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FREE SPEECH HYPOCRISY: CAMPUS FREE SPEECH CONFLICTS AND THE SUB- LEGAL FIRST AMENDMENT

CHRISTINA E. WELLS*

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INTRODUCTION

College and university campuses are awash in free speech conflicts—i.e., conflicts between two individuals or groups of First Amendment actors, such as a speaker and angry protestors. In 2015, for example, student protestors at the

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University of Missouri (MU) had extremely contentious encounters with the media at an outdoor gathering on campus.¹ That same fall, after receiving emails regarding how they should respond to offensive Halloween costumes, Yale University students had contentious encounters with professors, protested, and ultimately demanded the professors' resignations.² More recently, an extraordinarily disruptive student protest at Middlebury College erupted in response to a lecture by Charles Murray, author of *The Bell Curve*.³ In 2017 alone, similar free speech conflicts occurred at Auburn University, the University of California (Berkeley), St. Olaf's College, and Evergreen State College, among others.⁴

Many observers cast these conflicts as First Amendment tragedies, primarily laying blame at the feet of student

1. Jonathan Peters, *Why Journalists Have the Right to Cover the University of Missouri Protests*, COLUM. JOURNALISM REV. (Nov. 10, 2015), http://www.cjr.org/united_states_project/university_of_missouri_protests_first_amendment.php [<https://perma.cc/9PAU-RKHZ>]; Conor Friedersdorf, *Campus Activists Weaponize 'Safe Space'*, ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/11/how-campus-activists-are-weaponizing-the-safe-space/415080/> [<https://perma.cc/JT56-FXCH>] [hereinafter Friedersdorf, *Campus Activists*].

2. Conor Friedersdorf, *The Perils of Writing a Provocative Email at Yale*, ATLANTIC (May 26, 2016), <https://www.theatlantic.com/politics/archive/2016/05/the-peril-of-writing-a-provocative-email-at-yale/484418/> [<https://perma.cc/9XT7-JQ9A>] [hereinafter Friedersdorf, *Perils*].

3. Editorial Bd., *Smothering Speech at Middlebury*, N.Y. TIMES (Mar. 7, 2017), https://www.nytimes.com/2017/03/07/opinion/smothering-speech-at-middlebury.html?_r=0 [<https://perma.cc/4S95-X8KG>].

4. Protests at the University of California and Auburn University, for example, occurred in response to controversial speakers invited to campus. At St. Olaf's College, students occupied campus buildings after racially hateful messages appeared on campus over the course of a year. See CHRON. OF HIGHER EDUC., DEALING WITH CONTROVERSIAL SPEAKERS ON CAMPUS (2017) http://www.chronicle.com/items/biz/resource/ChronFocus_ControversialSpeakersv3_i.pdf [<https://perma.cc/54P8-9245>]; see also Lindsey Bever, *Protests Erupt, Classes Cancelled after Racist Notes Anger Minnesota College*, WASH. POST (May 1, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/01/protests-erupt-classes-canceled-after-racist-notes-enrage-a-minnesota-college/?utm_term=.aee6d29149cb [<https://perma.cc/GV89-BKP4>]. At Evergreen State College students protested due to rising racial tensions over the previous year, which came to a head after a faculty member's email response to a suggested change in the school's historical "[D]ay of [A]bsence." Susan Svrluga, *Evergreen State College Closes Again After Threat and Protests Over Race*, WASH. POST (June 5, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/06/05/college-closed-for-third-day-concerned-about-threat-after-protests-over-race/?utm_term=.04d98a650f70 [<https://perma.cc/DB2J-WXDR>]; Matt Driscoll, *If You are Going to Talk About Evergreen, At Least Get Your Facts Straight*, OLYMPIAN (June 5, 2016), <http://www.theolympian.com/news/local/news-columns-blogs/article154526814.html> [<https://perma.cc/6GVJ-PMSP>].

protestors. In light of the protestors' actions, the Thomas Jefferson Center awarded to MU and Yale "Jefferson Muzzles," which recognize the most "egregious or ridiculous affronts" to free speech.⁵ Others lament the protestors' ignorance of the First Amendment⁶ or characterize their actions as censorship,⁷ likening them to mobs trying to stifle free speech.⁸ This concern with maintaining unhindered expression is understandable. The First Amendment "occupies [a] kind of pride of place" in the United States,⁹ and colleges and universities are supposed to be places of free and open inquiry consistent with the spirit of the First Amendment.¹⁰ But there is an element of hypocrisy to the above criticism, which ignores what the protestors are actually doing as well as the structure and purposes of the Supreme Court's doctrine. As a result, this criticism threatens to undermine the very thing it claims to want to protect.

The First Amendment prevents *government* actors from abridging our speech rights through their official conduct.¹¹ More particularly, it prevents government officials from regulating the content of speech, except in narrow circumstances.¹² The Court's antipathy toward regulation of

5. JEFFERSON MUZZLES, <http://tjcenter.org/2016-jefferson-muzzles/> (last visited Oct. 4, 2017) [<https://perma.cc/2LFB-RVQA>].

6. Peters, *supra* note 1; David Folkenflik, *Analysis: At the University of Missouri, An Unlearned Free Speech Lesson*, NPR (Nov. 10, 2015, 7:28 PM), <http://www.npr.org/2015/11/10/455532242/analysis-at-the-university-of-missouri-an-unlearned-free-speech-lesson> [<https://perma.cc/ZCS6-Z33R>].

7. Haley Hudler, *Yale Students Demand Resignations from Faculty Members Over Halloween Email*, FIRE (Nov. 6, 2015), <https://www.thefire.org/yale-students-demand-resignations-from-faculty-members-over-halloween-email/> [<https://perma.cc/B3LC-6VCT>]; Editorial Bd., *supra* note 3.

8. Bari Weiss, *When the Left Turns on Its Own*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/when-the-left-turns-on-its-own.html> [<https://perma.cc/M6JM-RPER>].

9. Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175, 192 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

10. *Healy v. James*, 408 U.S. 169, 180 (1972); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

11. U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."). The Supreme Court has since recognized the First Amendment applies to the actions of state and local officials as well. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

12. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring in the judgment); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997); *see also infra* Section II.A.

content extends to offensive, even highly offensive, speech.¹³ Thus, when public university officials attempt to restrict protests or disinvite speakers from campus, their actions may indeed violate the First Amendment.

The Court's requirement of government "neutral[ity] in the marketplace of ideas,"¹⁴ however, does not extend to private citizens, such as students at public universities. In fact, the Court's cases suppose that citizens will discuss and make moral decisions about the speech that they find acceptable. This is the concept of public discourse at the heart of the First Amendment.¹⁵ Thus, the Court has created a jurisprudential framework

within which cultural conflict is allowed to proceed without legal control. Although the absence of such control creates the possibility of the "tumult," "discord" and "cacophony" which typically accompanies unmediated cultural dispute, First Amendment jurisprudence justifies this turbulence by the "hope that use of such freedom will ultimately produce a more capable citizenry and a 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."¹⁶

Accordingly, free speech conflicts are not only anticipated by the Court's First Amendment doctrine, they are an integral part of it. Such conflicts are, however, a "sub-legal" aspect of the First Amendment—i.e., they are within the arena of public discourse between private citizens contemplated by the Court's free speech framework but not actually regulated by it. Few of the Court's rules regarding regulation of speech directly restrict citizens' communicative interactions with one another.

13. See *Hill v. Colorado*, 530 U.S. 703, 716 (2000); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Boos v. Barry*, 485 U.S. 312, 322 (1988); *Hustler v. Falwell*, 485 U.S. 46, 55–56 (1988); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

14. *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (Stevens, J., plurality opinion).

15. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

16. Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 505 (2003) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

If anything, the Court's rules are designed to protect private interactions and promote public discourse, no matter how rude or uncivil.

Critics of the protestors often focus on conflicts within this sub-legal arena of the First Amendment, primarily condemning protestors' responses to other speakers—which involve shouting, heckling, and demanding that speakers or the press shut up or be barred from speaking—rather than censorship by university officials. As one critic noted, “students who strenuously, and . . . contemptuously, disapprove of the views of speakers whose view of the world is different from theirs, and who seek to prevent those views from being heard” pose the biggest threat to the First Amendment.¹⁷ It is precisely this response that reflects the critics' free speech hypocrisy.

The Court has long recognized counter speech as an acceptable response to offensive speech.¹⁸ Short of engaging in violence or disruption amounting to a “heckler's veto,”¹⁹ student protestors do not violate the First Amendment by “strenuously and contemptuously” responding to the content of someone else's speech, even when the students' message is one of intolerance, such as a demand that university administrators disinvite speakers. Students may express this message. University officials need not comply. Any claim that such speech censors others misunderstands the First Amendment's complex framework and imposes upon students free speech principles that do not exist. In fact, that criticism demands a level of civility from student protestors that the Court deliberately rejects.²⁰

17. Jeff Robbins, *Floyd Abrams Speaks Freely to Political Correctness on America's Campuses*, OBSERVER (May 9, 2016, 9:00 AM), <http://observer.com/2016/05/floyd-abrams-speaks-freely-to-political-correctness-on-americas-campuses/> [<https://perma.cc/H392-J2QQ>] (quoting First Amendment expert Floyd Abrams); see also Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [<https://perma.cc/KA5S-A9Z9>] (claiming students seek to “scrub campuses clean of words, ideas, and subjects that might cause discomfort or give offense”).

18. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (discussing counter speech as a remedy); *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (same).

19. See *infra* notes 102–104 and accompanying text.

20. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 629–31 (1990); see also *infra* Section II.B.

This Article is modest in scope. It seeks primarily to illuminate the role of free speech conflicts, especially those involving contentious speech, within the Court's jurisprudence, and to illustrate how arguments characterizing the protestors' speech as censorship misperceive the important role such conflicts play. Using both the Court's doctrinal framework and conflict resolution literature, this article attempts to bring deeper understanding to the purposes for the Court's approach, the context underlying the current conflicts, and the flaws underlying the argument that the protestors' actions are censorial.

Part I briefly reviews three illustrative free speech conflicts at the University of Missouri, Yale University and Middlebury College. Part II discusses the Supreme Court's free speech doctrinal framework. It first examines the Court's doctrine as it pertains to the regulation of speech, particularly focusing on its antipathy toward content-based regulations and the purposes that underlie the Court's approach. Part II then examines how this framework creates a "sub-legal" arena in which interaction between private communicative actors is often raucous and unruly, and which the Court's free speech framework clearly contemplates, but on which it does not impose rules. Finally, Part III examines recent free speech conflicts in light of the Court's free speech framework and conflict resolution principles. It further discusses the extent to which the criticism of student protestors misunderstands this framework and is inconsistent with the Court's concept of public discourse.

I. CAMPUS FREE SPEECH CONFLICTS

This Part examines three recent free speech conflicts. All conflicts involved responses by protestors, primarily student protestors, to other speakers or First Amendment actors. All generated substantial criticism that the students engaged in censorship or otherwise undermined the First Amendment. Accordingly, these encounters fall within most general definitions of conflict used by conflict theorists—e.g., an experience of "discord due to [an] obstruction or irritation by one or more other people."²¹ This Part focuses on direct

21. EVERT VAN DE VLIERT, *COMPLEX INTERPERSONAL CONFLICT BEHAVIOR*:

interactions between protestors and other First Amendment actors because of the specific and direct conflicts involved and, as discussed in Part II, the unique free speech issues that arise. For that reason, it does not focus on other important but tangential issues regarding the First Amendment on campus, such as speech codes or trigger warnings.²²

A. *University of Missouri—2015 Protests*

In the fall of 2015, protests occurred on MU's campus in response to numerous prior racial incidents. These incidents included the scattering of white cotton balls around the Black Culture Center, which evoked a racial slur associated with slavery and oppression,²³ the appearance of racial slurs painted and posted around campus,²⁴ and spoken racial epithets directed at black students and faculty on campus.²⁵ Sparked by

THEORETICAL FRONTIERS 5 (1997) (defining a “conflict issue”); see also DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 7–8 (3d ed. 2004) (defining “conflict” as a “perceived divergence of interest, a belief that the parties’ current aspirations are incompatible”).

22. For an excellent review of these broader free speech issues on campus, see Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987 (2017).

23. Janese Heavin, *Two Arrested in Cotton Ball Incident*, COLUM. DAILY TRIB., <http://www.columbiatribune.com/d9781cd7-52ee-5f18-801b-a66de6d6720c.html> (last updated Mar. 3, 2010, 7:33 AM), [https://perma.cc/KC3U-QHQ8].

24. *Student Gets Probation for Racist Graffiti at MU*, ST. LOUIS POST DISPATCH (June 5, 2012), http://www.stltoday.com/news/local/crime-and-courts/student-gets-probation-for-racist-graffiti-at-mu/article_33b8b072-af18-11e1-90d8-0019bb30f31a.html [https://perma.cc/P59S-MV3V]; *Swastika Drawn with Human Feces Found in Residence Hall*, COLUM. MISSOURIAN (Oct. 30, 2015), http://www.columbiamissourian.com/news/higher_education/update-swastika-drawn-with-human-feces-found-in-mu-residence/article_4f9c57f0-7f4c-11e5-9f88-a324bf705d1d.html [https://perma.cc/C2WG-UUF4].

25. Ruth Serven & Ashley Reese, *In Homecoming Parade, Racial Justice Advocates Take Different Paths*, COLUM. MISSOURIAN (Oct. 10, 2015), http://www.columbiamissourian.com/news/in-homecoming-parade-racial-justice-advocates-take-different-paths/article_24c824da-6f77-11e5-958e-fb15c6375503.html [https://perma.cc/55PX-FZT9] (discussing slur directed toward members of Legion of Black Collegians); Susan Svrluga, *What the Student Body President Did When He Was Called the N-Word – Again*, WASH. POST (Sept. 16, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/09/16/what-the-student-body-president-did-after-he-was-called-the-n-word-again/?utm_term=.e769c29729c8 [https://perma.cc/69TC-J3R4] (discussing Missouri Student Body President Peyton Head’s account of his regular encounters with racial slurs). Although there were specific reports of the use of racial slurs, students and faculty on campus mentioned that they had “been called the n-word ‘too many times to count.’” Alan Scher Zagier & Summer Ballentine, *Before Recent Protests, U. of Missouri’s*

these incidents and fed by university officials' seeming indifference to student requests to improve the racial environment on campus,²⁶ some black students formed an activist group, "Concerned Student 1950," to address the situation. Concerned Student 1950 held "Racism Lives Here" events in late September and early October; they also held several protests on campus, including stopping the car in which University of Missouri system president Tim Wolfe was riding at MU's homecoming parade and demanding over bullhorns that he make changes.²⁷ Increasingly, the protestors directed their ire at President Wolfe, who they saw as nonresponsive regarding racial issues generally and dismissive at the homecoming parade. After the homecoming encounter, the protests intensified. Jonathan Butler, a graduate student, declared a hunger strike on November 2, 2015, refusing to eat until President Wolfe resigned.²⁸ In solidarity with Butler, Concerned Student 1950 members began camping in tents on Carnahan Quadrangle (the Quad), a large green space in the middle of MU's campus.²⁹ They also boycotted all university retail services.³⁰ On November 7, dozens of MU football players announced a boycott of games and practices in support of

Campus Saw Decades of Strained Race Relations, U.S. NEWS & WORLD REP. (Nov. 11, 2015), <https://www.usnews.com/news/sports/articles/2015/11/10/ferguson-protests-influence-actions-at-u-of-missouri> [<https://perma.cc/K5L5-GKQF>].

26. Students were vocal about the university's minimal responses to their concerns in the past. See, e.g., Serven & Reese, *supra* note 25 ("All we get is emails and empty promises." . . . "And we're here to say that we are not going to be OK with just emails or empty promises anymore."); *Ferguson Protests Influence Actions at the University of Missouri*, TIMES FREE PRESS (Nov. 10, 2015), <http://www.timesfreepress.com/news/national/sports/story/2015/nov/10/fergusprot-ests-influence-actions-u-missouri/334905/> [<https://perma.cc/TM9R-A7SZ>] (discussing the university's failed responses to student and alumni concerns about racial issues).

27. Madison Plaster, *Second "Racism Lives Here" Event Calls for Administration to Act on Social Injustices*, MANEATER (Oct. 1, 2015), <https://www.themaneater.com/stories/campus/second-racism-lives-here-event-calls-administratio> [<https://perma.cc/BCR5-V72N>]; Nana Nashkidashvili, *Students March Through MU Student Center in Protest of Racial Injustice*, COLUM. MISSOURIAN (Oct. 1, 2015), http://www.columbiamissourian.com/news/higher_education/students-march-through-mu-student-center-in-protest-of-racial/article_4b8e3458-688b-11e5-8412-9b38a4d41eb8.html [<https://perma.cc/VE8B-XZFT>].

28. BRYAN CAVE, REPORT TO THE UNIVERSITY OF MISSOURI BOARD OF CURATORS 2 (2016), <http://bloximages.newyork1.vip.townnews.com/columbia-missourian.com/content/tncms/assets/v3/editorial/c/c8/cc81ed44-dbfd-11e5-a026-9b8c77d94462/56cf635daaeb8.pdf.pdf> [<https://perma.cc/76FP-TEXB>].

29. Peters, *supra* note 1.

30. BRYAN CAVE, *supra* note 28, at 2.

Butler.³¹

On November 9, 2015, President Wolfe announced his resignation.³² Hundreds of people quickly gathered on the Quad where Concerned Student 1950 had their tent city.³³ Throughout their camping, Concerned Student 1950 members displayed signs indicating that media were unwelcome at the tent city and that it was a “safe space.”³⁴ These signs reflected the students’ concern that the media “twisted” their words and created “insincere narratives” about the protests to fit their own ends.³⁵ Once Wolfe stepped down, the campers expressed a desire to be free from media inquiries for a short time. Some media did not heed this request, resulting in contentious encounters.³⁶ Subsequently, other students, faculty, staff, and community members, formed a protective ring around the tent city to keep media personnel from entering that space.³⁷ This ring eventually expanded to take up slightly under one-half of the Quad. Later contentious encounters occurred between media representatives and those forming the protective circle. In one encounter, protestors shouted general slogans such as “Hey hey, ho ho, reporters have got to go.”³⁸ They also argued with a student journalist, Tim Thai. Protestors told him that he

31. *Id.*; Marc Tracy & Ashley Southall, *Black Football Players Lend Heft to Protests at Missouri*, N.Y. TIMES (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html> [<https://perma.cc/87JA-U437>].

32. BRYAN CAVE, *supra* note 28, at 2.

33. *Id.*; Peters, *supra* note 1.

34. Friedersdorf, *Campus Activists*, *supra* note 1.

35. *Id.* (quoting students’ twitter account). A contemporaneous documentary of the Concerned Student 1950 movement during the fall of 2015 supports this narrative as students frequently voiced concerns about the press’s role in misreporting their actions. See Adam Dietrich, Varun Bajaj & Kellan Marvin, *Concerned Student 1950*, FIELD OF VISION PRODUCTIONS (Mar. 21, 2016), <https://fieldofvision.org/concerned-student-1950> [<https://perma.cc/KR53-DSVG>].

36. The press widely covered two encounters—one between protestors and Missourian reporter Tim Thai and one between Professor Melissa Click and reporter Mark Schierbecker. See *infra* notes 114–117 and accompanying text. However, at least two earlier contentious encounters between protestors and reporters apparently were recorded by the documentary film crew. See Dietrich et al., *supra* note 35.

37. Peters, *supra* note 1; Friedersdorf, *Campus Activists*, *supra* note 1; Austin Huguélet & Daniel Victor, “I Need Some Muscle:” *Missouri Activists Block Journalists*, N.Y. TIMES (Nov. 9, 2015), https://www.nytimes.com/2015/11/10/us/university-missouri-protesters-block-journalists-press-freedom.html?_r=0 [<https://perma.cc/S8Y4-JBHV>].

38. Huguélet & Victor, *supra* note 37.

was infringing on their right to be left alone and that he had no right to take pictures, threatened to call the police on him, and engaged in mutual argumentation and pushing and shoving as he tried to gain access to Concerned Student 1950 members.³⁹ Another student journalist, Mark Schierbecker, eventually gained access to Concerned Student 1950, but after Melissa Click, an MU professor working with the protestors, had a brief verbal and physical encounter with him in which she told him that he “needed to go” in an intimidating manner, he was escorted out.⁴⁰

Critics were quick to condemn the protestors’ actions as antithetical to the First Amendment. The Thomas Jefferson Center awarded MU a Jefferson Muzzle, in part, because of the protestors’ efforts to limit press access on campus.⁴¹ Others lamented the protestors’ lack of understanding of the First Amendment⁴² and their attempts to harass and intimidate the media into not exercising their First Amendment rights.⁴³ One commentator described the protestors’ actions as a “left-wing coup” from a “tantrum generation” that “suppress[ed] free speech for anyone who disagree[d] with the politically correct.”⁴⁴ The Missouri legislature voted to deny funding to

39. Peters, *supra* note 1; Friedersdorf, *Campus Activists*, *supra* note 1. Numerous video clips of the encounter exist. See *id.* (embedded video clip of the encounter titled “#ConcernedStudent1950 vs. the media at Mizzou”); see also Huguélet & Victor, *supra* note 37 (same).

40. Huguélet & Victor, *supra* note 37. MU professor Melissa Click briefly argued with Schierbecker and had a physical encounter with him. After he refused to leave, she called for help with his removal from the circle of protestors, shouting, “I need some muscle.” Click was charged with misdemeanor assault. The charge was later deferred. Elise Schmelzer, *City Prosecutor Foregoes Criminal Charge Against Melissa Click*, COLUM. MISSOURIAN (Jan. 29, 2016), http://www.columbiamissourian.com/news/local/city-prosecutor-forgoes-criminal-charge-against-melissa-click/article_3b9f2962-c6aa-11e5-93da-8f09d9af8792.html [<https://perma.cc/6NYC-M8GP>].

41. *2016 Jefferson Muzzles*, THOMAS JEFFERSON CTR., <http://tjcenter.org/2016-jefferson-muzzles/> (last visited Sept. 2, 2017) [<https://perma.cc/QFB4-YD7P>]. Professor Click’s actions also played a role in the Jefferson Center’s decision.

42. Peters, *supra* note 1; Folkenflik, *supra* note 6.

43. Friedersdorf, *Campus Activists*, *supra* note 1; Folkenflik, *supra* note 6; Sarah McLaughlin, *Mizzou Professor Demands ‘Muscle’ to Remove Student Journalists; Police Claim ‘Hurtful’ Speech Can Be Punished*, FIRE (Nov. 10, 2015), <https://www.thefire.org/mizzou-professor-demands-muscle-to-remove-student-journalists-police-claim-hurtful-speech-can-be-punished/> [<https://perma.cc/W6LH-E2Z7>]; Opinion, *Higher Ed. Falls Short on Free Speech*, ST. CLOUD TIMES, Dec. 8, 2015, at A8, 2015 WLNR 36427501.

44. Suzanne Fields, *Colleges Teaching Students What to Think*, WASH. TIMES, Nov. 12, 2015, 2015 WLNR 33583290.

MU for the protestors' actions "impeding news coverage of the [events]."45

B. Yale University—Halloween Email Protests

In October 2015, Yale University's Intercultural Affairs Committee sent Yale students an email asking them to consider the potentially "culturally unaware or insensitive" messages their Halloween costumes might send to members of marginalized groups.⁴⁶ Erika Christakis, a professor specializing in child development and head of Silliman College, one of Yale's residential colleges, wrote a response to the students in her college. Her email acknowledged the "genuine concerns about cultural and personal representation" and "other challenges to our lived experience in a plural community."⁴⁷ She went on, however, to state that

[a]s a former preschool teacher . . . it is hard for me to give credence to a claim that there is something objectionably "appropriative" about a blonde-haired child's wanting to be Mulan for a day. . . . I suppose we could agree that there is a difference between fantasizing about an individual character vs. appropriating a culture, wholesale, the latter of which could be seen as (tacky)(offensive)(jejeune) [sic] (hurtful), take your pick. But, then, I wonder what is the statute of limitations on dreaming of dressing as Tiana the Frog Princess if you aren't a black girl from New Orleans? Is it okay if you are eight, but not 18? I don't know the answer to these questions; they seem unanswerable. Or at the least, they put us on slippery terrain that I, for one, prefer not to cross.

45. Rudi Keller, *Lawmakers Upset at Melissa Click and Protests Deny Budget Boost to University of Missouri*, COLUM. TRIB. (Feb. 11, 2016, 12:01 AM), http://www.columbiatribune.com/news/education/turmoil_at_mu/lawmakers-upset-over-melissa-click-and-protests-deny-budget-boost/article_8be573be-0084-5ead-869f-b3d15eb43378.html [<https://perma.cc/A6HB-HNBW>].

46. *Email from Intercultural Affairs Committee to Yale Students*, FIRE (Oct. 27, 2015), <https://www.thefire.org/email-from-intercultural-affairs/> [<https://perma.cc/G782-JA56>].

47. *Email from Erika Christakis: "Dressing Yourself," Email to Silliman College (Yale) Students on Halloween Costumes*, FIRE (Oct. 30, 2015), <https://www.thefire.org/email-from-erika-christakis-dressing-yourself-email-to-silliman-college-yale-students-on-halloween-costumes/> [<https://perma.cc/U4YU-D789>].

Which is my point. I don't, actually, trust myself to foist my Halloweenish standards and motives on others. I can't defend them anymore than you could defend yours. . . .

Even if we could agree on how to avoid offense – and I'll note that no one around campus seems overly concerned about the offense taken by religiously conservative folks to skin-revealing costumes – I wonder, and I am not trying to be provocative: Is there no room anymore for a child or young person to be a little bit obnoxious. . . a little bit inappropriate or provocative or, yes, offensive? American universities were once a safe space not only for maturation but also for a certain regressive, or even transgressive, experience; increasingly, it seems, they have become places of censure and prohibition. And the censure and prohibition come from above, not from yourselves! Have we lost faith in young people's capacity – in your capacity – to exercise self-censure, through social norming, and also in your capacity to ignore or reject things that trouble you? . . .

Nicholas says, if you don't like a costume someone is wearing, look away, or tell them you are offended. Talk to each other. Free speech and the ability to tolerate offense are the hallmarks of a free and open society.

. . . I think there might be something missing in our discourse about the exercise of free speech (including how we dress ourselves) on campus, and it is this: What does this debate about Halloween costumes say about our view of young adults, of their strength and judgment?⁴⁸

Some Yale students and alumni responded quite negatively to her email. An open letter with over 700 signatures circulated, accusing Erika Christakis of “equat[ing] old traditions of using harmful stereotypes and tropes to further degrade marginalized people, to preschoolers playing make believe.”⁴⁹ The letter criticized her email for asking students to

“look away” if costumes are offensive, as if the degradation

48. *Id.*

49. *Open Letter to Associate Master Christakis*, DOWN MAG. (Oct. 31, 2015), <http://downat Yale.com/post.php?id=430> [<https://perma.cc/3W9A-YZA7>]. Approximately 740 students, alumni and faculty signed the letter. *See id.* (electronic version of signed letter).

of our cultures and people, and the violence that grows out of it is something that we can ignore. . . . Giving “room” for students to be “obnoxious” or “offensive,” as you suggest, is only inviting ridicule and violence onto ourselves and our communities, and ultimately comes at the expense of room in which marginalized students can feel safe.⁵⁰

It further condemned her response to critics, which involved an email with a hyperlink to an *Atlantic* article, *The Coddling of the American Mind*, the gist of which was that students increasingly demand classes and atmospheres at colleges and universities scrubbed clean of offensive ideas.⁵¹

After a series of meetings and forums at which participants discussed racism at Yale, around 100 students gathered in early November outside Silliman House to protest Erika Christakis’s email.⁵² Nicholas Christakis, also a head of Silliman College, encountered the protestors. Initially, the students and Nicholas Christakis engaged in a somewhat testy discussion about the students’ concerns. Upon his refusal to apologize for his wife’s email, however, the students became more upset, eventually shouting at and over him.⁵³ After this encounter, the students demanded the Christakis resign their positions as heads of Silliman,⁵⁴ which the Christakis eventually did.⁵⁵

As with the earlier incident at Missouri, the Thomas Jefferson Center awarded Yale University a Jefferson Muzzle, this time in the category of “censorship by students.” The award website specifically referred to the student’s view of Erika Christakis’s email as “disrespectful” and “dangerous,” and described their angry encounter with Nicholas Christakis and the call for the Christakis resignation as evidence of censorship.⁵⁶ Other observers also characterized the students’

50. *Id.*

51. *Id.*

52. Hudler, *supra* note 7.

53. For videos of these encounters, see FIRE, *Yale Halloween Costume Controversy*, YOUTUBE (last updated Nov. 6, 2015), <https://www.youtube.com/playlist?list=PLv1qJIL2kOMefn77xg6-6yrvek5kbNf3Z> [<https://perma.cc/5SKQ-46WA>]. Greg Lukianoff of FIRE, the Foundation for Individual Rights in Education, filmed the videos during the encounter. See Hudler, *supra* note 7.

54. Friedersdorf, *Perils*, *supra* note 2.

55. *Id.*

56. 2016 *Jefferson Muzzles*, *supra* note 41.

response to the email as interfering with the faculty members' "free speech rights"⁵⁷ and "censorship."⁵⁸ They further accused the students of using "thuggish tactics" such as "offensive epithets and insults" in response to Erika Christakis, who had "spoke[n] up for the 'rational.'"⁵⁹ One observer viewed the Yale incident as an object lesson in how "[i]nsufficient tolerance for disagreement is undermining campus discourse."⁶⁰

C. Middlebury College—Charles Murray Protests

In March 2017, a student organization at Middlebury College invited Charles Murray, author of *The Bell Curve*, to speak on campus.⁶¹ Murray's controversial book, which argued that genetics could partly explain the academic achievement gap between black and white students, was criticized at the time of publication for many of its assumptions and its statistical design.⁶² Students and alumni were unhappy about the invitation. In the week between the announcement of the lecture and its occurrence, tensions mounted after rumors began to circulate that his previous visit in 2007 resulted in insults to black students.⁶³ Earlier racial incidents on campus also heightened tensions.⁶⁴ Nearly 500 alumni wrote a letter to

57. Greg Lukianoff, *On the Front Lines of the Fight for Free Speech at Yale*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/11/on-the-front-lines-of-the-fight-for-free-speech-at-yale/?utm_term=.63e0a9b0210c [<https://perma.cc/85KL-HJNF>].

58. Hudler, *supra* note 7.

59. Fields, *supra* note 44.

60. Friedersdorf, *Perils*, *supra* note 2.

61. CHRON. OF HIGHER EDUC., *supra* note 4, at 13. The school's political science department also sponsored the invitation. *Id.* Murray was actually invited to speak about his most recent book, *Coming Apart: The State of White America, 1960–2010*. However, most of the protests referenced his reputation stemming from the earlier book.

62. See, e.g., CLAUDE S. FISHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* (1996); see also William J. Matthew, *A Review of the Bell Curve: Bad Science Makes for Bad Conclusions*, DAVID BOLES, BLOGS (Mar. 23, 1998), <https://bolesblogs.com/1998/03/23/a-review-of-the-bell-curve-bad-science-makes-for-bad-conclusions/> [<https://perma.cc/DK7L-ZNYT>].

63. Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO (May 28, 2017), <http://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195> [<https://perma.cc/5SSS-BFF4>]. People who attended the earlier lecture claim that Murray told a black student she would be better off attending a state university than Middlebury College, a statement Murray denies making. *Id.*

64. *Id.* (describing appearance of racial slurs on dorm room doors and Jewish

the student newspaper condemning the invitation: “The Southern Poverty Law Center considers Dr. Murray a ‘white nationalist’ who ‘us[es] racist pseudoscience and misleading statistics to argue that social inequality is caused by . . . genetic inferiority.’ Why has such a person been granted a platform at Middlebury?”⁶⁵ The decision to bring Murray to campus, they concluded, “directly endanger[ed] members of the community and . . . jeopardiz[ed] the institution’s claims to intellectual rigor and compassionate inclusivity.”⁶⁶

Despite attempts by university administrators and the political science department to assuage student concerns, over 400 students, faculty, and community members protested during Murray’s presentation at Middlebury. They stood and turned their backs to Murray.⁶⁷ The protestors held signs saying “Charles Murray go away—racist, sexist, anti-gay” and “No eugenics here.”⁶⁸ Students and faculty also shouted and chanted during Murray’s presentation and, despite administrators’ pleas to allow the speech to proceed unimpeded, would not stop heckling Murray.⁶⁹ Eventually, Middlebury officials moved Murray to another room from which he could deliver his talk via livestream although even there protestors attempted to disrupt it.⁷⁰ The protests turned violent after Murray’s talk. Masked protestors accosted Murray and a faculty member as they left the venue, eventually resulting in the faculty member’s medical treatment for a

congregation centers in the weeks following the presidential election).

65. *Charles Murray at Middlebury: Unacceptable and Unethical, Say Over 500 Alumni*, BEYOND GREEN (Mar. 2, 2017), <https://beyondthegreenmiddlebury.com/2017/03/02/charles-murray-at-middlebury-unacceptable-and-unethical-say-over-500-alumni/> [<https://perma.cc/DG3F-QMWS>].

66. *Id.*

67. CHRON. OF HIGHER EDUC., *supra* note 4, at 13; Gee, *supra* note 63.

68. Conor Friedersdorf, *Middlebury Reckons with a Protest Gone Wrong*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middleburys-liberals-respond-to-an-protest-gone-wrong/518652/> [<https://perma.cc/5TUT-55SN>].

69. *Id.*

70. Katherine Q. Seelye, *Protestors Disrupt Speech by ‘Bell Curve’ Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html?_r=0 [<https://perma.cc/6ABW-6P66>]. Protestors apparently crowded into the hall outside of this second room chanting loudly and pulling the fire alarm. *Id.* Murray had warned the university of this possibility from his previous encounters with student protestors. Gee, *supra* note 63.

concussion and other injuries.⁷¹

Critics were quick to condemn the protests as an “example of students’ intolerance of uncomfortable speech.”⁷² The *New York Times* criticized students for interfering with the “sacred right” of free speech, “which needs protecting.”⁷³ Others characterized the students as “would-be censors”⁷⁴ and “brown-shirted thug[s].”⁷⁵ Dozens of students were disciplined through the school’s internal process as a result of their actions, although many critics were unhappy with the light nature of their discipline.⁷⁶ At least one faculty member believed that the episode “reflected an institutional failure in the way students are taught at Middlebury” because “[t]hey don’t understand the value of free speech at a college and what free speech really means.”⁷⁷

II. THE SUPREME COURT’S FREE SPEECH FRAMEWORK

Criticism of the student protestors is, of course, acceptable. One can disagree both with the content of their arguments as well as the approach in expressing their message. But describing the students’ actions as censorship or violations of others’ free speech rights is simply wrong and potentially undermines both the Court’s doctrine and the purpose of the First Amendment. This Part discusses the Court’s free speech

71. CHRON. OF HIGHER EDUC., *supra* note 4, at 13. There is some dispute as to whether the protestors were associated with the university and the extent to which university officials may have exacerbated the violence. *Id.*; Gee, *supra* note 63.

72. CHRON. OF HIGHER EDUC., *supra* note 4 (citing examples).

73. Editorial Bd., *supra* note 3.

74. Friedersdorf, *supra* note 68.

75. Eugene Volokh, *Protestors at Middlebury College Shout Down Speaker; Attack Him and a Professor*, WASH. POST (Mar. 4, 2017), https://www.washingtonpost.com/news/volokhconspiracy/wp/2017/03/04/protesters-at-middlebury-college-shout-down-speaker-attack-him-and-a-professor/?utm_term=.cfd509b3110c [<https://perma.cc/7XMH-CJER>].

76. Stephanie Saul, *Dozens of Middlebury Students are Disciplined for Charles Murray Protest*, N.Y. TIMES (May, 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news> [<https://perma.cc/N9S9-L3S3>]; Gee, *supra* note 63 (quoting Murray as saying “[t]he disciplinary response of Middlebury is pathetic . . . It will [only] encourage more of the same thing to happen”).

77. Saul, *supra* note 76 (quoting political science professor Matthew Dickinson).

framework.

A. *The Basic Doctrine*

First Amendment doctrine is a complex framework of rules designed to implement the amendment's purposes. For example, the Court distinguishes between government regulations that limit speech based on the speaker's message (content-based regulations) and government regulations that limit speech regardless of its content (content-neutral regulations).⁷⁸ Absent a finding that a government regulation pertains to "low-value" speech,⁷⁹ the Court highly disfavors content-based regulations, striking them down unless they meet strict scrutiny.⁸⁰ The Court subjects content-neutral regulations to much lesser, intermediate scrutiny⁸¹ and often upholds laws that are reasonably tailored to time, place, and manner regulations of speech as long as there are legitimate regulatory goals.⁸²

The Court's antipathy toward content-based regulations stems largely from its view that they are more likely than content-neutral regulations to undermine public discourse:

At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas

78. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994).

79. The Court has identified several categories of speech that are more readily subject to regulation based on their content. These include incitement of illegal action, fighting words, defamation, fraud, true threats, obscenity, child pornography, and speech integral to criminal conduct. *United States v. Stevens*, 559 U.S. 460, 468 (2010). The Court does not find speech to be low value "on the basis of a simple cost-benefit analysis." *Id.* at 471. Rather it tends to view the list of identified categories as traditionally and historically limited. *Id.* at 468–69; see also *United States v. Alvarez*, 567 U.S. 709, 722 (2012).

80. *Reed*, 135 S. Ct. at 2226 ("Content-based laws . . . are presumptively unconstitutional . . .").

81. *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (asking whether a regulation is "narrowly tailored to serve a significant government interest, and . . . leave[s] open ample alternative channels for communication of the information").

82. See *id.* (upholding National Park Service regulation banning protestors from sleeping overnight in a national park); see also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding a municipal regulation requiring concert performers to use city amplification equipment); see also *Kovacs v. Cooper*, 336 U.S. 77, 81 (1949) (upholding law banning use of amplified sound trucks on city streets).

and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions “rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”⁸³

This antipathy extends to government attempts to curtail offensive speech. Here too, unless such speech is found to fall within a low-value category, the Court refuses to allow government regulation “because the speaker’s message may be offensive to his audience.”⁸⁴ To do so would give officials far too much leeway to arbitrarily regulate speech.⁸⁵ As importantly, the lack of warning regarding when one’s speech is offensive would cause a profound chilling effect on speakers, leading to unwanted self-censorship of otherwise protected speech.⁸⁶ As with its approach to content-based regulations, the Court’s hostility toward regulations of offensive speech stems from a desire to protect public discourse:

In the realm of . . . political belief, sharp differences arise. . . . [T]he tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the

83. *Turner Broad.*, 512 U.S. at 641 (citations omitted).

84. *Hill v. Colorado*, 540 U.S. 703, 716 (2000); see also *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt.”).

85. *Gooding v. Wilson*, 405 U.S. 518, 527–28 (1972).

86. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

citizens of a democracy.⁸⁷

B. *The Sub-Legal First Amendment*

As the above discussion reflects, the Court's doctrine prohibits censorship to protect public discourse. Hence, the focus is on preventing *government* censorship. The doctrine leaves private citizens' interactions with one another largely unregulated. In fact, the Court's cases suggest that our ability to engage in uninhibited communicative interactions with one another is integral to the concept of public discourse even when those interactions include unpleasant exchanges.

For example, the Court has consistently stated that "counter speech," rather than government suppression, is the best remedy for speech with which we disagree.⁸⁸ As Justice Brandeis noted in *Whitney v. California*, "If there be time to expose through discussion [and] . . . to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁸⁹ Indeed, the Court has emphasized that the "First Amendment itself ensures the right to respond to speech we do not like."⁹⁰

The Court's offensive speech cases similarly envision an arena of wide-open communicative exchanges between citizens. The Court's early cases not only protected highly provocative and offensive speech, they presumed that audience members might respond with anger or similarly raucous speech, noting that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."⁹¹ Furthermore, although protection of offensive speech may often result in a cacophonous "verbal tumult [and] discord,"⁹² the Court views such interaction as a positive good:

87. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). For more detailed discussion, see Post, *supra* note 20, at 627–28.

88. See *supra* note 18 (citing cases).

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

90. *United States v. Alvarez*, 567 U.S. 709, 728 (2012).

91. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); see also *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

92. *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 into 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.⁹³

This, then, is the sub-legal First Amendment—i.e., the area of public discourse involving communicative interaction between citizens that results from the Court's rules preventing government restriction of speech based on its content or offensiveness. Within this arena, the concerns regarding government censorship of speech do not apply to citizens' actions toward one another. Thus, citizens may be as rude and insulting as they wish; they may express intolerance toward the messages of others even if that intolerance causes others to rethink their desire to express themselves; they may even tell other speakers to "shut up" or that their speech is unacceptable. This is all part of the wide-open discourse between citizens that is contemplated, but not regulated, by the Court's doctrine.

This differential treatment of government censorship of citizen's speech and citizen's interactions with each other occurs precisely because "America contains 'many' diverse communities which are often in sharp conflict."⁹⁴ It is not the government's or Court's obligation to work through these issues for us as a legal matter.⁹⁵ Indeed, our dignity and autonomy as decision-makers would be "fatally compromised if the state were to impose civility rules upon public discourse, for citizens would be cast as already constrained and captured by one form of community rather than another."⁹⁶ The framework

93. *Id.* at 24. Cohen challenged his conviction for breach of the peace for wearing a jacket in a Los Angeles courthouse that bore the words "Fuck the Draft." *Id.* at 17.

94. Post, *supra* note 20, at 630.

95. See Wells, *supra* note 12, at 187 ("To allow the State to suppress [offensive speech] is to abdicate our moral responsibility to discuss our disagreements and try to resolve them. Only individuals living in a community can come to a determination of what is right and wrong.")

96. Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J.

of the Court's cases leaves to us as citizens the hard work of resolving conflicts via "uninhibited, robust, and wide-open" dialogue and debate, even though the Court recognizes that such debate will often contain "vehement, caustic, and sometimes unpleasantly sharp attacks" on those who are speaking.⁹⁷

C. *Exceptions*

Exceptions exist to this wide-open arena of public discourse between citizens. When communicative interactions progress from merely raucous and uncivil to speech that falls within one of the Court's "low-value" categories, government officials may intervene. For example, the government may punish a speaker who uses personal abuse or epithets that amount to fighting words.⁹⁸ Government officials may also punish a speaker who threatens another person.⁹⁹ But the Court carefully circumscribes these categories to ensure that they regulate only speech likely to result in immediate violence or fear of violence. In this way, the Court ensures that the government's response results from a legitimate regulatory goal related to public safety rather than suppression of offensive viewpoints.¹⁰⁰

473, 481 (1997).

97. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[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.") (citations omitted); see *supra* notes 84–86 and accompanying text.

98. *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (defining fighting words as those that have a "direct tendency to cause acts of violence by the person to whom, individually," they are addressed); see also *Cohen*, 403 U.S. at 24.

99. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining threats as "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

100. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 480 (1996) ("The premise of [these categories] . . . is that the government would respond to such a danger no matter what its views of the ideas affected.").

Robert Post has also pointed out that public discourse is much more constrained for private citizens in areas where the government has greater managerial authority, such as in workplace settings, classrooms, and prisons. Similar to low value speech regulations, government faces less scrutiny when regulating speech in such areas because it pursues non-censorial managerial goals. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

The Court's "hostile audience" or "heckler's veto" cases involve another area in which legal regulation is sometimes appropriate in the arena of citizens' communicative interactions. When offensive speech occurs, especially when crowds are involved, the Court requires that police make all efforts to protect speakers in the face of hostile audiences.¹⁰¹ Thus, absent a finding that the speaker intends to rouse a hostile crowd or that immediate violence is likely to result, police cannot rely on an unruly audience as a reason to silence the speaker as opposed to reining in offenders in the audience.¹⁰² Even here, however, courts recognize the importance of protecting communicative interaction.¹⁰³ They have allowed audience members great leeway to respond to speakers before finding that police intervention is warranted:

When the actions of the hostile audience become violent . . . the government is permitted to intervene and arrest or remove the offending persons. So too, if the hostility effectively prevents the speaker from speaking, and in that sense constitutes an outright bar to the speaker's exercise of his or her freedom to speak, the police are justified . . . in intervening against the audience. Until that threshold is reached, however, courts will protect the right of a hostile audience to chant, clap, boo, hiss, picket, and protest, even though it may be offensive and disruptive to the sensibilities

101. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111 (1969); see also *Cox v. Louisiana*, 379 U.S. 536 (1965); see also *Edwards v. South Carolina*, 372 U.S. 229 (1963). Justice Kagan has written that this trilogy of cases establishes "a duty to provide as much police protection for speakers whose ideas officials hate as for speakers whose ideas the officials approve." Kagan, *supra* note 100, at 434 n.63; see also Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 *LOYOLA L. REV.* 411, 521 n.557 (1999) (surveying lower court cases imposing a duty on the police to protect speakers).

102. *Edwards*, 372 U.S. at 236 (noting that police may silence a speaker who "passes the bounds of argument or persuasion and undertakes incitement to riot"); see also *Glasson v. City of Louisville*, 518 F.2d 899, 909 (6th Cir. 1975) ("[T]he law does not expect or require [police] to defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury.").

103. Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 *HOFSTRA L. REV.* 1305, 1306 (2007) (noting that "heckler's veto cases . . . illustrate the fundamental conflict between two members of the public with competing speech goals and the role of the state in promoting the dissemination of messages").

and interests of the speaker, or others in the audience.¹⁰⁴

Thus, in keeping with the Court's desire to carve out an arena of public discourse in which citizens work out their own issues without state interference, a hostile audience's response should be free from regulation unless it proves to be disruptive or violent to the point of exercising a heckler's veto over speech.

III. FREE SPEECH HYPOCRISY: CAMPUS FREE SPEECH CONFLICTS, PUBLIC DISCOURSE AND CIVILITY

The free speech conflicts in Part I arose from communicative interactions between student protestors and other First Amendment actors rather than interactions between speakers and government regulators. They thus fall squarely within the arena I have termed the sub-legal First Amendment. Although rarely violent or disruptive, those interactions became testy, unruly, and often hostile. On occasion, students demanded that universities disinvite speakers, shouted at them to shut up, or actively tried to prevent them from speaking. As a result, many criticized the protestors for censoring speakers or for undermining their First Amendment rights. Although actual interference with another speaker is just cause for censure, critics too often characterized all of the students' actions as censorial. Their arguments ignore that the Court's doctrinal framework allows, and even expects, citizens to interact in this manner and undermine the Court's concept of public discourse.

A. *Violent and Disruptive Campus Protests—Middlebury College*

At the outset of this Part, one must acknowledge those aspects of the protests that involved violence or disruption directed at other speakers. Protestors did engage in violent

104. 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH §10.39 (citing cases); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1775 (1967) (The "[hostile audience doctrine] does not reach more subtle types of suppression, such as heckling and jeering, since ordinarily members of the crowd would have an equal right to be heard, particularly when the heckling does not substantially interfere with communication of a message or when the purpose of the demonstration is to provoke a hostile response for enhanced publicity.").

activity that injured a faculty member after Charles Murray's speech at Middlebury College.¹⁰⁵ Critics' argument that this violence is inconsistent with public discourse is surely correct. Such violence, even if potentially communicative, is likely to deter both Murray and future speakers and has no legitimate role in a communicative framework as the Court has recognized.¹⁰⁶

The situation with the heckling protestors in the auditorium is somewhat more difficult. Students heckled Charles Murray and chanted with the clear intent of interfering with his lecture.¹⁰⁷ After twenty minutes, the vice president of the college suggested moving him to another room where he finished his lecture via livestream.¹⁰⁸ The heckling did not technically shut down Murray's lecture, but over 75 percent of the audience left, some to watch the livestream and others not, and their opportunity to interact with him after the lecture was clearly diminished.¹⁰⁹ Although the protestors did not pose an "outright bar" to the lecture,¹¹⁰ they intended to do so, and they had a significant impact on its delivery. Audience members who wanted to see Murray speak and to engage with him were in a much different situation than what they had expected. Because the Court has never defined the nature of "disruptive" speech, we should be wary of using that term loosely.¹¹¹ However, the protestors' actions, intent, and the

105. See *supra* note 70 and accompanying text. Violence also occurred during protests in Berkeley in response to an invitation extended to Milo Yiannopoulos. See CHRON. OF HIGHER EDUC., *supra* note 4. There exist disputes regarding the sources of that violence. For example, Middlebury students argue that the police inflamed the issue and that there were outside protestors as well. Nevertheless, it seems clear that protestors were involved in the violence in some way. Gee, *supra* note 63.

106. *O'Brien v. United States*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

107. Friedersdorf, *supra* note 68.

108. Gee, *supra* note 63.

109. *Id.*; see also *Discord at Middlebury: Students on the Anti-Murray Protests*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/opinion/discord-at-middlebury-students-on-the-anti-murray-protests.html> [<https://perma.cc/4ESF-KFU6>] (discussing various students' responses to Murray's lecture, including the desire to ask him questions afterwards).

110. See *supra* note 70 and accompanying text.

111. Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 967-72 (2015); C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade*

effect of substantially altering the course of a planned lecture combined to create a disruption in this instance.

On the other hand, as discussed more fully below in the context of Yale and Missouri, the actions of students, alumni, and community members questioning Murray's invitation, requesting that he not speak, and holding signs protesting him within and outside the lecture room do not amount to censorship or intolerance violating the First Amendment.¹¹² Although angry and contentious, these activities are the very kind of responsive counter-speech the sub-legal First Amendment contemplates.

B. Contentious Protests—Yale and Missouri

In large part, critics did not focus on violence and disruption that would amount to censorship even within the realm of interactions between private citizens. Rather, much criticism was concerned with the “atmosphere of intense pushback and protest that has made some speakers hesitant to express their views and has subjected others to a range of social pressure and backlash, from shaming and ostracism to boycotts and economic reprisal.”¹¹³ Thus, critics focus on the intensity of the students' emotions and their uncivil and contentious tactics when accusing them of censorship, implying that such tactics violate the First Amendment.

For example, in the encounter between reporter Tim Thai and the students and faculty at MU who formed a protective ring around Concerned Student 1950, critics referred to those forming the large protective ring as “smirking,” “chanting,” “yelling,” “using intimidation and initiating physical aggression,” “harassing,” and blocking attempts to take photographs by reporters who repeatedly tried to break through the circle.¹¹⁴ Notably, none of the available video—nor even the critics' writings themselves—indicates that the student protestors engaged in actual violence, intimidation, or

Permits and Time, Place and Manner Regulations, 78 NW. U. L. REV. 937, 979–80 (1983).

112. See *supra* notes 63–68 and accompanying text.

113. Thomas Healy, *Who's Afraid of Free Speech*, ATLANTIC (June 18, 2017), <https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/> [https://perma.cc/6988-5KXE].

114. See Friedersdorf, *Campus Activists*, *supra* note 1; Folkenflik, *supra* note 6.

aggression. In reality, Professor Melissa Click, the one person accused of violence and intimidation in seeking to have a different reporter removed, was charged with misdemeanor assault.¹¹⁵ The remaining protestors seem to have primarily engaged in a testy exchange with the reporter, where they repeatedly asked him to respect their wishes; he replied he had a job to do, to which they responded, “We don’t care about your job.”¹¹⁶ They also yelled at the reporter that he was not allowed to photograph them, claimed he was infringing on their right to be left alone, and led various chants.¹¹⁷ This combined with their attempts to broaden the protective ring and their jostling with the reporter, caused critics to claim students had “overtake[n] a public forum,”¹¹⁸ had “imped[ed] news coverage of the events,” and “suppressed free speech.”¹¹⁹

The student protestors unquestionably engaged in contentious tactics—i.e., those designed to resolve a conflict on the user’s terms without regard to another’s interests.¹²⁰ But the fact that speech is contentious does not make it censorial; it simply makes it contentious speech. Many Supreme Court cases involve contentious yet fully protected speech—ranging from protestors shouting at and following women entering medical clinics to those holding grossly offensive signs at funerals.¹²¹ Indeed, protests, which lie at the core of the First Amendment, are by definition contentious tactics.¹²² For all their contentiousness, however, there is no indication that the protestors crossed the line into censorship. Students did not chase reporters off the Quad or forcibly prevent them from taking photographs. They did not take their cameras from

115. See *supra* note 40 and accompanying text.

116. Huguelet & Victor, *supra* note 37.

117. See *supra* note 39 and accompanying text.

118. Peters, *supra* note 1.

119. See *supra* notes 43–44 and accompanying text.

120. PRUITT & KIM, *supra* note 21, at 38–39 (defining contentious tactics); Dean G. Pruitt, *Social Conflict*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 486 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (same).

121. *Hill v. Colorado*, 530 U.S. 703 (2000) (protestors at medical clinic); *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (funeral protestors).

122. PRUITT & KIM, *supra* note 21, at 81 (listing nonviolent protest and other forms of nonviolent resistance as contentious tactics); Paul F. Kirgis, *Bargaining with Consequences: Leverage and Coercion in Negotiation*, 19 HARV. NEG. L. REV. 69, 95 (2014) (discussing protests/picketing as a form of negative leverage, which exerts external pressure and costs on another in order to meet the protestors’ interests).

them. What occurred was an *argument* about whether the reporters were going to be able to interview and photograph Concerned Student 1950 members within the protective ring. Citizens may turn down such interviews, even in a public space; reporters may try to persuade them differently.¹²³ Such arguments are part of the public discourse envisioned by the sub-legal First Amendment. Rather than champion free speech rights as critics imply, equating the students' actions with censorship utterly misunderstands the point of public discourse and twists the Court's vision beyond recognition.

Similarly, at Yale, much of the criticism focused on the students' emotional and "disrespectful" response to the Halloween costume email, again implying a violation of others' First Amendment rights. They noted in particular two things. First, they focused on one student's public exchange with Nicholas Christakis who disagreed with the student protestors that his position as head of Silliman House obligated him to "create a place of comfort and home for students who love Silliman."¹²⁴ As one commentator described the student's response upon hearing Christakis's disagreement:

"Then why the fuck did you accept the position?!" she screamed. "Who the fuck hired you?! You should step down! If that is what you think about being a master you should step down! It is not about creating an intellectual space! It is not! Do you understand that? It's about creating a home here. You are not doing that!"¹²⁵

123. The students' claims that reporters could not take photographs were manifestly wrong. Members of the public, including the press, are free to gather information while in a traditional public forum. Carnahan Quadrangle would likely qualify as such a forum. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). But making such a statement does not qualify as censorship or interference with the press. Citizens are free to tell reporters to leave them alone even while in public spaces and at some point "[o]rverzealous surveillance, even if it occurs in public, may give rise to intrusion [on privacy] claims, or in some cases, harassment or stalking suits." *Liability for Intrusive or Harassing Newsgathering Activities*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/liability-intrusive-or-harassing-newsgath> (last visited Sept. 24, 2017) [<https://perma.cc/W995-CUNQ>].

124. Friedersdorf, *Perils*, *supra* note 2.

125. *Id.* Videos of the exchange reflect that the student was quite upset. See FIRE, *supra* note 53.

Second, they focused on the fact that students demanded the Christakis' resignation as masters of Silliman House, arguing that their apologies made them unfit to run the House.¹²⁶ According to critics, these "thuggish tactics" amounted to censorship and intolerance inconsistent with the First Amendment.¹²⁷

As with the Missouri protestors, the Yale students' tactics were quite contentious. Students shouted at and sometimes over Nicholas Christakis during their communicative exchange with him. They also protested Erika Christakis's email, as well as the university's response to it. Finally, they used another contentious tactic, shaming, to express their displeasure.¹²⁸ But speakers, including the student protestors, are allowed to do this. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."¹²⁹ Furthermore, the Court has recognized that the "emotive function [of speech] practically speaking, may often be the more important element of the overall message sought to be communicated."¹³⁰ Thus, the students' anger does not undermine the communicative aspect of their actions.

In effect, the critics' condemnation implies that the protestors' tactics have violated civility norms, somehow forfeiting their right to participate in public discourse. Thus, much of the critics' concern comes with their perception of the protestors' unreasonable behavior in contrast to the "impressive intellectual and emotional poise"¹³¹ of the MU reporter or "vigorous[] but respectful[]" defense of the First Amendment by Nicholas Cristakis.¹³² But in the sub-legal First Amendment, civility rules are out of place: "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . There is no room under

126. Hudler, *supra* note 7.

127. See *supra* notes 56–58 and accompanying text.

128. Richard H. Smith et al., *The Role of Public Exposure in Moral and Nonmoral Shame and Guilt*, 83 J. OF PERSON. & SOC. PSYCH. 138, 138 (2002) (noting that shaming is caused by the public condemnation of others as result of public exposure of a defect or transgression). Shaming is a contentious tactic. PRUITT & KIM, *supra* note 21, at 69–70.

129. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

130. Cohen v. California, 403 U.S. 15, 26 (1971).

131. Friedersdorf, *Campus Activists*, *supra* note 1.

132. Lukianoff, *supra* note 57.

our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas.”¹³³ Accordingly, although the students’ tactics are contentious, they are a legitimately considered part of public discourse. Suggesting that the protestors’ expression has diminished First Amendment value merely because of its form ignores the Court’s long-held recognition that the form and emotive value of speech are often as important as its cognitive function.

Ironically, by focusing on the contentiousness and incivility of the student protestors, the critics commit the very sin of which they accuse the students—failure to engage with others’ speech. That focus has the effect of ignoring or diminishing the cognitive component of the protestors’ message. From the outset, Concerned Student 1950 communicated its distrust of the media and its underlying reasons for it.¹³⁴ The protective ring around Concerned Student 1950 was formed in solidarity with this message.¹³⁵ Similarly, the Yale students (along with hundreds of alumni and faculty) wrote an extensive rebuttal to Erika Christakis’s email detailing why they felt her position was wrongheaded and tone-deaf.¹³⁶ They also did exactly what her original email had requested, i.e., they personally engaged with Nikolas Christakis and asked him to acknowledge their position and apologize for his wife’s email.¹³⁷ Yet critics rarely address these substantive issues; instead they commonly equate the protestors’ emotional and uncivil responses with attempts to interfere with others’ First Amendment rights or censorship.

This approach is a form of conflict avoidance. By focusing almost entirely on the students’ uncivil and angry actions, critics engage in misdirection that “defin[es the] conflict in ways that cloud the real issue or problem.”¹³⁸ As a result,

133. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

134. *See supra* notes 34–35 and accompanying text.

135. *See supra* note 37 and accompanying text.

136. *See supra* notes 49–51 and accompanying text.

137. Erika Christakis’s email mentioned that the students should “look away or tell [others] you are offended” by Halloween costumes. *See supra* text accompanying note 48. By confronting Erika Christakis in their open letter, *see supra* notes 49–51 and accompanying text, and engaging with her husband personally, *see supra* notes 53–54 and accompanying text, the students were expressing their offense at the Christakis’s email and subsequent responses.

138. BERNARD MAYER, *STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES* 63 (2009); *see also* PRUITT & KIM, *supra* note 21, at 39 (noting that diversion to other issues during a discussion is a strategy of avoiding

critics have effectively co-opted the discussion about these student protests, making it almost entirely about the First Amendment rather than the issues the students raised.¹³⁹ Alternatively, they cast the protestors' actions as "tantrums" or their behavior as "thuggish," implying that the protestors are so lacking in personal responsibility (that they are either evil, stupid, or crazy) that their narrative is not worthy of mention.¹⁴⁰ Because there is no effective way to engage such individuals, critics imply, it is simply best to dismiss their point of view altogether.¹⁴¹ Accordingly, critics have effectively dismissed or diminished the protestors' substantive narrative almost to the point of nonexistence. They have thus captured the moral high ground, effectively shutting down responses to

conflict).

139. Even when engaging the students, critics often diminish or simplify the issues they raise, such as the claim for a needed "safe space." This term has a long and complex history. Kitrosser, *supra* note 22, at 2018 nn.143–45. Further, use of the term in the Part I conflicts was complex and context-specific. Yet many critics characterized the students' use of the term as a shield to free themselves from unwanted speech. See Friedersdorf, *Campus Activists*, *supra* note 1 (claiming that Mizzou and Yale students "weaponized" safe spaces); see also William Hennessy, *Up from Political Correctness*, HENNESSY'S VIEW (Dec. 5, 2015), <https://hennessysview.com/2015/12/05/up-from-political-correctness/> [<https://perma.cc/SG29-G37V>] (saying that students at Mizzou wanted to establish safe spaces that he equated with "bubbles of ignorance" where nobody "may say or do anything that might offend anyone else").

140. MAYER, *supra* note 138, at 63–64; see also LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC* 153 (1996) ("When values collide, all sides tend to wrap themselves in the rhetoric of moral right and moral outrage. The other side is portrayed as ignorant at best and as inhuman at worst."). The accusation could be leveled at protestors as well. For example, one critic has observed when writing about proponents of political correctness that they "not only seek[] to censor uncongenial speech but wish[] to declare an uncongenial individual ineffable—in effect, to render him an unperson." James Taranto, *Chalk and Awe: The New Free Speech Movement*, WALL ST. J. (Apr. 4, 2016), <https://www.wsj.com/articles/chalk-and-awe-1459790373> [<https://perma.cc/SB9S-KAMK>]. As Susskind & Field note, moral outrage and dehumanization on all sides is common when values collide as they do in these conflicts between equality and free expression. I focus primarily on the protestors' critics because they take a particular view of the First Amendment, which is the subject of this symposium. I certainly do not deny that both sides of this conflict could easily be engaged in dehumanization.

141. See, e.g., Peggy Noonan, *The First Amendment Needs Your Prayers*, WALL ST. J. (Dec. 4, 2015), <https://www.wsj.com/articles/the-first-amendment-needs-your-prayers-1449187707> [<https://perma.cc/4QME-X3NQ>]. Noonan argues that "Americans are growing weary of being told what they can and cannot publicly say" by "the mad little Marats and Robespierres who are telling students and administrators what they are and are not allowed to say or do" on college campuses. *Id.*

their censure, much like politicians who wave the American flag.¹⁴²

This is not to say that the students' tactics are beyond criticism. It is certainly possible that the students' contentious tactics were counterproductive or did not advance their agenda. Conclusions to that end, however, largely depend on the protestors' interests and what they hoped to accomplish.¹⁴³ They may, for example, have wanted nothing more than to bring attention to their cause, which they clearly did—both positive and negative attention.¹⁴⁴ Or they may have wanted to convey the intensity of their feelings—again something they seem to have managed quite well. However, if they wanted to bring the two sides of the conflict closer to a resolution of the problem, the use of contentious tactics may not have advanced that agenda; instead it may have led to escalation of the conflict rather than problem-solving.¹⁴⁵ On the other hand, it is possible that these exercises of power got the students exactly what they wanted—the resignation of a university president and heads of their colleges.¹⁴⁶ Any of these issues are worth exploring from a critical perspective. Trying to understand that these campus-related events involve a conflict between two free

142. Schauer, *supra* note 9, at 193 (“Does the persistent enlistment of the First Amendment into a wide range of causes suggest that the litigant or public advocate who clothes herself in the First Amendment is like the politician who clothes himself in the American Flag?”).

143. In a conflict, interests are “needs, desires, concerns, fears—the things one cares about or wants. They underlie people’s positions—the tangible items they say they want.” WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 5 (1988) (emphasis in original).

144. For negative coverage, see articles cited *supra* notes 41–45, 56–60, 72–77. For positive coverage, see Alan Levinovitz, *In Praise of Intolerance*, SLATE (Mar. 20, 2017), http://www.slate.com/articles/health_and_science/science/2017/03/tolerance_isn_t_the_goal_truth_is.html [<https://perma.cc/ZR9J-7V2W>]; and see Osita Nwanevu, *The Kids Are Right*, SLATE (Mar. 12, 2017), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/there_s_nothing_outrageous_about_stamping_out_bigoted_speech.html [<https://perma.cc/GXR6-2FHD>]; also see Ulrich Baer, *What ‘Snowflakes’ Get Right About Free Speech*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/opinion/what-liberal-snowflakes-get-right-about-free-speech.html> [<https://perma.cc/24QL-S623>].

145. Pruitt, *supra* note 120, at 480. Pruitt reviews literature finding that contentious tactics “tend to crowd out problem solving” (defined as “behavior aimed at locating alternatives that satisfy both parties’ goals”) and “may lead to a conflict spiral that produces serious escalation.” *Id.*

146. See *supra* notes 32, 54, 55 and accompanying text. Some critics saw the students’ actions as an exercise of power albeit not a positive one. See Kitrosser, *supra* note 22, at 2024 (discussing one response to protests as “student protestors [being] hungry for power, including power over others’ speech”).

speech actors is an endeavor worthy of exploration. Engaging the merits of the students' arguments is worth doing as well. But reducing these conflicts to simplistic notions of intolerant students rampaging over the free speech rights of others willfully misunderstands the Court's free speech framework and does a disservice to the First Amendment.

CONCLUSION

Contentious, angry, and uncivil speech is unsettling. We rarely like it. It seems to violate community norms that "define [our] dignity" and causes us to feel "threatened, demeaned, perhaps even deranged."¹⁴⁷ Perhaps this is why so many people view passionate protests as being "irrational, fickle, violent, undirected, and contagious."¹⁴⁸ Yet, the Court makes clear that it is speech nonetheless. It has created an arena to protect such speech in large part so that we can become "a more capable citizenry and more perfect polity."¹⁴⁹ Accordingly, we cannot fall back on the First Amendment as a bludgeon, claiming that those who respond with anger, incivility, or even intolerance somehow violate its sacred principles. This argument is destined to lead us nowhere. The First Amendment leaves it in our hands to resolve our free speech conflicts. Rather than condemn contentious speech as violating the principles of the First Amendment, it is our responsibility to determine how best to address that speech, both substantively and tactically. This means attempting to understand the history, context, and substance regarding all arguments in the conflict.¹⁵⁰ It means understanding that many of these free speech conflicts are "enduring," and that we must remain engaged with contentious arguments so that we can "deepen our understanding of how others think and feel about the issue."¹⁵¹ The sub-legal First Amendment expects no less.

147. Post, *supra* note 96, at 476.

148. Baker, *supra* note 111, at 981.

149. *Cohen v. California*, 403 U.S. 15, 24 (1971).

150. See Kitrosser, *supra* note 22, at 2050-51 (describing a class where students and professors came to appreciate both racism and bullying experienced by students and importance of free expression by forming a continuing dialogue).

151. MAYER, *supra* note 138, at 11-12.