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# WHEN AUDIENCES OBJECT: FREE SPEECH AND CAMPUS SPEAKER PROTESTS

GREGORY P. MAGARIAN\*

## INTRODUCTION

In March 2017, conservative author Charles Murray arrived to speak at Middlebury College in Vermont, invited by a student affiliate of the American Enterprise Institute.<sup>1</sup> Murray planned to discuss his 2013 book, *Coming Apart: The State of White America, 1960-2010*. Many Middlebury students and faculty, however, deplored Murray for an earlier book, 1994's *The Bell Curve*,<sup>2</sup> where he drew specious connections between race and intelligence.<sup>3</sup> Others simply considered Murray an intellectual lightweight who didn't warrant a speaking slot at the prestigious college. Murray's critics objected to the Political Science Department's co-sponsorship of his appearance and the college president's plan to make opening remarks. In addition, most of the campus community still felt shell-shocked from Donald Trump's recent ascent to the presidency.

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\* Professor of Law, Washington University. Thanks to Helen Norton and participants in the 2018 Ira C. Rothgerber Conference on Constitutional Law at the University of Colorado Law School.

1. This narrative of Murray's appearance at Middlebury is drawn from Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO MAG. (May 28, 2017), <http://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195> [<https://perma.cc/D7KP-5TBS>], and Peter Holley, *A Conservative Author Tried to Speak at a Liberal Arts College. He Left Fleeing an Angry Mob.*, WASH. POST (Mar. 4, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/03/04/a-conservative-author-tried-to-speak-at-a-liberal-college-he-left-fleeing-an-angry-mob/> [<https://perma.cc/3MFV-Q66G>].

2. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

3. See, e.g., Charles Lane, *The Tainted Sources of "The Bell Curve"*, N.Y. REV. BOOKS (Dec. 1, 1994), <http://www.nybooks.com/articles/1994/12/01/the-tainted-sources-of-the-bell-curve/> [<https://perma.cc/6VK2-TFUX>]. For extensive discussions of *The Bell Curve*, see *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1995); *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS* (Russell Jacoby & Naomi Glauberman eds., 1995).

Protesters greeted Murray at Middlebury. When he took the stage, a group of student protesters chanted and yelled, making it impossible for him to address the audience. Organizers took Murray to a different location for a closed-circuit broadcast of his discussion with political science professor Alison Stanger. Protesters found the broadcast venue and tried to disrupt the broadcast with noise. When Murray and Stanger left the building, events turned violent. A group of about two dozen people, apparently including both students and non-student anti-fascist activists, confronted Murray and Stanger. The group blocked and shoved the duo, piled on their car once they reached it, and tried to stop them from leaving. Stanger suffered a neck injury and a severe concussion before she and Murray managed to get away. The school punished seventy-four students for participating in the disruptions and/or the physical confrontation.<sup>4</sup>

Commentators cast the Middlebury melee as the latest brick in a rising wall of left-wing student intolerance at American colleges and universities.<sup>5</sup> Similar incidents have occurred at other schools. The University of California's flagship Berkeley campus canceled a speech in early 2017 by right-wing celebrity Milo Yiannopoulos after violence erupted amid protests.<sup>6</sup> Two months later, right-wing author Ann Coulter canceled her own scheduled Berkeley appearance over safety concerns.<sup>7</sup> In 2014, former Secretary of State Condoleezza Rice withdrew her initial acceptance of an invitation to deliver Rutgers University's commencement address after students

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4. See *Middlebury College Completes Sanctioning Process for March 2 Disruptions*, NEWSROOM (Middlebury College, Middlebury, Vt.), May 23, 2017, <http://www.middlebury.edu/newsroom/archive/2017-news/node/547896> [<https://perma.cc/MM7S-L9F7>].

5. See Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/> [<https://perma.cc/U93Q-5F7N>]; Richard Cohen, *Protesters at Middlebury College Illustrate "Cultural Appropriation"—of Fascism*, WASH. POST (May 29, 2017), [https://www.washingtonpost.com/opinions/protesters-at-middlebury-college-demonstrate-cultural-appropriation—of-fascism/2017/05/29/af2a3548-4241-11e7-9869-bac8b446820a\\_story.html](https://www.washingtonpost.com/opinions/protesters-at-middlebury-college-demonstrate-cultural-appropriation—of-fascism/2017/05/29/af2a3548-4241-11e7-9869-bac8b446820a_story.html) [<https://perma.cc/Q9EM-XRMH>]; Michael R. Strain, *Charles Murray's Account of Middlebury*, NAT'L REV. (Mar. 5, 2017, 11:55 PM), <http://www.nationalreview.com/corner/445508/charles-murrays-account-middlebury> [<https://perma.cc/SB7M-CHSX>].

6. See Jeremy W. Peters & Thomas Fuller, *Ann Coulter Says She Will Pull Out of Speech at Berkeley*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/us/ann-coulter-berkeley-speech.html> [<https://perma.cc/GJB8-S3RY>].

7. See *id.*

and faculty objected due to her leading role in starting the Iraq War.<sup>8</sup> Other high-profile commencement speakers have run into similar troubles.<sup>9</sup> Student speaker protests, along with calls for safe spaces and advocacy of trigger warnings, have drawn loud condemnation. A chorus of critics darkly warns that college students' departures from liberal norms of open public debate threaten free speech values on U.S. campuses.<sup>10</sup> One widely discussed polemic derides today's college students as a spoiled cadre of whiney, developmentally stunted wimps bent on vindictively punishing any speaker who causes the barest upset to their fragile emotional equilibrium.<sup>11</sup>

Criticisms of campus speaker protests often betray a limited understanding of the free speech norms and First Amendment principles that the critics centrally invoke. Indeed, one recent broadside against student illiberalism laments "complicated views" of expressive freedom as the deadliest threat to campus free speech, as if the worst thing students can

8. See Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Student 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> [https://perma.cc/797D-5SVU].

9. See Eric Westervelt, *As More Speakers Get the Boot, Who's Left to Send Off Graduates?*, NPR (May 14, 2014, 4:00 PM), <http://www.npr.org/sections/thetwo-way/2014/05/14/312524021/can-anyone-speak-at-a-college-graduation-anymore> [https://perma.cc/3XTB-29ZR].

10. See JEFFREY HERBST, ADDRESSING THE REAL CRISIS OF FREE EXPRESSION ON CAMPUS 2 (2017) (claiming that "young people" construe the First Amendment as protecting only "the right to non-offensive speech"); David French, *It's Time to Crush Campus Censorship*, NAT'L REV. (Apr. 24, 2017, 7:07 PM), <http://www.nationalreview.com/article/446999/free-speech-campus-censorship-congress-must-punish-universities-give-student-mob> [https://perma.cc/TL7V-5XN2] (accusing "the student-radical mob" of "carrying the virus of censorship and oppression beyond the university and into the nation"); Conor Friedersdorf, *The New Intolerance of Student Activism*, ATLANTIC (Nov. 9, 2015), <https://www.theatlantic.com/politics/archive/2015/11/the-new-intolerance-of-student-activism-at-yale/414810/> [https://perma.cc/D8AT-J26K] (generalizing Yale students' pushback against a faculty member's apology for racist Halloween costumes as hateful, illiberal bullying). Some university administrators have taken up the cudgel, as shown in University of Chicago Dean of Students John Ellison's 2016 letter to the University's incoming undergraduate class. Letter from John Ellison, Dean, University of Chicago, to Class of 2020 Students (2016), [https://news.uchicago.edu/sites/default/files/attachments/Dear\\_Class\\_of\\_2020\\_Students.pdf](https://news.uchicago.edu/sites/default/files/attachments/Dear_Class_of_2020_Students.pdf) [https://perma.cc/W74B-TPZN]. For an exhaustive study and critique of complaints about student illiberalism, see Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987 (2017).

11. See Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [https://perma.cc/V9E2-UVN].

do for the right to critical inquiry is use it.<sup>12</sup> Heidi Kitrosser's recent survey of outcries against college students' "political correctness" documents rampant imprecision and flattening of nuance in debates over campus free speech.<sup>13</sup> This Essay seeks to complicate the discussion of campus speaker protests with insights from free speech theory and First Amendment doctrine. Those insights, I contend, support a more sympathetic view of student protests against campus speakers than public commentary generally offers. At the same time, a sensible application of free speech principles enables more precise and reasoned criticism of campus protesters' mistakes and excesses.

A sound free speech analysis of campus speaker protests should begin with the insight that the student audience's interest is paramount because the university's defining purpose is to educate its students. That doesn't mean students should simply dictate every decision about speaker invitations. Students hold all sorts of divergent views, and administrators necessarily and properly direct the university's educational program, including the invitation of speakers to enhance students' education. However, the primacy of the student audience's interest means that administrators owe students a duty of faithful service in deciding which speakers to invite. It also means that students with different views about invited speakers may and should make their voices heard.

The campus speaker debate implicates free speech principles as to all universities but the First Amendment *per se* only as to public universities. That distinction doesn't matter much for my purposes. First Amendment law should reflect free speech principles, and those principles, in my view, should usually govern private as well as public institutions. In both settings, free speech informs discourse, enhances judgment, and fosters critical engagement. Free speech principles certainly should frame interactions among administrators, students, and invited speakers at institutions, whether public or private, dedicated to teaching and scholarship. Accordingly,

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12. HERBST, *supra* note 10, at 14.

13. See Kitrosser, *supra* note 10, at 2041–51. Survey data support this critique, showing that college graduates and political progressives favor free speech more than other population groups. See Matthew Yglesias, *Everything We Think About the Political Correctness Debate Is Wrong*, VOX (Mar. 12, 2018, 8:00 AM), <https://www.vox.com/policy-and-politics/2018/3/12/17100496/political-correctness-data> [<https://perma.cc/LTY7-2LVX>] (compiling and discussing data).

this Essay speaks mainly in normative rather than legal terms, assessing what should happen under free speech principles when students object to invited speakers in either a public or private university setting.

This Essay makes no pretense of comprehensively analyzing free speech problems in higher education. A comprehensive analysis would need to focus on the forces that pose the greatest dangers to free speech in university communities. Speech suppression carries greater force and thus greater danger when actors with more power do the suppressing. Pressure groups that try to punish, harass, and intimidate students and faculty for expressing ideas the groups don't like often have more power than students.<sup>14</sup> University administrators who squelch or discourage various forms of student expression have as much or more power than pressure groups.<sup>15</sup> Government officials and legislatures that seek, for ideological reasons, to defund state universities,<sup>16</sup> interfere in educational programs,<sup>17</sup> and gut tenure protections<sup>18</sup> have far more power than

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14. See, e.g., Glenn Greenwald, *The Greatest Threat to Campus Free Speech Is Coming from Dianne Feinstein and Her Military-Contractor Husband*, INTERCEPT (Sept. 25, 2015, 1:47 PM), <https://theintercept.com/2015/09/25/dianne-feinstein-husband-threaten-univ-calif-demanding-ban-excessive-israel-criticism/> [https://perma.cc/5RT7-GJTM] (discussing efforts to make certain criticisms of Israel, including advocacy of the Boycott, Divestment, and Sanctions movement, punishable in the University of California system).

15. See, e.g., *Healy v. James*, 408 U.S. 169 (1972) (holding that a college's viewpoint-based refusal to recognize a student group violated the First Amendment). See generally Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017) (criticizing a wide range of university restrictions on students' speech).

16. The most ironic example in the context of this Essay is the president's 2017 threat to pull federal funding from the University of California-Berkeley after violent agitation forced the university to cancel Milo Yiannopoulos's speech. See Susan Svrluga & Brian Murphy, *Trump Lashes Back at Berkeley After Violent Protests Block Speech by Breitbart Writer Milo Yiannopoulos*, WASH. POST (Feb. 2, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/02/01/berkeley-cancels-speech-by-breitbart-writer-milo-amid-intense-protests/> [https://perma.cc/J9WH-6HPK]. A more ubiquitous problem is conservative state legislatures' ideologically driven movement toward reducing funding for higher education. See David Sarasohn, *The Republican War on Public Universities*, NEW REPUBLIC (Aug. 10, 2016), <https://newrepublic.com/article/135972/republican-war-public-universities> [https://perma.cc/H66R-ZZEJ].

17. See Kitrosser, *supra* note 10, at 2053–55 (discussing legislative efforts in Missouri and elsewhere to impose new constraints on state universities because of legislative opposition to student protests).

18. See Colleen Flaherty, *Killing Tenure: Legislation in Two States Seeks to End Tenure at Public Colleges and Universities*, INSIDE HIGHER EDUC. (Jan. 13, 2017), <https://www.insidehighered.com/news/2017/01/13/legislation-two-states-seeks>

administrators. Any thorough discussion of campus free speech problems should deeply probe all those threats before turning to complaints about illiberal students.

Student protests against campus speakers merit attention because, beyond the protests' immediate impacts, they implicate broadly resonant free speech issues. In the university context, how should we understand the interplay among administrators', students', and other actors' free speech interests? When do student protesters threaten free speech, and when do they simply exercise free speech? In the wider world, where public protest plays a major role in political discourse, which modes of protest should we question, and which should we encourage? Most important, how should differences in social power figure into our foundational understandings of free speech?

This Essay provides a taxonomy for thinking about campus speaker protests and zeroes in on the most difficult problem within that taxonomy. The first section of Part I discusses violence in and around protests. Although violence is beyond the pale of free speech, I contend that the media and law enforcement must take far greater care to distinguish violence from nonviolent protest. The second section of Part I discusses what I call *preemptive protest*—protesting before or adjacent to a speech in a manner that doesn't physically or verbally disrupt the speech. I contend that preemptive protests against speakers, including the much-derided student campaigns to "disinvite" campus speakers, make legitimate and valuable contributions to public discourse.

Part II concentrates on the most controversial mode of protest against campus speakers, a mode that falls conceptually between violence and preemptive protest: efforts to shout down invited speakers while they attempt to speak. Starting from the widely shared premise that free speech principles usually bar shouting down, I propose an exception for a particular, narrow set of cases. If a university invites a speaker to campus for reasons that diverge from the interests of the student community, then the invitation lacks validity because it violates the university's duty of faithful service to its students.

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-eliminate-tenure-public-higher-education [<https://perma.cc/3DTS-2G5W>] (discussing Republican-led tenure cuts in Wisconsin and similar proposals in Iowa and Missouri).

Assessment of an invitation's validity, I contend, should focus on the university's process for inviting the speaker. If process failures indicate a violation of the university's duty of faithful service to students, then free speech principles should not bar students from shouting down the speaker.

## I. VIOLENCE AND PREEMPTIVE PROTEST: PROBLEMS AT THE EASY EXTREMES

Core principles of free speech theory and First Amendment law dictate a much more nuanced evaluation of protests against invited campus speakers than critics generally offer. Like any debate, this one requires a precise definition of the problem. Campus protests against invited speakers encompass three distinct categories of behavior: violence, preemptive protest, and shouting down. Shouting down, which presents the most complicated analytic challenge, gets close attention in Part II. We can more easily assess violence and preemptive protest, but those categories still present some important complications. Section A of this Part explains that free speech principles foreclose violent protest, even as those same principles demand great care to avoid conflating speech with violence. Section B contends that preemptive protest, including student campaigns to disinvite campus speakers, contributes to public discourse and advances free speech values.

### A. *Excluding Violence: The Speech-Action Distinction*

The Middlebury-Murray incident illustrates how violence can accompany impassioned public protest. The First Amendment does not protect acts of violence.<sup>19</sup> In the context of student protests against invited speakers, violent attacks deeply offend free speech values by negating speech through coercion. The Supreme Court has embedded a distinction between speech and action in First Amendment law.<sup>20</sup> This distinction forms the essential boundary of First Amendment doctrine. It underpins the well-known exceptions to First

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19. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

20. The speech-action distinction presents serious analytic problems. Constitutional speech protection, however, would be inconceivable without it. *See, e.g.*, STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO* 105 (1994).



Amendment protection for speech that incites others to commit acts of violence<sup>21</sup> and for speech prone to trigger a violent response.<sup>22</sup> Alongside actual violence, techniques of intimidation that make a speaker fear physical harm, even if the intimidators don't follow through with physical action, lie squarely outside the bounds of permissible protest. First Amendment law excludes that sort of intimidation from constitutional protection under the "true threats" doctrine.<sup>23</sup> Anyone who seeks to deny a speaker a platform through violence or intimidation commits an offense against democratic values and free speech principles.<sup>24</sup>

The advent of an individual Second Amendment right to keep and bear arms<sup>25</sup> has raised the stakes for conceptually distinguishing and physically separating violence from protest. During the infamous 2017 "Unite the Right" rally in Charlottesville, Virginia, many right-wing militants (including neo-Nazis and Klansmen) openly carried firearms (including high-capacity rifles) through the streets.<sup>26</sup> In the wake of that event, the American Civil Liberties Union announced that its rigorously non-ideological efforts in defense of First Amendment rights would no longer extend to the bearing of arms in public protests.<sup>27</sup> Guns intimidate and mute opponents of the armed protesters' viewpoint. On a broader theoretical level, the alchemy of passionate expression and lethal firepower under-

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21. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (stating the contemporary test for the incitement exception).

22. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (establishing the "fighting words" exception).

23. See *Virginia v. Black*, 538 U.S. 343, 362–63 (2003) (allowing bans on cross burnings that convey true threats).

24. This rejection of violent protest requires two caveats. First, when protesters face physical attacks, self-defense becomes justifiable. Second, obstructions of thoroughfares, like labor pickets and highway blockages, don't fit any reasonable definition of violence.

25. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

26. See David Frum, *The Chilling Effects of Openly Displayed Firearms*, ATLANTIC (Aug. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/08/open-carry-laws-mean-charlottesville-could-have-been-graver/537087/> [<https://perma.cc/99L5-ZR2S>] (situating the Charlottesville rally in a growing U.S. trend of armed protests).

27. See Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting With Firearms*, WALL ST. J. (Aug. 17, 2017, 6:54 PM), <https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167> [<https://perma.cc/U8TE-K59S>]. In fact, the ACLU didn't limit its disavowal of armed protest to "hate groups," but that label fairly describes most of the protest groups the ACLU's decision affects.

mines the discursive, incremental qualities of speech that help to justify singling out speech for special, strong constitutional protection.<sup>28</sup> Our ubiquitous gun culture has increased the urgency of insisting, under free speech norms and First Amendment law, that public protest must remain nonviolent. This concern carries some irony for the present discussion: The white supremacist ideology that many campus speaker protests condemn has a strong association with guns and a chilling body count,<sup>29</sup> while student protests have neither. Still, the imperative of nonviolent protest cuts across ideologies.

As surely as the First Amendment does not protect violence of any kind, it does protect aggressive, nonviolent protest.<sup>30</sup> Unfortunately, law enforcement and the media drastically overstate the prevalence of violence in public protests, including campus speaker protests, and misleadingly blur the distinction between violent and nonviolent protesters. Media outlets in 2017 breathlessly reported a survey in which 20 percent of college students advocated violence against “offensive and hurtful” speakers, but these reports missed egregious methodological flaws that exposed the survey as a sham.<sup>31</sup> Whenever violence erupts in or around a public protest, the dominant narrative portrays the protest as pervasively violent.<sup>32</sup> That’s a dangerous fallacy to indulge if we care about

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28. I discuss interactions and tensions between First and Second Amendment rights in Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012).

29. See Ben Mathis-Lilley, *The Long List of Killings Committed by White Extremists Since the Oklahoma City Bombing*, SLATE (Aug. 14, 2017, 3:15 PM), [http://www.slate.com/blogs/the\\_slatest/2015/06/18/white\\_extremist\\_murders\\_killed\\_at\\_least\\_60\\_in\\_u\\_s\\_since\\_1995.html](http://www.slate.com/blogs/the_slatest/2015/06/18/white_extremist_murders_killed_at_least_60_in_u_s_since_1995.html) [<https://perma.cc/DW2U-WMDN>]; Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now they Don't Know How to Stop It*, N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/P5MW-E6UW>].

30. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915–17 (1982) (emphasizing that occurrences of violence in a political boycott did not diminish First Amendment protection for nonviolent elements of the boycott).

31. Polling experts savaged the survey, funded by the right-wing Charles Koch Foundation, for using an online opt-in methodology, deceptively stating a margin of error for a nonrandom sample, and gathering data just after the Charlottesville far-right rally had inflamed passions against a fringe segment of right-wing speakers. See Lois Beckett, *'Junk Science': Experts Cast Doubt on Widely Cited College Free Speech Survey*, GUARDIAN (Sept. 22, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/22/college-free-speech-violence-survey-junk-science> [<https://perma.cc/HZ5Q-NLM2>].

32. See Douglas M. McLeod, *News Coverage and Social Protest: How the*

sustaining a vibrant democracy. Violence in or around a protest does not make the protest a riot. The fact that some people at a protest engage in violent conduct doesn't mean that the protest organizers or the other protesters have done anything wrong. These distinctions are especially important given violent agitators' frequent strategy of disrupting and effectively commandeering protests. At the protest against Milo Yiannopoulos's Berkeley speech, for example, a small group of "black bloc" activists injected violence into an action that students had spent weeks planning. When the dust settled, the media all but ignored the nonviolent protest.<sup>33</sup> Media and law enforcement distortions of protesters as violent no doubt contribute to Americans' antipathy toward public protest.<sup>34</sup> The fallacy of the violent protest narrative is especially harmful to communities of color. The prominence of people of color in public protests, most obviously through the Black Lives Matter movement,<sup>35</sup> means that exaggerations of protest violence, in addition to undermining democracy, often reinforce racist stereotypes of people of color as violent criminals.

Perhaps the most egregious instance of unfairly ascribing violence to protesters in a campus setting followed the 2015 protests against institutional racism at the University of Missouri. The protests, led by African-American students,

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*Media's Protest Paradigm Exacerbates Social Conflict*, 2007 J. DISP. RESOL. 185, 186–87 (2007) (describing a "protest paradigm" through which media coverage exaggerates violence and other negative elements of public protest). For an illustration breaking down media coverage of protests in Baltimore following the 2015 death of Freddie Gray in police custody, see Tom McKay, *One Tweet Shows the Hypocrisy of the Media's Reaction to Riots in Baltimore*, MIC (Apr. 26, 2015), <https://mic.com/articles/116524/outrage-over-baltimore-riots-completely-misses-the-point#> [<https://perma.cc/MW7U-8KH6>]. The problem of exaggerating violence around protests isn't new. See JEROME H. SKOLNICK, *THE POLITICS OF PROTEST* 4–5 (N.Y.U. Press 2010) (1969) (discussing exaggerated perceptions of violence around U.S. protest movements of the late 1960s).

33. See Max Kutner, *Inside the Black Bloc Protest Strategy That Shut Down Berkeley*, NEWSWEEK (Feb. 14, 2017, 8:00 AM), <http://www.newsweek.com/2017/02/24/berkeley-protest-milo-yiannopoulos-black-bloc-556264.html> [<https://perma.cc/PA3Z-LWXB>].

34. See, e.g., Paul Herrnson & Kathleen Weldon, *Going Too Far: The American Public's Attitudes Toward Protest Movements*, HUFFINGTON POST (Oct. 22, 2014, 2:48 PM; updated Dec. 6, 2017), [http://www.huffingtonpost.com/paul-herrnson/going-too-far-the-america\\_b\\_6029998.html](http://www.huffingtonpost.com/paul-herrnson/going-too-far-the-america_b_6029998.html) [<https://perma.cc/M4X2-DCEP>].

35. See Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 AM), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [<https://perma.cc/K6QG-DQH3>].

achieved sweeping institutional changes, including the resignation of the university's president.<sup>36</sup> Some protesters sought to exclude journalists from the protests in order to avoid negative media attention. In the heat of one protest action, a white junior professor named Melissa Click shouted, "I need some muscle over here!" to stop a journalist from reporting on protesters.<sup>37</sup> No violence occurred. But within a few days the name "Melissa Click" was all that most Americans knew about the Missouri protests.<sup>38</sup> Almost none of the media outlets that savaged the media-shy students and turned Click into a poster child for censorship bothered to report that a leading student protest group recanted the anti-media stance and praised journalists' reporting on the protests.<sup>39</sup> Thus did one white faculty member's vague, unfulfilled intimation of violence eclipse and delegitimize African-American students' nonviolent, hugely successful protest against racial injustice.

Opponents of campus speaker protests have fueled the conflation of protest and violence. A singularly absurd charge of violence against a speaker protest arose in 2014, when Haverford College invited former University of California chancellor Robert Birgeneau to deliver the college's commencement address. A group of students and faculty objected because Birgeneau ran the University of California system when university police attacked and beat protesters at Berkeley.<sup>40</sup> He had notoriously defended police tactics and

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36. See John Eligon & Richard Pérez-Peña, *University of Missouri Protests Spur a Day of Change*, N.Y. TIMES (Nov. 9, 2015), <https://www.nytimes.com/2015/11/10/us/university-of-missouri-system-president-resigns.html> [<https://perma.cc/6L2N-SXYH>].

37. See David Folkenflik, *Analysis: At the University of Missouri, an Unlearned Free Speech Lesson*, NPR (Nov. 10, 2015, 7:28 PM), <http://www.npr.org/2015/11/10/455532242/analysis-at-the-university-of-missouri-an-unlearned-free-speech-lesson> [<https://perma.cc/7ZXR-QMVQ>].

38. Conservative media outlets were still fixated on Click almost a year after the Missouri protests, reporting breathlessly on her joining Gonzaga University for a one-year, non-tenure-track position. See, e.g., Blake Neff, *Fired Mizzou Professor Melissa Click Joins Gonzaga Faculty*, DAILY CALLER (Sept. 3, 2016, 9:37 AM), <http://dailycaller.com/2016/09/03/fired-mizzou-professor-melissa-click-joins-gonzaga-faculty/> [<https://perma.cc/D86D-CLCH>].

39. See Folkenflik, *supra* note 37. Folkenflik deserves credit for being one of the few journalists to report this important detail, although it belies the headline of his piece: "An Unlearned Free Speech Lesson."

40. Richard Pérez-Peña, *In Season of Protest, Haverford Speaker Is Latest to Bow Out*, N.Y. TIMES (May 13, 2014), <https://www.nytimes.com/2014/05/14/education/in-season-of-protest-haverford-speaker-is-latest-to-bow-out.html> [<https://perma.cc/UUJ8-K6UF>].

called protesters' linking of arms "not non-violent civil disobedience."<sup>41</sup> The Haverford objectors wrote Birgeneau a letter demanding that he take various measures to atone for his actions at Berkeley. Birgeneau's terse response, upping the ante from his condemnation of arm-linking, called the written charges and demands from people he had never physically met "untruthful, violent verbal attacks."<sup>42</sup> He then withdrew from the address. Likewise, media condemnations of the Middlebury-Murray incident indiscriminately lumped the various protesters together, ignoring the differences in chronology and location between nonviolent and violent actions and conflating the distinct identities of nonviolent and violent actors.<sup>43</sup>

Given the importance of vigorous public debate for a healthy democratic society and the benefits that the vast majority of protesters bring to our system of free expression, protest may be the very worst context for imposing guilt by association. Conflation of campus protest and violence carries a heavy irony given that critics often castigate student protesters for conflating derogatory speech and violence.<sup>44</sup> Violence in and around protests, including university students' protests against invited speakers, should be prominently reported and vigorously investigated, not least because of the material and rhetorical threat that violence poses to protest itself.<sup>45</sup> However, conflating protest with violence does tremendous, unjust harm. Journalists, whose special role in promoting free expression is enshrined in the First Amendment's Press Clause,<sup>46</sup> should

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41. Robert J. Birgeneau et al., *Message to the Campus Community About 'Occupy Cal'*, BERKELEY NEWS (Nov. 10, 2011), <http://news.berkeley.edu/2011/11/10/message-to-the-campus-community-about-occupy-cal/> [<https://perma.cc/Y9MK-HHM8>].

42. Dan McQuade, *Haverford Commencement Speaker: Letter a "Violent, Verbal Attack"*, PHILA. MAG. (May 8, 2014, 2:03 PM), <http://www.phillymag.com/news/2014/05/08/haverford-commencement-speaker-letter-a-violent-verbal-attack/> [<https://perma.cc/YV9M-J7H5>] (quoting Birgeneau's letter).

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

44. See, e.g., Jonathan Haidt & Greg Lukianoff, *Why It's a Bad Idea to Tell Students Words Are Violence*, ATLANTIC (July 18, 2017), <https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/> [<https://perma.cc/DFQ2-JRS7>].

45. See Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2203–04 (2018) (advocating rigorous enforcement of applicable laws against people who commit violent acts during campus speaker protests).

46. U.S. CONST. amend. I. For discussions of the Press Clause's distinctive constitutional function of ensuring that the news media advance democratic self-

exercise the highest professional standards when reporting and commenting on campus speaker protests where violence happens. They should report thoroughly on the nonviolent aspects of the protests. When journalists or law enforcement discuss violence, they should specify the nature, extent, and circumstances of violent acts. They should identify factions that avoided violence and specify which factions or people committed violent acts. Above all, they should abjure the familiar, corrosive narrative that protest equals violence.

### *B. Validating Preemptive Protest*

The most common mode of student protest against invited campus speakers is what I'll call "preemptive protest." Preemptive protest is nonviolent, nonobstructive action that makes a case for why a speaker shouldn't be heard. Telling white supremacists not only "you're wrong" but also "go away" is preemptive protest. Urging people not to buy a forthcoming book because its publication will have undesirable consequences is preemptive protest. Challenging a speaker's qualifications or authority to address a gathering is preemptive protest. Preemptive protesters may seek to persuade potential audience members to boycott a speaker. They may express objection to the speaker through picketing outside the speech or a silent demonstration or walkout during the speech.

Campus speaker controversies feature all these varieties of preemptive protest. The most notorious variety of preemptive protest against campus speakers advocates disinvitation: students seek to persuade university administrators to rescind a speaker's invitation. Critics insist that disinvitation campaigns violate free speech principles.<sup>47</sup> Leading the outrage parade, a libertarian group called the Foundation for Individual Rights in Education (FIRE) maintains a "disinvitation database," which attempts to catalog every successful and unsuccessful effort to get a campus speaker disinvited. FIRE

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government, see C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002); RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499 (2019).

47. See Kitrosser, *supra* note 10, at 2016–17 (compiling criticisms of disinvitation campaigns and other campus speaker protests).

condemns all disinvitation efforts, without qualification, as contributing to “a culture of censorship on college campuses.”<sup>48</sup>

That charge doesn’t hold water. Preemptive protest doesn’t betray or undermine a system of free expression. Rather, preemptive protest works squarely within and honorably serves a system of free expression. Students have substantially less power in universities than administrators. Trying to persuade administrators to disinvite a speaker or potential audience members to boycott a speech leverages students’ limited power through argument. Argument is exactly what First Amendment law and free speech norms are supposed to protect and promote. To be sure, preemptive protest argues bluntly and harshly that certain speech isn’t worth hearing and doesn’t deserve a platform. But challenging the value or legitimacy of an opponent’s ideas, or even the opponent’s character or integrity, is a valid, familiar, and often highly persuasive mode of argument.

The molten core of First Amendment law grants constitutional protection even to the most extreme form of preemptive protest: speech that rejects the liberal democratic preconditions for free speech altogether. In a First Amendment passage both foundational and deeply radical, Justice Holmes wrote of Leninist communism: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”<sup>49</sup> That principle eventually led the Supreme Court to affirm that the First Amendment fully protects advocacy of unlawful action.<sup>50</sup> In this hard-won paradox of our deepest liberal commitments, expressive freedom compels us to tolerate even the most deeply illiberal speech. Some liberals, however, deride this tolerance as a “suicide pact,”<sup>51</sup> and some prominent

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48. *User’s Guide to FIRE’s Disinvitation Database*, FIRE: FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (June 9, 2016), <https://www.thefire.org/how-to-use-the-disinvitation-database/> [<https://perma.cc/RG9U-GUSQ>].

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

50. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

51. Justice Robert Jackson introduced this phrase to First Amendment law in objecting to the Supreme Court’s overturning of a right-wing priest’s conviction for sparking a riot. *See Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). For a history of Justices’ use of the “suicide pact” argument, see Linda Greenhouse, *The Nation*; “Suicide Pact”, N.Y. TIMES (Sept. 22, 2002), <http://www.nytimes.com/2002/09/22/weekinreview/the-nation-suicide-pact.html> [<https://perma>

scholars would compromise the First Amendment to let the government punish insurrection and illiberal admonitions.<sup>52</sup>

Critics of preemptive student protest purport to embrace a boldly liberal free speech vision by shielding the rights of illiberal campus speakers from preemptive protesters. In reality, though, the critics' hostility to preemptive protest violates free speech principles. Preemptive protest doesn't violate anyone's rights. It just airs a conflict between two opposing ideas. Challenged campus speakers sometimes complain that preemptive protest seeks to "silence" them. That's a category mistake. Silencing—or FIRE's preferred epithet, "censorship"—entails the use of coercive authority to prevent a speaker from reaching an audience. Preemptive protesters don't have coercive authority. If they succeed in getting a speaker broadly boycotted, or even disinvented, then they've simply won an argument.

Perhaps the most notorious recent campus disinvitation controversy was the protest by Iraq War opponents that led Condoleezza Rice to withdraw as Rutgers University's 2014 commencement speaker.<sup>53</sup> Two years later, President Obama spoke at Rutgers' commencement ceremony. He chastised that year's graduates for their predecessors' resistance to Secretary Rice:

[T]he notion that this community or this country would be better served by not hearing from a former Secretary of State, or shutting out what she had to say—I believe that's misguided. I don't think that's how democracy works best, when we're not even willing to listen to each other. . . . If you disagree with somebody, bring them in. . . . and ask them tough questions. Hold their feet to the fire. Make them defend their positions. . . . Don't be scared to take somebody on. Don't feel like you got to shut your ears off because you're too fragile and somebody might offend your sensibilities. Go at them if they're not making any sense. Use your logic and reason and words. And by doing so,

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.cc/WG6Z-Q28C].

52. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015, 5:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/12/isis\\_s\\_online\\_radicalization\\_efforts\\_present\\_an\\_unprecedented\\_danger.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html) [<https://perma.cc/2SGW-EUCP>].

53. See *supra* note 8 and accompanying text.



you'll strengthen your own position, and you'll hone your arguments. And maybe you'll learn something and realize you don't know everything. And you may have a new understanding not only about what your opponents believe but maybe what you believe. Either way, you win. And more importantly, our democracy wins.<sup>54</sup>

President Obama's scolding of the Rutgers students provides a useful catalog of the most familiar free speech arguments against students' efforts to disinvite speakers. Close examination exposes those arguments as largely, to borrow the president's term, misguided.

First, President Obama's flat assertion that "the community would be better served by . . . hearing [what] a former Secretary of State . . . had to say"<sup>55</sup> offends core free speech principles by denying the community's agency to decide what it wants to discuss. Robert Post contends that the First Amendment must protect the political community's ongoing autonomy to determine and change not only the substance of government policies but also the processes by which we conceptualize democratic self-government—the terms of the discussion itself.<sup>56</sup> Why is the community clearly better off if it hears from Condoleezza Rice? Perhaps the community believes that a chief architect of what many people consider a criminal war has less to contribute to members' understanding of the world than any number of other speakers. Less pointedly, the community might reasonably decide that the celebratory occasion of a commencement address was a poor setting for spotlighting a deeply divisive political figure, even if hearing from her in a different setting might be worthwhile. No one in our society, not even the president, gets to dictate to the rest of us what we should discuss and "how democracy works best."<sup>57</sup> We decide that.<sup>58</sup>

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54. Barack H. Obama, Remarks by the President at Commencement Address at Rutgers, the State University of New Jersey (May 15, 2016, 1:04 PM), <https://obamawhitehouse.archives.gov/the-press-office/2016/05/15/remarks-president-commencement-address-rutgers-state-university-new> [<https://perma.cc/65WJ-JH86>].

55. *Id.*

56. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 273–74 (1995) (positing and exploring the "necessary indeterminacy of public discourse").

57. Obama, *supra* note 54.

58. See generally ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

Second, even if what Secretary Rice had to say was substantively worthwhile in the abstract, the president may have erred in presuming that hearing her speak on campus would add much to the knowledge base of the Rutgers community. Secretary Rice was one of the most prominent, publicly audible figures in the country throughout the first decade of this century. Her views on her subjects of expertise became resoundingly familiar to anyone who paid attention. Perhaps the passage of time gave her new, less familiar insights by 2015. On the other hand, her Rutgers address might have followed the form of many prominent speakers—phoning in bland platitudes or regurgitating their “greatest hits.” Some campus speakers, contrary to President Obama’s high-minded account, make no serious effort to engage students who disagree with them. Instead they seek to promote their books, score political points with outside audiences, or engage in cheap provocation.<sup>59</sup> Of course, none of those goals deprives a speech of full First Amendment protection, but they all undercut the speech’s value to the audience.<sup>60</sup>

Some invited campus speakers actively avoid critical engagement and make a mockery of free speech principles. In one egregious recent example, the conservative Georgetown Center for the Constitution invited Attorney General Jeff Sessions to speak at Georgetown University’s law school.<sup>61</sup> The day before the speech, some students who had signed up to attend the event got disinvitation emails from the Center on the ground that they hadn’t attended any of the Center’s past

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59. See, e.g., UNIV. OF CAL., BERKELEY COMMISSION ON FREE SPEECH, REPORT OF THE CHANCELLOR’S COMMISSION ON FREE SPEECH 6 (2018), [https://chancellor.berkeley.edu/sites/default/files/report\\_of\\_the\\_commission\\_on\\_free\\_speech.pdf](https://chancellor.berkeley.edu/sites/default/files/report_of_the_commission_on_free_speech.pdf) [<https://perma.cc/G9FJ-X6FC>] (questioning certain invited campus speakers’ “commitment to anything other than the pursuit of wealth and fame”).

60. The particular occasion of a commencement ceremony might warrant greater latitude for students to decide what they want from a speaker. On the other hand, a leading critic of campus speaker protests dismisses what he calls the “not on my special day” argument; but the best justification he can find for his position is that not all campus speaker protests involve commencement speakers. See Greg Lukianoff, *New Report: The Push Against Campus Speakers Is Getting More Intense*, HUFFINGTON POST (May 30, 2014, 10:53 AM), [http://www.huffingtonpost.com/greg-lukianoff/new-report-the-push-again\\_b\\_5417664.html](http://www.huffingtonpost.com/greg-lukianoff/new-report-the-push-again_b_5417664.html) [<https://perma.cc/K5ZQ-HR8X>].

61. See Molly Roberts, *Jeff Sessions and Georgetown Show Off the Sneaky Way to Shut Down Free Speech*, WASH. POST (Sep. 26, 2017), <https://www.washingtonpost.com/blogs/post-partisan/wp/2017/09/26/jeff-sessions-and-georgetown-sneakily-shut-down-free-speech/> [<https://perma.cc/3JZ8-2C4E>].

events, which perhaps made them seem ideologically unreliable. On the day of Sessions's appearance, the University confined protesters to restrictive "free speech zones." The attorney general, meanwhile, only answered questions that had been vetted before his appearance. The subject of Sessions's talk? How the left is destroying free speech on campus.<sup>62</sup>

Third, President Obama was wrong to argue that engaging with contrary ideas is the only valid response to provocative or offensive speech.<sup>63</sup> We encounter all sorts of speakers—misogynists, Holocaust deniers, climate science skeptics—whom most of us quite reasonably choose to condemn or ignore rather than engage. In part, that choice reflects the finite resource of our attention. Do we really benefit, for example, from substantively working through arguments for white supremacy? Such arguments have enjoyed extraordinary opportunities for persuasion throughout European and American history, and today most of us would say that no reasonable person could find them persuasive.<sup>64</sup> Likewise, mainstream speakers like Secretary Rice may traffic in ideas that many or most members of an audience have considered and decided to reject. Participants in a well-functioning system of free expression often have good reasons for ignoring discredited ideas and moving on to fresher and more substantial challenges.

Condemning rather than engaging an invited speaker can also embody a rhetorical strategy. Under the First Amendment, the government may not compel us to make conscientious statements we disagree with.<sup>65</sup> This doctrine acknowledges the unique expressive content of refusing to speak.<sup>66</sup> Rejecting engagement with a speaker's ideas, like

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62. See *id.*

63. For an elaboration of this argument, see Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 214–18 (2016).

64. Of course, white supremacy retains a major structural influence on our society and institutions, which may provide a different reason not to indulge white supremacist arguments. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

65. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment . . . includes . . . the right to refrain from speaking . . .”).

66. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (extending First Amendment protection to a religious objector's refusal to stand,

refusing to speak, sends a distinctive message of negation. By seeking to exclude a speaker from a forum, objectors contend that the speaker is not merely wrong but beyond the pale, unworthy of participation in the discussion. Condemnation strategies can be especially useful for people and groups who face structural disadvantages in public debate.<sup>67</sup> Pious insistence on “civility” in public discussion stacks the political deck against people of color and other minority groups, who often must break down imposing political and practical barriers in order to communicate effectively with dominant groups.<sup>68</sup> In some settings, condemnation can leverage an opponent’s notoriety to publicize the protesters’ agenda. Familiar examples include labor picketing, protests at abortion clinics, and civil rights sit-ins.<sup>69</sup> National news outlets probably wouldn’t have noted Rutgers students’ and faculty members’ objections to the Iraq War in 2015 if not for the disinvitation campaign against Secretary Rice.

President Obama stooped to the condescension endemic to critics of campus protesters when he accused Rutgers students of “be[ing] scared to take somebody on” and “shut[ting] your ears off because you’re too fragile and somebody might offend your sensibilities.”<sup>70</sup> Those “ear shutting” students took a stand precisely because they knew very well what Condoleezza Rice had said and done in her public life. Those “scared” students stood up to their university administration and challenged one of the most formidable public figures in the country. Those “fragile” students spoke out against the Iraq War and withstood blowback from the national media and the President of the United States. The Rutgers students’ preemptive protest

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salute the American flag, and recite the Pledge of Allegiance).

67. See *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (recognizing the distinctive force of displaying the message “fuck the draft” for expressing opposition to the Vietnam War); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

68. See, e.g., Vann R. Newkirk II, *Sometimes There Are More Important Goals Than Civility*, ATLANTIC: POLITICS (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/discussing-racism-white-voters/509528/> [<https://perma.cc/D9S9-DZYA>].

69. See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 147–48 (2001) (discussing insurgent movements’ borrowing of attention from speakers they oppose).

70. See Obama, *supra* note 54 and accompanying text.

against Secretary Rice, whatever its substantive merits, honored free speech principles.

Preemptive protest against invited speakers does have costs. No one disputes President Obama's view that a vibrant democratic discourse requires substantial engagement with diverse, opposing ideas. Engagement, as the President suggested, has many benefits. It broadens everyone's bases of insight and knowledge about the world. It provides a ground for testing and sometimes discrediting ideas on their merits. At other times, provocative ideas pass the test of public scrutiny to take hold and change society, often for the better. Sometimes disinvitation campaigns, like other forms of argument, can be ignorant, arrogant, and counterproductive. The widely noted problem of ideological bubbles<sup>71</sup> represents a normatively unappealing extreme of preemptive protest: reflexively deny the legitimacy of your opponent while never engaging with ideas that challenge your own. Preemptive protest can become corrosive if it excessively limits engagement.

What counts as excessive, however, is subject to dispute. Critics may not simply rule preemptive protest out of bounds by decree. They need to fill their own prescription by actively engaging with arguments in favor of preemptive protest. Disengagement from those arguments shirks the crucial task of assessing how free speech principles should bear on public controversies. In any event, for FIRE and other campaigners against student protest to portray preemptive protests against invited speakers as dominating the campus speech environment requires either extreme cognitive dissonance or willful cynicism. University students today, as in the past and no doubt in the future, engage with a wide range of ideas, including a great variety of speakers. Indeed, a recent study of 7,000 undergraduates at 120 schools concludes that "college attendance is associated, on average, with gains in appreciating political viewpoints across the [ideological] spectrum . . ."<sup>72</sup> Preemptive protest remains the exception on our nation's campuses, not the rule.

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71. See, e.g., ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011).

72. Matthew J. Mayhew et al., *Does College Turn People into Liberals?*, CONVERSATION (Feb. 2, 2018, 6:28 AM), <https://theconversation.com/does-college-turn-people-into-liberals-90905> [<https://perma.cc/3ZDX-XL8F>].

Students generally lack authority to disinvite campus speakers. Preemptive protest, by definition, doesn't directly obstruct a speaker's appearance. When university administrators accede to students' disinvitation pleas, we can fairly question and assess how the university has used its authority. On the other hand, when speakers like Condoleezza Rice choose to withdraw from campus appearances, not because of pressure from the university or genuine safety concerns but simply because preemptive student protests have offended or unsettled them, they bear the responsibility for refusing to engage with students who object to their presence. Critics of campus speaker protests often miss the distinction between social pressure and coercion. For example, *New York Times* CEO Mark Thompson claims, with no evidence, that putative campus speakers' voluntary withdrawals or refusals to accept invitations reflect student "intimidation."<sup>73</sup>

Preemptive protest embodies free speech values and advances our system of free expression. A recent Newseum Institute report on "the crisis of free expression on campus" remarkably condemns "active protest" as one way the present generation of college students "censors itself and others . . ."<sup>74</sup> This disdain for student protest reflects broader currents in our contemporary politics. A 2017 United Nations report details proposed legislation in sixteen U.S. states that would "criminaliz[e] peaceful protests . . ."<sup>75</sup> Meanwhile, Donald Trump has lashed out at protesters during his campaign and administration.<sup>76</sup> These attacks on preemptive protest turn free speech principles upside down. Crusaders against campus illib-

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73. MARK THOMPSON, ENOUGH SAID: WHAT'S GONE WRONG WITH THE LANGUAGE OF POLITICS? 243 (2016). Poaching what he purports to condemn as the language of victimization, Thompson even calls Michael Bloomberg, one of the world's wealthiest and most powerful men, a "survivor" of a student disinvitation campaign. *Id.* at 244.

74. HERBST, *supra* note 10, at 2.

75. Letter from David Kaye, U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, and Maina Kiai, U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, to Theodore Allegra, Chargé d'Affaires ad interim, U.S. Mission to the United Nations and Other International Organizations (Mar. 27, 2017), <http://i2.cdn.turner.com/cnn/2017/images/04/15/un.report.pdf> [<https://perma.cc/ZA8N-ALFX>].

76. See, e.g., Ashley Parker, *Riskiest Political Act of 2016? Protesting at Rallies for Donald Trump*, N.Y. TIMES (Mar. 10, 2016), <https://www.nytimes.com/2016/03/11/us/politics/riskiest-political-act-of-2016-protesting-at-rallies-for-donald-trump.html> [<https://perma.cc/L2VZ-KTVW>].

eralism undercut free speech principles when they foment moral panic about preemptive student protest.

## II. SHOUTING DOWN INVITED SPEAKERS AS A RESPONSE TO PROCESS FAILURE

The thorniest mode of campus speaker protests, and the one that therefore demands the closest attention, is student action that falls between violence and preemptive protest. This is nonviolent protest at the time and place of a speech that aims to prevent the speaker from reaching an audience, commonly called "shouting down." Thomas Emerson argued that shouting down shares essential qualities with physical force and that First Amendment doctrine should therefore treat shouting down, like violence, as unprotected conduct rather than speech.<sup>77</sup> That categorical dismissal of shouting down doesn't work. Shouting down is verbal rather than physical, and I've explained why free speech principles counsel against conflating any expression with violent action.<sup>78</sup> We therefore need to figure out how shouting down, as a mode of student protest against invited campus speakers, relates to free expression.<sup>79</sup>

Shouting down presumptively offends free speech principles for the obvious reason that it disrupts speech. Shouting down is speech that nonviolently obstructs settled order, which makes it a form of civil disobedience. Our free speech tradition values civil disobedience as a way for dissenters to speak truth to power.<sup>80</sup> However, civil disobedience generally obstructs either predominantly nonexpressive action, like commerce and traffic, or government processes.<sup>81</sup> Shouting down, in contrast, obstructs ordinary, private speech. When dissenting speech

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77. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 338 (1970). Professor Kitrosser, a forceful defender of student protest, takes a similar view. See Kitrosser, *supra* note 10, at 2040 (positing that shouting down "plainly crosses the line from protest and counter-speech to naked exercise of force").

78. See *supra* Section I.A.

79. The issue of shouting down potentially implicates a fundamental free speech problem: the extent to which granting any speaker the privilege of uninterrupted communication serves or disserves our system of free expression. For this discussion, I assume that uninterrupted speech can have substantial positive value.

80. See generally HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE* (1849).

81. For a thorough history of the practice of civil disobedience in the United States, see LEWIS PERRY, *CIVIL DISOBEDIENCE: AN AMERICAN TRADITION* (2013).

disrupts private expression rather than action or government speech, the dissent transgresses the boundaries within which we ordinarily value the contribution civil disobedience makes to the system of free expression. We want civil disobedience to expand public discourse by expressing and embodying opposition to the status quo, not to contract public discourse by turning disagreements into shouting matches.

To argue that shouting down always violates free speech principles, however, ignores the inevitable distributive problems in a system of free expression and forecloses recourse against speakers who gain expressive opportunities in violation of the system's norms. I contend that shouting down campus speakers usually violates free speech norms but that process failures in inviting speakers can justify shouting down in a narrow range of cases. Section A of this Part develops a theory for making free speech judgments about instances of shouting down. It contends that universities, when they invite speakers to campus, owe students a duty of faithful service, and it explains why and how assessments of universities' adherence to that duty should focus on the processes by which universities invite speakers to campus. Section B puts the theory into practice. It presents idealized models of speaker invitation processes that serve and disserve free speech principles. It then uses those models to assess the shouting down of Charles Murray at Middlebury.

A. *The Conceptual Framework: Selection as Power, Removal as Resistance*

Invitations to speak at universities aren't simple affirmations of speakers' expressive autonomy or generally available public forums.<sup>82</sup> Rather, when a university invites a speaker to campus, it allocates scarce expressive resources to that speaker and denies those resources to others. The university enables students to engage with that speaker and not with others. Sometimes a professor invites a speaker to a class or a group invites a speaker to a meeting at little or no cost. Even in those situations, however, one speaker rather than another commands students' attention. When, how, and to what extent

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82. *Cf. Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (recognizing the general availability of public streets and parks for expressive activity).



do universities' decisions about resource allocation invest a speaker's appearance before a student audience with normative free speech value?

### 1. The Problem of Speech Selection and Speech Removal

Arguments about shouting down implicate the important but usually opaque distinction between selection and removal of recipients of expressive resources. After an incident like Charles Murray's shouting down at Middlebury, critics inevitably argue that free speech norms have suffered because students need to hear many different viewpoints.<sup>83</sup> But that premise says less about the dynamics of inviting speakers to campus than its proponents tend to admit. For students to engage a number and variety of perspectives that fulfill free speech principles, a university need not invite Charles Murray—or any other particular speaker—in the first instance.

Shouting down contests an invited speaker's selection to receive the expressive resource of a campus platform. For shouting down to present a free speech problem, the invitation to the speaker must therefore have procedural legitimacy. We would run into problems if we generally required substantive legitimacy, meaning a certain measure of substantive value in the speaker's ideas or expressions. Under a substantive legitimacy requirement, shouting down would always satisfy free speech principles as long as the protesters were able to propose an alternative speaker with better ideas or expressions. How would a diverse community resolve constant fights over the relative superiority of competing speakers?<sup>84</sup> The requisite legitimacy of a speaker invitation must therefore be procedural. Procedural legitimacy depends on the premise that the invitation, an allocation of the university's expressive resources, came about through a proper process.<sup>85</sup>

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83. See, e.g., sources cited *supra* note 5.

84. I suggest below that in some unusual instances, substantive problems with a speaker's ideas might indicate a procedural problem with a speaker's invitation. See *infra* text preceding note 124.

85. This mode of analysis resonates strongly with the familiar theory of representation reinforcing review in constitutional law. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

First Amendment doctrine provides some useful guidance for normatively assessing procedural legitimacy. First Amendment law lets the government allocate expressive resources in various settings. The simplest example is a speech permit. Some forms of expression, like parades and rallies, require exclusive use of expressive resources. Cities therefore grant exclusive permits to march down particular streets at particular times.<sup>86</sup> Although First Amendment law usually works to avoid government control of speech, speech permit systems can facilitate a system of free expression. Of course, a permitting scheme could undermine the system of free expression if the government selected recipients based on its preference or antipathy for their ideas. That's why permit systems pass First Amendment muster only when they're impartial and procedurally consistent.<sup>87</sup>

The speech selection problem becomes more complicated when the stakes of distributing expressive resources rise because demand for a resource substantially exceeds supply. What if the government wants to support artists financially<sup>88</sup> or allocate an especially valuable expressive commodity like broadcast airwaves?<sup>89</sup> In such situations First Amendment law lets the government subjectively evaluate which speakers should get scarce resources, which turns a permitting process into a *licensure* process. In a licensure process, the government assesses the public benefits of licensing different speakers.<sup>90</sup>

The subjectivity of licensure evaluation creates a high risk of *selection bias*: improper licensure of speakers whose ideas the government favors rather than speakers who the government in good faith determines serve the public interest. First

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86. See *Cox v. New Hampshire*, 312 U.S. 569, 577–78 (1941) (upholding a permit requirement for parades).

87. See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 136–37 (1992) (striking down a permit system that left the government with unbounded discretion to set fees).

88. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 590 (1998) (rejecting a First Amendment challenge to a statutory “decency” criterion for NEA grants).

89. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477–78 (1940) (rejecting a statutory challenge to the FCC's issuance of a broadcast license).

90. An instance of speaker licensure from a different First Amendment precinct is the selection of clergy to perform ceremonial functions in government institutions. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014) (rejecting an Establishment Clause challenge to a scheme for choosing clergy to deliver legislative prayers).

Amendment law centrally condemns biased or standardless licensure schemes as impermissible prior restraints on speech.<sup>91</sup> Selection processes often happen outside public view. Nonpublic processes enable selection bias while making the bias impossible to discern. Normative free speech assessment of attempts to remove speech must grapple with how to take account of selection bias. One response might be simply to presume regularity in licensure processes. Because of the crucial speech interests at stake, however, the foundational First Amendment prohibition on prior restraints imposes the opposite presumption.<sup>92</sup>

Consider an axiomatic selection problem: the process by which books and other materials appear on the shelves of public libraries. Libraries have limited funds to acquire materials. Accordingly, librarians constantly make subjective decisions about which materials to buy. To make all those decisions in open public view would be cumbersome and inefficient. We never hear much about why librarians choose to buy the books they do. Libraries solicit and accept public input on purchase decisions. Ultimately, though, we rely heavily on librarians' expertise in distributing the library's scarce acquisitions budget. Thus, a librarian's selection of materials generally fits the paradigm of speech licensing. Even so, First Amendment law, which imposes strong free speech norms on public libraries, finds no problem with librarians' broad discretion in selecting materials.<sup>93</sup>

Campaigns to remove books from libraries present classic occasions for free speech battles.<sup>94</sup> No form of ground-level censorship or repression is more notorious to civil libertarians than cries to remove this "filthy" or that "blasphemous" book from what are supposed to be open centers of learning. Librari-

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91. *See, e.g.*, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (striking down as a prior restraint a standardless permit system for placing news racks on public property).

92. *See id.*

93. *See United States v. Am. Library Ass'n*, 539 U.S. 194, 207-08 (2003) (plurality opinion) (invoking librarians' discretion to select materials as a basis for upholding the constitutionality of a federal rule that tied certain funding for libraries to the libraries' use on public computers of Internet filtering software).

94. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 868-72 (1982) (plurality opinion) (concluding that the First Amendment right of access to information bars a school board from removing books from a school library for the purpose of denying students access to ideas).

ans and other civil libertarians promote “banned books week,” designed to call negative attention to efforts to remove books from library shelves.<sup>95</sup> Why, as a free speech matter, do we worry so much about efforts to remove books and not at all about the processes by which the books were selected in the first place? The two events present a direct parallel. If a library doesn’t buy a book, the result is the same as removing it: the book isn’t on the shelf.<sup>96</sup> The most obvious difference is that removal campaigns are highly visible, while acquisition decisions mostly happen outside public view. From a free speech standpoint that’s a disturbingly thin reason for ignoring acquisition decisions.

Fortunately, a more substantial factor than mere visibility distinguishes libraries’ selection processes from campaigns to ban books: public librarians have earned society’s trust. We have good reasons for empowering librarians to make largely autonomous acquisition decisions. They’re professionals with a well-established commitment to fostering knowledge, serving the public, and promoting free speech values.<sup>97</sup> We trust librarians not to indulge their, or the broader government’s, biases but rather to fulfill a duty of faithful service to their patrons. If we couldn’t trust librarians to fulfill that duty, then we would need to factor the possibility of selection bias into our assessment of book removal campaigns’ free speech stakes. At the extreme, if we had reason to believe that acquiring librari-

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95. See BANNED BOOKS WEEK COAL., <http://www.bannedbooksweek.org/> [<https://perma.cc/7NVW-BBYJ>].

96. See *Pico*, 457 U.S. at 916–17 (Rehnquist, J., dissenting). One commentator argues that the presence in libraries of resource constraints at the selection stage but not the removal stage justifies imposing First Amendment scrutiny on library removal decisions while giving acquisition decisions a First Amendment “pass.” See Richard J. Peltz, *Use “The Filter You Were Born With”: The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 468–75 (2002). That distinction has limited force. At the selection stage, selection bias can interact with resource constraints. At the removal stage, even though the cost of an acquisition has already been sunk, opportunity costs of keeping and storing physical materials can still impose resource constraints.

97. See, e.g., Rodney A. Smolla, *Freedom of Speech for Libraries and Librarians*, 85 LAW. LIBR. J. 71, 73–74 (1993) (advocating a “professionalism principle” that would constitutionalize the commitment of acquisition decisions to librarians’ professional judgments); see also Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274 (2005) (situating libraries among institutions that might warrant special autonomy from speech regulations).

ans were just as perniciously biased as book-ban campaigners, it would be hard to fault the campaigners from a free speech standpoint. They would simply be asserting the public interest, or at least their account of it, against an illegitimate selection process.

## 2. University Administrators' Duty of Faithful Service to Students

University students are the constituency for campus speaker invitations, just as municipal residents are the constituency for library book acquisitions. (This premise sidesteps hard questions about what duties universities might owe to other communities, such as residents of the university's locality and potentially including broader segments of the public. Recognizing such duties might change some substantive inputs to the analysis I propose here, but not the basic analytic approach.) University students aren't a political majority that putatively threatens First Amendment rights, no matter how much the moral panic about students' supposed illiberalism exaggerates their power.<sup>98</sup> They aren't mere consumers of an educational product, motivated only by market preferences.<sup>99</sup> They aren't children properly subject to the substantial discretion that First Amendment law accords to primary and secondary school officials.<sup>100</sup>

Rather, free speech principles should lead us to conceptualize university students as members of a community that university administrators organize and manage but may not dominate. Students, of course, don't have a monolithic worldview. When students protest against an invited speaker, other students likely had a role in inviting the speaker. Students may diverge sharply in their views about whether a speaker should appear and their desires to hear the speaker.

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98. See *supra* note 10 and accompanying text.

99. But see Frank Bruni, *In College Turmoil, Signs of a Changed Relationship With Students*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/in-college-turmoil-signs-of-a-changed-relationship-with-students.html?https://perma.cc/QX4Z-Q94X> (ascribing students' rampant illiberalism to their posture as universities' demanding customers).

100. See Papandrea, *supra* note 15, at 1849–52 (criticizing judicial application of primary school precedents to higher education free speech controversies); cf. *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (granting a high school principal sweeping discretion to punish a student's off-campus speech).

Those divergences make the integrity of the invitation process even more important.

As with library acquisitions, university administrators owe their constituents, the university's students, a duty of faithful service in selecting campus speakers. Faithful service to students doesn't require administrators to invite only those speakers whom the students would vote to invite any more than faithful service to library patrons requires librarians to acquire only those books that patrons expressly request. Students need quality and variety in invited speakers. University administrators, much like librarians, should provide that quality and variety by inviting worthwhile, edifying speakers who represent a range of viewpoints to help students learn about the world and develop their critical thinking skills.<sup>101</sup> Because the reason for inviting speakers is to serve students' interests, administrators may not invite speakers based merely on the administrators' biases or self-interest.<sup>102</sup> If administrators indulge improper selection bias in inviting a speaker, then student objectors may be justified in shouting the speaker down.

To assess the legitimacy of a campus speaker invitation process, we must ask whether, or in what circumstances, university administrators are trustworthy licensors like librarians. If we have strong reasons to think administrators are basing their speaker invitations on their own biases rather than students' interests, then we have much weaker reasons to pass harsh free speech judgments on students' efforts to shout down speakers. In general, we have some grounds for trusting that university administrators, like librarians, will honor their duty of faithful service to their students. University adminis-

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101. This formulation brackets arguments about substantive baselines. Maybe a predominantly left-wing student community should hear from a more right-wing roster of invited speakers. Maybe universities should disproportionately feature speakers from minority population groups. Maybe current social or political controversies should influence the subject matter focus of speaker invitations.

102. *Cf.* *Bd. of Regents v. Southworth*, 529 U.S. 217, 234–36 (2000) (requiring a public university's expenditure of activity funds drawn from mandatory student payments to be viewpoint neutral). The purpose of presenting a range of speakers to advance students' interests bars public universities from justifying viewpoint biases in speaker invitations as "government speech." *Cf.* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (requiring viewpoint neutrality in a public university's support for student organizations and distinguishing *Rust v. Sullivan*, 500 U.S. 173 (1991), as a case where apparent viewpoint discrimination was permissible under the government speech doctrine).

trators tend to be professional educators—dedicated, like librarians, to a mission that internalizes strong free speech norms. Like librarians, university administrators spend their days immersed in an institutional setting devoted to enlightenment and critical engagement.<sup>103</sup>

However, other important factors distinguish university administrators from librarians. First, universities put greater pressures on their administrators than libraries put on librarians. Public universities answer to state governments, not just local governments. Both public and private universities generally answer to powerful management boards, they have to deal with alumni, and they often have lucrative relationships with outside funding entities.<sup>104</sup> All those groups can influence speaker invitations.<sup>105</sup> Second, university speaker decisions in particular are more fraught than library acquisition decisions. While libraries have many acquisition opportunities, universities have far fewer and more prominent speaking opportunities. Finally, university administrators differ from librarians in their professional identities.<sup>106</sup> Today's university administrators are often grounded more in business than in education.<sup>107</sup> They therefore may not have the same vocational commitment to free speech values as librarians. In addition, the culture wars that tend to swirl around universities may result in appointments of administrators who are either more self-consciously ideological or, at the other extreme, more cautious or malleable than the typical librarian.

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103. See Schauer, *supra* note 97, at 1274–75 (situating universities alongside libraries as institutions with distinctive commitments to expressive freedom).

104. For a discussion of these and other problems of university governance, see DEREK BOK, *HIGHER EDUCATION IN AMERICA* 44–71 (2013).

105. See Amanda Hess, *Elite College Students Protest Their Elite Commencement Speakers*, SLATE (May 13, 2014, 5:36 PM), [http://www.slate.com/blogs/xx\\_factor/2014/05/13/commencement\\_speaker\\_protests\\_elite\\_college\\_students\\_reject\\_christine\\_lagarde.html](http://www.slate.com/blogs/xx_factor/2014/05/13/commencement_speaker_protests_elite_college_students_reject_christine_lagarde.html) [<https://perma.cc/QD2Y-A28W>] (discussing universities' interest in finding commencement speakers with high social stature). These outside influence groups form a counterpoint to the outside activists who sometimes co-opt protests against campus speakers. See *supra* notes 33 and accompanying text. Both sorts of outside groups prompt complicated questions about the "authenticity" of actions taken around campus speaker controversies.

106. See BOK, *supra* note 104, at 47–63.

107. See Laura McKenna, *Why Are Fewer College Presidents Academics?*, ATLANTIC (Dec. 3, 2015), <https://www.theatlantic.com/education/archive/2015/12/college-president-mizzou-tim-wolfe/418599/> [<https://perma.cc/W4SS-CPAW>] (discussing the increasing number of university leaders with business rather than academic backgrounds).

University administrators have been known to disinvite campus speakers without any input from students. Two years ago, for example, Marquette University's law school invited Peter Feigin, president of the Milwaukee Bucks basketball team, to speak to students in a sports law workshop. Then Feigin, addressing a different audience, called Milwaukee "the most segregated, racist place I've ever experienced in my life." The university rescinded Feigin's invitation. A spokesman claimed the school was concerned about public disruption of Feigin's appearance but cited no basis for that concern and conceded that security wasn't the university's main reason for the disinvitation.<sup>108</sup> Universities' self-motivated decisions to disinvite speakers are hard to quantify, not least because critics of students' supposed illiberalism largely ignore these incidents.<sup>109</sup> The FIRE disinvitation database, up to date with an unsuccessful 2017 effort by left-wing Marquette students to secure another speaker's disinvitation, ignores the Feigin incident.<sup>110</sup> Feigin's disinvitation illustrates how selection bias—in this case, a desire to avoid controversy and offense to the surrounding community—can influence university administrators' attitudes toward campus speakers. Administrators might easily indulge this and other sorts of selection bias when deciding behind closed doors which speakers to invite in the first place.

Perhaps some university administrators choose not to invite speakers to whom they believe students would object.<sup>111</sup> If that choice reflects the administrators' judgment that

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108. See Annysa Johnson, *Marquette Law School Cancels Feigin Talk*, MILWAUKEE J. SENTINEL (Sept. 29, 2016), <http://www.jsonline.com/story/news/local/milwaukee/2016/09/29/marquette-law-school-cancels-feigin-talk/91270208/> [<https://perma.cc/4WWY-GZTC>].

109. The legal literature offers a sharp rebuke of university administrators' viewpoint-based restrictions on outside speakers—if we dig back a mere fifty-five years. See William W. Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963).

110. See *Disinvitation Attempts*, FIRE, [https://www.thefire.org/resources/disinvitation-database/#home/?view\\_2\\_search=Marquette&view\\_2\\_page=1](https://www.thefire.org/resources/disinvitation-database/#home/?view_2_search=Marquette&view_2_page=1) [<https://perma.cc/4BSQ-82T6>]. FIRE's database appears to include some instances of autonomous disinvitation by university administrators. See *Disinvitation Attempt Details*, FIRE, <https://www.thefire.org/resources/disinvitation-database/#home/viewdisinvitationattemptdetails/> [<https://perma.cc/8KXM-MVLM>] (noting James Madison University's 2002 disinvitation of Doris Kearns Goodwin after she acknowledged using quotations without sufficient attribution in her writing). The database, however, doesn't identify or distinguish those cases.

111. See HERBST, *supra* note 10, at 12.



students would rightly object because the speaker wouldn't satisfy the educational goals of inviting speakers, then it fulfills the administrators' duty of faithful service to students. On the other hand, if the choice reflects, say, the administrators' self-interested desire to avoid controversy, then it reflects improper selection bias. In all events, the key question is whether an invitation resulted from a legitimate selection process rather than a process tainted by selection bias.

How can university administrators avoid selection bias and establish legitimacy in their decisions about which speakers to invite to campus? The clearest way for administrators to fulfill their duty of faithful service is to give students a voice in speaker invitations. Two qualities that can bring students' voices into invitation processes are *inclusion* and *openness*. Inclusion means giving students an active role in the process and a meaningful opportunity to inform and influence outcomes. The easiest, most common form of inclusion is funding student organizations to invite their own speakers.<sup>112</sup> For singular speaking opportunities such as commencement addresses, inclusion may mean involving student committees or representatives in the decisional process. Openness means optimizing the transparency of the invitation process. Administrators might publish goals and standards for inviting speakers or even hold open forums to discuss the university's priorities in allocating speaking invitations. Openness also entails giving students enough notice of a speaker's appearance to enable discussion and protest. Substantial inclusion and openness in an invitation process provide strong free speech grounds for disapproving the shouting down of invited speakers.

Some critics have proposed, and some states have considered, legal punishments for shouting down speakers (and for related behaviors) at public universities.<sup>113</sup> Ironically, conservative media voices invoke the First Amendment in urging these sorts of punishments for students' speech.<sup>114</sup> Any

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112. See Goldberg, *supra* note 45, at 40–41 (arguing that a university may not bar student groups from inviting speakers whose messages the university opposes); Kitrosser, *supra* note 10, at 2051 (urging universities to give student groups funds for inviting speakers and to support student protest more broadly).

113. See, e.g., Assemb. B. 299 Leg., 2017–2018 Sess. (Wis. 2017), <http://docs.legis.wisconsin.gov/2017/related/proposals/ab299> [<https://perma.cc/D63Y-TQL5>] (requiring state universities to impose disciplinary sanctions for any and all “disorderly conduct” that interferes with another speaker).

114. See, e.g., *Finally, a College Cracks Down on the Left's Snowflake Fascists*,

such legislation, however, would likely violate First Amendment bars on overbroad and vague speech restrictions.<sup>115</sup> More fundamentally, the nuance required for assessing whether shouting down is a valid mode of protest in particular cases, combined with the general complexity and high constitutional stakes of clashes between opposing speech interests,<sup>116</sup> suggests that legislative intervention would be wrong as both a legal and a policy matter.

*B. Assessing the Legitimacy of Shouting Down Invited Campus Speakers*

The prior section built a framework for judging the legitimacy of processes for inviting speakers to campus. That judgment forms the predicate for assessing, under free speech principles, whether student protesters are justified in shouting down invited speakers. This final section brings that framework to bear on the shouting down of Charles Murray at Middlebury College. To set up the analysis, I'll first consider two hypothetical, idealized speaker invitation processes.

1. Rightbury: The Inclusive, Open Dream

Rightbury College's ideologically and demographically diverse administration has very strong policies and procedures in place to protect students' expressive freedom and to promote diversity and broad-based access to the College's benefits. Rightbury has sought to develop a speaker invitation process that maximizes inclusion and openness.

Some years ago, Rightbury administrators convened a set of student listening groups. The groups accurately represented students across all standard diversity categories. Group facilitators discussed with students what characteristics of campus

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N.Y. POST (July 19, 2017), <http://nypost.com/2017/07/19/finally-a-college-cracks-down-on-the-lefts-snowflake-fascists/> [<https://perma.cc/7CNK-LXZA>] (praising Claremont-McKenna College for suspending students who nonviolently impeded and shouted down an invited speaker).

115. *Cf.*, e.g., *Houston v. Hill*, 482 U.S. 451, 471–72 (1987) (invalidating on overbreadth grounds a prohibition on interfering through speech with a police officer's official duties).

116. See generally Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation Enhancing Review*, 83 NOTRE DAME L. REV. 185 (2007).

speakers would add the most to students' Rightbury education. At the same time, administrators gathered faculty input about the educational value of different sorts of outside speakers. The administration processed the input from students and faculty to produce a draft Policy on Invited Speakers. The administration published the draft, held an open hearing, and invited comments. Taking that additional input into account, the administration finalized the policy. At the beginning of every school year, the administration gives every student a copy of the policy and invites critiques and comments, leading to occasional tweaks in the policy.

Rightbury's speaker policy sets forth both substantive standards and procedures for inviting speakers to campus. Substantively, the policy calls for an intellectually and demographically diverse array of speakers. It aims for speakers who can broaden students' knowledge, challenge their preconceptions, and stimulate discussion throughout the university community. The policy states that speakers whose predominant message denigrates any demographic group should be disfavored, but a speaker's criticism or even contempt for a group does not disqualify the speaker from invitation if the speaker, on the whole, serves the policy's goals. Procedurally, the policy calls for students to recommend speakers to invite each year using two thirds of the available budget for outside speakers and for faculty to recommend speakers using the other third. Within the student process, various student organizations make most of the recommendations. A committee with equal representation of students, faculty, and administration makes final decisions. The committee operates under a strong presumption in favor of the student and faculty recommendations while taking care to ensure that the overall slate of invitees satisfies the policy's substantive goals. The committee, independently informed by the student and faculty speaker recommendations, decides on certain invitations with separate budget lines or distinctive functions, such as endowed lectures and the commencement speaker.

To enable discussion, debate, and protest, the Rightbury administration gives the university community at least a month's notice before invited speakers appear. Individual students or groups of students may petition the Speaker Committee to disinvite a speaker. The committee gives all such petitions serious attention and treats them as contributions to

a dialogue. However, the policy states that disinvitation is strongly disfavored, and it instructs the committee to disinvite a speaker only if the committee finds that the invitation resulted from a process failure. After each invited speech on campus and again at the end of the school year, the administration solicits student and faculty feedback on the speakers. Every administrative step related to speaker invitations happens with as much transparency as possible for the university community.

The Rightbury process for inviting speakers to campus exemplifies faithful service to the student community. The administration takes a leading role in the process but has little opportunity to impose its own subjective preferences. The process for selecting speakers conforms to strong free speech principles while taking account of substantive objections that students might raise to particular speakers. Diverse voices inform invitation decisions, and everything happens above board. In these circumstances, meaningful selection bias is vanishingly unlikely to taint the invitation process. Accordingly, the Rightbury administration may and should condemn shouting down an invited speaker as a violation of free speech principles.

## 2. Wrongbury: The Exclusive, Closed Nightmare

Wrongbury College has a stated, sincere commitment to conventional values of liberal education. Wrongbury, however, has no stated goals, let alone any written policy, to govern the invitation of speakers to campus. The Wrongbury administration maintains full authority over speaker invitations. Sometimes the administration funds student groups to invite speakers, but the same fiat that characterizes the administration's own speaker invitations extends to its decisions about which groups to involve in invitations and how to involve them. The Wrongbury administration has no mechanisms for reporting to students and faculty or getting their feedback about outside speakers. Wrongbury simply invites the administration's chosen speakers and then announces their appearances a few days before they speak.

While the Wrongbury administration largely ignores faculty views and completely ignores student views about which speakers the administration should invite to campus, it

listens intently to the views of major donors, the College's institutional partners, powerful and wealthy alumni, and government officials. Wrongbury administrators view speaking invitations as vehicles for currying favor with people and constituencies who have strong input into whether the administrators keep their jobs. In addition, the administration is acutely aware of public opinion, and administrators strive to avoid invitations and controversies that might offend opinion leaders. Within those broad constraints, Wrongbury's administrators freely indulge their own preferences in determining which speakers to invite.

The results of Wrongbury's approach to speaker invitations reflect a lack of diversity in every important sense. The complement of outside speakers over the past decade has skewed substantially whiter, more male, and more heterosexual than the population of Wrongbury's student body, its region, and the nation. Some subjects of public concern have received a lot of attention from speakers; other equally prominent matters have received little or no attention. On many contentious issues, the array of Wrongbury speakers has leaned heavily or exclusively in a common ideological direction.

The Wrongbury administration knows that public commentary on student disinvitation campaigns has been predominantly negative. Accordingly, the administration has trumpeted a "zero tolerance" policy for protests against invited speakers. The policy states that under no circumstances will Wrongbury honor any student plea to disinvite a speaker and that Wrongbury views preemptive protest (both disinvitation campaigns and calls to boycott speakers) as a violation of the College's free speech policies. Wrongbury's president has publicly berated students who have criticized speaker invitations as "melting snowflakes who are scared of disagreement and would rather lash out and pout than have a frank exchange of ideas."

Wrongbury's approach creates an extreme danger of selection bias from the administration itself and from constituencies that influence the administration, even as administrators flout any notion of a duty of faithful service to students. The lack of any regular student role in inviting speakers, combined with the administration's restrictions on preemptive protest, may leave shouting down as students' only way to contest the administration's allocation of expressive resources and

(dis)service to the student community. In these circumstances a speaker's platform at the College lacks procedural legitimacy, and the act of shouting the speaker down therefore converges with ordinary norms of disruptive civil disobedience. Shouting down still presents problems, most notably the need for students who support the speaker to join a shouting match if they want to be heard. That unfortunate state of affairs, however, simply underscores how the Wrongbury process fails the whole student community.

What if the Wrongbury speaker invitation process wasn't visibly rotten but rather entirely opaque? If an opaque process produced an accomplished, interesting, diverse slate of invited speakers, shouting down would be hard to justify despite the procedural uncertainty. In that instance, students should simply agitate for a more open process. If, at the other extreme, an opaque process produced a slate of speakers that a legitimate process shouldn't produce—say, a slate of all Democratic politicians in a state with a Democrat-dominated government—students would have a strong justification for presuming the process illegitimate and, accordingly, for shouting speakers down. One might even argue that free speech principles could underwrite a *duty* to shout down a starkly viewpoint-biased slate of speakers.

The “all Democrats” example points back toward the rocky terrain of substantive justifications for shouting down speakers. Because a diverse community has no workable standard for constantly evaluating speakers' merits, I've posited that the legitimacy of a university's process for inviting speakers must depend on procedural rather than substantive factors. Some speakers, however, may so egregiously lack merit that their substantive failings arguably indict the legitimacy of an opaque invitation process. To take the most obvious example, could a procedurally legitimate system for inviting speakers to campus ever result in giving a platform to an avowed Nazi? If we think not, then shouting down a Nazi speaker could be permissible, or perhaps normatively compelled, even absent direct evidence of selection bias.

### 3. Middlebury and Murray

How should an analysis focused on avoiding selection bias and giving students a voice in speaker invitations lead us to

judge Middlebury College students' 2017 shouting down of Charles Murray? (Set aside the preemptive protest and the subsequent violence.) We need to consider the process through which Murray was invited to speak at Middlebury. Like any real-world invitation process, Middlebury's falls somewhere between the Rightbury dream and the Wrongbury nightmare. But where?

The shouting down of Charles Murray prompted an apparently ongoing revision of Middlebury's speaker invitation policies. The College's interim policy for inviting speakers, adopted in the wake of the Murray incident,<sup>117</sup> requires students, faculty, and staff who wish to host speakers to submit a request at least three weeks before the planned event.<sup>118</sup> The Web page for the Speakers Committee of the College's student-run Activities Board previously included more detailed procedures for student invitations to speakers. As of September 28, 2018, that page had no content.<sup>119</sup> Under the procedures in force as of March 2017, Middlebury's branch of the American Enterprise Institute ("AEI") decided to bring Charles Murray to campus. Presumably a left-wing student group could have invited Morris Dees to explain why his Southern Poverty Law Center calls Murray a "white nationalist"<sup>120</sup> or Van Jones to counter Murray's social critique. Given that substantially open and inclusive process, shouting down Murray seems out of bounds.

Some aspects of the Murray affair, however, raise concerns about Middlebury's speaker invitation process. First, although a student-run affiliate of the AEI extended the invitation to Murray, the national AEI apparently funded his visit.<sup>121</sup> Out-

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117. See Lisa Rathke, *Middlebury College Releases New Event Guidelines After Protest*, BURLINGTON FREE PRESS (Sep. 19, 2017, 7:09 PM), <https://www.burlingtonfreepress.com/story/news/2017/09/19/middlebury-college-releases-new-event-guidelines-after-charles-murray-protest/683377001/> [<https://perma.cc/T3ZR-S26U>].

118. See *Event Scheduling Policies*, MIDDLEBURY: DEPT' OF EVENT MANAGEMENT, [http://www.middlebury.edu/offices/business/scheduling/scheduling\\_policies](http://www.middlebury.edu/offices/business/scheduling/scheduling_policies) (last visited Oct. 2, 2018) [<https://perma.cc/KQY6-ULNN>].

119. See *404 Path Not Found*, MIDDLEBURY, <http://www.middlebury.edu/student-life/community-living/activities/activities-board/speakers> (last visited Sept. 28, 2018) [<https://perma.cc/X76E-RDSW>].

120. *Charles Murray*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/charles-murray> [<https://perma.cc/N2G4-BGXN>].

121. See Alex Newhouse & Ellie Reinhardt, *Charles Murray Visit Provokes Uproar*, MIDDLEBURY CAMPUS (Mar. 9, 2017), <https://middleburycampus.com/35372/features/charles-murray-visit-provokes-uproar/> [<https://perma.cc/43PF-LNJV>].

side funding of campus speakers presents a quandary. On one hand, more sources of money means more funding for speech. On the other hand, a major benefit of having universities fund student groups without regard to viewpoint is to put all manner of different student viewpoints on equal footing. Outside funding upsets that equilibrium. In addition, outside funders may have agendas distinct from, or even contrary to, the best interests of the student community. AEI, for example, may just want liberal college campuses to serve as ironic backdrops for Murray's recitations of right-libertarian dogma. For these reasons, outside funding presumptively undercuts the process value of Middlebury's system for bringing speakers to campus.

Second, Middlebury's speaker invitation process lacked some elements that could have given the overall student community a stronger voice. College administrators appear not to have played any active role in overseeing the process, although Middlebury's post-Murray interim policy requires administrators to review potential public safety issues with speaker events.<sup>122</sup> Administrative dominance of the invitation process would risk sliding into Wrongbury territory, but a lack of administrative guidance leaves doubts about whether the overall process works effectively, gives different student groups equitable funding, and/or serves the broad educational interests of the student community.

Middlebury administrators and faculty appear to have done a very poor job of communicating with students about Murray's visit.<sup>123</sup> By failing to publicize Murray's speech until a week before he arrived, the College limited valuable opportunities for substantive preparation, engaged debate, and preemptive protest. In addition, while the political science department's sponsorship, the university president's introductory remarks, and Professor Allison Stanger's role as Murray's interlocutor all appear to have resulted from standard practices at the College, students apparently did not know about those practices when they learned of the institutional involvement in Murray's visit. We shouldn't easily presume that observers ascribe endorsement to an institution's passive tolerance or even-

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122. See *Event Scheduling Policies*, MIDDLEBURY: DEPT' OF EVENT MGMT., [http://www.middlebury.edu/offices/business/scheduling/scheduling\\_policies](http://www.middlebury.edu/offices/business/scheduling/scheduling_policies) [<https://perma.cc/KQY6-ULNN>].

123. The facts in this paragraph come from Gee, *supra* note 1.



handed hosting of outside speech.<sup>124</sup> However, Middlebury's lack of communication about the extensive official participation in Murray's visit gave students some reason to believe the College's leadership sympathized with Murray's views.

For me, concerns about the process that brought Charles Murray to Middlebury gain force from my substantive belief that Murray is a hateful crank: a supposed scholar who claims academic books don't need peer review<sup>125</sup> and a white man who claims his marriage to an Asian woman absolves him of the racism manifest in *The Bell Curve*.<sup>126</sup> I can't imagine why any institution that cares about intellectual rigor and serious debate would maintain a system for inviting speakers to campus that pours scarce expressive resources down Charles Murray's drain. As convinced as I am of Murray's substantive failings, however, I don't think he falls to the extreme depths at which substance indicts process.

Likewise, the flaws in the process itself did not, in my view, sink to the level of violating Middlebury's duty of faithful service to its students. The College created an inclusive process for inviting speakers through the conventional method of allocating speaker resources among student organizations. The process was publicly known. Students had enough notice of Murray's visit to plan substantial preemptive protests, which many students did. I doubt whether fixing the flaws in Middlebury's process would have averted the Murray invitation or the attendant conflict. Students at Middlebury and elsewhere have reasonable grounds for demanding improvements in speaker invitation processes beyond public safety: a fair resolution of the outside funding issue,<sup>127</sup> greater advance notice of speaker events, clear policies about departmental sponsorship of speakers, and active administrative oversight to

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124. *But see, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009) (excusing a city's viewpoint-based refusal to place a statue in a city park because, in the Court's view, passers-by assume cities support the messages of statues in public parks).

125. *See* Gee, *supra* note 1.

126. *See* Holley, *supra* note 1.

127. One approach might be for universities to match some portion of outside speaker funding and distribute the matching funds among student groups that don't have access to outside funds. For the Supreme Court's rejection of a comparable scheme in the more fraught context of campaign finance, see *Arizona Free Enter. Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011). In the alternative, universities could simply steer major outside funding for speakers into a common pool, effectively increasing the university's overall speaker budget.

enforce process norms. But if we want, as I do, to preserve a strong default rule against shouting down speakers, with exceptions justified only by unusual process failures, then the process by which Middlebury invited Murray to speak passes muster.

## CONCLUSION

This Essay's assessment of campus speaker protests echoes much conventional wisdom: violence is bad, preemptive protest is permissible, and shouting down speakers is generally disfavored. My analysis, however, departs from all of these dominant views in ways that seem to me very important. The interest of student audiences, in my view, matters most in campus speaker protests, and we should respect students' prerogative to respond in various ways to controversial speakers. While violence is wrong, we must take great care not to tar vigorous, nonviolent protest with accusations of violence. Preemptive protest isn't just permissible—it makes a positive contribution to public discourse, even when it takes the form of a disinvasion campaign. Although shouting down speakers is usually wrong, it can find justification in process failure.

This Essay's reframing of student speaker protests points to a serious problem with the broader debate about free speech at U.S. colleges and universities. When we actually look at First Amendment law and think hard about our rich free speech tradition, campus free speech issues get much trickier than crusaders against student illiberalism admit. Those self-appointed paladins of freedom tend to care passionately about everyone's epistemic humility except their own. Too often they "treat their factual premises and policy conclusions as so self-evident, so beyond debate, that they illustrate the very intellectual slumber against which [John Stuart] Mill warned."<sup>128</sup> They indulge a libertarian bias for individual over collective modes of expression, a bias that has no grounding in free speech principles and that undervalues much robust, engaged discourse on university campuses. Higher education in the United States is a complex, diverse ecosystem in which a broad variety of actors and ideas compete, cooperate, and construct ideas about the real and the good. In this setting, free speech

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128. Kitrosser, *supra* note 10, at 2050.

values play out with even greater complexity than elsewhere.

Critics of student protests routinely lament the growth of campus “identity politics,” by which they inevitably mean heightened attention to the grievances of students of color, women, LGBTQ+ students, and members of other historically marginalized groups.<sup>129</sup> Those students and their allies can speak louder and with greater impact on today’s campuses than in the past. Parts of the resulting discourse challenge various liberal free speech precepts. That shouldn’t surprise anyone. Whenever new participants gain access to a discussion, they’re likely to challenge the terms on which the discussion takes place. People whose identities leave them outnumbered or overpowered by numerically or politically dominant groups can quite reasonably be expected to question an account of expressive freedom that merely calls for the government not to interfere with existing allocations of expressive power. Defenders of free speech can’t simply delegitimize these challenges or the challengers’ other contributions to public debate by dismissing the challengers as illiberal or censorious. Neither should free speech advocates mistake new arguments and ways of arguing for assaults on argument itself. A culture committed to free speech should welcome new voices into public discussion, nourish the new conversations those voices spur, and strive to realize the promise of expressive freedom for everyone.

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129. See French, *supra* note 10; HERBST, *supra* note 10, at 2.