

THE ‘INTELLECTUAL DIVERSITY’ CRISIS THAT ISN’T:
LIBERAL FACULTIES, CONSERVATIVE VICTIMS, AND THE
CYNICAL EFFORT TO UNDERMINE HIGHER EDUCATION
FOR POLITICAL GAIN

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I. INTRODUCTION

Popular conservative commentator Ben Shapiro called the move an “auto-da-fe,” a reference to the Spanish Inquisition.¹ He opened an article on his online periodical, *The Daily Wire*, by claiming: “Our universities may be irrevocably broken.”² Another conservative firebrand, Seth Mandel, responded to the move by welcoming us to “the future,” one he characterized as “a social sewage treatment plant.”³ Despite such powerful rhetoric, the move that Shapiro, Mandel, and others have criticized so harshly was just a routine withdrawal of an admissions offer by Harvard University.⁴ The applicant, Kyle Kashuv, had become a conservative star when he publicly opposed gun control measures after having survived the massacre at Marjory Stoneman Douglas High School in the winter of 2018.⁵ To conservatives, he became a useful antidote to the voices of some of Kashuv’s classmates who had gained notoriety in

¹ See Ben Shapiro (@benshapiro), TWITTER (June 17, 2019, 9:48 AM), <https://twitter.com/benshapiro/status/1140617237096570880>.

² Ben Shapiro, *Harvard Rescinds Admission To Conservative Kyle Kashuv Over Private Racist Remarks He Wrote At 16, Despite Apology And Evidence of Growth. This Is Disgusting.*, DAILY WIRE (June 17, 2019), <https://www.dailywire.com/news/47971/hold-harvard-rescinds-admission-conservative-kyle-ben-shapiro>. Shapiro further explained:

This move by Harvard is the worst move I’ve ever seen in academia — and it represents the establishment of a standard so insane that no one can possibly withstand it. All those who have never written an embarrassing thing *privately*, please step forward. Not so fast, SJWs. . . . Our colleges are irreparably broken; the inmates are in charge of the asylum.

Id.

³ Seth Mandel (@SethAMandel), TWITTER (June 17, 2019, 9:16 AM), <https://twitter.com/SethAMandel/status/1140609245940977664>.

⁴ In 2017, for instance, Harvard rescinded admissions offers to at least ten applicants based on their social media posts in a private Facebook group. Patricia Mazzei, *Racist Comments Cost Conservative Parkland Student a Place at Harvard*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/us/parkland-kyle-kashuv-harvard.html>.

⁵ Christina Animashaun, *You’ve Heard of David Hogg. But the Right has Claimed Another Parkland Student as its Own.*, VOX (Apr. 18, 2018, 10:00 AM), <https://www.vox.com/2018/4/18/17207458/parkland-kyle-kashuv-ben-shapiro-david-hogg-guns-parkland-fox>.

calling for gun regulations.⁶ The reason for Harvard withdrawing Kashuv's admission was his posting of racist comments on a message board and in private text messages.⁷ Those included his repeating of a notorious anti-black racial slur, one he joked to have gotten "really good at typing" because "like practice uhhhhhh makes perfect."⁸ He indeed had used that slur in texts shared with a closed group including him and fellow students at Parkland.⁹ As Dean of Admissions and Financial Aid William R. Fitzsimmons explained, these comments reflected poorly on his "maturity and moral character," two of the criteria Harvard uses in its highly selective admissions process.¹⁰

Harvard's decision sparked such a response in part because it so neatly fits a master narrative that conservatives (and some non-conservatives) tell us about higher education: namely, that it routinely, and systematically, discriminates against conservative voices. As part of his rise as a conservative media darling, Kashuv himself was named a high school outreach director for a group called Turning Point, USA.¹¹ At just eighteen years of age, Charlie Kirk founded that group in 2012 to combat what he saw, in his limited experience, as a liberal bias on college campuses.¹² Kirk has indeed become a bestselling author simply by

⁶ See Zack Beauchamp, *The Kyle Kashuv-Harvard Controversy, Explained*, VOX (June 17, 2019, 6:30 PM), <https://www.vox.com/policy-and-politics/2019/6/17/18682101/kyle-kashuv-harvard-parkland> (describing Kashuv as "a prominent conservative activist" who "became famous for opposing gun control measures" in the wake of the shooting at Marjory Stoneman Douglas High School). Some of the most vocal activists for tighter gun control in the wake of the shooting include Jaelyn Corin, Emma González, David Hogg, Cameron Kasky, Ryan Dietsch, and Alex Wind. See The Boston Globe, *Parkland Survivor Jaelyn Corin Will Join David Hogg at Harvard*, BOSTON (Dec. 23, 2018), <https://www.boston.com/culture/education/2018/12/23/parkland-survivor-jaelyn-corin-will-join-david-hogg-at-harvard>. Corin and Hogg were both admitted to Harvard. *Id.*

⁷ Adam Harris, *Harvard's Drastic Decision: The College has Rescinded an Admissions Offer to Kyle Kashuv, a Parkland Survivor and Conservative Activist.*, ATLANTIC (June 17, 2019), <https://www.theatlantic.com/education/archive/2019/06/harvard-rescinds-admissions-offer-kyle-kashuv-racist-remarks/591847/>.

⁸ Sebastian Murdock, *Parkland Teen Kyle Kashuv, Former Turning Point USA Member, Apologizes For Racist Slurs*, HUFFPOST (May 23, 2019, 11:27 AM), https://www.huffpost.com/entry/parkland-teen-kyle-kashuv-apologizes-racist-remarks_n_5ce6908be4b09b23e65ead62.

⁹ *Id.*

¹⁰ Mazzei, *supra* note 4.

¹¹ Beauchamp, *supra* note 6.

¹² See Joseph Guinto, *Trump's Man on Campus*, POLITICO (April 6, 2018), <https://www.politico.com/magazine/story/2018/04/06/trump-young-conservatives-college-charlie-kirk-turning-point-usa-217829>.

repeatedly accusing colleges of being “indoctrination center[s]” where it is “dangerous” to express views different from those of “the left.”¹³

One of Turning Point’s foundational missions is to “[e]ffectively push back against intolerance and bias against conservatives in higher education.”¹⁴ It ostensibly (and paradoxically) seeks to accomplish this push back against intolerance by placing professors who hold and espouse what the group considers to be liberal views on a “Professor Watchlist.”¹⁵ As an example, Masha Tupitsyn, a writer and professor at Eugene Lang College in New York, was added to the watchlist because she, in this organization’s view, “teaches students about how the media depicts the recent ‘fall’ of men and masculinity”: she “believes that men have lost their niches like war, marriage, and economic responsibility after World War II”; she has characterized men’s current situation as “playing video games all their lives, while feeling disenfranchised and resentful of their so-called lost power”; and, she sought to teach the work “Male Melancholia.”¹⁶ George Yancy, a professor of philosophy, was added to the list merely for publishing an open letter to white Americans about implicit biases and structural racism.¹⁷ Matthew Lamb, a graduate student who has helped in assembling the watchlist, justified the list by saying that its members have attempted to “chill free speech in the classrooms by taking radical positions that shut down debate.”¹⁸ Nothing in many of

¹³ See Matthew Boedy, *Debunking Charlie Kirk (and PragerU) on Liberal Professors*, MEDIUM (Feb. 13, 2018) <https://medium.com/@mboedy/debunking-charlie-kirk-and-prageru-on-liberal-professors-b6f2af0fb7f7>.

¹⁴ *Get Involved at SIUE – Turning Point USA*, SO. ILL. U. EDWARDSVILLE, <https://siue.campuslabs.com/engage/organization/tpusa> (last visited Feb. 8, 2021).

¹⁵ See Colleen Flaherty, *Being Watched: New Website Seeks to Register Professors Accused of Liberal Bias and “Anti-American Values.”*, INSIDE HIGHER ED (Nov. 22, 2016), <https://www.insidehighered.com/news/2016/11/22/new-website-seeks-register-professors-accused-liberal-bias-and-anti-american-values> (The website, “Professor Watchlist,” asks “students and others to ‘expose and document’ professors who ‘discriminate against conservative students, promote anti-American values and advance leftist propaganda in the classroom.’”).

¹⁶ Professor Watchlist, Professor Profile of Masha Tupitsyn, <https://web.archive.org/web/20181220155711/https://www.professorwatchlist.org/2018/08/13/masha-tupitsyn/> (last visited Mar. 26, 2021).

¹⁷ See *Professor Profile: George Yancy*, PROFESSOR WATCHLIST, <https://www.professorwatchlist.org/professor/georgeyancy> (last visited Feb. 8, 2021) (noting that Professor George Yancy “called on white America to examine the ‘racist poison that is inside of you.’”).

¹⁸ Max Larkin, *A Campus ‘Watchlist’ Reminds Professors Of Old Political Panics*, WBUR, <https://www.wbur.org/edify/2016/12/06/a-campus-watchlist-reminds-professors-of-old-political-panics> (last visited Feb. 8, 2021).

these professors' portfolios, even as alleged by Turning Point, indicates any attempt to "chill free speech" or to "shut down debate."

These professors were placed on Turning Point's watchlist merely for exercising their academic freedom in pursuing and teaching the truth, as they—experts in their respective fields—understand it. Academic freedom, when applied either to individual professors and instructors or to academic institutions, generally refers to three distinct phenomena, as the American Association of University Professors (the "AAUP") declared in 1915: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."¹⁹ Academic freedom has rightly been seen as "one of the foundations of greatness in the American higher education system,"²⁰ one that is critical to the core missions of the university; namely, to pursue and to dispense knowledge. By seeking to intimidate professors into silence simply for conducting research or sharing ideas they do not like and for plainly political purposes, groups like Turning Point chill speech and undermine academic freedom, the very thing Kirk, Lamb, and others accuse these professors of doing.²¹

The charge that universities silence conservative voices, or otherwise discriminate against conservative views, is one long lodged against institutions of higher education in the United States. In 1951, for example,

¹⁹ Hank Reichman, *AAUP Letter of Support for Rutgers Professor's Academic Freedom*, ACADEME BLOG (Aug. 28, 2018), <https://academeblog.org/2018/08/28/aaup-letter-of-support-for-rutgers-professors-academic-freedom/>.

²⁰ HENRY REICHMAN, *THE FUTURE OF ACADEMIC FREEDOM 2* (2019). Thomas Haskell, a historian, recently defined academic freedom as "the capstone of the institutional edifice that Victorian reformers constructed in hopes of establishing authority and cultivating reliable knowledge." Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge,"* in *THE FUTURE OF ACADEMIC FREEDOM* 43, 53 (Louis Menand ed. 1996). The AAUP recognized as much in 1940 when it declared that the university's service of the "common good depends upon the free search for truth and its free exposition." *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP: AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> (last visited Feb. 8, 2021).

²¹ See Larkin, *supra* note 18 (noting that the solitary function of the Professor Watchlist project run by Turning Point "is to intimidate . . . [and] [t]o get professors to change what they say in the classroom, to mute whatever criticisms of the dominant ideology they might have . . ."). Historical irony may have been something Kirk may have learned about had he stayed in school. As it is, the irony is apparently lost on him, as well as on the donors who contributed more than \$5,000,000 to Turning Point USA in 2016 alone. See Alex Kotch, *Who Funds Conservative Campus Group Turning Point USA? Donors Revealed*, INT'L BUS. TIMES (Nov. 28, 2017, 12:41 PM), <https://www.ibtimes.com/political-capital/who-funds-conservative-campus-group-turning-point-usa-donors-revealed-2620325> (noting that Charlie Kirk, the founder of Turning Point USA, claimed the organization "raised more than \$5 million in 2016.").

William F. Buckley Jr., who many consider the father of modern American conservatism, published a book based on his recent experiences as an undergraduate student at Yale.²² He argued that Yale forced students to adopt atheist and collectivist views, which stood in marked contrast to the embrace of religiosity and individualism that would be central to the “conservatism” that Buckley helped to found.²³

The reverberations of Buckley’s arguments—his claiming of victimhood—can be felt today. Critics of universities continually argue that a liberal bias manifests itself in the hiring and retention of faculties who are overwhelmingly liberal as compared to the population at large; in the development of curricula that emphasize liberal ideas, including the importance of “multiculturalism,” at the expense of what they see as “traditional” courses; and in the emphasis on racial, ethnic, and gender diversity in the academic community (including in admissions).²⁴ They typically see all of this as pointing to a concerted effort to indoctrinate students to the liberal worldview, alleging that these efforts will leave graduates ill-prepared for a “real world” in which they will encounter a range of ideas well beyond the supposedly narrow range of liberal—or “politically correct”—views to which they were exposed in college.²⁵ As legal and literary scholar Stanley Fish observed, conservatives have succeeded in painting universities as “hotbeds . . . of radicalism and pedagogical irresponsibility where dollars are wasted, nonsense is propagated, students are indoctrinated, religion is disrespected, and patriotism is scorned.”²⁶

²² *Father of Conservative Movement Dies*, NPR (Feb. 28, 2008, 7:38 AM), <https://www.npr.org/templates/story/story.php?storyId=87235288> (referring to Buckley as “a pioneer in the modern conservative movement” who wrote, among other things, *God and Man at Yale*, a book that expressed “his anger at the secularization of American society”).

²³ WILLIAM F. BUCKLEY JR., *GOD AND MAN AT YALE: THE SUPERSTITIONS OF “ACADEMIC FREEDOM”* lxiv (50th anniversary ed., 2002) (writing that the reaction to his point of view that Yale has a commitment “to the desirability of fostering . . . a belief in God” by persons associated with Yale were “violent”).

²⁴ See Neil Gross, *Op-Ed: Professors are Overwhelmingly Liberal. Do Universities Need to Change Hiring Practices?*, L.A. TIMES (May 20, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-gross-academia-conservatives-hiring-20160520-snap-story.html>.

²⁵ See Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 HARV. J.L. & PUB. POL’Y. 137, 137–38 (2014) (describing the “overwhelmingly liberal” faculty base of elite law schools as one that ill-prepares students for the adversarial system because “it is a fundamental axiom of American law that the best way to get to truth is through the clash of zealous advocates on both sides”).

²⁶ Stanley Fish, *‘Intellectual Diversity’: The Trojan Horse of a Dark Design*, CHRON. HIGHER ED. (Feb. 13, 2004), <http://chronicle.com/free/v50/i23/23b01301.htm>.

These critiques often take the form of calls for greater “intellectual diversity” among faculties and across college campuses.²⁷ Invoking the notion of universities as “marketplaces of ideas” wherein no ideas are forbidden, and all ideas, no matter how obnoxious, are debated freely and apparently without consequence, critics frame universities as hypocritically violating their core commitment to intellectual enlightenment.²⁸ They accuse faculties and administrators of excluding ideas not because of their lack of intellectual merit but rather because they might be offensive or might impede what they see as the true mission of the university: to serve the liberal cause.²⁹

This article proceeds in three sections. Section II describes this predominantly conservative critique of higher education in more detail, including its use of the term “intellectual diversity” as a rhetorical device, and explores the political and legal consequences for the future of higher education. These consequences include a declining public support for public universities and colleges and the undermining of tenure protections and academic freedoms for faculties, sometimes ironically under the auspices of protecting free speech. Section III examines the concept of “intellectual diversity” itself, including the degree to which it is important to the missions of universities and law schools. Importantly, though many critics, including some legal scholars, conflate the seeming lack of ideological diversity among faculties with a lack of intellectual diversity, intellect and ideology are radically different—even contradictory—things. Inasmuch as intellectual diversity is important to legal education, and to higher education more broadly, it cannot be measured by the number of registered Republicans or Democrats on a given faculty or how many conservatives or liberals are invited to speak on campus. Having distinguished intellectual from ideological diversity, this article proceeds in Section IV to examine the potential value for universities, including law schools, in enhancing ideological diversity or “balance” within their

²⁷ See e.g., Reecia Orzeck, *Academic Freedom, Intellectual Diversity, and the Place of Politics in Geography*, 44 *ANTIPODE* 1449, 1450 (2012) (Some “organizations propose—with varying degrees of directness—greater ‘intellectual diversity’ as the [appropriate] corrective . . .”).

²⁸ See Terri R. Day & Danielle Weatherby, *Speech Narcissism*, 70 *FLA. L. REV.* 839, 845 (2018).

²⁹ See Orzeck, *supra* note 27, at 1449

([S]tudents do not learn to think for themselves when their professors tell them what to think. They are exploited by professors who claim to be teaching them but who are in reality promoting their own agendas. The partisan, politically narrow culture that defines so much of academe is depriving an entire generation of the kind of education it deserves).

academic communities, the mechanisms for achieving it, and the inherent problems involved in doing so.

Ultimately, this article concludes that the accusations of universities lacking intellectual diversity or otherwise stifling conservative ideas are without merit. These accusations represent an ideologically-driven charge made by people whose goal is not intellectual diversity or even ideological balance, which is itself impossible to ascertain. Rather, the goal is to undermine the very academic “marketplace” they claim to cherish by artificially granting more market share to certain ideas with which they sympathize. In so doing, they undermine principles of academic freedom that are integral to the functioning of universities. To the extent that universities are in “peril” as the proponents of intellectual diversity proclaim, this article suggests that the threat to higher education is the result of such attacks upon the academy and not the fabricated crisis they have projected onto it.

II. THE ‘INTELLECTUAL DIVERSITY’ CRITIQUE AND ITS PRACTICAL CONSEQUENCES FOR HIGHER EDUCATION

Turning Point and William F. Buckley are far from the first to label and attack what they see as a liberal bias in the modern university. As just one example of earlier roots of the critique, English political philosopher Thomas Hobbes went so far as to blame the English Civil War on “republicans led astray at universities.”³⁰ Hobbes concluded that “the Universities have been to the nation, as the wooden horse was to the Trojans.”³¹ And, centuries before that, Socrates—one whose instructional methods continue to influence legal education and whose name thus makes law students everywhere shudder—was famously put on trial for corrupting the youth with his explorations of rational thought.³² The American experience has been no different. By the middle of the last century, American universities had firmly secured a reputation for their liberalness.³³ One study conducted in the 1950s determined that such a

³⁰ MICHAEL S. ROTH, SAFE ENOUGH SPACES: A PRAGMATIST’S APPROACH TO INCLUSION, FREE SPEECH, AND POLITICAL CORRECTNESS ON COLLEGE CAMPUSES 1 (2019).

³¹ *Id.*

³² *Socrates*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/socrates/> (last visited Feb. 8, 2021).

³³ See *Political Views of American Academics*, K12 ACADEMICS, <https://www.k12academics.com/Education%20Scandals%20and%20Controversies/political-views-american-academics> (last visited Feb. 13, 2021) (“Democratic surveys of faculty that began in the 1950s and continue to the present have found higher percentages of liberals than of conservatives . . .”).

reputation was warranted, finding that only sixteen percent of social scientists identified as Republicans.³⁴ This phenomenon did not go unnoticed in Republican and conservative circles; a cover story for a 1951 edition of *The American Legion Magazine*, for instance, ran with a headline asking “Do Colleges HAVE TO HIRE RED PROFESSORS?”³⁵ That volume of the *American Legion Magazine* was published the same year Buckley attacked Yale—and, by extension, higher education more generally—for its hostility to conservatism.³⁶ Academics were also among the prime targets of Senator Joseph McCarthy’s “Red Scare,” with as many as 600 “disloyal” faculty members losing their jobs, and thousands more having their research and teaching chilled.³⁷

Much as in the 1950s, professors are relatively liberal (or “progressive”) today as compared to the American population at large.³⁸ A recent study, for example, found that forty percent of professors identified their politics as either “radical left” or “progressive,” with another fourteen percent identifying their views as “center left”—a stark contrast to the twenty-seven percent of professors who identified as either an “economic conservative” or a “strong conservative.”³⁹ Another study found that almost five times as many faculty members identified as liberal than as conservative, though that same study found that a plurality identified as neither.⁴⁰ The ratio of liberals to conservatives varies among the disciplines, with the humanities and social sciences being among the

³⁴ NEIL GROSS, WHY ARE PROFESSORS LIBERAL AND WHY DO CONSERVATIVES CARE? 26–27 (2013).

³⁵ Louis F. Budenz, *Do Colleges Have to Hire Red Professors?*, AM. LEGION MAG. (Nov. 1951), <https://archive.legion.org/handle/20.500.12203/3970>. The cover also encouraged parents to “rid campuses of communists who cloak themselves in ‘academic freedom.’” *Id.* Further, a sub-headline to the article itself complained that when one “[u]ncover[s] a red doing his stuff on a college faculty,” a “hue and cry is raised over ‘academic freedom,’ as though these people had a God-given right to infect our children with their made-in-Moscow virus.” *Id.*

³⁶ See Budenz, *supra* note 35 (Budenz’s article was published in the *American Legion Magazine* in November 1951); BUCKLEY, *supra* note 23 (Buckley’s book was published in 1951).

³⁷ See ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 8–10 (1986) (arguing that McCarthyism had a massive chilling effect on criticism of the political status quo and perverted the scholarship of the 1950s).

³⁸ See Scott Jaschik, *Professors and Politics: What the Research Says*, INSIDE HIGHER ED (Feb. 27, 2017), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> (noting that a study conducted in the late 2000s showed that 44.1% of 1,417 faculty members identified as liberal).

³⁹ GROSS, *supra* note 34, at 63.

⁴⁰ Jaschik, *supra* note 38.

most liberal.⁴¹ Indeed, one 2016 study of forty leading American institutions found there were over thirty-three Democrats for every Republican among faculties of history.⁴² As social scientist Neil Gross concluded rather bluntly, “there is in fact a concentration in the academic ranks of people broadly on the left.”⁴³

The liberalness of the professoriate has inspired yet another round of attacks on the university system over the past generation. This Section outlines the main arguments contained in these attacks. Many critics assume the partisan or ideological imbalance (relative to American society as a whole) to be the result of systematic discrimination, one they see as violating a core tenet of universities as representing robust “marketplaces of ideas,” portraying faculty as radicals whose primary aim is indoctrination rather than education and students as being “coddl[ed]” and insulated from ideas merely because they might find them offensive.⁴⁴ This Section then explores the political consequences of these sustained attacks, including cuts in funding for universities and scholars and legislative attempts to undermine academic freedom by limiting tenure protections, infiltrating the processes of hiring or retaining faculty, or dictating curricula.

A. *The Substance of the Attack on Higher Education*

Many of the critics of the liberalness of university faculties seemingly assume the imbalance to be the result of discrimination. As Gross summarized their position, the academy is so liberal “[b]ecause over time liberals have taken over higher education and refuse to hire people with dissenting views.”⁴⁵ It is thus “[p]olitical bias and outright discrimination [that] keep conservatives out of the academic fold.”⁴⁶ At a 2013 symposium at Harvard Law School on the supposed lack of intellectual diversity in the legal academy, George W. Dent, Jr. went so far as to point to “discrimination against scholars who are politically

⁴¹ *Id.*

⁴² *Id.*

⁴³ GROSS, *supra* note 34, at 64.

⁴⁴ See Day & Weatherby, *supra* note 28, at 845, 881 (discussing that universities, “intended to function as marketplaces of ideas,” should stop “silencing offensive speech or coddling the most sensitive listeners”).

⁴⁵ GROSS, *supra* note 34, at 10.

⁴⁶ *Id.*

incorrect” (i.e., not liberal enough) as the only plausible reason for what he saw as the ideological imbalance of law faculties.⁴⁷

To some, this assumed discrimination against conservative scholars is part of a broader problem of universities silencing conservative views or otherwise ostracizing (or even punishing) those who hold or express them, accusing universities of failing to fulfill what they identify as their core mission of being free and open “marketplaces of ideas.”⁴⁸ The notion of a “marketplace of ideas” as an American ideal is one with deep roots in American free-speech jurisprudence, dating back to Justice Oliver Wendell Holmes’ dissent in the 1919 case of *Abrams v. United States*, in which Holmes reasoned that the best way for a democratic citizenry to combat dangerous or inaccurate ideas is not through censorship or state sanction, but through a “free trade in ideas.”⁴⁹ In arguing against the concept of seditious libel, in that case applied against Russian immigrants who had distributed pamphlets criticizing America’s military operation in Russia and calling for a strike in American ammunition plants, Holmes famously stated that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁵⁰

In the century since Holmes’ opinion in *Abrams*, the Supreme Court has had plenty of opportunities to expand on his insights. In a 1953 case involving the conviction of an individual for contempt of Congress for his refusal to disclose the names of people who had purchased books of a political nature for further distribution, Justice William O. Douglas wrote in a concurrence that the law purportedly giving the congressional committee the power to request such information violated the First Amendment.⁵¹ He reasoned that free speech protections are premised on the notion “that the safety of society depends on the tolerance of government for hostile as well as friendly criticism, that in a community

⁴⁷ George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL’Y. 165, 165 (2014). David Horowitz has made a similar claim; when a 2011 study purported to show a lack of discrimination towards applicants for graduate programs, Horowitz responded that “[t]here is no explanation for the overwhelming percentage of liberals—let alone leftists—in academia other than bias in the hiring process.” Peter Schmidt, *Experiment Tricked Graduate-Program Officials in Fruitless Search for Political Bias*, CHRONICLE OF HIGHER ED. (Mar. 21, 2011), https://www.chronicle.com/article/Experiment-Tricked/126845/?sid=at&utm_source=at&utm_medium=en.

⁴⁸ See Day & Weatherby, *supra* note 28, at 839 (“In the university setting, it was originally intended to welcome diverse views by encouraging minority students to feel part of the learning environment and to contribute to the ‘marketplace of ideas.’”).

⁴⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁵⁰ *Id.* at 617, 619–21, 630 (Holmes, J., dissenting).

⁵¹ *United States v. Rumely*, 345 U.S. 41, 50, 54–55 (1953) (Douglas, J., concurring).

where men's minds are free, there must be room for the unorthodox as well as the orthodox views."⁵² He continued that the defendant's organization, the Committee for Constitutional Government, "bids for the minds of men in the market place of ideas."⁵³

More recently, in 2012, Justice Anthony Kennedy explained that America's legal tradition opposed the notion of needing "Oceania's Ministry of Truth," a reference to George Orwell's *Nineteen Eighty-Four*.⁵⁴ He further reasoned that "the remedy for speech that is false is speech that is true," the remedy for speech that is "unreasoned" is speech that is "rational," the remedy for speech that is "uninformed" is speech that is "enlightened," and the remedy for "the straight-out lie" is "the simple truth."⁵⁵ In other words, we should let ideas compete and let the market sort out which are of greater value. In a concurrence, Justice Stephen Breyer contended that even patently false statements can serve useful human objectives, such as:

[I]n social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.⁵⁶

The Supreme Court has also extended the marketplace metaphor to universities.⁵⁷ In overruling a New York law which required instructors to certify they were not Communists, Justice William J. Brennan wrote in 1967 that "[t]he classroom is peculiarly the 'marketplace of ideas,'" and that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"⁵⁸ Then, just five years later, the Court clarified that it is not just "the classroom" that is "peculiarly the 'marketplace of ideas,'" but also "the surrounding environs" on campus.⁵⁹

⁵² *Id.* at 57 (Douglas, J., concurring).

⁵³ *Id.* at 49, 56 (Douglas, J., concurring).

⁵⁴ *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

⁵⁵ *Id.* at 727.

⁵⁶ *Id.* at 733 (Breyer, J., concurring).

⁵⁷ *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

⁵⁸ *Id.*

⁵⁹ *Healy v. James*, 408 U.S. 169, 180 (1972).

As to law schools, at least one scholar used what can be seen as a corollary to the “marketplace of ideas” metaphor, arguing that law schools have forgotten the law’s axiom that truth is best arrived at through the competition between adversaries, each with a stake in the outcome. Nicholas Quinn Rosenkranz, for instance, argued that law schools have seemingly forgotten the “fundamental axiom of American law that the best way to get to the truth is through the clash of zealous advocates on both sides.”⁶⁰ As he derisively observed: “[a]ll of these law professors have, in theory, dedicated their lives to the study of this axiomatically *adversarial* system. And yet, at most of these schools, on most of the important issues of the day, one side of the debate is dramatically underrepresented, or not represented at all.”⁶¹

Many in this current generation of critics of the liberalness of universities owe an intellectual debt not just to Buckley, but also to Allan Bloom and his 1987 work, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today’s Students*.⁶² According to Bloom, the academy’s emphasis on open-mindedness had ironically closed the minds of students and faculty alike.⁶³ Specifically, they had closed their minds to the notion of there being an objective truth, and of the notion that any one idea—or any one cultural belief system—could be superior to others.⁶⁴ The commitment to tolerance and equality, he argued, had come to prevent students and faculty alike from asking serious questions such as how best to live.⁶⁵ He thus alleged their supposed “open mindedness” was in fact an “openness of indifference.”⁶⁶ Critics of higher education have echoed Bloom’s major

⁶⁰ Rosenkranz, *supra* note 25, at 138.

⁶¹ *Id.* He was of course speaking of the “side of the debate” he was invited to Harvard Law to represent. *See id.*

⁶² *See generally* ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* (1987). In some ways, the arguments raised in Allan Bloom’s book are a repackaging of what William F. Buckley Jr. argued about Yale in the early 1950s.

⁶³ *See id.* at 40

([T]rying to prevent [prejudice] by removing the authority of men’s reason is to render ineffective the instrument that can correct their prejudices. True openness is the accompaniment of the desire to know, hence of the awareness of ignorance. To deny the possibility of knowing good and bad is to suppress true openness.)

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See* BLOOM, *supra* note 62, at 40–41 (The actors of the education system have an “openness of indifference” which “promote[s] . . . the twin purposes of humbling our intellectual pride and letting us be whatever we want to be, just as long as we don’t want to be knowers”

themes since the publication of this work. As an early leader of a movement Bloom helped establish, and as head of the National Endowment for the Humanities, Lynne V. Cheney warned in 1992 that many educators on college campuses had come to see the primary purpose of education as no longer being the truth, but rather “political transformation—of students and society.”⁶⁷ She argued that there existed a “narrowing impulse” in the humanities, one borne of “a desire to force-feed students prescribed versions of past and present—and to close both off to debate.”⁶⁸ As Michael Roth, a historian and president of Wesleyan University, recently observed, “[Bloom’s] complaints have been repeated by a herd of academic pundits trying to reach a wide book-buying audience by attacking leftist professors (‘tenured radicals’), conformist undergraduates (‘excellent sheep’), or overprotected students (‘coddled minds’).”⁶⁹

Since Bloom, some scholars have focused their attacks on what they see as an infection of “political correctness” across college campuses (and beyond). In a 1996 article, Kenneth Lasson lamented how “proponents” of the “academic PC movement” had begun to “identify and proscribe ‘politically incorrect’ conduct and curricula,” whereby “‘deconstruction,’ ‘multiculturalism,’ and ‘sensitivity training’ were created and applauded, while ‘Eurocentrism,’ ‘traditionalism,’ and even modern science were denounced.”⁷⁰ He further complained of students being required to attend “prejudice reduction workshops” and professors being targeted by “sexual harassment task forces.”⁷¹ More recently, Lasson complained that “much of the modern academy is dominated by deconstructionists who disdain

because they avoid prejudices “by removing the authority of men’s reason” and, in doing so, “render[s] ineffective the instrument that can correct their prejudices.”)

⁶⁷ LYNNE V. CHENEY, TELLING THE TRUTH: A REPORT ON THE STATE OF THE HUMANITIES IN HIGHER EDUCATION 7 (1992), <https://files.eric.ed.gov/fulltext/ED350936.pdf>.

⁶⁸ *Id.*

⁶⁹ Michael S. Roth, *Review: A Yale Professor Frets about a Waning Aristocracy*, WASH. POST (Aug. 23, 2019, 8:41 AM), https://www.washingtonpost.com/outlook/a-yale-professor-frets-about-a-waning-aristocracy/2019/08/23/99b70bd8-acb5-11e9-bc5c-e73b603e7f38_story.html. The phrase “tenured radicals” is a reference to ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990); the phrase “excellent sheep” is a reference to WILLIAM DERESIEWICZ, *EXCELLENT SHEEP: THE MISEDUCATION OF THE AMERICAN ELITE AND THE WAY TO A MEANINGFUL LIFE* (2014); and the phrase “coddled minds” is a reference to GREG LUKIANOFF & JONATHAN HAITT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018).

⁷⁰ Kenneth Lasson, *Political Correctness Askev: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689, 697–98 (1996).

⁷¹ *Id.* at 698.

'western' civilization, many of them pushing radical agendas."⁷² Terri R. Day and Danielle Weatherby further argued that students' demands for "trigger warnings" and "safe spaces" were emblematic of college campuses "becoming environments in which the most vulnerable among the student population can exercise a 'heckler's veto,' silencing speech that is subjectively offensive to the most sensitive students."⁷³

Many of the most influential critiques among the general public have come from outside of the academy. In 1991, Dinesh D'Souza's *Illiberal Education: The Politics of Race and Sex on Campus* criticized what he labeled a "victim's revolution" on college campuses, one he saw reflected in admissions policies, in redesigned curricula, and in campus life.⁷⁴ Regarding admissions, D'Souza criticized affirmative action policies as providing preferential treatment and other "coveted perks" to Blacks and Hispanics and sometimes to "other groups *claiming* deprivation and discrimination," including American Indians.⁷⁵ These supposed "perks" came at the expense of white students, he argued.⁷⁶ Regarding curricula, D'Souza lamented that universities had watered down what he called "their 'core curriculum' in the great works of Western civilization" in favor of courses about "non-Western cultures, Afro-American Studies, and Women's Studies."⁷⁷ He accused universities of vilifying or punishing professors who "present[] factual material that may provoke or irritate minority students," all while permitting "champions of minority interests" to write "overtly ideological scholarship," including some with "racial connotations."⁷⁸ Finally, regarding life on campuses, D'Souza mocked attempts of universities to promote pluralism or diversity and to "protect minority sensitivities," including through codes of conduct—codes which D'Souza claims do not apply with equal force to "blacks,

⁷² Kenneth Lasson, *Academic Extremism Threatens Democratic Values*, BALTIMORE SUN (Jan. 29, 2014, 4:14 PM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed—academic-israel-boycott-20140129-story.html>.

⁷³ Day & Weatherby, *supra* note 28, at 839.

⁷⁴ DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 1, 2, 5, 8 (1991).

⁷⁵ *Id.* at 3 (emphasis added).

⁷⁶ *See id.* (discussing that Ivy Leagues accept minority students with significantly lower grade point averages and SAT scores than the average incoming freshman class). The irony of claiming white victimhood in a book in which he blasts universities for fostering a culture of victimization was apparently lost on D'Souza.

⁷⁷ D'SOUZA, *supra* note 74, at 5.

⁷⁸ *Id.*

feminists, or homosexuals” since they are the “oppressed victims” meant to be protected.⁷⁹

Conservative columnist Bret Stephens continues to echo D’Souza’s critiques in the pages of *The New York Times* and on Twitter. On a regular basis, Stephens criticizes the culture of college campuses as one stifling of conservative expression, including through the establishment of “safe spaces” and the increasing use of content advisories (or “trigger warnings”).⁸⁰ In one case, he published a commencement address he had given in May of 2017 at Hampden-Sydney College, an all-men’s school in Virginia, one he titled, “Leave Your Safe Spaces.”⁸¹ He began the address with a warning of sorts: “Very soon, you’ll be gone from this gorgeous campus; this nurturing, stimulating, protective environment — a place that, in a manner of speaking, has been your safe space for these past few years.”⁸² He then defined a “safe space” as “a place, usually on campus, where like-minded people — often sharing the same race, gender, sexual orientation or political outlook — can spend time together without having to encounter the expression of any ideas or opinions that they do not endorse.”⁸³ This seemingly good-natured idea, according to Stephens, is dangerous in that the same logic could easily extend to the college campus writ large and even beyond.⁸⁴ Indeed, that “Orwellian” nightmare is already happening, according to Stephens.⁸⁵ He observed:

⁷⁹ *Id.* at 8.

⁸⁰ See, e.g., Sophia Tesfaye, *Right’s Massive Free-Speech Hypocrisy: Bret Stephens and Mo Brooks are the Tip of the Iceberg*, SALON, (Sept. 1, 2019, 10:00 AM), <https://www.salon.com/2019/09/01/rights-massive-free-speech-hypocrisy-bret-stephens-and-mo-brooks-are-the-tip-of-the-iceberg/> (Stephens “has warned against trigger warnings in the classroom: ‘If you can’t speak freely, you’ll quickly lose the ability to think clearly.’”); Bret Stephens, *Leave Your Safe Spaces: The 2017 Commencement Address at Hampden-Sydney College*, N.Y. TIMES, (May 15, 2017), <https://www.nytimes.com/2017/05/15/opinion/leave-your-safe-spaces-the-2017-commencement-address-at-hampden-sydney-college.html?searchResultPosition=1> (discussing the existence of what Stephens called “safe spaces” on college campuses).

⁸¹ Stephens, *supra* note 80.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See generally Parker Molloy, *How Bret Stephens and Bari Weiss Have Taken the NY Times’ Campus Concern Trolling to New Heights in Just 2 Years*, MEDIA MATTERS (June 4, 2019, 1:21 PM), <https://www.mediamatters.org/new-york-times/how-bret-stephens-and-bari-weiss-have-taken-ny-times-campus-concern-trolling-new> (analyzing Stephens’ comments regarding college campuses).

⁸⁵ See *id.* (“Stephens distorted the idea of giving people the space to relax for an hour into an Orwellian attack on free thought, making aggressive use of the slippery slope fallacy along the way.”).

In the name of being “safe,” it is becoming increasingly difficult for campus administrators to guarantee the physical safety of controversial visiting speakers [T]he job security of professors and administrators has been put at increasing risk — lest they espouse, teach or merely fail to denounce a point of view that contradicts the political certitudes of the moment [S]tudents with traditional religious values or conservative political views now feel decidedly unsafe about expressing their views on campus . . . [and] we are gravely jeopardizing the central task of any serious liberal education⁸⁶

Some university administrators agree with Stephens and his fellow critics; in a letter sent to entering freshmen in 2016, John Ellison, Dean of Students at the University of Chicago, wrote that their “commitment to academic freedom means that we do 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 spaces where individuals can retreat from ideas and perspectives at odds with their own.”⁸⁷ Of course, Stephens himself wrote a column celebrating the letter as a vindication of free speech, reasoning that

If you can’t speak freely, you’ll quickly lose the ability to think clearly. Your ideas will be built on a pile of assumptions you’ve never examined for yourself and may thus be unable to defend from radical challenges. You will be unable to test an original thought for fear that it might be labeled an offensive one. You will succumb to a form of Orwellian double-think without even having the excuse of living in physical terror of doing otherwise.⁸⁸

The stakes could not be higher, or so it might seem. Dean Ellison’s letter came in the wake of the University of Chicago’s “Report of the Committee on Freedom of Expression,” which was purportedly prompted by “recent events nationwide that have tested institutional commitments to free and open discourse.”⁸⁹ The statement expressed a commitment to sustaining an environment where ideas could be freely discussed and

⁸⁶ Stephens, *supra* note 81.

⁸⁷ Scott Jaschik, *The Chicago Letter and Its Aftermath*, INSIDE HIGHER ED (Aug. 29, 2016), <https://www.insidehighered.com/news/2016/08/29/u-chicago-letter-new-students-safe-spaces-sets-intense-debate#:~:text=%22Our%20commitment%20to%20academic%20freedom,at%20odds%20with%20their%20own%2C%22>.

⁸⁸ Bret Stephens, *America’s Best University President*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/opinion/robert-zimmer-chicago-speech.html?searchResultPosition=1>.

⁸⁹ *Report of the Committee on Freedom of Expression*, U. CHI., <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> (last visited Feb. 9, 2021).

where no ideas be suppressed merely because some, or even most, of the university community find them “offensive, unwise, immoral, or wrong-headed.”⁹⁰ It noted that “it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”⁹¹

These are indeed troubling times for higher education. Many universities are under great financial pressures, and many are forced to navigate a tense political environment wherein politicians now routinely threaten to undermine the academic freedom of both institutions and individual scholars. The following subsection explores the politics of higher education, one typified by a growing distrust of universities that confirms the success of the attacks analyzed in this subsection in turning the public against universities.

B. The Political Assault on Higher Education

Notably, not only pundits or disgruntled academics have joined the chorus attacking the supposed liberal intolerance of universities and law schools, but political leaders as well. For instance, in March of 2019, after a conservative speaker got punched at the University of California at Berkeley (by someone unassociated with the university),⁹² President Donald J. Trump followed through on his earlier promise and issued an executive order purportedly aimed at “promot[ing] free and open debate on college and university campuses” and at “encourag[ing]” institutions of higher learning “to avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning.”⁹³ The mechanism for “encouraging” colleges and universities to do this was to threaten to withhold federal funds if a school

⁹⁰ *Id.*

⁹¹ *Id.* In 2017, Ivy League professors (who are predominately conservative) followed the University of Chicago’s lead in publishing their own letter to incoming students across the country. *See Ivy League Scholars Pen Letter Urging New College Students to ‘Think For Yourself’*, COLLEGE FIX (Aug. 30, 2017), <https://www.thecollegefix.com/bulletin-board/ivy-league-scholars-pen-letter-urging-new-college-students-think/>. In it, they warned incoming students of a “tyranny of public opinion” that threatened to lead them, unthinkingly, “to suppose that dominant views are so obviously correct that only a bigot or a crank could question them.” *Id.* The professors then encouraged students to fight this tendency and not to “get trapped in an echo chamber.” *Id.*

⁹² Thomas Fuller, *A Right Hook in Berkeley Revives Debate Over Campus Speech*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/us/berkeley-assault-campus-free-speech.html>.

⁹³ *See* Exec. Order No. 13,864, 84 Fed. Reg. 58, 11401 (Mar. 26, 2019).

was found not to be properly promoting “free and open debate” on their campuses.⁹⁴

Meanwhile, Trump’s cabinet largely followed his lead in attacking universities for their liberal biases. Trump’s secretary of education, Betsy DeVos, made one of her first official appearances when she spoke at the 2017 meeting of the Conservative Political Action Conference, using the occasion to attack those who work in higher education: “The faculty, from adjunct professors to deans,” she implored the audience, “tell you what to do, what to say, and more ominously, what to think.”⁹⁵ This, she concluded, amounted to college faculty “silencing the First Amendment rights of people with whom [they] disagree.”⁹⁶ Trump’s first attorney general, Jeff Sessions, made the protection of conservative views on college campuses a focus of his justice department.⁹⁷ Early in his tenure, Sessions spoke at a Turning Point event and accused colleges of creating a “generation of sanctimonious, sensitive, supercilious snowflakes.”⁹⁸ In a speech on the importance of defending freedom of expression on college campuses, Sessions insisted that First Amendment freedoms were “under attack,” and, echoing D’Souza, lamented that the university, once “a place of robust debate, a forum for the competition of ideas,” had become “an echo chamber of political correctness and homogenous thought, a shelter for fragile egos.”⁹⁹ Roth recently summarized the Trump administration’s

⁹⁴ *Id.* at 11401, 11402.

⁹⁵ *U.S. Secretary of Education Betsy DeVos’ Prepared Remarks at the 2017 Conservative Political Action Conference*, U.S. DEP’T EDUC. (Feb. 23, 2017), <https://www.ed.gov/news/speeches/us-secretary-education-betsy-devos%E2%80%99-prepared-remarks-2017-conservative-political-action-conference>.

⁹⁶ *Id.*

⁹⁷ See Chris Quintana, *‘I Am With You’: President Trump Signs Executive Order on Free Speech at College Campuses*, USA TODAY (Mar. 21, 2019, 11:46 AM), <https://www.usatoday.com/story/news/politics/2019/03/21/president-donald-trump-executive-order-college-free-speech/3232560002/>.

⁹⁸ *Id.*

⁹⁹ *Attorney General Sessions Gives an Address on the Importance of Free Speech on College Campuses*, U.S. DEP’T JUST. (Sept. 26, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-gives-address-importance-free-speech-college-campuses>; Andrew Kreighbaum, *Attorney General Sessions Blasts Colleges on Issues of Free Speech*, INSIDE HIGHER ED. (Sept. 27, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/09/27/attorney-general-sessions-blasts-colleges-issues-free-speech>. Under Sessions, the Department of Justice began directing resources toward investigating and potentially bring legal action against universities for their affirmative action policies. See Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>. In an internal memorandum to the civil rights division, the department announced it was seeking

view of the university much as Hobbes described the university in his day, albeit with a Trumpian flourish: as “a Trojan horse undermining the nation with fake learning.”¹⁰⁰

The United States Congress has also taken up these issues. In 2003, for instance, the Senate Committee on Health, Education, Labor, and Pensions held a hearing purportedly to answer the question as to whether intellectual diversity was an “endangered species” on America’s college campuses.¹⁰¹ Chairman Judd Gregg opened the hearing by proclaiming the importance of intellectual diversity and decrying what he saw as the “deterioration” of higher education, one he blamed on “the failure of our higher education community to recognize that they are basically becoming single-dimensional and that they need more diversity in the area of intellectual activity.”¹⁰² He then defined “intellectual diversity” as arising from a “full marketplace of ideas” on campus, one “characterized by the free exchange of ideas and the honest debate on the issues of the day.”¹⁰³ He cited to the political leanings of college faculties, the replacement of “traditional” courses in American or European history with “trendy” courses on “race and culture and gender” (courses he said were light on “intellectual substance”), and the prominence of “speech codes” and “free speech zones.”¹⁰⁴

Politicians can do more than just talk (though it does not always seem like it). They can pass and implement policies with practical effects on universities. One way the federal government can strike back against an alleged liberal bias within the academy is by cutting federal support for research. As Senator Spencer Abraham of Michigan once argued, “the

lawyers who desired to work on a project involving “investigations and possible litigation related to intentional race-based discrimination in college and university admissions.” *Id.*

¹⁰⁰ See ROTH, *supra* note 30, at 3.

¹⁰¹ *Is Intellectual Diversity an Endangered Species on America’s College Campuses?: Hearing Before the Comm. on Health, Educ., Labor, & Pensions*, 108th Cong. U.S. Senate, 108 Cong. 1 (2003) [hereinafter “2003 Hearings”].

¹⁰² *Id.* at 1 (statement of Sen. Gregg).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2–3. As Gregg explained,

Students on many of America’s college campuses are being exposed to only a narrow range of viewpoints through the politicized course offerings and the ideologically homogeneous faculty that fosters an atmosphere where dissenting views are either quashed or ridiculed and significant restrictions are placed on free speech. Simply put, this lack of intellectual diversity in higher education shortchanges students by depriving them of the exposure to a robust debate on the issues of the day.

2003 Hearings, *supra* note 101, at 4. As examples of “trendy courses,” Gregg listed several courses from Antioch College in Ohio, including “Ethnopsychiatry,” “Queer British Fiction,” and “Ecology and Feminism.” *Id.* at 2.

activities of the [National Endowment for the Arts] and the [National Endowment for the Humanities] run against the sensitivities of many American taxpayers who are opposed to seeing their dollars fund projects that they find objectionable.”¹⁰⁵ Legal scholar John K. Wilson observed in 1996 that “we have a national political movement which is successfully aiming to defund artists and scholars for explicitly ideological purposes,” all “in the name of curing political correctness, the bitter medicine that academia must take to purge its sick body of this evil.”¹⁰⁶ The movement Wilson identified over twenty years ago remains active today; in February 2020, Trump proposed a budget that would close the NEH altogether.¹⁰⁷ The innocuous sounding National Association of Scholars has supported cuts to these organizations based on “the current state of scholarship,” namely, that it “denies that there is common intellectual ground, rejects the notion of excellence, and disparages the achievements of the past.”¹⁰⁸

While the federal government is an important source of funding for academic research, states serve the primary role in funding higher education.¹⁰⁹ For the most part, states have drastically reduced their financial support for higher education in recent decades.¹¹⁰ One recent study found that “[o]verall state funding for public two- and four-year colleges in the 2017 school year (that is, the school year ending in 2017) was nearly \$9 billion below its 2008 level, after adjusting for inflation.”¹¹¹ Another found that government funding for higher education had dropped by twenty-five percent from 1987 to 2018.¹¹² In 2017, state funding had

¹⁰⁵ John K. Wilson, *Myths and Facts: How Real is Political Correctness?*, 22 WM. MITCHELL L. REV. 517, 532–33 (1996).

¹⁰⁶ *Id.* at 532.

¹⁰⁷ See *Press Release, NEH Statement on Proposed FY 2021 Budget*, NAT'L ENDOWMENT FOR THE HUMANITIES (Feb. 10, 2020), <https://www.neh.gov/news/neh-statement-proposed-fy-2021-budget>.

¹⁰⁸ Wilson, *supra* note 105, at 535.

¹⁰⁹ *Federal and State Funding of Higher Education*, PEW CHARTIBALE TR. CHARTBOOK 1 (June 2015), https://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf.

¹¹⁰ Michael Mitchell et al., *A Lost Decade in Higher Education Funding: State Cuts Have Driven Up Tuition and Reduced Quality*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Aug. 23, 2017), <https://www.cbpp.org/research/state-budget-and-tax/a-lost-decade-in-higher-education-funding>; James Paterson, *Nearly All States Slashed College Funding Over Last Decade*, HIGHER ED DIVE (Oct. 5, 2018), <https://www.educationdive.com/news/nearly-all-states-slashed-college-funding-over-last-decade/538941/>.

¹¹¹ Mitchell, *supra* note 110, at 1.

¹¹² Douglas Webber, *Higher Ed, Lower Spending*, 18 EDUC. NEXT, no. 3, 2018, <https://www.educationnext.org/higher-ed-lower-spending-as-states-cut-back-where-has-money-gone/>.

dropped to the point where public universities, for the first time, received more revenue from tuition than from government funding, a development Ronald Brownstein, writing for *The Atlantic*, called “an ominous milestone.”¹¹³ In an extreme case, in 2019, the governor of Alaska threatened to cut state appropriations for higher education by approximately forty percent in a single year, a move university leaders condemned as “devastating” before ultimately compromising by reducing the cuts by nearly half and spreading them over three years.¹¹⁴

These cuts are due in part to a rising distrust of higher education among the public, one that correlates with the criticisms of universities detailed above.¹¹⁵ As Roth explained, public investment in higher education had once “stemmed from confidence that education was good for individuals, was good for the nation as a whole, and was best managed by professional educators.”¹¹⁶ The repeated attacks on the integrity of the university system have, quite simply, contributed to an “erosion in that confidence.”¹¹⁷ Stephen Moore, a top economic adviser to former President Trump, seemingly confirmed Roth’s observation when he celebrated, in 2017, that a tax reform bill would undermine universities

¹¹³ Ronald Brownstein, *American Higher Education Hits a Dangerous Milestone*, ATLANTIC (May 3, 2018), <https://www.theatlantic.com/politics/archive/2018/05/american-higher-education-hits-a-dangerous-milestone/559457/>.

¹¹⁴ Adam Harris, *Alaska Still Hasn’t Saved Its Universities*, ATLANTIC (Aug. 15, 2019), <https://www.theatlantic.com/education/archive/2019/08/alaskas-higher-education-system-still-trouble/596191/>; Nick Hazelrigg, *Imminent massive cuts could force faculty, staff layoffs at University of Alaska System*, INSIDE HIGHER ED (July 1, 2019, 3:00 AM), <https://www.insidehighered.com/news/2019/07/01/imminent-massive-cuts-could-force-faculty-staff-layoffs-university-alaska-system>.

¹¹⁵ Those expressing a “great deal” or “quite a lot” of confidence in public education in 1973 dropped by half by 2019, from fifty-eight percent to twenty-nine percent. *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Feb. 10, 2021). “For many Republicans, mistrust of Democrats and mistrust of institutions collide when it comes to higher education, because they see colleges and universities as having a liberal bent.” Adam Harris, *Higher Education Has Become a Partisan Issue: And University Budgets are Suffering as a Result*, ATLANTIC (July 5, 2019), <https://www.theatlantic.com/education/archive/2019/07/alaska-governor-vetoes-higher-education-funding/593368/>. See generally Crystal Thomas, *UMKC Chancellor Response to Conservative Speaker Attack Faces Backlash in Missouri Legislature*, KAN. CITY STAR (Apr. 16, 2019, 9:51 PM), <https://www.kansascity.com/news/politics-government/article229345909.html> (legislators were not satisfied with university responses to “conservative speaker attack.”).

¹¹⁶ ROTH, *supra* note 30, at 3.

¹¹⁷ *Id.*

for the reason that they had become “playpens of the left.”¹¹⁸ Stanley Fish was correct when he observed that conservative critiques of higher education, however inaccurate, have certainly been effective. Ironically, while some see the liberalness of public universities as an existential threat to higher education, it is the funding decreases that present perhaps the biggest challenges to higher education today.¹¹⁹ As the American Association of University Professors recently observed:

Cuts in funding have weakened colleges and universities in other ways. They have led to greater reliance on private support, which has augmented the role of wealthy donors, who may seek to restrict or direct scholarship in service of ideology or interest. They have encouraged the substitution of cheaper and more precarious contingent positions for faculty appointments with tenure. They have widened the gap between richer and poorer institutions. They have facilitated the rise of corporate management styles by administrators and trustees, with the consequent diminution of faculty participation in university governance. They have stimulated a consumerist conception of education, in which colleges and universities submit to the preferences of student demand and interest. They have spawned an “assessment movement” to measure the impact of research and teaching in entirely “objective,” quantitative terms. They have produced “partnerships” with industry in which sponsoring corporations receive privileged access to and control of the direction of faculty research and teaching. Undoubtedly, these developments have weakened American colleges and universities.¹²⁰

In addition to the repeated cuts in funding, legislators have also pushed for laws seeking to reduce or eliminate tenure protections for

¹¹⁸ See Bob Bryan, *Top Trump Adviser Says the GOP Tax Bill is 'Death to Democrats,'* BUS. INSIDER AUSTR. (Dec. 6, 2017, 4:23 AM), <https://www.businessinsider.com.au/trump-gop-tax-bill-democrats-salt-deduction-text-details-2017-12/amp>.

¹¹⁹ “The funding decline has contributed to higher tuition and reduced quality on campuses as colleges have had to balance budgets by reducing faculty, limiting course offerings, and in some cases closing campuses.” Mitchell, *supra* note 110, at 1.

¹²⁰ *In Defense of Knowledge and Higher Education*, AAUP: AM. ASS'N OF UNIV. PROFESSORS (January 2020), https://www.aaup.org/report/defense-knowledge-and-higher-education?link_id=1&can_id=b6c526262c17df2d286c6ceecc685c4e&source=email-attacks-on-expert-knowledge-and-higher-ed-threaten-democracy-3&email_referrer=email_695555&email_subject=attacks-on-expert-knowledge-and-higher-ed-threaten-democracy. The economics of higher education became especially bleak in the midst of the Coronavirus pandemic. See Corey Robin, *The Pandemic is the Time to Resurrect the Public University*, NEW YORKER (May 7, 2020), <https://www.newyorker.com/culture/cultural-comment/the-pandemic-is-the-time-to-resurrect-the-public-university> (noting that CUNY is struggling with the possibility of more budget cuts amid the pandemic and that “[s]ending students, professors, and workers back to campus, amid a pandemic, simply because colleges and universities need the cash, is a statement of bankruptcy more profound than any balance sheet could every tally”).

faculty.¹²¹ In the same week in early 2017, legislators in both Iowa and Missouri introduced legislation ending tenure, prospectively in Missouri's case and retroactively in Iowa's.¹²² Representative Rick Brattin, who wrote the Missouri bill, indicated he was inspired by an incident at the University of Missouri wherein a communications professor participating in a protest of the university's handling of racist incidents on campus was caught on tape shoving a journalist and calling for "muscle" to help remove him.¹²³ That incident had come to be a rallying cry for conservatives complaining of the liberal professoriate's intolerance for opposing views, ultimately leading to the professor being both criminally prosecuted and fired from her position.¹²⁴ In 2018, South Dakota's legislature considered a bill that would have abolished tenure for faculty in the humanities and social sciences, known to lean further to the political left than other disciplines.¹²⁵ These measures are incredibly dangerous given how central tenure is to academic freedom and to the functioning of universities.¹²⁶

States have also threatened to intervene in the hiring processes of university systems.¹²⁷ In Iowa, one legislator, Republican Senator Mark Chelgren, proposed legislation in 2017 that would have mandated "partisan balance" among faculties by prohibiting the hiring of any

¹²¹ See Colleen Flaherty, *Legislation in Two States Seeks to Eliminate Tenure in Public Higher Education*, INSIDE HIGHER ED (Jan. 13, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/01/13/legislation-two-states-seeks-eliminate-tenure-public-higher-education>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Richard Pérez-Peña, *University of Missouri Fires Melissa Click, Who Tried to Block Journalist at Protest*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/26/us/university-of-missouri-fires-melissa-click-who-tried-to-block-journalist-at-protest.html> (detailing the University of Missouri professor who was fired and charged with misdemeanor assault). For examples of citations to the incident as representative of liberal intolerance on college campuses, see, for example, *Topic - Melissa Click*, WASH. TIMES, <https://www.washingtontimes.com/topics/melissa-click/> (last visited Feb. 10, 2021); J. Martin Rochester, *Mizzou Madness: A Case Study of Non-Diversity, Non-Freedom, and Non-Academics in Higher Education*, NAT'L ASS'N SCHOLARS BLOG (Aug. 11, 2017), https://www.nas.org/blogs/dicta/mizzou_madness_a_case_study_of_non_diversity_non_freedom_and_non_academics.

¹²⁵ Jon K. Lauck, "A Long and Winding Road": *The South Dakota Intellectual Diversity Bill of 2019*, 98 NEB. L. REV. 674, 682, 684 (2020).

¹²⁶ On the importance of tenure, see *1940 Statement of Principles on Academic Freedom and Tenure*, *supra* note 20 (Tenure protections are "indispensable to the success of an institution in fulfilling its obligations to its students and to society.").

¹²⁷ See *infra* notes 128–130 and accompanying text.

professor whose most recent party affiliation would cause a greater than ten percent imbalance between the two most dominant parties.¹²⁸ Around the same time, legislators in North Carolina pushed for a requirement that the Board of Governors of the University of North Carolina adopt policies “to ensure [that] ideological balance is part of the experience for [its] . . . students.”¹²⁹ In 2018, the South Dakota legislature considered a bill that would have greatly intervened in the hiring process for new faculty, including a requirement that hiring committees consist of five members, the majority of whom were potentially from outside the academy; a member from the community in which the university was located, an alumnus from that university, and a member appointed by the Governor.¹³⁰

Although it failed in its initial attempts to infringe upon the academic freedom of academic institutions and scholars within the state, South Dakota has perhaps now established a model other states may follow with its passage in 2019 of “[a]n Act to promote free speech and intellectual diversity at certain institutions of higher education.”¹³¹ While other states had already passed “free speech” bills, including prohibitions on “quarantining students’ expressive activities to a few select designated areas” on college campuses,¹³² South Dakota was ostensibly the first to enact a law addressing the broader issue of a supposed lack of intellectual

¹²⁸ S.F. 288, 87th Gen. Assemb., Legis., Reg. Sess. (Iowa 2017), <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=SF288>; Colleen Flaherty, *Iowa Bill Would Force ‘Partisan Balance’ in Hiring*, INSIDER HIGHER ED (Feb. 21, 2017, 3:00 AM), <https://www.insidehighered.com/quicktakes/2017/02/21/iowa-bill-would-force-partisan-balance-hiring>. As the bill was being debated, its sponsor claimed on his official website that he had obtained a “business degree” from “Forbco Management school.” Corky Siemaszko, *Iowa Pol’s Bio Changed After ‘Sizzler U’ Discrepancy Emerges*, NBC NEWS (Mar. 1, 2017, 10:14 AM), <https://www.nbcnews.com/news/us-news/iowa-pol-s-bio-changed-after-sizzler-u-discrepancy-emerges-n726961>. That changed, however, when NBC News reported that “State Sen. Mark Chelgren’s alleged alma mater is actually a company that operated a Sizzler steak house franchise in southern California and he doesn’t have a ‘degree.’” *Id.* Rather, he took “a management course when he worked for [the] Sizzler” franchise, one similar to McDonald’s “Hamburger University,” at the completion of which he received “a certificate.” *Id.*

¹²⁹ S.B. 528, Gen. Assemb., Reg. Sess. (N.C. 2017), <https://www.ncleg.gov/BillLookUp/2017/S528>.

¹³⁰ Lauck, *supra* note 125, at 683–85.

¹³¹ See H.B. 1087, 2019 Leg. Assemb., 94th Sess. (S.D. 2019).

¹³² See Tyler Coward, *Texas Becomes 17th State to Enact Campus Free Speech Legislation*, FIRE (June 10, 2019), <https://www.thefire.org/texas-becomes-17th-state-to-enact-campus-free-speech-legislation/>.

diversity on college campuses.¹³³ Representative Sue Peterson, a Republican who co-sponsored the bill, celebrated the bill's passage as a milestone in combating leftist domination in academia, writing in an email: "We are thrilled that South Dakota has become the first state in the nation to adopt legislation requiring universities to promote intellectual diversity and not simply be dominated by the left."¹³⁴ She characterized the supposed "domination" of academia by "the left" as "a national epidemic" that has, in her view, "undermined the education of thousands of students and fueled out-of-control political correctness at the expense of hard-working taxpayers."¹³⁵

This bill was ultimately more limited than its sponsors and backers had desired. It required outdoor spaces be open fora for free expression, prohibited universities from discriminating against student groups based on their viewpoints, and required reporting on efforts to promote "intellectual diversity and the free exchange of ideas," as well as "any events or occurrences that impeded" either.¹³⁶ Even so, the sponsors of the bill insisted it accomplished much of what they initially sought in 2018.¹³⁷ In a letter to the Board of Regents advising the Board on how to comply with the new state requirements, they demanded that the Board and each university "create hiring practices to ensure the composition of the faculty and administration reflects a broad range of ideological viewpoints," and that hiring practices used to promote racial, ethnic, and gender diversity be "substituted with policies that promote and ensure intellectual diversity."¹³⁸ Even though the bill's language did not support the sponsors' interpretation, the director of education-policy studies at the conservative American Enterprise Institute still characterized it as a necessary counterweight to "the stifling orthodoxy that weighs so heavily on the nation's colleges and universities" and considered it a potential

¹³³ *Free Speech and Intellectual Diversity in South Dakota*, NAT'L ASS'N SCHOLARS (Mar. 18, 2019), https://www.nas.org/blogs/article/free_speech_and_intellectual_diversity_in_south_dakota.

¹³⁴ Graham Piro, *South Dakota Legislature Passes Intellectual Diversity Bill*, C. FIX (Mar. 14, 2019), <https://www.thecollegefix.com/south-dakota-legislature-passes-intellectual-diversity-bill/>.

¹³⁵ *Id.*

¹³⁶ See H.B. 1087 *supra* note 131. The bill shared many features of model legislation the Goldwater Institute had proposed. See *Campus Free Speech Act*, GOLDWATER INST., https://goldwaterinstitute.org/wp-content/uploads/2019/04/Campus-Free-Speech_Model-Legislation_Web.pdf (last visited Feb. 10, 2021).

¹³⁷ See Letter from Representative Sue Peterson et al. to Molly Weisgram, Exec. Assistant to the CEO, S.D. Bd. of Regents (June 12, 2019) (on file with author) (bill sponsors write "to provide clarity and perspective relating to the legislative intent" of the South Dakota bill).

¹³⁸ *Id.*

model for other states to follow.¹³⁹ Jack Stripling considered the bill a preview of how far the higher education “culture wars” could go, writing for the *Chronicle of Higher Education* that it showed “South Dakota ha[d] become a staging ground for the fiercest, most polarizing battles.”¹⁴⁰

It is not just the government that has sought to influence universities to adopt curricula and policies more friendly to conservative ideologies. With decreases in funding, universities have found themselves increasingly dependent upon contributions from alumni.¹⁴¹ After her time leading the National Endowment of the Humanities, Cheney sought to take full advantage of universities’ dependency and thus opened another front in the “culture wars” against liberal academia with her founding of the National Alumni Forum in 1995.¹⁴² That group, soon to be renamed American Council of Trustees and Alumni (“ACTA”), was established “to encourage alumni to use their gifts” in support of what ACTA called “academic freedom” but was really just an “opposition to what the forum s[aw] as political correctness.”¹⁴³ The organization claimed to desire intellectual diversity¹⁴⁴ by seeking to “safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education.”¹⁴⁵ Yet the organization’s continued existence is itself an ongoing violation of an intellectually diverse campus environment, the basic notions of academic freedom, or the free exchange of ideas. The group exists solely to exploit academia’s financial pressures to influence the intellectual life of the university to help ACTA’s membership oppose a political ideology (or set of ideologies) they have labeled “political correctness.”¹⁴⁶

¹³⁹ See Frederick M. Hess, *South Dakota’s Efforts to Protect Speech on Campus Could Be a Model for the Nation*, NAT’L REV. (Jun. 24, 2019, 6:30 AM), <https://www.nationalreview.com/2019/06/south-dakota-campus-free-speech-protections/>.

¹⁴⁰ Jack Stripling, *How Far Will Higher Ed’s Culture Wars Go? South Dakota Is Running Previews*, CHRON. HIGHER EDUC. (Mar. 17, 2020), <https://www.chronicle.com/article/how-far-will-higher-eds-culture-wars-go-south-dakota-is-running-previews/>.

¹⁴¹ See AAUP, *supra* note 120, at 4 (noting that cuts in funding have led to an increased “reliance on private support”).

¹⁴² See Lynne Cheney, NNDB, <https://www.nndb.com/people/294/000024222/> (last visited Feb. 22, 2021) (noting that Cheney was co-founder of the now-called American Council of Trustees and Alumni).

¹⁴³ Money & Management, *National Alumni Forum to Change Name*, ACTA: AM. COUNCIL TR. & ALUMNI (Oct. 17, 1997), https://www.goacta.org/news-item/national_alumni_forum_to_change_name/.

¹⁴⁴ AM. COUNCIL OF TR. & ALUMNI, *INTELLECTUAL DIVERSITY: TIME FOR ACTION 1* (2005), https://www.goacta.org/wp-content/uploads/ee/download/intellectual_diversity.pdf.

¹⁴⁵ Money & Management, *supra* note 143.

¹⁴⁶ See *id.*

In the wake of the terrorist attacks of September 11, 2001, ACTA confirmed its true purposes, and those purposes had nothing to do with academic freedom, free speech, or intellectual diversity. Published in November of 2001, its report, titled “Defending Civilization: How Our Universities Are Failing America and What Can Be Done About It,” opened with a criticism of faculty as being “the weak link in America’s response to the attack,” based on their “moral equivocation” and, in some cases, “explicit condemnations of America.”¹⁴⁷ The remaining bulk of the report is devoted to contrasting what politicians had been saying in response to the attack with isolated quotes of professors from campuses across the country.¹⁴⁸ These “campus voices” included references to the United States’ own long tradition of committing acts of terror, arguments against an aggressive military response, and calls to understand the attack in its full historical context.¹⁴⁹ These “voices” also included faculty who hosted “teach-ins” as an effort to provide some of that context.¹⁵⁰ To ACTA, this was all a symbol of a “pervasive moral relativism [that had become] . . . a staple of academic life,” as proven by the failure to “ensur[e] that students understand the unique contributions of America and Western civilization.”¹⁵¹ The report concluded with a condemnation of America’s academics for being “unwilling to defend [their] civilization” and for “giv[ing] aid and comfort to [their country’s] adversaries.”¹⁵² This was after the report also condemned alleged incidents of professors or students being “intimidated . . . if they . . . fail to conform to a particular ideology.”¹⁵³

According to one scholar, this report condemned professors for doing exactly what they are meant to do: to teach, to talk, to think, to discuss, to analyze, to self-criticize, and to refuse to be controlled by the prevailing passions of the people or their state—to be, in effect, intellectuals.¹⁵⁴ As Christopher Newfield observed, these professors were doing the very things that “define the university,” but to ACTA, these things were “the

¹⁴⁷ JERRY L. MARTIN & ANNE D. NEAL, DEFENDING CIVILIZATION: HOW OUR UNIVERSITIES ARE FAILING AMERICA AND WHAT CAN BE DONE ABOUT IT 1 (2001).

¹⁴⁸ *See id.* at 2–29.

¹⁴⁹ *See id.* at 2–4. As Christopher Newfield observed, ACTA could not point to a single faculty member who refused to condemn the loss of life on September 11. CHRISTOPHER NEWFIELD, UNMAKING THE PUBLIC UNIVERSITY: THE FORTY-YEAR ASSAULT ON THE MIDDLE CLASS 251 (2008).

¹⁵⁰ MARTIN & NEAL, *supra* note 147, at 1.

¹⁵¹ *Id.* at 5–6.

¹⁵² *Id.* at 7.

¹⁵³ *Id.* at 5.

¹⁵⁴ NEWFIELD, *supra* note 149, at 252.

essence of weakness and equivocation, a genuine danger to the nation.”¹⁵⁵ ACTA preferred judgment to thought, conviction to knowledge, and ideology (so long as it is the correct one) to intellectualism.¹⁵⁶

This report exemplified the anti-intellectualism that pervades this seemingly endless stream of criticisms of universities as, in some way, lacking intellectual diversity or failing to give enough respect to certain viewpoints or ideologies. The primary concern is almost entirely on representation of certain ideological positions, regardless of their intellectual merit or suitability to the respective discipline, and not actually on ensuring a robust, intellectually diverse or “rich” environment. The following Section examines the concept of “intellectual diversity” and contrasts it with notions of ideological diversity or balance. It then explores why the term “intellectual diversity” (as well as its related “marketplace of ideas” concept) has been such an effective rhetorical device, despite (or really *because of*) its inaccuracy in describing what these critics desire.

III. THE MEANING OF 'INTELLECTUAL DIVERSITY' CONTRASTED WITH IDEOLOGICAL DIVERSITY

When scholars, political figures, and others criticize universities for allegedly excluding certain ideas in contravention of their core intellectual missions, they apparently conflate the notion of intellectualism with that of ideology. They knowingly or unknowingly, intentionally or unwittingly, conflate the notion of being “intellectually diverse” with being ideologically diverse or even maintaining partisan balance.

For example, when the Harvard Federalist Society hosted a conference at Harvard Law School in April of 2013 on “Intellectual Diversity and the Legal Academy,” Rosenkranz opened his talk by lamenting that only three professors out of 120 at Georgetown Law School were, to his knowledge, “openly conservative, or libertarian, or Republican or, in any sense, to the right of the American center.”¹⁵⁷ Not only that, but the *ideological* median of the remaining 117, in Rosenkranz’s estimation, lay to the “left edge of the Democratic Party.”¹⁵⁸ George W. Dent Jr. similarly opened his paper by thanking the organizers

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* (“In the report, thought is weakness and judgment is strength. Knowledge is confusion and conviction is truth. ‘Tolerance and diversity’ will sap us while hate will prepare us.”).

¹⁵⁷ Rosenkranz, *supra* note 25, at 137.

¹⁵⁸ *Id.*

of the conference for addressing such an important issue as the leftward “tilt” of law school faculties.¹⁵⁹ Sherif Gergis, for his part, introduced his paper with self-deprecating humor and a promise not to include any analysis of “general and systematic data.”¹⁶⁰ He then began to analyze his first question—“Is there a lack of intellectual diversity in law school faculties?”—by asking how we can find “good proxies” for “*ideological* diversity.”¹⁶¹ It was on ideological diversity, rather than intellectual diversity, that the remainder of his paper focused.¹⁶² He at least kept his promise not to support his arguments with any general and systematic data.

Lawmakers do the same thing. For instance, in the 2003 Senate hearing regarding the supposed deterioration of intellectual diversity on college campuses, senators and their guests focused almost exclusively on a lack, in their view, of political balance.¹⁶³ In his opening statement, Chairman Gregg cited to a survey showing that “the academy leans to the political left by a wide margin in contrast to 30 years ago” as the principal piece of evidence for his contention regarding the deterioration of

¹⁵⁹ Dent, *supra* note 47, at 165.

¹⁶⁰ See Sherif Gergis, *How the Law School Can Succeed—An Invitation*, 37 HARV. J.L. PUB. POL’Y 187, 187 (2014) (Gergis opened lightheartedly with: “I have been lucky enough to give many talks at law schools, and whenever I take the microphone—and, inevitably, lower the microphone—the question flashes on people’s faces: ‘Why *him*?’”).

¹⁶¹ *Id.* at 188 (emphasis added). Similarly, one of Justice Kavanaugh’s law clerks, Trenton Van Oss, who is also (not at all incidentally) a former student at Harvard and member of the Federalist Society, recently explained how the Federalist Society itself enhances intellectual diversity:

One of the ways in which Fed Soc [*sic.*] encourages intellectual diversity at the school is to bring in new ideas and new speakers and in that way let students know that it’s okay if you don’t agree with the other 98 percent of your professors and students . . . There are very smart and successful people out in the world who hold opposing views. They just don’t happen to be here.

Lewis Rice, *Trenton Van Oss: ‘I’ve Really Had to Defend my Views and Self-Reflect on Why I Believe the Things I Believe’*, HARV. L. TODAY (May 12, 2017), <https://today.law.harvard.edu/trenton-van-oss-ive-really-defend-views-self-reflect-believe-things-believe/>. It should be noted here that the Federalist Society is an organization which exists to push an ideological agenda, committed not to developing a particular method for uncovering the truth, as intellectualism requires, but to pursuing a particular set of values and positions. See *id.* (describing the Federalist Society as “an organization for conservative and libertarian law students”).

¹⁶² See Gergis, *supra* note 160, at 188–98.

¹⁶³ See 2003 Hearings, *supra* note 101 (At the 2003 hearing, senators and their guests cited to surveys and reports showing a political imbalance in university faculty, as well as their own personal experiences on the issue).

intellectual diversity over that same time period.¹⁶⁴ This, he said, was precisely “what this hearing is about.”¹⁶⁵

Much more recently, in passing its “intellectual-diversity bill,” South Dakota legislators repeatedly insisted that intellectual diversity meant only political or ideological balance, even expressing frustration when the executive director of the state’s board of regents defined “intellectual diversity” as respecting and promoting a diversity of intellectual approaches to the pursuit of knowledge.¹⁶⁶ Four sponsors of the bill, including the senate and house majority leaders, criticized the executive director for having defined “intellectual diversity” in what they acknowledged was a “comprehensive and multidimensional manner.”¹⁶⁷ They suggested the executive director knew his “comprehensive and multidimensional” definition was “completely different than the meaning of intellectual diversity” they sought to be promoted.¹⁶⁸ As a way of providing clarity, the bill sponsors then defined “intellectual diversity” as “the presence of a wide variety of ideological and political opinions on campus and not simply the domination of one ideological bloc,”¹⁶⁹ considering this the “proper definition” based solely on it being the one used in popular discourse “currently ongoing in policy circles.”¹⁷⁰

This Section examines the concept of intellectualism as a way of gaining a fuller (or perhaps “multidimensional”) understanding of what it means for a university to have intellectual diversity and how it may be achieved or maintained. This conception stands in stark contrast to what it means to be ideologically diverse, which is ostensibly what many critics

¹⁶⁴ See *id.* at 1–2 (statement of Sen. Gregg). It is not clear on what Gregg was relying on to support his claims of academia having become more liberal.

¹⁶⁵ *Id.* at 2.

¹⁶⁶ See Stripling, *supra* note 140 (noting that lawmakers were frustrated at the regents’ codification of a policy “encouraging ‘professional diversity in faculty’” by mandating that the university abstain from “shield[ing] individuals from viewpoints they find unwelcome, disagreeable, or even deeply offensive” as not “go[ing] far enough.”).

¹⁶⁷ Letter from Senate Majority Leader Kris Langer, et al. to Paul B. Beran, Exec. Dir. & CEO, S.D. Bd. of Regents (Dec. 10, 2018) (on file with author).

¹⁶⁸ *Id.* (writing, “[w]e assume this must be a mistake on the part of the [Board of Regents] and not a case of stark bad faith.”).

¹⁶⁹ *Id.*

¹⁷⁰ Letter from Langer et al. to Beran, *supra* note 167. Interestingly, in arguing in support of the bill, legal scholar Patrick M. Garry did not address the distinction between the “intellectual diversity” the bill purports to support and what he rightly observed was the bill’s actual focus on ideology. See Patrick M. Garry, *When Legislatures Become the Ally of Academic Freedom: The First State Intellectual Diversity Statute and Its Effect on Academic Freedom*, 71 S.C. L. REV. 175, 179 (2019) (discussing only “the nature, purpose, and development of the First Amendment right of academic freedom” and “the state of free speech and intellectual diversity in the nation’s institutions of higher education.”).

are demanding, even as they insist on using the language of “intellectual diversity.” This Section then examines how the use of this term helps critics frame the debate over higher education in a way that is advantageous to them, but highly misleading. Specifically, it allows them to claim the mantle of true intellectualism, even as they engage in anti-intellectualism, and to be the guardians of academic freedom, even as they undermine it.

A. *The Real Meaning of ‘Intellectual Diversity’*

What many participants in this debate fail to recognize is that ideology is distinct from intellect. Ideology—or at least *political* ideology—generally refers to a set of values or beliefs.¹⁷¹ In a review of the ways in which political scientists had used the term “ideology” over the course of the twentieth century, Kathleen Knight identified the core definition of ideology as “a coherent and relatively stable set of beliefs.”¹⁷² Knight further explained that ideology, in its broadest terms, can be understood as “the way a system . . . rationalizes itself.”¹⁷³ Importantly, these rationalizations can be “idiosyncratic, impractical, or even delusional,” while still maintaining “coherence and . . . stability.”¹⁷⁴ They can be based on assumptions about reality, assumptions that can remain impervious to new observations that conflict with those assumptions.¹⁷⁵ It is also clear the beliefs that comprise an ideology include both descriptive and normative beliefs; they include not just beliefs about the way things *are*, but also about the way things *should be*.¹⁷⁶ Anthony Downs captured

¹⁷¹ *Political Ideology*, SCI. DIRECT, <https://www.sciencedirect.com/topics/psychology/political-ideology#:~:text=A%20political%20ideology%20is%20a,and%20political%20arrangements%20and%20processes> (last visited Feb. 22, 2021).

¹⁷² Kathleen Knight, *Transformations of the Concept of Ideology in the Twentieth Century*, 100 AM. POL. SCI. REV. 619, 625 (2006) (emphasis omitted). In the nineteenth century, the term “ideology” tended to be used to describe (and demean) a certain set of beliefs. *See id.* (“In the nineteenth century, ideology connoted attachment to values of liberal democracy, and not to be an ‘ideologue’ was to support ‘the rights of man’ against an absolutist state.”).

¹⁷³ *Id.* at 619.

¹⁷⁴ *Id.*

¹⁷⁵ *See* John Levi Martin, *What is Ideology?*, 77 SOCIOLOGIA, PROBLEMAS E PRÁTICAS 9, 15 (2015) (“[T]here is general evidence from psychology that when we come across information that contradicts our strongly held positions, we are less likely to pursue it (e.g., read it), less likely to understand it if we *do* pursue it, and more likely to forget if we do understand.”)

¹⁷⁶ *See id.* at 12 (“Most social scientists have assumed that if ideology is separable from some other political beliefs or opinions, it is because ideology is intrinsically *normative* and *generative* . . .”).

the normative component of ideology when he defined it as “a verbal image of the good society and of the chief means of constructing such a society.”¹⁷⁷

Intellectualism refers to a separate compartment of the human mind, the intellect having been described by historian Richard Hofstadter as “the critical, creative and contemplative side of mind.”¹⁷⁸ To be intellectual is to remain skeptical; it is to live for ideas without becoming committed to any single idea.¹⁷⁹ The life of the intellectual is not simply the pursuit of truth, as it is so often said, but the “quest for new uncertainties.”¹⁸⁰ It is to take something many—whether inside or outside the academy—assume to be the truth and to problematize it. It is, in short, to be *non*-ideological or even *anti*-ideological.

With this understanding of what it means to be an intellectual (as opposed to an ideologue), we can gain an understanding of what it means for a department or college to be intellectually diverse. As historian David Hollinger explained at the annual meeting of the American Historical Association in 2005, questions to be asked regarding whether a particular department or college is *intellectually* diverse is not whether it is balanced in terms of political affiliations, but whether it represents the different approaches to scholarly work appropriate for its particular discipline.¹⁸¹ According to Hollinger, one might fairly ask whether “departments of economics in the elite universities of the United States [are] balanced in the choice of topics their faculties address in their scholarly work and in issues around which their curricula is organized[.]”¹⁸² One might also question: “Do these departments have enough specialists in area studies

¹⁷⁷ *Id.*

¹⁷⁸ RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 25 (1963).

¹⁷⁹ *See id.* (“Whereas intelligence seeks to grasp, manipulate, re-order, adjust, intellect examines, ponders, wonders, theorizes, criticizes, imagines. Intelligence will seize the immediate meaning in a situation and evaluate it. Intellect evaluates evaluations, and looks for the meanings of situations as a whole.”).

¹⁸⁰ *Id.* at 30. As for being an intellectual, Hofstadter wrote that what distinguishes the intellectual from the non-intellectual is not their profession, as there can be intellectuals and non-intellectuals alike in the academy as well as in other “intellectual” professions such as law, science, journalism, and others. *See id.* at 26–27. Rather, it is in one’s attitude towards ideas themselves; namely, as Hofstadter defined it, an intellectual “lives for ideas” and is dedicated to “the life of the mind.” HOFSTADTER, *supra* note 178, at 27.

¹⁸¹ *See* David A. Hollinger, *What Does It Mean to Be “Balanced” in Academia?*, HIST. NEWS NETWORK, <http://historynewsnetwork.org/articles/10194.html> (last visited Feb. 10, 2021).

¹⁸² *Id.* Hollinger observed that “[t]o be balanced is simply to do an academic project professionally,” whereas “[t]o be imbalanced is to leave out of account something that the academic norms of evidence and reasoning in the interest of truth require you to take into account.” *Id.*

(in the economy of China or of India or of Russia or of the United States), and do they devote enough attention to the study of economic institutions and to Marxist theories?"¹⁸³ Similarly, one might ask:

Are departments of philosophy in the elite universities of the United States balanced in the choice of topics their faculties address in their scholarly work and in the issues around which their curricula is organized? Do these departments have enough specialists in applied ethics, in theory of culture, philosophy of religion, and in the study of the great Asian philosophers?¹⁸⁴

As to the legal discipline, intellectual diversity (honestly defined) would thus require a faculty body who specialize in a variety of doctrinal areas or practical skills and whose scholarship represents a variety of intellectual approaches to understanding the law. The first matter is simple; most faculty searches identify specific areas of law or particular skills (such as legal writing or trial practice) for which they have needs.¹⁸⁵ The second is a bit more complicated and is normally not the priority for law schools given their general emphasis (unlike graduate programs in other disciplines) in producing practitioners, not scholars.¹⁸⁶ There are many ways of categorizing the myriad of approaches with which legal scholars contemplate the law. As just one example, Guido Calabresi, a federal circuit judge and professor emeritus at Yale Law School, conceptualized legal scholarship as containing four basic approaches.¹⁸⁷ The first of Calabresi's basic approaches is "doctrinalism," "autonomism," or "formalism," a perspective that generally "views law as autonomous and distinct from other fields of learning" and whose fundamental purpose "is to render the rules of law consistent and coherent with each other."¹⁸⁸ The second is the "functionalist" approach; in the words of famous legal scholar Roscoe Pound, this approach focuses on

¹⁸³ *Id.*

¹⁸⁴ Hollinger, *supra* note 181.

¹⁸⁵ See *Best Practices for Conducting Faculty Searches*, HARV. U. OFF. SENIOR VICE PROVOST: FAC. DEV. & DIVERSITY, https://faculty.harvard.edu/files/fdd/files/best_practices_for_conducting_faculty_searches_v1.2.pdf (last visited Feb. 10, 2021) ("The position description [of Harvard faculty] should be as broad as possible, while obviously noting the desired area(s) of scholarship, experience, and disciplinary background.").

¹⁸⁶ See Philip L. Merkel, *Scholar or Practitioner?: Rethinking Qualifications for Entry-Level Tenure-Track Professors at Fourth-Tier Law Schools*, 44 *CAP. U. L. REV.* 507, 509 (2016) ("[T]he purpose of most law schools is to teach students how to practice law, not to serve as academic think-tanks.").

¹⁸⁷ See Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 *STAN. L. REV.* 2113, 2114–27 (2003).

¹⁸⁸ *Id.* at 2114–15.

assessing “legal . . . doctrines and institutions by the extent to which they furthered or achieved the ends for which law exists,” rather than “judging law by criteria drawn from itself,” as those ascribing to doctrinalism mainly did.¹⁸⁹ In assessing the effectiveness of the law, these functionalists drew upon other academic disciplines thus, becoming known as the “law and . . .” school.¹⁹⁰ The third approach—the “legal process school”—focuses on “institutional capacity,”¹⁹¹ examining the institutions that contribute to the law, particularly the features of each that would make one institution especially well-suited, as compared to the others, to decide certain legal questions.¹⁹² The final approach is what Calabrese calls the “law and status” school, which asks how particular legal rules or doctrines affect certain groups of people, especially those who lack relative power within the legal order.¹⁹³

These different intellectual approaches to understanding the law, as Calabresi defined them, do not align with the spectrum of political ideologies, and they do not align much, if at all, even with “conservative” or “liberal” legal or judicial philosophies. This should not be surprising if we remember that intellectualism is about asking questions, not pushing a particular answer.

Importantly, intellectual diversity does not require legal or other scholars to redefine their disciplines to incorporate perspectives or positions that are unsupported (and unsupportable) based on the practices and epistemological axioms that are fundamental to, and hence define, the discipline.¹⁹⁴ As legal scholar Robert Post has reminded us, a “discipline,” after all, is “not merely a body of knowledge but also . . . a set of practices

¹⁸⁹ *Id.* at 2118–19, 2119 n.22 (quoting ROSCOE POUND, *PHILOSOPHY OF LAW* 42–43 (rev. ed. 1954)).

¹⁹⁰ *See Calabresi, supra* note 187, at 2118–19.

¹⁹¹ *Id.* at 2122–23.

¹⁹² *Id.* at 2123.

¹⁹³ *Id.* at 2127. I do not mean to suggest that there is no room for disagreement within disciplines regarding the “body of knowledge” or the practices used in producing, maintaining, or distributing it, or that each discipline is wholly independent of other disciplines. For thoughtful discussions of these issues, among others, *see*, for example, Julie Thompson Klein, *Blurring, Cracking, and Crossing: Permeation and the Fracturing of Discipline*, in *KNOWLEDGES: HISTORICAL AND CRITICAL STUDIES IN DISCIPLINARITY* 185, 186, 190 (Ellen Messer-Davidow et al. eds., 1993) (arguing that notions of unity within disciplines do not represent reality); Robert Post, *Debating Disciplinarity*, 35 *CRITICAL INQUIRY* 749, 751 (2009) (identifying the extent of “internal coherence” regarding methodology and substance as one characteristic that varies from discipline to discipline).

¹⁹⁴ *See Post, supra* note 193, at 751.

by which that knowledge is acquired, confirmed, implemented, preserved, and reproduced.”¹⁹⁵

Today, there is an anti-intellectual culture in this country, and elsewhere, that seeks to undermine the truth-claims of disciplines as merely reflecting the ideological viewpoints of the scientists or scholars producing them.¹⁹⁶ Climatologists have long been the target of this line of attack, including from within the halls of Congress.¹⁹⁷ In 2015, Senator Ted Cruz held a Science Subcommittee of the Senate Commerce Committee hearing, the entire premise being that climatologists were driven by “dogma” rather than “data” and that scientists were attempting to hide the truth from the American people.¹⁹⁸ As it happened, all of the “inconvenient” pieces of data that Cruz suggested scientists were hiding from the public had been fully integrated into the scientists’ work and broadly distributed by those scientists to a wide audience, apparently including Senator Cruz.¹⁹⁹

¹⁹⁵ *Id.*

¹⁹⁶ See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674–75 (1983) (discussing skeptics within the legal community “who look[] with indifference and even disdain upon the legal theorists who . . . volunteered to salvage and recreate the traditions of objectivism and formalism,” while at the same time “reject[ing] any alternative to the formalist and objectivist view.”).

¹⁹⁷ See, e.g., *Sen. Cruz Confronts the Dogma of Climate Change Alarmism*, U.S. SEN. FOR TEX.: TED CRUZ (Dec. 8, 2015), https://www.cruz.senate.gov/?p=press_release&id=2548 (Republican Texas Senator Ted Cruz refuting the legitimacy of climate science data).

¹⁹⁸ See *id.*

¹⁹⁹ The data Cruz claimed scientists were hiding were the “facts” that the “minimum sea ice extent” that year was higher than its record low a few years prior, that ice in the Antarctic was “increasing in mass,” and that “there ha[d] been no significant global warming for the past 18 years.” *Id.* The National Snow and Ice Data Center had published its findings regarding minimum sea ice extent in the Arctic, which revealed 2012 (not 2011) as being “the record low year.” Press Release, *Arctic Sea Ice Extent Settles at Fourth Lowest in the Satellite Record*, NAT’L SNOW & ICE DATA CTR. (Oct. 6, 2015), http://nsidc.org/news/newsroom/PR_2015meltseason. Of course, as I observed in 2017, “climatologists also recognize that [given the natural annual variations in sea ice coverage] the important comparisons are not year to year, but rather decade to decade On this point, the NSIDC concurs with the rest of the scientific community that the trend line is pointing downward.” Sean M. Kammer, *No-Analogue Future: Challenges for the Laws of Nature in a World without Precedent*, 42 VT. L. REV. 227, 278 (2017). As to the growth in the Antarctic ice’s mass, not only had climatologists observed and reported such developments, but they had also predicted such growth in ice mass would occur. See Kate Ramsayer, *Antarctic Sea Ice Reaches New Record Maximum*, NASA (Oct. 7, 2014), <https://www.nasa.gov/content/goddard/antarctic-sea-ice-reaches-new-record-maximum>; see also IPCC WORKING GROUP II, THE REGIONAL IMPACTS OF CLIMATE CHANGE: AN ASSESSMENT OF VULNERABILITY 9, 93 (Robert T. Watson et al. eds., 1998), <https://www.ipcc.ch/site/assets/uploads/2020/11/The-Regional-Impact.pdf>. Finally, as to the claim of there being a hiatus in global warming over the past 18 years, this claim was based on a theory within the International Panel on Climate Change’s Report from 2013; the acquisition

Historians have also had their integrity as scholars publicly questioned. D'Souza, among the most prominent of these provocateurs, did not cease his attacks on higher education with his publication of *Illiberal Education* in 1991. He has recently taken to accusing “[p]rogressive historians” of hiding the truth regarding the Democratic Party’s past.²⁰⁰ In July of 2018, after the release of his film *Death of A Nation*, he claimed that “[p]rogressive historians know the truth about the racism of the Democratic Party, but they employ tricks . . . to cover it up.”²⁰¹ He even insisted his film “unmask[ed] the treason of progressive historians,” namely, “how they shamelessly cover up the crimes of the Democrats.”²⁰² The marketing materials for the book accompanying the film advertise it as “present[ing] the shocking story of the Democratic Party’s dark past” and as “expos[ing] the hidden truth that racism comes not from Trump or the conservative Right, but rather from Democrats and progressives on the Left.”²⁰³

As several notable historians have demonstrated, D'Souza's claims lack any intellectual merit. Perhaps most notably, Kevin Kruse, a historian at Princeton,²⁰⁴ responded to one of D'Souza's arguments by pointing out that “[a]nyone who ever took US history, even in high school, knows that in the antebellum era, Democrats were the party of slavery while abolitionism drove the GOP.”²⁰⁵ Far from being a secret among professional historians and educators, the Democrats' “dark past,” as

of new data from 2014, 2015, and 2016 subsequently debunked that theory because each set of data established new highs for being the hottest on record. See Nathaniel L. Bindoff et al., *Detection and Attribution of Climate Change: from Global to Regional*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 867, 870 (Stocker, T.S., et al. eds., 2013), https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter10_FINAL.pdf; Press Release, NASA, NASA, *NOAA Data Show 2016 Warmest Year on Record Globally* (Jan. 18, 2017), <https://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally>; Justin Gillis, *Earth Sets a Temperature Record for the Third Straight Year*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/science/Earth-highest-temperature-record.html?_r=0.

²⁰⁰ See Dinesh D'Souza (@DineshDSouza), TWITTER (Jul. 20, 2018, 10:00 AM), <https://twitter.com/DineshDSouza/status/1020307347946778624>.

²⁰¹ *Id.*

²⁰² Dinesh D'Souza (@DineshDSouza), TWITTER (Jul. 7, 2018, 8:11 AM), <https://twitter.com/DineshDSouza/status/1015569062104129536>.

²⁰³ *Death of a Nation*, D'SOUZA, <https://www.dineshsouza.com/books/death-of-a-nation/> (last visited Feb. 10, 2021).

²⁰⁴ *Dep't of History: Kevin M. Kruse*, PRINCETON UNIV., <https://history.princeton.edu/people/kevin-m-kruse> (last visited Feb. 22, 2021).

²⁰⁵ Kevin M. Kruse (@KevinMKruse), TWITTER, (June 6, 2019, 11:48 AM), <https://twitter.com/KevinMKruse/status/1136661468034797573>.

D'Souza called it, in support of slavery, and, later, racial segregation, is common knowledge.²⁰⁶

An illuminating example of D'Souza's intellectual dishonesty came when he posted a video in June of 2019 claiming that "no Republican owned slaves in 1860."²⁰⁷ Showing startling confidence in his position, he even promised he would "take back his claim" if a historian could prove him wrong.²⁰⁸ He took any failure to do so as demonstrative of the danger of "#FakeHistory"; namely, that "the misinformation being taught in schools enables the #FakeNews being pushed by the biased media Left!"²⁰⁹ The logic is difficult to follow, but still historians took on the task and, in very short order, provided at least nine examples of Republicans who owned slaves in 1860.²¹⁰ Still, D'Souza refused to "take it back" as he promised, even after being forced to admit that one historian was "technically right" in proving him wrong.²¹¹ Instead, not only did he keep the video on his website and Twitter feed, but he continued to

²⁰⁶ For prominent works of scholarship examining the role of the Democratic Party in perpetuating white supremacy, see, for example, V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949); NUMAN V. BARTLEY & HUGH D. GRAHAM, *SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION* (1975); NEIL R. McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64* (1971); WILLIAM D. BARNARD, *DIXIECRATS AND DEMOCRATS: ALABAMA POLITICS, 1942-1950* (1974); IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME*, 157, 159 (1st ed., 2013). As for American history textbooks (or books used widely in introductory American history courses) written by "progressives," neither D'Souza nor anyone else has been able to find one that supports his claim of historians hiding the Democratic Party's role in perpetuating slavery and racial segregation or the Republican Party's role in ending slavery. Even Howard Zinn's famously progressive text, one that is often the target of conservative critics, recognized that at the turn of the twentieth century, "Blacks had tied themselves to the Republican party, the party of Lincoln and civil rights laws," while "[t]he Democrats were the party of slavery and segregation." HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT* 289 (20th ed., 1999).

²⁰⁷ See Warren Throckmorton, *A Teachable Moment: Dinesh D'Souza Refuses to Take Back False Claim about Republicans Owning Slaves in 1860* (June 11, 2019), <https://www.wthrockmorton.com/2019/06/10/dinesh-dsouza-refuses-to-take-back-false-claim-about-republicans-owning-slaves-in-1860/>.

²⁰⁸ *Id.*

²⁰⁹ Dinesh D'Souza (@DineshDSouza), TWITTER (June 9, 2019, 9:30 AM), <https://twitter.com/DineshDSouza/status/1137713456096768000>.

²¹⁰ See Kevin M. Kruse, (@KevinMKruse), TWITTER (June 9, 2019, 11:01 AM), <https://twitter.com/KevinMKruse/status/1137736498613297152> (tweeting that "[h]istorians gave nine examples" proving D'Souza wrong, "but he hasn't taken it back.").

²¹¹ See Dinesh D'Souza (@DineshDSouza), TWITTER (June 7 2019, 10:47 AM), <https://twitter.com/DineshDSouza/status/1137008107060682752> ("So you are technically right just as I was about Burton. Even so Blair was a Democrat when he became a slaveowner and returned to the Democratic Party after the war.").

rebroadcast it.²¹² Always the educator, Kruse took this episode as a “good lesson why actual historians don’t speak in . . . absolutes, because when you do . . . you’re liable to wind up looking like an utter moron.”²¹³ Political correctness be damned.

These exchanges represent the difference between intellectualism, properly practiced, and ideology. On the one hand, we have someone who has devoted his life since dropping out of graduate school to fabricating accusations against the notion of “expertise” to service his ideological predispositions.²¹⁴ New information that is inculpatory to his position is either ignored or explained away using another round of unsupported assertions.²¹⁵ There is no search for new questions because he already has all his answers. On the other hand, we have a group of professional historians with a comprehensive understanding of the relevant secondary literature who rebut his claims using state of the art historical methodologies.²¹⁶ The difference in approaches could not be more apparent, which begs the question: Why do critics insist on condemning universities for lacking intellectual diversity when what these critics really mean is that universities lack ideological diversity or balance? This article will explore that question in the following subsection.

B. *The Rhetorical Power of ‘Intellectual Diversity’*

The use of the term “intellectual diversity”—as opposed to “ideological balance” or any other term—is part of a rhetorical strategy to win the argument before it has even started; it is one that is so successful in part because it remains so well hidden, perhaps even to those using the term. Whether or not these individuals recognize it, the reason is that words have significant political power. According to communications scholars, words establish “frames,” which then direct and constrain policy

²¹² See Throckmorton, *supra* note 207 (explaining that D’Souza “still hasn’t taken down the original tweet” and “insists on promoting a false picture of historiography surrounding party realignment”).

²¹³ Kevin M. Kruse, (@KevinMKruse), TWITTER (June 6, 2019, 11:44 AM), <https://twitter.com/KevinMKruse/status/1136660260167520257>.

²¹⁴ See Louis Menand, *The PH.D. Problem*, HARV. MAG., Nov.–Dec. 2000, at 30, <https://harvardmagazine.com/sites/default/files/pdf/2009/11-pdfs/1109-27.pdf> (“[I]t is not a coincidence that many of the most prominent critics of academia were themselves graduate-school dropouts,” including Dinesh D’Souza).

²¹⁵ See *supra* notes 209–211 and accompanying text.

²¹⁶ See Kruse, *supra* note 210 (tweeting that historians rebutted D’Souza’s claims with nine different examples).

debates.²¹⁷ The choice of one word or set of words over another “communicate[s] what is at stake in a societal debate and why the issue matters.”²¹⁸ In the case of “intellectual diversity” as a framing device, no academic or university administrator is going to say they are against “intellectual diversity” or against the “free exchange of ideas.” None will say ideas with intellectual merit should be silenced merely because some might find them offensive, or that students should not be encouraged to think for themselves. In the wake of South Dakota’s passage of its “Free Speech and Intellectual Diversity” bill in 2019, Joan Wink, a university regent, rightly observed that “‘intellectual diversity’ was code speak for something else.”²¹⁹

The use of rhetoric has long been part of the conservative strategy in confronting what they see as a liberal bias in higher education.²²⁰ As Stanley Fish observed in 2004, conservatives had already won the public relations battle as it comes to higher education in large part “by mastering the ancient art of rhetoric and spinning a vocabulary that, once established in the public mind, performed the work of argument all by itself.”²²¹ Fish was referring primarily to the right’s use of the term “political correctness,” but he also noted the start of the same process as to the term “intellectual diversity.”²²² Largely in response to David Horowitz’s “Academic Bill of Rights,” Fish accused conservatives of once again “taking a phrase that seems positively benign and even progressive (in a fuzzy-left way) and employing it as the Trojan horse of a dark design.”²²³ Indeed, as Fish noted, Horowitz was not even trying to keep his strategy

²¹⁷ Matthew C. Nisbet & Dietram A. Scheufele, *What’s Next for Science Communication? Promising Directions and Lingerin*g Distractions, 96 AM. J. BOTANY 1767, 1770 (2009).

²¹⁸ *Id.*; see also Zhongdang Pan & Gerald M. Kosicki, *Framing Analysis: An Approach to News Discourse*, 10 POL. COMMUN 55 (1993) (examining the active role media plays in framing issues of public policy, thereby constraining the range of political alternatives available to the public); William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, 95 AM. J. OF SOCIOLOGY 1 (1989) (examining the role of media framing in shaping public opinion on nuclear energy); Christopher Claassen et al., *Ideological Labels in America*, 37 POL. BEHAV. 235 (2015) (examining how media framing of political labels influences how Americans self-identify their ideological leanings and policy preferences, namely in “liberal” being framed negatively, and “conservative” being framed positively).

²¹⁹ Stripling, *supra* note 140.

²²⁰ See *Exploring Free Speech on College Campuses: Hearing Before the Senate Comm. on Health, Educ., Labor & Pensions*, 115th Cong. 4 (2017) (opening statement of Sen. Alexander) (employing conservative rhetoric to argue that the “one-sidedness” toward the left at universities “is a problem in [our] country”).

²²¹ Fish, *supra* note 26.

²²² *Id.*

²²³ *Id.*

a secret.²²⁴ In 2003, Horowitz openly advocated that conservative students “use the language that the left has deployed so effectively on behalf of its own agendas” by arguing that “professors have created a ‘hostile learning’ environment for conservative students,” that “[t]here is a lack of ‘intellectual diversity’ on college faculties and in academic classrooms,” and that “[t]he conservative viewpoint is ‘under-represented’ in the curriculum.”²²⁵ He also urged students to emphasize that “[t]he university should be an ‘inclusive’ and intellectually ‘diverse’ community.”²²⁶ Notably, while Horowitz’s “Bill of Rights” was itself fairly innocuous, Fish predicted that conservatives would soon use the rhetorical devices Horowitz helped to establish to fuel efforts to undermine academic freedom, as has occurred in numerous states in recent years.²²⁷

The term “intellectual diversity” is such a powerful rhetorical tool because it presupposes that universities are failing in their fundamental mission of being vibrant, open atmospheres for the intellectual pursuit of truth and knowledge. It presupposes that what universities are doing is attempting “*to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.*”²²⁸ It allows for anti-intellectuals to denigrate academics as hypocrites who merely preach about their open embrace of diversity while practicing something else entirely.²²⁹

One can observe a similar dynamic in the debate over climate change. Since climate change became a politically salient issue in the 1980s, news organizations have tended to present the scientific consensus on climate change (and its anthropogenic causes) as being countered by

²²⁴ *Id.*

²²⁵ Fish, *supra* note 26.

²²⁶ *Id.*

²²⁷ *See id.* (Horowitz’s hope “is that colleges and universities will reform themselves . . . offer[ing] the ‘Academic Bill of Rights’ (which is the product of consultation with academics of various persuasions) as a convenient base-line template to which they might refer for guidance.”); *see also* Orzeck, *supra* note 27 at 1450 (“despite the . . . [Academic Bill of Rights] innocuous appearance, it represents a threat to academic freedom insofar as it helps to make a case for the relocation of decision-making powers over substantive intellectual and pedagogical matters away from disciplines and the faculty persons therein.”).

²²⁸ *Report of the Committee on Freedom of Expression*, *supra* note 89 (emphasis added).

²²⁹ The same is true of the label “political correctness.” As legal scholar Kate Bartlett observed in 1991 in response to D’Souza’s *Illiberal Education*, that label “represents an effort by PC critics to seize the moral high ground of the First Amendment” and to “claim that those protesting the continuation of racism and sexism on college campuses are moral ideologues, intolerant censors, Vietnam-protestors-turned-fascists.” Society of American Law Teachers, *President’s Column*, 1991 SALT EQUALIZER, no. 3, Sept. 1991, at 1 (quoting SALT Board member Kate Bartlett’s article published in The Wall Street Journal).

an equally legitimate denial of that scientific consensus, one they have typically labeled as “climate skepticism.”²³⁰ Giving a platform to science deniers would be bad enough in terms of communicating the truth of the science, but, as scientists have recognized, what is worse is labeling the deniers as *climate skeptics*.²³¹ In 2014, a group of concerned scientists urged journalists and media personalities to stop using the term skeptic to refer to opponents of the scientific consensus, explaining that:

[S]kepticism promotes scientific inquiry, critical investigation, and the use of reason in examining controversial and extraordinary claims. It is foundational to the scientific method. Denial, on the other hand, is the *a priori* rejection of ideas without objective consideration As scientific skeptics, we are well aware of political efforts to undermine climate science by those who deny reality but do not engage in scientific research or consider evidence that their deeply held opinions are wrong. The most appropriate word to describe the behavior of those individuals is “denial.” Not all individuals who call themselves climate change skeptics are deniers. But virtually all deniers have falsely branded themselves as skeptics. By perpetuating this misnomer, journalists have granted undeserved credibility to those who reject science and scientific inquiry.²³²

Labeling “deniers” as “skeptics” accomplishes two things, each of which bolsters the legitimacy of deniers in relation to actual scientists. It presents deniers as scientists, while portraying scientists as not living up to the fundamental axiom of the scientific enterprise: namely an impartial, skeptical search for the truth.

As with the debate over intellectual diversity, the use of “climate skeptic” frames the climate issue in a way that allows critics to make statements with which everyone agrees and pretend that the expert “establishment” disagrees. Thus, climate scientists—whose job is to be skeptical—are uncritical ideologues and academics and university administrators, who are supposed to be open to ideas and criticisms, shield themselves and their students from controversial ideas. As Kevin Gannon, a history professor, quipped in response to the letter from the dean of students at the University of Chicago:

Students ought to be challenged, even made uncomfortable, in order to learn in deep and meaningful ways. And, *of course*, collegiate education is where students must encounter perspectives different from their own. No one who genuinely believes in higher education is going to dispute any of that. And that’s

²³⁰ For a discussion of this phenomenon, see Kammer, *supra* note 199, at 273–75.

²³¹ *Id.*

²³² *Id.* at 275; Mark Boslough et al., *Deniers Are Not Skeptics*, CTR. FOR INQUIRY (Dec. 5, 2014), <http://www.csicop.org/news/show/deniersarenotskeptics>.

what this dean and the anti-trigger-warnings, no-safe-spaces crowd are counting on — that the surface veneer of reasonableness in these admonitions to the class of 2020 will obscure the rotten pedagogy and logical fallacies that infest this entire screed.²³³

Henry Reichman echoed Gannon's analysis when he wrote that “[n]o one doubts that higher education should be about developing independence of mind.”²³⁴ It is just that universities must also ensure such “independent critical thinking . . . be informed by knowledge and expertise.”²³⁵

If what we are actually talking about is ideological diversity or balance rather than intellectual diversity, the question becomes whether faculties and administrators should strive for ideological balance and, if so, how that balance might be best achieved. This article will address those questions in the following Section.

IV. THE PROBLEM WITH SEEKING IDEOLOGICAL DIVERSITY ON COLLEGE CAMPUSES

As this article demonstrated in Section II, advocates for greater representation of “conservative” ideas and ideological positions on college campuses often point to colleges as institutions that are supposed to embody the free “marketplaces of ideas” of our country's First Amendment jurisprudence. This Section explores some of the fundamental problems in pursuing ideological balance on college campuses, including interfering with the very “marketplace” these critics purport to desire. It then examines the fallacy at the heart of these calls for such a balance to be mandated by political representatives and officials. Ultimately, this Section concludes that none of the empirical claims which purportedly justify such intrusions into the academy can withstand serious scrutiny. These empirical claims include claims that faculties and administrators discriminate against conservative scholars in the hiring and retention processes, that schools discriminate against conservative students based on their conservatism, that universities design their curricula to indoctrinate students and the public to support a liberal

²³³ Kevin Gannon, *UChicago's Anti-Safe Spaces Letter Isn't About Academic Freedom. It's About Power.*, VOX (Aug. 26, 2016, 11:00 AM), <https://www.vox.com/2016/8/26/12657684/chicago-safe-spaces-trigger-warnings-letter>.

²³⁴ REICHMAN, *supra* note 20, at 168.

²³⁵ *Id.*

agenda, or that universities are hostile to the free expression of conservative, intellectual ideas.²³⁶

A. *Misguidedness of Pursuing Ideological Diversity*

The entire goal of ideological balance is itself misplaced and contrary to the mission of the university, regardless of whether the university mandates it from within or not. The first problem is conceptual: at the outset, making a university or discipline ideologically balanced means sharing an understanding as to what the ideological center is over which the ideologies of faculty are to be balanced. Such a shared understanding does not exist. The problem is not just in locating the center within some structure, but in identifying the structure—the apparatus on which this center is located—in the first place.

While critics of political imbalance among faculties often focus on the issue as one of “conservatives” versus “liberals”—or the “right” versus the “left”—whereby balance is presumably achieved by having equal numbers from each category, this approach ignores the true diversity of ideologies and the impossibility of placing all of them into two objective categories to be weighed against each other.²³⁷ The definitions of what constitutes a “conservative” or “liberal” position or person are historically constructed, constantly changing (sometimes slowly, other times abruptly), and always contested.²³⁸ As an example,

²³⁶ See Schmidt, *supra* note 47 (discussing discrimination in the hiring and retention of conservative faculty); Iliana Redstone, *We're Failing Our Students, and It Hurts Us All*, NAT. REV. (Feb. 12, 2019, 6:30 AM), <https://www.nationalreview.com/2019/02/colleges-universities-left-wing-bubbles-failing-students/> (discussing how universities are failing to encourage conservative students and discussion); Jonathan Alger & Mark Piper, *Administration, Faculty, and the Hard Free-Speech Questions*, AAUP: AM. ASS'N U. PROFESSORS, <https://www.aaup.org/article/administration-faculty-and-hard-free-speech-questions#.Xw4KDWhKjIU> (last visited Feb. 11, 2021) (discussing how universities are grappling with conservative ideas and freedom of speech in an educational setting).

²³⁷ See *Exploring Free Speech on College Campuses: Hearing Before the Senate Comm. on Health, Educ., Labor & Pensions*, 115th Cong. 4 (2017) (statement of Sen. Warren) (“I think we all agree that free speech is not some kind of left versus right issue.”).

²³⁸ See Pamela Johnston Conover & Stanley Feldman, *The Origins and Meaning of Liberal/Conservative Self-Identifications*, 25 AM. J. POL. SCI. 617, 620 (1981) (“With respect to the social attitudes composing political belief systems, . . . ‘liberal is not the opposite of conservative’; rather than representing endpoints on the same continuum, liberalism and conservatism constitute relatively distinct attitude systems based on different critical referents.”). Political Scientists Conover and Feldman observed that “a critical by-product” of the “multidimensionality” of political ideological labels was that “the salience of specific beliefs is likely to vary among people, thus creating different frames of reference from which they interpret the meaning of ideological labels.” *Id.* As a result of this, they reason, “the ways in

consider the fact that a proposal for universal healthcare based on an individual mandate, an employer mandate, requirements to cover preexisting conditions, and extensive public subsidies for the poor to afford insurance went from being a conservative, free-market approach to universal healthcare, initially proposed by the conservative Heritage Foundation, to “socialized medicine” in just a few years.²³⁹ For an even more recent example of these political labels being contested, consider all of the notable conservative thinkers who disavowed President Trump as the antithesis of conservatism, while many others supported him as the embodiment of conservatism—some quite enthusiastically.²⁴⁰ People even misidentify their own ideological perspectives, at least if one takes the prevailing views of what it means to be a “liberal” or a “conservative.” One recent study found that thirty percent of self-identified

which self-defined liberals and conservatives understand those labels may differ in important respects.” *Id.*

²³⁹ See Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn it Later*, N.Y. TIMES, (Feb. 14, 2012), <https://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html> (discussing the conflict between conservatives’ criticisms of President Obama’s individual mandate given the concept’s conservative roots). *C.f.* Jonathan H. Adler, *Was the Individual Mandate a “Republican Idea”?*, VOLOKH CONSPIRACY (Mar. 29, 2010, 1:37 PM), <http://volokh.com/2010/03/29/was-the-individual-mandate-a-republican-idea/> (noting that while “many conservatives and Republicans championed an individual mandate . . . others on the Right have always been opposed”). Regardless of whether features of the Affordable Care Act were conservative ideas, that it was a matter of debate at all shows how ideologies, and how they are categorized, are socially constructed and contested.

²⁴⁰ For examples of notable conservatives opposing Trump or otherwise seeking to distance themselves (as well as conservatism itself) from Trump and his supporters, *see*, for example, The Editors, *Against Trump*, NAT’L REV. (Jan. 22, 2016 3:00 AM), <https://www.nationalreview.com/2016/01/donald-trump-conservative-movement-menace/> (arguing Trump was not worthy of conservative support, calling him a “philosophically unmoored political opportunist who would trash the broad conservative ideological consensus within the GOP in favor of a free-floating populism with strong-man overtones”); Peter Wehner, *The Battle for the Soul of Conservatism*, REALCLEAR POL. (Feb. 26, 2017), https://www.realclearpolitics.com/articles/2017/02/26/the_battle_for_the_soul_of_conservatism.html. (“One of the concerns those of us who are conservative had about the right rallying around Donald Trump is that he would have a degrading effect on conservatism itself. It hasn’t taken much time for those concerns to be realized.”); George F. Will, *Trump Must be Removed. So Must His Congressional Enablers*, WASH. POST (June 1, 2020, 3:18 PM), https://www.washingtonpost.com/opinions/no-one-should-want-four-more-years-of-this-taste-of-ashes/2020/06/01/1a80ecf4-a425-11ea-bb20-ebf0921f3bbd_story.html (calling Trump a “weak person’s idea of a strong person,” a “chest-pounding advertisement of his own gnawing insecurities,” a “low-rent Lear,” a “malignant buffoon,” as well as a “vulgarian,” and suggesting Republicans in the Senate were “Vichyite collaborat[ors]”).

“conservatives” actually held “liberal” positions, while almost five percent of self-identified “liberals” held “conservative” ones.²⁴¹

Moreover, if the distinction means for the “liberal” versus “conservative” approach to incorporate the totality of human ideologies, then each category must be stretched to include a wide assortment of individual ideologies, some of which might contradict others. If the model conflates liberalism with socialism, for instance, then it also potentially treats free-market, liberal capitalists the same as Marxists. Further demonstrating this approach's arbitrariness, the distinction often groups free-market, liberal capitalist “conservatives” on the “right” along with an illiberal wing of social conservatives and ethno-nationalists.²⁴² One could easily imagine a contrary categorization scheme whereby a community is ideologically balanced with equal numbers of illiberals, neo-liberals, social democrats, and socialists. One could also imagine a scheme whereby anti-racists are to be balanced with racists, nationalists with globalists (or localists, for that matter), legalists with anarchists, and humanists with biocentrists. Is this what people want when they talk about ideological balance? Probably not. Regardless, whether one emphasizes one system of categorization over another is entirely subjective.

Additionally, some ideologies cannot be neatly plotted along the traditional left-right, liberal-conservative axis. There are ideologies that span the entirety of the political spectrum, including statism and libertarianism. As for libertarianism, in his talk at Harvard on the lack of intellectual diversity in the legal academy, Rosenkranz combined into one category those who are “openly conservative, or libertarian, or Republican or, in any sense, to the right of the American center.”²⁴³ His implicit premise that libertarianism, honestly defined, is a conservative or Republican ideology rather than one that cuts a swath across the spectrum

²⁴¹ Claassen et al., *supra* note 218, at 264. This study shows that, “[o]n balance, . . . Americans espouse operationally liberal views, supporting a robust federal government, but at the same time more Americans consider themselves conservative than consider themselves liberal.” *Id.* at 254–55; *see also* CHRISTOPHER ELLIS & JAMES A. STIMSON, *IDEOLOGY IN AMERICA* 91 (2012) (e-book) (finding similar mismatches between “symbolic” and “operational” ideologies); Conover & Feldman, *supra* note 238, at 619 (explaining a poll which showed that only half the electorate could properly identify the conservative and liberal positions on major political issues of the day, as well as to other studies showing the difficulty of self-identified ideologues in distinguishing liberal positions from conservative ones).

²⁴² *See* Nick Burns, *The New Intellectuals of the American Right*, *NEW STATESMEN* (Apr. 7, 2020), <https://www.newstatesman.com/world/north-america/2020/04/new-intellectuals-american-right> (American “conservatives” today use a variety of terms to characterize their political ideology, including: “national conservative, integralist, traditionalist, post-liberal, . . . [or even] a Marxist.”).

²⁴³ Rosenkranz, *supra* note 25, at 137.

commonly used to describe—and constrain—political discourse highlights the fallacy of using the single-dimensional left-to-right spectrum to describe the variety of ideological perspectives that hold currency in the United States and elsewhere. There is indeed a prominent strand of left-libertarianism or libertarian socialism in the United States and elsewhere.²⁴⁴

All of this demonstrates an inherent subjectivity and arbitrariness in describing ideological structures and in determining the political center. Accordingly, for universities to enact policies aimed at ensuring that their academic communities remain firmly balanced atop that center, they would need to establish a Committee on Ensuring Ideological Balance to define how all the different ideologies are to be measured to guarantee that one identifying as “conservative” is a “*true* conservative,” and to determine what constitutes a balance, lest it be left to each department or college (some of which are ostensibly ideologically imbalanced as it is) to determine. Of course, for that committee not to be unduly influenced by the ideological predispositions of its members, that committee would itself need to be ideologically balanced. That would require the formation of a second committee—one called, let us say, the Committee on Ensuring the Committee on Ensuring Ideological Balance is Balanced. Moreover, ensuring that the committee is balanced would require a third committee. And on and on and on, ad infinitum. As much as academia loves

²⁴⁴ For discussions of left-libertarian ideologies or political parties, *see*, for example, Herbert P. Kitschelt, *Left-Libertarian Parties: Explaining Innovation in Competitive Party Systems*, 40 *WORLD POL.* 194, 194–95 (1988) (examining the emergence of left-libertarian parties in several states as representing a phenomenon of “electoral constituencies that cut across the established cleavage structures”); Kent Redding & Jocelyn S. Viterna, *Political Demands, Political Opportunities: Explaining the Differential Success of Left-Libertarian Parties*, 78 *SOC. F.* 491, 492 (1999) (analyzing the reasons left-libertarian parties enjoyed successes in some states but not others); Diana Virginia Todea, *Libertarianism and Immigration*, 2 *LIBERTARIAN PAPERS* 1, 3–5 (2010) (distinguishing between right-libertarianism and left-libertarianism as it comes to immigration); Tate Fegley, *Kevin Carson and the Freed Market: Is His Left-Libertarian Vision Plausible*, 8 *LIBERTARIAN PAPERS* 273, 273 (2016) (assessing the political viability of what the author called “[t]he ‘FREE MARKET ANTICAPITALIST’ strand of left-libertarianism”). It is difficult to imagine Rosenkranz was ignorant of the existence of left-libertarians. The use of Republicans as proxies for conservatives (or the “right”) and Democrats as liberals (or the “left”) is perhaps even more problematic given that the parties embrace different ideological positions at different times on the basis of securing a winning coalition of voters; their fundamental purpose is not to represent an ideology but rather to win elections and to maintain a governing coalition. On the history of political parties in the United States and their respective ideological platforms, *see generally* JOHN GERRING, *PARTY IDEOLOGIES IN AMERICA, 1828-1996* (1998) (tracing the transformations in the professed ideological commitments of America’s dominant political parties).

committees, even the most bureaucratically minded administrator would deem this unworkable.

Beyond that fundamental issue, it is not all that important for universities to be ideologically balanced. Those claiming that universities are failing to provide for a variety of ideological or political perspectives argue that universities are failing in what they presume to be the fundamental mission of universities: to function as “marketplaces of ideas.”²⁴⁵ Since critics use this term to mean that people should give all ideas equal respect—that is, equal access to the megaphone of the modern university—they fail to recognize that the university is not meant to be such a marketplace. The academic community premises the entire university system on the idea of experts within their respective disciplines considering a range of ideas and, through the process of peer review, identifying those ideas which are worthy of further study and refinement and those ideas which are unworthy of further attention. This is still very much a “marketplace.” It is just that the market participants are not the general public, but are instead a select group of experts whose education, experience, and abilities qualify them as members of a particular discipline. Inasmuch as universities are “marketplaces,” they are neither open nor free.

Intrinsic to the university is the valuing of certain ideas over others. This is indeed a necessary component of the search for the truth that the university represents. According to political scientist Keith Whittington, “[m]odern academic disciplines make progress by systematically screening out ideas and arguments that cannot survive careful scrutiny. In this way they insist not on homogeneity but on expertise.”²⁴⁶ In the introduction to his edited volume regarding current challenges to understanding (and, in turn, potentially defending) academic freedom, Louis Menand emphasized exactly this point, writing that “[w]hen we talk about the freedom of the academic to dictate the terms of his or her work, we are also and unavoidably talking about the freedom to exclude, or to limit the exposure of, work that is not deemed to meet academic standards.”²⁴⁷ In other words, “in being free to regulate itself, the profession is free to reject what does not *intellectually* suit it.”²⁴⁸ Ronald Dworkin put it more bluntly when he wrote that “[u]niversities do well

²⁴⁵ See, e.g., Redstone, *supra* note 236.

²⁴⁶ REICHMAN, *supra* note 20, at 41.

²⁴⁷ Louis Menand, *The Limits of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 3, 9 (Louis Menand ed. 1996).

²⁴⁸ *Id.* (emphasis added).

not to hire scholars . . . who are committed to ideas their colleagues think patently wrong, or trivial, or of no *intellectual* importance.”²⁴⁹ It is the intellectual value of an idea that is important, not the political ideology or ideologies the university may potentially use the idea to serve.²⁵⁰ Academia is, by its very nature, *exclusive*.

The scholarly goal of seeking the truth is undermined by devoting scarce resources to the exploration of ideas that the members of a particular discipline, applying their academically rigorous methodologies, have deemed unworthy. Meanwhile, the educational goal of helping students understand certain truths, as well as the methodologies employed in producing them, can be undermined by teaching ideas that have already lost out in the “marketplace” of a particular discipline as if they were equal to those ideas which have “won”—however tentatively. This is the core of the idea of academic freedom. Robert Post explained that “[d]isciplines are grounded on the premise that some ideas are better than others,” that “disciplinary communities claim the prerogative to discriminate between competent and incompetent work,” and that “disciplines do not create expert knowledge through a marketplace of ideas in which content discrimination is prohibited and in which all ideas are deemed equal.”²⁵¹

It is important to contrast academic freedom, which is fundamental to the functioning of the university, with free speech. As Jonathan Alger and Mark Piper have explained:

Of course, academic freedom and free speech are related but not identical. Academic freedom is a principle that reflects both rights and responsibilities

²⁴⁹ Ronald Dworkin, *We Need a New Interpretation of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 181, 186 (Louis Menand ed. 1996) (emphasis added). Further, Greg Lukianoff described academia as a “ruthless and tough system in which ideas that once gave us great comfort can be quickly relegated to the dustbin of history,” its goal being not to protect one’s “feelings or . . . ego,” but rather to “discern[] what is true and wise.” REICHMAN, *supra* note 20, at 47.

²⁵⁰ Notably, inasmuch as universities have emphasized inclusion of marginalized groups, it is not an exception to this general rule of testing ideas solely by their intellectual merit. As Michael S. Roth summarized the findings of a recent Harvard University task force report, *Pursuing Excellence on a Foundation of Inclusion*, fostering an exclusive environment “begins with the notion that heterodox viewpoints will be protected to the extent that they will be carefully, respectfully, considered.” ROTH, *supra* note 30, at 40–41. It does not mean, however, that “all ideas will be found to have equal merit—only that they will have an equal opportunity to be studied.” *Id.* at 41.

²⁵¹ Robert Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, Yale L. Sch., Public Law Research Paper No. 619, 18, 19 (Sept. 28, 2017), <https://ssrn.com/abstract=3044434> or <http://dx.doi.org/10.2139/ssrn.3044434>; see also Stephen C. Veltri, *Free Speech in Free Universities*, 19 OHIO N.U. L. REV. 783, 798 (1993) (“Education begins with the realization that some ideas are better than others.”).

inherent in the educational mission of colleges and universities, the standards of academic disciplines, and the search for truth. Free speech, as protected by the First Amendment to the Constitution, is an individual right to be free from government constraint on expression of thoughts, ideas, and opinions in society more generally—subject to certain limitations that protect and preserve the rights of others and the society as a whole.²⁵²

Historian Joan W. Scott put it much more succinctly: “Free speech makes no distinction about quality; academic freedom does.”²⁵³

Academic freedom promotes the free operation of a mechanism whose very function is to amplify certain voices—those deemed worthy—at the expense of all others. As Thomas Haskell demonstrated, if our consideration of what ideas we give priority or even allowed within certain contexts on college campuses were based entirely on notions of free speech, one would have a difficult time justifying the exclusion of ‘creation science’ from the curriculum and the inclusion of Darwin’s theory of evolution instead.²⁵⁴ “After all,” Haskell explained,

[W]hen biblical literalists say that evolution is “only a theory,” they are not wrong. Like all scientific theories, Darwin’s is contestable and will one day be superseded. Why give it a privileged place in the curriculum? The only persuasive answer lies in the authority that inheres in a well-established disciplinary community. Darwin’s theory deserves a privileged place because it, unlike “creation science,” enjoys the support of a strong consensus of competent biological investigators, who have organized themselves in such a way as to foster mutual criticism and drive out truth claims that cannot take the heat.²⁵⁵

Using the same example, Scott demonstrated the fallacy of using public opinion to shape which ideas are researched at universities or taught in their classrooms, reasoning that giving creationism equal time to the science of evolution in the biology curriculum based only on half the students who believe in creationism would indicate that “both sides carry

²⁵² Alger & Piper, *supra* note 236.

²⁵³ Joan W. Scott, *On Free Speech and Academic Freedom*, 8 AAUP J. ACAD. FREEDOM 1, 6 (2017), https://www.aaup.org/sites/default/files/Scott_0.pdf. This is not to suggest that academic freedom and free speech are unrelated. Indeed, as Scott argued, “[a]cademic freedom—the right of teachers to teach as they choose, without outside interference—is . . . the key to the exercise of free speech. Free speech not as the expression of the unruly id but as the voice given to reasoned argument. That voice can be angry, insistent, condemnatory; there is no contradiction between reason and outrage.” *Id.* at 8.

²⁵⁴ Haskell, *supra* note 20, at 55.

²⁵⁵ *Id.* This is not to say that academic freedom and freedom of expression do not overlap in substantial ways, or even that the First Amendment has no role in protecting academic freedom. See *Keyishian v. Bd. of Regents of U. of State of N. Y.*, 385 U.S. 589, 603 (1967) (holding academic freedom to be a First Amendment concern).

equal weight in the training of future scientists[.]”²⁵⁶ That, of course, is untrue. Accordingly, professors are not being ideological when they refuse to accept biblical accounts as scientific evidence.²⁵⁷ As Reichman similarly reasoned, “[a]strology, creationism, and Holocaust denial . . . are protected in the open market but not in the classroom.”²⁵⁸

Some might criticize this conception as elitist. They would be right that it is elitist in the sense that it emphasizes expertise and bestows a higher status on those who possess it. Academia premises the university system itself on this sort of hierarchy—namely, the notion that certain methodologies for ascertaining the truth require great ability and extensive training. According to the AAUP,

Expert knowledge is not produced in a “marketplace of ideas” in which all opinions are equally valid. The dialogue that produces expert knowledge occurs among those who are qualified by virtue of their training, education, and disciplinary practice. To know why vaping presents a harm to public health, we need to know the difference between a type I and type II error in statistics; to know whether Caliban is Shakespeare’s comment on colonization in the Americas, we need to know both the facts of Elizabethan expansion and the history of Elizabethan theater; to begin to understand conflicts in the Middle East, we need to know about the collapse of the Ottoman Empire. The debate is open and fierce, but mere opinion has no place at the table.²⁵⁹

Indeed, one historian’s conception of academic freedom is that it is the “the capstone of the institutional edifice that Victorian reformers constructed in hopes of establishing authority and cultivating reliable knowledge.”²⁶⁰

Now, as it comes to the composition of faculty within a department, university, or discipline, there is an argument that a lack of ideological diversity within an intellectual community can lead to a narrow-mindedness as it comes to the pursuit of the truth—that it can diminish

²⁵⁶ Scott, *supra* note 253, at 6.

²⁵⁷ See Haskell, *supra* note 20, at 55.

²⁵⁸ REICHMAN, *supra* note 20, at 209.

²⁵⁹ *In Defense of Knowledge and Higher Education*, *supra* note 120, at 3.

²⁶⁰ Haskell, *supra* note 20, at 53. Joan W. Scott similarly wrote that

[t]he Academy’s mandate, like the principle of academic freedom is, to be sure, full of so-called elitist implications—intellectuals in general, and the faculty in particular, are corporate, self-regulating (disciplined) bodies whose training to produce new knowledge guarantees a certain autonomy and a share in the governance of the university and the regard of the nation. This is not elitism but expertise, the production of knowledge informed by disciplined research, science in the public interest.

Scott, *supra* note 253, at 7.

the intellectualism of academic practitioners. Although Rosenkranz misidentified the problem as one of intellectual diversity rather than ideological diversity, he argued at Harvard's symposium on intellectual diversity that the liberalness of his colleagues at Georgetown had prevented them from adequately scrutinizing their understandings of the law.²⁶¹ As support, he cited two examples where the law faculty overwhelmingly supported a legal position ultimately rejected by the Supreme Court.²⁶² In the first case, he cited his colleagues at Georgetown who had endorsed the position that it was unconstitutional for the federal government to withhold funds to universities that restrict military recruiters' access to their campuses.²⁶³ In the other, he cited the hostile reaction within "the elite academy" to one of his colleague's arguments against the constitutionality of the Affordable Care Act's individual mandate based on the Commerce Clause.²⁶⁴

What Rosenkranz failed to recognize, however, is that people—including legal scholars and instructors—can mean different things when they purport to say *what the law is*. In one instance, one might be presenting their view of *what the law is* in light of all of the relevant precedent and policy rationales through their unique subjective lens. In another instance, one might be saying *what the law is* in the Holmesian sense of predicting what courts—including the Supreme Court—will say and do once the issue confronts them. By way of example, if I were to argue that the Constitution generally prohibits states from banning abortions prior to viability, I could not be said to have been wrong in the event the Supreme Court were to overturn over forty years of precedent in allowing such a ban on abortions to stand, so long as I was describing the law in the first sense rather than as a mere prediction of future Supreme Court jurisprudence.²⁶⁵

As a third example of an alleged liberal myopia among law faculties, Rosenkranz cited to what he considered to be a grave historical mistake that was allowed to persist for a generation.²⁶⁶ The alleged mistake was the contention that an early draft of the "necessary and proper" clause included specific reference to the implementation of

²⁶¹ Rosenkranz, *supra* note 25, at 138–39, 142.

²⁶² *Id.* at 138–40.

²⁶³ *Id.* at 138–39.

²⁶⁴ *Id.* at 140.

²⁶⁵ I also would not be logically inconsistent if I said the Constitution generally protects a woman's right to an abortion prior to viability while also explicitly recognizing that the Supreme Court may, in the very near future, restrict or even eliminate said right.

²⁶⁶ Rosenkranz, *supra* note 25, at 140, 141.

treaties.²⁶⁷ To Rosenkranz, this mistake was allowed to stand for as long as it did because it was consistent with the liberal view of the extent of the federal government's powers.²⁶⁸ Even assuming Rosenkranz is correct in his history of the preliminary drafts of the "necessary and proper" clause, his explanation for the failure of the legal and historical communities to correct Henkin's mistake is dubious at best. Jean Galbraith contends there was a general lack of scholarly attention to the question not because Henkin's research seemingly supported the liberal argument, whatever that is, but because "scholars with as widely different views on the scope of the treaty power as Curtis Bradley and David Golove have agreed that *Missouri v. Holland*'s holding as to Congress's treaty-implementing power is its least controversial aspect."²⁶⁹

Rosenkranz apparently ignored the reality of academia. Far from being unchallenged, for ideas to be accepted, they must first go through a rigorous process. While disciplines can represent a monopoly in the sense that certain ideas gain an advantage and enjoy communal support within an academic community, historian Thomas L. Haskell has reminded us that "this sort of monopoly comes about by intensifying competition between producers (in this case, of ideas), not by sheltering them from it,

²⁶⁷ *Id.* at 141.

²⁶⁸ *Id.*

²⁶⁹ Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 71 (2014) (internal quotation marks omitted). For additional Supreme Court case law on this topic, see, for example, *United States v. Lara*, 541 U.S. 193, 201 (2004) (recognizing that the treaty power "authorize[d] Congress to deal with matters with which otherwise Congress could not deal") (internal quotation marks omitted); *Neely v. Henkel*, 180 U.S. 109, 121 (1901) (holding that "[t]he power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power"); *Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (holding it beyond doubt that Congress had the "power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty [with China]"). *Cf.*, *Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842)

(Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfil [sic.] all the obligations of treaties.)

as in the classic case of economic monopoly.”²⁷⁰ “The price of participation in the community of the competent”—which is what academia represents—“is perpetual exposure to criticism.”²⁷¹ According to Haskell, the competition within the academic community is indeed more intense, the criticisms “more severe than [what] would be thought acceptable in ordinary human communities.”²⁷²

While having an ideologically diverse faculty can arguably be a good thing, everything else being equal,²⁷³ a fundamental problem with university departments hiring faculty based on a desire to enhance ideological balance is that this would inherently involve injecting politics into the hiring process. It would innately make it so that everything else is *not* otherwise equal. For example, if a law school faculty or administration observed that its faculty had more liberal members than conservative, and it decided in response to increase the number of conservative faculty members, that would seemingly require it to give candidates with conservative political ideologies preferential treatment as compared to their liberal counterparts. It would require the very sort of political discrimination many conservative commentators accuse law schools of engaging in as is. It could also pigeon-hole scholars as being “conservative” or “liberal,” thereby pressuring them to continue to represent, in both their scholarship and teaching, whatever ideology the department hired them for, lest the department be accused of once again falling out of ideological balance. For instance, is a university truly at balance where all of its conservatives are not ideologically driven, while many of its liberals are? This whole thing runs counter to the intellectual mission at the heart of the university system.

²⁷⁰ Haskell, *supra* note 20, at 47 (emphasis omitted).

²⁷¹ *Id.* (emphasis omitted).

²⁷² *Id.* As a historian, this author can say anyone who alleges that scholars are subdued into complacency because scholars avoid confronting one another for their alleged mistakes has never attended a history conference. Or, as the historian Seth Cotlar quipped, they likely have never been to a faculty meeting either. Seth Cotlar (@SethCotlar), TWITTER (July 7, 2020, 12:18 AM), <https://twitter.com/SethCotlar/status/1280355441839452160> (“Anyone who thinks college professors are in some kind of mind meld with each other where they all agree and indoctrinate their students with that unified message...has clearly never been in a faculty meeting.”).

²⁷³ Some research indicates that political diversity within at least some disciplines can lead to better scholarship. See Chris C. Martin, *How Ideology Has Hindered Sociological Insight*, 47 AM. SOCIOLOGIST 115, 116–17, 126–27 (2016) (arguing that political diversity is important in the field of sociology); see also José L. Duarte et al., *Political Diversity Will Improve Social Psychological Science*, 38 BEHAV. & BRAIN SCI. 1, 1 (2015) (recommending increased political diversity in social psychology).

It would also substitute the sound judgment of the academic community as to which truth claims are worthy of being further studied and taught—and who is qualified within each discipline or field—for the (relatively uninformed) opinions of the public. Whereas one purpose of the university system is to push the boundaries of knowledge, this would, as Menand warned, result in universities merely preserving “a static knowledge” that may be “in the service of some vested interest.”²⁷⁴ This would contradict a fundamental purpose of the university as an “intellectual experiment station” free from the “equally dangerous tyrannies of public opinion and political autocracy,” as the AAUP declared in its 1915 report.²⁷⁵

Inasmuch as professors allow their political ideology to impair the intellectual quality of their scholarship or their teaching, attempting to balance one professor’s failings by replacing that professor with another who will fail equally from the opposite end of the ideological spectrum does not even remotely solve the problem.²⁷⁶ As Menand reasoned, in the rare case where a professor “deliberately misreads a text, or suppresses what he or she knows to be valid evidence, in order to compel a ‘correct’ political reading,” the problem is not that the professor holds certain political ideologies, but that the professor was dishonest and unprofessional.²⁷⁷ Suppose a professor excludes from course coverage certain topics or ideas based not on their lack of intellectual merit or pedagogical value, but purely for ideological reasons; in that case, the solution is not to have another section of the course that will exclude a different set of topics or ideas also for purely ideological reasons. Instead, the solution is for departments to ensure faculty act professionally.²⁷⁸ Nor is the solution for professors to attempt to be apolitical. It is quite simply impossible for a scholar or instructor to be apolitical, for the very

²⁷⁴ Menand, *supra* note 247, at 13.

²⁷⁵ Haskell, *supra* note 20, at 57.

²⁷⁶ This is not to suggest the existence of an objective one-dimensional ideological spectrum, such as that indicated by the labels “left” and “right.” Political scientists now understand there to be at least two dimensions, typically divided between the economic and the cultural or social. See Conover & Feldman, *supra* note 238, at 618.

²⁷⁷ Menand, *supra* note 247, at 16.

²⁷⁸ See *id.* (“[V]ery few professors conduct their classes in anything resembling a spirit of indoctrination, for the simple reason that indoctrination isn’t just bad pedagogy; it’s bad advocacy.”). According to Cass R. Sunstein, “[a] teacher who refuses to teach the subject, fails to allow counterarguments, treats students contemptuously, or vilifies them in class, can be penalized without” any abridgement of their academic freedoms. Cass R. Sunstein, *Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems*, in *THE FUTURE OF ACADEMIC FREEDOM* 93, 106 (Louis Menand ed. 1996).

acts of producing scholarship and teaching are inherently political in nature. This is because ideology incorporates certain truth-claims, only some of which may coincide with the best knowledge of the relevant disciplines. Because any material being researched or taught potentially conflicts with (or supports) a given ideological belief, researching and teaching are both inescapably political. One cannot teach science without confronting ideological beliefs founded on denying or distorting scientific truths. One cannot teach history without confronting ideological beliefs founded on mythology.²⁷⁹ Beyond that, if one accepts that knowledge is power and that politics, at its core, is an allocation of power within a system, then any act which produces or distributes knowledge is a political one. That is true regardless of the subject being researched or taught.²⁸⁰

Avoiding issues or topics because of their political salience would undermine the reasons professors exist in the first place: to profess their

²⁷⁹ A recent and compelling example is the reaction to the New York Times Magazine's *The 1619 Project*, whose aim was to "reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative." Jake Silverstein, *Why We Published The 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html>. The start of the project, on the 400th anniversary of the beginning of African chattel slavery in what would become the United States, provoked an intense backlash; some of this backlash came in the form of legitimate criticisms, including from respected professional historians. See Letter to the Editor, *We Respond to the Historians Who Critiqued The 1619 Project*, N.Y. TIMES MAG., <https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html> (last updated Jan. 19, 2021). Some of it, however, came in the form of politicians and others trying to delegitimize the entire project and attempting to have it blocked from being used in school curricula. See, e.g., S.4292, 116th Cong., 2d Sess. (2020) (This bill, titled the "Saving American History Act of 2020," is a bill aimed "[t]o prohibit Federal funds from being made available to teach the 1619 Project curriculum in elementary schools and secondary schools, and for other purposes."). The bill was referred to the Committee on Health, Education, Labor, and Pensions (seeking to prohibit federal funds being used to teach the 1619 Project in K-12 curricula). *Id.*; see also David Randall, *Kick the '1619 Project' Out of Schools*, CTR. FOR AM. GREATNESS (Aug. 7, 2020), <https://amgreatness.com/2020/08/07/kick-the-1619-project-out-of-schools/> (arguing in the aptly named "Great America" online journal for the 1619 Project's removal from school curricula). While these critics cite to the historical critiques as evidence of The 1619 Project being "nothing more than a shabby, fact-free polemic," to use Randall's words, *id.*, they fail to recognize that this is precisely the purpose of projects like *The 1619 Project* and all good history: to provoke a discussion about the meanings we attach to the past. There may be one national myth, but there is never one history. History itself is a conversation, one they have demonstrated no interest in joining.

²⁸⁰ Even Stanley Fish, who has famously advocated for professors to avoid being political in the sense of trying to change the world, recognizes the inherently political nature of academic research and teaching. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 12–13 (2008); Stanley Fish, *Why We Built the Ivory Tower*, N.Y. TIMES (May 21, 2004), <https://www.nytimes.com/2004/05/21/opinion/why-we-built-the-ivory-tower.html>. Fish drew a hard line between "interpret[ing]" the world and "chang[ing]" it, between "academic work" and "partisan advocacy." *Id.*

knowledge. It is the province and duty of academics “to find and tell and teach the truth as they see it,” as Ronald Dworkin put it.²⁸¹ Menand has reminded us that “[i]t is because professors have views about their subjects that they have been hired to teach them.”²⁸² The duty to speak the truth does not lessen just because there are potential ramifications to what is taught. If one considers that one of the utilitarian rationales for public education is to produce good citizens capable of self-governance, then the duty of professors to speak the truth is heightened where there are political stakes.²⁸³

As misguided as it would be for a university or department to voluntarily cede their autonomy in making decisions regarding hiring, funding, or curricula to the dangerous “tyranny of public opinion,”²⁸⁴ to use the AAUP’s words from its 1915 declaration, it would be even worse for the government to require that they do so. As discussed in Section II, some legislators have proposed exactly this.²⁸⁵ Whatever their motivation, for politicians to assert a role in determining which scholars are hired, the manner subjects are studied, or how students are educated—including the use of guest speakers—is to undermine the bedrock of the modern university system; namely, the concept of academic freedom. Two fundamental aspects of academic freedom, after all, are the self-governance of academic institutions and the self-regulation of the disciplines, both of which these sorts of governmental actions undermine. One could justify such actions only where necessary to combat systemic discrimination against conservative students, conservative scholars, or

²⁸¹ Dworkin, *supra* note 249, at 190.

²⁸² Menand, *supra* note 247, at 16.

²⁸³ See *In Defense of Knowledge and Higher Education*, *supra* note 120. The AAUP recently began its “Defense of Knowledge and Higher Education” with reference to Francis Bacon’s quote that “[k]nowledge is power,” and by arguing the importance of knowledge, such as that cultivated and spread in universities, to a nation’s self-governance. “Without knowledge,” it wrote, “no nation can govern its economy, manage its environment, sustain its public health, produce goods or services, understand its own history, or enable its citizens to understand the circumstances in which they live.” *Id.* This is an old justification for the development of a robust system of public education at all levels in the United States. 79. *A Bill for the More General Diffusion of Knowledge, 18 June 1779*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> (last visited Feb. 15, 2021). In 1779, for instance, Thomas Jefferson argued for the creation of an educational system based on his belief that “the most effectual means of preventing [tyranny] . . . would be to illuminate, as far as practicable, the minds of the people at large.” *Id.* See generally FISH, *supra* note 283, 7 (arguing that administrators and professors should cease trying to justify the university system based on social ends beyond the intrinsic value of intellectualism itself).

²⁸⁴ *AAUP’s 1915 Declaration of Principles*, AM. ASS’N U. PROFESSORS, http://www.aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf (last visited Feb. 15, 2021).

²⁸⁵ See discussion *supra* Section II.

conservative ideas. Perhaps this is why many critics assume such discrimination to be taking place. An examination of the veracity of such claims is the subject of the following subsection.

B. Lack of Support for Claims of Discrimination or Systematic Silencing of Conservative Ideas

Critics of the liberalness of universities repeat several truth-claims about universities. This subsection scrutinizes some of the most common claims, and ultimately finds them to lack empirical support. Universities are not discriminating against conservative scholars. Professors are not discriminating against or trying to convert conservative students. “Safe spaces” and “trigger warnings” are not indicative of coddling students, protecting them from ideas, or suppressing free speech.

1. Universities are not discriminating against conservative scholars

If universities were currently and systematically discriminating against conservative candidates for faculty positions, and if that were indeed the cause of the ideological imbalance among faculties—as some critics insist—then improving ideological balance would be as simple as eliminating such discriminatory conduct. Studies of the political views of the professoriate reveal, however, that discrimination against conservatives is rare and accounts for a small fraction, if any, of the leftward tilt of the academy.²⁸⁶ Gross examined several of the most common hypotheses for the liberalness of the American professoriate, including: the place of the academic within the broader social class structure, the supposedly liberalizing effects of higher education professors are required to have received, differences between liberals and conservatives as they relate to the values, work, and rewards of the academic profession, other potential cognitive and personality factors distinguishing liberals and conservatives, and the alleged political bias and discrimination against conservatives in the recruiting and hiring process.²⁸⁷ Gross found that “the statistical interaction of advanced degree holding with cognitive ability accounts for just under 60% of the political

²⁸⁶ See e.g., GROSS, *supra* note 34, at 168 (“[T]he study should count as reasonably strong evidence that most social scientists and humanists in leading departments work hard to keep their political feelings and opinions from interfering with their evaluations of academic personnel.”).

²⁸⁷ *Id.* at 66.

gap between professors and others,” while any discrimination against aspiring conservative scholars had only a minimal impact.²⁸⁸ In other words, liberals who are very smart are much more likely to decide to pursue advanced degrees and become professors than conservatives.²⁸⁹

The reason for that discrepancy, Gross argued, is the reputation of the academy for being liberal.²⁹⁰ Gross concluded that the most substantial cause of the professoriate’s liberalism was that the history of the modern university’s founding in the United States “imprinted” it as a secular, liberal institution, a reputation that, “in any given year, draws in many more liberals than conservatives in a process that further reinforces its liberal reputation.”²⁹¹ Importantly, universities have such a reputation not because liberals have discriminated against conservative scholars in the past, but because the liberalism of the academy is, to a substantial degree, inherent to its mission.²⁹² According to Gross, “the liberalism of the American professoriate is not an extraneous feature of the occupation but a fundamental and more or less enduring social characteristic, one that has been built into our collective image of what professors are like.”²⁹³

²⁸⁸ *Id.* at 122. Gross found that the experiences of students in pursuing advanced degrees accounted for twenty percent of the liberalness of faculties, that differing views as to religion and the scientific method accounted for ten percent, and that the other potential causes, including discrimination against aspiring conservative scholars, had only a minimal impact. *Id.* at 80.

²⁸⁹ *Id.* at 122. Gross’ self-selection thesis is consistent with what social scientists Matthew Woessner and April Kelly-Woessner had previously discovered. In a study first published in 2007, they found conservative undergraduate students were less likely than their liberal counterparts to seek a Ph.D. and were more likely to choose majors in professional fields. Matthew Woessner & April Kelly-Woessner, *Reflections on Academic Liberalism and Conservative Criticism*, 52 *SOC.* 35, 35 (2014). Later, they responded favorably to Gross’ work, agreeing that “academia’s reputation appeals to liberals, given their somewhat distinct worldview and personal goals,” namely in placing “greater emphasis on autonomy and intellectual pursuits, as well as the ability to ‘influence social change.’” *Id.*

²⁹⁰ GROSS, *supra* note 34, at 115.

²⁹¹ *Id.* at 116; see STANLEY ROTHMAN ET AL., *THE STILL DIVIDED ACADEMY: HOW COMPETING VISIONS OF POWER, POLITICS, AND DIVERSITY COMPLICATE THE MISSION OF HIGHER EDUCATION* (2011) (ebook) (providing that only seven percent of conservative academics even report having been the victim of political discrimination of any sort.)

²⁹² See ROTHMAN ET AL., *supra* note 291 (describing that the mission of universities “is to create a place, a marketplace where you can debate and you can discuss, you can disagree, and you can even offend in the goal of exchanging ideas and the goal of advancing human knowledge and the goal of advancing our culture.”).

²⁹³ GROSS, *supra* note 34, at 185. See generally Neil Gross & Ethan Fosse, *Why are Professors Liberal?*, 41 *THEORY & SOC’Y* 127 (2012) (Gross first published his team’s findings in an article he co-authored with Ethan Fosse); Woessner & Kelly-Woessner, *supra* note 289, at 38. While sympathetic to Gross’ argument, Matthew Woessner and April Kelly-Woessner also contend that universities having made conscious choices to incorporate liberal values—

2. Professors are not discriminating against or trying to convert conservative students.

University faculty and administrators have not developed curricula or courses with the purpose of indoctrinating students to uncritically accept a “liberal” or “PC” worldview. In 1991, legal scholar Katharine Bartlett asked rhetorically in response to calls to end “political correctness” on college campuses: “Where is this ideological coercion?”²⁹⁴ As a professor at Duke University, often targeted as a bastion of PC-culture gone awry, Bartlett observed that “[t]he average female Duke student shuns the label ‘feminist,’” whereas “no shame appears to attach to association with conservative causes.”²⁹⁵ She noted that the traditional courses in western civilization that PC-critics claimed were under attack were not in fact the ones “under siege,” as she put it, but rather “courses on subjects such as Marxism, women’s studies and Afr[ican]-American literature.”²⁹⁶

Indeed, ethnic, race, and gender studies programs are often on the front lines of the culture wars and are pointed to as emblematic of the failures of the university, either as evidence of watering down the curriculum by de-emphasizing the “great books” (which just so happen to have been almost exclusively written by white men) or as proof of an intent to indoctrinate students to a liberal worldview.²⁹⁷ At the heart of Bloom’s influential *Closing of the American Mind* is the university’s increasing emphasis on multiculturalism or equality, both of which he saw as inferior to a traditional education which emphasized the Western canon.²⁹⁸ He argued that respect for other cultures would potentially lead

such as equality, racial diversity, and social justice—into their missions serves a role in perpetuating the reputation of universities as liberal. *Id.*

²⁹⁴ Katharine T. Bartlett, *Some Factual Correctness about Political Correctness*, WALL ST. J., June 6, 1991, at A19.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See Carrie Lukas, *Gender Studies’ Value is Under Question—And for Good Reason*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Jan. 30, 2019) <https://www.jamesgmartin.center/2019/01/gender-studies-value-is-under-question-and-for-good-reason/> (“Women’s and gender studies programs aren’t merely encouraging political engagement and activity, but for the advancement of social changes”); see also Elwood Watson, *The Latest Resurgence of Ethnic Studies*, HIST. NEWS NETWORK (Sept. 6, 2020) <https://historynewsnetwork.org/article/177227> (“There were those who saw this new recognition of the contribution of color as an attack on ‘classic, well-established (read Eurocentric) scholarship’ that had supposedly ‘stood the test of time.’ The much-touted idea of ‘culture wars’ reared its intense, combative, head”)

²⁹⁸ See BLOOM, *supra* note 62, at 26–27 (describing the “palpable difference” between traditional education, which “found a fundamental basis of unity and sameness” in men “by

to the Soviet reality someday becoming ours, whoever the “we” is he had in mind.²⁹⁹ Bloom specifically cited to requirements that each student pass a course in non-Western culture as embodying what he saw as, to borrow from his title, the closing of the mind.³⁰⁰ Bloom insisted that these requirements were merely part of a misguided attempt to establish a world community in contravention of what he saw (no doubt relying upon great books) as the natural order, one where “[m]en must love and be loyal to *their* families and *their* peoples in order to preserve them.”³⁰¹ Apparently, since “ethnocentrism” is natural, then it is an act of self-sabotage for Euro-Americans to attempt to understand or to respect the perspectives of other than those of their own culture.³⁰²

Bartlett rightly traced these attacks, as represented by Bloom, to a social phenomenon whereby those in power typically get to decide, often without realizing it, which ideas are to be taken for granted as “objective and neutral” and which are to be seen as radical, marginal, or political.³⁰³ Thus, Bartlett pointed out, “[s]ome PC critics dismiss as interest-group politics requests that authors such as Toni Morrison or Mary Wollestonecraft be included in the curriculum,” yet “assignments of

recognizing and accepting men’s natural rights,” whereas today’s mindset “pays no attention to natural rights or the historical origins of our regime” and “is open to all kinds of men, all kinds of life-styles, all ideologies”).

²⁹⁹ *Id.* at 33.

³⁰⁰ *Id.* at 35.

³⁰¹ *See id.* at 37 (emphasis added).

³⁰² *See, e.g.,* Betsy McCaughey, *Left-Wing Activists Trying to Hijack Kids’ Minds with ‘Ethnic Studies’*, N.Y. POST (Aug. 22, 2019, 7:49 PM), <https://nypost.com/2019/08/22/left-wing-activists-trying-to-hijack-kids-minds-with-ethnic-studies/> (“Left-wing activists are using the same divisive ideology to hijack our kids’ young minds. Across the country, leftists are demanding public schools teach ‘ethnic studies.’ Many of these courses demonize America, label whites as oppressors and indoctrinate students to become ‘social justice organizers.’”); Gilbert T. Sewall, *Radical Indoctrination: Coming to a Public School Near You*, AM. CONSERVATIVE (Aug. 12, 2019, 12:01 AM), <https://www.theamericanconservative.com/articles/radical-indoctrination-coming-to-a-public-school-near-you/> (“Reviewing panel reports, curriculum proposals, and humanities textbooks for three decades, I’ve watched multiculturalism’s ambitions rise from ‘a place at the table’ to demands for absolute content and conscience control. The prospect of a state-decreed high school graduation requirement in ethnic studies openly abandons teaching and learning in favor of political indoctrination.”).

³⁰³ *See* Bartlett, *supra* note 294

(Surplus visibility exemplifies a larger phenomenon PC critics have been unwilling to understand: the privilege of those who have power to say what needs defending and what does not. In any social organization, the views of the dominant tend to be taken for granted as objective and neutral. Challenges to these views – like those we are now hearing in the universities – appear to seek special favors for the ‘less qualified,’ or some compromising of academic standards).

writings by Nathaniel Hawthorne or T.S. Eliot draw no notice and require no defense; neither does the ‘basic’ political philosophy course that begins with Aristotle and ends with John Rawls.”³⁰⁴ There is, of course, immense irony in critics who claim to desire that a diversity of viewpoints be represented on college campuses, including in their curricula, bemoaning the emphasis on “multiculturalism,” something that is not only consistent with diversity but indeed essential to it. Kevin Gannon got it exactly right when he wryly observed that “when you’re accustomed to privilege, equality feels like oppression.”³⁰⁵

Those attacking “ethnic studies” programs often seek to obscure rather than to enlighten. They seek to deny knowledge rather than to create it. According to Anne Winkler-Morey, the “[o]mission of facts and figures is central to the spinning of the historical national mythology.”³⁰⁶ That is precisely the goal of conservatives in perpetuating these culture wars. The attacks on ethnic studies are part of a broader project, the goal of which is “to present an America that is and always has been a land of liberty and unity,” despite all the evidence of its atrocities and pervasive injustices, which are either ignored or explained away.³⁰⁷ In 2011, the state of Arizona passed a law prohibiting courses that “[p]romote resentment toward a race or class of people,” that “[a]re designed primarily for pupils of a particular ethnic group,” or that “[a]dvocate ethnic solidarity.”³⁰⁸

³⁰⁴ *Id.*

³⁰⁵ Gannon, *supra* note 233.

³⁰⁶ Anne Winkler-Morey, *The War on History: Defending Ethnic Studies*, 40 BLACK SCHOLAR 51, 52 (2010).

³⁰⁷ *See id.* at 53; *see also* Jericka Duncan et al., *Map in Widely Used U.S. History Textbook Refers to Enslaved Africans as ‘Immigrants,’ CBS News Analysis Finds*, CBS NEWS (Feb. 19, 2020, 8:00 AM), <https://www.cbsnews.com/news/the-american-pageant-map-in-widely-used-us-history-textbook-refers-to-enslaved-africans-as-immigrants-cbs-news/>. One prominent high school history textbook referred to enslaved peoples as “immigrants,” to slavers as “white planter[s],” to enslaved rape survivors as “black mistress[es],” and to the mixed-race children of white slavers and enslaved Blacks as “mulattoes,” a racial slur. *Id.* In another popular textbook, the coverage of Thomas Jefferson omitted any reference to him having enslaved roughly 600 people, though that book at least discussed the horrors enslaved people faced on the “Middle Passage” across the Atlantic Ocean. *Id.* A middle school textbook on Texas state history characterized slave labor as doing “chores,” included a picture depicting slavery as what historian Ibram X. Kendi called a “fairly pleasant scene” and problematically identified “states’ rights” as a cause of the Civil War. *Id.*; Dana Goldstein, *Two States. Eight Textbooks. Two American Stories*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/interactive/2020/01/12/us/texas-vs-california-history-textbooks.html> (comparing social studies textbooks in California and Texas to show how partisan politics impacts what students are taught).

³⁰⁸ A.R.S. § 15-112(A)(2)–(4) (2020). For discussion of this “ethnic studies ban,” *see*, for example, Lee Bebout, *Washing Education White: Arizona’s HB 2281 and the Curricular Investment in Whiteness*, in RHETORICS OF WHITENESS 153, 155 (Tammie M. Kennedy et al.,

When that law was declared unconstitutional,³⁰⁹ a legislator later proposed a similar bill with an identical aim to ban ethnic studies programs, which would have prohibited any state institution from offering any course that supposedly “promotes ‘division, resentment or social justice toward a race, gender, religion, political affiliation, social class or other class of people.’”³¹⁰ It would have also banned courses that “advocate[] solidarity . . . based upon ethnic, racial gender or social class.”³¹¹ In Arkansas, another bill would have prohibited anything written by or about Howard Zinn from being included in the school curriculum.³¹² In 2020, Senator Cotton introduced federal legislation that would prohibit school districts from using federal money to teach the 1619 Project, a project which emphasizes the experiences of black Americans, in primary or secondary schools.³¹³

Despite how they are portrayed, ethnic and women’s studies programs work to ensure that the full human experience—and not just that of Euro-American men—is represented in scholarship and on college campuses. As Ron Scapp, President of National Association for Ethnic Studies, observed, these programs are “an honest and rigorous investigation into the history of the United States” which “explore[] the history of oppression and the successful relationship of race, ethnicity, class and gender and various ways diverse people have coped and

eds., 2017) (placing the ban in the context of white Americans portraying themselves as victims while also labeling minoritized ethnic groups as radical or dangerous); Jorge F. Rodriguez, *Understanding the Politics of Knowledge and How it Unfolds in the United States: The Mexican American Studies Program, and the Ethnic Studies Ban in Tucson AZ* 9 (2019) (unpublished doctoral dissertation, Univ. of Wisc.-Madison) (critiquing the arguments in support of the ban and showing its impact upon students in the Mexican American Studies program).

³⁰⁹ *Arce v. Douglas*, 793 F.3d 968, 990 (9th Cir. 2015) (affirming district court’s holding finding A.R.S. § 15-112 unconstitutional); *González v. Douglas*, 269 F. Supp. 3d 948, 964 (D. Ariz. 2017) (“In *Arce v. Douglas*, the Ninth Circuit affirmed this Court’s ruling that A.R.S. § 15-112 is not discriminatory on its face . . . [but] would still be unconstitutional if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose.”); *see also* Scott, *supra* note 253, at 3 (noting the Arizona bill’s failure).

³¹⁰ Scott, *supra* note 253, at 3.

³¹¹ Eric Owens, *Arizona Lawmaker’s Bill Would BAN Taxpayer Funding Of Ridiculous Social Justice Classes*, DAILY CALLER (Jan. 6, 2017, 9:08 AM), <https://dailycaller.com/2017/01/06/arizona-lawmakers-bill-would-ban-taxpayer-funding-of-ridiculous-social-justice-classes/#ixzz4VBRzm8tf>.

³¹² Scott, *supra* note 253, at 3.

³¹³ S.4292, *supra* note 279 (characterizing the 1619 Project as “a distortion of American history . . . which claims that ‘nearly everything that has truly made America exceptional’ grew ‘out of slavery.’”).

survived and thrived in a nation that is still developing its identity.”³¹⁴ In other words, these programs provide an opportunity for racialized—minoritized—groups to be subjects and to write their stories and, in so doing, foster knowledge.³¹⁵ The College of Ethnic Studies at California State University at Los Angeles has the following as its mission:

We will develop leaders who engage in rigorous, self-reflexive study that motivates critical engagement, self-determination and decolonial understandings of the world. The college provides an interdisciplinary intellectual space that centers the histories, traditions, cultures, experiences, struggles and accomplishments of diasporic communities of color, making connections between the local and transnational.³¹⁶

According to Winkler-Morey, ethnic studies do not “replace one set of nationalist myths for another.”³¹⁷ Rather, they “focus on uncovering the experiences of oppressed peoples,” “recognize the agency to those left out, on the bottom,” and highlight the otherwise hidden “structures and systems that create and maintain inequality.”³¹⁸

³¹⁴ Tina A. Brown, *Advocates Say Ethnic Studies Misunderstood, Needlessly Under Fire*, DIVERSE (Apr. 14, 2013), <https://diverseeducation.com/article/52609/>; see also Alvaro Huerta, *The Right to Ethnic Studies in Higher Education*, INSIDE HIGHER ED (May 15, 2020), <https://www.insidehighered.com/advice/2020/05/15/why-students-should-be-required-take-ethnic-studies-opinion>

(As an interdisciplinary scholarly field, ethnic studies is about self-respect and self-determination. It’s about racialized groups—workers, students, scholars, organizers and others—refusing to be viewed or gazed upon from a Eurocentric paradigm as inferior or less than. It’s about rejecting the scholarly practice of being objects of studies. Instead, we demand to be the subjects in this equation. As subjects, we don’t need outsiders writing our stories, narrating our histories and planning our futures. As subjects, we, too, create knowledge!)

³¹⁵ Huerta, *supra* note 314.

³¹⁶ *College of Ethnic Studies*, CAL. ST. L.A., <http://www.calstatela.edu/ethnic-studies> (last visited Feb. 16, 2021).

³¹⁷ Winkler-Morey, *supra* note 306, at 54.

³¹⁸ *Id.* Regarding the pedagogical value of ethnic studies programs, see generally Rodriguez, *supra* note 308, at 75–124 (detailing findings derived from interviews with students in the Mexican-American Studies program in Tucson, Ariz.); Christine E. Sleeter, *The Academic and Social Value of Ethnic Studies: A Research Review*, NAT’L EDUC. ASS’N vii (2011), <http://www.nea.org/assets/docs/NBI-2010-3-value-of-ethnic-studies.pdf> (distinguishing between programs designed primarily for members of the group under study and those designed for diverse student groups including white students and finding both to serve important functions if designed properly); Erin B. Godfrey et al., *For Better or Worse? System-Justifying Beliefs in Sixth-Grade Predict Trajectories of Self-Esteem and Behavior Across Early Adolescence*, 90 CHILD DEV. 180, 180 (2019) (finding that system-justification beliefs in the sixth grade lead to lower outcomes in self-esteem, delinquency, and classroom behavior among low-income and minoritized students from sixth to eighth grades).

Importantly, there is no evidence that these programs are part of a broader project to indoctrinate students and, in fact, the effect of a university education on students appears to be the opposite. One recent study showed that the more students engaged with professors and their academic work, the more students' political beliefs are moderated, suggesting "that a critical engagement with a diverse set of ideas—a hallmark of the college experience—challenges students to re-evaluate the strength of their political convictions."³¹⁹ Similarly, another study found that nearly half of students viewed "liberals" more favorably in their second year of college than they did when they first started, and even more students viewed "conservatives" more favorably than the beginning of their college experience.³²⁰ Far less (roughly thirty percent) viewed either political ideology less favorably, leading the study's authors to conclude that, on average, college attendance is associated with gains in appreciating political viewpoints across the spectrum, not just liberals.³²¹ As for the tolerance of ethnic studies programs to a diversity of viewpoints, other research indicates that "hierarchy-attenuating" programs are "more accepting of a broad range of student perspectives."³²² Roth summarized the research as showing that the "cynical" claims of liberal indoctrination are quite simply not "based on facts."³²³ "There is," in short, "no evidence that recent graduates of colleges and universities are far more radical than those who preceded them, or that they have been indoctrinated into the political beliefs of their professors in significant numbers."³²⁴

While conservative students are slightly more likely to report self-censoring, supposedly out of fear of provoking a negative reaction from faculty or out of fear of receiving a lower grade,³²⁵ the evidence suggests

³¹⁹ KYLE DODSON, *The Effect of College on Social and Political Attitudes and Civic Participation*, in *PROFESSORS AND THEIR POLITICS* 135, 156 (Neil Gross & Solon Simmons ed. 2014).

³²⁰ Matthew J. Mayhew & Alyssa N. Rockenbach, *Does College Turn People Into Liberals?*, *CONVERSATION* (Feb. 2, 2018, 6:28 AM), <https://theconversation.com/does-college-turn-people-into-liberals-90905>.

³²¹ *Id.*

³²² Markus Kimmelmeier et al., *What's in a Grade? Academic Success and Political Orientation*, 31 *PERSONALITY & SOC. PSYCH. BULL.* 1386, 1395 (2005), https://wolfweb.unr.edu/homepage/markusk/Kimmelmeier_2005_PSPB.pdf.

³²³ ROTH, *supra* note 30, at 4.

³²⁴ *Id.*; see also Woessner & Kelly-Woessner, *supra* note 289, at 37 (noting they "found little evidence of widespread ideological indoctrination").

³²⁵ ROTHMAN ET AL., *supra* note 291, at 184–86; see also *SPEAKING FREELY: What Students Think about Expression at American Colleges*, FIRE <https://www.thefire.org/research/publications/student-surveys/student-attitudes-free-speech->

those fears are largely unjustified. In a recent study, political scientists Matthew Woessner, Amanda Thompson, and Robert Maranto surveyed students as to their political views in their first and fourth years of college and correlated students' political views with their performances in college.³²⁶ To Woessner's surprise, they found that the data did not support claims of discrimination.³²⁷ As they concluded, the "results do not paint a picture of conservative students under siege."³²⁸ Rather, conservative students "remain largely satisfied with their college education, and perform nearly as well as, if not better than, their liberal counterparts."³²⁹ Another study found that conservatives—after controlling for student ability—received higher grades than their liberal counterparts in disciplines such as economics or marketing (regarded as "hierarchy-enhancing"), while receiving identical grades to their liberal counterparts in disciplines like cultural anthropology, ethnic studies, and women's studies (regarded as "hierarchy-attenuating").³³⁰

3. 'Safe spaces' and 'trigger warnings' are not indicative of coddling students, of protecting them from ideas, or of suppressing free speech.

Much like with the use of the term "intellectual diversity," people attack "safe spaces" and "trigger warnings" using language with which most people would agree by arguing against a "strawman." Safe spaces are not areas "where individuals can retreat from ideas and perspectives at odds with their own," as John Ellison, Dean of Students at the University of Chicago, wrote in his letter to incoming students.³³¹ Trigger

survey/ (last visited Feb. 16, 2021) (finding that fifty-four percent of students stopped sharing their political beliefs since beginning college, thirty percent of students censored themselves in class for fear of expressing an opinion that might be viewed as offensive, and twenty-percent of students censored themselves outside of the classroom for fear of being politically incorrect).

³²⁶ David M. Perry, *No, Professors Aren't Discriminating Against Conservative Students*, PAC. STANDARD (Jul. 30, 2019), <https://psmag.com/ideas/no-professors-arent-discriminating-against-conservative-students>. For whatever it is worth, Woessner, who led the study, is a life-long Republican. *See id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Perry, *supra* note 326. *But see* Paul Musgrave & Mark Rom, *Fair and Balanced? Experimental Evidence on Partisan Bias in Grading*, 48 AM. POL. RES. 536, 536 (2015) (noting that scholars found "the evidence for bias is much weaker than activists claim.").

³³⁰ Kemmelmeier et al., *supra* note 322, at 1391–94; *see also* Talia Bar & Asaf Zussman, *Partisan Grading*, 4 AM. ECON. J. 30, 31 (2012) (showing that Democratic professors tend to be egalitarian in their grading, whereas Republican professors award more higher and lower grades, while also giving lower grades to black students than Democratic professors.).

³³¹ Jaschik, *supra* note 87.

warnings do not coddle students or otherwise conflict with a “commitment to academic freedom,” as Ellison also suggested.³³² Rather, they are each about ensuring that the exchange of ideas on college campuses includes the widest variety of perspectives.³³³

Safe spaces—or “counter spaces”—are designed to provide places where members of historically marginalized groups can feel welcome and, yes, safe. That’s it. They are not “[i]dea-free zones staffed by thought police, where disagreement is prohibited[,]”³³⁴ as the conservative Goldwater Institute would have us believe. Safe spaces are instead part of a broader effort of educators to foster environments to help socially marginalized students reclaim some of the cognitive resources otherwise devoted to combating racism, sexism, classism, xenophobia, homophobia, transphobia, or any other ideologies that maintain social hierarchies or perpetuate stereotypes at their expense.³³⁵ They are part of a broader program to allow socially marginalized students to attain their full potential and to contribute fully to a vibrant intellectual community.³³⁶ According to sociologist Cia Verschelden, “[i]t is completely unacceptable that we are squandering the brainpower of over half our young people because of the negative effects of racism, poverty, and social marginalization.”³³⁷

The purpose of safe spaces is not to insulate such students from intellectual arguments they may find offensive, but to give them some place where they can simply feel safe and relax in their own skin—where they can recharge so that they may contribute more fully to the intellectual life of the university and reach their full intellectual potential. Using Verschelden’s analogy, they are places “where students can recover

³³² *Id.*

³³³ *See id.* (“Having one’s assumptions challenged and experiencing the discomfort that sometimes accompanies this process are intrinsic parts of an excellent education. Only then will students develop the skills necessary to build their own futures and contribute to society.”).

³³⁴ *Restoring Free Speech on Campus*, GOLDWATER INST., <https://goldwaterinstitute.org/campus-free-speech/> (last visited Feb. 16, 2021).

³³⁵ *See* Amber Ly, *Safe Spaces Don’t Coddle Students, They Build Up Their Confidence*, YR (Aug. 11, 2017), <https://yr.media/news/safe-spaces-dont-coddle-students-they-build-up-their-confidence/> (“[A] space space . . . [is] for young people to escape bullying, homophobia, microaggressions, racism, sexism, Islamophobia, and more.”).

³³⁶ *See id.* (describing safe spaces as allowing “students from marginalized communities [to] . . . speak their minds without getting drowned out by others. It gives opportunities for students who have been through similar experiences to share their struggles and relate to one another.”).

³³⁷ CIA VERSCHELDEN, *BANDWIDTH RECOVERY: HELPING STUDENTS RECLAIM COGNITIVE RESOURCES LOST TO POVERTY, RACISM, AND SOCIAL MARGINALIZATION* xiii (2017).

bandwidth.”³³⁸ Importantly, the thing from which these spaces provide some safety is not an intellectual idea they may find uncomfortable or offensive—as critics often unthinkingly contend—but is instead the otherwise nearly constant bombardment of micro-aggressions—a class of statements that serve no intellectual value but do deprive socially marginalized students of cognitive resources they would otherwise devote to the intellectual enterprise.³³⁹ As Roth argued in his nuanced call for “safe enough spaces,” ensuring that students from marginalized groups feel welcome on campus allows them “to be open to ideas and perspectives so that the differences they encounter are educative.”³⁴⁰ Far from representing an assault on intellectual diversity, safe spaces serve to ensure a broader range of intellectual views is truly represented on campus and beyond.

The same is true for trigger warnings or “content advisories.” The College of Literature, Science, and the Arts at the University of Michigan explains that the debate over trigger warnings “stems primarily from a misunderstanding regarding what content warnings are, how their use can make a classroom more inclusive for students with mental health disabilities, and how they do or don’t impact instructor liability.”³⁴¹ Trigger warnings are not about insulating students from controversial or challenging ideas. They are not even about “helping people with anxiety disorders avoid the things they fear,” as Greg Lukianoff and Jonathan Haidt wrote in their wildly popular 2015 article in *The Atlantic*, *The Coddling of the American Mind*.³⁴² Rather, trigger warnings are quite simply an attempt to warn students of specific types of content known to cause physiological and psychological symptoms for people suffering from anxiety disorders including, most notably, Post-traumatic Stress Disorder.³⁴³ Far from censoring or censuring educators or otherwise

³³⁸ *Id.* at 96; *see also* ROTH, *supra* note 30, at 101 (explaining that safe spaces are “zones where you can ‘entertain new beliefs and experiment with new behavior without fear of reprisal,’” the “reprisal” in this instance “not mean[ing] counterargument” but rather physical intimidation or assault).

³³⁹ *See* VERSCHULDEN, *supra* note 337, at 33–34 (describing micro-aggressions as “modern racism”).

³⁴⁰ ROTH, *supra* note 30, at xi.

³⁴¹ *An Introduction to Content Warnings and Trigger Warnings*, U. MICH. <https://sites.lsa.umich.edu/inclusive-teaching/2017/12/12/an-introduction-to-content-warnings-and-trigger-warnings/> (last visited Feb. 16, 2021).

³⁴² 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/>.

³⁴³ *See* Francesca Laguardia et al., *Trigger Warnings: From Panic to Data*, 66 J. LEGAL EDUC. 882, 886 (2017) (noting that the term “trigger warning” is “connect[ed] to artillery

encouraging them to avoid challenging material or ideas, these advisories or warnings help engage students “by giving them the ability to take charge of their own health and learning.”³⁴⁴

When, for example, a student who has been sexually assaulted is presented with a graphic depiction of sexual violence, that student “might shut down, disassociate, panic, become angry, or otherwise disengage from the class as they put all their attention into managing the emotional and physical symptoms the triggering material brings up for them.”³⁴⁵ If that same student, in contrast, is forewarned of the material, “they might prepare for it by meditating, seeing their therapist, or simply give themselves more time to work through the material so they can process it under controlled conditions.”³⁴⁶

Maybe, instead, that student “might still need to disengage and skip the pages that include the depiction or step out of class for a few minutes when the material is being discussed, because their mental health and safety are more important than their engagement with the material.”³⁴⁷ As Kevin Gannon, a professor of history, explained:

If I'm teaching historical material that describes war crimes like mass rape, shouldn't I disclose to my students what awaits them in these texts? If I have a student suffering from trauma due to a prior sexual assault, isn't a timely caution the empathetic and humane thing for me to do? And what does it cost? A student may choose an alternate text I provide, but this material isn't savagely ripped out of my course to satiate the PC police . . . Do I tell my student that, even though she was the victim of a brutal assault in her past, she must read testimony of gang-rape survivors in my course in order to uphold the sacred values of free intellectual inquiry?³⁴⁸

Both safe spaces and trigger warnings are criticized, and even mocked, based on fundamental misunderstandings of what they are and the functions they serve.

The fact that people misrepresent safe spaces and trigger warnings as showing an intolerance to the expression of controversial ideas does not

remind[ing] us that this understanding of trauma springs historically from an attempt to describe the emotional and psychological experiences of soldiers returning from combat.”)

³⁴⁴ *An Introduction to Content Warnings and Trigger Warnings*, *supra* note 344.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Gannon, *supra* note 233; *see also* ROTH, *supra* note 30, at 26. Roth similarly asked, “what if a faculty member wanted to give students a heads-up that they would be reading a racist text or a book about rape so as to help them understand why it was part of the work of the class?” *Id.*

mean there are not serious issues universities and faculty must resolve when it comes to freedom of expression on campus. The critical issue here is not whether colleges or universities should respect the rights of their students, faculty, or guest speakers under the First Amendment to the United States Constitution. Colleges and universities have no choice in that regard; they must comply with the requirements the First Amendment—as the Supreme Court has interpreted it—imposes on them.³⁴⁹ The real question is the degree to which universities should promote the underlying spirit of the First Amendment beyond its strict legal mandates given that universities have other important values they must serve, including producing knowledge and ensuring student safety.

Nobody is seriously suggesting that universities should make the freedom of speech on college campuses absolute. To suggest that would mean faculty and students alike are free to say whatever they want, wherever they want, whenever they want, and as loudly as they want. To do so would arguably protect protesters at a campus event in disrupting a speech through shouting as much as it protects the professor or speaker, since the student—or “heckler”—is, in a technical sense, merely adding speech to the supposed “marketplace.”³⁵⁰ Indeed, courts have generally allowed—and, in cases involving threats of violence, even compelled—states to remove protesters who are interfering with a speaking event, the rationale being that their protests—though an expression of ideas—disserve the fundamental purpose of the First Amendment to promote democratic discourse by increasing the viewpoints to which the public is exposed.³⁵¹ Of course, speech is rightly limited on campuses in many

³⁴⁹ See *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 602, 606, 609 (1967) (finding two laws to be inconsistent with the First Amendment because they sought to bar employment based on association which did not threaten “New York’s interest in protecting its education system from subversion”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1968) (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *Healy v. James*, 408 U.S. 169, 192 (1972) (“[T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not.”).

³⁵⁰ See Howard Gillman & Erwin Chemerinsky, *Does Disruption Violate Free Speech?*, CHRON. HIGHER EDUC. (Oct. 17, 2017), <https://www.chronicle.com/article/does-disruption-violate-free-speech/>. As President of the University of Oregon Michael H. Schill reasoned, “Free speech is the right of individuals and communities to express themselves without repression from the state. The students are not the state nor the repressors. Taking to the stage and using this platform was an act of free speech — not a violation of it.” *Id.*

³⁵¹ See Cheryl A. Leanza, *Heckler’s Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007) (“[The] Heckler’s veto cases . . . [assess] the appropriate behavior of local law enforcement when a crowd or individual threatens hostile

contexts, including in the classroom itself, in part for the same reason.³⁵² Even the influential Chicago Statement acknowledged that “[t]he freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish.”³⁵³ It recognized that universities “may restrict expression . . . that constitutes a genuine threat or harassment . . . or that is otherwise directly incompatible with the functioning of the [u]niversity.”³⁵⁴ While this statement is uncontroversial, it is also superficial and unhelpful.

The devil is in the details, as they say. The difficulty here comes in drawing the line between “harassment”—which is not legally protected and disserves both the purposes of the First Amendment and the fundamental mission of universities³⁵⁵—and mere “hate speech,” which is protected speech regardless of its impact on the learning environment.³⁵⁶ The difficulty is in ensuring that all members of the community, including those in marginalized or minoritized groups, feel welcome and safe enough to share their perspectives and to contribute to the democratic discourse the First Amendment is meant to promote, while still protecting

action in response to a demonstration or speaker.”). There is some suggestion that states are required by the First Amendment to intervene and remove protesters who are disrupting a speech. *Id.* The caselaw, however, all of which is from lower courts, is limited to cases where there is a threat of violence. *Id.* at 1307. In those cases, courts have held that the state, if its purported concern is safety, must first use its resources to protect the speaker from the audience rather than stopping or preemptively canceling the speech itself. *Id.* at 1311.

³⁵² See Patrick Schmidt, *Heckler’s Veto*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto> (“[T]he core concern with the heckler’s veto is that allowing the suppression of speech because of the discontent of the opponents provides the perverse incentive for opponents to threaten violence rather than to meet the ideas with more speech. Thus the Supreme Court has tended to protect the rights of speakers against such opposition in these cases, effectively finding hecklers’ vetoes inconsistent with the First Amendment.”)

³⁵³ *Report of the Committee on Freedom of Expression*, *supra* note 89.

³⁵⁴ *Id.*

³⁵⁵ See *Davis, as Next Friend of LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)

(a private damages action may lie against the school board in cases of student-on-student harassment . . . only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities . . . [and only where the] harassment . . . is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit).

³⁵⁶ See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391 (1992) (“Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.”).

the rights of students who may—either intentionally or inadvertently—deprive them of that security.³⁵⁷

Notably, groups like the Goldwater Institute, whose model legislation has inspired “Campus Free Speech” legislation in several states, are not interested in participating in this discussion. They are seemingly not even interested in free speech as a principle. The Goldwater Institute’s model legislation itself contains provisions which either directly limit the ability of certain speakers to express legitimate and legally-protected viewpoints or will potentially have the effect of “chilling” meaningful debate on campuses.³⁵⁸ Specifically, the model bill requires universities to punish those who interfere with the free speech of another person, to suspend for at least one year or even expel “[a]ny student who has twice been found responsible for infringing the expressive rights of others,” and to strive “to remain neutral . . . on the public policy controversies of the day.”³⁵⁹

Experts in higher education and at least one conservative advocacy group have pointed to the potential chilling effect of the model bill, especially its disciplinary measures.³⁶⁰ The AAUP, for instance, explained that:

³⁵⁷ See AM. ASS’N U. PROFESSORS, *Campus Free-Speech Legislation: History, Progress, and Problems* 10 (2018), <https://www.aaup.org/report/campus-free-speech-legislation-history-progress-and-problems>. As the AAUP recently argued,

[m]any of the most difficult issues surrounding free speech at present are about balancing unobstructed dialogue with the need to make all constituencies on campus feel included. This can, at times, be a tricky undertaking. But punitive and simplistic measures advocated by proponents of many campus free-speech bills make finding an adequate solution more difficult, not less.

Id.

³⁵⁸ See PEN AM., CHASM IN THE CLASSROOM: CAMPUS FREE SPEECH IN A DIVIDED AMERICA 8 (Apr. 2, 2019), <https://pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf> (explaining that “calls to protect vulnerable students from objectionable speech . . . risk the chilling of free speech and academic freedom”).

³⁵⁹ GOLDWATER INSTITUTE, *supra* note 334.

³⁶⁰ See AM. ASS’N U. PROFESSORS, *supra* note 357 (characterizing the Goldwater model bill as “a punitive approach” that “risks having a chilling effect on campus free speech”); Neil H. Hutchins, *Campus Free Speech Laws Being Enacted in Many States, But Some May Do More Harm Than Good*, CITY CLUB CLEVELAND (May 16, 2019), <https://www.cityclub.org/blog/2019/05/16/campus-free-speech-laws-being-enacted-in-many-states-but-some-may-do-more-harm-than-good> (expressing concerns that the proposals raised in the Goldwater Institute’s model bill “may cause discrimination against students, be unworkable and put a chilling effect on student free speech.”); *Keeping Universities Safe for Free Speech*, CHARLES KOCH FOUND. (May 2, 2017, 6:21 PM), <https://www.charleskochfoundation.org/story/keeping-universities-safe-for-free-speech/> (“Though measures like the Goldwater Institute’s model policy may attempt to protect campus free speech, fear of punishment can have the opposite effect of chilling speech.”).

The danger of such policies is that they interfere with individual institutions' disciplinary policies and allow the threat of disciplinary action to hover over events in which frank exchanges of opinion are likely to occur. This punitive approach risks having a chilling effect on campus free speech—or could have the opposite effect of heating up already tense situations.³⁶¹

Professor Neil H. Hutchins agreed: “I also am concerned that some legislative proposals may cause discrimination against students, be unworkable and put a chilling effect on student free speech.”³⁶² While the conservative Charles Koch Foundation's motives were different, it reached the same result regarding the Goldwater Institute's model legislation.³⁶³

It seems the Goldwater Institute's intent is not really to promote the robust free expression of controversial ideas on college campuses. The AAUP observed that the measures in the model legislation seem “tailored specifically to respond to the kinds of incidents that have affected conservative speakers” and that “[t]he legislation rarely addresses other constraints on campus free speech, such as the recording of professors in classrooms or professor watch lists.”³⁶⁴ To the AAUP, these measures and their omissions “suggest that its primary goal is not to enhance campus free speech but to protect conservative voices.”³⁶⁵ One of the co-authors of the Goldwater Institute's report on free speech and its accompanying model legislation seemingly confirmed the AAUP's assessment when he argued for curricula that emphasize “multiculturalism” in American history to be replaced with one that shows the importance of assimilation.³⁶⁶ This is, of course, an issue that extends beyond the Goldwater Institute. In one case of stunning hypocrisy, one Republican operative suggested protestors of conservative speakers be shot, just as

³⁶¹ AM. ASS'N U. PROFESSORS, *supra* note 357, at 10.

³⁶² Hutchins, *supra* note 360 (noting that states with these legislative provisions include Arizona and North Carolina, while the Wisconsin Board of Regents requires that students who disrupt speakers three times be expelled.); *see also* Morgan Watkins, *Kentucky Legislature Passes College Free Speech Bill Opposed by ACLU*, COURIER J. (Mar. 14, 2019, 9:30 AM), <https://www.courier-journal.com/story/news/politics/ky-legislature/2019/03/14/kentucky-lawmakers-consider-college-free-speech-protections/3154292002/> (writing that the ACLU of Kentucky opposed a similar measure in Kentucky for this reason.)

³⁶³ *See* CHARLES KOCH FOUND., *supra* note 360. In our current political moment, any requirement for universities to remain neutral on the public policy controversies of the day would prohibit universities from posting signs encouraging people to wear face coverings or maintain social distancing during a pandemic, or from advising students to get a flu vaccination.

³⁶⁴ AM. ASS'N U. PROFESSORS, *supra* note 357, at 10.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 2.

students protesting the Vietnam War were at Kent State University.³⁶⁷ In South Dakota, the same governor who signed that state's campus free speech law also signed into law a measure greatly curtailing the rights of citizens to protest the construction of pipelines.³⁶⁸

What legal scholar Bartlett wrote of critics of "PC" culture three decades ago remains true today: "[Professors] are not trying to stifle debate," but rather "trying to begin one—a difficult one that challenges perspectives that are taken for granted in the university and in society."³⁶⁹ She continued, "[i]f our critics were true to the free-speech principles they profess, they would be engaging in that debate" instead of relying upon "personal denunciation and caricature."³⁷⁰ The fact that she wrote those words three decades ago shows that the entire premise of organizations like the Goldwater Institute and Foundation for Individual Rights in Education are fallacious. The sky is not, in fact, falling. Or, as the AAUP recently reported, "[e]ven if the current political environment poses significant problems for free speech, the view that the free exchange of ideas no longer occurs on campuses is grossly exaggerated."³⁷¹ Inasmuch as the current political climate endangers the truly free exchange of ideas, including on college campuses, the approaches of Turning Point or the Goldwater Institute are not helping universities find solutions and are, indeed, counterproductive.

V. CONCLUSION

Conservatives and other critics have never been able to support their charge that universities are dominated by left-wing academics who use their power to impose their political agendas on their students, their colleagues, and the public. This begs the question as to why attacks on higher education *always* seem to find an audience. Part of the answer is simply because knowledge is power, and thus questions of *what* constitutes knowledge, *how* it gets produced, *who* gets to produce it, and *who* gets to receive it will always be contested. This is why the accusations

³⁶⁷ Scott, *supra* note 253, at 3.

³⁶⁸ See Lacy Louwagie, *SD Passes Law to Crack Down on Pipeline Protests*, COURTHOUSE NEWS SERV. (Mar. 14, 2017), <https://www.courthousenews.com/s-d-passes-law-crack-protests/> ("[T]he governor's office said passage of this law is an important step toward reducing potential disruption from protests when the Keystone XL pipeline begins in the state.").

³⁶⁹ Bartlett, *supra* note 294.

³⁷⁰ *Id.*

³⁷¹ AM. ASS'N U. PROFESSORS, *supra* note 357, at 10.

against Socrates in Athens several centuries ago continue to reverberate today. The modern university—including its emphasis on academic freedom—was premised on a recognition of the tendency of political actors to hinder the production of knowledge and, hence, on the need to insulate the academy, as much as possible, from political intrusions.

Still, with knowledge itself being power (and, thus, political), the university was never a perfect solution, as we have seen. As much as scholars might like to see knowledge itself as the end goal of the academic enterprise, the potential utilitarian value of particular bits of knowledge undoubtedly influences what questions get asked and, once asked, which questions get answered first, if at all. While this is undoubtedly true, there is a unique danger that arises where the political influence on the scholarly production of knowledge takes the form of undermining intellectualism or expertise itself. For instance, while it is true that the potential practical uses of nuclear energy, including in war, drove research into certain physical phenomena relating to the atom through the middle decades of the twentieth century, that is a different thing from saying that the science produced was itself invalid or that any random person knows as much about the workings of the atomic nucleus than the scientists who worked on the Manhattan Project. The fruitfulness of any research agenda, regardless of its political or financial backing, can ultimately be tested through the scientific processes of peer review and falsification. That notably can only be done by people with the proper expertise.

In the same way, one can rightly say that universities and other scholarly organizations devote the money and resources they do to understanding infectious diseases because of the practical importance of such understandings to public health. The social values of preferring people be healthy rather than sick—live long lives rather than die— influences the amount of resources that are devoted to studying infectious diseases. But that is different from saying the science produced is inherently invalid. The science can be tested, as with nuclear energy, through the scientific method. As with nuclear energy, that requires expertise.

Thus, it is fitting that I am now finishing this article in the midst of a deadly pandemic that is currently ravaging my country—the United States—much more harshly than other similarly situated countries. The political and social response in the United States has been hindered at every step by an anti-intellectual, anti-expertise denial of the reality of the pandemic, one led by the White House itself. From the start of the crisis, the Trump administration, Republican politicians, and conservative media

personalities have dismissed the reality of the epidemic, they have denied its seriousness, and they have sought to undermine the insights and advice of epidemiologists, including the common sense precaution of wearing face coverings and maintaining distance from others who might be infected.³⁷² Notably, these efforts to undermine science included a prominent law professor, Richard A. Epstein, who in March challenged the validity of epidemiological models and projected, using his alternate model, a death toll of approximately five-hundred in the United States.³⁷³ His predictions, despite him lacking any expertise in epidemiology, reportedly influenced decision makers in the White House.³⁷⁴ The efforts to deny the science regarding the Coronavirus have been so effective in part because they exploit a foundation of distrust of intellectuals and experts that conservatives have cultivated over decades. Their claims regarding the supposedly “leftist” academy may not reflect reality, but their attacks have consequences that are all too real. We are seeing them now.

³⁷² See Tamara Keith, *Timeline: What Trump Has Said And Done About the Coronavirus*, NPR (Apr. 21, 2020, 5:00 AM), <https://www.npr.org/2020/04/21/837348551/timeline-what-trump-has-said-and-done-about-the-coronavirus> (comparing Trump’s comments and actions with those of his administration); Paul Krugman, *America’s Rejection of Science and Responsibility is Killing Us*, MERCURY NEWS (June 23, 2020, 11:40 AM), <https://www.mercurynews.com/2020/06/23/krugman-a-plague-of-willful-> (“[N]ot wearing a face mask . . . has become a political symbol: Trump has suggested that some people wear masks only to signal disapproval of him . . .”); Michael D. Shear & Maggie Haberman, *New Numbers Showing Coronavirus Spread Intrude on a White House in Denial*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/trump-coronavirus.html?auth=login-email&login=emai> (recognizing the growing impossibility that it had become “to fully ignore the fact that the pandemic the White House ha[d] for weeks insisted was winding down ha[d] done just the opposite”); Jonathan Chait, *American Death Cult: Why Has the Republican Response to the Pandemic Been so Mind-Bogglingly Disastrous*, N.Y. MAG. (Jul. 20, 2020), <https://nymag.com/intelligencer/2020/07/republican-response-coronavirus.html> (“The distrust and open dismissal of expertise and authority may seem uniquely contemporary – a phenomenon of the Trump era . . .”).

³⁷³ See Richard A. Epstein, *Coronavirus Perspective*, HOOVER INST. (March 16, 2020), <https://www.hoover.org/research/coronavirus-pandemic>.

³⁷⁴ See Isaac Chotiner, *The Contrarian Coronavirus Theory That Informed the Trump Administration*, NEW YORKER (March 30, 2020), <https://www.newyorker.com/news/q-and-a/the-contrarian-coronavirus-theory-that-informed-the-trump-administration> (acknowledging that Trump began to question the serious threat posed by the Coronavirus after Epstein’s article was circulated amongst Trump and his administration).