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ESSAY

THE MISEDUCATION OF FREE SPEECH

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INTRODUCTION

The claim that America’s campuses are in the midst of a free speech crisis has been made so often and so emphatically that it has widely become accepted as fact.¹ According to the prevailing narrative, liberal

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¹ See, e.g., Jonathan Chait, Not a Very P.C. Thing to Say: How the Language Police are Perverting Liberalism, *N.Y. Mag.* (Jan. 27, 2015), <https://nymag.com/intelligencer/2015/01/not-a-very-pc-thing-to-say.html> [<https://perma.cc/5H7J-FVUP>]; Jeannie Suk Gersen, The Trouble with Teaching Rape Law, *New Yorker* (Dec. 15, 2014), <https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law> [<https://perma.cc/8KV9-T8CQ>]; 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/8PEM-LE7L>]; Megan McArdle, Sheltered Students Go to College, Avoid Education, *Bloomberg* (Aug. 13, 2015), <https://www.bloomberg.com/opinion/>

professors and students have turned institutions of higher learning into elitist enclaves, where any thought that does not conform to leftist orthodoxy is aggressively suppressed. In this narrative, America's institutions of higher learning have been transformed from vibrant marketplaces of ideas to intolerant and censorious safe spaces.

This is not a new narrative. In 1970, soon-to-be Supreme Court Justice Lewis Powell lamented that

frightening progress has been made toward radicalizing the campus. . . . [T]he movement has engulfed many of the most prestigious universities and is a recognized influence on almost every campus. . . . Colleges have been shut down; files looted; manuscripts destroyed and buildings burned. Freedom of speech has been denied, reasoned discourse repudiated and academic freedom endangered.²

In a newspaper editorial published in 1971, Powell expressed his critique in words that could have been written yesterday: "It is common practice, especially on the campus, for leftists to shout down with obscenities any moderate or conservative speaker or physically to deny such speaker the rostrum."³

The historical backdrop of Justice Powell's sentiments was the wave of protests sweeping America's campuses in the early 1970s, with students protesting the Vietnam and Cambodian conflicts as well as police brutality, racism, and sexism.⁴ Despite Justice Powell's attempt to characterize student protesters as hostile to free speech, the period is now seen as a high-water mark for student free speech.⁵ Moreover, it was

articles/2015-08-13/sheltered-students-go-to-college-avoid-education [https://perma.cc/3W-YV-E388]; Judith Shulevitz, In College and Hiding from Scary Ideas, N.Y. Times (Mar. 21, 2015), https://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html [https://perma.cc/GA95-33YJ]; Robby Soave, "Oppression Studies," Actual Oppression Coming to American University, Reason (Jan. 24, 2016), https://reason.com/2016/01/24/oppression-studies-actual-oppression-com/ [https://perma.cc/GJ2D-UHTH].

² Lewis F. Powell, Jr., The Attack on American Institutions, Address at the Southern Industrial Relations Conference 7 (July 15, 1970), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1008&context=powellspeeches [https://perma.cc/56CN-RF-V9].

³ Lewis F. Powell, Jr., Civil Liberties Repression: Fact or Fiction?, Richmond Times-Dispatch, Aug. 1, 1971, at 1, 3.

⁴ See Kathi Valeii, Kent State, Jackson State Survivors Talk Student Activism, Rolling Stone (May 4, 2018), https://www.rollingstone.com/culture/culture-features/kent-state-jackson-state-survivors-talk-student-activism-629402/ [https://perma.cc/HV4W-93MQ].

⁵ See Mary-Rose Papandrea, The Free Speech Rights of University Students, 101 Minn. L. Rev. 1801, 1840 (2017).

students, not the people or the ideas they were protesting, who bore the brunt of violence during this time. Only a few months before Justice Powell's 1970 speech, four students had been shot dead at Kent State, and another two students were killed during a college protest at Jackson State a few weeks later.⁶

The assertion that conservative ideas are being violently suppressed on college campuses is as untrue today as it was in the 1970s.⁷ While there have been a handful of violent incidents involving conservative speakers, the vast majority of universities have experienced no such controversies. The attempts at ideological suppression that do occur on campuses are far more likely to target leftist views than right-wing views. In general, students remain more open-minded and tolerant than the general population, and universities remain some of the most robust free speech institutions in the country.

In other words, the narrative of widespread liberal intolerance and suppression of conservative views on college campuses is simply false. Yet it continues to be repeated by politicians, civil libertarians, university administrators, media outlets, and scholars. This false narrative of the campus free speech crisis is harmful for two primary reasons.

One is that, in Orwellian fashion, it is used to justify the imposition of laws and policies that severely restrict students' right to protest—censorship in the name of free speech. The impact of these regulations is not likely to be evenly distributed but will instead further chill the speech of already marginalized groups. The false narrative of liberal intolerance has particularly vilified the responses of women, nonwhite men, and sexual minorities to the provocations of far-right speakers and other situations seemingly calculated to incite campus conflict. The characterization of protest by these groups as “censorship” that should be punished, as opposed to counterspeech that should be protected, deepens the free speech divide between the privileged and the vulnerable.

The second harm inflicted by the false narrative of the college free speech crisis is how it undermines the legitimacy of the university as a free speech institution. This is particularly alarming in our current historical moment, when our nation's leaders have demonstrated open and sustained hostility to free speech and have degraded every value the right was intended to protect: truth, autonomy, and democracy. We are living

⁶ Valeii, *supra* note 4.

⁷ See discussion *infra*.

through a presidential administration that harnesses the power of the Internet to promote blatant lies, encourage the brutal suppression of dissent, and vilify the press. It is no accident that the attack on universities is driven by Internet celebrities with little knowledge of and even less concern for what a healthy free speech community looks like. While individual universities doubtless often fall short of the ideal, the university as an institution serves to inculcate free speech values in their students and faculty and provides a uniquely valuable model for the cultivation of free speech norms in a broader context. The myth of the censorious campus distracts us from the very real threats to free speech posed by our nation's leaders and delegitimizes the university's ability to fight them. The university model of free speech, which at its best encourages research, reflection, and self-improvement, is needed now more than ever to compete with the Internet model of free speech, which at its worst rewards ignorance, impulsivity, and self-satisfaction.

I. THE MANUFACTURED CAMPUS FREE SPEECH CRISIS

In my 2019 book, *The Cult of the Constitution*,⁸ I detail the convergence of conservative and liberal ideology on free speech over the last few decades. This convergence is perhaps nowhere as apparent as in the recent hand-wringing over the supposed campus free speech crisis. While conservatives have been bemoaning “political correctness” on college campuses since the 1990s,⁹ accusations of student hostility to freedom of speech is now as likely to come from self-described liberals as conservatives. In a piece for *New York Magazine* in 2015, Jonathan Chait followed the conservative playbook by citing a handful of examples of liberal intolerance as evidence that leftists were engaged in an all-out assault on freedom of thought.¹⁰ Chait's piece was followed by a flurry of popular press articles similarly decrying the leftist takeover of college campuses. In 2016, the University of Chicago was lauded across the political spectrum for sending a welcome letter to incoming students that stated that the university does “not support so-called trigger warnings, we do not cancel invited speakers because their topics might prove controversial and we do not condone the creation of intellectual safe

⁸ Mary Anne Franks, *The Cult of the Constitution* (2019).

⁹ Moira Weigel, *Political Correctness: How the Right Invented a Phantom Enemy*, *Guardian* (Nov. 30, 2016), <https://www.theguardian.com/us-news/2016/nov/30/political-correctness-how-the-right-invented-phantom-enemy-donald-trump> [<https://perma.cc/YYE2-84YP>].

¹⁰ Chait, *supra* note 1.

spaces where individuals can retreat from ideas and perspectives at odds with their own.”¹¹

In 2017, three campus protests against right-wing speakers in particular drew intense media coverage and criticism from high-profile liberals. The most legitimately alarming of these involved Charles Murray’s visit to Middlebury College.¹² Murray is best known as the co-author of the controversial 1994 book *The Bell Curve*, widely criticized for unfounded and racist claims about intelligence.¹³ Murray was reportedly prevented from giving his speech by dozens of shouting students, and protesters pulled fire alarms in an attempt to disrupt his delivery of the speech in a different room.¹⁴ Some protesters became physically aggressive with Murray and his faculty interviewer, Professor Allison Stanger, as they departed the building. Protesters rocked the car they entered and jumped on the hood, and Professor Stanger was left with a concussion.¹⁵

Violence also broke out at the University of California, Berkeley in February 2017 in advance of a scheduled appearance by Milo Yiannopoulos, then a senior editor for the far-right publication Breitbart, who is best known for being a gay, homophobic, misogynist, and racist Donald Trump supporter.¹⁶ At some point during the day Yiannopoulos was set to speak, a group of demonstrators set fires and fireworks,

¹¹ Scott Jaschik, “U Chicago to Freshmen: Don’t Expect Safe Spaces,” *Inside Higher Ed* (Aug. 25, 2016), <https://www.insidehighered.com/news/2016/08/25/u-chicago-warns-incoming-students-not-expect-safe-spaces-or-trigger-warnings> [<https://perma.cc/D8WH-5LZ9>]. As Heidi Kitrosser notes, much critique of supposed campus intolerance tends to conflate several disparate and poorly defined issues. Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 *Minn. L. Rev.* 1987, 1992–93 (2017) (“[T]here is tremendous imprecision throughout the public discourse. This is especially, though not exclusively, true in statements by anti-PC critics. Many commentators decry political correctness as a threat to free speech but leave unclear whether, by political correctness, they mean campus speech codes, informal social pressures, or something else. Similarly, in the 2014–2016 reports, PC critics refer in mocking but uniformly vague terms to such phenomena as trigger warnings, safe spaces, and microaggressions. Such imprecision impacts the quality of the debate considerably.”).

¹² Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, *N.Y. Times* (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html> [<https://perma.cc/5UH8-M4NM>].

¹³ See *id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Doug Lederman & Scott Jaschik, *Amid Violence, Yiannopoulos Speech at Berkeley Canceled*, *Inside Higher Ed* (Feb. 2, 2017), <https://www.insidehighered.com/news/2017/02/02/violent-protests-visiting-mob-lead-berkeley-cancel-speech-milo-yiannopoulos> [<https://perma.cc/S7C5-9WH3>].

damaged property, and threw rocks at police.¹⁷ Citing public safety concerns, the university canceled his appearance.¹⁸

Threats of violence also plagued a planned appearance at Berkeley by the conservative political commentator Ann Coulter in April 2017. After receiving what the university characterized as “very specific intelligence” regarding violent demonstrations, Berkeley officials announced that they would not be able to provide adequate security to host Coulter in the venue and on the specific date she had requested.¹⁹

The Coulter controversy sparked comment not just from conservative pundits, but also liberal politicians. Senator Bernie Sanders weighed in, calling attempts to prevent her from speaking “a sign of intellectual weakness. . . . If you can’t ask Ann Coulter in a polite way questions which expose the weakness of her arguments, if all you can do is boo, or shut her down, or prevent her from coming, what does that tell the world?”²⁰ Senator Elizabeth Warren was similarly critical, telling CNN’s Jake Tapper, “My view is, let her speak. . . . If you don’t like it, don’t show up.”²¹

David Cole, the legal director of the ACLU, went even further, releasing a public statement on the events surrounding Coulter’s non-appearance at Berkeley:

The unacceptable threats of violence that have led to the “hecklers’ veto” of Ann Coulter’s speech at Berkeley are inconsistent with free speech principles that protect us all from government overreach. . . . For the future of our democracy, we must protect bigoted speech from government censorship. On college campuses, that means that the best way to combat hateful speech is through counter-speech, vigorous and creative protest, and debate, not threats of violence or censorship.²²

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Thomas Fuller & Stephanie Saul, *Berkeley Is Being Tested on 2 Fronts: Free Speech and Safety*, N.Y. Times (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/us/berkeley-ann-coulter-speech.html> [<https://perma.cc/NRL9-ZQD9>].

²⁰ See Daniel Marans, *Bernie Sanders Condemns Threats Against Ann Coulter Speech at Berkeley*, Huffington Post (Apr. 22, 2017), https://www.huffpost.com/entry/bernie-sanders-ann-coulter-berkeley_n_58fb7006e4b00fa7de14bc3d [<https://perma.cc/MZ9E-8AHH>].

²¹ Olivia Beavers, *Warren on Coulter: 'Let her speak'*, The Hill (Apr. 25, 2017), <https://thehill.com/homenews/news/330364-warren-on-coulter-let-her-speak> [<https://perma.cc/P7QU-E937>].

²² ACLU Statement on Ann Coulter Speech, ACLU (Apr. 26, 2017), <https://www.aclu.org/news/aclu-statement-ann-coulter-speech> [<https://perma.cc/T3M2-J9W6>].

A closer look at the Coulter episode, however, complicates the picture of a liberal university stifling unpopular conservative speech. While many news outlets reported that Berkeley had canceled Coulter's talk and suggested that it had done so out of a bias against conservative speakers, Coulter was never officially scheduled to speak at Berkeley.²³ The organizations that had invited Coulter had asked for but not received confirmation of an available venue.²⁴ Berkeley administrators reportedly only learned of the invitation by reading about it in the newspaper. After the school received warnings of violent reactions to Coulter's unscheduled visit, they offered to host Coulter at a different venue on a later date.²⁵ Coulter and the groups that invited her did not find this alternative acceptable, and Coulter claimed she would show up on the original date.²⁶ Berkeley administrators reiterated that they could not provide a secure location on that date, but that they would arrange for a police presence to attempt to maintain public safety if Coulter did show up.²⁷ After the conservative organizations that invited Coulter stated that they could no longer support the event due to safety concerns, Coulter decided not to show up after all.²⁸

What is more, there is little evidence that "liberal" students, or even students at all, are behind the violent protests in this handful of cases. Many in the media and the general public assumed that the students who expressed nonviolent disagreement with controversial speakers were also responsible for the violence and property damage that occurred during these incidents. But the violent behavior highlighted by the Middlebury and Berkeley incidents does not appear to have been instigated by students. The Berkeley violence "was instigated by a group of about 150 masked agitators who came onto campus and interrupted an otherwise non-violent protest."²⁹ And a Middlebury Police Department statement indicated that many of the individuals present where the violence

²³ Krissy Eliot, *Ann Coulter at Berkeley: Untangling the Truth*, Cal. Mag. (May 6, 2017), <https://alumni.berkeley.edu/california-magazine/just-in/2017-05-08/ann-coulter-berkeley-untangling-truth> [<https://perma.cc/JAG9-6PZM>].

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Public Affairs, *Milo Yiannopoulos Event Canceled After Violence Erupts*, Berkeley News (Feb. 1 2017), <https://news.berkeley.edu/2017/02/01/yiannopoulos-event-canceled/> [<https://perma.cc/TD8K-NSGV>].

occurred outside the Murray event “were not members of the college community.”³⁰ For example, during a protest of Yiannopoulos’s speech at the University of Washington, a Yiannopoulos supporter with no connection to the university shot a demonstrator in the stomach, critically wounding him.³¹ According to police, the shooter and her husband had gone to the UW campus with the specific purpose of provoking altercations with protesters.³² The shooter’s husband sent a Facebook message the day before Yiannopoulos’s talk stating, “I’m going to the milo event and if the snowflakes get out off [sic] hand I’m going to wade through their ranks and start cracking skulls” and noted that his wife would be armed.³³ Violent campus protests are, in short, both rare and not clearly attributable to students, to say nothing of students with any particular ideological affiliation.

Speaker disinvitations, which are often cited as evidence of increasing academic intolerance, are only slightly less rare than violent protests. The Foundation for Individual Rights in Education (FIRE), a nonprofit organization whose stated mission is “to defend and sustain individual rights at America’s colleges and universities,” has maintained a database of attempts to disinvite college speakers since 2000.³⁴ According to FIRE’s database, the number of attempted disinvitations in 2016 was forty-two. Eleven of these were disinvitations of a single speaker, Milo Yiannopoulos.³⁵ There are more than 4,500 degree-granting institutions of higher education in the United States.³⁶ Even if each of these

³⁰ Media Release, Middlebury Police Dep’t., Police Close the Investigation into the Disturbance at Middlebury College Following the March 2, 2017 Presentation by Charles Murray (May 23, 2017), http://www.middleburypolice.org/files/Media_Release_17MB-000685.docx [<https://perma.cc/A8CZ-TDLA>].

³¹ Mike Carter & Steve Miletich, Couple Charged with Assault in Shooting, Melee During UW Speech by Milo Yiannopoulos, *Seattle Times* (May 1, 2017), <http://www.seattletimes.com/seattle-news/crime/couple-charged-with-assault-in-shooting-melee-during-uw-speech-by-milo-yiannopoulos/> [<https://perma.cc/5LCX-JJTJ>].

³² *Id.*

³³ *Id.*

³⁴ Franks, *supra* note 8, at 141; Alex Morey, Campus Disinvitations Set Record in 2016, FIRE (Dec. 20, 2016), <https://www.thefire.org/campus-disinvitations-set-record-in-2016/> [<https://perma.cc/UC9D-829P>].

³⁵ Morey, *supra* note 34.

³⁶ National Center for Educational Statistics, Fast Facts: Educational Institutions, <https://nces.ed.gov/fastfacts/display.asp?id=84> [<https://perma.cc/9ZGF-4V6L>].

institutions held only one speaker event a year, the percentage of attempted disinvitations would be less than one-tenth of a percent.³⁷

And finally, conservative attempts to suppress liberal speech are at least as common as the inverse, but they receive comparatively less attention in the media and by both conservative and liberal commentators.³⁸ The national media watchdog group Fairness & Accuracy in Reporting (“FAIR”) reviewed eighteen months of *New York Times*’ reporting on campus free speech and found that the newspaper devoted seven times as much column space to stories about conservative speech suppression as it did for stories of liberal speech suppression: “A review of *Times* articles, columns, op-eds and reports shows a clear emphasis on documenting and condemning perceived suppression of conservative voices at American universities, while rarely mentioning harassment campaigns against leftist professors and/or the criminalization of leftist causes such as the pro-Palestinian BDS (Boycott Divestment Sanctions) movement.”³⁹

One relatively overlooked story of the suppression of liberal speech involved Anita Sarkeesian, a cultural critic best known for her critiques of sexism in video games.⁴⁰ Sarkeesian’s work has made her a target for violent, misogynist abuse since 2012, abuse that intensified during “Gamergate,” the 2014 high-profile harassment campaign against women in the gaming industry.⁴¹

On October 14, 2014, the day before Sarkeesian was scheduled to give a talk at Utah State University, university administrators received an anonymous e-mail from a person who threatened to carry out “the deadliest school shooting in American history” if her talk was not

³⁷ Franks, *supra* note 8, at 142. Even if some disinvitations go unreported, it is difficult to imagine that their proportion could be anything more than miniscule.

³⁸ Zack Beauchamp, Data Shows a Surprising Campus Free Speech Problem: Left-Wingers Being Fired for Their Opinions, *Vox* (Aug. 3, 2018), <https://www.vox.com/policy-and-politics/2018/8/3/17644180/political-correctness-free-speech-liberal-data-georgetown> [https://perma.cc/W4AP-BBYP].

³⁹ Adam Johnson, NYT’s Campus Free Speech Coverage Focuses 7-to-1 on Plight of Right, Fairness & Accuracy in Reporting (Nov. 15, 2017), <https://fair.org/home/nyts-campus-free-speech-coverage-focuses-7-to-1-on-plight-of-right/> [https://perma.cc/9WZY-GHTN].

⁴⁰ See Franks, *supra* note 8, at 147–48.

⁴¹ See Simon Parkin, Gamergate: A Scandal Erupts in the Video-Game Community, *New Yorker* (Oct. 17, 2014), <https://www.newyorker.com/tech/annals-of-technology/gamergate-scandal-erupts-video-game-community> [https://perma.cc/NFR6-34FK].

canceled.⁴² The anonymous author invoked Marc Lépine, the man who murdered fourteen women at the École Polytechnique in Montreal in 1989 in the name of “fighting feminism.”⁴³ The author claimed to have “a semi-automatic rifle, multiple pistols, and a collection of pipe bombs,” and told the university it had “24 hours to cancel Sarkeesian’s talk.”⁴⁴ The email continued:

Anita Sarkeesian is everything wrong with the feminist woman, and she is going to die screaming like the craven little whore that she is if you let her come to USU. I will write my manifesto in her spilled blood, and you will all bear witness to what feminist lies and poison have done to the men of America.⁴⁵

Sarkeesian is no stranger to threats, and rarely cancels speaking appearances because of them. She did, however, request that the university implement metal detectors or pat-downs for the event in light of the email’s specific reference to firearms.⁴⁶ The university refused,⁴⁷ claiming “they could not prevent those in attendance from carrying weapons into the lecture if they had concealed weapons permits.”⁴⁸ It also refused Sarkeesian’s request that those carrying firearms be asked to show their permits because “that would have been needlessly invasive for the audience.”⁴⁹ Sarkeesian canceled her talk, stating, “It’s unacceptable that the school is unable or unwilling to screen for firearms at a lecture on their campus, especially when a specific terrorist threat had been made against the speaker.”⁵⁰

Sarkeesian is a high-profile speaker who was targeted with specific threats of violence solely based on the anticipated content of her speech, threats that extended to the student audience of the event. By declining to take the threat seriously, university administrators left Sarkeesian with the

⁴² Erin Alberty, Anita Sarkeesian Explains Why She Canceled USU Lecture, Salt Lake Trib. (Oct. 16, 2014), <http://archive.sltrib.com/article.php?id=58528113&ittype=CMSID> [<https://perma.cc/5CBD-4Q86>].

⁴³ Franks, *supra* note 8, at 147.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Alberty, *supra* note 42.

⁴⁷ NPR Staff, One Feminist Critic’s Battle with Gaming’s Darker Side, WBUR News (Oct. 18, 2014), <https://www.wbur.org/npr/357194775/one-feminist-critics-battle-with-gamings-darker-side> [<https://perma.cc/56NQ-MZFE>].

⁴⁸ Alberty, *supra* note 42.

⁴⁹ *Id.*

⁵⁰ *Id.*

choice of speaking and risking death or injury to herself and her audience, or not speaking at all. What Sarkeesian experienced was far graver than Ann Coulter's experience with Berkeley, and yet Sarkeesian's case did not generate anything close to the outrage and condemnation by prominent figures on either the right or the left. The violent suppression of Sarkeesian's speech was not denounced in right-wing outlets fond of invoking the First Amendment when it comes to speakers like Yiannopoulos or Coulter, or used as an example of worrisome intolerance by liberals like Jonathan Chait. The ACLU did not denounce the "hecklers' veto" of Sarkeesian or use it to encourage those on college campuses to use "counter-speech, vigorous and creative protest, and debate, not threats of violence or censorship."

Sarkeesian's story is only one of many right-wing attempts to silence liberal speakers that fails to generate the attention or outrage of incidents involving right-wing provocateurs. In June 2017, *Inside Higher Ed* published an article highlighting recent threats against academics.⁵¹ Five of the six incidents targeted liberal professors, and yet the incident on the list that received the most sustained media coverage and widespread condemnation was the single case⁵² involving a conservative professor, Bret Weinstein of Evergreen State College.⁵³

Among the faculty members who received far less attention and support include Princeton University Professor Keeanga-Yamahtta Taylor, who was targeted with threats of violence, including lynching and being shot, after calling Donald Trump "a racist, sexist megalomaniac" in a commencement speech at Hampshire College in May 2017.⁵⁴ She canceled planned speeches in Seattle and the University of California, San

⁵¹ Colleen Flaherty, *Old Criticisms, New Threats*, *Inside Higher Ed* (June 26, 2017), <https://www.insidehighered.com/news/2017/06/26/professors-are-often-political-lightning-rods-now-are-facing-new-threats-over-their> [<https://perma.cc/2V9Q-WTBV>].

⁵² A case that, like so many other supposed incidents of campus suppression of conservative ideas, was more complicated than media coverage indicated. See Noah Berlatsky, *How Right-Wing Media Has Tried to Stifle Student Speech at Evergreen State College*, *Pac. Standard* (June 14, 2018), <https://psmag.com/education/the-real-free-speech-story-at-evergreen-college> [<https://perma.cc/BN6K-YAK6>].

⁵³ Eoin Higgins, *Threats to Campus Speech Don't Alarm Media When They Come from the Right*, *Fairness & Accuracy in Reporting* (June 15, 2017), <https://fair.org/home/threats-to-campus-speech-dont-alarm-media-when-they-come-from-the-right/> [<https://perma.cc/9TSS-YBKU>].

⁵⁴ Colleen Flaherty, *'Concession to Violent Intimidation,' Inside Higher Ed* (June 1, 2017), <https://www.insidehighered.com/news/2017/06/01/princeton-professor-who-criticized-trump-cancels-events-saying-shes-received-death> [<https://perma.cc/YQX6-8HRM>].

Diego over concerns for her safety.⁵⁵ In another case, John Eric Williams, an associate professor of sociology at Trinity College, was subjected to physical threats after he shared an article that suggested black people should not help bigots.⁵⁶ Trinity College shut down for a day over the threats and placed Williams on leave. In yet another incident, a classics professor at the University of Iowa was threatened and harassed for noting that many ancient Western statues were not originally white.⁵⁷

Outspoken critics of campus intolerance rarely mention the right-wing website *Professor Watchlist*, which has the stated purpose of identifying faculty who “discriminate against conservative students and advance leftist propaganda in the classroom.”⁵⁸ The site provides the professors’ institutional affiliations and faculty photos as well as a summary of their putative infractions. The websites *Campus Reform* and *College Fix* feature similar stories.⁵⁹ According to the American Association of University Professors, “Individual faculty members who have been included on such lists or singled out elsewhere have been subject to threats of physical violence, including sexual assault, through hundreds of e-mails, calls, and social media postings.”⁶⁰

These professors face violent, targeted threats that directly impact their sense of physical safety and their livelihood. Nearly all of them were targeted for the content of their speech—their views on racism, sexism, or white male supremacy. If concerns about freedom of expression in academia are sincere, then these incidents should receive at least the same amount of attention and generate at least as much outrage as those involving right-wing celebrities. Indeed, anyone truly concerned about

⁵⁵ *Id.*

⁵⁶ Colleen Flaherty, AAUP Condemns Threats Against Faculty Members, *Inside Higher Ed* (June 23, 2017), <https://www.insidehighered.com/quicktakes/2017/06/23/aaup-condemns-threats-against-faculty-members> [<https://perma.cc/A5SX-69HK>].

⁵⁷ Colleen Flaherty, Threats for What She Didn’t Say, *Inside Higher Ed* (June 19, 2017), <https://www.insidehighered.com/news/2017/06/19/classicist-finds-herself-target-online-threats-after-article-ancient-statues> [<https://perma.cc/RA74-G5W2>].

⁵⁸ Valerie Strauss, New Conservative ‘Watch List’ Targets Professors for Advancing ‘Leftist Propaganda,’ *Wash. Post* (Dec. 1, 2016), <https://www.washingtonpost.com/news-answer-sheet/wp/2016/12/01/new-conservative-watchlist-targets-professors-for-advancing-leftist-propaganda/> [<https://perma.cc/BZ82-UAUF>].

⁵⁹ See *Campus Reform*, <https://www.campusreform.org/> [<https://perma.cc/9NCY-V5JB>] (last visited Nov. 14, 2019); *College Fix*, <https://www.thecollegefix.com/> [<https://perma.cc/LX46-J9KZ>].

⁶⁰ Am. Ass’n of Univ. Professors, Targeted Online Harassment of Faculty (Jan. 31, 2017), <https://www.aaup.org/news/targeted-online-harassment-faculty> [<https://perma.cc/P5V2-YQ-JR>].

intellectual freedom on college campuses should find direct threats to professors' livelihoods more troubling than protests over famous media personalities with multiple outlets for expressing themselves.

Intellectual intolerance on college campuses is indeed disturbing and should be taken seriously. But the caricature of conservatives struggling to be heard over rioting liberal reactionaries is a grotesque distortion of reality. True instances of violent, intolerant suppression of ideas on college campuses are rare; those specifically targeting conservative ideas are even rarer.

How then, did the myth of a violent, coordinated leftist student push to silence conservative voices on university campuses become so widely accepted? The answer lies in the well-funded, strategic efforts by conservative groups amplified by poorly sourced, sensationalist reporting and liberal free speech fundamentalists.

According to author Amy Binder, "For decades, a handful of organizations has been working in the trenches with conservative college students to stage events" to create the impression of leftist intolerance.⁶¹ "With their emphasis on conservative victimhood and liberal indoctrination, these organizations have fostered right-leaning student activism and suspicion about higher education, which have created fertile soil in which larger-scale political attacks on higher education germinate and grow."⁶² One such organization is the Young America's Foundation ("YAF"), which arranges college speaking tours for Ann Coulter and other conservative celebrities.⁶³ The YAF listed nearly \$60 million in assets and \$23 million in expenditures in 2014.⁶⁴ Its funding sources include the Koch brothers, the Lynde and Harry Bradley Foundation, and Betsy Devos.⁶⁵ Binder writes:

YAF fuels a provocative style for what one of our interviewees called "Average Joe" college students. Enticed by slogans depicting faculty as

⁶¹ Amy Binder, *There's a Well-Funded Campus Industry Behind the Ann Coulter Incident*, *Wash. Post* (May 1, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/01/theres-a-well-funded-campus-outrage-industry-behind-the-ann-coulter-incident/?utm_term=.112bf3354229 [<https://perma.cc/378R-M4G5>].

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Ctr. for Media and Democracy, Exposed: The State Policy Network—The Powerful Right-Wing Network Helping to Hijack State Politics and Government* 2, 21 (2013), https://www.alecexposed.org/w/images/2/25/SPN_National_Report_FINAL.pdf [<https://perma.cc/6HAJ-RYMZ>].

“tree-hugging, gun-taking, wealth-hating, and leftist-loving,” students are taught in “boot camps” to fight “persecution” on campus with an “activist mentality,” confronting their liberal peers and professors head-to-head with “aggressive” tactics. Students take up the combative charge by staging showy events like “Affirmative Action Bake Sales” and “Catch an Illegal Alien Day.” This provocative style of right-wing activism is designed to poke fun at liberals, get them angry, protest their events and, when chaos ensues, attract media attention.⁶⁶

Other well-funded, right-wing organizations sponsoring conservative campus events include the Leadership Institute, Turning Point USA, and the American Enterprise Institute. Several of these organizations are members of the State Policy Network (“SPN”), a wide network of right-wing, tax-exempt think tanks. The SPN Network, which enjoys close ties to the Koch brothers as well as to global corporations including Microsoft, Verizon, and Comcast, pushes “an extreme right-wing agenda that aims to privatize education, block healthcare reform, restrict workers’ rights, roll back environmental protections, and create a tax system that benefits most those at the very top level of income.”⁶⁷

And of course, there is FIRE, one of the loudest voices proclaiming a state of emergency for freedom of expression in higher education. As noted above, FIRE’s own research shows that speaker disinvitations are extremely rare, and yet the organization claimed in 2017 that “the climate for free speech on campus is in many ways more precarious than ever.”⁶⁸ The stark discrepancy between the rhetoric and the reality is made more explicable in light of the individuals who constitute FIRE’s leadership and provide its funding. Despite FIRE’s self-characterization as a nonpartisan foundation, its “funding, board members, and closest associations are heavily right wing.”⁶⁹ The organization listed \$6 million in revenue and \$6 million in assets in 2016,⁷⁰ an amount that includes generous donations

⁶⁶ *Id.*

⁶⁷ See Franks, *supra* note 8, at 141 (citing Ctr. for Media and Democracy, *supra* note 65, at 2).

⁶⁸ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017*, <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2017/> [<https://perma.cc/FKM2-TAFR>].

⁶⁹ Jim Sleeper, *The Conservatives Behind the Campus ‘Free Speech’ Crusade*, *Am. Prospect* (Oct. 19, 2016), <http://prospect.org/article/conservatives-behind-campus-%E2%80%99free-speech%E2%80%99-crusade> [<https://perma.cc/37FZ-T7N3>].

⁷⁰ Nonprofit Explorer, *Foundation for Individual Rights in Education Inc: Full Text of ‘Form 990’ for Fiscal Year Ending June 2017*, ProPublica, <https://projects.propublica.org/>

from right-wing nonprofits such as the Lynde and Harry Bradley Foundation and the Koch brothers' DonorsTrust.⁷¹

II. THE GOLDWATER BILL, OR THE BETRAYAL OF *TINKER*

The concept of counterspeech is central to First Amendment doctrine. In Justice Louis Brandeis's famous formulation, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁷² In his statement on behalf of the ACLU regarding the Coulter controversy at Berkeley, David Cole echoed Brandeis: "[T]he best way to combat hateful speech is through counter-speech, vigorous and creative protest, and debate, not threats of violence or censorship."⁷³ Protest is itself a valuable form of free speech, and one with a particularly distinguished pedigree. In the landmark case *Tinker v. Des Moines*, the Supreme Court held that public high school students wearing black armbands in opposition to the Vietnam War were engaging in expressive conduct protected by the First Amendment.⁷⁴ The mere possibility that such speech may disrupt the educational environment, the Court found, does not justify its suppression. Students' expressive conduct may be restricted only when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."⁷⁵ As Justice Fortas explained:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the

nonprofits/organizations/43467254/201703069349300405/IRS990, [<https://perma.cc/H2K3-DXGE>].

⁷¹ Sleeper, *supra* note 69.

⁷² *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁷³ ACLU Statement on Ann Coulter Speech, *supra* note 22.

⁷⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

⁷⁵ *Id.* at 508, 513.

independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.⁷⁶

Tinker underscores that the right to peaceful protest is an essential aspect of the right to free speech, and serves as a reminder of the role of peaceful protest by students throughout American history, from war protests to civil rights demonstrations.

The promoters of the campus free speech crisis myth have, in Orwellian fashion, targeted a long-recognized, well-established form of protected free speech—student protest—and recast it as censorship. As one legal scholar points out:

[T]he fact that speech is contentious does not make it censorial; it simply makes it contentious speech. Many Supreme Court cases involve contentious yet fully protected speech—ranging from protestors shouting at and following women entering medical clinics to those holding grossly offensive signs at funerals. Indeed, protests, which lie at the core of the First Amendment, are by definition contentious tactics.⁷⁷

In their vilification of student protesters, the promoters of the censorious campus myth bring to mind Justice Hugo Black’s sputtering dissent in *Tinker*, in which the self-styled First Amendment “absolutist” ridiculed the idea that the First Amendment should protect the “groups of students all over the land . . . already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.”⁷⁸

The second Orwellian twist is that the anti-protest measures enacted to respond to this false crisis are themselves censorial. Since the Middlebury and Berkeley incidents, at least seventeen states have enacted anti-protest laws, including eight in 2019 alone.⁷⁹ These bills are based on model legislation titled, with no apparent irony, the “Campus Free Speech Act,”⁸⁰ drafted by the Ethics and Public Policy Center and the Goldwater

⁷⁶ *Id.* at 508–09 (citation omitted).

⁷⁷ Christina E. Wells, Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment, 89 U. Colo. L. Rev. 533, 558 (2018) (footnote omitted).

⁷⁸ *Tinker*, 393 U.S. at 525 (Black, J., dissenting).

⁷⁹ Jeremy Bauer-Wolf, Free Speech Laws Mushroom in Wake of Campus Protests, Inside Higher Ed (Sept. 16, 2019), <https://www.insidehighered.com/news/2019/09/16/states-passing-laws-protect-college-students-free-speech> [<https://perma.cc/9ZHL-E7MD>].

⁸⁰ See Goldwater Inst., Campus Free Speech Act, https://goldwaterinstitute.org/wp-content/uploads/2019/04/Campus-Free-Speech_Model-Legislation_Web.pdf [<https://perma.cc/RQ75-RMSF>].

Institute.⁸¹ These two organizations have received millions of dollars in funding from the Koch brothers. The Ethics and Public Policy Center has also received funding from several wealthy conservative family foundations, including nearly \$2 million from the Lynde and Harry Bradley Foundation.⁸² The Goldwater Institute is “funded by some of the biggest benefactors in Republican politics,” including receiving more than a million dollars from the Mercer Family Foundation since 2012.⁸³

The model bill’s most troubling provisions include Section 1.4, which states that “protests and demonstrations that infringe upon the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction” (with the exception of “professors or other instructors . . . maintaining order in the classroom”); Section 1.7, which states that “anyone under the jurisdiction of the institution who interferes with the free expression of others” will be subjected to “a range of disciplinary sanctions”; Section 1.9, which dictates that a “student who has twice been found responsible for infringing the expressive rights of others will be suspended for a minimum of one year, or expelled”; and Section 1.10, which states that the academic institution “(1) shall strive to remain neutral, as an institution, on the public policy controversies of the day, and (2) may not take action, as an institution, on the public policy controversies of the day in such a way as to require students or faculty to publicly express a given view of social policy.”⁸⁴

The policy does not define “interfering with the free expression of others” or “infringing the expressive rights of others.” Does it include chanting quietly? Holding up large signs? Turning one’s back to the speaker? Such ambiguity should trigger First Amendment concerns about chilling effects, particularly given the harshness of the sanctions imposed for violations. The clause requiring institutions to “remain neutral on the public policy controversies of the day” is difficult to describe as anything other than naked censorship. As Ralph Wilson, an activist who lobbies to

⁸¹ See Stanley Kurtz et al., *Campus Free Speech: A Legislative Proposal 3*, Goldwater Inst. (2019), https://goldwaterinstitute.org/wp-content/uploads/2019/03/Campus-Free-Speech-A-Legislative-Proposal_Web.pdf [<https://perma.cc/4JGH-4DL2>].

⁸² Franks, *supra* note 8, at 143.

⁸³ Jeremy W. Peters, *In Name of Free Speech, States Crack Down on Campus Protests*, N.Y. Times (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html> [<https://perma.cc/AF27-9JFL>].

⁸⁴ Kurtz et al., *Campus Free Speech: A Legislative Proposal 20*, Goldwater Inst., https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf [<https://perma.cc/L4UE-APX6>].

keep corporate influence out of education, writes, the bills can be likened to the *Citizens United* ruling in that they “bend the definition of free speech to favor corporate funded speech (campus speakers sponsored by outside groups, or corporate funded student groups). Spontaneous protest will be pre-empted by sponsored speakers.”⁸⁵

In October 2017, the University of Wisconsin system approved a policy that closely tracked the Goldwater bill, including a provision that expels students who have “disrupted others’ free expression three times.”⁸⁶ The policy, like the Goldwater bill and a version of the bill that passed in the Wisconsin Assembly in June 2017, does not specify what disruptive conduct is. Sixteen of the Board of Regents’ eighteen members were appointed by Republican Governor Scott Walker.⁸⁷ Only one regent, Democrat Tony Evers, dissented, stating that “[t]his policy will chill and suppress free speech on this campus and all campuses.”⁸⁸ The system president, Ray Cross, spoke without any apparent irony about the importance of “teach[ing] students how to engage and listen to those with whom they differ,” leaving it unclear how suspending students for expressing disagreement would convey this lesson.⁸⁹

John K. Wilson, editor of the *Academe Blog*, noted that the legislative sponsors of the “Tennessee Freedom of Speech on College Campus Bill,” that state’s version of the Goldwater bill, did not exactly have a reputation for upholding academic freedom and protecting free speech: they had previously supported cutting \$436,000 from the University of Tennessee-Knoxville’s diversity and inclusion programs and attempted to prohibit funding for Sex Week programs, which aim to “foster a comprehensive and academically-informed conversation about sex, sexuality, and relationships.”⁹⁰ Wilson provided a detailed critique of the original draft

⁸⁵ Ralph Wilson, Koch Network’s Student Protest Ban Disguised as “Campus Free Speech,” *UnKoch My Campus* (Mar. 1, 2017), <http://www.unkochmycampus.org/mar-1-2017-protest-ban-sold-as-free-speech/> [<https://perma.cc/LNB5-N699>].

⁸⁶ Todd Richmond, *University of Wisconsin Approves Free Speech Policy that Punishes Student Protesters*, *Chi. Trib.* (Oct. 6, 2017), <http://www.chicagotribune.com/news/nation-world/midwest/ct-university-of-wisconsin-protest-punishment-20171006-story.html> [<https://perma.cc/2E7Z-URWV>].

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Tricia Culligan, *University of Tennessee Shuts Diversity Office After Sex Week, Gender Controversy*, *U.S. News* (May 21, 2016), <https://www.nbcnews.com/news/us-news/university-tennessee-shuts-diversity-office-after-sex-week-gender-controversy-n578101> [<https://perma.cc/XZW9-PVS7>]; John K. Wilson, *The Tennessee Legislature's Attack on Free Speech*,

of the bill, which went far beyond suppressing student protest and “invents a brand new right imposed by state law for students to say anything they want in class, even if it’s disconnected from the content of the course, and leaves professors completely powerless to stop students and keep a class on track for what it’s supposed to cover.”⁹¹ In his view, the “bizarre and burdensome regulations” not only “take[] away from professors the ability to control the classroom and threatens their academic freedom,” but “[they] subject[] students and staff to repressive new rules that can easily be abused to punish campus protest and dissent.”⁹² In short, Wilson concludes, “This proposed law isn’t a defense of free speech, it’s an attack on it.”⁹³

III. COMPETING FREE SPEECH CULTURES: THE INTERNET VERSUS THE UNIVERSITY

Free speech in America is not only a matter of constitutional doctrine. It is also a matter of strongly felt intuitions by a general public not particularly well versed in the nuances of First Amendment law. What determines how Americans will understand and exercise the principle of free speech comes down largely to non-legal norms, norms that emerge from particular settings and practices. We can assess the healthiness of a given free speech culture by reflecting on how well it promotes the values underpinning the First Amendment: truth, autonomy, and democracy. A free speech culture that encourages habits of research, reflection, and self-improvement will be the most successful in advancing these values; a free speech culture that encourages ignorance, impulsivity, and self-satisfaction will be the least. Broadly speaking, the university embodies the former culture, and the Internet embodies the latter.⁹⁴ The

Academe Blog (Feb. 12, 2017), <https://academeblog.org/2017/02/12/the-tennessee-legislatures-attack-on-free-speech/> [<https://perma.cc/4HFU-27SG>].

⁹¹ Wilson, *supra* note 90.

⁹² *Id.*

⁹³ *Id.* Wilson wrote a much more positive follow-up post in May 2017 after the bill was rewritten in consultation with FIRE to remove its most censorious aspects. See John K. Wilson, *The Tennessee Legislature’s Defense of Campus Free Speech*, Academe Blog (May 11, 2017), <https://academeblog.org/2017/05/11/the-tennessee-legislatures-defense-of-campus-free-speech/> [<https://perma.cc/84VM-WXRW>].

⁹⁴ See Zeynep Tufekci, *It’s the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018), <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/> [<https://perma.cc/3YQD-WWYW>] (“Creating a knowledgeable public requires at least some workable signals that distinguish truth from falsehood. Fostering a healthy, rational, and informed debate in a mass society requires mechanisms that elevate opposing viewpoints,

manufactured campus free speech crisis and the censorious regulations passed in its wake can be viewed as the triumph of Internet free speech culture over university free speech culture.

One of the most influential forces in the creation of the myth of the campus free speech crisis was Milo Yiannopoulos, whose claim to fame is primarily his reputation as an Internet provocateur. Yiannopoulos possesses no particular knowledge or skill that would make him an obvious choice to receive speaking invitations from prestigious universities. At the time he began to appear on college campuses, he was perhaps best known for being permanently banned from Twitter after facilitating an online harassment campaign against Leslie Jones, an African American actress who starred in the 2016 reboot of *Ghostbusters*.⁹⁵ Before Berkeley, his previous speaking engagements at college campuses had been marked by controversy. During a talk at the University of Wisconsin-Milwaukee, Yiannopoulos targeted a transgender student by name, ridiculing the student for filing a Title IX complaint about bathroom access.⁹⁶ According to some sources, Yiannopoulos was planning to name undocumented students during his Berkeley talk.⁹⁷ After protests erupted at Berkeley and the university canceled his appearance for public safety reasons, Yiannopoulos took to Facebook to politicize the situation and don the mantle of a free speech martyr: “The Left is absolutely terrified of free speech,” he wrote, “and will do literally anything to shut it down.”⁹⁸

preferably their best versions. To be clear, no public sphere has ever fully achieved these ideal conditions—but at least they were ideals to fail from. Today’s engagement algorithms, by contrast, espouse no ideals about a healthy public sphere.”)

⁹⁵ Elle Hunt, Milo Yiannopoulos, Rightwing Writer, Permanently Banned from Twitter, *Guardian* (July 20, 2016), <https://www.theguardian.com/technology/2016/jul/20/milo-yiannopoulos-nero-permanently-banned-twitter> [https://perma.cc/EZJ4-C28N].

⁹⁶ Claire Landsbaum, Alt-Right Troll Milo Yiannopoulos Uses Campus Visit to Openly Mock a Transgender Student, *The Cut* (Dec. 15, 2016), <https://www.thecut.com/2016/12/-milo-yiannopoulos-harassed-a-trans-student-at-uw-milwaukee.html> [https://perma.cc/8UV9-B5BU].

⁹⁷ Maya Oppenheim, UC Berkeley Protests: Milo Yiannopoulos Planned to ‘Publicly Name Undocumented Students’ in Cancelled Talk, *Independent* (Feb. 3, 2017), <https://www.independent.co.uk/news/world/americas/uc-berkeley-protests-milo-yiannopoulos-publicly-name-undocumented-students-cancelled-talk-illegals-a7561321.html> [https://perma.cc/359S-XM-TP].

⁹⁸ Claire Landsbaum, Alt-Right Troll’s Visit to UC Berkeley Canceled After Student Protests, *The Cut* (Feb. 2, 2017), <https://www.thecut.com/2017/02/u-c-berkeley-canceled-milos-visit-after-student-protests.html> [https://perma.cc/DS3E-B4XV].

Such was Milo's influence on the campus free speech controversy that Tennessee's anti-protest bill was also referred to as "the MILO bill," and a statement from Yiannopoulos was read out loud at the press conference for the bill.⁹⁹ "We are winning the war," it read, "And we will continue to win as long as students, and now defenders of free speech within the government, stand up to ivory-tower intellectuals and left-wing administrators intent on shutting up any speech they don't find convenient."¹⁰⁰ According to one sponsor of the bill, Senator Joey Hensley, "Too many times we've seen classrooms where the professor doesn't want to hear both sides of an issue, we've heard stories from many students that, honestly, are on the conservative side that have those issues stifled in the classroom."¹⁰¹ His sentiments were echoed by another speaker at the press conference, Luke Elliot, the vice president of the University of Tennessee College Republicans. Elliot stated, "Students are often intimidated by the academic elite in the classroom, Tennessee is a conservative state, we will not allow out of touch professors with no real world experience to intimidate eighteen-year-olds."¹⁰²

The sentiment that professors should not be allowed to "intimidate" their students by teaching them content they do not like is whiplash-inducing coming from the very people who complain about "liberal snowflakes" and "intellectual safe spaces." It also paints an extraordinary picture of what the supporters of such bills think a university should look like: a place where every discussion must hear out "both sides," where people with years of training and expertise should have no more status than those with none, where the demonstration of knowledge is considered a threat.

But that is not a description of a university. That is a description of the Internet.

Milo Yiannopoulos, Ann Coulter, and their ilk are not experts, or professors, or intellectuals. They are Internet celebrities. Their appearance on college campuses is objectionable because they are simply not qualified to be there, and universities should not squander precious attention and resources on clowns and provocateurs. But Internet free speech culture takes the First Amendment right of *protection* for speech and turns it into a demand for *promotion* of speech. Hence the spate of

⁹⁹ Wilson, *supra* note 85.

¹⁰⁰ *Id.*

¹⁰¹ Wilson, *supra* note 90.

¹⁰² *Id.*

lawsuits filed by mostly conservative speakers against companies such as Twitter and Facebook over account suspensions and other disciplinary measures¹⁰³: at their heart is the misguided belief that the right to free speech means the right to an audience. The Internet fetishizes engagement over education, controversy over quality, and attention over expertise.

These norms are in direct conflict with the norms of a university. While there are many competing ideas about the goal of higher education, and all universities fall short of the ideal, at the core of the educational project is the desire to learn more—about the world, about other people, about the nature of truth. That project requires discernment, not blind insistence on the value of hearing “both sides.” As Justice Felix Frankfurter explained in his concurring opinion in the 1952 case *Wieman v. Updegraff*, democracy is built on “disciplined and responsible” public opinion, and “[i]t is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.”¹⁰⁴

These habits are why, contrary to the claims of those who believe in the campus free speech crisis, college students as a group are more open-minded and supportive of free speech than the general population. A 2018 Gallup-Knight Foundation survey found that 70 percent of students “preferred their campus to be an ‘open learning environment’ where they might be exposed to offensive speech, while only 29 percent said they preferred a ‘positive’ environment where offensive speech is banned,” making them “more supportive of an open learning environment than U.S. adults overall.”¹⁰⁵ Indeed, “older people and Republicans actually exhibit *less* tolerance for free expression” than young, left-leaning individuals.¹⁰⁶ Recent studies have also indicated that student appreciation for free speech increases over their time in college, “suggest[ing] that college

¹⁰³ Jane Coaston, *The Facebook Free Speech Battle, Explained*, Vox (May 14, 2019), <https://www.vox.com/technology/2019/5/6/18528250/facebook-speech-conservatives-trump-platform-publisher> [https://perma.cc/Y2ST-VLXF].

¹⁰⁴ 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

¹⁰⁵ Jeffrey Adam Sachs, *The ‘Campus Free Speech Crisis’ Is a Myth. Here Are the Facts.*, Wash. Post (Mar. 16, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/16/the-campus-free-speech-crisis-is-a-myth-here-are-the-facts/> [https://perma.cc/5CDS-WXR2].

¹⁰⁶ Catherine Rampell, *Older People and Republicans, Threatening Free Speech*, Wash. Post (Nov. 2, 2017), <https://www.washingtonpost.com/news/rampage/wp/2017/11/02/older-people-and-republicans-threatening-free-speech/> [https://perma.cc/R5BM-6TRP].

attendance may actually bolster a student's support for free speech rather than undermine it."¹⁰⁷ The number of universities with restrictive speech codes is falling, not rising, and "is currently at an all-time low."¹⁰⁸

CONCLUSION

In 2016, Floyd Abrams, one of the most prominent First Amendment lawyers in the country and the author of the book *The Soul of the First Amendment*, stated that the single greatest threat facing free speech today "comes from a minority of students[] who strenuously[] and . . . contemptuously, disapprove of the views of speakers whose view of the world is different from theirs, and who seek to prevent those views from being heard."¹⁰⁹ Such a claim is shocking not only because it so grotesquely mischaracterizes the current state of free speech on college campuses, but because it ignores so many other urgent, alarming, and effective direct attacks on free speech on campuses and elsewhere.

The outsized focus on isolated, headline-grabbing incidents takes attention away from many pressing issues facing college campuses. Those who raise the alarm about universities' growing intolerance for uncomfortable ideas and students' alleged demands for safe spaces are largely silent, for example, about the passage of "campus carry" laws, which cater to students irrationally terrified of facing the world without the protection of firearms and create a truly troubling "safe space" that endangers not only the free expression, but also the actual lives, of their fellow students.¹¹⁰ Self-proclaimed campus free speech defenders have little to say when a dean of students resigns after a right-wing propaganda outlet publicizes old tweets he wrote about racism,¹¹¹ or when the U.S. Education Department threatens to withdraw funding for a Middle East Studies program if it continues to emphasize "the positive aspects of

¹⁰⁷ Sachs, *supra* note 105.

¹⁰⁸ *Id.*

¹⁰⁹ Jeff Robbins, Floyd Abrams Speaks Freely to Political Correctness on America's Campuses, *Observer* (May 9, 2016), <https://observer.com/2016/05/floyd-abrams-speaks-freely-to-political-correctness-on-americas-campuses/> [<https://perma.cc/CF3Z-RWSW>].

¹¹⁰ Franks, *supra* note 8, at 152.

¹¹¹ Wesley Jenkins, Dean of Students at U. of Alabama Resigns After Breitbart Resurfaces Old Tweets, *Chron. Higher Ed.* (Sept 6, 2019), <https://www.chronicle.com/article/Dean-of-Students-at-U-of/247090> [<https://perma.cc/9Q79-NMJ6>].

Islam,”¹¹² or when university administrators impose gag rules on college rape victims.¹¹³ They also have very little to say, indeed, about rampant sexual assault and sexual harassment on college campuses, or racialized threats targeting minority students.¹¹⁴ These issues have a far greater chilling effect on free speech than the occasional student protest of a controversial speaker.

And what of the threat to free speech in the culture at large, led by the occupant of the highest office of the United States? What of Donald Trump’s belief that flag burners should be imprisoned or stripped of citizenship, a view shared by 67 percent of Republicans?¹¹⁵ Or his desire to “open up our libel laws,” a proposition to which at least one Supreme Court Justice seems amenable?¹¹⁶ What of his demand that the theater be a “safe and special place” for his Vice-President,¹¹⁷ his demonization of the press,¹¹⁸ his attacks on athletes who kneel during the national anthem,¹¹⁹ and his equation of whistleblowing with treason?¹²⁰ Surely the open and repeated hostility to free speech demonstrated by the President of the United States, enforced by his loyal supporters in every branch of

¹¹² Caroline Kelly, Education Department Says Duke-UNC Middle East Studies Program Favors Islam over Christianity, Judaism, CNN (Sept. 19, 2019), <https://www.cnn.com/2019/09/19/politics/education-department-middle-east-studies-islam-christianity-judaism/-index.html> [https://perma.cc/G9AQ-S97L].

¹¹³ Tyler Kingkade, He Admitted to Sexual Assault, But She’s the One They Tried to Silence, Huffington Post (Mar. 8, 2016), https://www.huffpost.com/entry/college-sexual-assault-gag-orders_n_56ddd17ae4b0ffe6f8ea278c [https://perma.cc/F5VC-KGC5].

¹¹⁴ Franks, *supra* note 8, at 152.

¹¹⁵ Jamie Ballard, 67% of Republicans Say People Who Burn the US Flag Should be Stripped of Citizenship, YouGov (July 11, 2019), <https://today.yougov.com/topics-politics/articles-reports/2019/07/11/flag-burning-citizenship-trump-poll> [https://perma.cc/6-AEM-6ZRL].

¹¹⁶ Adam Liptak, Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling, N.Y. Times (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/politics/-clarence-thomas-first-amendment-libel.html> [https://perma.cc/PXZ3-V4YT].

¹¹⁷ Joanna Walters, Trump Demands Apology from Hamilton Cast After Mike Pence Booed, Guardian (Nov. 19, 2016), <https://www.theguardian.com/us-news/2016/nov/19/mike-pence-booed-at-hamilton-performance-then-hears-diversity-plea> [https://perma.cc/RVR6-Y8WN].

¹¹⁸ See Brian Stelter, Why Trump’s Constant Attacks on an Independent Press Are So Dangerous, CNN (Sept. 2, 2019), <https://www.cnn.com/2019/09/02/media/trump-press-attacks-media/index.html> [https://perma.cc/G69Y-T3S7].

¹¹⁹ Jacqueline Thomsen, Trump Renews Attacks on NFL Players, Calling for Suspensions, The Hill (Aug. 10, 2018), <https://thehill.com/homenews/administration/401217-trump-attacks-protesting-nfl-players-they-want-to-show-outrage-at> [https://perma.cc/YD56-EBEJ].

¹²⁰ Maggie Haberman & Katie Rogers, Trump Attacks Whistle-Blower’s Sources and Alludes to Punishment for Spies, N.Y. Times (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/trump-whistle-blower-spy.html> [https://perma.cc/B27G-GTMC].

the government, is a greater threat than a handful of student protesters. President Trump has said that “it’s embarrassing for the country to allow protesters”¹²¹ when you “don’t even know what side” they’re on; he has expressed longing for the “old days” when “we used to throw them out.”¹²² The promoters of the myth of the campus free speech crisis would seem to agree.

The university “will function for the benefit of society, provided it is a center of independent thought.”¹²³ Its role is never more important than when free speech and democracy itself is under attack. The values promoted by the university—critical reflection, intellectual curiosity, independent thought—are not only goods in themselves, but also an essential bulwark against tyranny: “no totalitarian government is prepared to face the consequences of creating free universities.”¹²⁴

The true threat to free speech on college campuses is posed not by university norms on free speech, but by the attack on those norms by the Internet culture of free speech. The Internet model of free speech is little more than cacophony, where the loudest, most provocative, or most unlikeable voice dominates. Whatever else might be said in praise of such a model, it does little to promote knowledge or encourage a diversity of voices. The university model of free speech, by contrast, strives to achieve the “robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”¹²⁵ If we want to protect free speech, we should not only resist the attempt to remake college campuses in the image of the Internet, but consider the benefits of remaking the Internet in the image of the university.

¹²¹ Felicia Somnez, *Trump Suggests that Protesting Should Be Illegal*, Wash. Post (Sept. 5, 2018), https://www.washingtonpost.com/politics/trump-suggests-protesting-should-be-illegal/2018/09/04/11cfd9be-b0a0-11e8-aed9-001309990777_story.html [<https://perma.cc/4C7T-BR5T>].

¹²² *Id.*

¹²³ *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring).

¹²⁴ *Id.*

¹²⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (alteration in original) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).