to toe the party line. As a result, students are left unprepared for self-government or healthy political debate. This climate thwarts the First Amendment’s original design. Freedom of speech protects citizens’ right to participate in how they should be governed. Should future leaders envision the marketplace of ideas as a battlefield of physical and verbal assault, there will be no functioning government at all. Compromise will become a relic in American politics—a topic discussed in history books involving venerable, dead politicians like Henry Clay, Teddy Kennedy, or John McCain. In this political environment, the First Amendment might become a dead letter because innovation, experimentation, and dialogue in government will be paralyzed. Solutions are needed to stop the free speech crisis on college campuses.

College administrators and students should repeal speech-inhibiting policies. Safe spaces, themed housing, and speech zones are threats to speech. I proposed at least four programs that universities can consider to facilitate speech and promote deliberation among students from diverse backgrounds. While I believe that diversity is

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323. *Id.* at 1084.

324. *See id.*

an important endeavor, the means by which universities now pursue it are counterproductive. Justice Alito had a reasonable doubt as to whether the educational benefits that flow from diversity were even measurable: “[T]he claimed benefits that arise from diversity] are laudable goals, but they are not concrete or precise, and they offer no limiting principle. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved?”<sup>325</sup> He is right that these benefits are immeasurable in the abstract. But the programs discussed above closely connect the admission of a potential candidate and the speech benefit he or she can potentially provide to the classroom. The diversity college program, for example, requires that “[a]dmissions offices will offer seats to applicants who meet minimum standards and submit an essay describing how their racial background as well as personal qualities will be ‘important in an overall evaluation of how she will contribute to the learning community goals.’”<sup>326</sup> The mini-law schools program, likewise, requires students to provide objective opinions on law through the Socratic Method and to discuss perspectives on torts, contracts, criminal law, or constitutional law with other students. A livelier discussion is advanced. These actual benefits can be measured through attribution and graduation rates. Furthermore, essays, evaluations, and interviews conducted to measure the “speech effect” that these programs have.

Colleges must do their homework, providing “reasoned, principled explanation[s]” to show how their programs are achieving the speech interest through the programs they implement.<sup>327</sup> The university is a forum for speech; it is time for universities to begin to live up to their constitutional role. If the college does not, students will continue to be intellectual sheep led by their diversity herdsman.<sup>328</sup>

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325. *Id.* at 2223.

326. Kuykendall & Adside, *supra* note 51, at 1084.

327. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016).

328. I give credit to my former Research Assistant and close friend, Keith W. Bouschor, for providing this powerful quote.