CAMPUS SPEAKERS AND COUNTERSPEECH: A FIRST AMENDMENT RATIONALE FOR CONTINUED STUDENT PROTESTS

Charles F. Walker*

* Retired partner, Skadden, Arps, Slate, Meagher & Flom LLP. Mr. Walker served as the co-chair of Skadden's global Pro Bono Committee until 2022. Previously, he was co-chair of the firm's Litigation Group in the Washington, DC office. The views expressed in this Article are Mr. Walker's and do not necessarily reflect the views of the firm or any of its partners. Thanks to Raina H. Fishbane, Esq. and Emma R. Walker (NYU School of Law, Class of '24) for the helpful feedback, support, comments, and edits. Thanks also to the editors of the *Virginia Journal of Social Policy & the Law* for editorial assistance, especially Abigail R. Hauer and Marie K. Ceske.

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Student protests against outside speakers involving heckling and shouting continue to be condemned by university administrators and commentators who claim that hecklers have no First Amendment right to shout down speakers. The March 2023 protest at Stanford Law School — which, unlike most private universities, is bound by First Amendment principles under state law — prompted not just the usual round of op-eds and administrative condemnation, but was followed by, among other responses, a ten-page letter from the Stanford Law School Dean to the "SLS Community" addressing issues raised by the protest and thereafter an ABA committee proposal (now adopted) for revisions to law school accreditation standards that address student protests and disruptions. These responses, much like those in the late 2010s to similar protests, uniformly tout free speech principles and the importance of allowing the invited speaker to be heard, with little attention to the underlying concerns of the student protestors. Part I of this Article argues that these responses are misplaced and that student counterspeech, including heckling, is speech protected under the First Amendment even if it results in shouting down the speaker. Proposed limits on that counterspeech in the form of university policies or state legislation requiring "civic discourse" and prohibiting the "disruption" of university events constitute unlawful viewpoint-discrimination insofar as they limit or prohibit protestor counterspeech. Even if such restrictions were deemed viewpoint-neutral time, place, or manner restrictions, the nature of a university speaker event is such that in most cases there will be no adequate alternative venue which would permit limitation on counterspeech in that forum. Of course, civility is a virtue, and none of this is to say that heckling or shouting down speakers should become routine. The First Amendment, however, does not provide a basis for condemning such counterspeech. Part II of this Article seeks to provide context for how and why protestor counterspeech, including heckling, can be understood as a reasonable and defensible strategy. This context includes the growth of right-wing extremism and hate speech in the United States over the past decades, and the changing college demographics in that same time frame. The Article concludes that in light of the constitutionally defensible nature of these protests, rather than trying to tell students how they should protest, more attention should be paid to the protestors' messages concerning hate speech and the social and political issues being confronted through such speech today.

INTRODUCTION

Campus protests of outside speakers are once again under scrutiny.[1] As was the case in the late 2010s, these protests have been followed in many cases by administrative, academic, and media pushback decrying student protestors for "heckling" and shouting down speakers. That pushback invariably cites the First Amendment and free speech principles, and calls for universities to stop the protesters, stand strong against the "heckler's veto," and remain neutral on speech issues. At the same time, protestors are often criticized as "coddled" or "snowflakes," trying to stop speech rather than engage in dialogue and debate the speaker's views.[2] The commentary in many cases discounts the protestors' depth of understanding of the First Amendment while failing to address — other than in passing — the underlying substantive issues, namely, the hate speech and other invidious rhetoric targeted by the protestors, including appeals to white supremacy, antisemitism, and long-discredited racial and gender

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[1] University speaker protests were a focus of media and academic commentary through the 2016-2019 time period. Those protests and related commentary ebbed with the pandemic in 2020. *See generally* Kristine L. Bowman & Katherine Gelber, *Responding to Hate Speech: Counterspeech and the University*, 28 VA. J. SOC. POL'Y & THE LAW 248, 261 (2021) (citing surveys). With the return of students to campuses post-pandemic, the protests and commentary have similarly rebounded, with law schools being the new focus for these conflicts. *See, e.g.*, Erwin Chemerinsky & Howard Gillman, *Free speech Doesn't Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-to-shut-down-campus-debate/ (discussing protests at the University of Hastings College of Law and Yale Law School in March 2022); section I.A. below (discussing protest at Stanford Law School in March 2023). As a result, among other things, revisions to law school accreditation standards addressing student protests and speaker disruptions have been adopted by the American Bar Association, *see* Section I.B.3. below, and a group of college presidents have issued a "Campus Call for Free Expression" to "re-emphasize" principles of free speech and "civic discourse." Zachary Schermele, *College Presidents Are Planning 'Urgent Action' to Defend Free Speech*, CHRON. HIGHER ED. (Aug. 15, 2023), https://www.chronicle.com/article/college-presidents-are-planning-urgent-action-to-defend-free-speech.

[2] The commentary and criticism of student protestors in the 2010s reached a crescendo in 2017 with the disrupted speaker event involving Charles Murray at Middlebury College and proposed appearances by Ann Coulter and Milo Yiannopoulos at the University of California, Berkeley. *See, e.g.*, The Editorial Board, *Smothering Free Speech at Middlebury,* N.Y. TIMES (Mar. 7, 2017) [hereinafter, *Smothering Free Speech*], https://www.nytimes.com/2017/03/07/opinion/smothering-free-speech-at-middlebury.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb; Sarah Larimar, *Senate Hearing Examines Free Speech on College Campuses After Incidents at UC-Berkeley, Middlebury,* WASH. POST (June 20, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/06/20/senate-hearing-examines-free-speech-on-college-campuses-after-incidents-at-uc-berkeley-middlebury/.

tropes; promotion of Nazi ideology; or espousal of patently false election denial theories.[3] The focus more often than not instead remains on the sanctity of free speech and the First Amendment.

A recent example of this phenomena is the Stanford Law School student protest of a speaker, Judge Stuart Kyle Duncan, in March 2023. Judge Duncan's talk was reportedly "interrupted and cut short" due to "heated interactions" between Judge Duncan and student protestors.[4] Stanford Law School Dean (now University Provost) Jenny Martinez issued a letter afterwards in which she excoriated the student protestors, articulated the university policy on "campus disruptions," and stated that the First Amendment — the principles of which are applicable to private universities in California as a result of state law — allows the university to limit or prohibit student speech that "substantially impairs the effective conduct" of a speaker event.[5] In this regard, Dean Martinez's position is aligned with that of Erwin Chemerinsky, Dean of the University of California, Berkeley, School of Law; Howard Gillman, Chancellor of the University of California at Irvine; and others who have taken the position that disruptive protestors whose speech results in precluding speakers from

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[3] Although the term "hate speech" has no single agreed-upon legal definition, it is generally understood to mean "speech that expresses hateful or discriminatory views about certain groups that historically have been subject to discrimination (such as African Americans, Jews, women, and LGBTQ persons) or about certain personal characteristics that have been the basis of discrimination (such as race, religion, gender, and sexual orientation)." NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP xxiii (2020). The phrase "other invidious rhetoric" is included here because the speech targeted by protestors at university speaker events may not be limited to hate speech as so defined.

[4] Greta Reich, *Judge Kyle Duncan's Visit to Stanford and the Aftermath, Explained*, STAN. DAILY (Apr. 5, 2023), https://www.stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained/.

[5] Jenny S. Martinez, Letter to SLS Community at 2 (Mar. 22, 2023) [hereinafter, Martinez Letter], https://www.law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf. Although the First Amendment is not directly applicable to a private university such as Stanford, California's Leonard Law, Cal. Educ. Code §94367, "prohibits private colleges from making or enforcing rules subjecting students to discipline on the basis of speech that would be protected by the First Amendment or California Constitution if regulated by a public university." Martinez Letter at 2. There are other states with laws protecting freedom of speech that similarly may impact private institutions, *see, e.g.*, Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302 (2021); however, the First Amendment does not itself bind private colleges and universities. *See, e.g.*, Ben Trachtenberg, *Private Universities and the First Amendment*, 2018 J. DISPUTE RES. 71, 73 (2018).

addressing audiences do not themselves enjoy the constitutional protection of freedom of speech.[6]

Part I of this Article addresses this issue directly and argues that student protestors' counterspeech, including "heckling" and other speech short of threats or incitement, is protected under the First Amendment even if it may result in "shouting down" a speaker.[7] Student protestors are not government actors, and their counterspeech, even if it stops the speaker from conveying his or her message, is free speech subject to First Amendment protection. The government has no duty to ensure that the speaker is heard, and it cannot punish protestors for their counterspeech.[8]

It is important to note in this context that heckling should not be simply viewed as "intolerance" by student protestors, or as an opportunity taken to cancel a speaker. It is protected speech for a reason — because it is, as Professor Jeremy Waldron stated, "a mode of valued critical engagement" with the speaker; unwelcomed by the speaker yes, but a mode of engagement nevertheless, intended to elicit a response in some cases, and in others perhaps to disturb the speaker's "choreographed performance," or simply to make the audience aware of the protestors' antipathy.[9] Whatever the intent, heckling has a value insofar as it "indicates critical attention and active engagement, a dynamic and interactive element in the otherwise controlled relation between speaker and audience."[10]

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[6] Erwin Chemerinsky, *Comment on Free Speech in Law Schools*, 51 HOFSTRA L. REV. 687, 688 (2023) [hereinafter Chemerinsky, *Comment on Free Speech*] ("There is no First Amendment – or more generally, no free speech right – to use speech to shout down and silence others."); David French, *Free Speech Doesn't Mean Free Rein to Shout Down Others*, N.Y. TIMES (Mar. 23, 2023), https://www.nytimes.com/2023/03/23/opinion/free-speech-campus.html/; Chemerinsky & Gillman, *supra* note 1.

[7] As to what, exactly, is meant by heckling in this context, this Article follows the lead of Professor Jeremy Waldron in his article *Heckle: To Disconcert with Questions, Challenges, or Gibes*, 2017 SUP. CT. REV. 1, 3 (2017), where he cites to the Merriam Webster Dictionary's "helpful definition" defining "heckle" as "to harass and try to disconcert with questions, challenges, or gibes" — with the "focus on 'disconcert.'").

[8] The term counterspeech refers to "any speech that counters or responds to speech with a message that the speaker rejects, including 'hate speech' . . . . In content, it may include denunciations or refutations of the message, support for the people the speech disparages, and information that seeks to alter the views of the speaker and others who might be sympathetic to those views. For any speech that has a feared harmful tendency but does not satisfy the emergency test [i.e., is not likely to cause imminent harm], the Supreme Court has held that the constitutionally permissible response is counterspeech, not censorship." Strossen, *supra* note 3, at xxii. As discussed below, this Article takes the position that those "denunciations or refutations" may include heckling, jeering, and booing (although Professor Strossen may disagree, *see infra* note 137).

[9] Waldron, *supra* note 7, at 9, 29.

[10] *Id*. at 31.

The Martinez Letter and other commentators state that heckling and other counterspeech, even if protected speech, can be regulated under the First Amendment through reasonable time, place or manner restrictions, and that protestors can thereby be prohibited from speaking if their speech would disrupt the speaker.[11] This Article takes the position that protestor counterspeech should not be properly subject to such government limitation under existing precedent. As a general matter, any such limitation by its very nature would be viewpoint-based and therefore impermissible. Moreover, there is a strong case to be made that in most situations there is no adequate alternative forum for such counterspeech even if restrictions were found to be viewpoint-neutral.[12]

Part II of this Article seeks to provide some context for an understanding of how and why such counterspeech, whether in the form of heckling or otherwise, can be characterized as a reasonable and defensible strategy.[13] This context, as noted above, has been lacking in much of the commentary around student protests against hate speech. Right-wing extremism has been on the rise in the United States throughout this first quarter

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[11] Martinez Letter, *supra* note 5, at 2 (citing Frisby v. Schultz, 487 U.S. 474, 487-88 (1988)); *see, e.g.*, ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 124-25 (2017) [hereinafter, CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS] ("'Although faculty, students and staff are free to criticize, contest and condemn the views expressed on campus, they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe.'") (quoting Geoffrey Stone, *Statement on Principles of Free Inquiry,* UCHICAGONEWS: BEHIND THE NEWS (July 2012)). *See also* Robert J. Zimmer & Eric D. Isaacs, *Statement on Free Expression at the University of Chicago*, UCHICAGONEWS (Jan. 7, 2015), https://news.uchicago.edu/story/statement-free-expression-university-chicago (formalizing Professor Stone's *Statement on Principles of Free Inquiry*).

[12] Although, as discussed below, support can be found in some federal and state court decisions and dicta for the view that restrictions on counterspeech are defensible, that position is arguably inconsistent with the tenor and import of existing Supreme Court precedent.

[13] It should be noted in discussing the context of student protests against outside speakers that the claim of a free speech "crisis" on our college campuses is largely a false narrative. *See* Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 220 (2019). In fact, it is painfully clear that much of the narrative of a leftist push to silence right-wing speakers stems from strategic efforts of conservative groups in staging events. *Id.* at 230-31; *see also* Chemerinsky, *Comment on Free Speech*, *supra* note 6, at 688 ("I see no indication of a crisis — or even a serious problem — concerning free speech in law schools . . . . Events with controversial speakers occur all the time at law schools without incident."); Thomas Healy, *Return of the Campus Speech Wars,* 117 MICH. L. REV. 1063, 1070 (2019) [hereinafter, Healy, *Campus Speech Wars*] ("[I]t is important to be careful how we characterize the state of free speech on campus. Colleges — and college students — are easy targets that often become pawns in the larger culture wars.").

of the twenty-first century.[14] Hate speech has concomitantly increased during this time. Much of that hate speech is profound in its impact, threatening the existence of individuals based on group identity (e.g., Black, Jewish, Muslim, LGBTQ+). These are messages that attack the foundation of our society, that are contrary to the basis of our social network. At the same time, democracy is under attack in the United States; even academia is under siege, with states banning books and seeking to require teaching history and other subjects in accord with governmental dictates.[15] Absent active and vocal protest, the country risks normalizing hate speech, discrimination, and creeping autocracy, creating a context in which these ideas are just another form of speech in a sea of discussion.[16]

The context for campus protests today also includes the changing demographics in our public universities over the past two decades. Increased diversity in the college ranks means that in many cases the protestors or their allies are the direct targets of the hate speech. The students protesting speakers and undertaking these strategies understand the issues they are confronting and are in most, if not all, instances acting in good faith in dedication to a cause. These students are not "coddled snowflakes." They are addressing crucial issues that they know and understand, and they are consciously placing themselves at risk by standing up to university administrators and publicly challenging extremist speakers and hate speech.

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[14] *See, e.g.*, JEFFREY TOOBIN, HOMEGROWN: TIMOTHY MCVEIGH AND THE RISE OF RIGHT-WING EXTREMISM 357-73 (2023).

[15] *See, e.g.*, Jennifer Ruth*, Authoritarians Come for the Academy*, CHRON. HIGHER ED. (Aug. 14, 2023), https://www.chronicle.com/article/authoritarians-come-for-the-academy; Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.,* N.Y. TIMES (Jan. 30, 2022; updated June 22, 2023), https://www.nytimes.com/2022/01/30/books/ban-us-schools.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb; *cf.* Eduardo Penalver, *Statehouses, Not Student Activists, Are the Real Threat to Free Speech; Fixating on Drama at Stanford Law Leads Us Astray*, CHRON. HIGHER ED. (May 17, 2023), https://www.chronicle.com/article/statehouses-not-student-activists-are-the-real-threat-to-free-speech (criticizing student heckling of speakers but adding: "overcoming student heckling is not the battle with which we ought to be the most concerned . . . . The greatest dangers to higher ed do not come from our students, but from the rising tide of state censorship.").

[16] *See* Bowman & Gelber, *supra* note 1, at 273-74. In setting out the importance of university leaders' counterspeech to hate speech, Professors Bowman and Gelber state that "systemically discriminatory speech is harmful . . . and leaders' responses to this type of speech matter. When university leaders respond with silence, either literally or through an ineffective response, their silence can subsidize injustice. When they respond with robust counterspeech . . . [they] challenge the authority of the speech and help to prevent the uptake of the speech in the community in which it takes place. In so doing, [such counterspeech] tries to prevent the systemically discriminatory speech from resetting the rules of the game in such a way that systemic discrimination becomes normalized . . ." Counterspeech by student protestors functions similarly insofar as it responds to such speech in a timely and effective manner.

They are also putting themselves into a possible media firestorm which, to judge by recent history, will be overtly critical of their conduct with little or no discussion of the substance of the issues against which they are protesting. [17]

The university administrators who condemn these strategies are, in most cases, undoubtedly also acting in good faith, seeking to maintain order in tumultuous situations. They have a job to do, as "managers of crowd-control."[18] And civility, of course, is a virtue worthy of promotion. But that does not mean you can hang your hat on the First Amendment when it does not apply.[19] The First Amendment is not a sword to stop

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[17] *See, e.g.*, Gregory Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests,* 90 U. COLO. L. REV. 551 (2019). Professor Magarian succinctly critiqued President Obama's reproval of Rutgers' students for their protests against proposed speaker Condoleeza Rice: "President Obama stooped to the condescension endemic to critics of campus protestors when he accused Rutgers students of 'be[ing] scared to take somebody on' and 'shut[ting] your ears off because you're too fragile and somebody might offend your sensibilities.' Those 'ear shutting' students took a stand precisely because they knew very well what Condoleeza Rice had said and done in her public life. Those 'scared' students stood up to their university administration and challenged one of the most formidable public figures in the country. Those 'fragile' students spoke out against the Iraq War and withstood blowback from the national media and the President of the United States. The Rutgers students preemptive protest against Secretary Rice, whatever its merits, honored free speech principles." *Id.* at 569-70. (The protests against Secretary Rice did not involve heckling, as those protests took place prior to her speaking engagement, leading to the university canceling that event. *Id.*)

[18] Stanley Fish, *Free Speech is Not an Academic Value*, CHRON. HIGHER ED. (Mar. 20, 2017), https://www.chronicle.com/article/free-speech-is-not-an-academic-value/ ("My advice to [college] administrators: Stop thinking of yourselves as in-house philosophers or free-speech champions or dispensers of moral wisdom and accept your responsibility as managers of crowd-control, an art with its own history and analytical tools . . ."). Controversial speakers are going to bring controversy. Professor Waldron's admonition to campus speakers is equally applicable to university administrators: "Speakers who come to a campus should not think they are coming to a cowed and cloistered environment whose audiences have been pacified and silenced for the sake of exposure to unwelcome ideas. Campuses need to keep faith with the active and disconcerting side of the free speech principle. Speech will elicit a reaction, and that is what campus speakers should be prepared for." Waldron, *supra* note 7, at 28.

[19] *Cf.* Thomas Healy, *Who's Afraid of Free Speech?*, KNIGHT FIRST AMEND. INST. (July 14, 2017), https://knightcolumbia.org/content/whos-afraid-free-speech: "[T]he critics are well within their right to push for a more elevated, civil form of public discourse. They are perfectly justified in arguing that a college campus, of all places, should be a model of rational debate. But they are not justified in claiming the free speech high ground. For under our free speech tradition, the crudest and least reasonable forms of expression are just as legitimate as the most thoughtful and eloquent." Although Professor Healy does take the position that heckling in the form of "[o]ccasional boos or interruptions" is compatible

student protestors, but it is a shield protecting their counterspeech, even where it may seem offensive and inappropriate.

The discussion in this Article is intended to be guided by the contours of First Amendment law as it currently exists and to provide the outlines of an argument in support of student protestors who proffer counterspeech against hate speech. In that regard, the arguments herein technically apply only to public colleges and universities, which are government entities, and to private universities such as Stanford that are bound by state law to follow the principles of the First Amendment.[20] Many private colleges and universities, however, have committed to following free speech principles with regard to their regulation of student conduct and events, and the arguments presented below therefore may have broader application.[21] Moreover, as Professors Chemerinsky and Gillman advocate, in light of the importance of First Amendment and free speech principles in the university setting, there is a strong case to be made that their protections should be extended to all colleges and universities, whether private or public.[22]

This Article concludes that student protests countering hate speakers with counterspeech, even where in some cases such protests result in shouting down proponents of hate, can be a reasonable and defensible approach.[23] Accordingly, consideration should be given to paying greater

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with free speech, he also is of the view that "heckling that is so loud and continuous that a speaker literally cannot be heard — what the critics call 'shouting down' — is little different from putting a hand over a speaker's mouth and should be viewed as antithetical to the values of free speech." *Id; see also* Thomas Healy, *Social Sanctions on Speech,* 2 J. FREE SPEECH L. 21, 25, 56 (2022) [*hereinafter,* Healy, *Social Sanctions on Speech*] (discussing "principle of free speech that reaches beyond the Constitution."). This Article is focused on the First Amendment law of free speech, and not on the broader parameters of free speech values and principles beyond the Constitution that Professor Healy addresses.

[20] *See* Martinez Letter, *supra* note 5, at 2.

[21] *See* Section II below (noting Middlebury College's commitment to free speech principles).

[22] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 19-20 ("However important free speech principles are in society as a whole, they require even stronger protection in academic settings . . . Although the First Amendment applies only to public universities, *all* colleges and universities should commit themselves to these values.").

[23] *Cf.* Mark Tushnet, *What the Constitution says Berkeley can do when controversial speakers come knocking*, VOX (Sept. 23, 2017), https://www.vox.com/the-big-idea/2017/9/22/16346330/free-speech-week-first-amendment-constitution-bannon (noting that although counterspeech in the form of heckling does not violate the speaker's constitutional rights, "[t]hat's not to say that shouting down a speaker is a good idea. I think it's sometimes worth doing, but not often. . ."). Such a strategy does have a long and venerable pedigree from British parliamentary debates to the halls of the U.S. Congress today. *See* In re Kay, 464 P.2d 142, 148 (Cal. 1970). An example is seen in the censure of Congressman Adam Schiff (D-Cal.) on June 21, 2023, by the House of Representatives: "[Speaker] McCarthy took over the speaker's chair and called Schiff to the

heed to the concerns being expressed by student protestors, and devoting less time to telling students how best to conduct their protests.

I. THE FIRST AMENDMENT AND PROTESTS AGAINST OUTSIDE SPEAKERS AT PUBLIC UNIVERSITIES

A. The Martinez Letter

Stanford Law School Dean Jenny Martinez's letter takes the position that disruptive protest of an event is not constitutionally protected speech. Citing the California Supreme Court's decision in *In re Kay*,[24] the Dean states that "settled First Amendment Law allows many governmental restrictions on heckling to preserve the countervailing interest in free speech."[25]

Kay involved the arrest and conviction of protestors under Section 403 of the California Penal Code for clapping and shouting during a congressional representative's speech in a public park.[26] The court first noted that the protestors conduct, including "clapping,"[27] "cheering and shouting,"[28] and "flag waving"[29] was "'closely akin to pure speech'"[30] and therefore raised serious questions under the First Amendment. In this regard, the court stated:

> Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment . . . . The public interest in an active and critical audience has long been recognized. The heckling and harassment of public officials and other

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well to receive the Trump-ordered rebuke. Democrats crowded around Schiff, applauding and chanting 'Adam!' At McCarthy they chanted 'shame!' and 'disgrace!' — then heckled him as he tried to read the admonishment. 'I have all night,' said McCarthy, though he quickly abandoned his attempt to gavel down the enraged Democrats and instead tried to talk over them." Dana Milbank, *The U.S. House of Recriminations begins Biden's Impeachment*, WASH. POST, June 25, 2023, at A21.

[24] 464 P.2d at 149.

[25] Martinez Letter, *supra* note 5, at 2.

[26] Kay, 464 P.2d at 145-46. In relevant part, California Penal Code § 403 makes it a misdemeanor to "willfully disturb[] or break[] up any assembly or meeting . . . other than an assembly or meeting referred to in . . . Section 18340 of the Elections Code." Section 18340 is discussed below.

[27] *Kay*, 464 P.2d at 147 (citing Edwards v. South Carolina, 372 U.S. 229, 233 (1963)).

[28] *Id.* (citing Cox v. Louisiana, 379 U.S. 536, 546 (1965)).

[29] *Id.* (citing Stromberg v. California, 283 U.S. 359, 362 (1931)).

[30] *Id.* (quoting Tinker v. Des Moines School District, 393 U.S. 503, 505 (1969)).

> speakers while making public speeches is as old as American and British politics . . . .[31]

In light of these concerns, the court in *Kay* vacated the convictions, holding that the First Amendment requires a narrow construction of Section 403, and that the protests must therefore "substantially impair[] the effective conduct of a meeting" to warrant criminal sanctions.[32] The court concluded that because the conduct at issue lasted only a few minutes and the speaker was able to conclude his remarks, the state did not meet its burden of establishing that the conduct of the meeting was substantially impaired.[33]

Dean Martinez's letter relies on the *Kay* holding in asserting that "the First Amendment permits the regulation of speech that '*substantially impairs the effective conduct of a meeting*.'"[34]

A Ninth Circuit case addressing *Kay* (not cited in the Martinez Letter) calls into question the applicability of *Kay* in the context of a university speaker event.[35] In that case, *CPR for Skid Row v. City of Los Angeles*,[36] the Circuit faced the question of whether Section 403 of the California Penal Code — the statute addressed in *Kay* — is constitutional.[37] Protestors had filed a civil lawsuit challenging the constitutionality of Section 403 after they were arrested for alleged violations in the course of a public protest.[38] As part of its challenge, CPR pointed to the provision of Section 403 that exempts from its coverage "an assembly or meeting referred to

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[31] *Kay,* 464 P.2d at 147-48.

[32] *Id.* at 150.

[33] *Id.* at 151-52.

[34] Martinez Letter, *supra* note 5, at 2 (emphasis in original).

[35] The Martinez Letter does cite to *Frisby v. Schultz* for the proposition that "the First Amendment allows the imposition of reasonable content-neutral time, place, and manner restrictions." 487 U.S. 474, 487-88 (1988). *Frisby* involved abortion protestors picketing outside the home of a doctor who performed abortions. The Court in that case upheld a town ordinance that banned picketing of an individual residence. Stating that "individuals are not required to welcome unwanted speech into their own homes and . . . the government may protect this freedom," the Court held that "the First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id.* at 485-87.

[36] 779 F.3d 1098 (9th Cir. 2015).

[37] *Id.* at 1100.

[38] *Id.* at 1100-01. The plaintiffs were an organization, CPR for Skid Row ("CPR"), and two of its members. They were protesting walks through the Skid Row neighborhood of Los Angeles in which public officials, police, members of the business community, and others traversed the area purportedly to see and learn about it. CPR believed that that the walks were "demeaning and depersonalizing" and were being used to "gain support for repressive measures." *Id.* at 1101. CPR protested the walks by chanting, yelling loudly and banging on drums in close proximity to the participants. *Id.*

in . . . Section 18340 of the Elections Code."[39] That statute states: "Every person who, by threats, intimidations, or unlawful violence, willfully hinders or prevents electors from assembling in public meetings for the consideration of public questions is guilty of a misdemeanor."[40] Under the Ninth Circuit's view of this statute, in the case of a "public meeting for the consideration of public questions," a person can be subject to penalties for "hinder[ing]" a meeting only if he or she does so through "threats, intimidation or unlawful violence."[41] The court held that CPR's activities were governed by Section 18340, and not Section 403, because the protests involved public meetings for the consideration of public questions.[42] The court accordingly reversed the district court's rejection of CPR's as-applied challenge while upholding the facial validity of Section 403.[43]

As discussed further below, a campus speaker event is fairly characterized as a public meeting for the consideration of public questions under this precedent. It is a limited forum insofar as it involves an invited speaker to a campus event whose attendees may (or may not) be limited to students, faculty, and other members of the university community.[44] But it is a public meeting in the broader sense of a gathering of members of the community for a discussion of what are most certainly public questions. Thus, *Kay's* failure to address Section 18340 raises a question about reliance on that case or its progeny to support the proposition that the First Amendment permits regulation of speech that "substantially impairs the conduct of a meeting" in the case of a public meeting to discuss public questions. Significantly, in a separate opinion, Judge Reinhardt found the confusion engendered by this failure to be fatal to the statutory scheme:

> I find that *Kay* and *Kay*'s progeny have left the statutory scheme comprehended by § 403 and its express exceptions without any means of rational construction, and the people of California without any means of determining how and why the various sections apply. In short, because Californians are not adequately informed of how or in what manner they must comport themselves when engaged in protests regarding political gatherings . . . or,

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[39] *Id.* at 1102. Section 403 also contains an exception for meetings "for religious worship." *Id.* That exception is not relevant here.

[40] *Id.* at 1102. "Electors" under the statute "include anyone over 18 who resides in any election precinct." *Id*. By its plain language, the term as used in the statute does not have the specialized meaning found in federal and state election law. Thus, the Ninth Circuit notes in its opinion that CPR's activities fall within the scope of Section 18340 because the meetings at which they protested "consist[ed] of public officials and members of the public who meet on public sidewalks . . ." *Id.* at 1111.

[41] *Id.* at 1102.

[42] *Id.* at 1111.

[43] *Id.*

[44] The nature of the forum is discussed below in Section I.B.2.

> critically, under what circumstances they face criminal punishment for engaging in such First Amendment activity, there is no alternative but to find that §403 and its related sections are unconstitutionally vague.[45]

Although the majority opinion did not go as far as Judge Reinhardt, under the holding of *CPR for Skid Row*, Section 403 does not apply to public meetings to discuss public questions; rather, a protestor's speech or other actions at such a meeting are subject to sanction only where "threats, intimidations, or unlawful violence" are used to hinder the meeting.[46] That formulation, rather than *Kay*'s, would therefore appear to apply to a public meeting to discuss public questions such as a university speaker event.[47]

The Martinez Letter further states that a "university classroom setting for a guest speaker invited by a student organization is . . . a setting where the First Amendment tolerates greater limitations on speech than it would in a traditional public forum."[48] That setting, the Letter states, should be considered a "limited public forum" under Supreme Court precedent, "where restrictions on speech are constitutional so long as they are viewpoint-neutral and reasonable in light of the forum's function and all the surrounding circumstances."[49] The Supreme Court's limited public forum cases, however, simply allow restricting the forum to certain groups such as students, and to specific content (or topics), which could vary from the general (such as recent developments in a particular field of study) to the specific (such as abortion rights post-*Dobbs*[50]). Once a forum is opened for speech, discrimination based on viewpoint remains prohibited, and

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[45] *CPR for Skid Row,* 779 F.3d at 1117 (Reinhardt, J., concurring in part and dissenting in part).

[46] *Id*. at 1108.

[47] Although not mentioned in *CPR for Skid Row*, there was a prosecution of student protestors under §403 for heckling the speech of Israeli Ambassador Michael Oren at the University of California, Irvine, in 2010. *See* Faiza Majeed, *The Irvine 11 Case: Does Nonviolent Student Protest Warrant Criminal Prosecution?*, 30 L. & INEQ. 371 (2012) (discussing prosecution of student hecklers under California Penal Code §403); CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 124 (discussing same incident). Those reports of that prosecution do not indicate that the court referenced or relied on California Elections Code § 18340. The criminal prosecution of nonviolent student protestors under § 403 should give further pause to reliance on that statute and *Kay* as a basis for a free speech policy.

[48] Martinez Letter, *supra* note 5, at 3.

[49] Martinez Letter, *supra* note 5, at 3 (citing Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 (2010); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676, 688 (1988)).

[50] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 133 (1992)).

restrictions on the speech must be "reasonable."[51] Those restrictions, as discussed below, generally cannot prohibit or otherwise limit counterspeech directed at a speaker.[52]

The Martinez Letter adds that in a setting such as a "planned lecture in a reserved room on campus," university policy may appropriately, and consistent with the First Amendment, limit audience participation to holding signs, asking questions "during a planned Q&A" or holding "alternative events where they can share their own views without disrupting the invited speaker."[53] As discussed below, however, this articulation of what would constitute an adequate alternative forum for student protestors arguably does not capture what the First Amendment requires in order to fairly restrict their speech.[54]

B. First Amendment Law Governing Protests Against Outside Speakers at Public Universities

As noted at the outset of this Article, there has been a great deal of legal commentary around student protests of outside speakers over the past years, much of it describing the facts of the protests and criticizing

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[51] Christian Legal Soc'y, 561 U.S. at 679; Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). *See also Forbes*, 523 U.S. at 682 (allowing exclusion of independent candidate at debate; "[i]t is . . . beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest.").

[52] *See* Section I.B.2.

[53] Martinez Letter at 3. Dean Martinez's proscriptions evoke the "sad spectacle of lifeless discourse" described by Professor Waldron: "The idea of the anti-heckling mentality is that free speech means a laborious succession of speeches. Each speech will be received passively and respectfully in silence, and in order to hear an opposing point of view, one will have to go somewhere else (by which time the detail of any issue or contradiction will be forgotten). . . . [T]he suppression of heckling in the name of free speech presages a sad spectacle of lifeless discourse, where we take free speech — *an inherently interactive idea* — and do our best to minimize the lively and immediate confrontation that interactions between speaker and members of the audience used to involve." Waldron, *supra* note 7, at 23-24 (emphasis in original).

[54] The Martinez Letter also notes that the University has its own First Amendment rights which include the right to promulgate and enforce a "free speech and campus disruption policy." *Id.* at 3-4 (citing Sweezy v. State of New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Putting aside the irony of reliance on the First Amendment in support of a policy that arguably suppresses speech, it appears that the citation to *Sweezy* is meant to pull in the concept of academic freedom in defense of the policy, insofar as the university has the responsibility to determine "what may be taught [and] how it shall be taught." Sweezy, 354 U.S. at 263. As discussed below, the concept of academic freedom, although central to university life in many respects, does not bear on the university's ability to regulate speech by student protestors outside the classroom setting per se.

the student protestors.[55] Something that commentary has not done in all cases, however, is clearly and fairly set out the First Amendment law applicable to the speech and expressive conduct of those protestors. Dean Chemerinsky and Professor Gillman, for example, have stated that "disrupting a speaker is not conduct protected by the First Amendment"[56] and that "[f]reedom of speech does not include a right to shout down others so they cannot be heard," describing such action as a "heckler's veto."[57] As discussed below, although this position has the virtue of promoting civility and decorum, it appears at odds with the tenor and import of the Supreme Court's First Amendment jurisprudence.

The analysis below follows that set forth in the Supreme Court's decision in *Cornelius v. NAACP Legal Defense and Education Fund, Inc*.[58] In that case, the Court established the following approach:

> [W]e must first decide whether . . . [the] speech is protected by the First Amendment . . . Assuming that . . . [it] is protected speech, we must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic. Finally, we must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard.[59]

The initial question, then, is whether heckling a speaker at a campus event is protected under the First Amendment.

1. Counterspeech, Including Heckling, Is Protected Speech

Counterspeech directed at a campus speaker can take many forms. It may include spoken words directed at the speaker, as well as signs, photographs, and other forms of expression. It may also include heckling and

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[55] *See, e.g.*, Chemerinsky & Gillman*, supra* note 1; French, *supra* note 6; CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS*, supra* note 11, at 1-7, 73-74, 124-25; Alyson R. Hamby, *You Are Not Cordially Invited: How Universities Maintain First Amendment Rights and Safety in the Midst of Controversial On-Campus Speakers,* 104 CORNELL L. REV. 287, 290-93 (2018).

[56] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS*, supra* note 11, at 124.

[57] Chemerinsky & Gillman, *supra* note 1.

[58] 473 U.S. 788, 812-13 (1985) (holding that federal government charity drive was a nonpublic forum that could reasonably exclude legal defense and political advocacy organizations; declining to decide "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view" and remanding.).

[59] *Id.* at 797; *see also, e.g.*, Bible Believers v. Wayne County, Mich., 805 F.3d 228, 242 (6th Cir. 2015) (en banc).

jeering.[60] Such symbolic speech and expressive conduct is protected under the First Amendment.[61] As Professor Howard Wasserman stated, "boos, jeers and hisses" are a form of protected "symbolic counter-speech;" they are words and noises that take meaning from the object to which they are directed, and thereby communicate ideas.[62] This follows from the Court's articulation in *Cohen v. California*:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. . . [and] that emotive function . . . practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures – and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[63]

As one district court stated in striking down a city ordinance used against protestors:

> [P]ublic meetings and a host of other activities produce loud, confused or senseless shouting not in accord with fact, truth or right procedure to say nothing of not in accord with propriety, modesty, good taste or good manners. The happy cacophony of democracy would be stilled if all 'improper noises' in the normal meaning of the term were suppressed.[64]

The protection for discordant and disruptive speech stems from a long line of Supreme Court cases, including *Cohen v. California*.[65] There, an antiwar protestor was arrested for wearing a jacket in the Los Angeles County Courthouse on which the words "Fuck the Draft" were plainly

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[60] *See, e.g.*, In re Kay, 464 P.2d 142, 147-48 (Cal, 1970); Healy, *Who's Afraid of Free Speech, supra* note 19 ("[e]ven heckling, though rude and annoying, is a form of expression.").

[61] Cohen v. California, 403 U.S. 15, 24-25 (1971); Texas v. Johnson, 491 U.S. 397, 415-16 (1989); U.S. v. Eichman, 496 U.S. 310, 315-16 (1990).

[62] Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 395-97 (2004).

[63] Cohen v. California, 403 U.S. at 26 (quoting Baumgartner v. U.S., 322 U.S. 665, 673-74 (1944)).

[64] Landry v. Daley, 280 F. Supp. 968, 970 (N.D. Ill. 1968) (cited in Eve H. Lewin Wagner, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215, 222 (1986)).

[65] *See* Cohen v. California, 403 U.S. at 26.

visible. The protestor was convicted under a state statute prohibiting disorderly conduct. In overturning the conviction, the Court found that the offensive slogan was protected speech, as it does not fall under a category of unprotected speech, such as incitement or fighting words, and there is no privacy interest implicated by speech in a public building.[66] Absent one of these exceptions, the government "may not prescribe the form or content of individual expression."[67]

Similarly, in *Snyder v. Phelps*,[68] the Court set aside a jury verdict that imposed tort liability on the Westboro Baptist Church for intentional infliction of emotional distress in a case where Westboro was alleged to have picketed a veteran's funeral with signs carrying offensive messages.[69] The Court said: "'[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.'"[70] Heckling may be all that —

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[66] *Id.* at 20-22.

[67] *Id.* at 24. The Court articulated the rationale for protecting the disruptive and distasteful speech presented by the case: "the immediate consequence of [the constitutional right of free expression] may often appear to be only verbal tumult, discord and even offensive utterance. These are however, within established limits, in truth necessary side effects of the broader enduring values which the process of an open debate permits us to achieve. That the air may at times seem to be filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem like a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." *Id.* at 24-25; *see also* Cantwell v. Connecticut, 310 U.S. 296, 310-11 (1940) (overturning conviction of Jehovah's Witness door-to-door solicitors whose speech "arouse[d] animosity" and stating that the government "appropriately may punish" activities that "incite violence and breaches of the peace," but cannot punish offensive speech that threatens "no . . . clear and present menace to public peace and order.").

[68] 562 U.S. 443 (2011).

[69] The signs included messages such as "God Hates the USA/Thank God for 9/11," "Thank God for IEDs," "Thank God for Dead Soldiers," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id.* at 448.

[70] *Id.* at 458 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). The Court in *Snyder* noted that "Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible." *Id.* at 460. Similarly, in *Texas v. Johnson*, in holding that the act of burning an American flag is expressive conduct protected under the First Amendment, the Court stated: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989) (citing cases); *see also* Matal v. Tam, 582 U.S. 218, 243 (2017) ("Giving offense is a viewpoint."); Counterman v. Colorado, 600 U.S. 66, 87 (2023) (Sotomayer, J., concurring in part and concurring in the judgment) ("First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it.").

offensive, insulting, outrageous — but as speech, it retains its First Amendment protection.

Heckling is also conceptually consistent with the "marketplace of ideas" underlying much of First Amendment jurisprudence.[71] Heckling brings attention to the opposing view, forcing the speaker and the audience to consider a competing position in real time. As Professor Waldron stated, "heckling a speaker — disconcerting him, disturbing the composure he has worked up for the occasion — is often and characteristically a good thing for the exchange of ideas . . . ."[72] That is, part of the value in heckling "involves the abrupt juxtaposition of a view with one of its rivals so that the issue between them cannot be avoided."[73]

What about the "heckler's veto?" Doesn't allowing disruptive counterspeech permit protestors to improperly shut down speakers? Doesn't the speaker have a right to be heard? Although the "heckler's veto" in the campus context has been referred to as "students attempting to silence other viewpoints,"[74] that shorthand formulation is inconsistent with the concept of the "heckler's veto" as articulated in the case law.[75] The concept of the "heckler's veto," as found in federal court decisions, is a First Amendment construct based on state action. A "heckler's veto" occurs when the government shuts down a speaker in reaction to a hostile audience.[76] Student protestors are not state actors or agents of the government,

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[71] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it . . . . For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.") (citation omitted); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

[72] Waldron, *supra* note 7, at 9.

[73] *Id.* at 19 (citing to the California Supreme Court's *Kay* opinion: "A cogent remark, even though rudely timed or phrased, may 'contribute to the free interchange of ideas and the ascertainment of truth." In re Kay, 464 P.2d 142, 147 (1970) (quoting Garrison v. Louisiana, 379 U.S. 64 (1964)).

[74] Chemerinsky & Gillman, *supra* note 1.

[75] Some commentators allow for this shorthand formulation *sans* state action as an informal or "less sophisticated" use of the term. *See, e.g.*, Waldron, *supra* note 7, at 7. That less sophisticated use, however, simply misstates the term as used in the case law while impugning the counterspeech of protestors and allowing for no nuance as to the nature of the heckling.

[76] *See, e.g.*, Satanic Temple, Inc. v. Saucon Valley Sch. Dist., No. 5:23-CV-01244-JMG, 2023 WL 3182934, at *9 (E.D. Pa. May 1, 2023) ("The First Amendment generally does not permit the so-called 'heckler's veto,' i.e., 'allowing the public, *with the government's help*, to shout down unpopular ideas that stir anger.'") (emphasis added) (quoting Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 475 (3d Cir. 2015)); *see also, e.g.*, Kessler v. City of Charlottesville, No. 20-1704, 2022 WL 17985704, at *1 (4th Cir. Dec. 29, 2022) ("The state imposes a heckler's veto when it 'curtail[s] offensive speech' to 'avoid . . . risks of public disorder.'") (quoting Berger v. Battaglia, 779 F. 2d 992, 1001 (4th Cir. 1985) and

and the concept of the "heckler's veto" therefore has no bearing in the context of student counterspeech against a campus speaker. As Professor Wasserman stated, "[t]he right to counter-speak necessarily includes a right to speak over, or otherwise heckle, the original speaker. It only crosses the line to a heckler's veto if the heckler succeeds in halting the first speaker through legally coercive force — that is, some exercise of government power silencing the original speaker."[77] The First Amendment by its terms does not apply to discourse between citizens and presumes that such speech should be allowed to flow (or not) without intervention by the state.[78]

In short, absent government interference, a speaker's right to free speech does not provide him or her a right to be heard:

> [A] speaker with a right to free speech does not have a right to an audience; he does not have a right that others listen to him when he speaks. He certainly doesn't have a right to the audience he wants, even if there are people willing to listen to him. The members of the audience are independent participants with their own rights. The presence and the actions of a heckler amount to a fragment of the audience asserting itself against the speaker's desire for exactly the sort of audience attention that would serve his purposes. No doubt it is frustrating for the speaker.

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citing Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) ("Speech cannot be . . . punished . . . simply because it might offend a hostile mob.").

[77] Wasserman, *supra* note 62, at 400; *see also* Eric T. Kasper, *Public Universities and the First Amendment: Controversial Speakers, Protests, and Free Speech Policies*, 47 CAP. U. L. REV. 529, 566 (2019) ("If they are not state actors, then protestors who shout down speakers are being disruptive, but they are not infringing on any First Amendment rights of speakers or listeners; indeed, the U.S. Supreme Court has long held that individual non-state actors do not infringe on constitutional rights.").

[78] *See* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in to the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.") (citing Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring)); *see also* Christine Wells, *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment*, 89 U. COLO. L. REV. 533, 536-37 (2018) ("the Court's rules are designed to protect private interactions and promote public discourse, no matter how rude or uncivil.").

> But the frustration of the speaker's desires is not for that reason a violation of his rights.[79]

Thus, the question remains as to what limits, if any, can be placed on those using speech to protest a speaker at a public forum. Some guidance regarding the government's authority to step in and regulate speech in the case of a speaker facing a hostile audience of protestors can be found in a series of cases starting with *Terminiello v. Chicago.*[80] In that case, the speaker drew the animosity of a large crowd outside the auditorium in which he was speaking by "vigorously, if not viciously, criticiz[ing] various political and racial groups . . ."[81] The crowd rioted, and the speaker was thereafter prosecuted for disorderly conduct under a Chicago city ordinance. His arrest and conviction resulted from his speech which violated the ordinance because under the trial court's jury instructions it "stir[red] the public to anger, invite[d] dispute . . . or create[d] a disturbance."[82] In reversing the Illinois Supreme Court's affirmance of the conviction, the Court stated: "[F]reedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest."[83]

In *Edwards v. South Carolina*,[84] the Court cited to *Terminiello* in reversing the convictions of 187 civil rights demonstrators for breach of peace. The demonstrators were chanting and singing on the State House grounds in protest of discrimination and discriminatory state laws. A large crowd gathered, and by some accounts, a "dangerous situation" was building.[85] Told to disperse, petitioners refused, and were arrested. Absent any threat of violence or other statutory violation, the Court held that the First Amendment protected the demonstrators, voiding the arrests and convictions.[86]

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[79] Waldron, *supra* note 7, at 12; *see also, e.g.*, Tushnet, *supra* note 23 ("as far as the First Amendment is concerned" it is "okay" if a "raucous crowd shouts down the speaker . . . . The opponents aren't the government, so even if they prevent the speaker from getting his message across, that's just too bad — or it's speech countering speech.").

[80] 337 U.S. 1 (1949); *see* Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1677-78 (2019) [hereinafter Schauer, *Hostile Audience*]; Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. (Nov. 2, 2017), https://knightcolumbia.org/content/hostile-audience-revisited.

[81] *Terminiello*, 337 U.S. at 3.

[82] *Id.* at 4.

[83] *Id.*

[84] 372 U.S. 229 (1963).

[85] Edwards, 372 U.S. at 239 (Clark, J., dissenting). Justice Stewart's opinion states to the contrary that there was no basis in the record indicating imminent concern at the time of the protest. *See id.* at 235-36.

[86] *See id.* at 235-36; *see also* Cox v. Louisiana, 379 U.S. 536, 551 (1965) ("[C]onstitutional rights may not be denied simply because of hostility to their

These cases make clear that the "heckler's veto" in its true sense — government action to shut down a speaker in order to deal with an unruly crowd — is not permitted under the First Amendment.[87] The language of these decisions also supports the view, found throughout the case law, that government action to prohibit or limit speech relating to political and social issues is permissible only in narrow circumstances, such as imminent violence.[88] Substantially impairing "the effective conduct of a meeting"[89] as a basis to prohibit or limit speech does not find purchase under this precedent.

The cases discussed above all involved speech in traditional public forums. The next section discusses speaker events in a campus setting, outside of the traditional public forum.

2. A Campus Speaker Event is a Limited Public Forum

If, as argued above, protestor counterspeech at a speaker event is protected speech, the next step in the analysis is to look at the nature of the forum, as that will determine the limits on the university in imposing restrictions on that speech. The Supreme Court's decisions place government property into three categories for First Amendment purposes: traditional public forums, designated public forums, and limited public forums.[90] A traditional public forum includes archetypal examples such as a public street, park, or sidewalk — the forums found in many of the cases discussed above in Section I.B.1. There, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must

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assertion or exercise."); Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (peaceful and orderly protest "falls well within the sphere of conduct protected by the First Amendment."). In another case, *Feiner v. New York*, the Court upheld the conviction of a speaker for disorderly conduct where violence and fights erupted. 340 U.S. 315 (1951). *Feiner* is distinguished on its facts in *Edwards* and *Cox v. Louisiana* and has fallen into disfavor after those decisions. *See* Schauer, *Hostile Audience*, *supra* note 80, at 1680 ("the Supreme Court appears to have eviscerated *Feiner* of whatever authority it may once have had") (citing *Edwards, Cox,* and *Gregory*).

[87] *See* Schauer, *Hostile Audience, supra* note 80, at 1684.

[88] *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Snyder v. Phelps, 562 U.S. 443, 456-59 (2011).

[89] Martinez Letter, *supra* note 5, at 2. Time, place or manner restrictions are discussed below. *See infra* text accompanying note 101.

[90] *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010). The Court has also referenced nonpublic forums, which are treated similarly to limited forums. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) ("Control over access to a non-public forum can be based on subject-matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."). A military base is an example of a nonpublic forum. *See* Greer v. Spock, 424 U.S. 828, 836 (1976).

be narrowly tailored to serve a compelling government interest."[91] In addition, any restriction on speech in a traditional public forum must leave open "ample alternative channels of communication."[92] A designated public forum is a place not traditionally available to the public for speech that is opened up generally for expressive activity.[93] A designated forum, once opened, is treated as a traditional public forum, and restrictions on speech are "subject to the same strict scrutiny as restrictions in a traditional public forum."[94] A limited public forum is government property that is opened for speech but is "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[95] Under the Court's limited forum precedent, any restriction on speech "must not discriminate . . . on the basis of viewpoint" and "must be 'reasonable in light of the purpose served by the forum.'"[96]

The Martinez Letter states that a speaker event or lecture on a university campus is a setting best characterized as a "limited public forum" under First Amendment precedent.[97] That characterization appears consistent with case law.[98] Although as a limited public forum, a university speaker event does allow for greater toleration of certain restrictions than would a traditional public forum, the guiding principles of the First

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[91] *Christian Legal Soc'y*, 561 U.S. at 679 n.11 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995).

[92] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[93] *See Christian Legal Soc'y*, 561 U.S. at 679 n.11; *Pleasant Grove*, 555 U.S. at 469. A municipal city-leased theater is an example of a designated public forum. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (city's rejection of application to show rock musical "Hair" in municipal theater held to be an unconstitutional prior restraint lacking adequate procedural safeguards).

[94] *Pleasant Grove*, 555 U.S. at 470.

[95] *Id.* at 470; Pollak v. Wilson, No. 22-8017, 2022 WL 17958787, at *2 (10th Cir. Dec. 27, 2022).

[96] Good News Club v. Milford Central School, 533 U.S. 98, 106-07 (2001) (first citing *Rosenberger*, 515 U.S. at 829 and then quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)). An example of a limited public forum is seen in the case of advertising on a city bus system allowing commercial but not political advertisements (thereby permissibly imposing restrictions on content while remaining viewpoint-neutral). *See Perry Educ. Ass'n*, 460 U.S. at 47 (citing Lehman v. Shaker Heights, 418 U.S. 298 (1974)). As discussed below, an outside speaker event at a public university is also an example of a limited public forum.

[97] Martinez Letter, *supra* note 5, at 3 (citing Christian Legal Soc., 561 U.S. at 679 and Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676-78, 688 (1998)).

[98] *See*, *e.g.*, Christian Legal Soc'y, 561 U.S. at 679; *Rosenberger*, 515 U.S. at 829-30 (regarding a student group seeking access to university funding); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993) (regarding access to school property for an after-hours program).

Amendment still hold, and the Supreme Court's admonition in a seminal case addressing the parameters of the First Amendment in the context of a university fully applies in this context:

> [T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'[99]

Accordingly, although a university may in a limited public forum restrict access to certain speakers or to certain subjects and need not keep the forum open indefinitely, its ability to limit speech once that forum is open is otherwise constrained by the same need for nondiscrimination and evenhandedness required in a traditional public forum.[100] Thus, reasonable restrictions, including reasonable time, place, or manner restrictions, are permissible provided they are viewpoint-neutral and leave open ample alternative channels of communication for the information.[101]

The Martinez Letter repeatedly refers to the setting for the March 2023 event at Stanford Law School as the "university classroom."[102] Although as a general matter that may accurately describe the physical rubric for that event, and for many campus speaker events, reference to the "classroom" is inapt for an event where an outside speaker is invited in to speak other than as part of a classroom course or doctrinal seminar.[103] That is, the scope of permissible limitations for a campus outside speaker event is not the same as would be found in a university classroom per se. In the classroom, the tenets of academic freedom hold sway and the university can control the content of education, with oversight of teaching and the curriculum. In that setting, standards of professional academic conduct

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[99] Healy v. James, 408 U.S. 169, 180 (1972) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[100] The standard of review, however, is one of "reasonableness" and, other than with respect to the issue of viewpoint-discrimination, strict scrutiny does not apply as it would in the case of review of government restrictions on speech in a traditional public forum. Christian Legal Soc'y, 561 U.S. at 679; *see* R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 417 n.348 (2019) (noting that "if the restriction involves viewpoint discrimination, it would trigger strict scrutiny in either a public or nonpublic forum.") (citing Gerlich v. Leath, 861 F.3d 697, 705 (8th Cir. 2017) (finding Iowa State University trademark licensing program to be a limited public forum and applying strict scrutiny to review of university's restrictions on sale of t-shirts with marijuana logo as viewpoint discrimination)).

[101] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 53 (1983).

[102] Martinez Letter, *supra* note 5, at 3.

[103] *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 727 (1990) ("The mere physical characteristics of the property cannot dictate forum analysis.").

provide the university and its faculty with extensive authority to regulate speech. Principles of academic freedom allow "[c]ampus faculties and administrators [to] limit the topics that can be discussed in classrooms to those related to the topic of the course, even though this sort of subject matter restriction would not be acceptable if states or localities attempted to limit what people can say in their everyday lives."[104]

A university speaking event, in contrast to the classroom, is a public forum — limited in certain respects as described above, but nevertheless a public forum. Such an event is a gathering for the dissemination of opinions and political positions, a forum where advocacy and argument predominate. It is a public meeting for the consideration of public questions, where discussion is not limited to matters of fact or even necessarily to a search for the truth, as is the case for classroom instruction. Professors Chemerinsky and Gillman capture the essence of this distinction:

> We should think of campuses as having two different zones of free expression: a *professional zone*, which protects the expression of ideas but imposes an obligation of responsible conduct in formal educational and scholarly settings; and a larger *free speech zone*, which exists outside scholarly and administrative settings and where the only restrictions are those of society at large. Members of the campus community may say things in the free speech zones that they would not be allowed to say in the core educational and research environment.[105]

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[104] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 66. *See also, e.g.*, Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 908, 923-24 (2006) (discussing the "murk[y]" "doctrinal, conceptual and normative issues surrounding the idea of academic freedom," and concluding, inter alia, that "the right of academic freedom, as a component of the First Amendment, may well be the right of a university — whether public or private — to make its own academic decisions, even if those decisions might, when made by a public college or university, constitute otherwise constitutionally problematic content-based or even viewpoint-based decisions."); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (referencing the freedom of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

[105] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 77. The concept of the "larger free speech zone" articulated here by Chemerinsky and Gillman does not capture the nuance of different types of forums found on a public university campus, which, as noted above, may be divided into areas characterized as nonpublic forums, limited public forums, designated public forums and traditional public forums. *See* Healy, *Campus Speech Wars, supra* note 13, at 1073-74. Nevertheless, that concept does broadly capture an important distinction consistent with the case law governing free speech on public university campuses. *See id.* at 1075.

A university speaker event, such as Judge Duncan's appearance at Stanford, should therefore be viewed as a limited public forum like any other, with no additional constraints appropriate or permissible because of the campus setting.

3. Restrictions Imposed on Counterspeech at a University Speaker Event Are, by Definition, Not Viewpoint-Neutral

Viewpoint neutrality is the sine qua non of any permissible restriction on speech.[106] In the case of a protestor at a campus speaker event, his or her counterspeech is by definition in opposition to the speaker and his or her speech. Thus, any restriction on that counterspeech would not be viewpoint neutral, as it would limit protestor speech based on the fact of its hostility to the speaker's viewpoint. This was the conclusion reached by the Sixth Circuit in analogous circumstances in *Ison v. Madison Local School District Board of Education*.[107] In that case, limitations were placed on speakers at a school board meeting because of their criticism of the board under a policy that prohibited, inter alia, "antagonistic statements." The court held that those limitations constituted improper viewpoint discrimination.[108] The policy's infirmity stemmed from the fact that it "by definition, prohibits speech opposing the board."[109] Prohibiting

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[106] *See*, *e.g.*, Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . ."); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a façade for viewpoint-based discrimination."); People for the Ethical Treatment of Animals v. Tabak, No. 21-cv-2380, 2023 WL 2809867, at *13 (D.D.C. March 31, 2023) ("No matter the forum, viewpoint-based discrimination is never permitted."), *appeal docketed*, No. 23-5110 (D.C. Cir. May 16, 2023). Moreover, "'the dangers of viewpoint discrimination are *heightened* in the university setting.'" Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) (quoting Gay Lesbian Bisexual All. v. Pryor, 110 F.3d 1543, 1550 (11th Cir. 1997)); *see Rosenberger*, 515 U.S. at 836 ("For the university, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

[107] 3 F.4th 887 (6th Cir. 2021).

[108] *Id.* at 894-95.

[109] *Id*. at 894; *see also, e.g.*, NAACP v. City of Philadelphia, 39 F. Supp. 3d 611, 614, 634-35 (E.D. Pa. 2014) (finding airport advertising space a limited public forum and striking down as improper viewpoint discrimination a policy that permitted ads intended to create a "positive image" of the Philadelphia region while prohibiting proposed ad stating, "Welcome to America, home to 5% of the world's people & 25% of the world's prisoners."), *aff'd*, 834 F.3d. 435 (3d Cir. 2016); Griffin v. Bryant, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014) (striking down village governing body board resolution as viewpoint-based First Amendment violation "because its prohibition against 'negative mention . . . of any Village

counterspeech at a campus speaker event similarly improperly silences the opposition. Professor Mark Tushnet offers a clarifying example: "Suppose the heckling takes the form of repeated shouts of 'You lie!' (remember congressmember Joe Wilson?), and the like, at every assertion by the speaker, to the point where the speech is disrupted."[110] A restriction limiting or prohibiting such speech would not and could not be viewpoint-neutral. This conclusion is reinforced by the fact that disruption by supporters of the speaker, in the form of clapping and cheering, delaying and disrupting the speech, would presumably not be limited by any restrictions placed on protestors. Any policy allowing this result would constitute an improper viewpoint-based restriction.[111]

One example of a policy that seeks to be viewpoint-neutral is the Stanford Policy on Campus Disruptions, which prohibits students, faculty, and staff from "prevent[ing] or disrupt[ing] the effective carrying out of a University function or approved activity, such as lectures, meetings . . . ceremonies . . . and public events."[112] This policy, however, does not distinguish or even address the role that speech may play in the disruption or prevention of the event, and therefore does not get past the issue of

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personnel, staff or the Governing Body,' permits praise and neutral feedback, but not criticism, of both government employees and, worse, the Governing Body itself.").

[110] Mark Tushnet, *Free Speech on Campus,* BALKINIZATION (Sept. 24, 2017) [hereinafter, Tushnet, *Free Speech*], https://balkin.blogspot.com/2017/09/free-speech-on-campus.html ("I doubt that there's a way to strike [the] balance [between the speaker with the microphone and the speaker in the audience] that doesn't take content into account."). With regard to the underlying reference to Congressman Wilson's outburst at President Obama in a speech before Congress, *see, e.g.*, Corey Dade and Naftali Bendavid, *'You Lie!' Jars Washington but Resonates Back Home,* WALL ST. J. (Sept. 11, 2009), https://www.wsj.com/articles/SB125258756088899359.

[111] *See, e.g.*, Wagner, *supra* note 64, at 235 (noting that her proposed rule restricting heckling that drowns out the "primary" speaker should withstand constitutional challenge because it "would cover heckling that seemingly supports the speaker" and could therefore be "justified without reference to content.").

[112] STANFORD UNIVERSITY, CAMPUS DISRUPTIONS POLICY STATEMENT, https://studentservices.stanford.edu/more-resources/student-policies/student-rights-responsibilities/campus-disruptions. The Martinez Letter notes that the policy states that "the application of the Policy also takes situational factors into consideration" and "[t]hus, for example, conduct appropriate at a political rally might constitute a violation of the Policy on Campus Disruptions if it occurred within a classroom." Martinez Letter, *supra* note 5, at 3 n.1. As discussed above, the law and policy considerations governing conduct in the classroom per se, which are governed by tenets of academic freedom, differ materially from that governing speech in a public forum, limited or otherwise, such as an outside speaker event at a university, regardless of whether that event happens to be held in a location otherwise used as a classroom.

viewpoint-neutrality. Other university policies and proposed legislation suffer from the same infirmity.[113]

Professor Frederick Schauer addresses some of the difficult issues under the First Amendment in dealing with protestors who are objecting to a speaker in a public forum, including the issue of content-neutral restrictions.[114] Professor Schauer notes, for example, that a content-neutral noise regulation would not be defensible against protestor speech, as "such a regulation would be most plainly constitutional only if it restricted the original speakers as well as those who are trying to keep them from being heard."[115] He goes on to posit a first-come-first-served restriction as a way to limit the speech of protestors:

> Although it is plain that hecklers do have free speech rights, the argument that they have rights to drown out other speakers seems strained. As long as reasonable and content-neutral time, place and manner restrictions are permissible, then it is at least plausible that some sort of first-come-first-served or other regulations designed to ensure that speakers can at least be heard would be

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[113] A number of universities and state legislatures have responded to the increase in student protests with policies and statutes meant to limit counterspeech and tamp down protests. *See, e.g.*, Jeffrey Adam Sachs, *Do Universities Need Choreographed Disagreement?*, 20 GEO. J.L. & PUB. POL'Y 937, 950 n.53, 951 n.55 (2022) (citing examples). The American Bar Association (the "ABA") has revised its accreditation standards to require law schools to "adopt, publish and adhere to" academic policies that, among other things, "[p]roscribe disruptive conduct that hinders free expression by preventing or substantially interfering with the carrying out of law school functions or approved activities such as classes, meetings, interviews, ceremonies and public events." *American Bar Association Section of Legal Education and Admissions to the Bar, Revised Standards for Approval of Law Schools, Standard 208 (b)(2)*, AM. BAR ASS'N (Feb. 2024), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2024/300-midyear-2024.pdf. To the extent the ABA's newly-adopted standard and those statutes and policies purport to prohibit heckling, they suffer from the same inadequacies as the Stanford policy. *See, e.g.*, Kasper, *supra* note 77, at 571 (Goldwater Institute's 2017 Model Campus Free Speech Act ("Goldwater Model Act") provision prohibiting protestors from disrupting a speaker with counterspeech "does not fully protect First Amendment rights for dissenters and protestors."); Franks, *supra* note 13, at 232-36 (proposed legislation (later revised) based on Goldwater Model Act "isn't a defense of free speech, it's an attack on it") (quoting John K. Wilson, *The Tennessee Legislature's Attack on Free Speech*, ACADEME BLOG (Feb. 12, 2017), https://academeblog.org/2017/02/12/the-tennessee-legislatures-attack-on-free-speech/).

[114] *See* Schauer, *Hostile Audience*, *supra* note 80, at 1693-98. Professor Schauer's discussion of content-neutral restrictions in a public forum is equally applicable to viewpoint-neutral restrictions in a limited public forum. *See* Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 829-30 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination.").

[115] Schauer, *Hostile Audience*, *supra* note 80, at 1695.

> permissible as well. In response, there might be the objection that such a regulation privileges those who get there first, or rewards those who have the resources to secure a permit in advance, but such arguments seem weak when compared to the argument for at least the reasonableness of regulations that are aimed at making the right to free speech effective, and restricting those who would make its exercise meaningless.[116]

Such a regulation would not solve the question of content-neutrality (or, in the case of a limited forum, viewpoint-neutrality).[117] It is unclear, for example, why one speaker would deserve priority.[118]

Support for Professor Schauer's position can be found in a handful of cases that have held in response to First Amendment claims that time, place, and manner restrictions can limit protestors' ability to disrupt permitted events.[119] Permitting regulations have long been recognized as a content-neutral means for the government "to regulate competing uses of

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[116] *Id.* Interestingly, the only case cited by Professor Schauer on the permissibility of a content-neutral time, place, or manner restriction to regulate counterspeech is the California Supreme Court's decision in *Kay*. *See* Section I.A above. Professor Schauer offers a number of examples of conduct, such as chewing gum or using visual distractions to disrupt the speaker, that raise the question of exactly what would count as interference subject to restriction. Schauer, *Hostile Audience*, *supra* note 80, at 1696; *see also, e.g.*, Wagner, *supra* note 64, at 234-35 (proffering a balance in which the "primary speaker" is given priority).

[117] *See* Rosenberger, 515 U.S. at 829-30 ("[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

[118] *See* Tushnet*, Free Speech*, *supra* note 110. Professor Schauer indicates that support in free speech theory for the "purported right of a heckler to drown out a speaker" is to be found in "individualistic arguments based on self-expression or some conception of individual autonomy" rather than "arguments based on searching for truth" or "based on engaging in democratic decisionmaking and deliberation." Schauer, *Hostile Audience*, *supra* note 80, at 1695 n.141. Professor Schauer's point arguably does not do justice to the principles of protest and dissent underlying much of free speech jurisprudence. As Professor Steven Shiffrin stated, dissent — "attack[ing] existing customs, habits, traditions and authorities" — is a concept that "stand[s] at the center of the First Amendment." STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 10 (1999). Professor Shiffrin notes that "dissent has important instrumental value;" its importance is not limited to self-expression as it also serves as "a crucial institution for challenging unjust hierarchies and for promoting progressive change." *Id.* at xii, 17.

[119] *See*, *e.g.*, Charles S. Nary, The New Heckler's Veto: Shouting Down Speech on University Campuses, 21 U. PENN. J. CON. LAW 305, 321-22 (2018).

public forums."[120] In *Startzell v. City of Philadelphia*, the Third Circuit took the permitting rationale a step further, stating that, "[t]he right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit."[121] In that case, Philly Pride Presents, Inc. ("Philly Pride") organized and obtained a permit for an event called OutFest "to celebrate 'National Coming Out Day' and to affirm LGBT identity."[122] Plaintiffs were a group of protestors who entered the festival grounds and approached the stage where the event speakers were located. The police directed the protestors to move after they, among other things, "used bullhorns and microphones in an attempt to drown out the platform speakers and then, most significantly, congregated in the middle of the walkway."[123] The court noted that the protestors also "block[ed] access to the vendors who had applied for booths at OutFest" and that "[t]he police action was not based on the content of [the protestors'] message but on their conduct."[124] The court held that removal of the protestors from the immediate area was not content-based, and stated:

> The City has an interest in ensuring that a permit-holder can use a permit for the purpose for which it was obtained. This interest necessarily includes the right of police officers to prevent [protestors] from disrupting or interfering with the message of the permit-holder. Thus, when protestors move from distributing literature and wearing signs to disruption of the permitted activities, the existence of a permit tilts the balance in favor of the permit-holders.[125]

Significantly, in a concurring opinion, Judge Stapleton pointed out the unprecedented basis of the court's decision:

> The Court persuasively demonstrates that the [protestors] had just as much right to be present at the festival as did the OutFest supporters and other members of the public. It also acknowledges that OutFest's pro-gay message and [the protestors'] anti-gay message were both protected speech. The police were thus presented with a situation

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[120] Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.").

[121] 533 F.3d 183, 198 (3d Cir. 2008).

[122] *Id.* at 189.

[123] *Id.* at 199.

[124] *Id.*

[125] *Id.* at 198-99.

> where two groups with conflicting protected messages were equally entitled to be on the public street where the crowd was assembling and were equally entitled to attempt to communicate their respective messages to as many people as possible. What the Court fails to do is to explain satisfactorily why, in the absence of "fighting words" or their equivalent, the police in such a situation have the ability to favor one side over the other by requiring the disfavored side to relocate to the periphery of the festival. My understanding of the case law is that, when conflicting points of view clash in a public forum, neither side has a right to speak without interruption, and the police must allow the competing groups to compete unless and until there are "fighting words," imminent violence or other serious threat to public safety.[126]

A handful of cases have, like *Startzell*, prioritized the rights of event sponsors over those of protestors.[127] Other cases, however, have found that such time, place, and manner restrictions, as applied, violate the First Amendment where a protestor was removed from an event for simply voicing a view contrary to that of the speaker or the subject of the event.[128]

Although *Startzell* does lend some support for the view that reasonable regulation of a forum should allow government restriction of speech so as to maintain order and allow the "permitted" speaker to speak, as Judge Stapleton's opinion points out, that view appears at odds with Supreme Court jurisprudence.[129] Moreover, even if a regulation limiting or

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[126] *Id.* at 206. Judge Stapleton adds: "Police may not, consistent with the First Amendment, silence protected speech based solely on their judgment that it is interfering with competing protected speech." *Id*. Judge Stapleton concurred (rather than dissented) based on his conclusion that at least some of the protestors had used fighting words directed at a specific transgender individual at the festival, and that the police reasonably intervened to avoid a breach of the peace. *Id.* at 207 n.15.

[127] *See, e.g.*, Grider v. Abramson, 994 F. Supp. 840, 847 (W.D. Ky. 1998) ("rally organizers had a prior claim to the sites."). The more recent cases following *Startzell* often reference the protestors' conduct as a basis for upholding the enforcement action. *See, e.g.*, Sessler v. City of Davenport, 640 F. Supp. 3d 841, 860-61, 866 (S.D. Iowa 2022) (limited public forum; protestor was allegedly "driving customers away" from vendors at festival), *appeal docketed*, No. 22-3459 (8th Cir Nov. 29, 2022); Marcavage v. City of Philadelphia, 778 F. Supp. 2d 556, 565 (E.D. Pa. 2011) (facts "almost identical" to Startzell), *aff'd*, 481 F.App'x 742 (3d Cir. 2012).

[128] *See, e.g.*, McGlone v. Metro. Gov't of Nashville, 649 F.App'x 402, 406, 409 (6th Cir. 2018); Garisto v. Topper, No. 1:20-CV-0646, 2023 WL 2923129, at *14 (M.D. Pa. Apr. 12, 2023).

[129] There is, of course, dicta in various Supreme Court cases that may be broadly read as supportive of time, place, or manner restrictions limiting counterspeech. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("two

prohibiting counterspeech at a public forum were deemed viewpoint-neutral, such a restriction would arguably run afoul of the requirement that there be an ample alternative forum. This point is discussed below.

4. Restrictions Must Allow for an Adequate Alternative Forum

Restrictions imposed in a limited public forum must also be reasonable, as judged in light of the purpose of the forum.[130] Whether restrictions are reasonable depends on, among other things, whether an adequate alternative forum is available for the speech.[131] Although the nature of a limited forum permits additional restrictions, the need for an adequate alternative still stands.[132]

An alternative forum "is not adequate if it 'foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups.'"[133] As the Court stated in *Reno v. ACLU*, "'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'"[134]

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parades cannot march on the same street simultaneously, and the government may allow only one.") (citing Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding permitting scheme)). The Court has also stated in this context, however, that the First and Fourteenth Amendments do not "afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford those who communicate ideas by pure speech." Cox v. Louisiana, 379 U.S. 536, 555 (1965) (reviewing (and reversing), inter alia, protestor's conviction for obstructing public passages).

[130] *See e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 806 (1985).

[131] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 690 (2010) (noting that restrictions are "more creditworthy" if there are other avenues available for speech); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983) (reasonableness of restrictions on speech "supported by the substantial alternative channels that remain open . . . . ").

[132] *Christian Legal Soc'y Chapter*, 561 U.S. at 690. Of course, the "reasonableness" standard is not a high bar, *Cornelius*, 473 U.S. at 808 (restriction "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation") (emphasis in original), and in any given case there may be a viable argument to be made that an adequate alternative forum is available. As set forth below, however, there is strong support generally for the inadequacy of alternatives in the case of a university speaker event.

[133] Weinberg v. City of Chicago, 310 F.3d 1029, 1041 (7th Cir. 2002) (citation omitted).

[134] 521 U.S. 844, 880 (1997) (quoting Schneider v. State of New Jersey (Town of Irvington), 308 U.S. 147, 163 (1939)); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (striking down ban on residential signs that prohibited anti-war protest signs; "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the sign someplace else, or conveying the same text or picture by other means.").

Protestors of a speaker at a university event in most instances lack an adequate and meaningful alternative. A protest of a speaker, a speaker's topic, or the opinions of the speaker other than in the forum at which the speaker is located would lose relevance and import were that protest moved to a different forum. As one court stated, "[s]peaking at a public meeting, where one may rally the support of other community members and attract wider publicity for one's views, is qualitatively different" from communicating outside such a meeting.[135] Indeed, in many cases, protestors may believe that "the medium is the message," and that the point to be conveyed is the protest itself, at that instant in time, with regard to that speaker. Professors Kevin Francis O'Neill and Raymond Vasvari articulate this idea in a slightly different context:

> Confronting an opponent in person may not merely be desirable, it may be part and parcel of the *message*. In some instances, one's very *presence* there is meant to convey resistance, vigilance, and the bearing of moral witness against those on the other side . . . . To interfere, then, with the right of such speakers to be present at such a forum — to bar them, for example, from sharing the forum with those they oppose — is literally to suppress the *content* of their message.[136]

Professor Nadine Strossen makes this point in discussing the importance of countering hate speech where it is found:

> I consider the responsibility to raise our voices against hateful speech to be especially incumbent on those of us who oppose censorship and urge counterspeech as the right alternative . . . . "[I]f we [in our legal system] tolerate hate speech, then the social compact ought to be that when people hear hate speech . . . they . . . condemn it; no matter to whom it's directed. . . . [W]henever you see it, as uncomfortable as it may be, you have to condemn it, *on the spot, right there.*"[137]

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[135] SEIU Local 73 v. Board of Trustees of Univ. of Ill., No. 2:22-cv-02099, 2023 WL 3587534, at *9 (C.D. Ill. May 23, 2023) (denying motion to dismiss complaint alleging that restriction on speaking in limited forum was unreasonable).

[136] Kevin Francis O'Neill & Raymond Vasvari, *Counter-Demonstration as Protected Speech: Finding the Right to Confrontation in Existing First Amendment Law*, 23 HASTINGS CONST. L.Q. 77, 88-89 (1996) (discussion of counter-demonstrations); *see also* Waldron, *supra* note 7, at 19 ("The immediacy of interjection, which . . . contributes to the vigor of debate, may be important too for the comparisons that the intellectual marketplace [of ideas] requires if it is to be successful.").

[137] Strossen, *supra* note 3, at 166 (quoting Professor Theodore Shaw, former head of the NAACP Legal Defense and Educational Fund; emphasis in original).

A number of cases and commentators support this view that both the audience for the communication and the location of the forum are centrally relevant to the analysis of the adequacy of the alternative.[138] Thus, denying a parent the ability to attend a school board meeting in person was a First Amendment violation where the offered alternative, telephone participation, "would have substantially diminished [the parent's] ability to communicate not only with the school board, but with community members" and would have lessened the effect of his speech on the intended audience.[139] Denying Black protestors a permit to march through a white neighborhood because of a fear of violence, and offering the alternative of marching through a Black neighborhood, was inadequate where the point of the protest was to decry Black people's inability to traverse the white neighborhood safely.[140] A policy disallowing students from building "shanties" in protest of Apartheid near the University of Virginia Rotunda — the center of campus, visible to the University's governing body — was found invalid, as no adequate alternative with comparable visibility to the intended audience was available.[141] Similarly, barring counterspeech at a university speaker event in most cases will not be a reasonable restriction because there is no comparable, adequate alternative to convey the message in the same way to the same audience.

Professor Strossen, it should be noted, is not a proponent of counterspeech that shouts down a speaker. She states, for example, that "[t]hose engaged in counterspeech should be careful not to act in ways that are ultimately counterproductive, including efforts to silence hateful speakers through aggressive counter-demonstrations." *Id.* at 161. The important point that she (and Professor Shaw) make in the quote above is nevertheless forcefully supportive of the importance of the speaker forum for counterspeech and the inadequacy of any proffered alternative.

[138] *See, e.g.*, *City of Ladue*, 512 U.S. at 56 (alternatives to posting signs on residential property, such as holding or posting signs elsewhere, are inadequate where protestors want to reach residential neighbors); Million Youth March Inc. v. Safir, 18 F. Supp. 2d 334, 347 (S.D.N.Y. 1998) ("The requirement that potential alternatives be 'ample' requires a nuanced analysis that may take account of (1) the audience to which the speaker seeks to communicate and (2) the contribution of the desired location to the meaning of the speech."); Kevin Francis O'Neill, *Disentangling the Law of Public Protest,* 45 LOY. L. REV. 411, 442-445 (1999) (collecting cases).

[139] Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 547, 549-50 (D. Vt. 2014) (finding that "[s]chool board meetings are limited public fora.").

[140] Dr. Martin Luther King, Jr., Movement Inc. v. City of Chicago, 419 F. Supp. 667, 673-75 (N.D. Ill. 1976).

[141] Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 339-40 (W.D. Va. 1987). *See also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) (where protestors who were targeting a naval parade were denied water access, restriction struck down as there was no available alterative that allowed the protestors to reach their intended audience); Nationalist Movement v. City of Boston, 12 F. Supp. 2d 182, 192 (D. Mass. 1998) ("the specific place where a message is communicated may be important to the message and, consequently, of constitutional significance itself.").

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The Supreme Court's precedents and those of other federal courts can fairly be read as generally unsupportive of, if not antithetical to public universities' efforts to limit counterspeech at campus speaker events.[142] The combination of the lack of a viewpoint-neutral regulation and the lack of an alternative forum creates the constitutional infirmity on governmental restrictions on counterspeech at these events.[143] As discussed below, that protest and counterspeech is all the more important in light of the increase in right-wing extremism and hate speech in recent years.[144]

II. THE CONTEXT AND IMPORTANCE OF STUDENT PROTESTS AGAINST THE RISE OF HATE SPEECH IN AN AGE OF RIGHT-WING EXTREMISM

The spate of student protests in the late 2010s and more recently have both occurred in a political and social environment that has grown progressively more turbulent. Right-wing extremism increased exponentially after the election of President Obama.[145] Social media and conservative

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[142] Professor Waldron submits that, "American constitutional doctrine on heckling remains uncertain and unsettled; there are not unequivocal Supreme Court precedents on the matter and state law is mixed." Waldron, *supra* note 7, at 2. Although that is not an unfair statement, this Article takes the position that insofar as heckling constitutes speech, its protection is certainly more consistent with the tenor and holdings of existing Supreme Court precedent than is the contrary view. As also noted above, although support can be found in the academy and in court decisions and dicta for limits on heckling by protestors, the legal landscape is not as stark as Dean Martinez makes it out to be in her letter to the SLS community.

[143] One might conclude that this result, precluding any limitations on counterspeech, lacks "practical wisdom" and will lead to "anarchy" — the conclusion reached by Justice Jackson in his dissent in *Terminiello*, which reversed the conviction of a defendant whose provocative speech stirred a crowd to anger and violence. Justice Jackson, despairing at the result, famously stated: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." Terminiello v. Chicago*,* 337 U.S. 1, 37 (1949). His concerns may apply in the present context, but *Terminiello* remains the law, raucous counterspeech remains protected, and Justice Jackson's dissent remains just that — a dissent.

[144] Of course, what's good for the goose is good for the gander. Nothing in this article is intended to imply that permissible limits on counterspeech turn on one's political views.

[145] *See* Anti-Defamation League ("ADL"), *A Dark and Constant Rage: 25 Years of Right-Wing Terrorism in the United States,* 2017, at 5, 8-16 [hereinafter, *ADL 2017 Report*]), https://www.adl.org/ resources/report/dark-and-constant-rage-25-years-right-wing-terrorism-united-states. The term "right-wing

news outlets aided its rise, touting, for example, the "great replacement" theory, a thinly-disguised restatement of white supremacy.[146] Former President Trump fueled the fire, particularly with his comments after the 2017 "Unite the Right" rally in Charlottesville, Virginia, in which he stated that there were "very fine people on both sides" — sending "a message to right-wing extremists and white supremacists that they had an ally in the Oval Office."[147] Following the January 6, 2021 insurrection and his exit from the White House, Trump has "abandoned even the pretense of detachment from right-wing extremist groups . . . [and has] openly embraced QAnon, a quasi-mystical political cult . . ."[148] Right-wing extremism and terror have not waned with Trump's departure from office. These individuals and groups were responsible for *all* extremist-related murders in 2022 and seventy-five percent of extremist-related murders in the 2013-2022 time period.[149]

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extremism" includes "white supremacist and anti-government extremist movements as well as a variety of single-issue extremist and anti-government extremist movements . . . . [T]he newest right-wing movements to emerge in recent years . . . include incels and other toxic masculinity extremists, QAnon adherents and anti-government boogalooers. . . ." ADL Center on Extremism, *Murder & Extremism in the United States in 2022,* February 2023, at 6 [hereinafter, *ADL 2023 Report*], https://www.adl.org/sites/default/files/pdfs/2023-02/Murder-and-Extremism-in-the-United-States-in-2022.pdf. The increase in right-wing extremism and violence during and subsequent to President Obama's tenure in office is described in Toobin, *supra* note 14, at 357-73.

[146] *See* Simon Clark, *How White Supremacy Returned to Mainstream Politics,* CENTER FOR AM. PROGRESS (July 1, 2020), https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics/; *see generally* Rachel Kleinfeld, *The Rise of Political Violence in the United States,* JOURNAL OF DEMOCRACY, Oct. 2021, at 160-61 ("[I]deas that were once confined to fringe groups now appear in the mainstream media. White-supremacist ideas, militia fashion, and conspiracy theories spread via gaming websites, YouTube channels, and blogs, while a slippery language of memes, slang, and jokes blurs the line between posturing and provoking violence, normalizing radical ideologies and activities.").

[147] Toobin, *supra* note 14, at 364. That 2017 rally — prompted by the city of Charlottesville's announcement that it would be removing a statute of Robert E. Lee — included a gathering of members of the KKK and other right-wing extremist groups and became "a frenzy of white supremacy and anti-Semitism, with hundreds chanting, 'Jews will not replace us!'" *Id.* at 363.

[148] *Id.* at 372.

[149] *ADL 2023 Report*, *supra* note 145, at 4-5. The 2022 murders include the shootings at Club Q, an LGBTQ+ bar in Colorado Springs, Colorado, on November 19, 2022, in which five people were killed and seventeen wounded (with others injured while trying to escape), and the attack by a white supremacist at a supermarket in Buffalo, New York, on May 14, 2022, killing ten and wounding three (eleven of the victims were Black). *Id*. at 16-17. The ADL notes that the statistics in the *ADL 2023 Report* are just one measure of right-wing extremist activity and criminal conduct. *Id*. at 1. Other crimes and incidents by right-wing

The rise in right-wing extremism has led to an increase in hate speech.[150] Reporting on the sentencing in connection with the deadliest antisemitic attack in U.S. history, the 2018 killing of eleven worshippers at a Pittsburgh synagogue, *The New York Times* stated that "online far-right fever swamps . . . have grown immensely since the synagogue massacre," and that "[t]he idea of the 'great replacement' — that elites, and often specifically Jewish people, are bringing in darker-skinned immigrants to 'replace' white Americans — . . . [is] expressed routinely on right-wing websites."[151] The ADL reports that "[o]nline hate and harassment surged" in 2023 and that the increases "were most pronounced among Black/African American and Muslim respondents," with Jewish respondents also reporting an increase.[152] In a vicious circle, the increase in hate speech leads to increased extremist activity, including increased violence.[153]

Concomitantly with the rise in right-wing extremism and hate speech, the demographics of public universities have radically changed in the past two decades. The student bodies of those schools are much more heterogenous today. Non-white student attendance as a percentage of the entire student population at public universities increased from 30.2% to 48.9% between 2000 and 2022.[154] Although Black student enrollment in public

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extremists are tracked by ADL and information thereon can be accessed at https://www.adl.org/resources/tools-to-track-hate/heat-map.

[150] *See, e.g.*, Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1031 (2021) ("Hate speech and hate crimes are trending. In the past five years, there has been an upsurge in extreme nationalist and nativist political ideology in mainstream politics globally."); Kleinfeld, *supra* note 146, at 162. The War in the Middle East starting in October 2023 led to further extremist activity, with increased threats and violence against both Jewish and Muslim people. *See, e.g.*, Kate Hildago Bellows, *Bias-Related Incidents are Roiling Colleges. What Might the Response Look Like?*, CHRON. OF HIGHER ED. (Nov. 6, 2023), https://www.chronicle.com/article/bias-related-incidents-are-roiling-colleges-what-might-the-response-look-like.

[151] Campbell Robertson, *Experts Say Extreme Views Held by Killer Are Widespread,* N.Y. TIMES, Aug 5, 2023, at A16.

[152] *Online Hate and Harassment: The American Experience 2023*, ADL CTR. FOR TECH. AND SOC'Y (June 27, 2023), https://www.adl.org/resources/report/online-hate-and-harassment-american-experience-2023.

[153] *See, e.g.*, Daniel L. Bynum, *How hateful rhetoric connects to real-world violence,* BROOKINGS (Apr. 9, 2021), https://www.brookings.edu/articles/how-hateful-rhetoric-connects-to-real-world-violence/.

[154] NAT'L CTR. FOR EDUC. STAT. ("NCES"), DIGEST OF EDUCATION STATISTICS, TABLE 306.20, *Total fall enrollment in degree-granting postsecondary institutions, by level and control of institution and race/ethnicity or nonresident status of student: Selected years, 1976 through 2022* (Dec. 2023) [hereinafter, *NCES Statistics*], https://www.nces.ed.gov/programs/digest/d23/tables/dt23_306.20.asp?current=yes. White student enrollment at public universities dropped from 69.8% to 51.1% in that same time period. LGBTQ+ data is

universities increased only moderately in this time period, from 11.6% to 12.1%, it reached a high of 13.5% in 2010.[155] Hispanic student enrollment more than doubled from 10.8% of the student population in 2000 to 23.5% in 2022.[156]

Not surprisingly in view of these statistics, leaders of today's student protests and other activists in many cases "are not the helicopter-parented offspring of the upper middle class . . . . [Rather, in many cases they are] students of color . . . [concerned with] eradicating persistent manifestations of discrimination that have outlasted decades of efforts at integration. . . ."[157] As Professor Healy notes in a different context, "[g]roups that were once excluded from, or marginalized by, the media and the academy have achieved a measure of power in these spheres and are using that power to push back against existing norms."[158] Indeed, the increase in right-wing activism and hate speech has arguably had a "galvanizing impact" on students, leading to "widespread campus activism in the past several years, as well as the increasing society-wide activism, including the Black Lives Matter, LGBTQ rights, anti-sexual violence and pro-immigrants' rights movements. This activism has flourished at the same time there have been reports of hateful, discriminatory speech, as well as bias crimes, against members of the pertinent groups."[159] It is these students who are

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more difficult to come by. NCES does not have comparable statistics for LGBTQ+ students. Neither the U.S. census nor other federal data sources have historically tracked sexual orientation or gender identity (beyond birth sex) in higher education. POSTSECONDARY NAT'L POL'Y INST., LGBTQ+ STUDENTS IN HIGHER EDUCATION FACTSHEET (Updated Nov. 2023), https://pnpi.org/factsheets/lgbtq-students-in-higher-education/. That factsheet reports that in "a 2020 survey from the Association of American Universities (AAU) that sampled more than 180,000 undergraduate and graduate students, nearly 17% identified as gay, lesbian, bisexual, asexual, queer, or questioning" and "1.7% of undergraduate and graduate students identified their gender as transgender, nonbinary, or questioning." *Id.* These numbers appear higher than the general population. One recent survey indicates that 8.6% of the population 18 or older identified as LGBT. *Id.*

[155] *NCES Statistics*, *supra* note 154.

[156] *Id.*

[157] Suzanne Nossel, *You can only protect campus speech if you acknowledge racism*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/outlook/you-can-only-protect-campus-speech-if-you-acknowledge-racism/2018/05/25/5c26bbcc-59ed-11e8-b656-a5f8c2a9295d_story.html; *see also* CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 13 (noting that "the changing demographics of American higher education," leading to increased diversity on campuses, "means there are more people on campus who can testify to the very real harms associated with hateful or intolerant speech, or the day-to-day indignities of microaggressions.").

[158] Healy, *Social Sanctions on Speech*, *supra* note 19, at 57-58 (discussing shifting norms in various cultural institutions).

[159] Strossen, *supra* note 3, at 132. *See also* Julia Brunette Johnson, *The Protest Generation,* NAT'L JURIST (Aug. 10, 2023), https://www.nationaljurist.com/national-jurist-magazine/the-protest-generation ("While student

confronting an onslaught of hate and extremism and who are leading and participating in campus protests, using counterspeech and heckling speakers. "The next generation is not dominated by so-called snowflakes or cowards, but rather by young adults determined to advance their notions of equality and justice, just as previous generations have done."[160]

In light of the rise of right-wing violence and associated hate speech, counterspeech is often seen by protestors as central to effectively conveying their message. Responding to speakers in the moment is essential. As Professor Strossen emphasizes, whenever you see hate speech, "you have to condemn it, *on the spot*, *right there*."[161]

This leaves the question as to when counterspeech in its extreme form — shouting down a speaker — is warranted. That question will turn on any number of factors, such as the speaker, the speech, the moment, the audience, and the protestors.[162] Where the line is drawn between a few intermittent interjections and shouting down is a strategic question for protestors in any given case.[163]

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activism is not new, it has taken on a new life in recent years.") (reporting on recent law school protests).

[160] Nossel, *supra* note 157. An example of what "previous generations have done" is seen in the 1960s Berkeley Free Speech Movement ("FSM"), lauded by Professors Chemerinsky and Gillman as protests that "helped establish within American higher education the rights of students to express themselves outside the academic context." CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 76. The FSM protests were (like many of the protests in the 1960s) led by thoughtful, intelligent students and were (like today's protests) vociferously opposed by university administrators at the time. *See, e.g.*, Samuel Farber, *The Berkeley Free Speech Movement, 56 Years Later*, JACOBIN (Sept. 3, 2020), https://www.jacobin.com/202/09/berkeley-free-speech-movement-hal-draper (recounting the "political tone-deaf responses" of the university administration in "rebuffing the demands of the nascent FSM coalition" and the aggressive actions of the student protestors in response to the administration's intransigence that "progressively delegitimized" the administration's authority and eventually led to faculty support of the FSM). Today's protests, even though opposed by administrators in many cases as to form rather than substance, are more often than not similarly led by creative, dedicated students.

[161] Strossen, *supra* note 3, at 166.

[162] The question may also turn on whether the university has implemented a policy and and/or whether the state in which the school is located has passed legislation to tamp down student counterspeech. *See supra* note 113, discussing such responses to student protests. With regard to public universities, such policies and legislation are arguably unconstitutional. *Id.* In many cases, it may be unclear whether students have a path to engage in counterspeech against speakers without facing sanctions, and from a students' point of view, the costs of school discipline may prove significant in assessing a course of action, even if that action ultimately may be vindicated in court.

[163] Calling this a strategic question assumes of course that the student protestors are acting in concert, which may not be the case. It may be that "heckling by

Putting aside this strategic question, there are certainly times when it may be fair to say that a speaker does not merit debate, and where a rational protestor may conclude that a speaker should be shouted down. It may be appropriate to say: we have had that debate, the issue is decided, and there is no room for further discussion. An example of such an instance might be found in the protest of Charles Murray at Middlebury College in 2017.[164] Student protestors shut down the event, inciting a media frenzy and resulting in widespread condemnation of their actions.[165] With little attention to the basis for the protestors' objections or the context of the students' response, the sanctity of free speech rights was repeatedly invoked and the students roundly criticized for their apparent disregard of those rights.[166] The "pushing and shoving" in an encounter between Murray and the protestors (and a faculty member) undoubtedly increased the media attention to the event.[167]

Putting that protest in context calls for looking back to student protests in the 1970s of the eugenics-promoting William Shockley. A report of one of those protests, at Yale University in 1974, is provided by Professors Chemerinsky and Gillman in their book, *Free Speech on Campus*.[168] After Shockley was invited to debate at Yale, students protested his appearance, and he was "drowned out" and prevented from speaking.[169] Defending his right to debate, Chemerinsky and Gillman refer to Shockley as a "controversial speaker[]" who was "a famed Stanford University physicist and inventor, who later in life became infamous for expressing the view that 'the major cause of the American Negros' intellectual and social deficits is hereditary and racially genetic in origin and, thus, not remediable to a

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many people adds up to something of a cacophony, even though this is neither orchestrated nor expected by the hecklers." Waldron, *supra* note 7, at 30.

[164] Middlebury College is a private institution and therefore not bound by the First Amendment in regulating student speech. It does, however, like many colleges and universities, tout principles of free speech as an important part of its mission. *See* Middlebury College, *Policy on Open Expression*, MIDDLEBURY HANDBOOK (Nov. 21, 2019), https://handbook.middlebury.edu/pages/i-policies-for-all/genl-principles/freedom-of-expression/.

[165] *See, e.g.*, Taylor Gee, *How the Middlebury Riot Really Went Down,* POLITICO MAG. (May 28, 2017), https://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195/.

[166] *See Smothering Free Speech, supra* note 2; Brock Read, *A Scuffle and a Professor's Injury Make Middlebury a Free-Speech Flashpoint*, CHRON. HIGHER ED. (Mar. 5, 2017), https://www.chronicle.com/article/a-scuffle-and-a-professors-injury-make-middlebury-a-free-speech-flashpoint/.

[167] *See* Read, *supra* note 166.

[168] *See* CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS*, supra* note 11, at 156.

[169] Anthony Lewis, *A Report on The Dangers To the Right Of Free Speech,* N.Y. TIMES (Jan. 26, 1975), https://www.nytimes.com/1975/01/26/archives/a-report-on-the-dangers-to-the-right-of-free-speech.html.

major degree by practical improvements in the environment.'"[170] They note that "[a]mong other measures, Shockley advocated voluntary sterilization within the African American community."[171]

Shockley, however, was more than a controversial speaker; indeed, he has been described as "a charlatan who used his scientific credentials to advance racist ideology."[172] Shockley jointly won the 1956 Nobel Prize in Physics, having been part of the team that invented the transistor, but he had no background or training in genetics, and did not engage in peer-reviewed research in connection with his promulgation of eugenic theories.[173] In the words of one commentator, Shockley was "firmly committed to the racial inferiority of Black people. Shockley was not just a physicist who held racist views. He was part of a wider academic system that then, and now, perpetuates racial inequality."[174] Moreover, Shockley's views and the folly of eugenics were not just "controversial" in the 1970s; his views were reported then as now to be offensive, hateful, and without scientific basis.[175]

Years later, in 2017, Charles Murray was invited by a student group to speak at Middlebury College. Like Shockley, Murray was frequently described as a "controversial" speaker. That view stemmed from his

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[170] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 156. These ideas can be traced back to the beginning of the last century, long before Shockley espoused them. *See, e.g.*, Joan Vogel, *Biological Theories of Human Behavior: Admonitions of a Skeptic,* 22 VT. L. REV. 425, 429 (1997) (discussing history of eugenics theory).

[171] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 156.

[172] H. Holden Thorp, *Shockley was a racist and eugenicist,* SCIENCE (Nov. 17, 2022), https://www.science.org/doi/10.1126/science.adf8117.

[173] *Id. See* American Society of Human Genetics ("ASHG"), *Facing Our History — Building an Equitable Future Initiative* (Jan. 2023), at 3, 11, https://www.ashg.org;wp-content/uploads/2023/01/Facing_Our_History-Building_an_Equitable_Future_Final_Report_January_2023.pdf (report documenting, inter alia, ASHG's "history of past indiscretions linked to racism, eugenics or other systemic forms of injustice" and noting that ASHG was hesitant to challenge Shockley in the 1960s despite his lack of "any background or training in genetics . . .").

[174] Ebony Omotola McGee, *Dismantle racism in science,* SCIENCE (Mar. 1, 2022), https://www.science.org/doi/10.1126/science.abo7849.

[175] *See, e.g.*, Wallace Turner, *Stanford Vetoes Shockley Course*, N.Y. TIMES (May 2, 1972), https://www.nytimes.com/1972/05/02/archives/stanford-vetoes-shockley-course-professor-sought-to-teach-disputed.html (reporting on Stanford University's decision denying Shockley permission to teach a course for credit on "dysgenics;" the committee report issued in connection with that decision stated that Shockley's "genocidal policies . . . are abhorrent to all decent people whatever their skin color."); Michael A. Hiltzik, *The Twisted Legacy of William Shockley*, L.A. TIMES (Dec. 2, 2001), https://latimes.com/archives/la-xpm-2001-dec-02-tm-10501-story.html (noting that "the image of Shockley the racist crackpot" traces back to the mid-1960s).

"extremely controversial thesis that there were racial differences in intelligence and that these differences are important factors influencing economic and social success in the United States. Many critics found deeply offensive the idea that [B]lacks in America were overall less successful than whites not because of persistent discrimination, but because they were less intelligent."[176] A number of scholars concluded that "Murray's claims about race and intelligence . . . do not stand up to serious critical or empirical examination."[177] That conclusion was reached years before Murray's appearance at Middlebury: scientific studies and leading academics in the mid-1990s had "provide[d] compelling refutation of [Murray's] methodologies and conclusions," finding his "entire argument" based on "dubious assumptions" and "zero evidence supporting the claim the differences in IQ test scores between whites and blacks are due to genetics . . . ."[178] Moreover, by the mid-2010s, it had become well-recognized that attacks questioning the IQ of minorities, and Blacks in particular, were widely-touted tropes within the right-wing extremist arsenal.[179]

Thus, two decades after Murray's theory had been derided, and forty years after Shockley had been marketing similar hate on college campuses, Murray was invited to a speaker event where he would be introduced by the president of Middlebury College and would appear on stage with one of the college's leading political science professors.[180] By organizing the event in this way, Middlebury's administration appeared to be giving an imprimatur to Murray and thus to his beliefs. The students' view of these developments may have understandably been similar to that articulated by one group of commentators soon after the event: "[a]sserting that the relatively poorer intellectual performance of racial groups is based on their genes is mistaken theoretically and unfounded empirically; and given the consequences of promulgating the policies that follow from such

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[176] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 63. This thesis was promulgated in the 1994 book authored by Murray and Richard J. Herrnstein entitled, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE.

[177] Eric Turkheimer, Kathryn Page Harden & Richard E. Nisbett, *Charles Murray is once again peddling junk science about race and IQ,* VOX (May 18, 2017), https://www.vox.com/the-big-idea/2017/5/18/15655638/charles-murray-race-iq-sam-harris-science-free-speech; *see also* Alex Shepard, *Charles Murray is Never Going Away,* NEW REPUBLIC (Jan. 28, 2020), https://newrepublic.com/article/156330/charles-murray-never-going-away; CHEMERINSKY AND GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 64.

[178] CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 64.

[179] *See, e.g.*, Clark, *supra* note 146 (noting that "[a]n obsession with genetics and intelligence has long been a hallmark of white supremacists" and citing a Neo-Nazi group's article "in which the group claimed that allowing immigration from Central America would lower the average IQ of Americans.").

[180] Gee, *supra* note 165. This was also just a few months after Trump's election in 2016.

assertions, it is egregiously wrong morally."[181] Vigorous non-violent protest is appropriate and should be expected under such circumstances.[182]

Of course, this does not mean Shockley or Murray should have been subject to government censorship. However, as discussed in Section I above, a speaker does not have a right to an audience. The students at Middlebury (like those at Yale in 1974[183]) took the position that the speaker and his scientifically unfounded and offensive views — impugning a whole race of people without basis — were simply not worthy of debate. That's not a free speech issue — these students were not government actors even if these were public institutions — and it is an entirely understandable position to take. It is rational to ask why views such as those found in Shockley's and Murray's writings are still under discussion in this day and age, and it is rational to refuse to debate them.[184]

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In light of the social upheaval of the past decade and the significance of the issues being confronted today, it should be no surprise that campus protests continue and that those protests may include heckling and jeering, and perhaps even shouting down a speaker in some instances. In this environment, more attention needs to be paid to the motivations, issues, and concerns animating the protestors. Professor Roderick Ferguson makes this point clearly:

> [I]t is time that we begin to see student protests not simply as disruptions to the normal order of things or as inconveniences to everyday life at universities. Student protests are intellectual and political moments in their own right,

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[181] Turkheimer, Harden & Nisbett, *supra* note 177.

[182] That is, protest in the form of counterspeech, even in the form of heckling and jeering, is appropriate. Violence and physical assaults are not. As noted above, the Middlebury event apparently involved physical confrontations and was marred by what appear to be a series of unfortunate missteps by the college administration. *See* Gee, *supra* note 165. A portion of those missteps may have been the failure to preclude outside non-student protestors (who may have borne responsibility for the violence) from participating in the event. *See id.*

[183] *See* CHEMERINSKY & GILLMAN, FREE SPEECH ON CAMPUS, *supra* note 11, at 156.

[184] Vice-President Harris's response to Florida Governor Ronald DeSantis's invitation to "discuss" Florida's approval of "an overhaul to its standards for teaching Black history, which now say middle schoolers should be taught that enslaved people developed skills that could be of personal benefit," is instructive. The Vice-President appropriately replied to that invitation: "[T]here is no round table, no lecture, no invitation we will accept to debate an undeniable fact: There were no redeeming qualities of slavery." Zolan Kanno-Youngs, *Kamala Harris Takes on a Forceful New Role in the 2024 Campaign,* N.Y. TIMES, Aug. 8, 2023, at A9.

> expanding our definitions of what issues are socially and politically relevant, broadening our appreciation of those questions and ideas that should capture our intellectual interests: issues concerning state violence, environmental devastation, racism, transphobia, rape, and settler colonialism.[185]

In short, campus protests against hate speech and other invidious rhetoric warrant close hearings, on the merits, especially where those protests are based on defensible principles of free speech.

CONCLUSION

There is a coherent argument to be made that student protestors' counterspeech is protected under the First Amendment — period, full stop, end of sentence, end of paragraph. A fair reading of existing precedent is that counterspeech that disrupts a speaker is protected speech even if it results in the speaker being shouted down. This remains true in the limited forum of a campus speaker event. That counterspeech can be noisy, ugly, accusatory, disturbing, and disruptive, but it should be no surprise that protests get contentious where the issues — hate speech, ongoing discrimination, and attacks on democracy itself — are of such moment. Respect, courtesy, and broadmindedness are all virtues, but they are not dictated by the First Amendment.[186]

Does that mean that as a strategic matter shouting down speakers should become commonplace at student protests?[187] Probably not. But that is an issue protestors need to grapple with, and the approach in any given case will turn on, among other things, the nature of the speech proffered by the speaker. Is this the answer that university administrators want to hear? Clearly not. But there is a sound argument to be made that this is where the law currently stands, and that rather than lecturing students about how they should protest, we should be listening more closely to the messages of those protests.

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[185] RODERICK A. FERGUSON, WE DEMAND: THE UNIVERSITY AND STUDENT PROTESTS 10 (2017).

[186] Professor Healy's counsel in discussing broader principles of free speech is applicable here: "None of this is to say that we shouldn't be concerned with the decline of civility . . . . But confusing the ideal of civility with the principle of free speech is not helpful. It disserves free speech by suggesting it is more limited than it really is. And it cheapens civility by tying it to a principle that sets the baseline, not the goal, for the level of our public discourse." Healy, *Social Sanctions on Speech*, *supra* note 19, at 62.

[187] Just to emphasize, it is not currently commonplace. *See* Franks, *supra* note 13, at 220; Chemerinsky, *Comment on Free Speech*, *supra* note 6, at 688.