SPEAKING UP FOR UNIVERSITIES?

JAMES J. BERNSTEIN*

Central to the conception of education is the availability for a free and open exchange of ideas. However, recently, many college or university institutions have restricted discussions and speech. Though some initiatives, like safe spaces, are not in and of themselves antithetical to the principles of the First Amendment, others, such as highly punitive disciplinary codes, have all but silenced students. This article offers three distinct policies to combat this recent trend which "chills" free expression. First, the passage of a federal Leonard Law; second, the adoption of more narrowly tailored and clear guidelines for students on campuses; and third, for the judiciary to remain ever vigilant in upholding the "contract" which students bind themselves to upon matriculating to a given college or university.

TABLE OF CONTENTS

I. INTRODUCTION *2*

II. ORIGINS AND THEORY OF FREE SPEECH *5*

III. SUPREME COURT PRECEDENTS AND CONCLUSIONS *6*

A. *Keyishian v. Board of Regents* 7

B. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 8

C. *Healy v. James* 9

D. *R.A.V. City of Saint Paul, Minn.* 10

E. *Conclusions* 11

IV. THE CAMPUS AS A "FORUM" *12*

V. SOLUTIONS *17*

A. *Changes to Internal Rules* 18

B. *Legislative Changes* 19

C. *A Call to the Judiciary* 20

VI. CONCLUSION *22*

I. INTRODUCTION

In what is perhaps the most cited argument in favor of free speech, John Stuart Mill ("Mill") wrote, among other things, an essay entitled *On Liberty*, which states

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[1]

Simply put, the robust, free exchange of ideas allows for truth-setting as well as truth-seeking, that is, unfettered by restrictions we are able to "exchang[e] error for truth" once faced with opinions which may fail to comport with our own.[2] What's more, though, said Mill, "even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds."[3] This is to say that not only should all ideas be shareable, but contested with, debated, teased and kneaded such that the most perfect form can take shape.

At no place may this be truer than at a college or university.[4] These institutions are, in short, the incubators of intellectual growth; young minds enter and, ideally, leave weathered by tested "truths."[5] Robert J. Zimmer, then-president of the University of Chicago wrote,

> [t]he purpose of a university education is to provide the critical pathway by which students can fulfill their potential, change the trajectory of their families, and build healthier and more inclusive

---

* J.D., Georgetown University Law Center (2024); B.A., Columbia College, Columbia University (2020). It is with immense gratitude that I thank my parents, Joe and Kirsten, who encouraged me and my siblings to spiritedly, but respectfully, share our thoughts at the dinner table.

[1] JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

[2] *Id.*

[3] *Id*. at 118.

[4] *See* Robert J. Zimmer, *A Crucible for Confronting Ideas*, U. CHI. MAG., Fall 2016, at 9, 9; John L. Magistro IV, *First Amendment Law–Free Speech and Higher Education: Can Public Colleges and Universities Use "Safe Space" Policies to Restrict Speech on Campuses?*, 41 W. NEW ENG. L. REV. 371, 408-09 (2018).

[5] *See* Zimmer, *supra* note 5.

> societies. Students learn not only through the acquisition of specific knowledge but also through the attainment of intellectual skills that serve them their entire life. Students come to appreciate context, trade-offs, and data. They master how to recognize complexity, to argue effectively for their positions, and to reconsider and challenge their own beliefs.[6]

Thus, at minimum, in the arena of the classroom or dorm halls, these students spiritedly defend their principles in the name of individual growth as well as the growth of their peers.

However, as is well documented of late, universities have become homes not to a series of high-speed collisions of ideas but rather sheltered, insular bubbles in which cross-intellectual debate is all but discouraged.[7] Part of this phenomenon is motivated by one's peer group.[8] However a significant portion of this self-silencing is the fear of legitimate, concrete punishment; when one speaks, one risks harming a classmate with a particular view and consequently risks being placed in front of a disciplinary tribunal.[9]

Having said this, there is a legitimate need to ensure that one does not *have* to engage with particular ideas outside of the classroom. Speech can cause real harm, if nothing else, it may rehash old trauma.[10] Excluding

---

[6] *Id*.
[7] *See* 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/ ("Christakis believes that he has an obligation to listen to the views of the students, to reflect upon them, and to either respond that he is persuaded or to articulate why he has a different view. Put another way, he believes that one respects students by engaging them in earnest dialogue. But many of the students believe that his responsibility is to hear their demands for an apology and to issue it. They see anything short of a confession of wrongdoing as unacceptable. In their view, one respects students by validating their subjective feelings. Notice that the student position allows no room for civil disagreement."); Thomas Healy, *Who's Afraid of Free Speech?*, ATLANTIC, (June 18, 2017), https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/ ("Instead, they have been complaining about an atmosphere of intense pushback and protest that has made some speakers hesitant to express their views and has subjected others to a range of social pressure and backlash, from shaming and ostracism to boycotts and economic reprisal").
[8] *See* Healy, *supra* note 8.
[9] The Federalist Society, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YouTube, at 50:00-51:00 (Nov. 9, 2016) https://www.youtube.com/watch?v=MYsNkMw32Eg (using the analogy of bar association meetings and its relationship to hostile environment harassment law).
[10] Arno K. Kumagai et al., *Cutting Close to the Bone: Student Trauma, Free Speech, and Institutional Responsibility in Medical Education*, 92 ACAD. MED., no. 3, at 318, 322 (2017).

particular kinds of speech, then may be, at certain times, critical.[11] To a certain extent, this view birthed the concept of a "safe space;" a carved-out section of a university in which students may freely engage with topics based on parameters of their design.[12] A "safe space" is not, to be sure, inconsistent with the ideals of the First Amendment; indeed, it closely aligns with the Freedom of Association Clause.[13] However, this is not a license to make the totality of a campus corpus a "safe space" – the entire grounds cannot be a place in which students or members of the academy dictate which ideas are welcome across the entire school at any one time. Creating a campus-wide space will result in a near universal chilling of speech and expression.

This article offers three solutions in the face of precedent, history, and in name of free exchange. First, the adoption of a federal Leonard Law (modeled after the California legislation[14]); second, the adoption of more modest, narrowly tailored disciplinary codes[15] to ensure that safe spaces are honored beyond the walls of a class; and, third, for courts to uphold the notion of "contract theory" if faced with a case of a university, either private or public, violating their own free speech standards which are outline in their respective student handbooks.[16]

This article will first begin by outlining the historical origins which call for the free and robust exchange of ideas, looking specifically at both the words of the Framers of the United States Constitution and other intellectuals. These messages will not re-litigate the meaning, *per se*, of the First Amendment (after all, private universities are not bound by its doctrine directly); rather, these thinkers, in concert, describe the roots of free speech in the United States. Following this conversation, this article will explore precedent examining four Supreme Court cases which dealt specifically with university speech. Thereafter, this article cites what is the ideal of the university to provide for open inquiry more broadly, and how this principle has been under siege from within. Lastly, this article will share the aforementioned solutions to this chronic dilemma, while taking

---

[11] *Id.*
[12] Magistro, *supra* note 5, at 373-74.
[13] *See* Michael Munger, *In Praise of Safe Spaces on Campus*, LEARN LIBERTY (Mar. 9, 2017), https://www.learnliberty.org/blog/in-praise-of-safe-spaces-on-campus/.
[14] Kate Selig, *California's Leonard Law: What it Means for Campus Speakers*, STANFORD DAILY (May 20, 2020, 12:51 AM), https://www.stanforddaily.com/2020/05/20/californias-leonard-law-what-it-means-for-campus-speakers/.
[15] APPALACHIAN STATE UNIV., *Policy Manual*, https://policy.appstate.edu/Discrimination_and_Harassment#Hostile_Environment (last updated Aug. 14, 2020).
[16] State of the Law: Speech Codes, FIRE, https://www.thefire.org/legal/state-of-the-law-speech-codes/ (last visited Oct. 29, 2022).

into account the views of both the most ardent supporters of free speech on campuses along with those of the most strident skeptics.

II. ORIGINS AND THEORY OF FREE SPEECH

Before, though no doubt eventually in conversation with, Mill and the Framers of the Constitution themselves, spoke on the power of free speech and the unique danger of silencing supposedly abhorrent and aberrant ideas.[17] Of the most prominent figures, Benjamin Franklin said that the freedom of speech is the "principal pillar of a free government."[18] Thomas Jefferson also opined that "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[19] Justices of the Supreme Court, charged with interpreting this provision, as well as the cases discussed later in this article, have also concurred. Justice Oliver Wendell Holmes Jr. wrote, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[20]

If nothing else, these quotes highlight that there is something rather unique about the American view of speech. Prince Harry, Duke of Sussex, did not mince words in his assessment of the American view on free speech, proclaiming such a view to be "bonkers."[21] As a descendant of the king who motivated these protections, such an appreciation for free speech may very well seem strange.[22] Floyd Abrams, an attorney who litigated a number of free speech cases, notably, *New York Times v. Sullivan*, summarized in *The Soul of the First Amendment*:

> The exceptionalism of the United States in the protections it offers to freedom of expression does not mean that other democratic nations do not respect, honor, and generally seek to protect it; it

---

[17] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 459-61 (1983) (discussing the framers' ratification of the First Amendment).
[18] Robert Shibley, *For the Fourth: Ben Franklin on Freedom of Speech – 50 Years Before the Constitution*, FIRE (July 4, 2016), https://www.thefire.org/news/fourth-ben-franklin-freedom-speech-50-years-constitution.
[19] Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1781) (on file with The Jefferson Monticello).
[20] *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).
[21] *Prince Harry: The First Amendment is 'bonkers'*, SPECTATOR WORLD (May 16, 2021, 11: 37 AM), https://thespectator.com/topic/prince-harry-first-amendment-bonkers-aspen-institute/.
[22] Royal Family Tree (849-Present), https://britroyals.com/royaltree.asp.

> does mean that American law does so more often, more intensely, and more controversially than is true elsewhere. Nor, to put it another way, does it mean that the United States cares less than other democratic nations do about a bevy of competing interests such as the vice of discrimination, the need for equality, the harm that defamation can do to personal reputation, the significant of personal privacy, and the need to safeguard national security. It does mean, however, that although American law seeks to protect those interests, it does so only after weighing, with far greater concern than occurs elsewhere, the dangers of government interference with and control over free expression.[23]

This, says Abrams elsewhere, is the "anticensorial soul" of the First Amendment which extends far beyond applying just to government.[24] While the text of the Constitution applies specifically and exclusively to the government, there is a balancing of interests - one that places, above all else, the need for the robust exchange of ideas.[25] It is this particular stance that, accordingly, this article takes as well: of course, one may not cite the First Amendment exclusively as law to advocate for broad speech rights on universities, particularly private ones;[26] this piece is an appeal to ideals, which place value on all ideas within the bounds of the amendment. This is not to say that colleges or universities do not have an interest in countering the effects of constitutionally impermissible forms of speech such as "fighting words" or libel or slander, they do;[27] instead, within the confines of allowable speech, both public and private universities fit within a mold formed by these standards too.

III. SUPREME COURT PRECEDENTS AND CONCLUSIONS

It is necessary to turn to the legal progeny of these ideals as it relates specifically to both student and university speech. Four cases - *Keyishian v. Board of Regents* (*Keyishian*), *Tinker v. Des Moines* (*Tinker*)*, Healy v. James* (*Healy*), and *R.A.V. v. St. Paul* (*R.A.V.)* - provide ample grounding for this discussion and highlight how our Nation's highest court has consistently defended the right for broad debate.

---

[23] FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT, xv-xvi (Yale Univ. Press) (2017).
[24] *Id*. at xiv.
[25] *See id*. at xvi.
[26] *See* Julie Horowitz, *The First Amendment, Censorship, and Private Companies: What Does "Free Speech" Really Mean?* CARNEGIE LIBR. PITTSBURGH (Mar. 9, 2021), https://www.carnegielibrary.org/the-first-amendment-and-censorship/.
[27] *See* Geoffrey R. Stone & Eugene Volokh, *Common Interpretation: Freedom of Speech and the Press*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/266 (last visited Oct. 24, 2022).

A. Keyishian v. Board of Regents

First, historically speaking, is the case of *Keyishian v. Board of Regents of the University of the State of New York*.[28] When Harry Keyishian ("Keyishian") became a state employee, after the University of Buffalo became a state institution, he was subject to rules and regulations meant to prevent the employment of "subversive persons."[29] Notably, this meant that Keyishian was made to sign a statement affirming he was not, nor ever had been, a Communist.[30] After refusing to do so, since Keyishian failed to comply with state law, his contract was not renewed.[31]

Justice William Brennan, writing for the majority, stated that the phrases "seditious" and "treasonable," in conjunction with "teaching" or "advising," were vague.[32] To support this claim, Justice Brennan wrote "[d]oes the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy?"[33] The opinion continued on to reason, "[a] teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine…. The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."[34]

This case highlights the invaluable protections that the First Amendment places and how a vague statute may undermine them.[35] However, more importantly, on a fundamental level, this case emphasizes the necessity for universities to allow the discussion of controversial ideas.[36] Regulations, which limit the subsequent exchanges, undermine not just the ideals of the Framers but also the core values of education as an institution.[37]

---

[28] 385 U.S. 589 (1967).
[29] *Id.* at 612.
[30] *Id.* at 592.
[31] *Id*.
[32] *Id.* at 597-99.
[33] *Id.* at 599.
[34] *Id*.
[35] *Id. at 603-05.*
[36] *Id*. at 603.
[37] *Id.*

B. Tinker v. Des Moines Indep. Cmty. Sch. Dist.

A more contemporary case is *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*[38] At the height of the Vietnam War, despite the threat of suspension, a group of students in Iowa collectively wore black arm bands as a symbol of their support for a truce.[39] Subsequently, all students were sent home.[40]

The United States Supreme Court once again sided for free expression.[41] Justice Abe Fortas wrote "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[42] Justice Fortas also wrote in defense of free speech more generally, stating

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. 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 independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[43]

The majority noted that to suppress some kind of speech, especially at a school, an actor "must be able to show that [the action taken to silence their view] was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[44]

Here, we see Mill and the Framers' arguments brought to bear; it is not just that the students in question were stripped of their Constitutional

[38] 393 U.S. 503 (1969).
[39] *Id*. at 504.
[40] *Id*.
[41] *Id at 505.*
[42] *Id*. at 506.
[43] *Id*. at 508-09.
[44] *Id*. at 509.

rights but also that there is an associated risk that is taken when exercising those rights.[45] Failing to uphold this "hazardous freedom" would, in turn, be a failure to defend values which allow for the introduction and sustained presence of views that one may consider unpleasant or unpopular.[46] As it relates specifically to one's education, the majority did not fail to miss the important relationship between speech and school stating intercommunication among students "is not only an inevitable part of the process of attending school; it is also an important part of the educational process."[47] Students are then not only expected, but implicitly encouraged to exchange ideas, presumably in the name of both socialization as well as truth-seeking.[48]

C. Healy v. James

On the heels of *Tinker* was *Healy v. James*.[49] Still during the Vietnam War, the president of Central Connecticut State College, a public college, found that the school could not allow the left-wing Students for a Democratic Society to form a chapter.[50] Other chapters, having been guilty of instigating violence at other schools, were held out to be "antithetical to the school's policies."[51]

Despite the potential disruptions, the Supreme Court of the United States held that the college had overreached and that there was no basis for infringing upon the students' First Amendment right to form such a group.[52] Justice Lewis Powell, writing for the eight-member majority, declared "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[53] Moreover, Powell wrote that precedents like *Tinker* and *Keyishian* "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large" because these micro-communities on campuses were but another "marketplace of ideas."[54]

[45] *See* MILL, *supra* note 2.
[46] *Id.*
[47] *Tinker*, 393 U.S. at 512.
[48] *Id.*
[49] 408 U.S. 169 (1972).
[50] *Id*. at 174.
[51] *Id*. at 175.
[52] *Id*. at 185.
[53] *Id*. at 180.
[54] *Id*.

D. R.A.V. City of Saint Paul, Minn.

Finally, there is the *R.A.V. v. City of Saint Paul, Minn.* case.[55] Here, four teenagers burned a cross on a Black family's lawn. The Court determined this act to be a biased-crime based on a statute which criminalized behavior that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[56]

In what is the only unanimous decision of the four discussed cases (the opinion of the Court was signed onto by lionized liberal Harry Blackmun,[57] author of the *Roe v. Wade* decision,[58] and the conservative champion Antonin Scalia,[59] who wrote the majority opinion in *D.C. v. Heller*[60]), the Court reasoned that, though the State may come for a particular "class"[61] of speech it may not proscribe speech based on "viewpoint."[62] Plainly, though the aims of protecting citizens against "abusive invective[s]" may have been laudable, "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."[63]

Importantly, and as it relates especially to campus speech, *R.A.V.* provides a declarative view on hate speech in many respects: the line between what is otherwise an incendiary viewpoint and what are fighting words is too often conflated.[64] While it is helpful, if not essential, to shield individuals from particular kinds of speech, or, at minimum, to take away First Amendment protections, codes such as these veer into a lane of silencing subjectively selected viewpoints.

---

[55] 505 U.S. 377 (1992).
[56] *Id*. at 377-80.
[57] *See* Stanley Kutler, *The Conservative as Liberal*, AM PROSPECT, (Aug. 14, 2005), https://prospect.org/culture/conservative-liberal/.
[58] 410 U.S. 113 (1973).
[59] *See* Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79*, WASH. POST, (Feb. 13, 2016), https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html (noting that Scalia "quickly became the kind of champion to the conservative legal world that his benefactor was in the political realm").
[60] 554 U.S. 570 (2008).
[61] *R.A.V.*, 505 U.S. at 388.
[62] *Id*.
[63] *Id*. at 391.
[64] *Id.* at 391-92.

E. Conclusions

The kinds of speech being silenced in three of the aforementioned cases was left-wing expression.[65] Today, much of the conversation surrounding marginalization focuses on right-wing speech; Milo Yiannopoulos, a right-wing provocateur, rather infamously instigated riots and protests at the University of California, Berkeley in 2017.[66] Though the particular political slant of the protagonists has changed significantly, the larger practice remains the same - whether from the left or right of the political spectrum, controversial ideas remain a point of contention at universities.[67] Thematically speaking, ideas, or other kinds of expression, charge up university populations when such expression is largely inconsistent with the ideals of at least a faction of the intellectual habitat.

However, more fundamentally, when assessing claims of limiting speech, it follows, the content is secondary to the great necessity for colleges and universities to be home to all forms of discourse.[68] Beyond the egregious excesses that speech may pose, like inciting violence, the ideal bounds of speech are vast so as to not step on particular viewpoints. By contrast, failing to hold high these values may ultimately lead to the explicit suppression of content we would otherwise agree with, or doing so may create a kind of "enforced silence."[69] As a Martin Niemöller poem shares,[70] turning a blind eye towards these intellectual injustices could, and historically has, brought the brunt of the guillotine on speakers with whom we would now endorse and not just those with whom we disagree.[71] The blade's swiftness leaves us with an inadequate amount of time to pull back and protect speakers whose messages we want heard. A recent example of this occurred when Nikole Hannah-Jones, director of the Pulitzer Prize winning *1619 Project*, was denied a tenured faculty position at the University of North Carolina at Chapel Hill in what appears to be

---

[65] *See Keyishian*, 385 U.S. 589; *Tinker*, 393 U.S. 503; *Healy*, 408 U.S. 169.
[66] *See* Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused $100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 PM), https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley.
[67] *See* Zimmer, *supra* note 5.
[68] *Id.*
[69] *Whitney v. California,* 274 U.S. 357, 377 (1927).
[70] *See* Martin Niemöller, FIRST THEY CAME (1946), https://www.amnesty.org.uk/files/2019-01/First%20They%20Came%20by%20Martin%20Niem%C3%B6ller_0.pdf?l6HOtWW1N8umC_ELxnQI6NpaAYbxRCJj=.
[71] *See* Erik Nielson, *If We Silence Hate Speech, Will We Silence Resistance?*, N.Y. TIMES, (Aug. 9, 2018), https://www.nytimes.com/2018/08/09/opinion/if-we-silence-hate-speech-will-we-silence-resistance.html ("If we become overzealous in our efforts to limit so-called hate speech, we run the risk of setting a trap for the very people we're trying to defend").

viewpoint discrimination.[72] Generally, then, in exchange for harmonious views in the present we implicitly offer our philosophical peers as future sacrifices for more suppression of speech.

More broadly, setting the precedent that a controversial speaker cannot present their arguments on campus has invariably banned speakers whose views are anathema to the initial victims.[73] Eventually all speakers' expressions are limited regardless of viewpoint by defaulting to a standard in which speech is not valued; forbidding some speakers grants license to forbid them all.

That being said, there are still limitations on free speech. This is not an argument to open the proverbial floodgates, which doubtlessly includes some kind of intellectual sludge; the Supreme Court has placed limits on fighting words and true threats.[74] Accordingly, should colleges and universities provide broad rights for free expression, this would not be a blank check, the outlined limits would still apply.[75] Yet, within the confines of this precedent, coupled with the requisite civility and respect of any kind of conversation, the breadth of speech is robust.

IV. THE CAMPUS AS A "FORUM"

While the cases involving schools explicitly discussed here were public institutions, meaning that, unlike private colleges and universities, there is a close, required allegiance to the Constitution. [76] This does not mean that institutions on the whole are not subject to the soul of free expression.[77] Indeed, "[f]reedom of expression and academic freedom are at the very core of the mission of colleges and universities and limiting the expression of ideas would undermine the very learning environment that is central to higher education."[78] To this particular end, "[m]odern colleges

[72] *See* Conor Friedersdorf, *A Culture of Free Speech Protects Everyone*, ATLANTIC, (May 21, 2021), https://www.theatlantic.com/ideas/archive/2021/05/free-speech-should-protect-nikole-hannah-jones/618959/ ("If antipathy toward the perspective of the 1619 Project motivated the denial of tenure – and I fear that it did – that would be a clear example of a government body unconstitutionally punishing someone for her views….Plenty of circumstantial evidence suggests that Hannah-Jones is a victim of impermissible viewpoint discrimination").
[73] *Keyishian*, 385 U.S. at 603.
[74] *See* Stone & Volokh, *supra* note 28.
[75] *Id.*
[76] *See Horowitz*, *supra* note 27.
[77] ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS, xx (Yale Univ. Press) (2017) https://www-jstor-org.elon.idm.oclc.org/stable/j.ctv1bvnfnb (last visited Dec 12, 2022).
[78] *Id.*

and universities achieved their present respect and importance only when they fully embraced a culture of unfettered scholarly inquiry."[79] And, to the degree colleges and universities place some kind of restrictions, like "time, place, and manner," these limitations are subject to substantial scrutiny.[80] In spite of actions indicating a widespread movement in the opposite direction, some universities at least publicly remain bastions of this kind of open inquiry. As Lee Bollinger, free speech scholar and university administrator, wrote in an article for the *Atlantic*:

> At Columbia and at thousands of other schools across the United States, controversial ideas are routinely expressed by speakers on both the left *and* the right and have been for decades. In fact, Columbia University is something of a magnet for provocative speakers. During the 2017–18 academic year, the conservative radio talk-show host and author Dennis Prager spoke at Columbia. The Fox News legal commentator Alan Dershowitz, the 2016 Republican Party presidential candidate Herman Cain, and the immigration activist Mark Krikorian spoke too—all without incident. The conservative political commentator, author, and filmmaker Dinesh D'Souza, after his talk, remarked on the civility of the discussion he encountered in his visit to Morningside Heights. The conservative commentators Ann Coulter and Mike Cernovich also spoke freely at Columbia, as did Israeli Ambassador Danny Danon. These speakers encountered varying degrees of student protest, an essential feature of a true free-speech environment that not only welcomes but relishes contentious debate.[81]

While Columbia and "thousands of other schools" may well encourage these dialogues, in balancing the needs of both students and free expression, other colleges and universities have perhaps erred; many speech codes "can, in theory, either lead to the punishment of very many people (who may not think they are demeaning anyone) or result in a

---

[79] *Id* at 65.
[80] *See* Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, First Amend. Encyclopedia, https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions#:~:text=Court%20requires%20%22stringent%22%20scrutiny%20of,heightened%20form%20of%20intermediate%20scrutiny.&text=His%20scholarship%20focuses%20on%20the%20Speech%20Clause%20of%20the%20First%20Amendment (last visited Oct. 29, 2022).
[81] Lee C. Bollinger, *Free Speech on Campus Is Doing Just Fine, Thank You,* Atlantic, (June 12, 2019) https://www.theatlantic.com/ideas/archive/2019/06/free-speech-crisis-campus-isnt-real/591394/.

refusal to punish many arguably stigmatizing speech acts."[82] These rules and regulations put forth, no doubt as an attempt to cure a particular kind of hateful and odious speech, often have unintended consequences. In point of fact, Henry Louis Gates shared that "[d]uring the years in which…[a university's] speech code was enforced, more than twenty blacks were charged – by whites – with racist speech."[83] Surely, this was not the intended outcome of the rules. Simply, to be both sufficiently broad while also targeting particular kinds of distressing content, these speech codes predictably captured forms of expression beyond the scope of their original design.[84]

To this particular point, there is a need for colleges and universities to be welcoming and inclusive, not just of ideas but to its students as well. Such a necessity gave rise to the controversial concept of a "safe space."[85] Proponents of these cornered off sections of colleges or universities "argue that these policies restrict harmful speech, effectively protecting the interests of minority students."[86] The original set-up for a "safe space" was a "literal safe zone, used to provide physical protection to the membership." [87]

To better explore the function of a safe space, this article will adhere to the definition offered by Judith Shulevitz of the *New York Times*: safe spaces are "innocuous gatherings of like-minded people who agree to refrain from ridicule, criticism or what they term microaggressions — subtle displays of racial or sexual bias — so that everyone can relax enough to explore the nuances of [a particular topic]."[88] There is an implied emphasis in this definition which critically highlights an important component of the safe space; it is an exclusive group gathering. Like any club or sports team likely found in similar measure on these campuses, the safe space is restricted in terms of its membership.

---

[82] CHEMERINSKY & GILLMAN, *supra* note 78, at 105.
[83] *Id* at 106-107.
[84] David L. Hudson Jr., *Hate Speech & Campus Speech Codes*, FIRST FORUM INST., (Mar. 2017) https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/hate-speech-campus-speech-codes/.
[85] *See* Magistro, *supra* note 5.
[86] Trevor N. Ward, *Protecting the Silence of Speech: Academic Safe Spaces, the Free Speech Critique, and the Solution of Free Association*, 26 WM. & MARY BILL RTS. J. 557 (2017), https://scholarship.law.wm.edu/wmborj/vol26/iss2/13/.
[87] *Id*. at 563.
[88] Judith Shulevitz, *In College and Hiding From Scary Ideas*, N.Y. TIMES, (Mar. 22, 2015), https://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html.

Simply put, safe spaces, in and of themselves, are not antithetical to the ideals of the First Amendment: not only is "the freedom of speech" among its provisions, so too is the concept of free association.[89] By analogy, one would not require a church or other religious institution to refrain from discussing intelligent design should that be the shared view of this hypothetical, like-minded congregation. But one may hope that this would not endorse the view that this debunked analysis spread rapidly into the realms beyond the nave or, at the very least, that Darwinians may voice their views in battle with these intellectual opponents.[90]

This is where colleges and universities have strayed most notably; in rightfully and justifiably protecting the interests of students, especially those that come from marginalized groups, the walls of the safe space have slowly expanded to capture the totality of the campus, or nearly so.[91] Significantly, "some universities have created policies which declare that the entire campus is a safe zone" or that only small, designated portions of the campus could be left for open expression, aptly titled as free speech zones.[92] In turn, the tension between free speech and free association is far more pronounced: such a choice, no longer "thrust[s] [would-be strangers] together for often extensive interactions in class, in dorms, and elsewhere on campus"[93] but, instead, creates a kind of compelled association irrespective of one's own views.

Moreover, vague disciplinary codes give agency to educational administrators in a role akin to granting power to the government. Notably, the Foundation for Individual Rights in Education (F.I.R.E.) has assailed campus disciplinary codes which, among other things, punish speech.[94] In order to substantiate these views, F.I.R.E. publishes a list of college and university disciplinary standards and color-coded them based on how

---

[89] *See* Magistro, *supra* note 5, at 373-75.
[90] *See* Austin Bragg & Eugene Volokh, *College and the First Amendment: Free Speech Rules (Episode 7)*, Reason, (Nov. 4, 2019, 10:59 AM), https://reason.com/video/2019/11/04/college-and-the-first-amendment-free-speech-rules-episode-7/ ("Inside the classroom, though, the professor is in charge. Professors may orchestrate class discussions in a way that they think brings out important ideas and facts and promotes student participation. That means they can cut off students who speak off topic or who insult their classmates. Professors can also ask students to make the best argument for a particular viewpoint, and tell students that certain views—say, that the Earth is 6,000 years old—are wrong").
[91] *See* Ward, *supra* note 87, at 566; *See, e.g.,* Inclusion Working Group, COLO. MESA U., https://perma.cc/5AXN-A7YP ("Together, [we work] to ensure that the CMU campus is an environment free from discrimination and fostering a climate that is supportive of all.") (last visited Dec. 4, 2017).
[92] *Id.* at 567.
[93] Stuart Chinn, *Free Speech Controversies and Consequences on Campus*, 54 Tulsa L. Rev. 225, 225 (2019).
[94] *See State of the Law Speech Codes*, *supra* note 17.

liberally the speech rights are restricted.[95] Left in the vast swath of the middle are so-called "yellow" measures, or those which are capable of, or rife for, abuse.[96]

There is no plausible cause, given the nature of a college or university as a place of intellectual development, in which campus rules should wholly or explicitly censor speech. Simply put, openly limiting speech in this manner flies in the face of the central edict of the educational environment.[97] However, at the very least, the mission of these nebulous policies, those which, with the wrong or bad faith actors could severely cripple forms of expression, are not, on their face, similarly out of place.[98] Indeed, just as it is the aim of a university to act as a haven for ideas, it must also be a hospitable home for its students. To this end, attempting to banish speech which is, or borders on, outright harassment is an ostensibly justifiable concern for the administrators.[99]

Nevertheless, though, these almost necessarily vague codes provide the ammunition to stifle intellectual inquiry in an attempt to banish the most concerning forms of expression. By analogy, many countries in Europe have sought to fight antisemitism by outlawing Holocaust denial.[100] On a basic level, these laws have failed insofar as they did not perfectly banish this hateful expression, and worse yet has given it the "veneer of intellectual martyrdom".[101] Generally speaking, what makes these pieces of legislation worrisome are their ability to grant others the power to dictate where intellectual or expressive transgressions occur.[102] Doing so no doubt places dialogue within carefully prescribed lanes and bestows power to the government to criminalize actions it may, at its discretion, deem unsuitable.[103]

Just the same, though the pursuit is laudable, as it is in Europe, campus disciplinary codes gift fickle or vindictive administrators the agency to dictate where they believe transgressions occurred based on broad and vague language.[104] As Justice Brennan wrote in *Keyishian,* no

---

[95] *See* FIRE's Spotlight Database, FIRE, https://www.thefire.org/research-learn/fires-spotlight-database.
[96] *See id.*
[97] *See* Zimmer, *supra* note 5.
[98] *Id.*
[99] *See* Kumagai et al., *supra* note 11, at 321-22.
[100] *See* NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP, 107 (Oxford Univ. Press) (2018).
[101] *See id*. at 138.
[102] *See id*. at 102-103.
[103] *Id*. at 6-7.
[104] *See Campus Rights: What We Defend*, FIRE, https://www.thefire.org/defending-your-rights/individual-rights-advocacy/campus-rights-advocacy/campus-rights ("The

one "[could] know just where the line is drawn between 'seditious' and nonseditious utterances and acts" on the basis of these vague systems today just as with then.[105] Accordingly, assaults on expression could apply to right-wing speech, as it appears is often the case today, or the left-wing speech of previous decades; as for what speech is silenced, the only motivation would be a dealer's choice of sorts. The subsequent disciplinary rulings may come devoid of tone, without the knowledge of any proceeding encounters, or, worse, left at the behest of one individual to determine a vague rule's meaning.[106] Irrespective of all of these and other facets which produce a more complete picture of an interaction, a judgement may be made which results in a disciplinary sanction.[107] As a result, one must default to the view that the potential for speech suppression is no different than the active assault on expression as these characters may inadvertently, or quite deliberately, silence individuals at the expense of the core mission and values of the campus. Simply, left at the behest of an administrator, who in their view has interpreted the campus expectations reasonably in accordance with their understanding of the rules, colleges and universities may inadvertently silence expression which would thus be counter to their expressed ideals.

V. SOLUTIONS

This is all to say that universities may be justified in trying to best tailor the speech on their campuses; after all, it is imperative that students feel as though they are free from "true threats."[108] But, on a fundamental

---

intellectual vitality of a university depends on this competition – something that cannot happen properly when students or faculty members fear punishment for expressing views that might be unpopular with the public at large or disfavored by university administrators….[S]peech codes dictating what may or may not be said, 'free speech zones' confining college free speech to tiny areas of campus, and administrative attempts to punish or repress campus free speech on a case-by-case basis are common today in academia.") (last visited Oct. 30, 2022).

[105] *Keyishian*, 385 U.S. at 599.

[106] *See* Benjamin Welch, An Examination of University Speech Codes' Constitutionality and Their Impact on High-Level Discourse, (Aug. 2014) (M.A. thesis, University of Nebraska – Lincoln), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1046&context=journalismdiss ("A psychology graduate student, known in the court report as John Doe, challenged the policy, arguing that the policy would effectively ban classroom discussions about the biological differences between men and women. Michigan responded by saying that 'legitimate' ideas were not sanctionable, effectively relegating to administrators the arbitrary definition of legitimacy").

[107] *Id.*

[108] Mich. State Univ. Coll. L., *Can A School Censor A Student's Threatening Speech?,* MCLELLAN, https://mclellan.law.msu.edu/questions/can-the-school-censor-threatening-speech (last visited, Oct. 24, 2022).

level, weaponizing speech appears to have the opposite effect; not only does this allow for disciplinary externalities, but universities also appear to fail in appropriately allowing for the type of intellectual environment that makes these institutions successful, desirable oases of discourse.

A. Changes to Internal Rules

As alluded to earlier, carefully designing the language of a disciplinary code not only outlines policies in a clear and digestible way, it also ensures that checks may be placed so as to not delegate or distribute authority into the wrong hands.

Take, for example, a Clark University disciplinary code which states: "University officials will determine if the noise level for any outdoor protest or demonstration is of an unacceptable volume and participants will be expected to comply with directives in that regard."[109] This is a questionable rule for at least two reasons: first, regardless of what "noise level" a university official determines violates Clark's rules, it directly infringes upon the right to assemble and peacefully protest, as guaranteed in the First Amendment[110]; second, and most critically of all, the "noise level" is subjective, left to the discretion of an individual and may, accordingly, vary depending on the scope or conceivably subject of the protestor's ire. Hypothetically, a university official who is sympathetic to the cause of the protestors may allow the decibel level to be turned up to eleven relative to a protest for which the administrator finds themselves on the side of the speaker or targeted group.

To remedy this, Clark, or other colleges and universities which fail to define from the outset the threshold by which a policy is violated, may explicitly write out the lines where a policy crosses from acceptable to unacceptable. Let's take a first pass re-write of Clark's policy: while the present state of the disciplinary code is nebulous, leaving open to interpretation when it is violated, a new version of it may read that "the noise level for any outdoor protest or demonstration is of an unacceptable volume *when electronic amplification equipment is used for gatherings of fifty or more*." To be sure, this is not necessarily to advocate for such a policy, it still implicitly places a kind of chilling restriction on speech; however, if Clark or another institution found such a code fit to, say, prevent the incitement of violence (again, not protected speech) or in order

[109] Clark Univ., *Clark University Protests and Demonstrations Policy*, (Feb. 8, 2019) https://www.clarku.edu/offices/human-resources/wp-content/blogs.dir/3/files/sites/90/2020/02/Clark-University-Protests-and-Demonstrations-Policy_Feb-2019.pdf.
[110] *Id.*

to avoid the reckless destruction of property (within the bounds of university power), clearly defining the rules better serves all parties involved. Such a version of Clark's disciplinary rules is bright-lined; one is either in violation of the university rules or it is not, there is no arbitrary or subjective standard in play which grants university officials power to dictate what kind of speech or what kind of protest is allowable.

B. Legislative Change

Justice Louis Brandeis wrote that "it is one of the happy incidents of the federal system that a single courageous State, may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." [111] Peers or even the federal government may look to an individual state in order to assess the success of a particular policy and perhaps even adopt it itself. At present, California provides a tested piece of legislation, it is more than twenty-five years old, which appropriately balances the interests of students and the principles of free expression: the Leonard Law.[112] This measure "applies to all California state universities and community colleges and provides that students cannot be disciplined for speech that would otherwise be protected by the First Amendment if spoken off campus."[113]

---

[111] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) (1932).
[112] CAL. EDUC CODE § 66301 (West, Westlaw through Oct. 15, 2022).
[113] Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. VA. L. REV. 511, 542 (1994); *See* CAL. EDUC CODE § 66301 (The statute provides: "(a) Neither the Regents of the University of California, the Trustees of the California State University, the governing board of a community college district, nor an administrator of any campus of those institutions, shall make or enforce a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the Unites States Constitution or Section 2 of Article I of the California Constitution.
(b) A student enrolled in an institution, as specified in subdivision (a), at the time that the institution has made or enforced a rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon a motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.
(c) This section does not authorize a prior restraint of student speech or the student press.
(d) This section does not prohibit the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected.
(e) This section does not prohibit an institution from adopting rules and regulations that are designed to prevent hate violence, as defined in subdivision (a) of Section 4 of Chapter 1363 of the Statutes of 1992, from being directed at students in a manner that denies them their full participation in the educational process, if the rules and regulations conform to standards established by the First Amendment to the United States

Though the statute makes clear that colleges and universities may "enact rules and regulations designed to [ensure that]...a student [is given] the opportunity to fully participate in the educational process," these rules must comply with the Constitution.[114] What's more, if a student is disciplined for speech, then that student is entitled to attorney fees in a civil suit.[115] Importantly, and perhaps most critically of all, this law also applies to private institutions.[116]

While it is perfectly reasonable to rely on other states to adopt similar laws, in the name of efficiency as well as consistency, this article calls for the adoption of a federal statute which is similarly constructed to its California counterpart. The reasons for this are two-fold: first, it should not matter which state a student resides, or to the extent of which, a student enjoys the power of free expression. Second, and relatedly, a federal law captures the entirety of the union rather than waiting for the slow march of time to eventually bring other states in. Most of all, the Leonard Law is anything but federally heavy-handed: "burdening" individual states with the potential for attorney fees in the event of a student's punishment appropriately ensures accountability at a more local level by using basic incentives.[117] By contrast, politicizing, or even outright weaponizing, federal executive agencies to guide towards a similar result overlooks the critical input of the legislature in formulating laws in concert with *de facto* delegating regulation to the states.

C. A Call to the Judiciary

Lastly, there is an incumbency upon courts to uphold "contract theory" - that is, the notion that at either private or public colleges and universities the student handbook functions as a kind of contract between *both* parties, the institutions and the students who attend them.[118] In *Havlik v. Johnson & Wales University*, the Court of Appeals for the First Circuit

---

Constitution and Section 2 of Article I of the California Constitution for citizens generally.
(f) An employee shall not be dismissed, suspended, disciplined, reassigned, transferred or otherwise retaliated against solely for acting to protect a student engaged in conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution").

[114] *Id.* at 542-43.
[115] *Id*. at 543.
[116] *See id*. at 542-43.
[117] *Id.*
[118] *See State of the Law: Speech Codes*, *supra* note 17.

ruled that "the relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook. We interpret such contractual terms in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them."[119] Or, just the same, in *Ross v. Creighton University*, the Court of Appeals for the Seventh Circuit wrote that "it is held generally in the United States that the 'basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'"[120] Though, of course, neither of these cases are the "law of the land" without the Supreme Court's blessing; rather these cases speak to the nature of how courts interpret and understand the nature of the student-school relationship.[121] There is one small caveat; of course, if a private institution states that it does not, for whatever reason uphold the values of the First Amendment, they are within their rights to dictate content on their grounds.[122] Plainly, "if a private college clearly does not promise free speech, and the college makes this known publicly and consistently, entering students have given informed consent and have voluntarily chosen to limit their own rights-in much the same way students entering military academies or theological seminaries understand that they are relinquishing many rights they would enjoy at a state college."[123] Nonetheless, should an institution grant these rights, whether it is a private school such as Harvard College[124] or a public institution like the University of Virginia[125], students at these schools have

---

[119] *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007) (internal citation omitted).

[120] *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (quoting *Zumbrun v. Univ. of S. Cal.,* 25 Cal. App. 3d 1, 10 (1972)).

[121] *See id.*; *Havlik*, 509 F.3d at 34.

[122] *See State of the Law: Speech Codes*, *supra* note 17.

[123] *Id.*

[124] Harvard Univ. Faculty of Arts and Science, *Free Speech Guidelines* (May 15, 1990), https://hwpi.harvard.edu/files/facultyresources/files/fs_guidelines_1990.pdf ("As a community, we take certain risks by assigning such a high priority to free speech. We assume that the long-term benefits to our community will outweigh the short-term unpleasant effects of sometimes-noxious views. Because we are a community united by a commitment to rational processes, we do not permit censorship of noxious ideas. We are committed to maintaining a climate in which reason and speech provide the correct response to a disagreeable idea").

[125] Univ. of Virginia, *Policies: Student Rights and Responsibilities*, https://studentaffairs.virginia.edu/policies/rights ("The University of Virginia is a community of scholars in which the ideals of freedom of inquiry, freedom of thought, freedom of expression, and freedom of the individual are sustained. The University is committed to supporting the exercise of any right guaranteed to individuals by the Constitution and the Code of Virginia and to educating students relative to their responsibilities.") (last visited Oct. 31, 2022).

a "reasonable" expectation that these rights are not written as parchment guarantees but legally actionable as a contract would imply.[126]

To this point, it is the judiciary that must act as a bulwark against the infringement of these rights when spelled out in this manner. High level courts, like a court of appeals, have paved the way for an eventual Supreme Court decision, and much like a movement for a federal Leonard Law, the Court must act in a manner so as to uniformly express the rights of individuals across and among the states.[127] The justification for this is simple: if one is expected to uphold one's end of a contract, such as the student handbook, one may reasonably expect the other party to do the same. Such an understanding is essential for the internal workings of these institutions and on that basis, the Court is justified in seeking to maintain the generally understood rights of these students. And, additionally, the Court is effectively brought into the fray in as much as these institutions invite Constitutional inquiry where they explicitly or implicitly cite the First Amendment as the framework for their intellectual standards. After all, it is the Supreme Court which is to interpret the fundamental tenets of the text.[128] In turn, not only is the Court, or lower courts for that matter, called in the name of outlining contractual obligations, they are called out of a sense of duty and allegiance to the Constitution.

VI. CONCLUSION

Consider, again, Justice Fortas's observation in *Tinker*: "our Constitution says we must take [a] risk" when it comes to providing openness for debate and engagement.[129] While, in the case of private institutions at least, some colleges and universities may hide in the shadow cast by the Constitution, all homes to students must inspire a similar willingness for this kind of risk taking.[130] Sure, colleges and universities may carve out particular corners of the campuses in the name of creating a "safe space," as is consistent, too, with the ideals of the First Amendment. But, by and large, these institutions must place a particular emphasis on the free exchange of ideas.

---

[126] *See* Chinn, *supra* note 95.
[127] *See* Selig, *supra* note 15.
[128] *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177-78 (2019).
[129] 393 U.S. at 508.
[130] *See* Munger, *supra* note 14.

As seen in past generations, failing to uphold these ideals leads to a suppression of all content, not just that with which one may most disagree.[131] In turn, efforts to ensure that one's views remain accessible in various fora are necessary. Of note, a federal Leonard Law, a more carefully authored disciplinary code, and an active judiciary all offer the chance to protect this cherished right in institutions which are most "respected" when speech is more available.[132]

To be sure, certain forms of expression, which would be constitutionally unprotected in other settings, remain counter to the soul of American free speech here, too. Yet, these three solutions not only acknowledge this fact, but also place colleges and universities in more explicit connection with the Constitution, and simultaneously provide readily accessible fodder to combat out-of-bounds speech.

Ultimately, these solutions aim to promote the robust exchange of ideas. This is not just stated in an idealistic or even normative sense: crippling free expression at schools around the country topples another domino, closes off another avenue, for one to speak one's mind in all senses regardless of the political slant associated with it. Beyond seemingly similar institutions, the campus is almost by design made in a mold to provide an intellectual market from which a bevy of options may be selected. What's more, this, paradoxically though it may seem, drives young minds towards the "true" opinion and thus catalyzes society to follow suit in due course. For the sake of inclusivity, future civility, and growth most of all, the underlying intent of the First Amendment must be held high for "We the People" occupying these educational institutions.

[131] *Id.*
[132] *See* Selig, *supra* note 15.