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## More than Free Speech: Politics, Higher Education, and the First Amendment

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The Dissertation Advisory Committee and the student's Department Chairperson, as representatives of the faculty, certify that this dissertation has met all standards of excellence and scholarship as determined by the faculty.

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**MORE THAN FREE SPEECH: POLITICS, HIGHER EDUCATION AND THE FIRST  
AMENDMENT**

by

**KRISTINA MICKEL CLEMENT**

Under the Direction of Deron Boyles, Ph.D.

**ABSTRACT**

Despite assertions that the First Amendment is under attack on college campuses in the United States of America, evidence suggests that students today have more freedom to exercise their constitutional rights on campus than at any time in history. Prior to the 1960s, colleges operated within the doctrine of *in loco parentis*, which significantly limited students from participating in protests or other behaviors deemed inappropriate by faculty or administrators. The end of *in loco parentis* coincided with an increase in campus activism during the 1960s with students actively involved in the civil rights movement and protests against the Vietnam War. The students' calls for a more just society were viewed as a threat to the status quo and conservative forces began an active campaign to discredit student activism. During the Nixon administration, student activism became a target for conservative politicians. Student activism was framed by conservatives as "campus unrest" and colleges and universities were derided by conservative politicians for "indoctrinating" students with liberal ideals and failing to manage

“campus unrest.” Meanwhile, campus administrators were struggling to create campuses that were open and inclusive of increasingly diverse student populations. In subsequent years, the steps taken by campus administrators to limit racial and sexual harassment would be challenged by conservatives for limiting the First Amendment rights of students. Since the 1960s, conservative politicians, businesses, and organizations have successfully utilized the media, the courts, and the legislatures to create a narrative of higher education as hostile to the First Amendment. Today, campus administrators continue to struggle to find a balance between the goals of diversity and inclusion and the First Amendment rights of students.

**INDEX WORDS:** Higher Education, Students, Activism, First Amendment

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by

KRISTINA MICKEL CLEMENT

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For my girls, Emma, Charlotte, Cristina, and Ella,

May you never be afraid to use your voice.

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## 1 WHEN *IN LOCO PARENTIS* REIGNED

For what purpose does the university exist? The answers are so numerous that it would be impossible to lay out each argument here. Clark Kerr, former president of the University of California at Berkeley wrote, “The university is so many things to so many different people that it must, of necessity, be partially at war with itself.”<sup>1</sup> Indeed there are faculty, staff, and administrators within the university who envision its purpose in contradiction to each other. When the purpose of the university is discussed in relation to First Amendment rights, two significant purposes emerge. The first purpose relates to the university as an incubator for democracy and the second relates to the university as an engine for the economy.<sup>2</sup>

Those who view the university as an incubator for democracy focus on the role of the university in creating educated and informed citizens and its potential to serve the public good.<sup>3</sup> The university is viewed as “a location where new, creative, unorthodox, and critical ideas can be exchanged and debated.”<sup>4</sup> In *Undoing the Demos: Neoliberalism’s Stealth Revolution*, Wendy Brown articulates the importance of universities in educating students, so they are prepared to participate in a democratic society. Her words are worth quoting at length here:

Citizens cannot rule themselves, even if that means only thoughtfully choosing representatives or voting on referenda, let alone engaging in more direct practices of shared rule, without understanding the powers and problems they are engaging. Providing tools for such understanding has been a key premise of public secondary and higher education in the West.<sup>5</sup>

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<sup>1</sup> Clark Kerr, *The Uses of the University*, 5<sup>th</sup> ed. (Cambridge, MA: Harvard University Press, 2001), 7.

<sup>2</sup> Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Brooklyn, NY: Zone Books, 2015); Keith E. Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton, NJ: Princeton University Press, 2018); Clark Kerr, *The Uses of the University*, 5<sup>th</sup> ed.; Wayne Au and Joseph J. Ferrare, *Mapping Corporate Education Reform: Power and Policy Networks in the Neoliberal State* (New York, NY: Routledge, 2015).

<sup>3</sup> Brown, *Undoing the Demos*.

<sup>4</sup> Vikram David Amar and Alan E. Brownstein, “A Close Up Look at First Amendment Academic Freedom Rights,” *Minnesota Law Review* 101 no. 5 (2017): 1943-1986, 1963.

<sup>5</sup> Brown, *Undoing the Demos*, 175.

In order to create an environment where students and faculty can engage in robust debate about issues, it is necessary that universities protect academic freedom and the First Amendment rights of faculty and students.<sup>6</sup> Academic freedom is generally considered limited to faculty and supports their “independence to exercise their professional judgment and not be constrained by social, political, or financial pressures to shade how they teach or what they write.”<sup>7</sup> Universities must resist pressures both within and outside the university to interfere with the work of faculty. Likewise, in order to ensure similar protections for students to debate ideas, universities must resist pressures to limit the First Amendment rights of students.

In order for the university to serve as an incubator for democracy, it is imperative that universities provide space for the active exchange of ideas. However, there are threats within and without the university that influence its ability to fulfill its role. In many ways, the threats are the result of a culture war between competing visions for not only the university, but also the nation. Historically, the university was expected to “safeguard and propagate national culture,” but over time the “idea of a national culture no longer provide[d] an overarching ideological meaning for what goes on in the University.”<sup>8</sup> As different groups have attempted to define our national culture, universities have found themselves in the middle of a battle between competing interests. Conservatives have accused universities of being too liberal, moving away from conservative values, and indoctrinating students in liberal ideology.<sup>9</sup> When students have attempted to use their First Amendment rights to push back against conservative ideals of tradition, family, and morality, conservatives have responded by demanding universities silence “individual expressive

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<sup>6</sup> Whittingdon, *Speak Freely*.

<sup>7</sup> Whittingdon, 7. Academic freedom will be discussed in more depth in Chapter 5.

<sup>8</sup> Bill Readings, *The University in Ruins* (Cambridge, MA: Harvard University Press, 1996), 13.

<sup>9</sup> Neil Gross, *Why are Professors Liberal and Why Do Conservatives Care?* (Cambridge, MA: Harvard University Press, 2013).

freedom.”<sup>10</sup> Meanwhile, liberals have attempted to create more inclusive and welcoming campuses reflective of the changing composition of the nation. They view universities as “a place of facilitating disagreement across difference” and a “rehearsal place for democracy,” where the university is responsible for protecting the minority, dissenting, or unpopular views for the sake of democracy and education.<sup>11</sup> However, in this process, liberals have also limited the free expression of some students through draconian speech codes and other regulations.<sup>12</sup> The culture wars show no sign of abating and they are closely linked with the view of education as an engine of the economy.

When the university is viewed as an engine of the economy, the debates about the culture of the campus in terms of liberal or conservative views are replaced with arguments about how to best prepare workers for a global economy. Wayne Au and Joseph Ferrare have succinctly addressed how this focus on the economy shifts the purpose of the university. They state:

under neoliberalism the purpose of education increasingly shifts to the production of “human capital,” “adding value,” and meeting the needs of the economy, rather than, for instance, serving the social good or meeting collective needs of communities.<sup>13</sup>

The emphasis on preparing students to meet the needs of the economy pressures higher education institutions to shift the focus of their curriculum. Traditional liberal arts curriculum is replaced with more specialized courses taught by increasingly more specialized faculty and courses are evaluated by their return on investment or ability to meet professional standards.<sup>14</sup> As a result,

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<sup>10</sup> Wayne Batchis, *The Right’s First Amendment: The Politics of Free Speech and the Return of Conservative Libertarianism* (Stanford: Stanford Law Books, 2016), 5.

<sup>11</sup> John Inazu, “The Purpose (and Limits) of the University,” *Utah Law Review* 5 (2018): 943-978, 947, 949.

<sup>12</sup> John Palfrey, *Safe Spaces, Brave Spaces: Diversity and Free Expression in Education* (Cambridge, MA: The MIT Press, 2017), 7-8. Speech codes will be discussed in greater depth in Chapter 4.

<sup>13</sup> Au and Ferrare, *Mapping Corporate Education Reform*, 6.

<sup>14</sup> Brown, *Undoing the Demos*.

universities have become more balkanized and courses have become less interdisciplinary.<sup>15</sup> In an environment focused on career preparation, there is little room for debates about democracy and the public good.

How does this view of the university as an economic engine intersect with debates about free speech? Roderick Ferguson argues in his book, *We Demand*, that student protests directly challenged corporate interests and prompted corporations to ally together to curb freedom of expression on campus.<sup>16</sup> In a memo to the chairman of the U.S. Chamber of Commerce, future Supreme Court Justice Lewis Powell implicated universities in the attack on the free enterprise system in America and encouraged corporations to use their resources to address the increasingly hostile attitudes towards business.<sup>17</sup> He explicitly stated, “the time has come...for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.”<sup>18</sup> Powell believed the priority in this defense of American business was “to address the campus origin of [the] hostility.”<sup>19</sup> In the ensuing years, a network of allies has emerged that have utilized the free speech debate to suppress views in opposition to their neoliberal ideals and embraced free speech rhetoric to promote causes that further corporate business.<sup>20</sup>

## **The Problem**

On March 21, 2019, President Trump signed the “Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities” after weeks of

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<sup>15</sup> Lawrence W. Levine, *The Opening of the American Mind: Canons, Culture, and History* (Boston, MA: Beacon Press, 1996).

<sup>16</sup> Roderick A. Ferguson, *We Demand: The University and Student Protests* (Oakland: University of California Press, 2017).

<sup>17</sup> Lewis F. Powell, “Confidential Memorandum: Attack on American Free Enterprise System,” Washington and Lee University School of Law Scholarly Commons, <https://scholarlycommons.law.wlu.edu/powellmemo/>, 1. The Powell Memorandum will be discussed in greater detail in Chapter 4.

<sup>18</sup> Powell, “Confidential Memo,” 9.

<sup>19</sup> Powell, “Confidential Memo,” 15.

<sup>20</sup> Batchis, *The Right’s First Amendment*.

lamenting the conditions for free speech on college campuses across the country.<sup>21</sup> The executive order articulated the Trump administration's stance on free speech, stating the:

Administration seeks to promote free and open debate on college and university campuses. Free inquiry is an essential feature of our Nation's democracy, and it promotes learning, scientific discovery, and economic prosperity. We must encourage institutions to appropriately account for this bedrock principle in their administration of student life and to avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning.<sup>22</sup>

A few weeks earlier at the Conservative Political Action Conference, Trump announced to an enthusiastic audience that if colleges and universities did not protect students' right to free speech on campus, then the institutions would be denied federal funding.<sup>23</sup> It was not the first time that Trump had raised such a threat to colleges and universities. In the fall of 2017, when the University of California at Berkeley canceled a speech planned on campus by Milo Yiannopoulos, a conservative provocateur, Trump threatened to withhold funding to the university.<sup>24</sup> Even during his first campaign for president, Donald Trump vowed to protect the right to free speech on campus.<sup>25</sup> Despite the president's insistence that there is a crisis on college campuses, evidence suggests that the state of free speech on campuses today is not in dire peril.

Historically, college campuses were not the safest places for students who chose to exercise their First Amendment rights as articulated in the United States Constitution.

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<sup>21</sup> "Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities," White House, accessed April 16, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities>.

<sup>22</sup> "Executive Order on Improving Free Inquiry."

<sup>23</sup> Michael D. Shear, "Trump Says He Will Sign Free Speech Order for College Campuses," *The New York Times*, March 2, 2019, <https://www.nytimes.com/2019/03/02/us/politics/trump-free-speech-colleges.html>.

<sup>24</sup> Shear, "Trump Says He Will Sign." Milo Yiannopoulos and his role in campus free speech debates will be discussed further in Chapter 6.

<sup>25</sup> Susan Svrluga, "Trump Vows to Defend Free Speech on Campus," *The Washington Post*, October 14, 2016, <https://www.washingtonpost.com/news/grade-point/wp/2016/10/14/trump-vows-to-defend-free-speech-on-campus/?noredirect=on>

Specifically, the First Amendment grants, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>26</sup> While initially the First Amendment was limited to the actions of Congress, the passage of the Fourteenth Amendment, which guaranteed that no state should deprive “any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” expanded the Constitutional protections to state and public entities including public colleges and universities.<sup>27</sup> While the Fourteenth Amendment passed in 1868, campuses operated as largely exempt from its demand for equal protection and due process until the 1960s.<sup>28</sup> Since that time, First Amendment protections have expanded for students on campus and many groups outside of higher education have actively monitored the ability of students to exercise their First Amendment rights. Students on campuses today are freer to exercise their First Amendment rights than at any other time in history.

Groups such as the Foundation for Individual Rights in Education (FIRE) and the American Civil Liberties Union (ACLU), which have a long history of tracking First Amendment violations on campuses, often cite the disinvitation of campus speakers and the presence of speech codes and speech zones as evidence that the First Amendment is under attack on campuses. Recent trends suggest the opposite of Trump’s assertion that free speech on

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<sup>26</sup> U.S. Const. amend. I.

<sup>27</sup> U.S. Const. amend. XIV. It is important to note that private higher education institutions are not held to the same standards as public institutions when it comes to protecting students’ First Amendment rights on campus.

<sup>28</sup> *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5<sup>th</sup> Cir. 1961). In this case, the courts ruled that students in state colleges were entitled to due process. This would set a precedent for future cases involving students and colleges and universities.

campus is in dire peril. While both liberal and conservative speakers have been recently disinvited from campuses, the total number of disinvitations is relatively limited when compared with the total number of colleges and universities in the country.<sup>29</sup> In 2017, FIRE reported that there were thirty-five successful attempts to block controversial speakers from visiting campuses.<sup>30</sup> In 2018, only eleven speakers were disinvited from college campuses.<sup>31</sup> While it is possible that there were fewer invitations extended to controversial speakers, FIRE has noted that the decrease in disinvitations is a positive trend for colleges and universities and demonstrates a commitment to upholding the First Amendment.

Restrictions on student speech are also cited to demonstrate the hostility of campuses to free speech. The target of these complaints are speech codes and speech zones. Speech codes, which are rules governing student speech, were first instituted on campuses in the 1980s and 1990s. Speech codes are often criticized for being overly broad and punishing speech that is merely rude or offensive.<sup>32</sup> FIRE has actively advocated against speech codes on the grounds that they are unconstitutional and the courts have affirmed FIRE's stance by declaring speech codes unconstitutional in every case that has been tried in court.<sup>33</sup> Speech zones, differently, are designated areas on campus that limit where students can engage in freedom of expression. Many of these zones were established during the height of student protests in the 1960s to help

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<sup>29</sup> I am not suggesting that speaker disinvitations are not problematic, but rather indicating that they are not as prevalent as if often suggested by the media.

<sup>30</sup> Jeffrey Adam Sachs, "The 'Campus Free Speech Crisis' is a Myth. Here are the Facts," *The Washington Post*, March 16, 2018, <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/16/the-campus-free-speech-crisis-is-a-myth-here-are-the-facts/>.

<sup>31</sup> Lee C. Bollinger, "Free Speech on Campus is Doing Just Fine, Thank You," *The Atlantic*, June 12, 2019, <https://www.theatlantic.com/ideas/archive/2019/06/free-speech-crisis-campus-isnt-real/591394/>.

<sup>32</sup> Azhar Majeed, "Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes," *Georgetown Journal of Law & Public Policy* 7 (2009): 481–544. Speech codes will be discussed in greater length in Chapters 4 and 5.

<sup>33</sup> Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (Stanford: Stanford Law Books, 2016).

administrators manage the exchange of ideas on campus. Administrators instituted regulations on these zones including advance registration requirements, restricted reservation times, and limited geographic areas.<sup>34</sup> Largely due to FIRE's efforts, speech codes and speech zones have been declining on college campuses and they are currently at an all-time low.<sup>35</sup> Students have more freedom to express themselves on campus than at any other time in history, so why the cause for alarm?

Critics of President Trump's executive order argue that he is not sincerely interested in protecting free speech on campus, but rather protecting the speech of students, faculty, and staff who share his political views.<sup>36</sup> When he announced his intentions for an executive order to the Conservative Political Action Conference, Trump referenced Hayden Williams, a conservative student at Berkeley, who was assaulted while on campus recruiting for a conservative student organization.<sup>37</sup> Later, when signing the executive order, Trump referred to Charlie Kirk of Turning Point USA, a conservative student group active on campuses across the country. During the signing ceremony, Trump stated: "Today's executive order is the culmination of Turning Point USA's tireless work to break the left's stranglehold on campus, a grip that has suffocated the free exchange of ideas and helped indoctrinate an entire generation to hate America."<sup>38</sup> This belief that colleges and universities are bastions of liberal indoctrination did not originate with

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<sup>34</sup> Jennifer Huddleston, "Free Speech in the Age of Political Correctness: Removing Free Speech Zones on College Campuses to Encourage Civil Discourse Note," *Alabama Civil Rights & Civil Liberties Law Review* 8 (2017): 279-294.

<sup>35</sup> Sachs, "The 'Campus Free Speech Crisis' is a Myth."

<sup>36</sup> Patricia McGuire, "Whose Freedom of Speech?," *Inside Higher Ed*, March 27, 2019, <https://www.insidehighered.com/views/2019/03/27/trumps-free-speech-executive-order-protects-only-those-right-political-spectrum>.

<sup>37</sup> Shear, "Trump Says He Will Sign Free Speech Order for College Campuses."

<sup>38</sup> McGuire, "Whose Freedom of Speech?," *op. cit.*

Donald Trump, but has been part of the national narrative ever since students dared to speak out against policies and laws that did not align with their values.

Prior to the 1960s, student activism was significantly curtailed on campuses due to the doctrine of *in loco parentis*, which gave college faculty and administrators the authority to act as parents and determine what was in the best interest of students. When students engaged in protests, they were often subject to strict discipline from administrators including suspension and expulsion. The threat of discipline limited student involvement in activism. Those students who did choose to engage in activism prior to the 1960s often participated in movements off campus that were spearheaded by adults in the community rather than college students. In the 1960s, courts declared that public educational institutions could not interfere with students' constitutional rights, which protected students who chose to engage in activism on and off campus. For the first time, a significant number of students engaged in protest movements that were led by other students. As protests grew in frequency throughout the decade, individuals outside the university grew concerned about the influence of students on issues such as the economy, war, and civil rights. These concerns would lead to interference from agents outside of higher education in an effort to rectify the perceived failure of colleges and universities to control their students in the 1960s.

While much has been written about student activism, particularly activism in the 1960s, the focus has often been on the colleges and universities themselves rather than the response to student activism from actors outside of colleges and universities and its influence on campuses today.<sup>39</sup> The research presented in this dissertation is significant because it explores how actions

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<sup>39</sup> Seymour Martin Lipset and Philip G. Altbach, eds., *Students in Revolt* (Boston, MA: Houghton Mifflin Company, 1969); Immanuel Wallerstein and Paul Starr, *The University Crisis Reader, Volume I: The Liberal University Under Attack* (New York, NY: Random House, 1971); Immanuel Wallerstein and Paul Starr, *The*

taken by the corporate business community, the legal community, and political actors in the decades after the 1960s have influenced university policies regarding First Amendment issues and continue to influence campus communities today. To facilitate this understanding of how we have arrived at this current juncture, where the state of the First Amendment on campuses is hotly contested, it is important to trace the history of the First Amendment on college campuses, as demonstrated through students' activism and resistance. While it is not within the scope of this project to provide a comprehensive review of the entire history of student activism and resistance, it is important to highlight key themes over time to illustrate the issues that most engaged students and the methods they utilized in pursuit of their goals. A close examination of student activism in the 1960s is necessary to demonstrate how activism shifted after students were granted some constitutional protections by the courts. This expansion of students' rights to the campus created the opportunity for students to work more closely to effect change on issues that most concerned them including their increasing dissatisfaction with the college experience, the civil rights movement, and the peace movement. One result of the students' activism was growing concern about the influence of students on issues outside of the universities, which invited intervention in collegiate affairs by the legal system, the business community, and political actors.

The focus of my research explored the actions taken after 1970 by the legal system, the business community, and political actors to influence the relationship between colleges and

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*University Crisis Reader, Volume II: Confrontation and Counterattack* (New York, NY: Random House, 1971); Seymour Martin Lipset, ed., *Student Politics* (New York, NY: Basic Books, Inc., Publishers, 1967); Alexander DeConde, ed., *Student Activism: Town and Gown in Historical Perspective* (New York, NY: Charles Scribner's Sons, 1971); James Miller, *"Democracy is in the Streets": From Port Huron to the Siege of Chicago* (Cambridge, MA: Harvard University Press, 1994); Howard S. Becker, ed., *Campus Power Struggle*, 2<sup>nd</sup> ed. (New Brunswick, NJ: Transaction Books, 1973); M. Stanton Evans, *Revolt on the Campus* (Chicago, IL: Henry Regnery Company, 1961); and Janet Harris, *Students in Revolt* (New York, NY: McGraw-Hill Book Company, 1970).

students. I specifically examined how this influence caused tension for administrators as they sought to balance the goals of the campus community and the desires of those outside campuses to quell student activism throughout the subsequent decades. I address the current state of the First Amendment on campus and examine how groups outside of colleges and universities have become intimately entangled in this debate, often presenting competing visions for higher education in America. Finally, I discuss how this debate has forced campus administrators to navigate the daily tension of balancing students' First Amendment rights to free speech and assembly with the challenge of creating campuses that are open and inclusive of diverse student populations and safe spaces . To understand the origins of this debate, I conducted a careful review of government and private agency reports, transcripts of political press conferences, court cases, news articles, financial records of conservative organizations, and archival records related to student activism.

### **Research Questions**

1. What is the historic relationship between student activism and the First Amendment rights of students on college campuses?
2. How have student activism and the First Amendment been politicized since the 1960s?
3. How have actors outside of higher education influenced the role of the First Amendment on campuses in the last fifty years?

## The Origins of *In Loco Parentis* on Campus

While student activism is often recalled in America as a relic of the 1960s, the origins of student activism and resistance are as old as colleges and universities themselves.<sup>40</sup> Perhaps this history is not as evident because, throughout most of their history, colleges and universities have enjoyed high levels of autonomy with minimal interference from outside the walls of the institutions.<sup>41</sup> For the majority of their history, university officials were able to make independent decisions about the regular treatment as well as punishment of students. Administrators were able to suppress any activism or resistance that portrayed the institution in a negative light or that would create animosity within the local community. Faculty and administrators operated under the doctrine of *in loco parentis* without significant legal challenges from the founding of the first universities to the era of campus unrest in the 1960s.

Although informally practiced since the founding of the first colleges, the doctrine of *in loco parentis* dates back to English common law and Sir William Blackstone in the mid-1700s.<sup>42</sup> During this period, Blackstone wrote in English law commentary that the father had the right to delegate parental authority including discipline to a tutor or schoolmaster responsible for the education of his child.<sup>43</sup> For centuries, *in loco parentis* was interpreted and enacted as “paternal,

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<sup>40</sup> Philip G. Altbach and Robert Cohen, “American Student Activism: The Post-Sixties Transformation,” *The Journal of Higher Education* 61, no. 1 (1990): 32-49; Mark Edelman Boren, *Student Resistance: A History of the Unruly Subject* (New York, NY: Routledge, 2001); and Frederick W. Obear, “Student Activism in the Sixties,” in *Protest! Student Activism in America*, eds. Julian Foster and Durward Long (New York, NY: William Morrow and Company, Inc., 1970). Obear quotes Aristotle’s comments about students to indicate that the roots of student activism and resistance are not unique to modern history. Students have long demonstrated a sense of optimism and hope for the future and their ability to change the world.

<sup>41</sup> Clark Kerr, “‘The Uses of the University’ Two Decades Later: Postscript 1982,” *Change* 14, no. 7 (October 1982): 23-31.

<sup>42</sup> Philip Lee, “The Curious Life of *In Loco Parentis* at American Universities,” *Higher Education in Review* 8 (2011): 65-90, 67.

<sup>43</sup> Peter F. Lake, *The Rights and Responsibilities of the Modern University: The Rise of the Facilitator University*, 2<sup>nd</sup> ed. (Durham, NC: Carolina Academic Press, 2013), 17-22.

male, often stern, disciplinary power” in educational institutions.<sup>44</sup> Faculty and administrators instituted strict rules and regulations on students’ behavior not only inside but outside of the classroom including placing limits on their social time, forbidding interactions with members of the opposite sex, prohibiting students from frequenting local establishments, and dictating dress and grooming habits.<sup>45</sup> While most colleges operated under this doctrine, *in loco parentis* did not appear in the United States’ legal record until the 1913 case, *Gott v. Berea College*.<sup>46</sup>

In the case of *Gott v. Berea College*, a private restaurant in the college community claimed to have lost business revenues when the college instituted a rule forbidding students from going to restaurant establishments off-campus.<sup>47</sup> Prior to the fall of 1911, students at Berea College were forbidden to visit liquor saloons and gambling houses, but had permission to visit local restaurants.<sup>48</sup> In the fall of 1911, Berea College announced a new rule to their students, which read as follows:

Eating houses and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismissal. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain.<sup>49</sup>

Shortly after the rule was implemented, several students tested its authority, which resulted in three students being expelled from the college. Afterwards, students’ patronage of Gott’s restaurant plummeted, and Gott sought recourse in the courts. Upon reviewing the case, the court

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<sup>44</sup> Lake, 20.

<sup>45</sup> Timothy J. Tracey, “The Demise of Equal Access and Return to the Early-American Understanding of Student Rights,” *University of Memphis Law Review* 43, no. 3 (Spring 2013): 557-638.

<sup>46</sup> John Inazu, “The Purpose (and Limits) of the University,” *Utah Law Review* 5 (2018): 943-978.

<sup>47</sup> Peter F. Lake, *Beyond Discipline: Managing the Modern Higher Education Environment* (Bradenton, FL: Hierophant Enterprises, Inc., 2009), 56-57. This was not the first time that Berea College found themselves in court. In 1908, they faced a court battle with the state of Kentucky over the right to educate white and black students. The Supreme Court held that Kentucky had the right to prohibit integrated private educational institutions. *Berea College v. Kentucky*, 211 U.S. 45 (1908).

<sup>48</sup> *Gott v. Berea College*, 161 S.W. 204, 205 (Ky. 1913).

<sup>49</sup> *Gott v. Berea College*, 205.

ruled in favor of the college and stated, “College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.”<sup>50</sup> Having been affirmed by the court, colleges and universities continued to subject their students to rules and regulations and, as since the beginning of colleges and universities, students continued to test the limits of these rules. *In loco parentis* dominated college governance until students finally toppled it during the tumultuous period of campus protests in the 1960s.

### **Campus Protest Before the 1960s**

Education systems have existed around the world since ancient times, but the establishment of universities as we know them today can be traced to twelfth century Paris, France and Bologna, Italy.<sup>51</sup> One of the first recorded protests occurred in Paris in 1200 between students from the University of Paris and the local townspeople.<sup>52</sup> The protest began when students confronted an innkeeper over his treatment of a student’s servant. The students ended up in a brawl with the innkeeper and some local townspeople. Enraged by the students’ actions, several town officials and angry citizens hunted down the students and beat several of the students to death. The university appealed to the king, who sided with the university and granted them an exemption from local jurisdiction. This decision, like many others made by the ruling and upper classes, would protect universities from political and economic controls outside the

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<sup>50</sup> *Gott v. Berea College*, 206.

<sup>51</sup> Boren, *Student Resistance*. The oldest educational institution in the world is the University of Karueein, founded in 859 in Morocco. However, universities in the United States are modeled after European institutions.

<sup>52</sup> Boren, *Student Resistance*.

institution and grant them a significant amount of autonomy, similar to that experienced by the early churches.<sup>53</sup>

Throughout the Middle Ages and into the Renaissance, tensions would occasionally arise between students and townspeople over what we generally refer to today as “town and gown” issues. Much like today, townspeople accused students of failure to “conform to their foster towns’ notions of proper behavior or proper respect for person or property.”<sup>54</sup> During this same period, universities consolidated substantial social power and financial assets leading to more stable relationships with the towns in which they resided. Although the increased power of the universities was often a result of student protests, due to the transient nature of students, “the power of the students did not make gains relative to that of the administration, masters, or the incorporated universities themselves.”<sup>55</sup> Students would continue to find themselves at odds with faculty and administration and the rules and regulations of universities would eventually shift the focus of students’ resistance from the towns to the universities.

By the time the first colleges were established in the United States in the seventeenth century, students worldwide were beginning to organize in order to gain power within colleges and universities. In the seventeenth and eighteenth century, the majority of student rebellions were sparked by restrictive rules under the doctrine of *in loco parentis*, frustration with the classical curriculum, and dissatisfaction with food and lodging arrangements.<sup>56</sup> While students rarely were granted changes to the rules, they were sometimes able to have students who had been expelled from the college reinstated by the administration. It is likely that colleges

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<sup>53</sup> Kerr, “‘The Uses of the University’ Two Decades Later,” 24.

<sup>54</sup> Boren, *Student Resistance*, 11.

<sup>55</sup> Boren, 20.

<sup>56</sup> Christopher J. Broadhurst, “Campus Activism in the 21<sup>st</sup> Century: A Historical Framing,” *New Directions for Higher Education* 167 (2014): 3-15.

reinstated students for financial reasons, as many early colleges were financially unstable and relied heavily on support from student tuition dollars.<sup>57</sup> Beginning in the mid-eighteenth century, motivated by the “strong sense of American liberty and personal independence,” students began to organize and demonstrate against the restrictive rules and lack of student input in university governance.<sup>58</sup> From 1765 to 1860, student protests broke out at universities from Columbia, Harvard, Brown, and Yale to the Universities of Georgia and North Carolina as students demanded rights on campus.<sup>59</sup> In the mid-nineteenth century, student protests began to shift outside of the universities as students became active in social issues of the time. Anti-slavery organizations were established during this period at colleges such as Amherst and New York University.<sup>60</sup> The Student Christian Volunteer Movement, which would later organize the YMCA and the YWCA was founded in 1886.<sup>61</sup> Some of their early activity would focus on educational reform and women’s liberation. This shift towards social issues in the mid to late-nineteenth century would dominate much of student activism and resistance into the twentieth century.

The early twentieth century saw the establishment of the earliest leftist groups including the Intercollegiate Socialist Society and the Young People’s Socialist League.<sup>62</sup> The Intercollegiate Socialist Society, founded in 1905, was more educationally focused than activist

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<sup>57</sup> Philo A. Hutcheson, *A People’s History of American Higher Education* (New York: Routledge, 2020), 33.

<sup>58</sup> Boren, *Student Resistance*, 36.

<sup>59</sup> Boren, *Student Resistance*; and Broadhurst, “Campus Activism in the 21<sup>st</sup> Century.”

<sup>60</sup> Boren, *Student Resistance*.

<sup>61</sup> Philip G. Altbach and Patti Peterson, “Before Berkeley: Historical Perspective on American Student Activism,” *The Annals of the American Academy of Political and Social Science* 395 (May 1971): 1-14. While some might consider the YMCA and YWCA as more conservative institutions, in the 1930s, college chaplains inspired by Reinhold Niebuhr and Harry War of the Union Theological Seminary in New York City encouraged campus chapters to embrace social justice and peace initiatives.

<sup>62</sup> Altbach and Peterson, “Before Berkeley.”

oriented and hoped to promote interest in socialism among college students. Some of its early notable members included Upton Sinclair, Jack London, Charlotte Perkins Gillman, and Walter Lippman.<sup>63</sup> Members of the Intercollegiate Socialists Society were interested in improving conditions for the working class, opposed to entry into World War I, and concerned about the censorship of campus newspapers and lack of student involvement in university governance.<sup>64</sup> The Young People's Socialist League, which was founded in 1907, was more interested in engaging in political activities than educational activities.<sup>65</sup> However, the growth of these organizations was limited due to the first Red Scare and the organizations' opposition to entry into World War I.

In the 1920s, American students protested censorship of campus publications by the administration and tried to bring radical speakers to campus. They were interested in free speech and frustrated by the repressive nature of universities, which often expelled or harshly punished radical students.<sup>66</sup> In 1927, students at Hampton Institute in Virginia went on strike to protest the quality of education they were receiving at the institute as well as the harsh regulations governing student behavior and activities.<sup>67</sup> Rather than listen to the concerns of students, the administration dismissed the students who were involved, which resulted in a significant purge of campus student leaders. Outside of campuses, the horrors of World War I fueled a growing peace movement in the 1920s and a demand from students to abolish compulsory participation in

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<sup>63</sup> Altbach and Peterson, "Before Berkeley."

<sup>64</sup> Broadhurst, "Campus Activism in the 21<sup>st</sup> Century," 4-6.

<sup>65</sup> Altbach and Peterson, "Before Berkeley."

<sup>66</sup> Altbach and Peterson, "Before Berkeley."

<sup>67</sup> Edward K. Graham and Margaret Mead, "The Hampton Institute Strike of 1927: A Case Study in Student Protest," *The American Scholar* 38, no. 4 (Autumn 1969): 668-683. Louise Thompson Patterson, a lifelong activist, helped to lead the student strike at Hampton. She would be forced out as a result of her actions. For more information, see Keith Gilyard, *Louise Thompson Patterson: A Life of Struggle for Justice* (Durham: Duke University Press, 2017).

the Reserve Officers' Training Corps (ROTC).<sup>68</sup> The National Student Forum, the National Student Federation of America, and the Student League for Industrial Democracy were all founded during this period with the intent of educating students on political and social issues. In 1927, the American Federation of Youth held their first conference with over fifty youth organizations and a platform that denounced compulsory military training, imperialism, and child labor.<sup>69</sup> Students were becoming increasingly engaged in the social issues of their time.

By the 1930s, there was a surge in student activism from the left “in support of unions, in opposition to rearmament, in repudiating Fascism, [and] in urging the New Deal to do more to meet the needs of the needy.”<sup>70</sup> The Great Depression and the rise of fascism in Europe helped to further spread socialist and communist ideas among liberal activists on campuses.<sup>71</sup> Unlike the left-leaning student protests that would take place in later years, the student protests in the 1930s were not generationally divided, but rather students were actively involved with groups of adults outside of the university.<sup>72</sup> For the first time in American history, there was a mass movement of students, although much of the activism was limited to metropolitan centers like New York and Chicago. During this period, even the Council on Christian Associations became more radicalized and believed that capitalism and fascism should be abandoned in favor of Marxist socialism.<sup>73</sup>

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<sup>68</sup> Broadhurst, “Campus Activism in the 21<sup>st</sup> Century.” The issue of ROTC on campuses would continue into the 1960s when campuses would end compulsory ROTC participation.

<sup>69</sup> Altbach and Peterson, “Before Berkeley.”

<sup>70</sup> Robert A. McCaughey, *Stand, Columbia: A History of Columbia University in the City of New York, 1754-2004*, (New York, NY: Columbia University Press, 2003), 394.

<sup>71</sup> Robert Cohen, *When the Old Left Was Young: Student Radicals and America's First Mass Student Movement, 1929-1941* (New York, NY: Oxford University Press, 1993), xiii-xx.

<sup>72</sup> Clark Kerr, “Student Dissent and Confrontation Politics,” in *Protest! Student Activism in America*, eds. Julian Foster and Durward Long (New York, NY: William Morrow and Company, Inc., 1970); Obeart, “Student Activism in the Sixties.”

<sup>73</sup> Altbach and Peterson, “Before Berkeley.”

The National Student League, which was founded in New York City in 1931, sponsored the first student mass protests in the city, well ahead of any other organization.<sup>74</sup> The City College of New York was influential in the start of the National Student League. The students at the City College of New York, which was a free college in the city, were from a lower socioeconomic background than students at more elite universities in the city. These students were largely working-class students with families that identified with socialist ideals. Immigrant communities were generally more open to socialism, since many immigrants worked in the highly exploitative garment industry in the city.<sup>75</sup> The Student League for Industrial Democracy was founded in 1932 to support workers' rights and oppose military conflict. In 1935, they would merge with the National Student League to form the American Student Union, which would sponsor anti-war demonstrations until it dissolved at the end of the decade because of increasing domination by communists.<sup>76</sup>

The issue of free speech came to the forefront for student activists in the 1930s, likely influenced by their interactions with various political movements. Members of the New Deal coalition which included union members, Socialists, and Communists as well as large numbers of immigrants, Catholics, and Jews saw the value in a strong right to free speech to further their causes.<sup>77</sup> The pro-labor movement wanted to protest management practices and appeal for government assistance, while immigrants, Catholics, and Jews hoped to be protected from an oppressive government. One of the largest protests over students' rights to free speech occurred

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<sup>74</sup> Cohen, *When the Old Left Was Young*, 22.

<sup>75</sup> Cohen, *When the Old Left Was Young*, 23-27.

<sup>76</sup> Broadhurst, "Campus Activism in the 21<sup>st</sup> Century."

<sup>77</sup> Geoffrey D. Berman, "A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s," *Virginia Law Review* 80, no. 1 (February 1994): 291-322.

when the editor of the Columbia University *Spectator* was expelled for publishing what was deemed by the administration as misrepresentations of the university.<sup>78</sup>

In 1932, Columbia University was home to some progressively minded staff and students.<sup>79</sup> The campus chapter of the National Student League was actively involved in social issues and participated in a trip to Harlan County, Kentucky to expose violations of the First Amendment rights of miners in the region. At the time, coal miners, participating in a strike to protest their working conditions and compensation, were subjected to brutal abuse by the coal mine owners and supervisors.<sup>80</sup> Reed Harris, the editor of the Columbia University *Spectator*, sent a student reporter on the trip to report on the conditions.<sup>81</sup> Afterwards, Harris penned an editorial in support of coal miners in Kentucky. Harris had a history of writing articles and editorials that raised the ire of Columbia University Dean Hawkes.<sup>82</sup> Previously, Harris had written an editorial that raised allegations of abuse in the funding of the college football team. Harris also wrote an expose about the campus dining hall alleging it exploited workers, served poor food, and overcharged. When Hawkes demanded evidence to support Harris' allegations about the dining hall, Harris invoked his rights as a journalist to keep the source of the

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<sup>78</sup> Altbach and Peterson, "Before Berkeley."

<sup>79</sup> Cohen, *When the Old Left Was Young*, 23. Cohen includes John Dewey, George Counts, Franz Boas, and Rexford Tugwell among the Left-leaning faculty at Columbia during this period.

<sup>80</sup> Cohen, *When the Old Left Was Young*, 43-47. Eighty students from New York City would travel to Harlan County on a bus, much as freedom riders would strike out for the South in buses in the 1960s.

<sup>81</sup> Cohen, 57.

<sup>82</sup> "Student Group Pledges Aid to Harris," *Columbia Daily Spectator* LV, no. 112 (April 4, 1932), Columbia Spectator Archive, Columbia University Libraries, <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19320404-01.1.1&e=-----en-20--1--txt-txIN----->, accessed on September 1, 2019; "Edits' Revealed Frank Opinions," *Columbia Daily Spectator* LV, no. 112 (April 4, 1932), Columbia Spectator Archive, Columbia University Libraries, <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19320404-01.1.1&e=-----en-20--1--txt-txIN----->, accessed on September 1, 2019; Cohen, *When the Old Left Was Young*, 44-45. The National Student League sent a delegation of students to Harlan and Bell counties in Kentucky to bring aid to striking coal miners who were being regularly abused by their employers as well as local law enforcement. The National Student League hoped the trip would raise the political consciousnesses of undergraduates when the students witnessed the evils of capitalism first-hand.

information confidential. The decision to keep his sources confidential and “slander” the dining services was the grounds for his expulsion.<sup>83</sup> Harris was shocked that he was offered no due process rights in his expulsion from Columbia.<sup>84</sup> Following his expulsion by the university, over two-thousand students gathered on the campus as part of a student strike.<sup>85</sup> Writing in support of Harris, Roger Baldwin, Director of the American Civil Liberties Union, argued that Harris “was not expelled for his alleged inability to substantiate charges concerning University affairs, but that his discharge rests on the publishing of material in the *Spectator* displeasing to the University authorities.”<sup>86</sup> Sixteen Columbia University faculty sent a letter to Dean Hawkes to call for the reinstatement of Harris because they believed his expulsion represented a clear violation of the principle of academic freedom.<sup>87</sup> Twenty days after he was expelled the university would reinstate Harris as a student, but they would continue to be caught in debates about their role in stifling freedom of speech.<sup>88</sup>

The 1940s appeared to sound a death knell for campus activism as America’s entry into the war deflated the spirit of campus activists who had been strongly supportive of anti-war

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<sup>83</sup> Cohen, *When the Old Left Was Young*, 57.

<sup>84</sup> Cohen, 59.

<sup>85</sup> “Strikers Hear Free Press Demanded,” *Columbia Daily Spectator* LV, no. 115 (April 7, 1932), Columbia Spectator Archive, Columbia University Libraries, <http://spectatorarchive.library.columbia.edu/?a=d&d=cs19320407-01&e=-----en-20--1--txt-txIN----->, accessed on September 1, 2019.

<sup>86</sup> “Baldwin Supports Right of Editorial Freedom in Letter,” *Columbia Daily Spectator* LV, no. 115 (April 7, 1932), Columbia Spectator Archive, Columbia University Libraries, <http://spectatorarchive.library.columbia.edu/?a=d&d=cs19320407-01&e=-----en-20--1--txt-txIN----->, accessed on September 1, 2019.

<sup>87</sup> “Sixteen of University Teaching Staff Call Act of Dean ‘Violation of Academic Freedom’ – Ask Reinstatement,” *Columbia Daily Spectator* LV, no. 115 (April 7, 1932), Columbia Spectator Archive, Columbia University Libraries, <http://spectatorarchive.library.columbia.edu/?a=d&d=cs19320407-01&e=-----en-20--1--txt-txIN----->, accessed on September 1, 2019.

<sup>88</sup> “Reinstatement and Withdrawal of Harris Climaxes Long Period of Official Statements, Mass Meetings and Apple Chucking,” *Columbia Daily Spectator* LV, no. 125 (April 21, 1932), Columbia Spectator Archive, Columbia University Libraries, <http://spectatorarchive.library.columbia.edu/?a=d&d=cs19320425-01&e=-----en-20--1--txt-txIN----->, accessed on September 1, 2019. Reed Harris would go on to write *King Football: The Vulgarization of the American College* (New York, NY: Vanguard Press, 1932), which built on the allegations he wrote about in the *Spectator* prior to his expulsion and exposed the early commercialization of college football.

efforts.<sup>89</sup> While anti-war protests in the 1930s were able to attract participation of hundreds of thousands of students across multiple campuses, following the attack on Pearl Harbor and a surge in patriotism, the core of the anti-war effort was reduced to about a thousand activists.<sup>90</sup> At the same time, many students were drafted into the war and even when they returned, they were more interested in finishing their degrees and moving on with their lives than getting involved in activism.<sup>91</sup> Towards the end of the decade, a few new student groups were formed including the National Student Association and the United World Federalists, but these groups did not have the same level of participation that student groups enjoyed in the 1930s.

Much like the 1940s, campus activism at the start of the 1950s was suppressed compared with the movements of the 1930s.<sup>92</sup> However, this is true only of activism associated with liberal ideology. The 1950s saw a surge in conservative activism that is rarely reported because of the general association of activism with left-leaning ideology.<sup>93</sup> The entry into the Korean conflict and the beginnings of the Cold War fueled anti-Communist sentiment and led to more conservative views on campus.<sup>94</sup> The 1950s saw growth in the National Student Association, which was founded in 1948 and grew to have significant anti-Communist views as the decade wore on.<sup>95</sup> Anti-Communist student groups were buoyed by Senator Joseph McCarthy's widespread campaign against radicals and liberals, which resulted in faculty members on several

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<sup>89</sup> Altbach and Peterson, "Before Berkeley."

<sup>90</sup> Broadhurst, "Campus Activism in the 21<sup>st</sup> Century," 6-7.

<sup>91</sup> Altbach and Peterson, "Before Berkeley," and Obear, "Student Activism in the Sixties."

<sup>92</sup> While students in the United States were relatively complacent in the 1950s, across Latin America and part of Europe, students were engaged in political movements. In Latin America, students were responsible for bringing down authoritarian dictators such as Argentina's Peron and Venezuela's Perez Jimenez. Students protested the rise of Communist regimes in Hungary, Poland, and East Germany. Obear, "Student Activism in the Sixties," 13-14.

<sup>93</sup> Evans, *Revolt on Campus*, 36-54.

<sup>94</sup> Broadhurst, "Campus Activism in the 21<sup>st</sup> Century."

<sup>95</sup> Altbach and Peterson, "Before Berkeley."

campuses being forced out due to their political views. Conservative political groups including the Intercollegiate Society for Individualists, the Young Americans for Freedom, and the Young Republicans expanded on campuses with the support of national conservative leadership.<sup>96</sup> Conservative students were actively involved in politics and influential in Barry Goldwater's campaign in 1960.<sup>97</sup> While conservative groups grew in the 1950s, progressive groups continued to operate, although in smaller numbers than before. In 1959, the Social-Democratic Student League for Industrial Democracy, a relic of the progressive movement in the 1930s, changed its name to Students for a Democratic Society, although it was still connected at the time with the League for Industrial Democracy. As it became more radical, it eventually would break ties with the national organization.

While the majority of college campuses were quiet in the 1950s, there was growing unrest among African American students particularly in the South.<sup>98</sup> The Supreme Court's decision in *Brown v. Board of Education of Topeka*, which concluded that "in the field of public education, the doctrine of 'separate but equal' has no place," inspired many African American students to challenge the lack of access to equal opportunities in higher education.<sup>99</sup> Many historians trace the beginning of the civil rights movement to this historic court decision.<sup>100</sup> Indeed, it was frustration caused by the slow pace of school desegregation that prompted four students at North Carolina Agricultural and Technical College to sit-in at the Woolworth's lunch counter in Greensboro, North Carolina in February 1960. Patterson argues that while the *Brown*

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<sup>96</sup> Evans, *Revolt on Campus*, 57-73, 108-144.

<sup>97</sup> Evans., 87-107.

<sup>98</sup> Broadhurst, "Campus Activism in the 21<sup>st</sup> Century."

<sup>99</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

<sup>100</sup> James T. Patterson, "*Brown v. Board of Education* and the Civil Rights Movement," *Stetson Law Review* 34, no. 2 (Winter 2005): 413-422.

*v. Board of Education of Topeka* decision was a spark, it was the direct action of students such as those in Greensboro that “led to the swelling of a morally powerful civil rights movement that far exceeded in effectiveness anything that *Brown* alone had sparked in the 1950s.”<sup>101</sup> The sit-ins that these students began would also eventually lead to the end of *in loco parentis* and set the stage for students to fully claim their Constitutional rights on campus.

### **The Beginning of the End of *In Loco Parentis***

The first sit-in at the Woolworth’s lunch counter on February 1, 1960 prompted multiple sit-ins across the South as well as picketing and boycotting of chain stores like Woolworth’s in the north. By April 1960, approximately two thousand students from high schools and colleges across the South had been arrested for participating in sit-ins.<sup>102</sup> The reaction of college administrators to their students’ participation in these early civil rights protests would eventually lead to the end of *in loco parentis* and offer students some protection to practice their First Amendment rights on and beyond the campus. The case of *Dixon v. Alabama State Board of Education*, “the first American case to impose traditional procedural due process requirements on higher education,” was a result of actions taken against student protestors.<sup>103</sup>

On February 25, 1960, twenty-nine African American students from Alabama State College entered Montgomery County Courthouse’s publicly owned lunchroom and asked to be served.<sup>104</sup> The students were denied service and the lunchroom was closed, but the students refused to leave, and the police were called in to disperse the students. Despite the students’

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<sup>101</sup> Patterson, 419.

<sup>102</sup> Gerald F. Goodwin, “Student Nonviolent Coordinating Committee Constitution,” in *Defining Documents: The 1960s*, ed. Michael Shally-Jensen (Amenia, NY: Grey House Publishing, Inc., 2016).

<sup>103</sup> Peter F. Lake, *Foundations of Higher Education Law and Policy: Basic Legal Rules, Concepts, and Principles for Student Affairs* (Washington, D.C.: National Association of Student Personnel Administrators, Inc, 2011), 183.

<sup>104</sup> *Dixon v. Alabama State Board of Education* 186 F. Supp. 945, 947 (M.D. Ala. 1960).

confrontation with the police, no arrests were made.<sup>105</sup> On the same day, Governor John Patterson, who also served as the chair of the State Board of Education, conferred with Harper Councill Trenholm, president of Alabama State College, and advised him to investigate the incident and consider expulsion or a similar disciplinary action for students who were involved. The next day, several hundred students from Alabama State College staged a demonstration at the courthouse in support of Harold Marco Stoutermire, a student who had attempted to register to vote and was accused of perjury for intentionally omitting the fact that he had previously been turned down for voter registration.<sup>106</sup> Two days later, on February 27, students staged mass demonstrations in Montgomery and Tuskegee, which prompted Trenholm to advise the students that they were interfering with the “orderly conduct of business at the college and were affecting the work of other students.”<sup>107</sup> On March 1, approximately 600 students staged a demonstration on the steps of the State Capitol, where one of the student organizers, Bernard Lee, “called on students to strike and boycott the college if any students were expelled by these demonstrations.”<sup>108</sup> The next day, Trenholm reported to the State Board of Education on the status of the situation and identified twenty-nine students who were responsible for the demonstrations. After hearing the report, the Board voted to expel nine students.<sup>109</sup>

After their expulsion from the college, St. John Dixon, Bernard Lee, Marzette Watts, Edward English Jones, Joseph Peterson, and Elroy Embry filed a lawsuit against the Alabama State Board of Education on the grounds that the actions taken against them violated their

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<sup>105</sup> Philip Lee, “The Case of Dixon v. Alabama: From Civil Rights to Students’ Rights and Back Again,” *Teachers College Record* 116, no. 12 (December 2014): 1-18.

<sup>106</sup> Lee, “Case of Dixon v. Alabama,” 3.

<sup>107</sup> *Dixon v. Alabama State Board of Education*, 185 F. Supp. 945 (M.D. Ala. 1960).

<sup>108</sup> *Dixon v. Alabama*, 945.

<sup>109</sup> *Dixon v. Alabama*, 949.

constitutional rights.<sup>110</sup> The students alleged “the lack of notice and denial of a hearing deprived them of due process under the fourteenth amendment [*sic*]; they further alleged that their dismissal was not justified under any valid rule of the college, but was retaliatory and arbitrary, in violations of their substantive constitutional rights.”<sup>111</sup> The students’ case was dismissed by the United States District Court for the Middle District of Alabama on the grounds that the right to attend a public college or university is not a constitutionally guaranteed right, but rather dependent on an “individual student’s compliance with the rules and regulations of the institution.”<sup>112</sup> Alabama State College operated under the rules of the Alabama State Board of Education which included a provision that students could be expelled for failure to follow rules and regulations or for conduct unbecoming to a student.<sup>113</sup> Thus, the court determined that Alabama State College acted in good faith in the exercise of their authority and did not deprive the students of their constitutional rights.<sup>114</sup> The students appealed the decision of the lower court to the United States Court of Appeals for the Fifth Circuit.<sup>115</sup>

The question before the appeals court was “whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct.”<sup>116</sup> The lower court had ruled that due process was not necessary because education was not a right protected by the Constitution. In their opinion, the appeals court asserted the idea

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<sup>110</sup> *Dixon v. Alabama*, 949.

<sup>111</sup> "Constitutional Law. Due Process of Law. Due Process Clause Forbids Expulsion of Students for Misconduct from Tax-Supported College without Notice or Hearing. *Dixon v. Alabama State Bd. of Educ.* (5th Cir. 1961)." *Harvard Law Review* 75, no. 7 (1962): 1429-431. doi:10.2307/1338554.

<sup>112</sup> *Dixon v. Alabama*, 950.

<sup>113</sup> *Dixon v. Alabama*, 950.

<sup>114</sup> *Dixon v. Alabama*, 952.

<sup>115</sup> *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). Representing the students in the case were Jack Greenberg, Thurgood Marshall, Fred D. Gray, and Derrick Bell, Jr. Thurgood Marshall had successfully represented students in the case of *Brown v. Board of Education of Topeka* and Derrick Bell would go on to become the first African American tenured law professor at Harvard Law School.

<sup>116</sup> *Dixon v. Alabama State Board of Education*, 151.

that it was not enough to consider the powers of the government agency. The court believed that the nature of the private interest of the students in continuing their education should also be considered by the court. In their ruling, the court stated:

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.<sup>117</sup>

The appeals court recognized the private value inherent in the students' right to complete their education.

Further, the appeals court expressed concern that the students in this case had been denied notice of the charges against them as well as an opportunity to defend themselves. The appeals court believed the decision made by the college could "well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education."<sup>118</sup> In testimony before the appeals court, President Trenholm of Alabama State College affirmed that in previous cases involving students' conduct and discipline from the college, students were able to hear and defend the charges brought against them.<sup>119</sup> The court ruled that all students should be given this right before being expelled for misconduct. Further, the appeals court provided standards with which future cases should comply regarding notice and hearing. These standards included informing students of the specific charges against them, providing students with the names and testimony of adverse witnesses, and granting students an opportunity to provide oral testimony or written affidavits on their own behalf.<sup>120</sup> The appeals

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<sup>117</sup> *Dixon v. Alabama State Board of Education*, 157.

<sup>118</sup> *Dixon v. Alabama State Board of Education*, 157.

<sup>119</sup> *Dixon v. Alabama State Board of Education*, 155.

<sup>120</sup> "Constitutional Law," 1429.

court based their decision on recent Supreme Court decisions involving “the dismissal of government employees, the listing of subversive organizations, and the deportation of aliens.”<sup>121</sup> In each of these cases, the Supreme Court had held that when private citizens have been harmed by government acts, they should not be deprived of due process rights.

The students at Alabama State College began their sit-in to protest the treatment of African Americans in their community, but the result of their actions would be the first significant challenge of the unquestioned authority of colleges and universities. When the United States Appeals Court ruled in favor of the students and affirmed their due process rights, it set a precedent for public colleges and universities across the country, although it did not immediately require due process for students outside of the Fifth District.<sup>122</sup> Prior to this ruling, students were subject to the arbitrary rulings of administrators in disciplinary matters and had little recourse when administrators denied the students’ ability to continue their education. Now, for the first time, courts had intervened on behalf of students and affirmed that students’ constitutional rights could not be blatantly ignored by institutions. In effect, this marked the beginning of the end of the doctrine of *in loco parentis* because it denied administrators the right to arbitrarily make decisions about disciplinary matters that the college or university believed to be in the best interest of the students and the institutions. It also sparked the beginning of a concerted movement by students that would dramatically influence the United States in the 1960s.

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<sup>121</sup> “Constitutional Law,” 1430.

<sup>122</sup> Lake, *Beyond Discipline*, 64-72.

## 2 THE TUMULTUOUS 1960s

The 1960s ushered in an era of unrest and turmoil on college campuses across the country. Some of the key issues at the heart of this campus unrest included racism, free speech, faculty involvement in the defense industry, the influence of colleges on their local communities, drug use, and personnel policies.<sup>123</sup> As students became more involved in the civil rights movement and opposition to the Vietnam War, they brought these issues and concerns with them to campus. While forcing these issues to be addressed on campus, students also demanded that universities be more responsive to the changing student demographic. Students increased demands for shared governance as well as programs that reflected the history and experiences of diverse student groups. While campuses had experienced various surges in activism throughout their histories, the 1960s is likely remembered as the pinnacle of student activism because of the sheer volume of students on campuses during the time period.

When activism spiked on campuses in the 1930s, the number of students involved in activism was proportionately higher than the total number of students who engaged in activism during the 1960s.<sup>124</sup> However, due to the massive increase in college attendance in the 1960s, there were more students on campuses involved in various causes and the total number surpassed the previous historic numbers of the 1930s. To provide a sense of the growth in total student population, in 1910, there were approximately 355,000 college students and by 1960, there were approximately 3,580,000.<sup>125</sup> A survey of students conducted by Leonard Baird in the 1960s found that over seventy-five percent of men and seventy-three percent of women had not

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<sup>123</sup> Howard S. Becker, "Introduction to the First Edition: The Struggle for Power on the Campus," in *Campus Power Struggle*, 2<sup>nd</sup> ed., ed. Howard S. Becker (New Brunswick, NJ: Transaction Books, 1973).

<sup>124</sup> Broadhurst, "Campus Activism in the 21<sup>st</sup> Century."

<sup>125</sup> Altbach and Peterson, "*Before Berkeley*."

participated in any form of activism.<sup>126</sup> Still, using an estimate of twenty-five percent of students involved in some form of activism would result in more than twice the total number of students enrolled in college fifty years earlier.

The increase in federal funding of higher education coupled with the arrival on campus of the baby boomers was largely responsible for the spike in student enrollment during the 1960s.<sup>127</sup> The federal government provided significant funding for defense industry research, which benefitted primarily research universities over liberal arts colleges.<sup>128</sup> During this period, the federal government hoped to increase the equality of opportunity for students through financial aid and for faculty by pressuring universities to accept women and minorities as faculty members.<sup>129</sup> While the efforts of the federal government were influential in raising college attendance and expanding access to some women and minorities, their efforts did not dramatically shift the numbers of students from low income families attending college. Still, despite this limitation, campuses in the 1960s were more diverse than any previous period in American history.

In addition to the influx of large numbers of diverse students, the increased media attention on campus activities and disruptions only further contributed to the belief that the 1960s were the height of student activism. Because campus activism was covered in a conventional way that highlighted the “instances of exciting troubles” and detailed the demands, the indignities suffered, and any police interactions, the public was largely unaware of the

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<sup>126</sup> Robert Rhoads, *Freedom's Web: Student Activism in an Age of Cultural Diversity* (Baltimore, MD: Johns Hopkins University Press, 1998).

<sup>127</sup> Broadhurst, “Campus Activism in the 21<sup>st</sup> Century.”

<sup>128</sup> John R. Thelin, *A History of American Higher Education*, 3<sup>rd</sup> ed. (Baltimore, MD: Johns Hopkins University Press, 2019), 323-326.

<sup>129</sup> Kerr, “‘The Uses of the University’ Two Decades Later.”

“underlying power situation that provoked the incident and conditioned its outcome.”<sup>130</sup> What was communicated to the public was that students were becoming unruly on campuses. Given that evidence does not suggest that significant numbers of students relative to the total campus populations were involved in protests, it is notable the amount of media attention campuses received. Robert Rhoads believes this constant attention was likely sustained because it served both sides involved in the protests of the time – the right who used it to reinforce the need for tradition and the left to demonstrate a strength they may not have actually had at the time.<sup>131</sup> The coverage of campus protests made national celebrities out of several leaders of student groups including Tom Hayden of the Students for a Democratic Society, Stokely Carmichael of the Student Nonviolent Coordinating Committee, and Abbie Hoffman of the Youth International Party (often referred to as the Yippies).<sup>132</sup> The issues that repeatedly came to the forefront in the media fell into one of the three general areas: dissatisfaction with the college experience, the civil rights movement, and the peace movement. While it is not within the scope of this chapter to include an exhaustive history of each protest during this period, a general overview of each area including key moments within each movement is necessary to understand the concerns of students and the ways in which universities responded to students’ attempts to exercise their First Amendment rights on campuses.

### **Dissatisfaction with the College Experience**

As greater numbers of students came to campuses in the 1960s, colleges and universities experienced significant growing pains. In 1951, half of the college population was enrolled at

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<sup>130</sup> Becker, “The Struggle for Power on Campus,” 8.

<sup>131</sup> Rhoads, “Freedom’s Web,” 36.

<sup>132</sup> Broadhurst, “Campus Activism in the 21<sup>st</sup> Century,” 7-10.

private colleges. Ten years later, sixty percent of students were enrolled in public universities.<sup>133</sup> The transition from small, liberal arts colleges with highly selective admissions policies to largely impersonal universities with increasingly diverse student populations changed what had come to be considered the college experience for students. During this same period, university faculties were becoming more specialized and focused on research, which limited their time with the average undergraduate student.<sup>134</sup> Students began to question the relationships between administrators, faculty, and students, the rules and regulations that governed students' behavior, and the power to determine the curriculum.<sup>135</sup> They wanted, and in some cases demanded, a say in the governance of universities.<sup>136</sup> The Free Speech Movement at the University of California at Berkeley and the fight for Black Studies at San Francisco State College are emblematic of the tensions that dominated campuses in the 1960s.

While the Free Speech Movement at Berkeley is often remembered for its demand for student rights, it was just as much a result of student discontent with the evolving "character and purposes of American universities."<sup>137</sup> The Free Speech Movement was fueled by "calls for a reduced role for administration, increased decision making by faculty and students, and educational experimentation to counter the impersonal character of a mass university."<sup>138</sup> Students were increasingly unhappy about their inability to challenge campus rules and were frustrated by attempts by the administration to limit political activity on campus. At the start of

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<sup>133</sup> Joseph Gusfield, "Beyond Berkeley," in *Campus Power Struggle*, 2<sup>nd</sup> ed., ed. Howard S. Becker (New Brunswick, NJ: Transaction Books, 1973).

<sup>134</sup> Gusfield, "Beyond Berkeley."

<sup>135</sup> Nathan Glazer, "'Student Power' in Berkeley," in *Confrontation: The Student Rebellion and the Universities*, eds. Daniel Bell and Irving Kristol (New York, NY: Basic Books, 1969).

<sup>136</sup> Kerr, "Student Dissent and Confrontation Politics."

<sup>137</sup> Gusfield, "Beyond Berkeley," 19.

<sup>138</sup> Robert Cohen, "The Many Meanings of the FSM: In Lieu of an Introduction," in *The Free Speech Movement: Reflections on Berkeley in the 1960s*, ed. Reginald E. Zelnik and Robert Cohen (Berkeley: University of California Press, 2002), 1–54.

the movement, students were particularly concerned about campus free speech and desired that students be treated as citizens with their behavior governed by the courts and not campus administrators.<sup>139</sup> According to Obear, “[t]he basic policy at issue was stated in a Dean of Students publication: ‘University facilities may not be used to support or advocate off-campus political or social action.’ The policy was interpreted by the activists to mean a ban on free speech, and they maintained that the implications of the ban clearly opposed the accepted purpose of educational institutions.”<sup>140</sup> In the fall of 1964, the administration of Berkeley announced that a space along the edge of campus that had previously been utilized for engaging in political activity would no longer be available to students for these purposes.

The first major confrontation in the Free Speech Movement occurred on October 1, 1964, when students set up tables on campus to collect donations for the civil rights movement, in clear violation of the ban on political activity.<sup>141</sup> Administrators called the police onto campus to evict Jack Weinberg who had set up a table on Sproul Plaza to promote the Congress of Racial Equality. A crowd of about one hundred students gathered in the plaza to protest the arrest of Weinberg and began chanting that the police should arrest them all. When a police car arrived on campus to assist in the arrest on Weinberg, students crowded around the police car and sat down beside it, preventing it from exiting the campus.<sup>142</sup> Students began to use the top of the police car as a podium to share their concerns with other students. The most memorable of the speeches given that day was by Mario Savio, who had spent the previous summer volunteering as part of

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<sup>139</sup> Margot Adler, “My Life in the FSM: Memories of a Freshman,” in *The Free Speech Movement: Reflections on Berkeley in the 1960s*, eds. Reginald E. Zelnik and Robert Cohen (Berkeley: University of California Press, 2002), 111-128, 115.

<sup>140</sup> Obear, “Student Activism in the Sixties,” 18.

<sup>141</sup> Robby Cohen, “Berkeley Free Speech Movement: Paving the Way for Campus Activism,” *Organizations of American Historians Magazine of History* 1, no. 1 (April 1983): 16-18.

<sup>142</sup> Adler, “My Life in the FSM.”

Freedom Summer in Mississippi.<sup>143</sup> Savio demanded that the university release Weinberg and not punish the students who were part of the protest, but the administration refused to negotiate with the protestors, which prompted about 150 students to move their protest into Sproul Hall and occupy the building. By the next day, thousands of students were crowding the police car and hundreds of police had arrived on campus to monitor the situation. Under intense pressure, Berkeley President Clark Kerr reached an agreement with the students to disband the protest, release Weinberg, and call a joint committee to review the university's policy on political activity.<sup>144</sup> For a moment, it seemed as if a serious crisis had been averted.

However, after the Thanksgiving break, several of the students who had been involved in the October protest including Mario Savio received letters from the administration charging them with violations of university policies and requesting them to appear before a campus disciplinary committee.<sup>145</sup> On December 2, approximately 1,000 students descended on Sproul Hall in the afternoon and stayed into the night to protest the latest action by the university.<sup>146</sup> At 3:45 a.m. the following morning, the Governor of California, Edmund Brown, ordered over 600 police officers to Sproul Hall to remove the protestors.<sup>147</sup> Over the next twelve hours they would forcibly remove 800 students from the building.<sup>148</sup> The police presence on campus shocked and angered many members of the campus community who had previously not engaged with the protests. On December 3, the Free Speech Movement declared a general strike that lasted three days.<sup>149</sup> The student arrests generated significant sympathy from the faculty and in a vote of the

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<sup>143</sup> Cohen, "Berkeley Free Speech Movement."

<sup>144</sup> Adler, "My Life in the FSM," 116.

<sup>145</sup> Cohen, "Berkeley Free Speech Movement."

<sup>146</sup> Rhoads, *Freedom's Web*.

<sup>147</sup> Cohen, "Berkeley Free Speech Movement."

<sup>148</sup> Adler, "My Life in the FSM."

<sup>149</sup> Cohen, "Berkeley Free Speech Movement."

Academic Senate they agreed that the university would no longer restrict the speech or advocacy of students.<sup>150</sup> Their resolution did include “provisions for time, place, and manner restrictions so as to not interfere with the academic enterprise.”<sup>151</sup> Still, it was a significant win for the students involved in the Free Speech Movement.

Three years later, just across the San Francisco Bay from Berkeley, students at San Francisco State College found themselves caught up in a similar situation as the students at Berkeley. Unlike the students at Berkeley who were protesting for their rights including free speech, the students at San Francisco State had much more specific demands for the administration. In comparing the two protests, Nathan Glazer stated: “the demands of the black students have been concrete, and have gone directly to curriculum and university organization. They want specific courses on American Negro history and culture, and African history and culture. They want more Negro faculty.”<sup>152</sup> For several years, students had expressed frustration with the curriculum at the college, which they believed did not adequately expose students to the realities of the world. In response, the Associated Students created programs including the Experimental College, which offered courses unavailable in the traditional curriculum; the Community Involvement Program, which placed students within neighborhood groups to address the specific needs of the communities; and the Tutorial Program, which provided tutors to help students with their education and encourage them to stay in school.<sup>153</sup> These programs were highly popular among the student body when they were introduced during the 1965-1966 academic year.

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<sup>150</sup> Cohen, “Berkeley Free Speech Movement.”

<sup>151</sup> Rhoads, *Freedom's Web*, 46.

<sup>152</sup> Glazer, “‘Student Power’ in Berkeley,” 18.

<sup>153</sup> John H. Bunzel, “Black Studies at San Francisco State,” in *Confrontation: The Student Rebellion and the Universities*, eds. Daniel Bell and Irving Kristol (New York: Basic Books, 1969).

In 1966, when the Black Students' Union formed on campus, they expressed frustration that the curriculum did not reflect their history or experiences, so they set about developing a black curriculum.<sup>154</sup> In the fall of 1966, they introduced the Black Arts and Culture Series as part of the Experimental College with the courses taught voluntarily by sympathetic faculty and graduate students.<sup>155</sup> Despite these efforts, the environment on campus was not welcoming to African American students.

On the morning of November 9, 1967, members of the Black Student Union upset by perceived racial implications in the campus newspaper "invaded the editorial offices and assaulted the editors."<sup>156</sup> The students accused the paper of continually printing humor that contained racial slurs and writing about Muhammad Ali, but continuing to use his former name, Cassius Clay.<sup>157</sup> On December 6, 1967, students and at least one faculty member marched to the administration building and broke in to the building. University trustees including Governor Ronald Reagan called the police to restore order and President Summerskill closed the campus.<sup>158</sup> Tensions would continue to stay elevated for the next several months with occasional protests staged on campus. On May 24, 1968, Summerskill was fired for his failure to take a hard-line stance with the campus protestors. President Smith was appointed to fill the position left vacant by Summerskill's departure.<sup>159</sup>

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<sup>154</sup> For more information on the struggle for a curriculum that represented black students, see Nathan Hare, "The Battle for Black Studies," *The Black Scholar* 3, no. 9 (May 1972): 32-47.

<sup>155</sup> Bunzel, "Black Studies at San Francisco State."

<sup>156</sup> James McEvoy and Abraham Miller, "The Crisis at San Francisco State," in *Campus Power Struggle*, 2<sup>nd</sup> ed., ed. Howard S. Becker (New Brunswick, NJ: Transaction Books, 1973), 62.

<sup>157</sup> William H. Orrick, Jr., *Shut It Down: A College in Crisis, San Francisco State College, October, 1968 to April, 1969. A Staff Report to the National Commission on the Causes and Prevention of Violence* (San Francisco, CA: San Francisco State College, June 1969). Accessed on September 1, 2019. <https://files.eric.ed.gov/fulltext/ED084943.pdf>

<sup>158</sup> McEvoy and Miller, "The Crisis at San Francisco State." Ronald Reagan had campaigned on his ability to bring order back to the California University System after the protests at Berkeley in 1964.

<sup>159</sup> McEvoy and Miller.

Trouble began brewing for newly appointed President Smith not long after the start of the fall semester. That semester, Charles Murray, the Minister of Education for the Black Panthers, returned to campus as a part-time instructor in the English department.<sup>160</sup> News of his return was picked up by the San Francisco papers and eventually the Los Angeles papers. Although Murray's performance as an instructor was without question, the Board of Trustees began pressuring Smith to reassign Murray to a non-teaching position or fire him.<sup>161</sup> On November 1, 1968, President Smith suspended Murray, after hearing rumors that he had told black students that they should carry weapons to protect themselves from the administration. On November 5, the Black Student Union presented President Smith with a list of ten demands and their decision to strike. The strike commenced on November 6, which was the one-year anniversary of the beating of the newspaper editors responsible for approving racially charged articles and comics in the student paper. On November 7, the Third World Liberation Front joined in the strike and added five additional demands for the administration. Over the course of the next several days, strikers formed a picket line to prevent students from accessing the campus as well as traveled through academic buildings disrupting classes. The strikers faced frustration from students who wanted the campus to stay open, even if they supported the strike and the demands of the strikers, which included the establishment of a Black Studies Department and reinstatement of Charles Murray.<sup>162</sup>

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<sup>160</sup> William H. Orrick, *Shut It Down!: A College in Crisis: San Francisco State College, October 1968-April 1969; A Report to the National Commission on the Causes and Prevention of Violence*. United States. National Commission on the Causes and Prevention of Violence. Investigative Reports. [For sale by the Supt. Of Docs, U.S. Govt. Print. Off.], 1969.

<sup>161</sup> Orrick, *Shut It Down*.

<sup>162</sup> McEvoy and Miller, "Crisis at San Francisco State."

On November 13, tensions escalated when the San Francisco Police Department's Tactical Squad engaged in conflict with students following a press conference that was being held at the Black Student Union. President Smith announced that the campus would be closed indefinitely, but faced immediate backlash from Governor Reagan, who stated, "I want to make it clear as long as I am Governor, our publicly supported institutions of higher education are going to stay open to provide educations for our young people."<sup>163</sup> President Smith reopened the campus on November 20 with a series of meetings with faculty and students, but when talks broke down the fate of the university was in limbo and no one was certain if it was opened or closed. On November 26, President Smith was called to a meeting with the trustees where he resigned his position. President Hayakawa was appointed to replace President Smith, who had lasted only six months in the role.<sup>164</sup> On November 30, President Hayakawa announced a press conference to discuss the reopening of the campus.<sup>165</sup>

On December 2, students from the Black Student Union and the World Liberation Front demanded to speak to Hayakawa and when he failed to appear, decided to occupy the administration building.<sup>166</sup> On December 3, which came to be known as Bloody Tuesday, police responded to protestors' aggression toward them by chasing students into the cafeteria and beating students, including some innocent bystanders. Prior to this incident, business school faculty and students had been strongly opposed to the strike, but seeing police beating strikers shifted their support from the administration to the strikers.<sup>167</sup> With the situation escalating out of control, a committee of community members chaired by William Hurley was formed to work out

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<sup>163</sup> As quoted in Orrick, *Shut It Down*, 45.

<sup>164</sup> McEvoy and Miller, "Crisis at San Francisco State."

<sup>165</sup> Orrick, *Shut It Down*.

<sup>166</sup> McEvoy and Miller, "Crisis at San Francisco State."

<sup>167</sup> McEvoy and Miller.

a resolution between the college and the striking students. Although tensions would continue to erupt for the next few months, on March 21, President Hayakawa and the Black Student Union announced a settlement and the strike finally came to an end. It would represent one of the longest student strikes in American history. The situation at San Francisco State College was an illustration of not only the increasing tensions between students and administration, but also indicative of the racial tensions that were fueling the civil rights movement. The three key issues that defined the era, a dissatisfaction with the collegiate experience, the civil rights movement, and the peace movement, often overlapped.

### **The Civil Rights Movement**

The sit-ins that began when four students from North Carolina A&T College sat down at the Woolworth's lunch counter in February 1960 would spread across the south for the next several months and eventually inspire students in the north. Bob Moses, a civil rights activist from the north, recalled his first impression of the student sit-ins in Greensboro, NC:

The students in that picture had a certain look on their faces, sort of sullen, angry, determined. Before, the Negro in the South has always looked on the defensive, cringing. This time they were taking the initiative. They were kids my age, and I knew this had something to do with my own life.<sup>168</sup>

Students in the north inspired by the action in the south began boycotting chain stores like Woolworth's. During this period, more black students were killed by police than students killed at Kent State in 1970, but their deaths did not garner the same attention, likely due to the fact that they occurred in southern states.<sup>169</sup> In April 1960, students involved in the sit-in movement gathered at Shaw University in Raleigh, North Carolina to discuss their next steps. Ella Baker, a

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<sup>168</sup> As quoted in Howard Zinn, *A People's History of the United States: 1492 - Present* (New York: Harper Perennial, 1980), 453. Bob Moses was a leader in the Student Nonviolent Coordinating Committee and co-founder of the Mississippi Freedom Democratic Party.

<sup>169</sup> Rhoads, *Freedom's Web*, 46.

member of the Southern Christian Leadership Conference (SCLC), allocated \$800 to the group and encouraged them to start their own organization that would have a more participatory democratic feel than the SCLC.<sup>170</sup> The group that formed would call themselves the Student Nonviolent Coordinating Committee (SNCC) and they would represent one of the first civil rights groups not to be affiliated with a church or prominent minister.<sup>171</sup> In interviews with members of SNCC, “activists actually denied that there were leaders in SNCC at all – because the word ‘leader’ connoted to them a person who manipulated others, thus distorting the purpose of an organization.”<sup>172</sup> These members may have embraced Ella Baker’s warning against the centralized leadership of the SCLC.

From the beginning, SNCC was a highly active group that believed in the equality of all members and was bound by a moral ethos that rejected a formal set of beliefs.<sup>173</sup> Members were students at schools and colleges across the south and eventually from the north. Bill Hansen, one of the early members of SNCC, recalled:

There was also the idea at the beginning of SNCC rooted here more in that idea of a religiously based morality...It manifested itself politically in the sense that we thought that American [sic] was good basically. [We believed] that it had some things wrong with it that could be reformed...I was a firm believer in that what we had to do was appeal to law, to justice, to the general public in the United States, and to the Constitution...<sup>174</sup>

SNCC members were engaged daily in their work and their nonviolent direct action began to win over the sentiments of moderate whites in the north. They chose to focus their work in

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<sup>170</sup> Gerald F. Goodwin, “Student Nonviolent Coordinating Committee Constitution,” in *Defining Documents: The 1960s*, ed. Michael Shally-Jensen (Amenia, NY: Grey House Publishing, Inc., 2016).

<sup>171</sup> Goodwin, “Student Nonviolent Coordinating Committee Constitution.”

<sup>172</sup> Emily Stoper, “The Student Nonviolent Coordinating Committee: Rise and Fall of a Redemptive Organization,” *Journal of Black Studies* 8, no. 1 (September 1977): 13-24, 15.

<sup>173</sup> Stoper, “Student Nonviolent Coordinating Committee.”

<sup>174</sup> Jennifer Jensen Wallach, “‘We Became Radicalized by What We Experienced’: Excerpts from an Interview with William (Bill) Hansen, Director of the Student Nonviolent Coordinating Committee’s Arkansas Project, July 22, 1997,” *Arkansas Review: A Journal of Delta Studies* 42, no. 2 (August 2011): 104-116, 111.

Mississippi because of its reputation as the most racist state in the union. According to Stoper, “[i]n tackling the rural Deep South, SNCC could enjoy a sense of a special and superior mission, which proved to be an important source of solidarity.”<sup>175</sup> However, the decision to focus attention on the Deep South placed SNCC volunteers in danger and resulted in members being beaten, jailed, and even murdered.

A year after the sit-ins began in Greensboro, the Congress of Racial Equality (CORE), a northern-based group dedicated to racial equality, organized the first “Freedom Ride,” to highlight the continued segregation of interstate travel even after the Interstate Commerce Commission banned racially segregated buses and facilities on interstate routes.<sup>176</sup> The group departed from Washington, D.C. in early May with the goal of arriving in New Orleans on May 7, the anniversary of the *Brown v. Board of Education of Topeka* decision.<sup>177</sup> Unfortunately, the bus never made it to New Orleans. After riders were attacked and beaten in South Carolina and the bus was set on fire in Alabama, all while police and law enforcement looked on, CORE canceled the ride.<sup>178</sup> Determined not to let violence win, Diane Nash of the Nashville SNCC organized a Freedom Ride from Nashville to Birmingham.<sup>179</sup>

Before the new Freedom Riders set out from Nashville, they called the Justice Department in Washington, D.C. to ask for protection, but were denied their request.<sup>180</sup> Still, they departed as planned from Nashville and were later arrested in Birmingham and transported

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<sup>175</sup> Stoper, “The Student Nonviolent Coordinating Committee,” 18.

<sup>176</sup> Zinn, *A People’s History of the United States*; Linda T. Wynn, “Freedom Rides from Washington, D.C. to New Orleans, Louisiana (1961),” *Freedom Facts & Firsts: 400 Years of the African American Civil Rights Experience*, January 2009, 39-40, <http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=khh@AN=40073982&site=edslive&scope=site>.

<sup>177</sup> Patterson, “*Brown v. Board of Education* and the Civil Rights Movement.”

<sup>178</sup> Zinn, *A People’s History of the United States*, 453.

<sup>179</sup> Wynn, “Freedom Rides from Washington, D.C., to New Orleans, Louisiana (1961).”

<sup>180</sup> Zinn, *A People’s History of the United States*.

back to Tennessee. Not to be deterred, they boarded another bus in Tennessee and headed back to Birmingham and then took a bus to Montgomery. When they arrived in Montgomery, they were attacked by a mob of angry whites, but persisted on to Jackson, Mississippi. At this point, they were attracting significant attention in the media and Attorney General Robert Kennedy arranged for the riders to be arrested in Jackson to protect them from mob violence.<sup>181</sup> After being arrested in Jackson, the Freedom Riders were convicted and sent to serve time in the Parchman Farm Penitentiary.<sup>182</sup> The arrests would not deter the volunteers in SNCC who would continue the rides for four months until the Interstate Commerce Commission established guidelines to effectively desegregate the transportation system.<sup>183</sup>

Throughout this same period, SNCC was continuing to build its operation in Mississippi, but was experiencing limited success. Three factors contributed to their lack of success: the state's refusal to entertain any form of racial equality, a lack of presence by federal officials to combat the state's resistance, and a failure to attract media attention.<sup>184</sup> Things began to change for them when Allard Lowenstein, a Democratic activist and college administrator, came to visit Mississippi in the summer of 1963 and invited himself into the affairs of SNCC.<sup>185</sup> Lowenstein suggested that SNCC hold "a protest vote to demonstrate the desire of blacks to participate in the electoral process."<sup>186</sup> In order to meet the demand for workers to pull off the protest vote, Lowenstein agreed to use his connections to recruit Northern college students to help with the project. He was able to recruit almost one hundred students and "their presence....ensured a great

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<sup>181</sup> Zinn.

<sup>182</sup> Wynn, "Freedom Rides from Washington, D.C., to New Orleans, Louisiana (1961)."

<sup>183</sup> Wynn.

<sup>184</sup> Doug McAdam, *Freedom Summer* (New York, NY: Oxford University Press, 1988).

<sup>185</sup> McAdam, *Freedom Summer*.

<sup>186</sup> McAdam, 36.

deal of favorable publicity for SNCC as well as the campaign itself.”<sup>187</sup> When the volunteers returned to their campuses after the campaign, they were greeted like heroes, which helped to promote civil rights work among college students.

After the successful fall campaign, Bob Moses proposed bringing more white students back in the summer of 1964 to help register more African American voters and draw attention to the violence African Americans experienced when attempting to exercise their right to vote. Although some members of SNCC were hesitant to rely on so much support from white students, “their experiences during the Freedom Vote campaign had convinced the SNCC high command that nothing attracted the media quite like scenes of white college kids helping ‘the downtrodden Negroes of Mississippi.’”<sup>188</sup> The Mississippi Summer Project, which would come to be known as Freedom Summer, brought eight hundred white students to Mississippi and one hundred stayed after the summer to continue working with SNCC.<sup>189</sup> The organization which had operated in small tight circles of volunteers for years experienced difficulties in assimilating these new members into the organization.<sup>190</sup> The new white volunteers began to take over which angered the black volunteers who had been working in the organization for years. This also created tension in the communities because the blacks that the white volunteers interacted with tended to defer to the whites. Questions were raised about the motivations of the white volunteers: “The blacks, after all, were fighting in their own cause, whose outcomes would directly affect their personal destinies. The whites were merely giving a little of their time to somebody else’s cause.”<sup>191</sup>

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<sup>187</sup> McAdam, 37.

<sup>188</sup> McAdam, 39.

<sup>189</sup> Stoper, “The Student Nonviolent Coordinating Committee.”

<sup>190</sup> Wallach, “We Became Radicalized by What We Experienced.”

<sup>191</sup> Stoper, “The Student Nonviolent Coordinating Committee,” 24.

Despite the tension that developed within SNCC after Freedom Summer, their decision to incorporate white college students did bring increased publicity to the plight of African Americans in the Deep South. Prior to the start of the Freedom Summer campaign, organizers requested federal protection, but the Johnson administration did not respond to their request.<sup>192</sup> Two weeks later, on June 21, 1964, three civil rights workers, Michael Schwerner, Andrew Goodman, and James Chaney, were arrested in Philadelphia, Mississippi for speeding after having visited with the congregation of an African American church that had been burned.<sup>193</sup> The men were released from jail hours later and reported missing when they did not return to their posts. In early August, after receiving a tip, the FBI discovered their bodies buried in a shallow grave.<sup>194</sup> The deaths of Schwerner, Goodman, and Chaney highlighted the failure of the government to protect its citizens against violence and led to mounting pressure on Congress to take action to address the severe civil rights violations in the South.<sup>195</sup>

In the late summer of 1964, SNCC backed the Mississippi Freedom Democratic Party in its effort to have delegates seated at the Democratic National Convention in place of the regular delegation, who were selected in a discriminatory manner.<sup>196</sup> The convention organizers would only consent to seating two of the members of the delegation as at-large delegates to the convention. This decision infuriated members of SNCC who were uncomfortable with a compromise that they saw as a conflict of “the forces of right and justice fighting against the forces of evil and racism” of which compromise should not be an option.<sup>197</sup> This experience

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<sup>192</sup> Zinn, *A People's History of the United States*, 456.

<sup>193</sup> John C. Devlin, “Parents Ask Mississippians’ Aid In Search for 3 Rights Workers,” *New York Times*, June 26, 1964.

<sup>194</sup> Claude Sitton, “Experts Identify Mississippi Bodies as Rights Aides’,” *New York Times*, August 6, 1964.

<sup>195</sup> “300 More Civil Rights Workers Enter Mississippi,” *New York Times*, June 29, 1964.

<sup>196</sup> Stoper, “The Student Nonviolent Coordinating Committee.”

<sup>197</sup> Stoper, 21.

marked a turning point for members of SNCC and the organization began to question whether their tactics would result in what they hoped to achieve.<sup>198</sup>

In 1966, Stokely Carmichael was elected as the new leader of SNCC with a decidedly more radical agenda that promoted black power and separation from whites in order to build black-controlled institutions.<sup>199</sup> White members were asked to leave the organization.<sup>200</sup> In May 1966, James Meredith, the first black student at the University of Mississippi, set off on what he called a “March Against Fear” from Memphis, Tennessee to Jackson, Mississippi, but he was shot by a sniper along the way.<sup>201</sup> Martin Luther King encouraged Stokely Carmichael and SNCC to continue Meredith’s march. Carmichael traveled to Greenwood, Mississippi to continue the march, but when he arrived, he was arrested by the police only to be released later that evening. After his release, Carmichael spoke before an audience of about three thousand that had gathered to hear him.<sup>202</sup> Frustrated by his experiences, Carmichael spoke passionately about the discrimination and oppression facing black Americans. His most memorable words would change the direction of SNCC: “The only way we stop them white men from whuppin us is to take over. We been saying freedom for six years and we ain’t got nothing. What we gonna start saying now is BLACK POWER!”<sup>203</sup> In the years to follow, SNCC would adopt a black nationalist agenda, but their increasingly radical approach would cost them the financial support of white liberals that they had come to rely on.<sup>204</sup>

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<sup>198</sup> Jennifer Hendricks, “Stokely Carmichael and the 1967 IMPACT Symposium: Black Power, White Fear, and the Conservative South,” *Tennessee Historical Quarterly* 63, no. 4 (Winter 2004): 284-304.

<sup>199</sup> Hendricks, “Stokely Carmichael and the 1967 IMPACT Symposium.”

<sup>200</sup> Stoper, “The Student Nonviolent Coordinating Committee.”

<sup>201</sup> Hendricks, “Stokely Carmichael and the 1967 IMPACT Symposium.”

<sup>202</sup> Hendricks.

<sup>203</sup> As quoted in Hendricks, “Stokely Carmichael and the 1967 IMPACT Symposium,” 288.

<sup>204</sup> Stoper, “Student Nonviolent Coordinating Committee.”

While many college students were involved in the civil rights movement and SNCC, in particular, much of the civil rights activity took place off campus. The shift in activism from seeking integration to Black Power brought the civil rights movement more squarely onto the campuses.<sup>205</sup> In the late 1960s, students at Howard University would grow frustrated with the administration and engage in protests. According to Lawrence de Graaf, a visiting faculty member during the time of the protest, there were three primary causes for the unrest: “the outdated institutional structure and policies of Howard, black nationalist ideology, and the atmosphere of frustration that evolved from repeated failures to secure campus reforms.”<sup>206</sup> Although Howard University served black students, the curriculum and structure of the university mimicked that of predominantly white universities and left students frustrated that their needs were not being met. There was a lack of investment in the black community around the university. Interestingly, the tenured faculty were mostly black and resistant to reforms, while junior faculty were overwhelmingly white and often sympathized with students.<sup>207</sup> In 1967, one of the greatest frustrations for students was the lack of a written code of conduct and student representation in the campus judicial process, which often resulted in arbitrary dismissal of students from the university.

In 1968, students at Howard University engaged in a sit-in to protest the police shooting at South Carolina State University where three students were killed and thirty others wounded.<sup>208</sup> The students occupied the administration building, which infuriated the administration. The administration believed that student protests and disruptions were unacceptable behavior for

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<sup>205</sup> Lawrence B. de Graaf, “Howard: The Evolution of Black Student Revolt,” in *Protest! Student Activism in America*, eds. Julian Foster and Durward Long (New York, NY: William Morrow & Company, Inc., 1970).

<sup>206</sup> de Graaf, “Howard: The Evolution of a Black Student Revolt,” 320.

<sup>207</sup> de Graaf, 320.

<sup>208</sup> Rhoads, *Freedom's Web*, 42-44.

Howard students, who were privileged to attend the university, rather than the constitutional right of students to assert freedom of expression. The president of Howard, James Nabrit, Jr., reportedly remarked that he would not “sit by and see the University become a place of lawlessness and disorder.”<sup>209</sup> However, the students saw their actions as demonstrating solidarity with the black struggle and urged the faculty and administration to adopt a more Afro American orientation in the curriculum.

In the spring of 1969, black students at Cornell University would stage their own protest. Prior to the 1960s, there were few black students attending Cornell. In 1965, a campus committee was organized with the sole purpose of recruiting more black students to Cornell, and by September 1969, approximately 240 black students were enrolled at Cornell.<sup>210</sup> Despite the college’s desire to attract more black students, the campus was not prepared to warmly welcome the students to campus. Black students reported difficulties living in campus housing with white students as well as open hostility from some students, faculty, and staff while on campus. In December 1968, tensions began to rise between black students and the administration over the slow progress being made in establishing a black studies program. Shortly before the winter break, black students began a series of demonstrations to express their frustration, which included many prank-like incidents such as playing drums on campus, emptying library shelves of books, claiming tables in the union as ‘black tables,’ and demanding to be seen by black doctors in the student clinic.<sup>211</sup> In January 1969, six students were charged by the Student-Faculty Conduct Board for their role in the demonstrations, which only increased tensions on

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<sup>209</sup>As quoted in de Graaf, “Howard: The Evolution of Black Student Revolt,” 321.

<sup>210</sup> William H. Friedland and Harry Edwards, “Confrontation at Cornell,” in *Campus Power Struggle*, 2<sup>nd</sup> ed., ed. Howard S. Becker (New Brunswick, NJ: Transaction Books, 1973).

<sup>211</sup> Friedland and Edwards, “Confrontation at Cornell.”

campus. The black students believed that their actions in December were political acts of protests for their experiences on campus and should not be punished as disciplinary acts by the campus administration.<sup>212</sup>

On Friday, April 18, 1969, at 3 a.m., a burning cross was thrown onto the porch of Wari House, a housing cooperative for black female students.<sup>213</sup> The police were called to the scene but dismissed the action as a “thoughtless prank,” and did not stay long to ensure the safety of the women.<sup>214</sup> Hours later, at 6:00 a.m., members of the Afro-American Society took over Willard Straight Hall to protest their frustration with the college. At 9:40 a.m., white fraternity members entered the building in an attempt to take it back from the black students.<sup>215</sup> The students engaged in a scuffle and the white students were removed from the building. In order to protect themselves from further attacks, the black students brought guns into the building.<sup>216</sup> In an act of solidarity with the Afro-American Society, the Students for a Democratic Society formed a picket line outside the building to prevent anyone else from entering the building.<sup>217</sup>

On Saturday afternoon, the students in Willard Straight Hall issued their demands to the Dean, which included the nullification of discipline reprimands for the students who participated in the December protests and a full investigation of the cross-burning incident. After consultation with Dean Robert Miller, they agreed to end the occupation Sunday afternoon and came out of the hall with their weapons brandished, in a moment that would be captured in a Pulitzer Prize-

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<sup>212</sup> Friedland and Edwards.

<sup>213</sup> Gregory Lowery, “A Campus Takeover that Symbolized an Era of Change,” *Cornell Chronicle*, April 16, 2009, <https://news.cornell.edu/stories/2009/04/campus-takeover-symbolized-era-change>.

<sup>214</sup> Friedland and Edwards, “Confrontation at Cornell,” 91. The identification of harassment as merely harmless pranks is one that will persist for decades and prevent any remedy to address harassment.

<sup>215</sup> Lowery, “A Campus Takeover that Symbolized an Era of Change.”

<sup>216</sup> Lowery.

<sup>217</sup> Friedland and Edwards, “Confrontation at Cornell.” The collaborative nature of left-leaning activist movements demonstrates their potential in bringing diverse groups of people together rather than causing further division. This is an issue I will return to in Chapter 4.

winning photo.<sup>218</sup> The idea of students carrying weapons on campus incensed the faculty and some forty faculty members signed a statement indicating they would resign if the disciplinary reprimands against the students were nullified.<sup>219</sup> The faculty's strong statement against the students set off a string of meetings where the question of what to do was fiercely debated. Faculty could not agree on the best course of action regarding a proposed resolution not to suspend disciplinary actions. Meanwhile, students organized a mass meeting as well as a teach-in to address the issues that had been brought to light over the last few days. With general student sentiment shifting towards the ideas of the more radical students, the faculty were pressured to come to some consensus on what should be done. They eventually voted to nullify the reprimands and establish a committee to restructure the university, so it could better meet the needs of students in the future.<sup>220</sup>

### **The Peace Movement**

The final dominant theme of student unrest in the 1960s involved a prevailing anti-war sentiment and a growing peace movement. Students were disillusioned by the United States' intervention in Vietnam, believing that it was not in the best interest of the country or the Vietnamese people to be involved in the conflict. Believing that the United States came away from World War II as heroes and adopting the moniker of "the leader of the free world," students viewed the new military intervention as less motivated by altruistic purposes and more by the potential gains for capitalism and imperialism.<sup>221</sup> Students increasingly condemned "America as a 'corporate state' bent on imperialistic war" and demanded that universities end involvement in

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<sup>218</sup> Lowery, "A Campus Takeover that Symbolized an Era of Change."

<sup>219</sup> Friedland and Edwards, "Confrontation at Cornell."

<sup>220</sup> Friedland and Edwards.

<sup>221</sup> Michael Kazin, "Some Note on S.D.S.," *The American Scholar* 38, no. 4 (Autumn 1969): 644-655, 647.

research for military purposes.<sup>222</sup> While students in various organizations were involved in war protests, the Students for a Democratic Society spearheaded the most significant anti-war protests during this period.

The Students for a Democratic Society (SDS) was the most active organization speaking out against the Vietnam War. The SDS had its origins in the early leftist student movements of the 1930s.<sup>223</sup> When considering how it would take action to oppose the Vietnam War, the SDS relied heavily on the blueprint for activist successes in the 1930s. The SDS's predecessor, the League for Industrial Democracy, had worked with a coalition of activist groups in the 1930s to ensure the passage of the New Deal and the establishment of "Keynesian economics and a vision of the state as an instrument that can sometimes be bent to the popular will and public interest."<sup>224</sup> The leadership of the SDS believed that it was time for a similar collaboration to continue to push reforms and advances given the current cultural, political, and economic situation.

Many SDS members had volunteered in the civil rights movement and worked closely with SNCC and were inspired by the changes that the group was pushing in the South. Their work with SNCC convinced SDS leaders that a racially united movement was possible with the "winning of whites to an antiracist position," thus they focused their efforts on racially diverse community action.<sup>225</sup> Prior to 1965, the work of the SDS was focused on organizing in poor

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<sup>222</sup> John P. Diggins, *The American Left in the Twentieth Century* (New York, NY: Harcourt Brace Jovanovich, Inc., 1973), 167.

<sup>223</sup> Hal Draper, "The Student Movement of the Thirties: A Political History," in *As We Saw the Thirties: Essays on Social and Political Movements of a Decade*, ed. Rita James Simon (Urbana, IL: University of Illinois Press, 1967), 151-189.

<sup>224</sup> Tom Hayden, "Crafting the Port Huron Statement: Measuring Its Impact in the 1960s and After," in *The Port Huron Statement: Sources and Legacies of the New Left's Founding Manifesto*, eds. Richard Flacks and Nelson Lichtenstein (Philadelphia, PA: University of Pennsylvania Press, 2015), 33.

<sup>225</sup> Kazin, "Some Notes on S.D.S.," 657.

black and white neighborhoods, where they sought to empower the poor to advocate for themselves and become active in influencing the decisions that affected their lives.<sup>226</sup> The students' desire for SDS to be more active in creating change would prompt the SDS to split from its parent organization, the Student League for Industrial Democracy, which desired to remain more educationally focused.

The split with its parent organization led to a special conference of the SDS in June of 1962 at the United Auto Worker's Center in Michigan.<sup>227</sup> Over the course of several days, a group of less than one hundred students led by Tom Hayden and Rennie Davis met to discuss the future of the SDS. Tom Hayden, who would lead the convention, had begun writing his thoughts about the future of the organization and its movement, while jailed in Albany, Georgia after participating in a freedom ride.<sup>228</sup> In six days, the students drafted a "sixty-four-page manifesto" that would come to be known as the Port Huron Statement, an articulation of their values and intentions for the future.<sup>229</sup> The opening line of the statement positioned them as students with privilege who were nonetheless concerned about the future. It began, "We are people of this generation, bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit."<sup>230</sup> They would go on to discuss the need for a participatory democracy grounded in liberal values and repudiate the apathy that they believed had overtaken society as well as college campuses.

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<sup>226</sup> Kazin, 646.

<sup>227</sup> Kazin, 646. The United Auto Works were early financial supporters of the SDS. Their founder regularly donated money to the group, although eventually tension would arise between UAW and SDS due to SDS's belief that the UAW had become too focused on capitalistic goals to the detriment of the greater good of society.

<sup>228</sup> Hayden, "Crafting the Port Huron Statement."

<sup>229</sup> Kazin, "Some Notes on S.D.S.," 645.

<sup>230</sup> "Port Huron Statement" in *The Port Huron Statement: Sources and Legacies of the New Left's Founding Manifesto*, eds. Richard Flacks and Nelson Lichtenstein (Philadelphia, PA: University of Pennsylvania Press, 2015), 239.

At the time of the writing of the Port Huron Statement, the focus of the SDS and the country in general was not on the Vietnam War. SDS was concerned about the increasing income inequality, the effects of unchecked capitalism, and the ongoing pursuit of civil rights for blacks in the United States. The SDS was working actively in cities to “bring to the American working class a consciousness of and identification with the movements of black people in the United States and of impoverished millions around the underdeveloped world.”<sup>231</sup> Like their predecessors in the 1930s, they sought to bring together disparate groups around the common cause of a more equal and just world. In the years immediately following the writing of the Port Huron Statement, SDS would turn its attention to the Vietnam War and their concerns with the economic incentives for participation in the war.

As one of the first groups to engage in anti-war activity, the SDS was in the position to take the lead in the mass protest of the Vietnam War when attention shifted towards it. The SDS had spent time educating student on America’s role in the war, which led some students to believe that the United States was on the wrong side of the war. Since they were in the forefront of the anti-war movement, once public sentiment turned against the war, SDS doubled its numbers across the country. In three years, SDS became “the largest and most influential organization on the growing American Left,” which prompted one congressman to question its ‘subversive’ activity.<sup>232</sup> In 1965, the SDS would host the first mass protest against the Vietnam War, attracting over 20,000 people by some estimates.

Throughout the early months of 1965, there was an escalation in war protests at colleges across the country from Minnesota and Ohio to California and New York.<sup>233</sup> Student protests

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<sup>231</sup> Kazin, “Some Notes on S.D.S.,” 653.

<sup>232</sup> Kazin, 647.

<sup>233</sup> Miller, *Democracy is in the Streets*, 227-231.

were often directed at campus recruiters for the defense industry and campus facilities that housed researchers aligned with the military industrial complex.<sup>234</sup> In January 1965, the SDS sent letters to groups across the country inviting them to participate in a march protesting the Vietnam War on April 17, Easter weekend, in Washington, D.C.<sup>235</sup> The SDS expected to have about 10,000 students participate in the march, but President Johnson's announcement in early April that he was sending more troops to Vietnam increased support for the SDS march and estimates for total attendance ranged from 15,000 to 25,000 participants.<sup>236</sup> Students began the day with a picket outside the White House and then moved to the Washington Monument grounds where they listened to speeches by leaders of the SDS and SNCC. Afterwards, the students, marching eighty abreast, marched to the Capitol to present a petition to Congress calling for them to end the war in Vietnam.<sup>237</sup> This event would serve as a catalyst for continued war protests on campuses from elite colleges like Columbia University to state universities like Michigan State and Kent State.

In the spring of 1968, Columbia University was the site of a major campus protest that shut down the university for the remainder of the academic year. In the years prior to the 1968 protest, Columbia University students were increasingly disgruntled with the university, which had dropped in the rankings and was attempting to bolster its reputation through a massive capital campaign and expansion into the Morningside Heights community, which bordered Harlem.<sup>238</sup> The administration had proposed the building of a new gymnasium on their property

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<sup>234</sup> Rhoads, *Freedom's Web*, 47.

<sup>235</sup> Miller, *Democracy is in the Streets*, 229.

<sup>236</sup> Miller, 231.

<sup>237</sup> Miller, 233.

<sup>238</sup> Ellen Kay Trimberger, "Columbia: The Dynamics of a Student Revolution," in *Campus Power Struggle*, 2<sup>nd</sup> ed., ed. Howard S. Becker (New Brunswick, NJ: Transaction Books, 1973), 35.

in Morningside Heights. At the time, over a thousand Columbia students were active in the Citizenship Council, which took part in community action projects with the local community and opposed the proposed expansion into Morningside Heights. In addition to their frustrations with the campus expansion plan, students were critical of Columbia's practice of supplying the draft boards with information about students as well as allowing army recruiting on campus. Although the university made some concessions to students in 1966 and 1967, they had maintained a relationship with the Institute of Defense Analyses that vexed more militant students involved in the SDS.

The SDS at Columbia University was founded in 1965 and focused on the "evils of capitalism, the plight of blacks, and the perfidies of the military-industrial complex."<sup>239</sup> In its early years on the campus, the SDS was led by Ted Kaptchuk, who was more interested in providing educational programming than protesting. When Mark Rudd assumed the chairmanship in the spring of 1968, he wanted the group to take substantive action on the issues that concerned them. At the time, they strongly protested the Institute of Defense Analyses (IDA), a collaboration between research universities and government agencies conducting research benefitting the military. Rudd was instrumental in leading protests against the IDA at Columbia University.

In March of 1968, the SDS sponsored a march to President Kirk's office to present him with a petition signed by 1,700 students demanding that the university separate itself from the IDA.<sup>240</sup> The President put six leaders of the SDS on probation for violating a campus ban on indoor demonstrations, which prompted students to request an open hearing, which was

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<sup>239</sup> McCaughey, *Stand Columbia*, 427.

<sup>240</sup> Trimberger, "Columbia," 42-46; and McCaughey, *Stand Columbia*, 423-261.

subsequently denied. On April 23, students planned to march into Low Library, the administrative building, to demand open hearings for the students and repeat the demand for separation from the IDA. When they arrived, they found the building locked, so they decided to march to the contested site of the proposed gymnasium in the Morningside Heights area. Once there, they were confronted by the police and returned to campus to occupy Hamilton Hall. Black student protestors asked the white protestors to leave Hamilton Hall because they sought to maintain a more moderate and open environment for negotiations with professors and city officials. The students then spread out to occupy buildings across the campus. Some white students occupied Low Library and Mathematics Halls. Architecture and graduate students took over Avery and Fayerweather Halls. According to students present, “[t]hese occupations generated feelings of moral exhilaration and solidarity; the buildings were transformed into ‘communes’ where the students engaged in lengthy political discussions.”<sup>241</sup>

While student protestors occupied the campus buildings, 800 more students came out to a rally to support the occupiers and 250 students came out to protest the rally.<sup>242</sup> The demands of the protestors were largely supported by the student body and faculty. The demands included severing ties with the IDA, stopping construction of the Morningside Heights gym, ending probation for the six SDS students, amnesty for all demonstrators, and open hearings for all future disciplinary proceedings. To articulate their position on the issue of amnesty, the Strike Committee wrote:

Our demand for amnesty implies a specific political point. Our actions are legitimate; it is the laws, and the administration’s policies which the laws have been designed to protect, that are illegitimate. It is therefore ridiculous to talk about punishment for students. No

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<sup>241</sup> Trimberger, “Columbia,” 42.

<sup>242</sup> Trimberger, 42.

one suggests punishment for the administration, who in fact must assume the guilt for the present situation. To consider discipline against the students is thus a political position.<sup>243</sup>

While the students hoped to appeal to the administrators by connecting the students' actions with their constitutional rights to free speech and assembly, the administration was not swayed by this argument. The students' demands were ignored by the administration who did very little in attempting to negotiate with the students. In an attempt to broker a compromise, a faculty ad-hoc committee developed a proposal to end the occupation, but it was ultimately opposed by both the administration and students. The administration took the students' refusal as a justification for the use of police force to end the occupation.

President Kirk, in consultation with New York Mayor Lindsay, ultimately made the decision to allow the police on campus to remove the students from the campus. Lindsay had been advised by his staff not to use police force against students, but after a conversation with Yale President Kingman Brewster, who advised him that "the very future of the American university depended on punishing the strikers," Lindsay made the decision to allow the police to proceed.<sup>244</sup> Police evacuation of Hamilton Hall ended peacefully with the arrest of 86 students because the black students had agreed to leave at the first signs of police intervention.<sup>245</sup> Low Library and Avery Hall were also cleared with minimal resistance and the arrests of 125 students. Fayerweather Hall was not easily cleared. Several students sustained injuries through altercations with the police and 286 students were subsequently arrested. Tom Hayden, the primary author of the Port Huron statement, was in Mathematics Hall and helped prepare the students for their confrontation with police.<sup>246</sup> Mathematics Hall was the most difficult for police

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<sup>243</sup> Trimberger, 46.

<sup>244</sup> McCaughey, *Stand Columbia*, 456.

<sup>245</sup> McCaughey, 427.

<sup>246</sup> Miller, *Democracy is in the Streets*, 290-292.

to clear because the students actively resisted arrest by going limp and police and students sustained injuries caused by soaped stairs. A total of 203 occupiers were arrested and 148 injuries reported during the evacuation of Mathematics Hall. The police evacuation of the occupied buildings began at 2 a.m. and ended at 3:15 a.m. By the time the police were finished, a large crowd had gathered on the campus to protest the removal of students.

The police presence on campus increased support for the student protestors and led students to call for a campus strike. Over 5,000 students actively participated in the strike.<sup>247</sup> A group of faculty members calling themselves the Independent Faculty Group endorsed the students' call for a strike. After significant discussion, the faculty approved the Rosenberg Resolution, which called for a short moratorium of classes, establishment of a tripartite committee to deal with discipline issues, and establishment of a faculty committee to guide the university's future actions.<sup>248</sup> The administration canceled classes and exams for the remainder of the academic year.<sup>249</sup> When the administration began disciplinary action against students involved in the occupation, it prompted a second sit-in at Hamilton Hall, an administrative and classroom building. When police were called in to clear the building, two-hundred students were arrested by police and sixty-eight students were injured during their removal. Despite demands for leniency, the university ultimately suspended seventy-five students who participated in the protests. As a private university, Columbia was not compelled to grant students due process rights prior to their suspension. While the police brutality against students was heightened, it would not compare with the violence inflicted on students at Kent State University two years later.

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<sup>247</sup> Trimberger, "Columbia," 42.

<sup>248</sup> McCaughey, *Stand Columbia*, 460-461.

<sup>249</sup> Trimberger, "Columbia," 42.

In the fall of 1964, Tony Walsh and Dave Edwards, former volunteers with the Congress of Racial Equality, started the peace movement at Kent State University with the founding of the Kent Committee to End War in Vietnam (KCEWV).<sup>250</sup> The group held their first event on campus in February 1965 and were physically assaulted by hawkish students on campus. Despite the aggression towards the KCEWV members, campus administrators including President White did not take steps to discipline the students who assaulted the KCEWV members. Further, President White spoke openly of his distaste for KCEWV and the Young Socialist Alliance that supported KCEWV.<sup>251</sup> It was White's opinion that the majority of students and faculty at Kent State were supportive of the war and the student protestors were not representative of Kent State. For much of its time on campus, KCEWV members were subjected to violence from other students and were generally marginalized on the campus. KCEWV member Mike Van DeVere expressed his frustration by challenging those who opposed KCEWV's presence on campus, stating:

This country is based and evolved from demonstration, the right of every man to disagree, and the duty of those who dissent to publicly criticize.

I hear the words "American" and "freedom" – these words have a hollow and empty ring - when they come from those who attempt to crush criticism and apparently don't have any imagination – and fear those who do. Do these concepts of "Americanism" mean – no dissent – a complete lack of imagination – and freedom to do only that which is popular?

Those few students and faculty members who truly believe in "freedom of speech" and the "American way" should...have the intestinal fortitude to support those who wish to exercise their right to free speech and dissent.<sup>252</sup>

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<sup>250</sup> Kenneth J. Heineman, *Campus Wars: The Peace Movement at American State Universities in the Vietnam Era* (New York, NY: New York University Press, 1993), 112.

<sup>251</sup> Heineman, 113.

<sup>252</sup> Heineman, 113-114.

Like the students at Columbia, Van DeVere brought attention to students' constitutional rights to protest as an appeal to faculty and administration. While opponents of the KCEWV tried to position the students as outliers, Van DeVere clearly positions the students as patriots who are exemplifying the ideals of the Constitution.

In the spring of 1966, KCEWV finally gained the attention and support of some students on campus through their participation in the annual Kent State parade, where members wore gas masks and distributed anti-war literature. When they held their next anti-war rally in May 1966, over 200 students attended the event.<sup>253</sup> By the fall of 1967, Kent State was developing a reputation for its anti-war protests and the Kent police were regularly coming to come to photograph campus demonstrations in an effort to deter outside agitators. The campus newspaper, which previously refused to print letters against the war, began to print anti-war letters, which caused right-wing students to complain.<sup>254</sup>

By 1968, KCEWV was receiving more support on campus, but some students were frustrated by their dovish stance. These students broke away from KCEWV to form the Student Religious Liberals, "a campus draft resistance group which was, despite its name, highly secularized and radical."<sup>255</sup> They counseled students on conscientious objection and coordinated protests against recruiters for Dow Chemical, the makers of napalm.<sup>256</sup> The Student Religious Liberals established a SDS chapter at Kent State University. In May 1968, when Hubert Humphrey came to campus, SDS sponsored a walkout and heckled Humphrey during his speech. One Humphrey supporter remarked that "this denial of Humphrey's right to speak freely sent a

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<sup>253</sup> Heineman, 114.

<sup>254</sup> Heineman, 115.

<sup>255</sup> Heineman, 136.

<sup>256</sup> Howard Means, *67 Shots: Kent State and the End of American Innocence* (Boston, MA: Da Capo Press, 2016).

‘chill down his spine’ and led him to view the radicals as ‘elitists’ dedicated to silencing those who did not agree with them.”<sup>257</sup> Given that hawkish students had repeatedly tried to silence the KCEWV and SDS, the sudden concern for free speech rights seemed disingenuous.

Once established at Kent State, the SDS would become actively involved in the campus community. Shortly after protesting Humphrey, the SDS protested campus recruitment efforts by the Oakland Police Department because of its persecution of the Black Panther Party. The SDS along with black students sponsored a five-hour sit-in in the campus administrative building.<sup>258</sup> During the sit in, the SDS and black students were attacked by other students, but the administration did nothing to protect the protestors.<sup>259</sup> In April 1969, SDS members marched to the administration building to demand that President White abolish the ROTC program and close the Liquid Crystals Institute, which was perceived as part of the war machine. During the confrontation, fights broke out between the SDS and hawkish students. When two members of the SDS were suspended for their role in the campus protests, two hundred students descended on the administration building to protest the suspension of the students at their disciplinary hearings.<sup>260</sup> Unbeknownst to the students, President White had filled the basement of the building with Ohio Highway Patrol because he hoped to arrest the entirety of the SDS chapter. While many students were able to escape the building through a service elevator, 59 members of SDS were arrested, which infuriated not only the SDS, but moderate students on campus. White also banned any group from sponsoring SDS meetings and speakers on campus. Faculty generally supported White’s actions because they were worried that the increasing student

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<sup>257</sup> Heineman, *Campus Wars*, 136-137.

<sup>258</sup> Means, *67 Shots*.

<sup>259</sup> Heineman, *Campus Wars*, 138.

<sup>260</sup> Heineman, 140.

protests would negatively influence state funding of higher education.<sup>261</sup> The Ohio legislature, increasingly frustrated with the inability of campuses to control student behavior, passed anti-riot legislation that allowed them to intervene in campus issues.<sup>262</sup> With this new power, in December 1969, Governor James Rhodes sent the Ohio National Guard to the University of Akron after three black students staged a nonviolent protest in support of the Black Power Movement. This context is important to frame what would happen at Kent State the following spring.

On April 30, 1970, President Nixon announced his decision to invade Cambodia, an escalation that was immediately protested by students and resulted in the closure or impairment of operations on about 425 campuses.<sup>263</sup> In New York City, construction workers assaulted student protestors, while the police looked the other way.<sup>264</sup> While the violence in New York City was significant, it was eclipsed by the death of four students at Kent State. On May 1, the day after President Nixon announced his decision to send troops to Cambodia without a declaration of war or the approval of Congress, protestors at Kent State buried a copy of the Constitution on the campus green to symbolize the death of its principles.<sup>265</sup> Later that evening, students coming out of a bar engaged in a fight that prompted a riot when a local townsman attempted to drive into a group of students. Mayor LeRoy Satrom declared a state of emergency and requested the assistance of the Ohio National Guard to protect the city from protestors.<sup>266</sup>

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<sup>261</sup> Heineman, 141.

<sup>262</sup> Heineman, 143.

<sup>263</sup> Diggins, *The American Left in the Twentieth Century*, 179.

<sup>264</sup> This riot would come to be known as the Hard Hat riot.

<sup>265</sup> Means, *67 Shots*, 8.

<sup>266</sup> Heineman, *Campus Wars*, 149.

On Saturday, May 2, a group of unidentified students burned down the ROTC building on campus. Although the police were on campus at the time, they did not intervene to stop the students from vandalizing the building or starting the fire.<sup>267</sup> After the fire at the ROTC building, Governor Rhodes made the decision to bring the National Guard to campus, declaring, “We are going to eradicate the problem. We are not going to treat the symptoms.”<sup>268</sup> The next day, campus gatherings were banned, but students continued to protest the presence of the National Guard on campus. By Monday morning, tensions were high on campus and students gathered on the lawn against orders by the National Guard. While the guardsmen advanced toward the crowd, some students threw objects at them or yelled obscenities. A group of guardsmen fired into the crowd, ultimately killing Jeffrey Miller, Allison Krause, William Schroeder, and Sandra Lee Scheuer. After the shooting, the National Guard retreated, while the crowd grew tense. General Canterbury, who was in command of the guardsmen, advised them to defend themselves by any possible means.<sup>269</sup> Meanwhile, faculty marshals led by Glenn Frank begged the students to leave the area. In the immediate aftermath of the shootings, the Kent townspeople feared an attack by students and rumors circulated widely that students were arming themselves.<sup>270</sup> The response by the townspeople demonstrates the significant divide that existed between the university and the rest of the community.

The shock of the students’ deaths at Kent State increased participation in a planned protest of the expansion of war into Cambodia on May 6, 1970. Approximately 4,350,000

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<sup>267</sup> Means, *67 Shots*, 30-31.

<sup>268</sup> Means, 47. The use of the word “eradicate” is particularly troublesome given what would transpire on the campus in the coming days. The willingness to use this type of inflammatory language represents the lack of respect that student protestors had in the community.

<sup>269</sup> Means, 98.

<sup>270</sup> Means, 114.

students at 1,350 colleges participated in the student strike.<sup>271</sup> Although a significant number of students were opposed to the war and appalled by what happened at Kent State, “American society as a whole was overwhelmingly of one mind in the aftermath of the Kent State tragedy: more students should have been shot.”<sup>272</sup> Society in general had grown increasingly impatient with campus unrest as evidenced by a 1969 Gallup poll indicating that 89 percent of Americans wanted student protestors expelled from campuses.<sup>273</sup> Despite the 1969 Supreme Court ruling in *Tinker v. Des Moines Independent Community School District*, which affirmed students’ constitutional right to free speech on campus, much of the general population was not in support of students choosing to exercise their rights on campuses.<sup>274</sup> Nixon’s law and order message, which supported repression of anti-war activities and invoked a war on drugs, was widely accepted by those opposed to campus unrest.<sup>275</sup>

The killings at Kent State University represented a significant moment in the history of colleges and universities. Some believe it was this incident that effectively ended the New Left movement that students had worked to build in the 1960s.<sup>276</sup> The response to the killings left many students disillusioned and enthusiasm for the anti-war movement began to wane. When President Nixon commissioned a committee to review the Kent State killings as well as the subsequent student deaths at Jackson State University in Mississippi, universities were subjected to a level of scrutiny that they had long avoided. No longer were college faculty and administration trusted to manage the affairs of students without outside intervention. College and

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<sup>271</sup> Heineman, *Campus Wars*, 150-153.

<sup>272</sup> Heineman, 153.

<sup>273</sup> Hayden, “Crafting the Port Huron Statement,” 31.

<sup>274</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The most often quoted line from the court’s decision states: “It can hardly be argued that neither students or [*sic*] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

<sup>275</sup> Diggins, *The American Left in the Twentieth Century*, 181.

<sup>276</sup> Miller, *Democracy is in the Streets*, 320.

universities would enter a new era where their power and control over students would be significantly influenced by forces outside campuses including the legal system, the business community, and political groups.

### 3 THE POLITICIZATION OF CAMPUS ACTIVISM IN 1970

As the tumultuous 1960s gave way to a new decade, stories of civil unrest and activism still dominated the headlines in the United States and around the world. While revolutionary organizations in Europe were beginning to falter, student unrest in Asia and Latin America was increasing due to a lack of opportunities for youth.<sup>277</sup> Meanwhile, in the United States, the ongoing war in Vietnam continued to be a target of student activism and protests on campuses around the country. In the aftermath of the student deaths at Kent State University and Jackson State College, the public increased their pressure on state and federal officials to do something to address the issue of campus unrest.<sup>278</sup> Politicians transferred this pressure to colleges and universities demanding that they take action to quell campus unrest. The year 1970 would prove to be a significant turning point in the relationships between higher education, the government, and private citizens and would set the stage for increased interference in the disciplinary matters of colleges and universities in subsequent years.

At the fifty-sixth annual meeting of the Association of American Colleges in January 1970, there was marked disagreement between two of the keynote speakers.<sup>279</sup> Bennington College President Edward Bloustein supported the activism of students and the rights of faculty and administrators to speak out in favor of social justice. Bloustein asserted that college presidents should not be required to maintain a neutral stance on political issues and should be free to advocate for political and social change. Bloustein further argued that he could not maintain the respect of his constituents if he failed to address the concerns weighing most

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<sup>277</sup> “World Student Unrest Still Smolders: Europe,” *New York Times*, January 12, 1970; “Education: Student Unrest is a Global Problem,” *New York Times*, September 6, 1970.

<sup>278</sup> In reporting during the time period, “unrest” was used to describe any type of campus disturbance including student activism. It illustrates a negative view of student activism and a belittling of the concerns of students.

<sup>279</sup> Robert Reinhold, “‘New Social Contract’ Urged for College Heads,” *New York Times*, January 13, 1970.

heavily on their consciences. Meanwhile, President Samuel Hayakawa of San Francisco State College vehemently disagreed with Bloustein and opposed the continued activism on campuses as “power grabs” and likened the students’ actions to Nazi tactics. Hayakawa stated, “Had we all recognized the actual intent of protest leaders soon enough...much of the damage to the reputation of educators might have been avoided.”<sup>280</sup> These two presidents represented one of the major divides that existed in educators’ opinions of student activism. Some educators felt compelled to support students and the causes they fought for, while others saw the students as selfish and engaging in disruptive actions damaging to higher education’s reputation.

In a speech prior to his inauguration as President of Columbia University, William McGill brought a new perspective to the issue of campus unrest. McGill argued that rapidly changing technologies had outpaced the university’s ability to keep up with growth and created environments on campus that alienated students.

We find ourselves faced increasingly with an archaic degree structure and with patchwork curricula desperately in need of reform. The sheer weight of modern education places extreme demands on students, alienating them in increasing numbers. There is no time for the development of a personal philosophy for dealing with the moral questions posed by society. Students find themselves in a rat-race for grades with the way barred for further development in the technical professions if they fail.<sup>281</sup>

McGill was reluctant to target students as the source of tensions on campus and hinted that the issue was much larger than the colleges and universities themselves.

A Gallup poll conducted in the spring of 1970 found that campus unrest was the number one concern of the public – ahead of the war in Vietnam or racial strife.<sup>282</sup> A majority of the

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<sup>280</sup> As quoted in Reinhold, “‘New Social Contract’ Urged.” Hayakawa was president of San Francisco State College during the longest recorded student strike.

<sup>281</sup> “Excerpts from Recent Addresses by Dr. McGill,” *New York Times*, February 3, 1970. This particular quote is an excerpt from “A Requiem for Joe College” given at the Acoustical Society of America meeting on November 5, 1969.

<sup>282</sup> “Poll Finds Worry in Campus Unrest: Lists Issue First Ahead of War and Racial Strife,” *New York Times*, June 19, 1970.

public viewed campus unrest as problematic and expressed dismay over student activism and protests on campuses. In February 1970, a woman in Buffalo, New York put forth her solution to student unrest: “Shoot ‘em all. That’s what I say, shoot ‘em all.”<sup>283</sup> In Cicero, Illinois, a parking lot employee shared his idea on how to handle campus protestors: “Throw them out of school and put them in the Navy. Us taxpayers have to pay for all that stuff.”<sup>284</sup> In New Palestine, Indiana, a parent of a college-aged daughter shared his concerns about the activity on campuses: “I don’t want my daughter exposed to that sort of stuff...Many institutions will teach her things I don’t believe in.”<sup>285</sup> A rare outlier, Madeline Sobran of Cicero, Illinois, showed support for students, stating, “The majority are good kids who have more guts than we’ve got. They’re willing to stand up for their rights.”<sup>286</sup> Evidence supports Sobran’s view of student activists. Reports from the period suggest that less than ten percent of campus activists engaged in violent behaviors or illegal activities.<sup>287</sup> However, these violent incidents received the most attention in the press, dominating the headlines for much of the 1960s and into 1970.

A Carnegie Commission Survey of University Presidents conducted in 1970 concluded that the campus protests in the spring of 1970 were the largest and most influential in history.<sup>288</sup> Results from the survey indicated that fifty-seven percent of campuses had experienced some form of organized dissent during the spring semester. Classes were canceled at twenty-one percent of the campuses due to campus unrest. Clark Kerr, who oversaw the administration of

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<sup>283</sup> As quoted in Paul L. Montgomery, “Buffalo Campus Calm but Strike Goes On,” *New York Times*, March 1, 1970.

<sup>284</sup> As quoted in Steven R. Roberts, “Conservatives Press Campus Unrest Issues: Conservatives Pressing Campus Unrest Issue, Putting Liberals on the Defensive,” *New York Times*, October 11, 1970.

<sup>285</sup> As quoted in Roberts, “Conservatives Press Campus Unrest Issue.”

<sup>286</sup> As quoted in Roberts, “Conservatives Press Campus Unrest Issue.”

<sup>287</sup> C. Van Woodward, “What Became of the 1960s?,” *New Republic* 171, no. 9 (November 9, 1974): 18-25.

<sup>288</sup> Anthony Ripley, “Kerr Survey Finds Spring Campus Protests Greatest in History,” *New York Times*, October 3, 1970. The survey was sent to 2,551 college presidents and seventy-three percent responded to the survey.

the survey, predicted that the future situation on campuses would continue to be volatile because of the ongoing confusion between dissent and disruption.<sup>289</sup> Kerr believed the survey results indicated an overall negative effect for higher education especially in light of the upcoming political elections. Kerr's concerns about the political implications of campus unrest for higher education would prove to be prescient. Another study released in early 1970 by the American Bar Association would prove equally prophetic.

In the fall of 1969, the American Bar Association tasked a committee to review the state of the First Amendment on college campuses as it related to students' ability to express dissent. The Report of the American Bar Association Commission on Campus Government and Student Dissent (ABAC) was published in the spring of 1970 and it raised important issues about students' rights on campuses that would continue to present challenges to universities for decades. While critics of higher education accused faculty and staff of indoctrinating students with liberal ideas, ABAC found that "most faculty members have struggled to keep universities apart from the divisive social problems of the nation, as neutral institutions seeking objective truth."<sup>290</sup> Despite these attempts to maintain neutrality, ABAC argued that universities could not be neutral parties if they were involved in military research.<sup>291</sup> While colleges were struggling to maintain neutrality, students were pushing for campus reforms that would prepare them to deal more readily with pressing social problems. Students wanted to take a stand on the issues that concerned them.

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<sup>289</sup> Ripley, "Kerr Survey Finds Spring Campus Protests Greatest in History." Kerr highlights an important point to which I will return to later regarding the view of student activism as political dissent or unlawful disruption.

<sup>290</sup> *Report of the American Bar Association Commission on Campus Government and Student Dissent* (Chicago: American Bar Foundation, 1970), 2.

<sup>291</sup> This critique was the same one made by student activists opposed to the Vietnam War.

In their review of student dissent at colleges across the country, the ABAC found that dissent was most prominent at elite universities. They posited that “the very excellence of a given university and its lack of repressive policies may be conditions conducive to unrest. Students may be less willing to assert perceived grievances if summary repression is the only foreseeable result.”<sup>292</sup> Although private universities do not have the same obligation to the First Amendment as public universities, ABAC found that private institutions were less likely to place restrictions on students’ political activity than were public universities.<sup>293</sup>

Before offering recommendations for institutional policies, the ABAC reiterated the Supreme Court’s decision in the 1969 case of *Tinker v. Des Moines School District* which held that “neither students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>294</sup> ABAC recommended that disciplinary rules addressing any aspect of the First Amendment should be “stated with clarity and precision.”<sup>295</sup> Further, they advised that “freedom of expression on campus...ought not be restricted only to areas especially suitable for stationary assembly,” although they agreed that content neutral time, place and manner restrictions were appropriate.<sup>296</sup> Additionally, ABAC addressed the issue of student groups on campus. They stated that student groups should not be compelled to have an advisor from the campus and that the right of assembly should not be limited to those groups who share

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<sup>292</sup> *Report of the American Bar Association*, 4.

<sup>293</sup> *Report of the American Bar Association*, 17.

<sup>294</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), 506.

<sup>295</sup> *Report of the American Bar Association*, 22. This would prove to be an important recommendation in subsequent years when universities were criticized for developing rules regulating student speech that were overly broad. This issue will be examined further in subsequent chapters.

<sup>296</sup> *Report of the American Bar Association*, 14. ABAC warned campuses here against the idea of speech zones, which would become a target for First Amendment advocates in subsequent years. Again, this issue will be discussed in future chapters.

the views of the university.<sup>297</sup> However, they warned that campus groups should not operate in such a manner as to convey that their views represent the university. Finally, ABAC asserted that affiliation with an outside organization should not be a reason to deny students the use of campus facilities.<sup>298</sup>

The ABAC report also addressed concerns about entities outside of universities interfering with students' First Amendment rights. They expressed concerns that legislatures in half of the states were reviewing legislation that severely limited students' right to dissent. Some of the legislation under consideration made it a crime to refuse to leave a property when asked by designated officials, prohibited interference with access or use of facilities, made it a felony to destroy records, prohibited firearms on campus, and punished conduct that impedes university personnel. Several states had already made changes to their riot laws making it easier to declare a state of emergency and intervene in campus protests.<sup>299</sup> Of utmost concern to ABAC was the recommendation by some legislators that financial aid be denied to students who participated in protests. ABAC believed laws incorporating this limitation "could operate in a discriminatory manner because they apply only to those who receive federal financial aid, a specific class of needy students. Thus, the wealthy student who leads a campus disruption would be unaffected by the legislation."<sup>300</sup> The ABAC worried that these actions sought to actively limit students' right to dissent.

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<sup>297</sup> *Report of the American Bar Association*, 11. The issue of access to campus facilities would be a central issue in *Widmar v. Vincent*, 454 U.S. 263 (1981) one of the first Supreme Court cases addressing First Amendment issues on college campuses.

<sup>298</sup> The issue of affiliation with outside organizations and campus recognition and access would be a key issue in *Healy v. James*, 408 U.S. 169 (1972).

<sup>299</sup> *Report of the American Bar Association*, 29. Ohio was one of the first states to adopt riot laws, which was why it was able to intervene in the student protest at Kent State in May 1970.

<sup>300</sup> *Report of the American Bar Association*, 34. In a press conference on March 14, 1969, Nixon hinted at his desire to cut off federal financial aid to students arrested for protesting. When asked about this again in June 1969, Nixon indicated that he was against denying funding to colleges where demonstrations were held. He stated

Finally, the ABAC report referenced the increasing use of legal action by and against students. Courts were being asked in record numbers to review disciplinary actions and procedures due to recent court hearings that gave students due process rights previously denied.<sup>301</sup> At the same time, universities were increasingly requesting injunctions to prevent students from participating in disruptive activities.<sup>302</sup> Injunctions were seen by local communities as evidence that the universities were trying to limit disruptions and the injunctions often dissuaded moderate students from participating in the targeted activities.

### *Nixon and Campus Unrest*

In the immediate aftermath of the shootings at Kent State and Jackson State, the Nixon Administration was under increasing pressure to do something to quell campus unrest, but Nixon was hesitant to take any action. From his earliest days in office, Nixon had a negative view of campus activists. In one of his first press conferences after taking office, when asked about campus unrest around the world, Nixon stated, “The young people abroad, it seems have somewhat the same problem as many young people here. They know what they are against, but they find difficulty in knowing what they are for.”<sup>303</sup> Nixon believed anti-war protestors were responsible for pushing Lyndon Johnson from office and he was determined not to suffer the same fate.<sup>304</sup> According to Nixon’s Chief of Staff Bob Haldeman, Nixon’s primary concern after

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that “we do not want the Federal Government interfering in and responsible for discipline in every college and university in this country.” George W. Johnson, ed., *The Nixon Presidential Press Conferences* (New York: Earl M. Coleman Enterprises, Inc., Publishers, 1978), 40, 55.

<sup>301</sup> *Dixon v. Alabama State Board of Education*, 294 F. 2d. 150 (5<sup>th</sup> Cir. 1961).

<sup>302</sup> *Report of the American Bar Association*, 27.

<sup>303</sup> Johnson, *The Nixon Presidential Press Conferences*, 31. Nixon participated in 39 president press conferences between 1969 and 1974. Campus unrest was discussed at eleven of these conferences between 1969 and 1971. His first statement on campus unrest was made at the press conference on March 4, 1969. Eventually, the interest in campus unrest was supplanted by controversies around school busing, the Vietnam War, Watergate, and the impending impeachment.

<sup>304</sup> Charles A. Thomas, “Mission Betrayed: Richard Nixon and the Scranton Commission Inquiry into Kent State,” Kent State University Special Collections and Archives, [https://www.library.kent.edu/special-collections-and-archives/mission-betrayed-richard-nixon-and-scranton-commission-inquiry-kent#\\_ftn1](https://www.library.kent.edu/special-collections-and-archives/mission-betrayed-richard-nixon-and-scranton-commission-inquiry-kent#_ftn1), chapter 1. Charles

the student deaths at Kent State was whether or not it would suppress demonstrations on other campuses.<sup>305</sup> The surge of activism on campuses across the country in the days following the shootings at Kent State indicated that the suppression Nixon hoped for would not be the case.

A study by the Urban Research Council determined that the killing of the four students at Kent State drastically increased the level of campus unrest. Prior to May 4, 1970, there were an average of twenty campus incidents a day. After May 4, there was a spike to over one hundred incidents a day at campuses across the country.<sup>306</sup> Perhaps reflective of the times, the death of two students at Jackson State did not result in a similar surge in unrest. According to John Nesbitt, the president of the Urban Research Corporation studying campus unrest, "The evidence is clear...that the deaths of four white students escalated years of student unrest to historic heights that shocked the nation; the deaths of two black students under similar circumstances had little effect on an essentially white national student strike."<sup>307</sup> In the week after the Kent State shooting, over four million students across the country participated in a national student strike.<sup>308</sup> The demands of students were consistent across the country: the withdrawal of troops from Southeast Asia, the release of political prisoners, and the end to universities' involvement in war efforts.<sup>309</sup> Despite Nixon's reluctance to acknowledge their concerns, the students showed no immediate signs of slowing their protests.

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Thomas worked in the National Archives in Washington, D.C. and was responsible for logging the evidence used by the President's Commission on Campus Unrest. His work with these materials prompted a twenty-five-year-long investigation into the incident at Kent State. This unpublished work represents his extensive research on the Kent State student deaths utilizing data from the National Archives as well as oral interviews with survivors. His collected works as well as the documents to support his work are housed in the Kent State University Special Collections and Archives.

<sup>305</sup> Thomas, "Mission Betrayed," chapter 1.

<sup>306</sup> J. Anthony Lukas, "Study Says Killing of Four at Kent State, Not Cambodia, Set Off National Student Strike," *New York Times*, June 24, 1970.

<sup>307</sup> As quoted in Lukas, "Study Says Killing of Four at Kent State."

<sup>308</sup> Heineman, *Campus Wars*, 150-153.

<sup>309</sup> Lukas, "Study Says Killing of Four at Kent State."

Supporters of student activism expressed growing concerns about attempts to suppress student activism. While acknowledging that campus unrest and violence from the left posed a national problem, Senator Jacob Javits argued there was “another, and at least as equal, danger – the growing threat of repression, not only of ‘demonstration,’ but all forms of expression and dissent traditionally protected by the Bill of Rights.”<sup>310</sup> Campus unrest and student activism were regularly conflated in the media and an increasingly conservative public supported measures to limit dissent, which they perceived as a threat to America.<sup>311</sup> Javits argued that persistent attacks on student activists as well as the mass media, the Supreme Court, and the Democratically-controlled Senate were:

couched in terms to turn people against one another, to sow suspicions among the people, to feed on their fears and, by clear implication, to lay claim to our national leaders as being the sole source of credibility, virtue and patriotism in the land. This is hardly the spirit in which our country was built and has prospered.<sup>312</sup>

Although Javits does not specifically name anyone in his remarks, President Nixon and his Vice-President, Spiro Agnew, were two of the most outspoken critics of both student activism and the media.

Nixon and Agnew were regularly accused by the press of using inflammatory language that only furthered growing resentment against colleges and universities. A *New York Times* columnist wrote, “There is a disturbing appeal to the nation’s lowest instincts in the present Administration’s descent to gutter fighting.”<sup>313</sup> The *Washington Post* ran a political cartoon with

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<sup>310</sup> As quoted in Richard L. Madden, “Javits Says U.S. Tolerates Repression,” *New York Times*, May 5, 1970.

<sup>311</sup> David E. Rosenbaum, “Colleges Tighten Security to Check Student Unrest: Colleges Tighten Security on Campus,” *New York Times*, September 14, 1970.

<sup>312</sup> As quoted in Madden, “Javits Says U.S. Tolerates Repression.” The argument that Javits makes in 1970 is similar to arguments made in recent years in the United States, an issue that I will return to in Chapter 5.

<sup>313</sup> “Text of Agnew’s Speech Scoring Press,” *New York Times*, May 23, 1970. The repeated calls for Agnew to tame his speech are not unlike the calls for Donald Trump to do the same in 2020.

an image of a National Guardsman with a box of ammunition. Each bullet was labeled with words from some of Agnew's most inflammatory speeches as well as Nixon's own admonition that activists were 'college bums.'<sup>314</sup> Pete Hamill of the *New York Post* directly called out Nixon in a statement in the press:

When you call campus dissenters 'bums,' as Nixon did the other day, you should not be surprised when they are shot through the head and the chest by National Guardsmen....At Kent State, two boys and two girls were shot to death by men unleashed by a President's slovenly rhetoric. If that's the brave new America, to hell with it."<sup>315</sup>

In a speech shortly after the shootings at Kent State, Agnew condemned the media, specifically the *Washington Post* and *New York Times*, for taking on the role of the "really illiberal, self-appointed guardians of our destiny who would like to run the country without ever submitting to the elective process as we in public office must do."<sup>316</sup> Agnew further argued that the news media was attempting to suppress his First Amendment rights by calling for Agnew to tame his inflammatory rhetoric. Agnew asserted:

the press – as a group – regards the First Amendment as its own private preserve. Every time I criticize what I consider to be excesses or faults in the news business, I am accused of repression, and the leaders of the various professional groups wave the First Amendment as they denounce me.

That happens to be my amendment too. It guarantees my free speech as much as it does their freedom of the press. So, I hope that will be remembered the next time a "muzzle Agnew" campaign is launched. There is room for all of us – and for our divergent views – under the First Amendment.<sup>317</sup>

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<sup>314</sup> "Text of Agnew's Speech Scoring Press." Nixon's comment about "bums" was recorded by a reporter that traveled with the President: "You see these bums, you know, blowing up the campuses. Listen, the boys that are on the college campuses today are the luckiest people in the world, going to the greatest universities, and here they are burning up the books, I mean storming around about this issue – I mean you name it – get rid of the war; there will be another one." When asked about this in a press conference, Nixon stated, "On university campuses the rule of reason is supposed to prevail over the rule of force. And when students on university campuses burn buildings, when they engage in violence, when they break up furniture, when they terrorize their fellow students and terrorize the faculty, then I think "bums" is perhaps too kind a word to apply to that kind of person. Those are the kind I was referring to." *Nixon Presidential Press Conferences*, ed. George W. Johnson (New York: Earl M. Coleman Enterprises, Inc., Publishers, 1978), 111, 66.

<sup>315</sup> "Text of Agnew's Speech Scoring Press."

<sup>316</sup> "Text of Agnew's Speech Scoring Press."

<sup>317</sup> "Text of Agnew's Speech Scoring Press."

While he argues in this speech that there is room enough for divergent views, Agnew also supported the punishment of those who chose to exercise their First Amendment rights on campus. Agnew stated, “It is my honest opinion that this hard core of faculty and students should be identified and dismissed from the otherwise healthy body of the college community lest they, like a cancer, destroy it.”<sup>318</sup> Agnew implies that he prefers free speech rights to be extended only to those with whom he agrees.

In the wake of the condemnation from the press and facing increasing criticism that he was out of touch with the reality of colleges and universities, Nixon took a step to demonstrate his willingness to hear from campus communities by appointing Alexander Heard as his special advisor on campus problems.<sup>319</sup> At the time of his appointment, Heard was serving as President of Vanderbilt University, where he was well-liked by faculty and students. A lifelong liberal, Heard supported student activism and commended students’ passionate involvement in societal issues. Heard believed that “the university existed not to protect students from ideas but rather to expose them to ideas.”<sup>320</sup> Just eleven days after his appointment as Nixon’s campus advisor, “it became clear in a conversation with reporters...that the 53-year-old Georgia Democrat [had] a somewhat different outlook...than many of his colleagues in the White House.”<sup>321</sup> One of the points of contention was the disagreement on students’ reasons for opposing the war. While Nixon believed students opposed the war because they were draft dodgers, Heard argued that students had no desire to participate in a war they viewed as immoral.<sup>322</sup> Heard told reporters that

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<sup>318</sup> “Text of Agnew’s Speech Scoring Press.”

<sup>319</sup> “Campus Communicator: George Alexander Heard,” *New York Times*, May 11, 1970. Nixon would come to regret his choice of Heard within days of Heard’s appointment to the special advisor role.

<sup>320</sup> “Campus Communicator.”

<sup>321</sup> Warren Weaver, Jr., “Nixon’s Campus Adviser Assays Student Unrest,” *New York Times*, May 21, 1970.

<sup>322</sup> “Excerpts from Memorandum to Nixon and a Note on Unrest,” *New York Times*, July 24, 1970.

students were concerned about the war effort and “its morality, its wisdom and effectiveness, their own participation and the diversion of national resources that results.”<sup>323</sup> Heard shared what he believed to be the sentiment of students at the time: “Some of them are very upset... They believe efforts are being made to discredit them in the eyes of the rest of the country, to prevent them from expressing their views. Some of them feel kind of at war, I guess, with other parts of society.”<sup>324</sup>

Despite appointing Heard as his special advisor, Nixon faced continued pressure to establish a commission to investigate the situation on America’s campuses, particularly Kent State. According to Haldeman, Nixon was opposed to a commission that would merely study the shootings at Kent State. Nixon preferred a commission that would investigate everything associated with student activism including the ROTC program, the Vietnam War and its expansion into Cambodia, campus curriculum, the environment, and the Black Panthers.<sup>325</sup> It was decided in late May that Nixon would appoint a commission to study campus unrest. There were a significant number of critics who believed the commission was unnecessary and redundant. The critics believed Nixon should heed the recommendations of previous studies related to the issue of campus unrest including the reports of the National Commission on the Causes and Prevention of Violence, the American Council of Education’s Ad Hoc Committee, the American Bar Association Commission on Campus Government and Student Dissent, and the National Association of State Universities.<sup>326</sup> Perhaps telling about the future of the President’s Commission on Campus Unrest are these words spoken by Herbert Klein, Nixon’s

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<sup>323</sup> Weaver, “Nixon’s Campus Adviser Assays Student Unrest.”

<sup>324</sup> As quoted in Weaver, “Nixon’s Campus Adviser Assays Student Unrest.”

<sup>325</sup> Thomas, *Mission Betrayed*, chapter 1.

<sup>326</sup> “Redundant Commission,” *New York Times*, June 16, 1970.

director of communication, “We have a President who is concerned with what they [students] are saying; a President who is willing to listen, but also one who feels that he alone must make the final decision on the major questions of policy.”<sup>327</sup> Just as he ignored the recommendations of previous studies, Nixon would later disregard many of the recommendations of the President’s Commission on Campus Unrest.

President Nixon signed the executive order establishing the President’s Commission on Campus Unrest (PCCU) on June 13, 1970. The purpose of the PCCU as outlined in the executive order was to “study dissent, disorder, and violence on the campuses of institutions of higher learning or in connection with such institutions, and reports its findings and recommendations to the President.”<sup>328</sup> The order placed a limited timeline on the PCCU, requiring a full report by October 1 and termination of the PCCU within thirty days after the presentation of the report. In his public statement regarding the establishment of the PCCU, President Nixon noted that he was asking the PCCU to determine “the principle causes of campus violence, particularly in the specific occurrences of this spring,” which insinuated that he did not readily understand the causes of the unrest, despite comments he had made previously.<sup>329</sup> When asked about the message that students were trying to send during a news conference after Kent State, Nixon stated:

They are trying to say that they want peace. They are trying to say that they want to stop the killing. They are trying to say that they want to end the draft. They are trying to say that we ought to get out of Vietnam. I agree with everything that they are trying to accomplish.<sup>330</sup>

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<sup>327</sup> As quoted in Marjorie Hunter, “President to Name a Panel to Study Kent State Deaths,” *New York Times*, May 25, 1970.

<sup>328</sup> *Report of the President’s Commission on Campus Unrest* (New York: Arno Press, Inc., 1970), 533.

<sup>329</sup> *Report of the President’s Commission*, 535.

<sup>330</sup> As quoted in George W. Johnson, ed., *The Nixon Presidential Press Conferences* (New York: Earl M. Coleman Enterprises, Inc., Publishers, 1978), 99.

Nixon's statement during this press conference indicated that while he was able to articulate the concerns of students, Nixon did not agree with the best action to take to achieve the students' desires.

Nixon appointed a diverse group of individuals to the PCCU in an effort to demonstrate that he did not intend for the PCCU's work to be a "whitewash" for the administration.<sup>331</sup> According to William Scranton, former Republican Governor of Pennsylvania and chair of the PCCU, he had received assurances from Nixon that the panel would be independent and would operate without interference from the White House or the Nixon Administration.<sup>332</sup> In addition to Scranton's appointment to the PCCU, seven men and one woman comprised the panel appointed by Nixon. James Ahern, a liberal police chief from New Haven, Connecticut, and Benjamin Davis, a retired Air Force general, were selected for their "law-and-order" experience. Bayless Manning, Dean of Stanford Law School, James Cheek, President of Howard University, and Martha Derthick, professor from Boston College, were selected to represent higher education. Erwin Canham, former editor of the *Christian Science Monitor*, represented the press. Revius Ortique, Jr., president of the all-black National Bar Association, represented the legal establishment. The only student on the committee, Joseph Rhodes, would prove to be the most controversial placement on the PCCU.<sup>333</sup>

The youngest person appointed to the panel, Joseph Rhodes, was a 22-year-old Harvard Fellow and former student government president at California Institute of Technology

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<sup>331</sup> John Ehrlichman, *Witness to Power* (New York: Simon and Schuster, 1982), 150.

<sup>332</sup> Robert B. Semple, Jr., "Finch Says Dispute Will Help Campus Study Panel," *New York Times*, June 19, 1970.

<sup>333</sup> Ehrlichman, *Witness to Power*, 150.

(Caltech).<sup>334</sup> During his tenure at Caltech, he befriended John Ehrlichman, Nixon's special assistant for domestic programs, and it was Ehrlichman who pushed for his appointment to the commission.<sup>335</sup> As the youngest member of the PCCU, Rhodes hoped to discover who had ordered troops on to the Kent State campus. He was also concerned with the administration's rhetoric about students, stating, "If the President's and Vice President's statements are killing people, I want to know that."<sup>336</sup> His remarks drew criticism from Spiro Agnew, who called for his removal from the PCCU, stating that Rhodes "did not 'possess the maturity, the objectivity and the judgment' to serve on the nine-member commission."<sup>337</sup> Caltech faculty and administration were shocked by Agnew's critical remarks of Rhodes, who they saw as a "moderate, despised by the radicals and black militants," and someone who helped to maintain the peace at Caltech.<sup>338</sup>

Despite Agnew's call for Rhodes' removal from the PCCU, Nixon chose to keep Rhodes on the PCCU. Scranton met with Nixon to discuss the possible implications of removing Rhodes from the PCCU. Of prominent concern to Scranton was the fact that Rhodes was the only student representative on the PCCU. Scranton believed it was necessary to have student representation, so the findings of the PCCU would be taken seriously by the public. Nixon was persuaded by

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<sup>334</sup> Robert Reinhold, "Negro on Campus Panel Feels 'Solemn' Duty to Stop Killings," *New York Times*, June 15, 1970.

<sup>335</sup> Thomas, *Mission Betrayed*, chapter 2.

<sup>336</sup> As quoted in Reinhold, "Negro on Campus Panel."

<sup>337</sup> As quoted in James M. Naughton, "Agnew Bids Student Quite Panel, but White House Rejects Move," *New York Times*, June 17, 1970. Criticism from Rhodes may have come as a surprise to the administration. Rhodes was seen as friendly with the Nixon administration due to his actions during a previous campus protest. During the "People's Park" demonstrations at Berkeley, Rhodes was in regular communication with the White House and students believed he was working with the administration to undermine the protest.

<sup>338</sup> Robert Reinhold, "Peacemaker on Campus Panel: Joseph Rhodes Jr.," *New York Times*, June 17, 1970.

Scranton's argument. According to Ehrlichman, "Nixon gave Scranton a free hand, with one qualification: 'Just don't let higher education off with a pat on the ass.'"<sup>339</sup>

### *Politicizing Campus Unrest*

In the weeks following the establishment of the PCCU, there were growing concerns that the Nixon Administration would exploit the issue of campus unrest for political gain.<sup>340</sup> Polls showed that the majority of people wanted troop withdrawals from Vietnam and Nixon's aides warned that youth were becoming increasingly anti-administration.<sup>341</sup> Charles Hamilton of the National Urban League predicted that things would become more tense and activism would surge if the Nixon Administration did not change its policy on the Vietnam War and rhetoric toward socially-engaged students.<sup>342</sup> Nixon was under pressure to energize support for Republican candidates in an election year and his political advisors suggested that campus unrest could be used to generate enthusiasm among Nixon's supporters as well as moderates frustrated by the ongoing unrest. When early reports that Nixon's special advisor Heard and the PCCU were leaning sympathetically towards students in their investigations, the Nixon administration began to take action to undermine both the Heard Report and the Report of the President's Commission on Campus Unrest.

One of the first actions of the PCCU was a turning point in its relationship with the Nixon Administration. The PCCU opted to conduct public hearings because they believed it would add

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<sup>339</sup> Ehrlichman, *Witness to Power*, 152.

<sup>340</sup> Robert B. Semple, "White House Cool to Heard's Study: Nixon on Men, Disappointed in Data on Campus Unrest, Are Critical of Schools," *New York Times*, July 30, 1970. Two of the most influential men in Nixon's Administration – Finch and Haldeman were both involved in the campus unrest in California and had previously used criticisms of campus unrest for political gain. Haldeman served on the Board of Regents of the University of California during major protests in the 1960s.

<sup>341</sup> Roscoe Drummond and Geoffrey, "Political Insecurity Could Tempt Nixon to Exploit Student Unrest," *Washington Post, Times Herald*, June 20, 1970.

<sup>342</sup> B. C. G. Fraser, "Urban League Trustee Predicts Rise in Student Activism in Fall," *New York Times*, July 22, 1970.

more credibility to their eventual findings if the public saw the efforts the PCCU made to thoroughly investigate the issues.<sup>343</sup> Scranton believed the PCCU had the unique opportunity to directly address themselves to the President of the United State and he wanted to be sure that the information presented to Nixon would provide a deeper understanding of the issues related to campus unrest.<sup>344</sup> Nixon, however, was not supportive of Scranton's desire to hold public hearings to gather information.

Just a few weeks after the PCCU's announcement about public hearings, Alexander Heard released his report based on his temporary role as Nixon's advisor on campus problems. Heard urged Nixon to "undertake serious efforts to improve his awareness of student attitudes and to take them into account when formulating foreign and domestic policies."<sup>345</sup> Heard also recommended that Nixon "use the moral leverage of his office to ease racial tensions and give blacks some sense that the national Government [sic] understands and cares about their problems."<sup>346</sup> In the report, Heard wrote that while student unrest "may seem baffling and chaotic to outsiders... underneath it is a deep moral commitment, a seriousness of purpose, to eliminate what the students genuinely believe to be the weaknesses of American society."<sup>347</sup> Heard warned that failure to address the concerns of students would be detrimental to the country and the future of democracy.

The danger is...that significant numbers of people will grow up with an assumption of hostility to their government and a conviction that their government is ineffective. If that occurs, it handicaps the functioning in the future of the most important way people have of working together on matters that they have to work together on – their government.<sup>348</sup>

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<sup>343</sup> Jack Rosenthal, "Nixon Panel Calls Hearings in Public on Campus Unrest," *New York Times*, July 7, 1970.

<sup>344</sup> Rosenthal, "Nixon Panel Calls Hearings."

<sup>345</sup> Robert B. Semple, Jr., "Nixon is Advised to Heed Students: Dr. Heard, Head of Panel on Campus Unrest, Praises the Motives of Youths," *New York Times*, July 24, 1970.

<sup>346</sup> Semple, "Nixon is Advised to Heed Students."

<sup>347</sup> Semple, "Nixon is Advised to Heed Students."

<sup>348</sup> As quoted in 116 Cong. Rec. S26942 (daily ed. August 30, 1970).

Heard hoped to convey to Nixon the sense of urgency and concern that students had for their country, but Nixon was not inclined to view students' actions in a positive light.

Heard and his co-advisor, James Cheek, had much more empathy for student activists than the Nixon administration that they served.<sup>349</sup> Heard and Cheek did not believe that Nixon grasped the reality of the student unrest on campuses and felt Nixon's negative view of student activists was due to misinterpretations about their intentions. Perhaps the negative view of student activists came from this point articulated in Heard's report:

Rather than emphasize what is good about America, most students emphasize what could be better about America (which frequently appears to be merely an emphasis on what is wrong with America.) Therefore, any form of injustice and inequality, such as is evident in our racial problems, is taken as an indictment of the entire social system, regardless of its improvements over the past or its relative superiority over other societies.<sup>350</sup>

Heard tried to emphasize that students were not antagonistic toward America, but truly believed in a better vision of America. The overall recommendation made by Heard and Cheek was for Nixon to expose himself more to faculty, staff, and students, so he had a better understanding of the climate and actualities of college campus life.

The release of the Heard Report drew immediate criticism from President Nixon and his supporters. Nixon complained that it was unfair to blame student unrest on the national government.<sup>351</sup> The Administration complained that Heard's report attributed campus unrest to national politics without acknowledging the role of students, faculty, and administrators as well as the bureaucratic structure of the universities.<sup>352</sup> Nixon's staff criticized as vague Heard's

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<sup>349</sup> Heard's co-advisor, James Cheek, was the President of Howard University. He receives little attention from the news reporters regarding his work alongside Heard or in statements from President Nixon.

<sup>350</sup> "Excerpts from Memorandum to Nixon."

<sup>351</sup> Robert B. Semple, Jr., "President Puts the Blame on Many in Campus Strife," *New York Times*, July 31, 1970.

<sup>352</sup> Semple, "White House Cool to Heard's Study."

recommendation to open lines of communication with students and campuses. Instead, the administration insisted that they knew what was bothering students and what the administration needed were better opportunities to get their position across to students.<sup>353</sup> Douglas Hallett, a student at Yale, published an editorial supporting Nixon and blaming campuses for student unrest.<sup>354</sup> Nixon pointed to this letter as evidence that there was room to spread the blame around when it came to campuses. One presidential aide commented that Hallett's letter was "the best thing written on the campus problem."<sup>355</sup> An editorial in the *New York Times* stated, "But the academic community itself cannot be absolved of its responsibility to re-establish itself as the guardian of rational discourse, intellectual civility and the free exchange of ideas."<sup>356</sup> The Nixon Administration preferred a narrative that blamed campus leaders for unrest and encouraged their supporters to make this same argument.

Just days after the release of the Heard Report, Paul Fannin, Republican from Arizona, would bring the issue of campus unrest to the Senate floor. Fannin repeated Nixon's claim that the campus leaders should bear the responsibility for campus unrest. Fannin remarked, "I believe that the finest course that our university leaders could take would be to shoulder their full blame – whether or not blame should be shared – for campus unrest. After all, though, leaders have a responsible and responsive role in troubled times."<sup>357</sup> To bolster his argument, Fannin requested that Hallett's editorial from the *Wall Street Journal* be admitted in full into the Congressional

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<sup>353</sup> Semple, "President Puts the Blame on Many."

<sup>354</sup> Douglas L. Hallett, "Campus Unrest: Don't Blame Mr. Nixon," *Wall Street Journal*, July 29, 1970.

<sup>355</sup> Semple, "President Puts the Blame on Many." Nixon and Haldeman actively distributed Hallett's letter to supporters to help build their case against universities. Their distribution of the letter was largely responsible for its inclusion in the Senate Congressional Record.

<sup>356</sup> "The Mood of the Campus," *New York Times*, July 28, 1970.

<sup>357</sup> As quoted in 116 Cong. Rec. S26741 (daily ed. July 31, 1970).

Record. The following excerpt from Hallett's letter illustrates why Nixon and his supporters were eager to widely distribute the letter:

While the testimony before the Scranton commission and Mr. Heard's report make some reference to the need for reform on university campuses themselves, the dominant tone is somewhat different: The President is at fault. He must listen to the students, respond to their views, end the war, and if that cannot be done tomorrow, at least try to "communicate" with the nation's colleges and universities...

Most so-called student radicals cannot be trusted. Students don't know what they want...

But inevitably the universities must take primary responsibility for the confusion among many of our students. More than any other institution, they influence the thoughts and feelings of the brightest of our young. And more than any other institution, they are responsible for preserving our past and passing along the best of it to the next generation. They have failed miserably in that role. And only when they begin to succeed will students turn to more constructive paths for their emotional urges.<sup>358</sup>

Hallett's letter would be used repeatedly in the coming days and weeks to deflect attention from Heard's recommendations and the work of the PCCU.

When questioned during a press conference about Heard's report, Nixon again refuted that the administration bore any blame for unrest. Nixon argued that even if the federal government solved all the problems that the students were protesting about on campuses, the issue of campus unrest would persist. Even if the war ended, Nixon insisted:

still the emptiness and the shallowness, the superficiality that many college students find in college curriculums will still be there. And still when that is done, the problem that we have of dissent on campus not remaining a peaceful challenge, which is perfectly appropriate and defensible, but dissent becoming sometimes violent, sometimes illegal, sometimes shouting obscenities when visiting speakers come to campus, this is a problem that is not a problem for Government – we cannot solve it – it is a problem which college administrators and college faculties must face up to.<sup>359</sup>

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<sup>358</sup> Douglas L. Hallett, "Campus Unrest: Don't Blame Mr. Nixon," *Wall Street Journal*, July 29, 1970. As quoted in 116 Cong. Rec. S26741 (daily ed. July 31, 1970).

<sup>359</sup> *Nixon Presidential Press Conferences*, 126.

After finishing his remarks on campus unrest, Nixon referred the press to the article written by Hallett, which supported Nixon's view of campus unrest.

Speaking on the Senate floor in the days following Nixon's press conference, Senator Robert Byrd of West Virginia addressed the issue of campus unrest, stating, "the American people are deeply disturbed by the unrest and disorders that have disrupted our colleges and universities."<sup>360</sup> He later expressed his displeasure with the Heard report and the work of the Commission because "the scales appear to be weighted in favor of those who have caused the trouble, and against those who want to get an education."<sup>361</sup> Deflecting responsibility from Nixon, Byrd argued that "the growing disregard for discipline in our society, manifested on the campus by the failure of college administrators to fire professors and expel students who foment rebellion, and in the home by the failure of parents to heed the scriptural admonition: 'Spare the rod and spoil the child.'"<sup>362</sup> Then, reinforcing Nixon's message about campus unrest, Byrd quoted Hallett, "students are frighteningly ignorant of the problems the country faces and of the efforts that have been made to solve them."<sup>363</sup>

While Nixon and his supporters were actively working to discredit students and place the blame for unrest on campus leaders, the PCCU began a series of public testimonies that would further alienate them from Nixon. Several witnesses before the PCCU would argue that conservative politicians were using the issue of campus unrest for political gain. Congressman

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<sup>360</sup> As quoted in 116 Cong. Rec. S26939 (daily ed. August 3, 1970).

<sup>361</sup> As quoted in 116 Cong. Rec. S26939 (daily ed. August 3, 1970).

<sup>362</sup> As quoted in 116 Cong. Rec. S26939 (daily ed. August 3, 1970). Byrd mentions here a lack of discipline. While it is not within the scope of this research project to expand on this view, in several *New York Times* interviews and press conferences, politicians blamed the unrest on parents listening to the advice of Dr. Spock, a revered pediatrician and parenting expert.

<sup>363</sup> 116 Cong. Rec. S26939 (daily ed. August 3, 1970). Byrd and Hallett attempt to discredit student knowledge of what was happening in society, which is a tactic that is used still to refute students' claims about social issues. This will be discussed in subsequent chapters.

William Steiger, a Democrat from Ohio, was part of a team of twenty-two politicians that visited fifty campus across the country to better understand the issue of campus unrest. While Steiger testified there was a group of dedicated anarchists wreaking havoc on some campuses, he argued he was more alarmed by the way right-wing politicians were preparing to take advantage of Middle America's backlash against campus unrest to promote a whole program of repression.<sup>364</sup> Craig Morgan, a ROTC Cadet from Kent State, testified before the PCCU that "right now there is more public relish and more political exploitation of that relish of anti-student and anti-hippie and anti-dissidents than there is any other emotion in this country" and the President is "attempting to exploit nationwide hatred of students, not [just] students, but nationwide hatred of anyone with any amount of dissent."<sup>365</sup> At the same commission hearing, Alex Stalcup, a student at the University of California Medical School in San Francisco, placed blame on Ronald Reagan for exacerbating issues in California. Stalcup stated before the commission, "His escalation of violent rhetoric and his willingness to use brute force have exacerbated, rather than quelled, protest and violence."<sup>366</sup> While these testimonies focused on politics and campus unrest, other testimonies focused on students and universities.

Kenneth Keniston, a Yale psychologist, argued that student activism was a reaction to unjust social practices and student activism should be seen not as a failure of American society but rather an indicator of the strength of democracy.<sup>367</sup> While Keniston sought to credit students for advocating societal change, Samuel Hayakawa said students were only protesting because they were bored.<sup>368</sup> While normally holding opposite views, Keniston and Sidney Hook of New

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<sup>364</sup> As quoted in Thomas, *Mission Betrayed*, chapter 3.

<sup>365</sup> Thomas, *Mission Betrayed*, chapter 4.

<sup>366</sup> As quoted in "Columbia President-Elect."

<sup>367</sup> Thomas, *Mission Betrayed*, chapter 3.

<sup>368</sup> Thomas, *Mission Betrayed*, chapter 3.

York University, both suggested to the PCCU that universities needed better campus codes to enforce policies and cut down on campus unrest. They suggested these codes should be developed jointly by students, faculty, and staff, and outline the prohibited behaviors and the appropriate sanctions for such violations.<sup>369</sup> After completing general public hearings on campus unrest, the PCCU held special hearings to determine the cause of the deaths of students at Jackson State College and Kent State University.

Testifying before the Commission in Mississippi, Margaret Alexander Walker, a teacher at Jackson State College, stated, “The system of repression is so completely organized that black people are helpless against it....Our children are shot down in the street like dogs.”<sup>370</sup> In response to the Commission’s line of questioning, Governor John Williams of Mississippi sent a telegram to Nixon urging him to dissolve the panel because of their “blatant bias on the side of lawbreakers and the absolute absence of objectivity in performing their assigned tasks.”<sup>371</sup> He specifically attacked two black members of the committee, Joseph Rhodes and James Cheek, but also expressed discontent with Scranton, the chair of the PCCU. In an interview with reporters, Scranton had shared, “I think it is very clear that racism is the major problem involved in the Jackson State incident.”<sup>372</sup> While the PCCU was adamant that racism was the primary motivation for the deaths in Jackson, Mississippi, the situation was more complicated in Kent, Ohio.

Witnesses testifying about the incident at Kent State blamed the governor, the National Guard, the administration, and students for the deaths at Kent State. Students testified that

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<sup>369</sup> William K. Stevens, “Strategy for Campus: Hearings Stress Cause of the Unrest but Must Find Code to Deal with It,” *New York Times*, August 7, 1970. Campuses would respond with a variety of new policies to mitigate campus unrest, but many of these policies would create legal problems for universities in subsequent years. This issue will be discussed in more detail in Chapters 4 and 5.

<sup>370</sup> As quoted in Martin Waldron, “Novelist Tells Panel on Unrest Government Represses Blacks,” *New York Times*, August 14, 1970.

<sup>371</sup> “Gov. Williams Scores Campus Inquiry,” *New York Times*, August 16, 1970.

<sup>372</sup> “Gov. Williams Scores Campus Inquiry.”

Governor Rhodes, who was engulfed in a primary battle for a Senate seat, brought the National Guard on campus as a political move.<sup>373</sup> Robert Stamps, a student wounded at Kent State, claimed that Governor Rhodes “played politics with the students of Kent State to try to win a primary.”<sup>374</sup> Meanwhile, the National Guard claimed they were only at the noon rally at the behest of President White, while White claimed that the National Guard was in charge of the campus and he had no authority to command them. Doris Aick, who had collected over 8000 signatures in support of the Guard’s actions at Kent State, complained that Kent was no longer safe because of all the college students - especially those with long hair.<sup>375</sup> When asked by the Commission what Nixon could do to stop campus disorders, Stamps replied, “Stop any repression, which is already being readied. Remove all the troops from Southeast Asia as soon as he can. Clean up our lakes and rivers without fooling around before we all die and give the poor people and the black people in this country a chance.”<sup>376</sup> This line of questioning only further alienated the PCCU from the President.

While the PCCU was actively working to complete their report by the October 1 deadline, Nixon and his supporters were spreading their own message about the causes of campus unrest. There were widespread reports that Nixon wanted to make his position on campus unrest clear because of rumors that the PCCU was “preparing a report that [would] include heavy criticism of the Administration’s domestic and foreign policies, implying that

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<sup>373</sup> John Kifner, "Inquiry at Kent Leaves Key Issues Cloudy: Political Motive Charged," *New York Times*, August 23, 1970.

<sup>374</sup> Kifner, "Inquiry at Kent."

<sup>375</sup> John Kifner, "Campus Unrest and Generation Gap: Panel Finds a Wide Chasm between Young and Old," *New York Times*, August 24, 1970. Pressed on this issue, she stated, "long hair was all right 'as long as his collar shows,' but if it was any longer, 'Well, they frighten me.'"

<sup>376</sup> As quoted in John Kifner, "Kent Student Suggests Officer Gave Signal to Shoot," *New York Times*, August 22, 1970.

these policies [were] the cause of much of the trouble.”<sup>377</sup> Nixon was also encouraged by Republican strategists to take a strong stance against campus unrest because they believed this would win votes from moderates at the ballot box in the November midterm elections.<sup>378</sup> As November approached, Nixon spent more time speaking publicly about campus unrest in order to:

pre-empt the commission’s ground by staking a claim to the opposite point of view – namely, that the fault lies not with the Government but the students themselves, who have forsaken the rational processes of democracy for terrorist tactics, and with university administrators and faculties, who have acquiesced in the behavior of their students and thus threaten[ed] the existence of the university as a citadel of free inquiry.<sup>379</sup>

In July, Nixon had contradicted the Heard report and his actions in September suggested he was preparing to do the same with the PCCU’s report.

In the week before the PCCU was scheduled to release their report, Nixon and his supporters repeatedly emphasized that campus administrators and not the federal government were responsible for maintaining order on campuses.<sup>380</sup> Nixon traveled to Kansas to deliver a speech on campus unrest to a friendly audience. In his speech, Nixon declared that “a ‘cancerous disease’ of ‘terror’ had spilled over onto university campuses, creating chaos and bringing American education to what he called its ‘greatest crisis.’”<sup>381</sup> Nixon assured the crowd, “The destructive activists at our colleges and universities are a small minority. But their voices have been allowed to drown out the responsible majority....That may be true of some places but not at

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<sup>377</sup> Semple, “President Calls Peace.”

<sup>378</sup> Fred M. Hechinger, “Education: Nixon Takes on the Issue of Campus Unrest,” *New York Times*, September 27, 1970.

<sup>379</sup> Robert B. Semple, Jr., “Nixon’s Stand on Campus Disorders: His View on Cause of Unrest is Seen as Consistent,” *New York Times*, September 23, 1970.

<sup>380</sup> Carroll Kilpatrick, “Scranton Fears Politicking on Campus Unrest,” *Washington Post, Times Herald*, September 24, 1970.

<sup>381</sup> Robert B. Semple, Jr., “President Urges End to Violence and Intolerance: Makes a Strong Appeal for Restoration of Civility in American Society,” *New York Times*, September 17, 1970.

Kansas State.”<sup>382</sup> Attorney General Mitchell, speaking at a Women’s National Press Club event, said that campus unrest and street violence were the biggest political issues.<sup>383</sup> In the same conversation, which he would later deny having, Mitchell also accused students of being stupid and ill-informed and faculty of being “stupid bastards” and ruining educational institutions. While some people appreciated the rhetoric of Nixon and Mitchell, critics believed this language was dangerous and unnecessarily divisive.

Supporters of student activism urged the Nixon Administration to take a more conciliatory tone. Robert Semple of the *New York Times* challenged the Administration to recognize their role in campus unrest:

But while it is unfair to put all the blame for the campus crisis on the Federal Government, it is even more dangerous not to recognize that much of the cynicism of the idealistic young springs from a feeling that Administration priorities are not attuned to America’s crying needs and that singularly little vigor is displayed in pursuing even the best of the Administration’s state programs for achieving a better and more responsive society.<sup>384</sup>

Philip Green, also with the *New York Times*, challenged the public to speak out against the inflammatory rhetoric of officials and political leaders. Green warned, “no nation whose President implicitly condones mob action by shaking hands with representatives of its perpetrators can afford to be complacent about its future.”<sup>385</sup> Another article in the *New York*

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<sup>382</sup> As quoted in Semple, “President Urges End to Violence.” Nixon said this is response to a few hecklers in the venue during his speech. This speech would later be rebroadcast in nine battleground states before the midterm elections. The Democrats would go to court to try to stop the rebroadcast because it was paid for by corporate funds, but the court would rule that it was an issue of public concern and not a political speech.

<sup>383</sup> “Mitchell Assails ‘Stupid’ Students: In Broad Attack, He Lashes Out at Educators, Too,” *New York Times*, September 19, 1970.

<sup>384</sup> “Mr. Nixon to the Students,” *New York Times*, September 20, 1970.

<sup>385</sup> Philip Green, “Can It Happen Here?: Is It Already Happening?,” *New York Times*, September 20, 1970. Green is referring to Nixon meeting with representatives of the Hard Hat Riot, an incident where construction workers in New York City attacked and brutally beat activists participating in a protest march. Nixon’s defense of these individuals is reminiscent of Trump’s support of the “very fine people on both sides” in the Charlottesville incident. A few weeks after the incident, Nixon invited the heads of the unions to the White House, where they gave him an honorary, personalized hard hat; shortly afterward, he named one of them Secretary of Labor. The hard hat

*Times* warned, “A crisis of understanding has made too many Americans, old and young, intolerant of each other’s opinions and, in the process, of those democratic rights which protect the bedrock freedom of dissent without fear of coercion and violence.”<sup>386</sup> Despite these warnings, attacks on students’ First Amendment rights to free speech and assembly would continue.

Speaking before a gathering of the Young Americans for Freedom, Senator Strom Thurmond of South Carolina told students that the country was entering a state of guerrilla warfare which would lead to the “dissolution of society.”<sup>387</sup> The conservative youth attending the convention were encouraged to create “an offensive against the radical left.”<sup>388</sup> The students’ strategies included “infiltrating” student government organizations as well as student publications, both of which they argued were dominated by liberal students, and taking legal action against colleges and universities.<sup>389</sup> Some of the young men committed to growing beards and their hair, “so they would look like radicals while proselytizing for the conservative cause.”<sup>390</sup> Shortly after the convention, the Young Americans for Freedom released their own report on campus unrest and in it they attributed campus unrest to “permissiveness and a

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was no longer merely safety apparel, but the symbol of official tolerance of vigilante violence against those who opposed the administration. Thomas, *Mission Betrayed*, chapter 4.

<sup>386</sup> “Cease-Fire on Campus,” *New York Times*, September 28, 1970.

<sup>387</sup> Joseph B. Treaster, “Thurmond Tells Youths Nation is Entering Guerrilla Warfare,” *New York Times*, September 12, 1970, 18. This meeting was the celebration of ten years of YAF, which was founded by William Buckley, editor of the *National Review*, and Barry Goldwater, Senator, as well as a few other Senators.

<sup>388</sup> Treaster, “Thurmond Tells Youths.”

<sup>389</sup> One of the early cases filed against a university was filed by Roger Paynter, a fireman from Queens, in Small Claims Court to recover the tuition he paid for his son, Raymond Paynter, to attend classes at NYU. The court ruled that the university had breached its contract and should refund the requested amount with interest plus court fees for the loss of 19 days of instruction time when the university was closed due to “riots, disorders and acts of vandalism” on campus at NYU. According to Judge Picariello, who oversaw the case, “It is this court’s opinion that the defendant, like many others similarly situated in this country, had not made a good-faith attempt to solve genuine and long-standing problems within its own college communities.” Arnold H. Lubasch, “N.Y.U. Held Liable in 19-Day Closing: Father of Student Wins Fee Refund Appeal Planned,” *New York Times*, October 15, 1970.

<sup>390</sup> Treaster, “Thurmond Tells Youths.”

‘revolutionary cadre’ on college campuses.”<sup>391</sup> The group planned to ask the White House to endorse their report over the PCCU’s report.

On September 20, the White House mailed letters to nine hundred administrators and trustees that included a copy of an article written by Sidney Hook, a professor at New York University, defending academic freedom and accusing administrators of having “yielded too easily to the demands of campus dissidents and hav[ing] thereby ushered in an era of intellectual and physical intimidation, thus corrupting the purposes of the university.”<sup>392</sup> In his cover letter accompanying the article, Nixon praised Hook’s article for being the “most cogent and compelling” account of the question of campus violence.<sup>393</sup> In Hook’s article, quoted in the *New York Times*, he writes, “Some administrators...who have abetted the erosion of the academic ideal, are seeking to muddy the waters by pretending that the public is getting fed up with controversy, and that the chief threat to academic freedom today comes from without and not from within. This is noisome hogwash.”<sup>394</sup> Hook warned against the campus being used for political purposes when it should primarily be used to study social and political problems and propose solutions. Nixon’s choice of Hook’s article was interpreted by some to be an attempt by the White House “to underscore what it considers the correct findings and to discredit contrary opinions.”<sup>395</sup>

Later that same week, Nixon would turn away from his previous assertions that the federal government should stay out of campus issues. In late August, the bombing of the Army

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<sup>391</sup> “Campus Unrest Laid to Permissiveness,” *New York Times*, September 27, 1970.

<sup>392</sup> Robert S. Semple, Jr., “President Calls Peace on Campus Educators’ Task: Colleges and Their Faculties Must Take Responsibility for Order,” *New York Times*, September 21, 1970; Fred M. Hechinger, “Education: Nixon Takes on the Issue of Campus Unrest,” *New York Times*, September 27, 1970.

<sup>393</sup> As quoted in Semple, “President Calls Peace.”

<sup>394</sup> Semple, “President Calls Peace.”

<sup>395</sup> Hechinger, “Education.”

Mathematics Building at the University of Wisconsin in Madison prompted a call for more intervention to prevent campus violence.<sup>396</sup> Nixon reportedly used the bombing in Madison to highlight the extremist nature of campus activism and garner support for a proposal to fund a thousand additional FBI agents to assist campuses with investigating violent incidents.<sup>397</sup> Under the law at the time, federal authorities could only assist in investigating major campus disorders if asked by university officials or local civil authorities.<sup>398</sup> This new proposal would grant access to federal authorities to any campus that received federal funding even if authorities were asked not to intervene. Notably, Nixon asked for this legislation without the advice of the PCCU, which further suggested that he was not interested in their ideas.

Agnew was also actively promoting Nixon's view on campus unrest. In a televised debate with students, Agnew compared the activism of anti-war demonstrators with those of the construction workers who attacked protestors in New York. Agnew claimed that unlike the anti-war activists, the workers were protesting in defense of America. According to Agnew, "Campus disruptions were not spontaneous. They were not the result of a rage that swept a person who worked with his hands to build America [and saw] people advocating that it be torn down. This [the hard-hat attacks] was a wave in defense of a country, not a wave to destroy a country."<sup>399</sup> Throughout the debate, Agnew repeatedly referred to student activists as "radical-liberals" and asserted that the Nixon-Agnew ticket planned to fight against "radical" ideas. The White House

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<sup>396</sup> "Madison, Wis., is Tense After Blast," *New York Times*, August 30, 1970.

<sup>397</sup> Marjorie Hunter, "President Seeks U.S. Intervention in Campus Terror: Will Ask Congress for 1,000 More F.B.I. Agents to Act on Bombings and Arson," *New York Times*, September 23, 1970.

<sup>398</sup> Hunter, "President Seeks U.S. Intervention."

<sup>399</sup> As quoted in James M. Naughton, "Agnew and Student Leaders Hit Impasse in TV Debate," *New York Times*, September 22, 1970.

believed this kind of attack on student activism was key to winning over moderate and conservative blue-collar Democrats.<sup>400</sup>

Scranton grew increasingly frustrated by attempts to taint the PCCU's report prior to its release. He hoped the report would "emphasize the deep divisions in the country and the urgent need for reconciliation."<sup>401</sup> He expressed his frustration that campus unrest was being turned into a political issue. In a press conference, Scranton warned that "public figures who tried to win political profit by criticizing student dissenters were risking further turmoil and diminishing the chances of a reconciliation between the younger generation and its worried elders."<sup>402</sup> He specifically called out Barry Goldwater for publishing an article stating that the PCCU was "a partisan group opposed to the President, intent on placing most of the blame for campus unrest on the President's and Vice President Agnew's rhetoric."<sup>403</sup> Scranton argued that the report would condemn campus violence, but would also uphold "nonviolent dissent as a healthy contribution to the democratic process."<sup>404</sup> Scranton and other members of the PCCU encouraged Nixon to send the message that "to exploit the 'student issue' to garner votes or fill campaign coffers is an act of sabotage against domestic peace."<sup>405</sup> Nixon did not choose to heed their advice.

While the PCCU was expressing frustration with Nixon and his supporters, the Democratic party was taking issue with Nixon's politicization of campus unrest. Democrats were frustrated by the decision of the major television networks to rebroadcast Nixon's Kansas State

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<sup>400</sup> Naughton, "Agnew and Student Leaders."

<sup>401</sup> Kilpatrick, "Scranton Fears Politicking."

<sup>402</sup> As quoted in "Scranton Warns Critics of Unrest: Says 'Playing Politics' Can Spread Campus Alienation," *New York Times*, September 24, 1970.

<sup>403</sup> "Scranton Warns Critics."

<sup>404</sup> "Scranton Warns Critics."

<sup>405</sup> "Cease-Fire on Campus."

speech on campus unrest. Four corporations had agreed to sponsor the rebroadcast during primetime in fourteen cities in key battleground states. The Democrats regarded the sponsorship as the funding of political speech, a violation of campaign finance rules.<sup>406</sup> The Democratic National Committee requested the Justice Department to investigate the four corporations sponsoring the rebroadcast and argued that campus unrest was being used as a political weapon.<sup>407</sup> The Justice Department ruled that the rebroadcast did not violate the spirit or letter of the law. According to William Rehnquist, then Assistant Attorney General in the Office of Legal Counsel, Nixon's speech was focused on "one of the pressing problems of the times – the increasing prevalence of violence in our society."<sup>408</sup> A poll released by Republicans corroborated Rehnquist's claim that campus unrest was a pressing issue. According to the Republican poll, most Americans saw campus unrest as an important issue. According to the poll, seventy-one percent of Americans believed that administrators were too lenient on students; fifty-nine percent believed campus administrators were responsible for fixing the problem on campuses; and forty percent believed that student demonstrations were not justified.<sup>409</sup> The final report of the PCCU would demonstrate a more nuanced position on campus unrest.

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<sup>406</sup> The issue of campaign financing would become a major issues after the Supreme Court's *Citizens United* ruling.

<sup>407</sup> James M. Naughton, "Democrats Decry a Nixon Telecast: See Violation in Sponsorship of Speech Rebroadcast," *New York Times*, September 26, 1970.

<sup>408</sup> Fred P. Graham, "Nixon TV Address Held Unpolitical: Democratic Plea Rejected in Rebroadcasting Case," *New York Times*, October 10, 1970. The speech was rebroadcast in nine states with battleground elections.

<sup>409</sup> "G.O.P. Poll Finds Public Backs Nixon on Violence," *New York Times*, September 27, 1970. The poll was conducted by Chilton Research Services of Philadelphia who conducted 976 telephone interviews of participants.

### *The Findings of the President's Commission on Campus Unrest*

In the *Report of the President's Commission on Campus Unrest*, the PCCU determined protests had grown more widespread and violent in the years leading up to 1970 and that the issues that were once the concern of a small number of students had become of great concern to the majority of students.<sup>410</sup> The primary issues contributing to campus unrest were racial injustice, the Vietnam War, and the university experience. The report briefly discussed each of the primary causes before moving on to provide recommendations to universities, law enforcement, and the government.<sup>411</sup>

The PCCU began its examination of campus unrest by focusing on the campuses and considering the diverse expectations thrust upon universities. In many cases, the PCCU believed these expectations were more than could be reasonably achieved, writing:

Americans today have higher expectations of the university than they do of practically any other social institution. It is expected to provide models, methods, and meanings for contemporary life. It is an advisor to government and a vehicle for self-improvement and social mobility. Indeed, since science and critical method are enshrined in the university, it occupies a place in the public imagination that may be compared to that of the church in an earlier day.<sup>412</sup>

In addition to meeting these various expectations, universities were responsible for meeting the needs of an increasingly diverse student population. Not only were more students than ever attending college, but more students were seeking advanced degrees, thus extending the amount of time they spent on campuses.<sup>413</sup> The longer students stayed on campus, the more likely they were to demand the rights and privileges of adults, which contributed to increased activism.<sup>414</sup>

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<sup>410</sup> *Report of the President's Commission*, 47.

<sup>411</sup> *Report of the President's Commission*, 3.

<sup>412</sup> *Report of the President's Commission*, 74.

<sup>413</sup> *Report of the President's Commission*, 70.

<sup>414</sup> *Report of the President's Commission*, 71.

A second major issue discussed by the PCCU was the increasing unrest among African American college students. A study by the Urban Research Corporation in 1969 found that on fifty-nine percent of the campuses surveyed, racial issues were a motivating factor for unrest.<sup>415</sup> The PCCU referenced the opinion of twenty-two Congressmen who visited over fifty colleges and universities across the country in 1969 and noted that there was “a depth of bitterness among black students at black institutions that surpassed anything found among white students.”<sup>416</sup> The Congressmen summarized what they heard from black students across the country:

Their problem is more external than internal. They are concerned about non-college problems which they identify as discrimination, economic oppression, loss of identity, poverty, hunger, and racism. They ask to be respected and desire true economic opportunity. Words and promises will no longer suffice.<sup>417</sup>

Black students believed they had done the work to raise awareness about racial issues in the United States and now they wanted something for themselves. A *Time*-Louis Harris poll conducted on April 6, 1970 found that eighty-five percent of African Americans surveyed supported Black Studies programs in high schools and colleges and saw these as important in the development of Black identity and pride.<sup>418</sup>

Finally, the PCCU found disillusionment with the Vietnam War was a motivating factor for campus dissent. The PCCU was careful to stress that the right to protest was an essential component of the university experience and was protected by the Constitution. They elaborated this point by stating,

Because there seems to be so much confusion on this point, we cannot emphasize too strongly that dissent and orderly protest are permissible and desirable. American students are American citizens, and a campus – frequently even the campus of a private university – is essentially a public place. Court after court has declared for most universities the area

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<sup>415</sup> *Report of the President's Commission*, 109.

<sup>416</sup> *Report of the President's Commission*, 94.

<sup>417</sup> *Report of the President's Commission*, 95.

<sup>418</sup> *Report of the President's Commission*, 103.

of permissible expression on campus is at least as broad as that protected by the First Amendment. As the courts have defined free speech, it includes such activities as marching, carrying placards, and passing out handbills. It also includes discourse which is not reasonable or calm or polite.<sup>419</sup>

Although the PCCU conceded that protest was a part of campus life, the PCCU held the campus community to a higher standard of civil discourse. They argued that the academic community had an intellectual and social obligation to engage in civil protests and tolerate the diverse views of others.<sup>420</sup> Despite the issues taking place outside of the campuses with the civil rights movement and the war in Vietnam, the Commission placed much of the blame for campus unrest squarely on universities themselves.

The PCCU wrote that the “many serious weaknesses in American colleges and universities today have contributed significantly and needlessly to the growth of campus unrest.”<sup>421</sup> They attributed the failures of the university to four major issues: pressures on academic freedom from within and outside of the university, decreased attention on academic research and teaching due to outside commitments, failed academic reforms, and corrosion of the community between faculty, students, and administrators.<sup>422</sup> To better manage campus disruptions, the PCCU recommended changes to campus codes of conduct. They believed the disciplinary codes were either vague or overly broad and did not readily communicate to students the range of respectable behavior. They recommended that universities’ disciplinary codes include “simple and precise regulations governing the time, place, and manner of permissible mass assemblies and demonstrations.”<sup>423</sup> The Commission also affirmed the need for universities

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<sup>419</sup> *Report of the President’s Commission*, 118.

<sup>420</sup> *Report of the President’s Commission*, 119.

<sup>421</sup> *Report of the President’s Commission*, 185.

<sup>422</sup> *Report of the President’s Commission*, 186-187.

<sup>423</sup> *Report of the President’s Commission*, 128. Despite the Commission’s request for universities to be more forthright in their disciplinary codes, this would be a persistent issue for universities for the next fifty years.

to discipline students because without implementation of disciplinary sanctions, they predicted the established procedures would be ignored by students.<sup>424</sup>

The PCCU also encouraged universities to establish codes and procedures for disciplining faculty members including those with tenure.<sup>425</sup> A survey conducted by the American Council on Education found that during the 1967-1968 academic year, faculty were involved in half of the student protests which occurred on campuses and on two-thirds of the campuses where protests occurred, faculty passed resolutions demonstrating their support for the protests.<sup>426</sup> The PCCU believed that radical faculty members like Herbert Marcuse were responsible for student hostility toward Western capitalist society.<sup>427</sup> The PCCU emphatically stated, “Faculty members who engage in or lead disruptive conduct have no place in the university. The spectacle of a professor leading a band of marauders into a colleague’s lecture bent on disrupting the classroom is abhorrent to anyone who values the university as an institution.”<sup>428</sup> It is important to note that although the PCCU provides examples of disruptive behaviors, faculty were not likely to participate in unlawful or violent protests.

The PCCU did acknowledge a history of threats to academic freedom from outside the academic community to “prevent the discussion of controversial views, the appearance of controversial speakers, or the advocacy of unpopular positions on university campuses.”<sup>429</sup> Outside challengers included legislators who threatened to withhold appropriations and mayors who refused to support administrators without commitments from them to push ‘unruly’ students

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<sup>424</sup> *Report of the President’s Commission*, 143.

<sup>425</sup> *Report of the President’s Commission*, 131

<sup>426</sup> *Report of the President’s Commission*, 81.

<sup>427</sup> *Report of the President’s Commission*, 87. Powell would echo this argument in his memo to the Chamber of Commerce.

<sup>428</sup> *Report of the President’s Commission*, 146.

<sup>429</sup> *Report of the President’s Commission*, 188. The Red Scare and McCarthyism are just two examples.

out.<sup>430</sup> The PCCU also called out politicians for being virulent and ignorant in their attacks and for misleading public opinion regarding universities. They condemned legislators for passing anti-student and anti-university laws that were unnecessary and, in some cases, “purely vindictive.”<sup>431</sup> The PCCU reiterated that universities should not be punished for protecting the constitutional rights of their members.<sup>432</sup> In coming to the defense of the universities after offering pages of rebuke, the PCCU appears eager to spread the blame for campus unrest.

In their report, the PCCU faulted law enforcement for being ill-prepared to deal with campus unrest. The PCCU believed it was imperative that the campuses and law enforcement work together in a coordinated manner to resolve campus unrest before it became especially troublesome or out of control.<sup>433</sup> They urged proper training on civil unrest for law enforcement as well as the National Guard.<sup>434</sup> While it was too late for the students killed at Kent State, the Commission insisted that “state National Guard organizations adopt and strictly adhere to standards of restraint for the use of deadly force in campus disorders which at a minimum conform to those promulgated by the Department of the Army.”<sup>435</sup> The PCCU blamed the lack of coordination at the early onset of unrest for the situations that occurred at Kent State and Jackson State.

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<sup>430</sup> *Report of the President's Commission*, 126.

<sup>431</sup> *Report of the President's Commission*, 147.

<sup>432</sup> *Report of the President's Commission*, 190.

<sup>433</sup> *Report of the President's Commission*, 160.

<sup>434</sup> During May 1970, the National Guard was deployed on twenty-four different occasions to offer support on twenty-one different campuses. The fact that they had received little training on civil unrest was particularly concerning in light of their increasing involvement in campus incidents. *Report of the President's Commission*, 174.

<sup>435</sup> *Report of the President's Commission*, 179. According to the Commission Report, at the moment of firing, most of the nine students at Kent State who were wounded were beyond the range at which they could have presented an imminent threat to the National Guard. *Ibid.*, 276. Students who were interviewed after the Kent State deaths also complained that the National Guard did not render first aid to the victims after the shootings. *Ibid.*, 277.

Despite opposition from campus activists, the PCCU encouraged the exchange of intelligence between campuses and local police departments to prevent campus unrest. The presence of police on campuses, particularly the high numbers of undercover agents, had long been a serious concern for students. Students felt unfairly targeted by police forces and argued their privacy was being usurped by universities.<sup>436</sup> In a concession to students, the PCCU cautioned against excessive use of undercover agents to gather intelligence, not only because it undermined trust in the police force, but also because it was seen as repressive. Polls indicated that fifty-eight percent of students believed that the United States was actively repressing activism. A Harris poll found that fifty-two percent of Americans surveyed believed that “students should *not* have the right to protest peacefully or otherwise,” indicating a pervasive intolerance of dissent.<sup>437</sup> The PCCU acknowledged repressive acts against students including official rhetoric encouraging harsh treatment of student activists, misuse of undercover agents on campuses, injunctions that prohibited student protests, and legislation prohibiting financial aid to students involved in protests as evidence to support the students’ opinions.<sup>438</sup>

When the PCCU finally turned its attention to the government, their critiques were mild in comparison to their admonishment of universities and law enforcement. They urged the government to move toward the goal of ending the Vietnam War and to seek racial and social justice. They also encouraged the government to protect the right of individuals to dissent. The PCCU assigned the government the urgent task to “restore the faith of Americans in their government, in their fellow citizens, and in their capacity to live together in harmony and

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<sup>436</sup> *Report of the President’s Commission*, 171. The use of undercover agents and surveillance of student activists was a common practice during the period of heightened student activism in the 1930s as well. Cohen, *When the Old Left was Young*.

<sup>437</sup> *Report of the President’s Commission*, 219. Emphasis added.

<sup>438</sup> *Report of the President’s Commission*, 217, 219.

progress.”<sup>439</sup> They argued that the President needed to “reassert his administration’s openness to all views, including the voices of student protest.”<sup>440</sup> Finally, in a recommendation that would be much derided by the Nixon Administration, the PCCU wrote:

the most important aspect of the overall effort to prevent further campus disorder – indeed, the most important of all the Commission’s recommendations – rests with the President. As the leader of all Americans, only the President can offer the compassionate, reconciling moral leadership that can bring the country together again. Only the President has the platform and prestige to urge all Americans, at once, to step back from the battlelines into which they are forming. Only the President, by example and by instruction, can effectively calm the rhetoric of both public officials and protestors whose words in the past have too often helped further divide the country, rather than unite it.<sup>441</sup>

While the PCCU was spreading the blame for campus unrest among universities, law enforcement, and, to a lesser extent, the government, they placed the burden of moral leadership on President Nixon to help navigate a way forward.

### ***Reactions to the Report on Campus Unrest***

On September 27, 1970, just over three months since it was formed, the President’s Commission on Campus Unrest released their report to President Nixon.<sup>442</sup> In the words of one reporter, the final report “condemned with impartial fervor fanatical student terrorists, complacent campus officials, brutal law enforcement officers, and vindictive acts and inflammatory words of politicians.”<sup>443</sup> Talking with reporters, Scranton shared that he did not

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<sup>439</sup> *Report of the President’s Commission*, 215.

<sup>440</sup> *Report of the President’s Commission*, 216.

<sup>441</sup> *Report of the President’s Commission*, 231.

<sup>442</sup> Jack Rosenthal, “President’s Panel Warns Split on Youth Perils U.S.; Asks Him to Foster Unity,” *New York Times*, September 27, 1970. On the same day, the White House mailed another letter to college administrators that included a letter from J. Edgar Hoover warning students of the attempts by extremists to lure them in and trick them into supporting violence. Jack Rosenthal, “Two on Nixon Panel Term College Deaths Unjustified: 2 on Nixon Panel Score College Deaths,” *New York Times*, September 28, 1970.

<sup>443</sup> Jack Rosenthal, “President’s Panel Warns Split on Youth Perils U.S.; Asks Him to Foster Unity,” *New York Times*, September 27, 1970.

believe Nixon or his Administration understood the urgency of the campus unrest issue. In his discussion with reporters, Scranton shared an urgent plea for understanding and reconciliation.

The divisions are far deeper, far more compelling, and growing far faster than most Americans realize... If this crisis of understanding endures, the very survival of this nation will be threatened. A nation driven to use the weapons of war upon its youth is a nation on the edge of chaos.<sup>444</sup>

Scranton reiterated the PCCU's plea to Nixon for unity, while Nixon's supporters quickly rallied in his defense.

A staunch supporter of the President, Spiro Agnew criticized the PCCU's report and argued that it was irresponsible for the commission members to hold the President responsible for the moral leadership to reunite the country.<sup>445</sup> When offering his critique of the PCCU, Agnew repeatedly referred to the PCCU as the Scranton Commission rather than the President's Commission on Campus Unrest, an attempt to downplay the fact that the members were appointed by the President.<sup>446</sup> Agnew condemned the PCCU for not refuting students' claims that the United States was "a corrupt, repressive society engaged in an immoral war," while arguing that Nixon exhibited outstanding moral leadership in his pursuit of peace in Vietnam.<sup>447</sup> Agnew stated that all blame for campus unrest should be placed "on the steps of the university administration building and at the door of the faculty lounge."<sup>448</sup> Jeffrey St. John, another Nixon supporter, wrote that the PCCU "evaded the decisive role that power-lusting intellectuals have played in violently savaging the American university system."<sup>449</sup> St. John describes intellectuals

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<sup>444</sup> As quoted in Rosenthal, "President's Panel Warns Split."

<sup>445</sup> James M. Naughton, "Agnew Condemns Report on Unrest: He Alleges 'Scapegoating' Says that Nixon 'Cannot Replace Campus Cop'," *New York Times*, September 30, 1970.

<sup>446</sup> Naughton, "Agnew Condemns Report."

<sup>447</sup> Naughton, "Agnew Condemns Report."

<sup>448</sup> As quoted in Naughton, "Agnew Condemns Report."

<sup>449</sup> Jeffrey St. John, "The Scranton Report: A Critique; The Commission Seen as Failing to Blame the Intellectuals," *New York Times*, October 10, 1970. St. John was a political commentator who described himself as having a libertarian philosophy.

as frustrated by their lack of power and willing to abandon reason, scholarship and academic freedom in favor of political power. St. John argued, “A rude realistic fact is that an important segment of the American intellectual community is using many of the nation’s universities as a political power base to deplace the current occupant of the White House.”<sup>450</sup>

Meanwhile, sixty-six Senators including five Democratic Senators addressed a letter to President Nixon condemning the PCCU for disregarding all of Nixon’s efforts related to campus unrest. The Senators asserted that the PCCU’s recommendations were not grounded in reality. In response to the Senators’ letter, Matthew Byrne, executive director of the PCCU, stated, “The report speaks for itself in quite a clear and concise manner. I would urge that all concerned withhold their judgement until they actually read the report.”<sup>451</sup> Attorney General Mitchell agreed with the Senators that the PCCU should not have blamed the federal government for campus unrest. Instead, Mitchell believed the blame should rest with families, churches, and schools, “where education starts, proceeds, and terminates.”<sup>452</sup> By showing unwavering support for the President, Nixon’s supporters hoped to gain more support in the upcoming election.<sup>453</sup>

### *Campaigning Against Campus Unrest*

In the weeks following the release of the PCCU’s report, one of Nixon’s primary strategies was to keep attention on campus unrest rather than acknowledge how his foreign and domestic policies were responsible for the surge in student activism.<sup>454</sup> Nixon believed there was a strong majority of the country who supported his stance on campus unrest. Nixon and

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<sup>450</sup> St. John, “The Scranton Report.” Note that St. John also uses Scranton’s name to discuss the report.

<sup>451</sup> As quoted in Jack Rosenthal, “66 Members of House Say Campus Unrest Panel ‘Blatantly Ignores’ Efforts Already Made by Nixon,” *New York Times*, September 30, 1970.

<sup>452</sup> Rosenthal, “66 Members of House.”

<sup>453</sup> Jack Rosenthal, “Campus Panel’s Future: Final Report Regarded as Only Prelude to a Scranton Meeting with President,” *New York Times*, October 6, 1970.

<sup>454</sup> Robert B. Semple, “The Three Strategies of a Master Politician,” *New York Times*, November 1, 1970.

Republican strategists regarded the “Forgotten American (or Silent Majority, or Middle American) as the dominant political force in [the] country,” and believed it was important for Nixon to “convey to the Middle Americans the impression that while he is, by official position, a cut above them, he remains at heart one of them.”<sup>455</sup> According to Ehrlichman, one of Nixon’s advisors, the objective of the post-Southern strategy was “to represent the workingmen of this country, the forgotten man of American politics.”<sup>456</sup> In a memo to Nixon on October 21, 1970, Ehrlichman advised Nixon to demonstrate that Republicans can be the party of the working man and to emphasize programs that the middle class would find desirable. Ehrlichman advised that social issues speak more to the voting middle than either of the extremes, so these should be the focus of the messaging. He told Nixon to say, “It’s time to get America moving again.”<sup>457</sup>

Ehrlichman gave Nixon the following advice about how to address the PCCU’s report:

refer to the Report in a campaign speech, say you’ve read it and had it analyzed. Quote a couple passages critical of students and administrators ‘that everyone here will agree with.’ Finesse the question of blame because indictments are now outstanding in Ohio. Joke about everyone advising the President these days. Reaffirm your position on violent dissent and move on to other subjects.

Then never comment on the report again and don’t see Scranton again.<sup>458</sup>

Nixon would heed the advice of Ehrlichman and encourage other Republicans to adopt a similar strategy.

During the election season, campus unrest became a key issue in states with competitive races. Republican candidates created advertisements linking their Democratic opponents to

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<sup>455</sup> Semple, “The Three Strategies.” This focus on the “Silent Majority” would continue to dominant politics for the next several decades and would be repeated as a campaign strategy for Republicans.

<sup>456</sup> Ehrlichman, *Witness to Power*, 213-214.

<sup>457</sup> Ehrlichman, *Witness to Power*, 217. This campaign slogan rings familiar in the 2016 campaign slogan, “Make American Great Again.”

<sup>458</sup> Ehrlichman, *Witness to Power*, 219.

violent student protests and bombings and questioning why the Democrats did not denounce student unrest. The Fair Campaign Practices Committee, a nonpartisan organization, noted that linking politicians with student radicals during the campaign was a resurgence of a guilt-by-association tactic that was common in the fifties.<sup>459</sup> Ronald Reagan embraced Nixon's strategy and received high marks for his strong stance on campus unrest, especially a statement that he would "welcome a 'bloodbath' if that was what was needed to end student unrest."<sup>460</sup> One reporter noted that campus unrest was a "vague and complex term," which many voters tended to conflate with black militancy, drugs, and crime.<sup>461</sup> Despite the unclear definition or perhaps because of it, politicians would continue to use campus unrest to generate support.

Just prior to the election, the grand jury in Kent, Ohio released indictments for twenty-five students, while exonerating the National Guard.<sup>462</sup> Police Chief James Ahern, who served on the PCCU, said the grand jury's exoneration of the National Guard was "inconsistent with the facts."<sup>463</sup> According to the grand jury report, "with the principle of law that words alone are never sufficient to justify the use of lethal force, the verbal abuse directed at the guardsmen by the students during the period in question represented a level of obscenity and vulgarity which we have never before witnessed."<sup>464</sup> The grand jury did not acknowledge that students were acting within their First Amendment rights by participating in the protest that resulted in the

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<sup>459</sup> Steven V. Roberts, "Conservatives Press Campus Unrest Issue: Conservatives Pressing Campus Unrest Issue, Putting Liberals on the Defensive," *New York Times*, October 11, 1970.

<sup>460</sup> Roberts, "Conservatives Press Campus Unrest Issue."

<sup>461</sup> Roberts, "Conservatives Press Campus Unrest Issue."

<sup>462</sup> John Kifner, "Jury Indicts 25 in Kent Disorder; Guard is Cleared: 'Major Responsibility' Laid to University Leaders for 'An Attitude of Laxity,'" *New York Times*, October 17, 1970.

<sup>463</sup> Kifner, "Jury Indicts 25 in Kent Disorder."

<sup>464</sup> William Barry Furlong, "A Jury Exonerates Guard for Kent State Tragedy: Scranton Report," *New York Times*, October 18, 1970. A later report by the FBI would contradict the findings of the grand jury. Robert M. Smith, "Kent State Study by F.B.I. Differs from Ohio Finding: Summary Quotes 6 in Guard as Asserting Their Lives Were Not in Danger," *New York Times*, October 31, 1970.

deaths of four students. In response to the indictments, Kent State students planned a nonviolent walk to Ravenna, Ohio, where the grand jury was meeting. The students met with town officials to inform them of their plans and apply for a permit. Before students could commence their walk, they were met with a court injunction forbidding picketing, distributing handbills, displaying signs, or demonstrating near the courthouse.<sup>465</sup> The injunction was to be in effect for twenty-four hours a day, thus prohibiting the students from exercising their First Amendment rights in response to the grand jury indictments. Kent State President White warned that “the grand jury’s view of the campus could undermine the foundations of civil liberties and academic freedom.”<sup>466</sup> White argued that the failure of Nixon to heed the PCCU’s call for reconciliation “leaves universities vulnerable to pressure from the left and the right and thus undercuts the forces of sanity and justice.”<sup>467</sup> Meanwhile, the grand jury indictments would be seen as evidence by Nixon’s supporters that something was being done to address campus unrest.

Despite continued pressure from the press for a public response to the PCCU’s report, Nixon did not formally respond to Scranton until several weeks after the election.<sup>468</sup> On December 10, Nixon conceded in a press conference that ending the Vietnam War would probably repair relations with America’s youth. He gave a slight nod to fact that the PCCU had made this recommendation in their report.<sup>469</sup> Although pressed for more information, Nixon

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<sup>465</sup> Kifner, “Jury Indicts 25 in Kent Disorder.”

<sup>466</sup> “The Voice the Failed,” *New York Times*, November 16, 1970.

<sup>467</sup> As quoted in “The Voice the Failed.”

<sup>468</sup> Jack Rosenthal, “Nixon Contests Scranton Report on Healing Rifts: In Letter to Head of Panel on Unrest He Cites Dispute on ‘What Problems Are,’ Understanding Urged Responsibility for Disruption of Campuses is Attributed to Academic Community,” *New York Times*, December 13, 1970. While Republicans did not do as well as in the 1970 midterm elections as they hoped, voters overwhelming voted against bonds and taxes for education and pollsters speculated that frustration for campus unrest was one primary reason for this outcome. John Herbers, “Survey Finds Voters Across the Nation Bonds or Taxes for Education,” *New York Times*, November 8, 1970.

<sup>469</sup> Johnson, *The Nixon Presidential Press Conferences*, 132-133. It seems that Nixon took the advice of Ehrlichman and made little mention of the Commission’s report. After this press conference, Nixon did not specifically mention the Commission again in his official press conferences. In only two future press conferences (May 1, 1971 and June 1, 1971) did he mention protests. In May 1971, he responded to questions about

declined to comment because his letter to Scranton regarding the report had not yet been released. In Nixon's letter to Scranton, which was sent eleven weeks after the report was submitted, he would contradict the primary recommendation of the commission and place responsibility for campus unrest with members of the academic community.<sup>470</sup> Nixon argued that moral authority does not reside solely with the president, but with the "thousands upon thousands of individuals – clergy, teachers, public officials, scholars, writers – to whom segments of the nation look for moral, intellectual and political leadership."<sup>471</sup> An editorial in the *New York Times* condemned Nixon for his insensitive response to the PCCU's Report, writing that in blaming universities for campus unrest, Nixon "ignores the fact that university administrations have already taken extraordinary – and costly – steps to correct past errors. They have done so without the Federal financial aid on which the commission placed such high priority."<sup>472</sup> Another writer scorned Nixon's response, writing, "Unless moral 'authority' and moral 'leadership' are precisely the same thing, the 'clergy, teachers, public officials, scholars [and] writers' cited by Mr. Nixon are scarcely in a position to offer the nation the kind of constructive personal example and symbolic attitude that a President can provide."<sup>473</sup> Despite their criticism, Nixon was not compelled to assume moral leadership to reconcile the divide within the country.

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demonstrators coming to Washington, D.C. a year after the Kent State shootings. In June 1971, he responded with approval to police action against protestors. *Ibid.*, 171-172, 184-185.

<sup>470</sup> Jack Rosenthal, "Nixon Contests Scranton Report on Healing Rifts," *New York Times*, December 13, 1970.

<sup>471</sup> "Excerpts from Nixon's Letter on Campus Unrest," *New York Times*, December 13, 1970.

<sup>472</sup> "Mr. Nixon's Insensitive Reply," *New York Times*, December 14, 1970.

<sup>473</sup> Tom Wicker, "Mr. Nixon's Moral Tone," *New York Times*, December 15, 1970.

### *Legislative Responses to Student Activism*

While the media focused a great deal of attention on President Nixon's response to campus unrest, legislatures at the federal and state level were actively devising ways to hold colleges accountable for campus unrest. In January 1970, a bill was proposed in a House of Representatives' committee that would require colleges to file codes of campus conduct as well as plans for dealing with campus disruptions before they could receive federal funds.<sup>474</sup> In the month after the shooting at Kent State, thirty-two states passed legislation designed to prevent further disorders from occurring on campuses. The legislation was similar in many of the states and included some of the following limitations: "the deprivation of financial aid to students engaged in illegal demonstrations, the penalizing of anyone who damages school property or interferes with campus activity, the barring of outsiders from college campuses and the dismissal of faculty members involved in protests."<sup>475</sup> One of the first states to enact legislation was Ohio, which passed Bill 1219 that ordered fines and arrests for campus protestors as well as dismissal of faculty involved in campus disturbances.<sup>476</sup> According to Thomas, "Ohio thus became the first state to enshrine the conservative moral axiom of Kent State – that it was all the students' fault that they had been killed – in legislation."<sup>477</sup>

In California, the site of significant campus unrest in the 1960s, the legislature amended the criminal code to make it a misdemeanor to prevent by force any student or teacher from attending class at any state university.<sup>478</sup> The legislature then voted to exempt university faculty

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<sup>474</sup> "Major Bills in Congress," *New York Times*, January 26, 1970. The bill (HR 11941) would remain in committee throughout the year.

<sup>475</sup> "32 States Fight Campus Unrest: Pass Laws Designed to Bar Any Further Disorders," *New York Times*, June 28, 1970.

<sup>476</sup> Thomas, *Mission Betrayed*, chapter 2.

<sup>477</sup> Thomas, *Mission Betrayed*, chapter 2.

<sup>478</sup> "32 States Fight Campus Unrest."

and staff from raises that were given to all other state employees. They also voted to cut back on funding to state universities. According to one California legislature, “We’re not trying to punish the university’s faculty for all the trouble; we’re just trying to discipline them.”<sup>479</sup>

In Illinois, Republican Senator William Horsley advocated for measures to stem the tide of campus unrest by advocating for “student marshals trained at the state police academy [to]...be used to help kick these trouble-makers off campus.” He blamed campus unrest on “Communist China, dope pushers and rich do-gooders,” and advocated for restricting pamphlets on campus, a clear violation of the First Amendment.<sup>480</sup> John Peltason, Chancellor of the University of Illinois, cautioned that some of these measures could raise constitutional issues.

When students at the generally quiet University of Alabama engaged in activism, they were quickly silenced by troops sent to the campus by Governor Brewer. The students believed they were being targeted for political reasons. “They [were] convinced that their civil liberties [were] being abused for political purposes, contending that the curfew and the ban against assemblies [was] part of a strategy by Governor Brewer to show the voters than he can be as adamant on law and order as Mr. Wallace.”<sup>481</sup> The actions by largely conservative legislators demonstrated an intolerance for the First Amendment on college campuses.

### ***Higher Education Responses to Student Activism***

By the 1970s, approximately half of college-aged Americans attended college compared with only one percent at the turn of the century.<sup>482</sup> According to Gusfield, the greatly expanded

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<sup>479</sup> As quoted in Winthrop Griffith, “The Isla Vista War: Campus Violence in a Class by Itself,” *New York Times*, August 30, 1970.

<sup>480</sup> “Illinois Hearing Chairman Asks Moves to Fight Student Unrest,” *New York Times*, September 20, 1970.

<sup>481</sup> James T. Wooten, “Activism Arrives at U. of Alabama: Question for Voters,” *New York Times*, May 24, 1970.

<sup>482</sup> Joseph R. Gusfield, “Student Protest and University Response,” *Annals of the American Academy of Political and Social Science* 395 (May 1971): 26-38.

and increasingly diverse campus populations brought new challenges to universities which were once relatively homogenous and “unconstrained by the attention and expectations of the variety of agencies, political powers, and interest groups that make up the public.”<sup>483</sup> Coupled with the public attention on campus unrest, universities were under significant pressure to take action. National polls indicated that the public wanted more hard-line approaches towards students who disrupted campus life and actions by legislatures suggested the same.<sup>484</sup> Despite the widespread belief that campuses were permissive and let students get away with protests, one study of twenty-eight colleges and universities showed that protests resulted in the suspension or expulsion of 950 students and additional reprimands to 800 students. Another study found that where protests occurred, particularly violent protests, in seventy-five percent of the cases, some disciplinary action was taken.<sup>485</sup> Still, colleges were encouraged to adopt harsh disciplinary measures. According to Duke President Terry Sanford, “With the self-righteousness of oligarchs, the leaders of repression are commanding college presidents to put off protest and to silence dissent.”<sup>486</sup> Universities responded with diverse solutions to the issue of campus unrest.

One of the more creative plans for dealing with campus unrest came from Princeton University in the aftermath of Nixon’s expansion of the Vietnam War into Cambodia. The Council of the Princeton University Community drafted a resolution, which would come to be known as the Princeton Plan, that would allow students the option to take time away from classes in the fall to participate in political activity in the two-week period before the election.<sup>487</sup> Prior to

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<sup>483</sup> Gusfield, “Student Protest and University Response,” 26-38.

<sup>484</sup> David E. Rosenbaum, “Colleges Tighten Security to Check Student Unrest: Colleges Tighten Security on Campus,” *New York Times*, September 14, 1970.

<sup>485</sup> Keniston and Lerner, “The Unholy Alliance,” 55.

<sup>486</sup> As quoted in Jon Nordheimer, “Sanford: A Politician on the Campus,” *New York Times*, October 11, 1970.

<sup>487</sup> Paul Sigmund, “Princeton in Crisis and Change,” *Change: The Magazine of Higher Learning* 5, no. 2 (1973): 34-41.

the release of the plan, Princeton had been dealing with tensions related to an Institute for Defense Analyses lease in one of its campus buildings. After a period of unrest, students began working more closely within the campus system to advocate for the changes they desired.<sup>488</sup> The Princeton Plan was an attempt to give students an opportunity to work closely on issues that they cared about in a productive and proactive manner.

The Princeton Plan was adopted by twenty-five percent of the members of the Association of American Universities including a mixture of private and public schools representing campuses across the country, with the exception of the deep South. While the plan was meant to engage students in the political process in a meaningful manner, negative commentary about the plan from James Reston and Strom Thurmond fomented in the public a negative attitude about the plan. Reston referred to it as a “political vacation” and Thurmond questioned the continued tax-exempt status of universities that chose to implement this plan. Thurmond’s question raised concerns from the American Council on Education, who conferred with the Internal Revenue Service about the plan. The Internal Revenue Service concluded that the proposal violated no laws, but the damage had already been done with many schools moving away from the idea of implementing the plan. As the months wore on, there was less support for the plan.<sup>489</sup> While the Princeton Plan represented a meaningful attempt to harness the energies of students, most of the steps taken by universities were more reactionary.

Many of the changes made at universities were clearly designed to limit student unrest. Some measures taken by universities were focused on ensuring the security of campuses through the expansion of police forces on campus, installation of spotlights on campus buildings, and the

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<sup>488</sup> Sigmund, “Princeton in Crisis and Change,” 41.

<sup>489</sup> Fred M. Hechinger, “Steam is Gone from Student Political Action,” *New York Times*, October 25, 1970.

addition of fireproof vaults in administrative buildings.<sup>490</sup> Other changes included the development of undisclosed contingency plans for major disturbances and revisions to the student judicial system, both of which were recommendations from the PCCU.<sup>491</sup> Most significant of the changes were policies that attempted to reconcile students' First Amendment rights with campus security. These policies attempted to balance robust freedom of expression with plans to ensure limited disruptions of campus activities. The American Council on Education found in a survey of 1,200 institutions that the majority of schools issued statements to their students on the limits of permissible campus protest.<sup>492</sup>

Many colleges announced changes to their disciplinary codes of conduct and announced statements on freedom of expression. One example of such policy came from the University of Missouri, which issued the following statement, "In a community of learning, willful disruption of the educational process, destruction of property and interference with the rights of other members of the community will not be permitted."<sup>493</sup> Those community members who were not in agreement with this statement were encouraged to sever ties with the university. Johns Hopkins University's new code of conduct delineated two areas subject to discipline: "conduct that abridges the rights of others and conduct that impairs the school's effective functioning or damages facilities."<sup>494</sup> The University of California at Los Angeles set new rules on the times and location for amplified sound used in demonstrations as well as places to distribute literature.<sup>495</sup> Kent State required everyone to carry campus identification cards and required the

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<sup>490</sup> Rosenbaum, "Colleges Tighten Security." For reference, UCLA went from 9 to 52 police officers and Ohio State went from 30 to 60 officers. Southern Illinois University went from 20 to 75.

<sup>491</sup> Andrew H. Malcolm, "Growing Number of Colleges Taking Tougher Stand in Guidelines on Protests," *New York Times*, October 6, 1970.

<sup>492</sup> Malcolm, "Growing Number of Colleges."

<sup>493</sup> Malcolm.

<sup>494</sup> Malcolm.

<sup>495</sup> Many of these rules limited speech would later be found unconstitutional.

registration of demonstrations twenty-four hours in advance. Kent State also permitted the immediate suspension of any student or faculty member suspected of violations with a hearing to be held within ten days. These are just a few of the examples of changes that were made at universities across the country.

At the closing meeting of the American Council on Higher Education in 1970, Terry Sanford, president of Duke University, spoke out against the criticism being directed at higher education and articulated the challenge that it presented to the future of American democracy.

Led by some of our highest government officials...they have labeled 'campus unrest' as a bigger problem than any of its causes, thus diverting not only attention but constructive effort away from the root problems....

Unlike some other institutions of American life, we are reluctant to counterattack, or to call on political or other allies to avenge our injuries. And yet, unless our colleges and universities remain solvent and viable, as well as free, we should all fear for the future of American society.<sup>496</sup>

Sanford recognized that the attention focused on higher education was diverting attention away from the significant issues facing the country. In subsequent years, higher education would continue to struggle to develop an effective response to the ongoing attacks on free speech.

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<sup>496</sup> As quoted in Reinhold, "Duke Head Scores College Critics."

#### 4 MOUNTING A DEFENSE AGAINST ‘LIBERAL INDOCTRINATION’

During 1970, colleges and universities faced intense scrutiny because of the increased politicization of student activism. However, by the end of the year, politicians and the media were beginning to shift their attention elsewhere as active protests and disruptions on campuses began to decline. From the spring of 1970 to the fall of 1970, there was a quieting of the campuses.<sup>497</sup> Student activists were increasingly aware of the risk of protests being used as political fodder for conservative candidates.<sup>498</sup> The exploitation of the campus unrest issue by Republicans may have encouraged students to adopt more nonviolent protests. Bill Echlin of Wayne State University suggested that the demonization of activists had resulted in more reformist activism focused on working within the system.<sup>499</sup> By the start of 1971, campuses were relatively peaceful compared to the state of campuses in the 1960s and into 1970. In addition to concerns about the politicization of student activism, the decline in student activism was attributed to a weakening economy and a growing uncertainty among students about their future. Sanctions related to involvement in protest activities may have raised more concerns for students as opportunities for employment grew scarcer.<sup>500</sup> Students who were surveyed during this time period attributed the decline in activism to a lack of effective leadership, an emphasis on changing the self rather than society, and the decreasing intensity of the Vietnam War.<sup>501</sup>

While student activism was less noticeable to the public in the 1970s and into the 1980s, it should not be assumed that students during this period were completely apathetic and disengaged. In more subtle ways, students continued to pressure universities to adopt more

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<sup>497</sup> Douglas E. Kneeland, “Campuses Quiet but Not Content,” *New York Times*, December 20, 1970.

<sup>498</sup> Fred M. Hechinger, “Steam is Gone from Student Political Action,” *New York Times*, October 25, 1970.

<sup>499</sup> As quoted in Kneeland, “Campuses Quiet but Not Content.”

<sup>500</sup> James D. Orcutt and James M. Fendrich, “Students’ Perceptions of the Decline of Protest: Evidence from the Early Seventies,” *Sociological Focus* 13, no. 3 (August 1980): 203-213, 205.

<sup>501</sup> Orcutt and Fendrich, “Students’ Perceptions of the Decline of Protest,” 208-209.

progressive policies. Students began serving on university task forces, facilitating programs to educate their peers on important issues, and generally, working within the system to affect change rather than through large demonstrations and sit-ins.<sup>502</sup> A 1978 study by the Carnegie Council on Policy Studies in Higher Education found that there was a significant shift in the types of activism that students engaged in after the 1960s. In the 1960s, destruction of property, student takeovers of buildings, student strikes, threats of violence, and student demonstrations comprised the majority of activism activities, these types of activities with the exception of demonstrations were largely missing from campuses in the late 1970s.<sup>503</sup> In place of the activities of the 1960s, activism activities in the 1970s were much more likely to include litigation and lobbying efforts. Thirty-five percent of schools participating in the 1978 Carnegie survey saw an increase in the number of lawsuits threatened or initiated by students.<sup>504</sup> Students increasingly looked for opportunities to work within the system to enact change.

One of the ways that students worked within the system was through public interest research groups (known as PIRGs). PIRGs were first proposed by Ralph Nader in 1970 as a way for students to work constructively on social reforms. According to Levine and Wilson, PIRGs were more successful than some previous student activism largely because they used a more diverse mix of tactics to accomplish their goals including lobbying, litigation, media, community organizing, and demonstrations.<sup>505</sup> PIRGs were also issue-oriented rather than politically

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<sup>502</sup> Laura M. Harrison and Peter C. Mather, "Making Meaning of Student Activism: Student Activist and Administrator Perspectives," *Mid-Western Educational Researcher* 29, no. 2 (April 2017): 117–35.

<sup>503</sup> Arthur Levine and Keith R. Wilson, "Student Activism in the 1970s: Transformation Not Decline," *Higher Education* 8, no. 6 (November 1979): 627–640.

<sup>504</sup> Levine and Wilson, "Student Activism in the 1970s."

<sup>505</sup> Levine and Wilson, "Student Activism in the 1970s." To provide some context on the size of PIRGs, the New York PIRG had more than 100,000 dues paying members, while at its peak the Students for a Democratic Society had only 6,000 dues paying members and 30,000 affiliated members nationwide.

ideological, so they attracted both conservative and liberal students. Finally, they were willing to “take whatever they [could] get and push for more” in a much more pragmatic manner than their predecessors.<sup>506</sup> Student lobbies began to proliferate as students used this new tactic to press for legislation favorable to student demands.

Legislators may have been more willing to listen to students after 1971 because college students now held the power of the vote. Prior to 1971, many states required citizens to be twenty-one years of age to vote. In 1970, Democrats largely came out in support of lowering the voting age in federal elections to eighteen because they believed it would help pass the voting rights bill. Nixon was not supportive of the proposed change to the voting age.<sup>507</sup> Supporters of lowering the voting age worried that television coverage of college students protesting would prevent the states from supporting a lower voting age.<sup>508</sup> Despite these early concerns, the Twenty-Sixth Amendment, which granted the right to vote in federal and state elections to citizens eighteen and older, was ratified in less time than any other amendment in United States history. It took less than one-hundred days for the amendment to gain the necessary support from Congress and be ratified by the states.<sup>509</sup> A coalition of thirty-three prominent civil rights organizations was largely responsible for coordinating the successful national campaign to expand the right to vote to eighteen-year-olds.<sup>510</sup> Although voter participation is generally weak

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<sup>506</sup> Levine and Wilson, “Student Activism in the 1970s,” 639. Levine and Wilson bring up the point that changes in student activism require changes in the way that research on student activism is conducted. If researchers are looking for what has been commonly identified with student activism – protests and demonstrations, they may be missing ways that students were engaged in activism at other points in time.

<sup>507</sup> Marjorie Hunter, “Democrats Press 18-Year-Old Vote: Celler is Confident Despite Opposition by President,” *New York Times*, April 29, 1970, 17.

<sup>508</sup> “Opposition to Lowering Voting Age Laid to TV Coverage of College Unrest,” *New York Times*, February 17, 1970.

<sup>509</sup> Yael Bromberg, “Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment,” *Journal of Constitutional Law* 21, no. 5 (May 2019): 1105-1166.

<sup>510</sup> Bromberg, “Youth Voting Rights,” 1123.

in voters under the age of twenty-four, evidence shows that college students as a whole vote in equal proportion to other segments of the population.<sup>511</sup> An active voting presence may have helped them gain the attention of legislators.

The 1970s and 1980s brought additional changes to colleges and universities that would ultimately influence students' First Amendment rights as expressed on campus. While lobbying and litigation changed the way that students engaged in activism, an increase in conservative student organizations brought new issues to the forefront of the campus community.<sup>512</sup>

Conservative students would increasingly turn to litigation to address their First Amendment rights, a tactic that had previously been utilized more by liberal-leaning students and organizations. In addition to conservative students challenging the 'liberal biases' of colleges and universities, conservative organizations outside of the campus including corporate business groups, private foundations, and evangelical churches would begin to speak out against what they believed to be the 'liberal indoctrination' of students on America's campuses. These conservative organizations were heavily influenced by the political rhetoric of the Nixon Administration and they would carry out attacks on colleges and universities similar to those that first emerged in 1970. Conservative students and conservative groups off-campus would wage successful legal battles against colleges and universities that would ultimately change how campuses interpreted students' First Amendment rights.

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<sup>511</sup> Levine and Wilson, "Student Activism in the 1970s," 631.

<sup>512</sup> Ziad Munson, "Mobilizing on Campus: Conservative Movements and Today's College Students," *Sociological Forum* 25, no. 4 (December 2010): 769-786. While I will provide some examples of conservative activism, it is not within the scope of this dissertation to provide a comprehensive overview. For more on this topic, see Jean V. Hardisty, *Mobilizing Resentment: Conservative Resurgence from the John Birch Society to the Promise Keepers* (Boston: Beacon Press, 1999); Gregory L. Schneider, *Cadres for Conservatism: Young Americans for Freedom and the Rise of the Contemporary Right* (New York: New York University Press, 1999); and Amy Binder and Kate Wood, *Becoming Right: How Campuses Shape Young Conservatives* (Princeton: Princeton University Press, 2012).

### Student Activism in the 1970s and 1980s

Student activism in the 1970s and 1980s continued to address many of the issues that had been raised in the 1960s. African Americans, Latinos, and women continued to advocate for academic departments focused on the study of these populations. At the same time, new issues emerged during this period. The gay liberation movement, environmentalism, and anti-apartheid movements slowly emerged as issues on college campuses. A growing conservatism in the United States as well as a more politically active Christian movement brought more conservative activism to the forefront of colleges and universities. Students began to advocate for the pro-life movement and speak out against a liberal bias on campus. The following examples of activism related to gay liberation and the apartheid movement are illustrative of the dominant student activism on campuses in the 1970s and 1980s.

Although homophile organizations existed in the 1940s and 1950s, the groups were not prominent on campuses during this period largely due to laws criminalizing homosexual activity.<sup>513</sup> Homophile groups that were active in local communities were hesitant to engage college students because many of the students were under twenty-one years of age, which increased the risk of criminal prosecution. Despite the significant challenges faced by gay and lesbian students, the first homophile groups began to appear on campuses in the late 1960s. The first of such groups, the Student Homophile League, started at Columbia University in 1967.<sup>514</sup> These early student groups did not seek to draw attention to themselves for fear of persecution. George Raya, a leader of one of these student groups, shared the anxiety that students felt about

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<sup>513</sup> Ruth M. Pettis, "Homophile Movement, U.S.," GLBTQ Archive, [http://www.glbtqarchive.com/ssh/homophile\\_movement\\_S.pdf](http://www.glbtqarchive.com/ssh/homophile_movement_S.pdf).

<sup>514</sup> David A. Reichard, "'We Can't Hide and They are Wrong': The Society for Homosexual Freedom and the Struggle for Recognition at Sacramento State College," *Law and History Review* 28, no. 3 (2010): 629-674.

meeting together during this time. “Every time someone knocked on the door or rang the doorbell, we kind of stiffened a bit because we didn’t know if it was another person coming to attend or if it was the police coming to arrest us.”<sup>515</sup> During Raya’s early campus years, gay and lesbian students avoided meeting on campus for fear of drawing attention to themselves. The Stonewall Rebellion of 1969 ushered in a new era of gay liberation, which empowered gay and lesbian students to demand access to campuses.<sup>516</sup> When administrators tried to block their associations, students took them to court.

One of the early groups to utilize the courts to protect their rights was the Society for Homosexual Freedom at Sacramento State College. Students involved in the organization were subjected to *in loco parentis*-type rules regarding their sexual behavior. The students were investigated for expressing their sexuality on campus, dismissed from the college for being arrested in gay bars, and admonished by school counselors for their ‘deviant’ behavior.<sup>517</sup> Despite regular attacks from administrators, the Society for Homosexual Freedom was supported on campus by the Women’s Liberation group and the Students for a Democratic Society as well as the Associated Students organization whose president, Stephen Whitmore, volunteered to be an officer in the Society for Homosexual Freedom.<sup>518</sup> When the group applied for recognition as a student organization, their request was granted by the Associated Students, but Sacramento State President Otto Butz refused to grant recognition to the group. In his denial letter to the

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<sup>515</sup> As quoted in John Ferrannini, “Meet the Man who Sued Sac State for Right to Form an Official LGBT Club on Campus – and Won,” *State Hornet*, April 12, 2017, <https://statehornet.com/2017/04/meet-the-man-who-sued-sac-state-for-right-to-form-official-lgbt-club-on-campus-and-won/>.

<sup>516</sup> Robert Reinhold, “Campus Homosexuals Organize to Win Community Acceptance,” *New York Times*, December 15, 1971; Eric Denby, “From ‘Black is Beautiful’ to ‘Gay Power’: Cultural Frames in the Gay Liberation Movement,” *Hilltop Review* 7, no. 2 (2015): 132-142. Scholars have argued about the relevance of the Stonewall Rebellion, but many agree that it did influence the gay liberation movement.

<sup>517</sup> Reichard, “‘We Can’t Hide and They are Wrong.’”

<sup>518</sup> Reichard, “‘We Can’t Hide and They are Wrong,’” 644.

organization, Butz wrote that “granting recognition would ‘conceivably be seen to endorse, or to promote, homosexual behavior, to attract homosexuals to the campus, and to expose minors to homosexual advocacy and practices,” which in his opinion was not something that Sacramento State College should invest its resources in.<sup>519</sup> Given this decision, the Associated Students agreed to file a lawsuit against the university on behalf of the Society for Homosexual Freedom.<sup>520</sup>

The *Associated Students of Sacramento State College v. Butz* lawsuit claimed that the college had denied students their First Amendments rights to free speech and assembly.<sup>521</sup> John Poswall, the attorney representing the Associated Students, argued that denying recognition of the organization was a form of prior restraint of constitutionally recognized free speech.<sup>522</sup> The case was heard by Judge William Gallagher who was widely considered to be a conservative judge. Gallagher was convinced by his law clerk, Paul Ramirez, to rule in favor of the students because of their strong claims to violations of the First Amendment. The decision by Poswall to focus on First Amendment violations rather than sexual orientation was seen as a wise decision because it made a clear case that the college denied the constitutional rights of students. Gallagher ruled in favor of the students but emphasized that recognition of the student group would in no way imply that the behavior and practices of the students were endorsed by the

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<sup>519</sup> Reichard, “We Can’t Hide and They are Wrong,” 646. Formal recognition by the university would have given the organization use of university facilities, access to faculty advisers, recognition in official campus publications, the use of student banking facilities, and use of the college name. These types of benefits are typical of student organization recognition on campuses today.

<sup>520</sup> Reichard, “We Can’t Hide and They are Wrong,” 651.

<sup>521</sup> Rhonda R. Rivera, “Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,” *Hastings Law Journal* 30, no. 4 (1979): 799-956, 924; William N. Eskridge, Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” *Michigan Law Review* 100, no. 8 (2002): 2062-2407.

<sup>522</sup> John Poswall faced significant pressure from his law firm for his decision to represent the Associated Students and was advised to make clear that he was focusing on the rights of all students at Sacramento State and not representing a gay student association. Reichard, “We Can’t Hide and They are Wrong,” 653-654.

university. He gave the college two months to reconsider the application of the group. Sacramento State did not appeal the decision and on February 19, 1971, the Society for Homosexual Freedom received formal recognition by the college. In May 1971, the group renamed themselves the Gay Liberation Front of Sacramento State College. Formal recognition of the group allowed a public presence for gay and lesbian students on campus. The college radio station hosted a Gay Liberation News Program in prime time, and the student newspaper had an openly gay editor. Although never formally recognized as a program, the Society for Homosexual Freedom also prompted a gay studies curriculum at the college. Notably, *Associated Students v. Butz* was one of the first cases that would tie First Amendment rights to student organizations, which would become paramount in the Supreme Court case *Healy v. James*, which would be decided in 1972. The actions of the Society of Homosexual Freedom demonstrate how student activists in the 1970s used new methods to promote their causes.

During the 1970s and 1980s, there was a growing movement on college campuses against apartheid in South Africa. Students began calling for universities to divest from their investments in companies that operated in South Africa. Speakers were invited to campus to educate students on the issue of apartheid and the urgency of divestment.<sup>523</sup> One of the methods students used to draw attention to their divestment campaign was to build shanty towns on campuses.<sup>524</sup> These shanty towns created spaces on campus where students as well as local community members gathered to raise awareness about apartheid and educate the campus community about divestment. According to Martin, students were claiming space on the campus for activism in

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<sup>523</sup> Sarah A. Soule, "Diffusion of an Unsuccessful Innovation," *Annals of the American Academy of Political and Social Science* 566 (November 1999): 120-131.

<sup>524</sup> Bradford Martin, "'Unsightly Huts': Shanties and the Divestment Movement of the 1980s," *Peace and Change* 32, no. 3 (July 2007): 329-360.

much the same way that the Free Speech Movement at Berkeley demanded space on campus for political expression.<sup>525</sup> The first shanty town was built at Cornell University in the spring of 1985, but perhaps one of the most memorable shanty towns was on the campus of Dartmouth College.

In the fall of 1985, the Dartmouth Community for Divestment announced they would build a shanty town on the campus green due to the trustees' failure to divest in South African investments.<sup>526</sup> While campus administrators attempted to accommodate the activists and their shanty town, conservative students on the campus were outspoken critics of the shanty town and actively called for the removal of the shanties. In January of 1986, students associated with Dartmouth's conservative campus newspaper, the *Dartmouth Review*, formed the Committee to Beautify the Green before Winter Carnival with the goal of dismantling the shanty town.<sup>527</sup> On January 21, students from the Committee to Beautify the Green took it upon themselves to dismantle the shanty town. At three in the morning, twelve students used sledgehammers to destroy the three shanties located on the campus green.<sup>528</sup> The students stopped when arrested by the campus police. In a letter to the college president, the Committee to Beautify the Green wrote that the shanties "'exacerbate the bad national press Dartmouth is already receiving' ... 'they confuse the student body, they create skepticism among devoted alumni, and they discourage prospectives when they visit the College.'" <sup>529</sup> According to Martin, while the divestment

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<sup>525</sup> Martin, "Unsightly Huts," 333.

<sup>526</sup> Martin, "Unsightly Huts."

<sup>527</sup> "The Usual Fiasco at Dartmouth," *National Review* 38, no. 3 (February 28, 1986): 20-21. The *Dartmouth Review* was not officially recognized by the campus at the time. It operated through alumni donations totaling \$100,000 per year. The paper was seen as antagonistic toward African Americans, women, and the LBGT community. Matthew L. Wald, "Students at Dartmouth Face Off Across Widening Political Divide," *New York Times*, January 24, 1986.

<sup>528</sup> Wald, "Students at Dartmouth Face Off."

<sup>529</sup> Martin, "Unsightly Huts," 351.

activists were motivated by global moral issues, the conservative student activists were concerned with protecting their own self-interest by maintaining the prestige of Dartmouth with alumni and prospective students.

While the establishment of shanty towns did not receive the same media attention as the protests of the 1960s, they did generate negative attention from conservative media outlets. The *National Review* wrote several articles in defense of the Committee to Beautify the Green and conservative students at Dartmouth. According to the *National Review*, “Dartmouth is the only major college in the nation that possesses an organized body of student conservatives who are prepared to say no to the college’s slide into leftist inanity.”<sup>530</sup> The leftist inanity included attempts by faculty to “turn the campus into a hermetically sealed leftist sandbox, replete with endless discussions of racism, sexism, socialism, homophobia, nuclear freeze, and blah, blah, blah.”<sup>531</sup> The disciplinary action taken against the twelve students for destroying the shanty town was seen by conservative supporters as an attack on the students’ First Amendment right of freedom of expression.<sup>532</sup>

The perceived threat against conservative students’ First Amendment rights brought a strong defense from outside of the campus. Republican Governor John Sununu denounced the actions taken by the college against the conservative students.<sup>533</sup> The Heritage Foundation held a fundraiser to cover the legal defense of the students who were suspended or expelled from Dartmouth College as a result of dismantling the shanty town.<sup>534</sup> In a speech at the fundraiser,

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<sup>530</sup> Laura Ingraham, “Counter-Revolution at Dartmouth, Continued,” *National Review* 38, no. 4 (March 14, 1986): 20.

<sup>531</sup> Ingraham, “Counter-Revolution at Dartmouth.”

<sup>532</sup> Martin, “Unsightly Huts.”

<sup>533</sup> “Counter-Revolution,” *National Review* 38, no. 7 (April 25, 1986): 20; “The Shanty Wars are about Much More,” *National Review* 38, no. 7 (May 9, 1986): 20.

<sup>534</sup> “The Second Dartmouth College Case,” *National Review* 38, no. 6 (April 11, 1986): 13.

Benjamin Hart emphasized the importance of defending conservative students against a radical tenured faculty angry about the nation's sharp move to the right.

If the conservative movement lets these kids down, these kids who are fighting the last vestiges of Sixties leftism – if the conservative movement does not come to the aid of the students who, at the moment, have their backs against the wall – then we might as well pack our bags and go home. For there will be no point carrying on the battle here in comfortable Washington, D.C., if we permit the Left to gang up on and lynch our people on America's real battlefield, the college campus.<sup>535</sup>

Hart's framing of college campuses as a battlefield for conservatives echoes the language and rhetoric of Nixon and Agnew during 1970. Just as Nixon's sought to frame student activism as a shortcoming of college administration rather than address the political concerns of students, conservatives in the 1980s would also focus on college administrator's actions rather than directly address this issue of apartheid brought up by student activists.

### **University Regulation of Student Speech**

The activism of the 1960s helped to open doors for students who had been previously granted limited access to higher education, but it also ushered in a period of intense scrutiny of higher education.<sup>536</sup> While colleges and universities were challenged with absorbing increasing numbers of women, students of color, and religious and ethnic minorities, they were also under pressure to restore order to the campuses.<sup>537</sup> With the fall of *in loco parentis* and the subsequent granting of due process rights, colleges and universities were limited in their ability to manage student behavior or summarily dismiss students who engaged in campus activism.<sup>538</sup> As a result, colleges and universities adopted formal regulations to limit students' First Amendment rights on

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<sup>535</sup> As quoted in "The Second Dartmouth Case."

<sup>536</sup> Robert A. Rhoads, "Student Activism, Diversity, and the Struggle for a Just Society," *Journal of Diversity in Higher Education* 9, no. 3 (September 1, 2016): 189–202.

<sup>537</sup> Harvey A. Silverglate, David French, and Greg Lukianoff, *FIRE's Guide to Free Speech on Campus*, 2<sup>nd</sup> ed., ed. Greg Lukianoff and William Creeley (Philadelphia, PA: Foundation for Individual Rights in Education, 2012), 20.

<sup>538</sup> The fall of *in loco parentis* is discussed in Chapter One.

campuses. These various regulations from the establishment of speech zones and speech codes to the strict guidelines for the establishment and funding of student organizations on campuses worked in tandem to limit students' rights and would eventually come under attack for being unconstitutional.<sup>539</sup>

Campus speech zones were established in response to student protests that increasingly threatened to take over campus administrative spaces and classrooms and interfere with the daily operations of higher education institutions. The goal of campus free speech zones was to limit student protests to a specific area on campuses in order to "allow for free exchange of ideas in a more manageable forum."<sup>540</sup> Administrators instituted regulations on these zones including requiring advanced reservations for the space, restricting the time frame for when the space could be utilized, and significantly limiting the geographic area available for free expression.<sup>541</sup> Over time, these regulations would significantly limit students' ability to practice their First Amendment rights on campus.

In addition to instituting speech zones to control students' use of university spaces, university administrators also established guidelines for the creation and funding of student organizations on campus, which significantly limited opportunities for students to gather on university property. Some of these policies prohibited the establishment of certain organizations on campus,<sup>542</sup> limited the usage of campus spaces for religious groups,<sup>543</sup> and denied student

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<sup>539</sup> Lukianoff, *Unlearning Liberty*.

<sup>540</sup> Huddleston, "Free Speech in the Age of Political Correctness," 284.

<sup>541</sup> Lukianoff, *Unlearning Liberty*.

<sup>542</sup> *Healy v. James*, 408 U.S. 169 (1972).

<sup>543</sup> *Widmar v Vincent*, 454 U.S. 263 (1981).

activity fee funding to controversial student organizations.<sup>544</sup> Students would successfully challenge these campus policies in court beginning in the 1970s and 1980s.

Perhaps the most controversial of the regulations to limit students' speech were campus speech codes which began to be adopted on campuses in the late 1980s. With the increase in women, students of color, religious and ethnic minorities, and openly gay students on campuses, there was an outbreak of hate speech as well as racial and sexual harassment on campuses across the country.<sup>545</sup> Generally defined, hate speech is "speech that is harmful or offensive to racial minorities, religious groups, or other historically disempowered minorities."<sup>546</sup> In establishing speech codes on campuses, administrators attempted to demonstrate their commitment to diversity and tolerance by prohibiting hate speech directed at students.<sup>547</sup> Fear of noncompliance with federal antidiscrimination laws including Title VI and Title IX likely increased administrators' willingness to establish rules to govern student speech.<sup>548</sup>

Speech codes are policies written into student codes of conduct that outline restrictions to speech that would normally be protected by the First Amendment.<sup>549</sup> By the end of the 1980s, sixty percent of all colleges and universities had established some form of speech codes.<sup>550</sup> While universities have the right to establish rules to govern student behavior, speech codes were

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<sup>544</sup> *Board of Regents, University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

<sup>545</sup> Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993). For an extensive listing of legal cases involving racist hate speech on campuses in the 1980s, see footnote 71 in Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87, no. 8 (August 1989): 2320-2381, 2333.

<sup>546</sup> Wayne Batchis, *The Right's First Amendment: The Politics of Free Speech and the Return of Conservative Libertarianism* (Stanford: Stanford Law Books, 2016), 69.

<sup>547</sup> Lukianoff, *Unlearning Liberty*.

<sup>548</sup> Mary-Rose Papandrea, "The Free Speech Rights of University Students," *Minnesota Law Review* 101 (2017): 1801-1862, 1801.

<sup>549</sup> Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven, CT: Yale University Press, 2017), 97-110.

<sup>550</sup> Batchis, *The Right's First Amendment*.

viewed as overly broad and oppressive to students. According to Azhar Majeed, “speech codes violate students’ free speech rights, often by taking aim at any expression deemed by university administrators to be uncivil, offensive, or disagreeable.”<sup>551</sup> However unpleasant or offensive, hate speech is protected by the United States Constitution and attempts to limit it through speech codes were viewed as clear attempts by colleges to suppress free speech. Further, speech codes were accused of having a chilling effect on speech because they did not clearly identify the limits of acceptable speech for students and left students confused about their rights on campus.<sup>552</sup> As speech codes continued to proliferate on campuses for the remainder of the 1980s and into the 1990s, they would draw the ire of conservatives who would equate speech codes with a rampant “political correctness” on campuses, a further indication of the campus as a battlefield for conservatives.

### **The Powell Memo and the Rise of the Conservative Coalition**

While the 1980s are often seen as the rise of conservatism in the United States, the origins of the conservative coalition that gained steam in the 1980s can be traced back to the early 1970s. In August 1971, Lewis Powell issued a confidential memorandum to the Education Committee of the United States Chamber of Commerce stating that “the American economic system is under broad attack,” and identifying college campuses as the “single most dynamic source” of the attack.<sup>553</sup> Although Powell’s confidential memo was aimed at saving the free-enterprise system from an increasing move in the country towards workers’ rights and unions,

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<sup>551</sup> Azhar Majeed, “Defying the Constitution,” 483.

<sup>552</sup> Lukianoff, *Unlearning Liberty*, 9. Lawyers commonly use the phrase “chilling effect.” Lukianoff explains, “If people believe there is *any* risk of punishment for stating an opinion, most will not bother opening their mouths; and in time, the rules that create this silence become molded into the culture.”

<sup>553</sup> Lewis F. Powell, “Confidential Memorandum: Attack on American Free Enterprise System,” Washington and Lee University School of Law Scholarly Commons, accessed on March 10, 2019, <https://scholarlycommons.law.wlu.edu/powellmemo/>, 1-2.

the recommendations he made led to a network that has been influential in shaping the narrative of free speech in the country. In directing corporations to arm themselves against attacks by liberals and social reformers, Powell emphasized that the bulk of the attacks were coming from “perfectly respectable elements of society” including colleges, churches, the media, and politicians.<sup>554</sup> While he recognized the multiple sources of the attack, Powell believed the Chamber’s priority should be “to address the campus origin of this hostility.”<sup>555</sup> Although scholars and critics argue over the influence of Powell’s memo, the recommendations he made in 1971 have in many ways been adopted by conservative and libertarian-leaning organizations in the United States.<sup>556</sup>

The recommendations Powell made were directed at universities, the media, politicians, and the judicial branch. The first recommendations listed in Powell’s memo were strategies to address the attack on the American free-enterprise system emanating from universities. Powell suggested the best defense would come from: funding scholars who could publish research supporting corporations and the free market system, establishing a speaker’s bureau to promote the corporate business agenda on campuses, balancing faculty appointments by pressuring boards of trustees and administrators to hire sympathetic faculty, funding graduate schools of business, and developing youth organizations to prepare the next generation of leaders.<sup>557</sup> Next, Powell focused his attention on the media and developing Chamber of Commerce personnel that could

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<sup>554</sup> Powell, “Confidential Memorandum,” 3.

<sup>555</sup> Powell, “Confidential Memorandum,” 15.

<sup>556</sup> It is not within the scope of this dissertation to outline the various arguments regarding the Powell Memo. For more discussion of its influence on conservative politics, see Mark Schmitt, “The Legend of the Powell Memo,” *American Prospect*, April 17, 2005, <https://prospect.org/article/legend-powell-memo/>; John P. Judis, *Paradox of American Democracy* (New York: Pantheon Books, 2000); John Micklethwait and Adrian Woolridge, *Right Nation* (New York: Penguin Press, 2004); and *Justice for Sale: Shortchanging the Public Interest for Private Gain* (Washington, D.C.: Alliance for Justice, 1993).

<sup>557</sup> Powell, “Confidential Memorandum,” 12-20.

utilize the media including television, scholarly journals, print media, and paid advertisements to counter unfair attacks on the American free-enterprise system.<sup>558</sup> Finally, Powell addressed the political system including the judicial branch by suggesting businesses should lobby their causes among politicians and consider utilizing the judiciary as an “instrument for social, economic, and political change.”<sup>559</sup> In suggesting that business leaders utilize the courts, Powell pointed out the success that the American Civil Liberties Union as well as other civil rights groups and public interest law firms had in utilizing the courts, often at the expense of corporations.<sup>560</sup> While Powell urged the members of the U.S. Chamber of Commerce to be aggressive in their counterattack, he also warned that they should exercise caution, so that no one organization would be singled out for its involvement. Many of these recommendations would eventually be manifested by conservative groups in the United States, whether or not they were directly influenced by Powell.

Powell himself articulated that his memorandum was not initially embraced by the Chamber of Commerce. Eugene Snyder, to whom the memo was addressed, had communicated with Powell that “there was not great enthusiasm for undertaking a program which might involve substantial increases in dues and also result in criticism.”<sup>561</sup> However, the memorandum did attract some significant attention in September 1972 when it was published by syndicated columnist, Jack Anderson, after Lewis Powell’s confirmation to the Supreme Court.<sup>562</sup> Anderson

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<sup>558</sup> Powell, “Confidential Memorandum,” 20-24.

<sup>559</sup> Powell, “Confidential Memorandum,” 26.

<sup>560</sup> Powell, “Confidential Memorandum,” 27.

<sup>561</sup> “Memo, Powell to Messrs. Buckley, Jeffries and Owens, November 12, 1973,” Powell Memorandum: Attack on American Free Enterprise System, Reaction, Washington and Lee University School of Law Scholarly Commons, accessed on February 1, 2020, <https://scholarlycommons.law.wlu.edu/powellmemo/3>.

<sup>562</sup> “Correspondence: Henry Cappello to Philip Geyelin, September 29, 1972,” Powell Memorandum: Attack on American Free Enterprise System, Reaction, Washington and Lee University School of Law Scholarly Commons, accessed on February 1, 2020, <https://scholarlycommons.law.wlu.edu/powellmemo/3>.

argued that the recommendations outlined in Powell's memo might taint his judicial decisions related to businesses. Supporters of Justice Powell were frustrated by the release of the confidential memo. Eugene Snyder, to whom the memo was addressed, wrote the following in a letter to Powell:

Again I regret exceedingly that there was a slipup of an unknown nature by an unidentified staff member of the United States Chamber of Commerce in the unauthorized disclosure of your now famous memorandum, but at the same time there may be a silver lining to the cloud in that it has received wide publicity and distribution. The Chamber has already had a number of requests for the memorandum from individual businessmen as well as local and state chambers of commerce, and...there are plans for reprinting it and distributing it on a very wide scale throughout the country.<sup>563</sup>

The wide release of the Powell Memorandum following its unauthorized publication brought renewed attention from the United States Chamber of Commerce, which decided afterwards to study Powell's recommendations.<sup>564</sup>

While the direct influence of Powell's Memorandum remains unclear, there is some evidence that it has served as a roadmap for an increasingly powerful conservative coalition. The conservative coalition that developed in the 1970s and gained momentum in the 1980s as conservatives gained political power within the United States includes a network of conservative law firms, media outlets, foundations, and student organizations. Over the subsequent decades, the conservative coalition would fulfill many of the recommendations in the Powell Memorandum. The conservative coalition would also prove to be a formidable foe to colleges and universities particularly regarding the First Amendment on campus.

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<sup>563</sup> "Correspondence, Eugene Snyder to Justice Powell, October 3, 1972," Powell Memorandum: Attack on American Free Enterprise System, Reaction, Washington and Lee University School of Law Scholarly Commons, accessed on February 1, 2020, <https://scholarlycommons.law.wlu.edu/powellmemo/3>.

<sup>564</sup> "Memo, Powell to Messrs. Buckley, Jeffries and Owens, November 12, 1973."

In his memo, Powell pointed out the influence that the courts had on American businesses. He argued, “Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and political change.”<sup>565</sup> Powell suggested that a “highly competent staff of lawyers” should be developed to defend the rights of businesses.<sup>566</sup> In 1973, the California Chamber of Commerce proposed what would become the non-profit Pacific Legal Foundation to protect the property rights of California citizens and corporations.<sup>567</sup> In subsequent years, the Pacific Legal Foundation would engage in legal battles to curb California’s environmental regulations.<sup>568</sup> In 1975, the National Legal Center for the Public Interest was founded as an organization committed to individual rights, free enterprise, limited government and a fair and efficient judiciary.<sup>569</sup> In 1977, the National Chamber Litigation Center was created to represent American business interests.<sup>570</sup> The first legal organizations to develop within the conservative coalition were primarily focused on business interests, but eventually organizations would develop to support other conservative causes including religious liberty, pro-life, and pro-gun advocacy.

Traditionally, conservatives who identified with Protestant evangelical denominations were hesitant to engage in legal battles to support their positions. However, in the mid-1970s, televangelist Jerry Falwell began to urge his followers to work with secular legal groups to push

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<sup>565</sup> Powell, “Confidential Memorandum,” 26.

<sup>566</sup> Powell, “Confidential Memorandum,” 27.

<sup>567</sup> Richard L. Grossman, “Review and Commentary,” *Workbook* 18, no. 3 (Fall 1993).  
<https://rational.org/corporations/Justice4Sale.html>.

<sup>568</sup> Jefferson Decker, “Pacific Views: Property Rights, the Regulatory State, and American Conservatism,” *Journal of Policy History* 28, no. 4 (2016): 654-679.

<sup>569</sup> “National Legal Center for the Public Interest Mission,” National Legal Center for the Public Interest, accessed on February 1, 2020, <http://www.nlcpi.org/mission.htm>. In 2004, the National Legal Center would merge with the American Enterprise Institute to form the AEI Legal Center for the Public Interest.

<sup>570</sup> Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago: University of Chicago Press, 2008), 15.

back against laws prohibiting school prayer and legalizing abortion.<sup>571</sup> In 1975, Protestant evangelicals founded the Center for Law and Religious Freedom “to address First Amendment rights and promote state accommodation of religious beliefs.”<sup>572</sup> While much of the focus of these early faith-based groups was on public elementary and secondary schools, the attention would eventually focus on higher education. In the 1970s and 1980s, conservative faith-based groups would bring several successful lawsuits against colleges and universities which would grant religious organizations the same access to campuses as secular groups.<sup>573</sup>

The emerging conservative coalition in the 1970s represented three core groups: social conservatives, libertarians, and businesses, which were held together by an organization that evolved from a student organization first started at Yale. Despite the fact there were myriad disagreements between social conservatives, libertarians, and business interests, leaders within the conservative coalition worked to keep these three groups united. One of the groups that was influential in holding together this alliance was the Federalist Society for Law and Public Policy Studies (Federalist Society). The Federalist Society was founded in 1982 as a debate society at Yale, but eventually focused its energies on professionalizing the conservative legal movement. With funding from the Olin Foundation, the Federalist Society was able to send speakers to campuses as well as establish student chapters at law schools across the country.<sup>574</sup> Today, the Federalist Society has student chapters at all American Bar Association accredited law schools as well as active chapters in ninety cities across the country.<sup>575</sup> The Federalist Society brings the three groups within the conservative coalition together to discuss and debate issues and

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<sup>571</sup> Southworth, *Lawyers of the Right*, 25.

<sup>572</sup> Southworth, *Lawyers of the Right*, 16.

<sup>573</sup> I will discuss court cases in more detail later in the chapter.

<sup>574</sup> Southworth, *Lawyers of the Right*, 27.

<sup>575</sup> “Our Background,” The Federalist Society, accessed February 1, 2020, [fedsoc.org/our-background](https://fedsoc.org/our-background).

emphasize the importance of standing together against liberal policies. The Federalist Society works closely with conservative foundations and policy centers to promote conservative causes.

Prior to the 1970s, there were very few public-interest law groups representing conservative causes or foundations supporting conservative ideas compared with the number of law firms and foundations supporting liberal causes. The Hoover Institution and the American Enterprise Institute existed prior to 1970 but had limited success compared with liberal groups like the American Civil Liberties Union and the Brookings Institute.<sup>576</sup> Beginning in 1970s, conservative foundations began to form and eventually they would proliferate across the country during the Reagan and Bush administrations in the 1980s. In 1973, the Heritage Foundation was founded with funding from Joseph Coors and Richard Mellon Scaife. The purpose of the Heritage Foundation was “to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.”<sup>577</sup> The Heritage Foundation would come to be one of the most powerful conservative organizations in the country and it would be instrumental in uniting the disparate foundations and organizations representing conservative causes.

Prior to the release of Powell’s Memorandum, the existing conservative foundations were actively promoting conservative causes and funding conservative thinkers, but these various foundations were not directly connected. Following the release of Powell’s Memorandum, the Philanthropy Roundtable, a consortium of conservative foundations was formed to connect donors with foundations that supported their beliefs.<sup>578</sup> The top priority for the Philanthropy

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<sup>576</sup> Southworth, *Lawyers on the Right*, 9.

<sup>577</sup> “About Heritage,” Heritage Foundation, accessed February 1, 2010, [heritage.org/about-heritage/mission](http://heritage.org/about-heritage/mission).

<sup>578</sup> Kathleen deMarrais, “‘The Haves and the Haves Mores’: Fueling a Conservative Ideological War on Public Education (or Tracing the Money),” *Educational Studies* 39, no. 3 (June 2006): 201-240, 205-206.

Roundtable was the funding of policy institutes to cultivate conservative scholars who could create research to combat the highly prolific liberal faculty on college campuses. The funding of scholars was one of Powell's suggestions.<sup>579</sup> One of the most prolific policy institutes, the Heritage Foundation, not only addressed Powell's recommendation to develop scholars, but they have also funded separate marketing divisions for media, government, academic and corporate relations, funded a speaker's bureau aimed at college campuses, and cultivated relationships with youth leaders, all recommendations made by Powell.<sup>580</sup> Initially, the Heritage Foundation was focused on business interests, but would eventually adopt positions supported by socially conservative groups. In 2004, the Heritage Foundation would create the DeVos Center on Religion and Civil Society to focus on religion and public policy.<sup>581</sup> The Heritage Foundation has been instrumental in bringing together conservative groups by regularly convening meetings of conservative activists and legal groups as well as providing training and job placement opportunities for young conservatives.<sup>582</sup>

Conservative foundations were especially interested in connecting with young conservatives and helped to fund the formation of conservative student organizations. In *Becoming Right*, a study of three prominent conservative student organizations, Amy Binder and Kate Wood found the message conservatives communicated to students, no matter the organization, was that:

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<sup>579</sup> deMarrais, "The Haves and the Haves Mores"; Powell, "Confidential Memorandum."

<sup>580</sup> deMarrais, "The Haves and the Haves Mores."

<sup>581</sup> The DeVos Center was made possible by a grant from the Richard and Helen DeVos Foundation to the Heritage Foundation. Trump's Secretary of Education, Betsy DeVos, is married to Dick DeVos, the son of Richard DeVos. Betsy DeVos has long been a supporter of charter schools and vouchers for private schools. Louis Freedberg, "Trump's Choice for U.S. Secretary of Education has History of Promoting School 'Choice'," EdSource, last modified November 23, 2018, <https://edsources.org/2016/trump-names-betsy-devos-new-u-s-secretary-of-education/573207>.

<sup>582</sup> Southworth, *Lawyers on the Right*, 126-130.

conservative students on campus – not by their own choosing but by the very nature of America’s liberally skewed higher education system – are ideologically at odds with the political and social commitments of the vast majority of faculty members, administrators, staff, and other students in American universities and colleges.<sup>583</sup>

The conservative organizations that grew on campuses during this period were a respite for conservative students from a liberal assault. One of the first conservative student organizations was the Young Americans for Freedom, which was founded in 1960 at the home of William Buckley, Jr. In 1971, the Young Americans for Freedom was renamed the Young America’s Foundation with a goal of bringing conservative speakers and activities to campus to balance out the liberal bias of campus faculty.<sup>584</sup> One of the early supporters of Young America’s Foundation was Ronald Reagan, who hosted a nationally syndicated radio program for the organization.<sup>585</sup> Young America’s Foundation also sponsors a national gathering of conservative students. At their conference in 1988, when two attendees were arrested for protesting outside the Soviet embassy, the Young America’s Foundation appealed the students’ case all the way to the Supreme Court. The case of *Boos v. Barry*, which overturned the ban on protest signs outside of embassies, would be one of their first legal victories.<sup>586</sup> In subsequent years, the Young America’s Foundation would bring lawsuits against colleges and universities for denying students their First Amendment rights.

Another prominent conservative student organization, the Leadership Institute, was founded in 1979 to identify, recruit, train, and place conservatives in government, politics, and

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<sup>583</sup> Binder and Wood, *Becoming Right*, 78.

<sup>584</sup> “History of Young America’s Foundation,” Young America’s Foundation, accessed on February 1, 2020, [yaf.org/about/history/](http://yaf.org/about/history/).

<sup>585</sup> “History of Young America’s Foundation.” Reagan would later donate his ranch to the YAF for future training programs.

<sup>586</sup> *Boos v. Barry*, 485 U.S. 312 (1988).

the media.<sup>587</sup> Since its founding, the Leadership Institute has trained more than 200,000 conservative activists, leaders, and students and created a campus network of more than 1,700 conservative campus groups and newspapers.<sup>588</sup> One of the most prominent alumni of the Leadership Institute is Mitch McConnell, the current Republican Senator from Kentucky and Senate Majority Leader.<sup>589</sup> Like many other conservative student organizations, the Leadership Institute receives significant funding from conservative donors including the Castlerock Foundation and the Lynde and Harry Bradley Foundation.<sup>590</sup> The Leadership Institute hosts the Campus Leadership Program, which trains students to recruit other students to form organizations sympathetic to conservative causes such as pro-life clubs or gun rights organizations.<sup>591</sup> Special interest student organizations are important because they are not classified as political organizations, so they maintain a nonpartisan status, which allows them access to funding sources that are denied to political groups.

While the politically conservative groups such as Young America's Foundation and Leadership Institute were gaining a foothold on campuses, there was also an increasing presence of evangelical student groups on campuses. These groups initially gained a stronghold at small colleges and universities in southern states. Conservative evangelical groups would become natural allies of politically conservative groups like the Young America's Foundation and the Leadership Institute. As they built their partnership, they would work together to carve out a

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<sup>587</sup> Binder and Wood, *Becoming Right*, 91.

<sup>588</sup> "About the Leadership Institute," Leadership Institute, accessed March 10, 2019, [leadershipinstitute.org/aboutus/](http://leadershipinstitute.org/aboutus/).

<sup>589</sup> Binder and Wood, *Becoming Right*.

<sup>590</sup> Binder and Wood, *Becoming Right*, 92.

<sup>591</sup> Binder and Wood, *Becoming Right*, 96-97.

space for conservatives on college campuses and bring legal challenges to colleges and universities that resisted their efforts.

### **Legal Challenges in the 1970s and 1980s**

Student activists in the 1970s and 1980s increasingly relied on litigation as a part of their strategy to promote their causes. When students believed that their rights on campuses were being limited, they employed the legal system against their colleges and universities. During this period, both liberal and conservative student organizations successfully won cases at the Supreme Court and in district court to ensure their colleges and universities did not interfere with their First Amendment rights.<sup>592</sup> The cases discussed below provide examples not only of students' activism, but also the first attempts by the conservative coalition to expand campus access to religious organizations.

The first case to reach the Supreme Court during this period was *Healy v. James*, which was brought on behalf of the Students for a Democratic Society (SDS) at Central Connecticut State College. The case of *Healy v. James* illustrates the lengths that a university administrator was willing to go to prohibit the formation of a student group.<sup>593</sup> In September 1969, a group of students sought to establish a chapter of SDS, which would entitle them to use campus facilities for meetings as well as publicize on bulletin boards and in the campus newspaper. The group met the guidelines outlined by the university for the establishment of student organizations, but the president of the college denied the group recognition because he was not satisfied that it was independent of the national organization, which had a reputation of violence and disruption on

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<sup>592</sup> Students for a Democratic Society discussed in Chapter Two represented liberal students organizations, while Cornerstone, a campus ministry, represented conservative student organizations.

<sup>593</sup> *Healy v. James*, 172.

campuses.<sup>594</sup> The decision by the president to deny official recognition to the SDS was in opposition to the Student Affairs Committee that had approved permission for the group on the grounds that “varying viewpoints should be represented on campus” and “a group should be available with which ‘left wing’ students might identify.”<sup>595</sup> The students who were seeking to establish a local chapter of the Students for Democratic Society reached out to the Connecticut Civil Liberties Union for help with their case.<sup>596</sup>

The Connecticut Civil Liberties Union referred the case to a local firm, Pudlin and Silver. Daniel Silver, who was a law student at the time, was asked by his father, Abraham Silver, to research the case. The initial complaint was filed in the United States District Court for the District of Connecticut and “centered on the denial of First Amendment rights of expression and association arising from denial of campus recognition.”<sup>597</sup> Initially, the District Court required the College to provide students with a due process hearing to discuss their affiliation with the National SDS.<sup>598</sup> The College complied with the request and afterwards, again denied the SDS campus recognition. The case came back before the District Court and was dismissed.<sup>599</sup> The students then appealed to the Second Circuit Court. Daniel Silver, who was a newly minted lawyer, wrote the brief for the Second Circuit, which affirmed the judgement of the lower court.<sup>600</sup> After exhausting recourse in the lower courts, the law firm filed for a *writ of certiorari*

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<sup>594</sup> *Healy v. James*, 169.

<sup>595</sup> *Healy v. James*, 174.

<sup>596</sup> Alex Morey, “FIRE Q&A: First Amendment Attorney Daniel Silver of Landmark Supreme Court Case ‘Healy v. James,’” FIRE, last modified August 12, 2016, <https://www.thefire.org/fire-qa-first-amendment-attorney-daniel-silver-of-landmark-supreme-court-case-healy-v-james/>.

<sup>597</sup> *Healy v. James*, 177.

<sup>598</sup> *Healy v. James*, 177.

<sup>599</sup> *Healy v. James*, 179.

<sup>600</sup> *Healy v. James*, 179.

before the Supreme Court. Under pressure from the American Civil Liberties Union (ACLU), the case was then turned over to the ACLU to defend at the Supreme Court.<sup>601</sup>

The case of *Healy v. James* was heard before the Supreme Court in 1972, three years after the students filed for recognition by the university.<sup>602</sup> The case would have been denied by the Supreme Court had not Catherine Healy still been enrolled at Central Connecticut as a part-time student. In reviewing the case, the justices noted that court precedents “leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”<sup>603</sup> The court ruled that the university could not deny students the right of association based on the risk of disruption if the students had met all of the regulations set forth by the university. This case would set a legal precedent that would force universities to reconsider their policies and procedures related to the establishment of student organizations.

In the Supreme Court’s decision in *Healy v. James*, Justice Powell, who delivered the opinion of the court, felt it was important to mention the climate in which the decision by the college to deny recognition was unfolding. His words are worth quoting at length here.

A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while, at others, files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period.<sup>604</sup>

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<sup>601</sup> Morey, “FIRE Q&A.”

<sup>602</sup> *Healy v. James*.

<sup>603</sup> *Healy v. James*, 180.

<sup>604</sup> *Healy v. James*, 171. Justice Lewis Powell is the same Lewis Powell who wrote the memorandum to the Chamber of Commerce in 1971. In 1972, Powell was nominated to the Supreme Court by President Nixon.

The widespread unrest that Powell mentioned was not limited to the SDS. While the SDS leaders had been involved in a number of campus protests, the SDS was not the only group actively protesting on campuses. Many students across the country participated in protests of the Vietnam War and the tragic shootings at Kent State University and Jackson State University only heightened the unrest on campuses.

In deciding the *Healy v. James* case, the Supreme Court referenced the precedent in *Tinker v. Des Moines* regarding schools prohibiting students' expression due to the potential for disturbance. In *Tinker v. Des Moines*, the Supreme Court ruled that schools were not "immune from the sweep of the First Amendment."<sup>605</sup> The Supreme Court found unanimously in favor of the SDS and reversed the decision and remanded the case back to the lower court. The Supreme Court affirmed that schools and universities not only had an obligation to control conduct in the schools, but also had a responsibility to protect the First Amendment rights of students including "the right of individuals to associate to further their personal beliefs."<sup>606</sup> They ruled that "denial of official recognition, without justification, to college organizations burdens or abridges that associational right."<sup>607</sup> When Central Connecticut denied the SDS official recognition, they limited the means in which the group could communicate and contribute to the campus community. Given that the group had met all the criteria for recognition as a campus organization, the burden was on the administration to justify its rejection of their application.<sup>608</sup> The Supreme Court indicated that they were "unable to conclude that no basis exists upon which

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<sup>605</sup> *Healy v. James*, 180.

<sup>606</sup> *Healy v. James*, 181. In their decision, the Supreme Court cited *Shelton v. Tucker*, 364 U.S. 479, 364 U.S. 487 (1960), which stated, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

<sup>607</sup> *Healy v. James*.

<sup>608</sup> *Healy v. James*, 184.

nonrecognition might be appropriate” leaving open the opportunity to deny the group’s existence on some grounds.<sup>609</sup> To provide guidance to the lower courts, Justice Powell clarified in the opinion of the Court the grounds on which Central Connecticut must make its decisions regarding campus organization recognition.

In outlining issues that must be considered in Central Connecticut’s decisions regarding campus recognition of student organizations, Powell outlined three main points. First, Powell clarified that Central Connecticut cannot “restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”<sup>610</sup> Second, Powell, leaning on the decision in *Tinker v. DesMoines*, explained that Central Connecticut had the right to prohibit actions that would substantially disrupt the work of the college, but when determining issues of disruption, it must draw the line at promoting imminent lawless action.<sup>611</sup> Third, Powell notes that Central Connecticut must make clear the group’s intent not to abide by the regulations of the college. There was not significant evidence presented in the case that demonstrated Central Connecticut had sufficiently clarified the group’s intent to flout the regulations of the college. Powell explained that “the critical line for First Amendment purposes must be draw between advocacy, which is entitled to full protection, and action, which is not.”<sup>612</sup> Based on these points, the decision was made to remand the case for reconsideration. The decision would be important in future cases involving students and educational institutions because it established that colleges and universities could not deny students access to the campus because their views conflicted with those of the institution.

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<sup>609</sup> *Healy v. James*, 185.

<sup>610</sup> *Healy v. James*, 187 - 188.

<sup>611</sup> *Healy v. James*, 188. Imminent lawless action was defined in *Brandenburg v. Ohio*, 395 U.S. 444, 395 U.S. 477 (1969).

<sup>612</sup> *Healy v. James*, 192.

The second major case to come before the Supreme Court during this period, *Widmar v. Vincent*, involved Cornerstone, an evangelical Christian student organization, and the University of Missouri – Kansas City (UMKC).<sup>613</sup> From 1973 to 1977, Cornerstone had utilized campus facilities for its weekly meetings and events, but in 1977, UMKC denied them access to campus facilities due to university regulations that prohibited the use of university facilities for religious worship or teaching.<sup>614</sup> Cornerstone then brought suit in Federal District Court alleging that “their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments” were being denied by UMKC.<sup>615</sup> The District Court determined that the regulation denying access to religious groups was required by the Establishment Clause of the First Amendment. The Court of Appeals reversed the decision on the grounds that the regulation was a content-based discrimination of religion and held that the Establishment Clause did not prohibit a policy of equal access to University facilities.<sup>616</sup> The Supreme Court affirmed the decision of the Court of Appeals, but unlike the case of *Healy v. James*, the justices did not come to a unanimous decision. Justice Powell delivered the majority opinion of the Court, while Justice Stevens filed a concurrent opinion and Justice White filed a dissenting opinion.<sup>617</sup>

In Justice Powell’s opinion of the Court, he outlined the question that the Supreme Court took into consideration in reviewing the case. Specifically, the Court asked:

whether a state university, which makes its facilities generally available for the activities of student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.<sup>618</sup>

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<sup>613</sup> “*Widmar v. Vincent*,” Oyez, accessed March 26, 2019, <https://www.oyez.org/cases/1981/80-689>.

<sup>614</sup> “*Widmar v. Vincent*.”

<sup>615</sup> *Widmar v. Vincent*, 454 U.S. 263, 266 (1981).

<sup>616</sup> *Widmar v. Vincent*, 263.

<sup>617</sup> *Widmar v. Vincent*, 264.

<sup>618</sup> *Widmar v. Vincent*, 265.

Powell recognized that the UMKC had a stated policy of encouraging student participation in organizations and had over one hundred registered student groups on campus.<sup>619</sup> Because UMKC had provided space for student meetings, the Supreme Court concluded that UMKC had “created a forum generally open for use by student groups,” which obligated the university to “justify its discrimination and exclusions under applicable constitutional norms.”<sup>620</sup> Drawing on precedent in *Tinker v. Des Moines* and *Healy v. James*, the court affirmed that the “rights of speech and association extend to the campuses of state universities” with respect to faculty, staff, and students.<sup>621</sup> In the opinion of the majority, religious worship and discussion are protected forms of free speech and association guaranteed by the First Amendment, therefore, the UMKC needed to demonstrate that “its regulation is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end.”<sup>622</sup>

The University of Missouri – Kansas City argued that it had a compelling interest in maintaining a strict separation between church and state as required by the Establishment Clause in the First Amendment of the Constitution as well as the Missouri Constitution.<sup>623</sup> However, the Supreme Court argued that a policy that provided equal access to all groups was not incompatible with the Establishment Clause if it was able to pass a three prong test that had been established in previous cases.<sup>624</sup> To pass the three prong test, the government policy must have a secular purpose, must neither advance or inhibit religion, and must not entangle the government with religion.<sup>625</sup> It was clear from the outset that the policy had a secular purpose and ensured the

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<sup>619</sup> *Widmar v. Vincent*, 265.

<sup>620</sup> *Widmar v. Vincent*, 267.

<sup>621</sup> *Widmar v. Vincent*, 269.

<sup>622</sup> *Widmar v. Vincent*, 270.

<sup>623</sup> *Widmar v. Vincent*, 270.

<sup>624</sup> The Supreme Court relied on precedent from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), and *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736.

<sup>625</sup> *Widmar v. Vincent*, 271.

university would not become entangled in religious matters. However, the question of whether allowing religious groups to participate in the public forum that UMKC had established advanced religion was in dispute.

While UMKC believed that allowing religious groups to utilize space on campus would in effect advance religion, the majority of the Supreme Court was “unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.”<sup>626</sup> The Court argued that given the number of students organizations participating in the open forum, involvement by religious groups would not “confer any imprimatur of state approval on religious sect or practices” any more than it would demonstrate the university’s support of the Young Socialist Alliance or the Students for a Democratic Society.<sup>627</sup> Further, there was no evidence that the religious groups would dominate the public forum in such a manner that the advancement of religion would be seen as the primary effect of the public forum.<sup>628</sup> While the Court ruled that UMKC did not have a sufficiently compelling reason to discriminate against religious speech, they did assert that the university could uphold reasonable time, place, and manner restrictions that would ensure that First Amendment activities would not “substantially interfere with the opportunity of other students to obtain an education.”<sup>629</sup>

In his concurrence, Justice Stevens expressed concern that the ruling in the case with its focus on “compelling state interest” and “public forum” analysis might undermine the academic freedom of public universities.<sup>630</sup> Stevens argued that universities are not open to the public in the same way as parks or streets and that university facilities are maintained for the use of faculty

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<sup>626</sup> *Widmar v. Vincent*, 273.

<sup>627</sup> *Widmar v. Vincent*, 274.

<sup>628</sup> *Widmar v. Vincent*, 275.

<sup>629</sup> *Widmar v. Vincent*, 277.

<sup>630</sup> *Widmar v. Vincent*, 278.

and students. Further, he provided examples of the multiple ways in which universities already make content-based decisions in the way they choose books in the library, hire faculty, or offer courses. Stevens believed universities should maintain the authority to decide for themselves what activities to allow on campus relevant to their academic missions.<sup>631</sup> However, he stopped short of stating that universities could prohibit access to the university forum just because they disagreed with a speaker or group. In order to deny access, the university must present a valid reason for doing so, which Stevens did not believe UMKC in this case had adequately demonstrated, thus he concurred with the majority decision.

In Justice White's dissent, he argued that the Establishment Clause does not establish what states are required to do regarding religious organizations. He believed there was room for policies that might "incidentally burden religion," just as some policies might benefit religion.<sup>632</sup> The UMKC policy allowed religious student organizations to use facilities as long as they were not participating in religious worship or teaching. While the majority opinion equated religious worship and teaching with protected speech, White argued that worship and teaching were religious practices discernible from speech.<sup>633</sup> If worship and teaching were truly protected speech in White's opinion, then the freedom of religion clause would be unnecessary because religious practices were already protected under the freedom of speech clause. Further, it was White's opinion that the regulation represented a minimal burden to the group, which did not obligate UMKC to do more than demonstrate that the prohibition of religious activities met

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<sup>631</sup> *Widmar v. Vincent*, 280.

<sup>632</sup> *Widmar v. Vincent*, 282.

<sup>633</sup> *Widmar v. Vincent*, 284.

“some permissible state end.”<sup>634</sup> On these grounds, he disagreed with the majority opinion of the court.

Powell’s majority opinion, which established the university as a public forum, has been utilized in the ensuing years to ensure that universities do not infringe upon students’ ability to exercise their rights on campus. The decision also significantly expanded the access of religious organizations to college campuses and would be used in subsequent cases to help secure funding for religious groups. It is important to note that while the case expanded access to religious groups, the attorney for the students, James Smart, chose to focus on the Speech Clause in this case rather than the Religion Clause. Smart relied on legal precedent in the case of *Police Department of City of Chicago v. Mosley*.<sup>635</sup> In the *Police Department of City of Chicago v. Mosley*, Earl Mosley, who had been for months peacefully protesting in front of a segregated high school, filed suit against the city due to the passage of an ordinance that prohibited picketing in front of schools by all groups except labor organizations.<sup>636</sup> At issue with the ordinance was that it described picketing in terms of subject matter and the First Amendment dictates that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>637</sup> In the majority decision, written by Justice Marshall, the Court clarified its opinion on public forums and it is worth quoting at length here because of its influence in *Widmar v. Vincent* and subsequent cases.

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating

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<sup>634</sup> *Widmar v. Vincent*, 289.

<sup>635</sup> Stephen Douglas Bonney, “The University Campus as Public Forum: The Legacy of *Widmar v. Vincent*,” *University of Missouri – Kansas City Law Review* 81 (2013): 545-567, 547.

<sup>636</sup> *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 93 (1972).

<sup>637</sup> *Police Department of Chicago v. Mosley*, 95.

in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.<sup>638</sup>

Because Smart could successfully prove that the university had opened the campus facilities to multiple student organizations, thus establishing itself as a public forum, he was able to argue that the exclusion of Cornerstone from campus facilities was a content-based decision that deprived them of their First Amendment rights. The Court affirmed Smart’s understanding that the University had established itself as a public forum and their ruling was guided by this affirmation.

Each opinion in *Widmar v. Vincent* elaborated on the unique and special role of the university but utilized their interpretations of the role differently. The majority decision focused on the role of the university as a “marketplace of ideas” where students and faculty are expected to engage in vigorous debates over ideas.<sup>639</sup> Justice Powell drew on precedent in the case of *Keyishian v. Board of Regents*, which supported this claim in stating:

[t]he classroom is particularly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’<sup>640</sup>

Drawing on this precedent, the majority decision sought to ensure a wide variety of issues, including religion, could be freely discussed and debated on campus. However, the majority

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<sup>638</sup> *Police Department of Chicago v. Mosley*, 96.

<sup>639</sup> *Widmar v. Vincent*, Footnote 5.

<sup>640</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

opinion also conceded that the university could impose regulations on the use of its facilities to ensure compliance with its academic mission.<sup>641</sup>

In Stevens' concurring opinion, he focused on the ability of the University to make content-based decisions to ensure the most effective use of its resources in consideration of its unique mission.<sup>642</sup> Stevens argued that "[a] university legitimately may regard some subjects as more relevant to its educational mission than others."<sup>643</sup> He believed the ability to make content-based decisions was necessary to ensure the protection of academic freedom, which was the primary focus of his concurrence. While the maintenance of academic freedom is important, Stevens' concurrence "would have allowed universities to engage in content-based discrimination in deciding which groups can use campus facilities," in contradiction of the equal access principle.<sup>644</sup>

In White's dissent, he believed the Establishment Clause left open the opportunity for UMKC to make decisions about the use of its facilities because the Establishment Clause only sets limits on the states regarding religion, but "does not establish what the State is *required* to do."<sup>645</sup> White argued that UMKC's prohibition of the use of campus space for religious teaching or worship were well within the rights of the university. Further, he asserted that teaching and worship were not the same as true speech and the University could discern the difference.<sup>646</sup> This assertion was strongly denounced by the majority who argued that it would require significant entanglement with religion to determine when singing, teaching, and reading, which are all

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<sup>641</sup> *Keyishian v. Board of Regents*, 603.

<sup>642</sup> *Widmar v. Vincent*, 278.

<sup>643</sup> *Widmar v. Vincent*, 280.

<sup>644</sup> Bonney, "The University Campus as Public Forum," 548.

<sup>645</sup> *Widmar v. Vincent*, 282. Emphasis in original.

<sup>646</sup> *Widmar v. Vincent*, 283.

protected forms of speech, become worship and thus impermissible.<sup>647</sup> The view of worship as a protected form of speech prevailed in the majority opinion of the Supreme Court.

*Widmar v. Vincent* was consequential in establishing the university as a public forum and mandating stricter review of university policies regarding First Amendment issues.<sup>648</sup> By establishing the university as public forum, the Supreme Court deemed that religious activities on campus do not bear the imprimatur of state approval because the campus is a forum open to a variety of groups for similar use.<sup>649</sup> The primary effect of the public forum is to promote the free flow of ideas, which might also include ideas that are religious in nature. Unless there was significant evidence to demonstrate that religious groups were dominating the forum, the court ruled that any prior restraint on their access to the forum would be impermissible.<sup>650</sup> This decision would set a legal precedent that would come to bear in future cases where universities attempted to balance their responsibilities under the Establishment Clause to maintain a separation of church and state with their responsibilities in the Speech Clause.

The last significant case of this time period, *Doe v. University of Michigan*, involved the constitutionality of the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment. The University of Michigan established this policy in response to a "rising tide of racial intolerance and harassment on campus" that resulted in demonstrations on campus over concerns that the university was not maintaining a non-racist, non-violent environment for students of color.<sup>651</sup> The American Civil Liberties Union

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<sup>647</sup> *Widmar v. Vincent*, Footnote 6.

<sup>648</sup> Vikram David Amar and Alan E. Brownstein, "A Close-up Modern Look at First Amendment Academic Freedom Rights," *Minnesota Law Review* 101 (2017): 1943-1985, 1945.

<sup>649</sup> S. Ezra Winn, "Constitutional Law – First Amendment – Religious Activities in State Universities," *Tennessee Law Review* 623 (1982): 623-651, 624.

<sup>650</sup> Winn, "Constitutional Law," 649.

<sup>651</sup> *Doe v. University of Michigan*, 721 F. Supp. 852, 853 (E.D. Mich. 1989).

represented the plaintiff in the case, who requested the pseudonym of John Doe to maintain and protect his privacy.<sup>652</sup> Doe, a graduate student in biopsychology, studied “the biological bases of individual differences in personality traits and mental abilities.”<sup>653</sup> He feared that discussion of theories positing differences based on race or gender might be construed as racist or sexist, thus subject to sanctions under the University of Michigan’s policy. He asserted that the policy had a chilling effect on his speech and requested that the discrimination and harassment policy be deemed unconstitutional.<sup>654</sup>

The District Court for the Eastern District of Michigan found in favor of Doe in this case on the grounds that the University of Michigan’s policy was outside the scope of permissible regulation, overbroad, and vague. Specifically, the District Court ruled that the University of Michigan established an anti-discrimination policy that had the effect of prohibiting speech because it disagreed with its content.<sup>655</sup> The court relied on the precedent in *Widmar v. Vincent*, where the Supreme Court had affirmed that the decision in the *Police Department of the City of Chicago v. Moseley* case, which prohibited state institutions from regulating the content of protected speech, extended to universities. The District Court held that the University of Michigan’s policy was overbroad because it “swe[pt] within its ambit a substantial amount of protected speech.”<sup>656</sup> As demonstrated in University of Michigan records, students’ protected speech had already been subjected to disciplinary sanctions.<sup>657</sup> Finally, the District Court ruled that the policy was vague and would require people of common intelligence to guess at its

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<sup>652</sup> *Doe v. University of Michigan*, Note 1.

<sup>653</sup> *Doe v. University of Michigan*, 858.

<sup>654</sup> *Doe v. University of Michigan*, 858.

<sup>655</sup> *Doe v. University of Michigan*, 863.

<sup>656</sup> *Doe v. University of Michigan*, 864.

<sup>657</sup> *Doe v. University of Michigan*, 865-866.

meaning. The University of Michigan’s policy prohibited words or actions that might “stigmatize” or “victimize” an individual, and the District Court determined these terms were too general.<sup>658</sup> While the District Court affirmed its sympathy “to the University’s obligation to ensure equal educational opportunities for all of its students,” the District Court asserted it could not do so at the expense of the First Amendment.<sup>659</sup> The case of *Doe v. University of Michigan* is significant because it was the first federal case that addressed the unconstitutionality of campus speech codes. Despite the ruling in this case, speech codes would continue to proliferate on campuses in the early 1990s and would subject colleges and universities to legal battles against students for many years. Perhaps administrators should have heeded the results of this case because, in case law to date, no case involving speech codes has ruled in favor of the university.

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<sup>658</sup> *Doe v. University of Michigan*, 867.

<sup>659</sup> *Doe v. University of Michigan*, 868.

## 5 THE 'POLITICALLY CORRECT' CAMPUS

While the 1990s brought a new wave of student activism and a renewed commitment to social justice, it also ushered in a new series of attacks against higher education for its embrace of diversity and inclusive policies.<sup>660</sup> Universities were criticized for abandoning the traditional western curriculum in favor of politically-motivated programs in race, gender, and ethnic studies, and faculty were accused of indoctrinating students with a left-liberal political ideology.<sup>661</sup> While higher education faced criticism from those outside of campus, students were also critiquing the campus experience. Increased access to higher education beginning in the 1960s resulted in campuses with significantly more women and students of color than ever before. In the 1990s, the increased diversity on campus coincided with an increase in campus hate speech as well as racial and sexual harassment.<sup>662</sup> Students began to clamor for more equitable learning environments and challenged campuses to become truly multicultural by creating welcoming spaces for their diverse student bodies.

On January 20, 1997, students at Indiana University at Bloomington held a rally in protest of the failure of the university to address the needs of its diverse students and faculty. The students created a list of demands to present to the university administrators. Their list of demands illustrated the wide net that liberal student activists sought to cast to bring everyone together within the university and represented the activists' commitment to multiculturalism.

Their "Declaration of Demands" included approval and implementation of a Latino Studies department, the appointment of an Asian American advocacy dean, the creation

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<sup>660</sup> Rhoads, *Freedom's Web*, 219; Raymond A. Mohl, "The Culture Wars and the Universities," *Educational Forum* 58, no. 1 (1994): 15-21.

<sup>661</sup> Mohl, "The Culture Wars.>"; Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (New York: Simon and Schuster, 1987). Bloom's book was one of the early books attacking higher education for abandoning western ideals. It would go on to sell over one million copies.

<sup>662</sup> Matsuda, "Public Response to Racist Speech," and Alice K. Ma, "Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights," *California Law Review* 83, no. 2 (1995): 695-732.

of an Asian cultural center, the maintenance of the Office of Diversity Programs, funding for gay, lesbian, and bisexual student support services, and immediate arrangements for an increase in both non-White and women faculty.<sup>663</sup>

The concerns of the students at Indiana University were reflective of concerns of liberal student activists across the country, who challenged colleges and universities to live up to their ideals in embracing diversity and multiculturalism on campus. It is important to note the various constituencies that the students included in their demands. While critics from outside the university accused identity politics of dividing the campus, the coalitions that came together in support of liberal activism initiatives during this period demonstrated that they actually brought more people together.<sup>664</sup>

While liberal student activists were working to create more welcoming campus environments, conservative student activists were challenging the ‘liberal agenda’ of the modern campus and pushing back on affirmative action policies that supported the increased diversity on campuses. In 1996, conservative students in California supported Proposition 209, the California Civil Rights Initiative, which would eliminate race and gender as factors for students’ admission to the California public university system.<sup>665</sup> Protests broke out at California State University at Northridge when the Student Senate voted to invite David Duke, former grand wizard of the Ku Klux Klan, to campus to debate the issue of affirmative action with Joe Hicks, the director of a Los Angeles Multicultural Collaborative.<sup>666</sup> Proponents of Proposition 209 accused the Student Senate of bringing Duke to campus to debate affirmative action as a political ploy to cast the

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<sup>663</sup> Rhoads, *Freedom’s Web*, 222.

<sup>664</sup> Rhoads, 222.

<sup>665</sup> “Public Education Myths Fuel the Push for Prop. 209; It Addresses Phantom Problems’ at UC and Elsewhere,” *Los Angeles Times*, October 28, 1996. The controversy surrounding affirmative action in California can be traced back to the Supreme Court case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which upheld affirmative action in admissions decisions, but ruled that quotas were unconstitutional.

<sup>666</sup> Andrew Blankstein, “CSUN Asks Ex-Klansmen Duke to Speak at Debate on Prop. 209,” *Los Angeles Times*, September 4, 1996.

proposition as racist.<sup>667</sup> University of California Regent Ward Connerly, leader of the Proposition 209 movement, asked the president of California State University at Northridge to withdraw the invitation for Duke to speak on campus, but the president refused.<sup>668</sup> After failing to have Duke's invitation to speak withdrawn, proponents of Proposition 209 attempted to have the courts intervene, but failed to win the sympathy of the courts. On the day of the affirmative action debate, protestors led by mainly students from Berkeley and other campuses as well as counter-protestors led by Connerly gathered outside of the hall where the debate was supposed to take place. While there was tension outside the hall with protestors throwing rocks at police, inside the event was largely calm.<sup>669</sup> The clash between conservative and liberal students on campus over affirmative action in admissions policies represented the competing views the groups held regarding who should have access to the campus.

An incident at Georgia State University in 1992 highlights the tension that existed on campuses between various student groups, while also emphasizing how traditionally marginalized groups on campus formed coalitions that were mutually beneficial. On Wednesday, November 4, 1992, a trash can was found outside the Kappa Sigma fraternity room in the University Center, the hub for student activity, with the misspelled racial slur "Nigers Enter" stenciled on it.<sup>670</sup> At the time of the incident, Kappa Sigma, a traditionally white fraternity, was pledging an African American student. The trash can was discovered by two members of the Phi Beta Sigma fraternity. Upon discovery of the trash can, the students placed it in their fraternity

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<sup>667</sup> Andrew Blankstein, "UC Regent Asks CSUN to Revoke Duke Invitation," *Los Angeles Times*, September 6, 1996.

<sup>668</sup> It is important to note that this was a conservative regent asking to cancel the invitation of a speaker to campus. Conservatives would spend much of the next decade complaining about speaker disinvitations.

<sup>669</sup> John M. Glionna and Julie Tamaki, "Police, Protestors Clash at Campus Debate; Prop. 209: But Forum with ex-Klansman and Civil Rights Activist is Calm," *Los Angeles Times*, September 26, 1996.

<sup>670</sup> Robert J. Vickers, "50 Stage GSU Sit-In Over Racial Incidents," *Atlanta Journal and Constitution*, November 6, 1992, Lexis Nexis Academic.

room on the floor and then proceeded to report the incident to the Dean of Students Office. Meanwhile, the individual responsible for the vandalism, Jesse Dent, was identified by a member of the Sigma Nu fraternity. The president of Sigma Nu told *The Black Student Voice* that he discussed the incident with the Dean of Students Office on Wednesday, but on Thursday, the Dean of Students, King Buttermore, stated that “he didn’t know who had done this ‘terrible thing’ and insisted he needed time to interview several students before he could come to a decision on the issue.”<sup>671</sup>

On Thursday, November 5, 1992, the weekly Multicultural Committee Meeting, which included a panel of deans and faculty, was held on campus.<sup>672</sup> Although the meeting was not scheduled to discuss the trash can incident, Nichole Smith, chairman of the committee, determined the trash can should be brought to the meeting for discussion. During the meeting, the African American students in attendance became frustrated by the solutions being offered by the administration, particularly Dean Buttermore. One student kicked the trash can to the ground, while exclaiming “what about this, what are we going to do about this!!”<sup>673</sup> Moments later, Kenyatta Adeniya and Lawrence Philpot, two African American students, announced they were “taking this matter to higher authority, the president of the University.”<sup>674</sup> The students then marched off with the trash can and invited the crowd of about sixty-five to follow them. The president, Carl Patton, was in a meeting at the time of the students’ arrival, but that did not stop them from dragging the trash can into his office and demanding his attention. After a short

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<sup>671</sup> Echoles, “‘Nigers Enter’: The Story,” *The Black Student Voice* 1, no. 1 (February 1993): 6, G2007-16A, Box 1, Folder 1, Tonya D. Cook Papers, University Archives, Special Collections and Archives, Georgia State University Library, Atlanta.

<sup>672</sup> Jennifer Hafer, “Trash Can Only Symptom of Problems,” *Signal*, November 10, 1992, Digital Collections, Special Collections and Archives, Georgia State University, Atlanta.

<sup>673</sup> Echoles, “‘Nigers Enter,’” 5.

<sup>674</sup> Echoles, “‘Nigers Enter,’” 6.

discussion, Patton agreed to issue a statement by 5 p.m. on Thursday and meet with the students in an open forum on Friday morning. In the statement issued by Patton, he said, “We will not tolerate acts of racism on this campus...I personally speak out against such actions and will investigate the current matter as well as larger, similar issues facing this campus.”<sup>675</sup>

On Friday, November 7, Patton held an open forum at 10 a.m. that was attended by about 300 students including African American students, European American students, Asian American students, fraternity and sorority members, members of the LGBT community, and students from the Atlanta University Center.<sup>676</sup> During the course of the meeting, the students recounted several incidents that had occurred in the previous four years that had gone unaddressed by the administration including the removal of authorized posters opposing Georgia’s sodomy laws and the wearing of black-face at a white fraternity party. One student shared that nothing was done and the students “got a Simi Valley verdict just like Rodney King.”<sup>677</sup> The meeting was long and African American students were “not satisfied with what the administration had to offer.”<sup>678</sup> About two hours into the meeting, the students presented Patton with nine demands including:

immediate formation of an African-American Studies Department, more tenured minority faculty, mandatory African-American history and women’s studies courses for all students, at least a three-year suspension of the Sigma Nu and Pi Kappa Alpha [fraternities], and the termination of the two deans the students claim [were] prejudiced and...ignored their complaints.<sup>679</sup>

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<sup>675</sup> Hafer, “Trash Can Only Symptom of Problems.”

<sup>676</sup> Robert J. Vickers, “Sit-in at GSU Protests Racial Harassment,” *Atlanta Journal and Constitution*, November 7, 1992, LexisNexis Academic.

<sup>677</sup> Vickers, “50 Stage GSU Sit-In Over Racial Incidents.”

<sup>678</sup> Echoles, ““Nigers Enter.””

<sup>679</sup> Vickers, “Sit-in at GSU Protests Racial Harassment.”

After presenting their demands, about fifty students left the auditorium and proceeded to the president's office located two floors above. The students' decision to hold a sit-in outside of the president's office prompted Patton to hold a closed meeting with the core group of students. The meeting lasted late into the evening and was eventually called off until Monday morning.<sup>680</sup>

On Monday, November 9, 1992, the administration arrived on campus to find about eighty students blocking the hallways in front of the offices of Student Accounts, Financial Aid, and Admissions. The students were sitting six abreast in the hallway, effectively blocking all foot traffic in the building. The Georgia State University police and later the Atlanta police were called in to secure the building and classes held in the building were canceled.<sup>681</sup> Additional protestors led by the Alliance of Lesbian, Gay, and Bisexual Students blocked entrance to the cafeteria and the elevators in the General Classroom Building.<sup>682</sup> Local restaurants provided food and drink to the protestors throughout the day.<sup>683</sup> Meanwhile, administrators were seeking a court order to remove the students from Sparks Hall, the site of the protest. A court order to remove the protestors was eventually granted by the Fulton County Superior Court, but not actually used against the students.<sup>684</sup>

Reactions to the sit-in on Monday were as varied as the student body. Chris Hollis, president of the Alliance of Lesbian, Gay, and Bisexual Students, stated, "People get tired of being tied up in beauracritic [*sic*] red tape... There's only so many times a person can take repeated offenses without anything being done."<sup>685</sup> Student Government Association President

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<sup>680</sup> Echoles, "'Nigers Enter.'"

<sup>681</sup> Echoles.

<sup>682</sup> Jennifer Hafer, "Student Protest Rock Georgia State," *Signal*, November 10, 1992, Digital Collections, Special Collections and Archives, Georgia State University, Atlanta.

<sup>683</sup> Echoles, "'Nigers Enter.'"

<sup>684</sup> Robert J. Vickers and Jack Warner, "GSU Taking Steps to Oust 80 Protestors," *Atlanta Journal and Constitution*, September 9, 1992, LexisNexis Academic.

<sup>685</sup> Hafer, "Student Protest Rock Georgia State."

Serge Medjo-Akino acknowledged tension between joining the protest and representing all students. He stated, "I'm angry and tired now...All these things affect me. I'm a black man first, and I want answers and solutions now."<sup>686</sup> Meanwhile, some students disagreed with the protestors. African Student Alliance President Kingsley Megwara stated, "They're hurting the interests of the black students in the way they're going about this."<sup>687</sup> Despite Megwara's fear, by the end of the day, Patton had agreed to at least five of the students' demands. Upon leaving the building Monday evening, Patton stated, "These were a bunch of great kids...They worked hard to try an [*sic*] make their point."<sup>688</sup>

On Tuesday, November 10, 1992, a group of about thirty-five members of predominantly white fraternities and sororities occupied Patton's office for about five hours.<sup>689</sup> These students were upset about Patton's decision to reassign Deans Buttermore and Pearson pending an investigation of allegations of inappropriate handling of racial complaints.<sup>690</sup> In addition, the decision to temporarily suspend Sigma Nu and Pi Kappa Alpha fraternities provoked ire from the fraternity and sorority community, which felt it was being unfairly punished for the actions of a few. Andrew Kearney, president of the Interfraternity Council, wrote a letter to Patton stating that the protest ended with "over half of the demands that were met serving as a means of revenge rather than a true act of education."<sup>691</sup> African American student protestors attempted to

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<sup>686</sup> Vickers and Warner, "GSU Taking Steps to Oust 80 Protestors."

<sup>687</sup> Hafer, "Trash Can Only Symptom of Problems."

<sup>688</sup> Robert J. Vickers, "Students at Georgia State End Protest of Racial Slur: Officials Grant 5 of 11 Demands," *Atlanta Journal and Constitution*, November 10, 1992, LexisNexis Academic.

<sup>689</sup> Robert J. Vickers, "Some at GSU Question Concessions to Protest: Too Few Opinions Sought, They Say," *Atlanta Journal and Constitution*, November 12, 1992, LexisNexis Academic.

<sup>690</sup> Jennifer Hafer, "Students Counter-Protest Patton's Concessions," *Signal*, November 17, 1992, Digital Collections, Special Collections and Archives, Georgia State University, Atlanta.

<sup>691</sup> Robert J. Vickers, "Patton's Concessions Upset Some at GSU," *Atlanta Journal and Constitution*, November 12, 1992, LexisNexis Academic.

share their perspective with the counter-protestors, but many of the counter-protestors left without listening to their explanations.

On Wednesday, November 11, 1992, students representing the College Republicans staged a sit-in at Patton's office to protest the lack of due process in the reassignment of Deans Buttermore and Pearson. Kara Lairsey, secretary of the College Republicans, viewed Patton's concessions as a sign of a weak administration. Meanwhile, Bryan Skalku, chairman of the College Republicans, compared Patton's decisions to the promises of President-Elect Bill Clinton. Skalku stated, "His word is no good. He's the Bill Clinton of GSU."<sup>692</sup> Patton only briefly addressed the group, reiterating his belief that the reassignment of the deans was in the best interest of the deans and Georgia State.

On Thursday, November 12, 1992, Patton addressed the faculty, staff, and students and answered questions about his handling of the student protests. In his address, he shared that many of the concerns brought forward by the students had credence and were validated by staff members in the Division of Student Affairs. Several faculty members in attendance admitted that campus racism had been ignored for years. Malinda Snow, an English professor, stated, "The worst reputation this university can have is as a center where racism is tolerated or ignored."<sup>693</sup> Jere Drummond, a member of the Alumni Board, came out in support of Patton stating, "He's trying to handle it in a fair and admirable manner...I think he will do the right thing."<sup>694</sup> Despite a growing consensus that Patton had acted in the best interest of the university, students from the

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<sup>692</sup> Hafer, "Students Counter-Protest Patton's Concessions."

<sup>693</sup> As quoted in Robert J. Vickers, "Patton Tries to Calm Troubled GSU: President Under Fire for Action After Sit-In," *Atlanta Journal and Constitution*, November 13, 1992, LexisNexis Academic.

<sup>694</sup> As quoted in Vickers, "Patton Tries to Calm Troubled GSU."

traditionally white fraternities and sororities continued to protest Patton's concessions to the student protestors.

On Friday, November 13, 1992, after a tense ten days on campus, the protests began to wind down. The student protestors, now dubbing themselves the Concerned Students Coalition, met again with Patton to solidify the implementation of their demands. The three hour meeting primarily focused on the establishment of the African American Studies Department and the process of selecting an outside evaluation team to investigate the Dean of Students Department as well as the Sigma Nu and Pi Kappa Alpha fraternities.<sup>695</sup> Afterwards, the Concerned Students Coalition held a press conference to provide an update on their progress and explain to the student body their motivations for the sit-in. The organizers claimed their work was aimed at helping all students at the university. Felix Brown, one of the primary organizers, commented, "We [are] a coalition of oppressed students trying to rid the university of racism, sexism, and homophobia."<sup>696</sup> The work of the student coalition and the subsequent counter-protest were representative of the tensions on campuses across the country during this period and helped to fuel accusations of 'political correctness.'

### ***'Political Correctness'***

Prior to the 1980s, the phrase "politically correct" had been used as a "term of self-criticism among Marxists and progressives: [a] person thus labeled was a hack who mindlessly hewed to the party line."<sup>697</sup> In the late 1980s, politically correct came to be used to represent

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<sup>695</sup> "Students Keep Pressure on Patton," *Signal*, November 17, 1992, Digital Collections, Special Collections and Archives, Georgia State University, Atlanta.

<sup>696</sup> Jennifer Hafer, "Students Committed to Change," *Signal*, November 17, 1992, Digital Collections, Special Collections and Archives, Georgia State University, Atlanta.

<sup>697</sup> Catherine R. Stimpson, "New 'Politically Correct' Metaphors Insult History and Our Campuses," *Chronicle of Higher Education* 37, no. 37 (May 29, 1991): A40.

people who had strong beliefs in the environment, the rights of women and people of color, and multiculturalism. By 1990, conservatives began to utilize the phrase “politically correct,” or P.C., to signify any programs or developments that they opposed including affirmative action, women’s studies programs, or ethnic centers on campuses. Catherine Stimpson compared conservatives use of the P.C. narrative to the Willie Horton campaign advertisements used by the Bush campaign in 1988.<sup>698</sup> “Like ‘Willie Horton,’ P.C. [was] easy to pronounce and remember,” and it came to represent all that was wrong with liberal politics and higher education.<sup>699</sup>

The phrase “political correctness” came to be used by conservatives to define “the ideology behind a variety of movements on college campuses, including efforts to promote multiculturalism in curricula, affirmative action for students and faculty members, and campus regulations designed to prevent ethnic or sexual harassment.”<sup>700</sup> Over time, political correctness would be connected with an attack on free speech on college campuses. In a speech at the University of Michigan in 1991, President H.W. Bush declared that free speech was “under assault throughout the United States, including on some college campuses.”<sup>701</sup> Critics of the conservative P.C. narrative argued that complaints about political correctness from conservative scholars were fueled by frustrations over their loss of power and influence on campus and the presence of more diverse faculty exerting their ideas on campus. According to Susan Schweik, a faculty member at University of California at Berkeley, “Just as these [new] voices [were] being

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<sup>698</sup> Willie Horton was a convicted felon who received a furlough from prison under a Massachusetts policy. While out on furlough, Horton raped a woman and stabbed her fiancé during a home invasion. Republicans used this example to paint Michael Dukakis as soft on crime. For more explanation, see Rachel Withers, “George H.W. Bush’s Willie Horton Ad Will Always be the Reference Point for Dog-Whistle Racism,” Vox, last modified December 1, 2018, <https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics>.

<sup>699</sup> Stimpson, “New ‘Politically Correct’ Metaphors,” A40.

<sup>700</sup> Christopher Myers, “Many Praise Bush for Lashing Out at ‘Political Correctness’ Concept, but Others See Misrepresentation,” *Chronicle of Higher Education* 37, no. 35 (May 15, 1991): A23.

<sup>701</sup> Myers, “Many Praise Bush for Lashing Out,” A23.

heard, they're being bashed as robotic arbiters of political correctness...It's an effective tool, the powerful presenting themselves as powerless."<sup>702</sup> Other critics of the conservative P.C. narrative believed that it deflected attention from the pressing issues on campus including increasing incidents of racial and sexual harassment as well as mounting economic pressures.<sup>703</sup>

The P.C. narrative was further fueled by media outlets that were eager to dramatize the conflict on campus "as a struggle between two forces, pro-Western freedom and anti-Western Political Correctness."<sup>704</sup> Campuses were accused of a left-wing McCarthyism intent on destroying academic freedom and inquiry.<sup>705</sup> The media began to compare the "P.C. campuses" with "some of the most repressive forces in modern history: the book burners of Nazi Germany, the Red Guards of China, ayatollahs, religious fundamentalists, totalitarians, Fascists, and the late Sen. Joseph McCarthy."<sup>706</sup> While the media presented political correctness as a pervasive problem on campuses, colleges argued that issues of racial and sexual harassment were a much more significant issue.

A study of 360 campuses by the American Council on Education found that less than ten percent of colleges and universities and twenty percent of doctorate granting institutions experienced controversies related to campus speakers, but thirty-six percent of colleges and seventy-four percent of doctorate granting institutions had experienced incidents of intolerance related to race, gender, or sexual preference.<sup>707</sup> In an article published in the *Chronicle of Higher*

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<sup>702</sup> Scott Heller, "Colleges Becoming Havens of 'Political Correctness,' Some Scholars Say," *Chronicle of Higher Education* 37, no. 12 (November 21, 1990): A1.

<sup>703</sup> Scott Heller, "Reeling from Harsh Attacks, Educators Weigh How to Respond to 'Politically Correct' Label," *Chronicle of Higher Education* 37, no. 39 (June 12, 1991): A1.

<sup>704</sup> Stimpson, "New 'Politically Correct' Metaphors," A40.

<sup>705</sup> Heller, "Colleges Becoming Havens."

<sup>706</sup> Stimpson, "New 'Politically Correct' Metaphors," A40.

<sup>707</sup> Susan Dodge, "Few Colleges Have Had 'Political Correctness' Controversies, Study Finds," *Chronicle of Higher Education* 37, no. 47 (August 7, 1991): A23

*Education*, Calvin Mackenzie eloquently expressed the tension that existed between the conservative P.C. narrative and the realities of the campus community and it is worth quoting at length here.

But it's not that simple, especially in a community committed to the education of young adults. When acts of this sort occur on a college campus, what message is conveyed if there is no institutional response? That anything goes? That the First Amendment is a license for irresponsibility? That a commitment to combat bigotry and hatred is valued less than the constitutional absolute of free expression? Can we tolerate intolerance? These are hard questions, and all of us in colleges today are struggling to find appropriate answers. On one hand, we understand how essential free expression is to scholarship and teaching. But on the other, it is impossible for any reasonable person to define cross burnings, swastikas painted on building walls, and screams of 'nigger' out a dormitory window as brave and essential exercises of free speech.<sup>708</sup>

Despite attempts to show its faults, the conservative P.C. narrative would come to dominate the media's presentation of college campuses. According to Stanley Fish, the prize for successfully characterizing the academy goes to conservatives, "for it is now generally believed that our colleges and universities are hotbeds...of radicalism and pedagogical irresponsibility where dollars are wasted, nonsense is propagated, students are indoctrinated, religion is disrespected, and patriotism is scorned."<sup>709</sup>

### *Speech Codes*

One of the primary targets of the conservative P.C. narrative has been campus speech codes. As previously discussed, campus speech codes were first instituted on campuses in the 1980s to combat increasing incidents of racial and sexual harassment. Campus administrators argued that these policies were created to "serve primarily as a deterrent to offensive remarks rather than an active tool to police behavior," and that they had been rarely used to punish

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<sup>708</sup> G. Calvin Mackenzie, "Fallacies of PC," *Chronicle of Higher Education* 38, no. 2 (September 4, 1991): B1.

<sup>709</sup> Stanley Fish, "'Intellectual Diversity': The Trojan Horse of a Dark Design," *Chronicle of Higher Education* 50, no. 23 (February 13, 2004): B13-B14, B13.

students.<sup>710</sup> However, critics argued that the existence of speech codes had a chilling effect on student speech. The American Civil Liberties Union as well as conservative activists began to challenge the speech codes in court.

The first case against a speech code was brought against the University of Michigan in 1989. The University of Michigan had adopted its “Policy on Discrimination and Discriminatory Harassment by Students in the University Environment” in the spring of 1988 after a series of racial incidents on campus.<sup>711</sup> In one incident, a flyer with a photo of the Ohio hunting season notice and an announcement that it was “open season on blacks” was slid under the door of a lounge where a group of African American women were meeting. Later that semester, a disc jockey at the student radio station was accused of broadcasting racist jokes on multiple occasions. A psychology student concerned that his research linking human behaviors to race and gender would be impermissible under Michigan’s code brought a case against the university with the help of the American Civil Liberties Union. As previously discussed, the case of *Doe v. University of Michigan* would rule that the speech code was unconstitutional.<sup>712</sup>

In 1991, the University of Wisconsin would become the second university to have its speech code struck down by the courts. Similar to the University of Michigan, the University of Wisconsin had adopted its speech code in the wake of racial incidents on campus. In one incident, a fraternity conducted a slave auction on campus where pledges performed in black face.<sup>713</sup> Campus administrators lamented that the ruling against the university’s speech code

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<sup>710</sup> Susan Dodge, “Campus Codes that Ban Hate Speech are Rarely Used to Penalize Students,” *Chronicle of Higher Education* 38, no. 23 (February 12, 1992): A35.

<sup>711</sup> Karen S. Brinkman, “U-M’s Speech Code Defeated: Administration Planning to Impose New Regulations on Student Behavior,” *Michigan Review* 10, no. 16 (Summer 1992): 1, 24-25.  
[http://www.umich.edu/~mrev/issues/Vol\\_10\\_No\\_16.pdf](http://www.umich.edu/~mrev/issues/Vol_10_No_16.pdf)

<sup>712</sup> *Doe v. University of Michigan*, 721 F. Supp. 852, 853 (E.D. Mich. 1989).

<sup>713</sup> Michele N-K. Collison, “Hate-Speech Code at U. of Wisconsin Voided by Court,” *Chronicle of Higher Education* 38, no. 9 (October 23, 1991): A1.

would make it more difficult for the university to deal with the problem of harassment. James Sutton, special assistant for minority affairs argued, “Everyone seems more concerned about the theoretical abridgement of First Amendment rights than about the real abridgement of rights based on racial harassment.”<sup>714</sup> Sutton articulated the frustration that many administrators felt in trying to balance the First Amendment with the need to create “an environment hospitable to persons who have felt unwelcome there for far too long, and whose very ability to learn may depend on civility and respect.”<sup>715</sup>

One of the first incidents to attract significant attention to speech codes from conservatives occurred at the University of Pennsylvania in 1993.<sup>716</sup> Known widely as the “Water Buffalo” case, it involved a white male undergraduate student, Eden Jacobowitz, and five female African American students, Colleen Bonnicklewis, Ayanna Taylor, Nikki Taylor, Denita Thomas, and Suzanne Jenkins.<sup>717</sup> While studying in his room, Jacobowitz was disturbed by loud singing outside of his residence hall. After asking the students to quiet down and receiving no compliance, Jacobowitz shouted, “Shut up, you water buffalo. If you’re looking for a party, there’s a zoo a mile from here.”<sup>718</sup> Unbeknownst to Jacobowitz, the women he yelled at were members of an African American sorority participating in a sorority tradition.<sup>719</sup> The female students accused Jacobowitz of using words that “likened us to beasts and banished us from an

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<sup>714</sup> Collison, “Hate-Speech Code,” A1.

<sup>715</sup> Robert M. O’Neil, “A Time to Re-Evaluate Campus Speech Codes,” *Chronicle of Higher Education* 38, no. 44 (July 8, 1992): A40.

<sup>716</sup> Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America’s Campuses* (New York: Free Press, 1998). Kors was intimately involved in this case and he outlined his involvement in Chapter One.

<sup>717</sup> Christopher Shea, “Resolution of Racial-Harrassment Case at U. of Penn Leaves Everyone Dissatisfied,” *Chronicle of Higher Education* 39, no. 39 (June 2, 1993): A24.

<sup>718</sup> Batchis, *The Right’s First Amendment*, 70.

<sup>719</sup> Kors and Silverglate, *The Shadow University*.

intellectual environment to one more suited for animals, like the zoo.”<sup>720</sup> After a short investigation, the university found Jacobowitz in violation of the hate speech code and he was threatened with expulsion.

The speech code at the University of Pennsylvania was emblematic of speech codes across the nation in prohibiting:

any behavior, verbal or physical, that stigmatizes or victimizes individuals on the basis of race, ethnic or national origin...and that has the purpose or effect of interfering with an individual’s academic or work performance; and/or creates an intimidating or offensive academic, living, or work environment.<sup>721</sup>

Jacobowitz’s words were deemed in violation of this code, which, like other speech codes, was viewed as overbroad in its restrictions on the First Amendment right to free speech. When news of the incident reached the media, Jacobowitz attracted diverse support from the American Civil Liberties Union, a long time defender of free speech; Dorothy Rabinowitz, a *Wall Street Journal* columnist and long-time critic of political correctness; and Rush Limbaugh, conservative radio host.<sup>722</sup> The women accused Jacobowitz of violating confidentiality rules by talking to the media about his case. However, Jacobowitz and his advisor, Alan Kohrs, believed that appealing to the media was the only thing that Jacobowitz could do to keep from being taken advantage of by the university disciplinary system in the face of expulsion. The advisor for the women lamented the state of speech codes and university battles to confront racial harassment on campus. She stated that “universities were doomed to see more battles like this one because ‘we cannot agree on where fighting words end and free speech begins’ and that the students were all being used as “pawns” in the debate over political correctness.”<sup>723</sup> In the ensuing media blitz surrounding the

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<sup>720</sup> Shea, “Resolution of Racial-Harassment Case,” A24.

<sup>721</sup> Kors and Silverglate, *The Shadow University*, 10.

<sup>722</sup> Kors and Silverglate, 10.

<sup>723</sup> Shea, “Resolution of Racial Harassment Case.”

case, the University of Pennsylvania was criticized for taking political correctness too far and punishing students for exercising their rights to free speech.

In the end, the University of Pennsylvania was forced to drop its policy on racial harassment after it was deemed to be overly broad.<sup>724</sup> The new policy they adopted in its place condemned hate speech, epithets, and racial, ethnic, sexual and religious slurs, but noted that the content of student speech or expression would not be used as the basis for disciplinary action against students.<sup>725</sup> Students worried that harassment would increase under the new policy and indeed it did in the immediate aftermath. In the months after the case, there were between thirty and forty complaints from African American students of harassing telephone calls as well as a bomb threat that October in a predominantly African American residence hall. According to Seth Hamalian, chairman of the Undergraduate Assembly, racial incidents such as these demonstrated the need for the speech code.<sup>726</sup> Meanwhile, Jacobwitz would bring a lawsuit against the University of Pennsylvania for causing him emotional distress for pursuing race-based judicial charges against him. The case would settle with the university admitting no fault, but paying the attorney fees for Jacobwitz's lawyer, Edward Rubenstone. Jacobwitz received no direct financial compensation from the university.<sup>727</sup>

The media attention that the Water Buffalo case attracted only served to strengthen the conservative P.C. narrative about campuses. Critics of speech codes accused administrators of writing codes that sought to confuse constitutionally protected speech with harassment and using

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<sup>724</sup> Christopher Shea, "Penn Will Drop Its Policy on Racial Harassment," *Chronicle of Higher Education* 40, no. 14 (November 24, 1993): A20.

<sup>725</sup> Ben Gose, "Penn to Replace Controversial Speech Code; Will No Longer Punish Students for Insults," *Chronicle of Higher Education* 40, no. 43 (June 29, 1994): A30.

<sup>726</sup> Shea, "Penn Will Drop Its Policy."

<sup>727</sup> "Settlement Closes 'Water Buffalo' Case," *Chronicle of Higher Education* 44, no. 4 (September 19, 1997): A10.

speech codes against students whose views the administrators found objectionable.<sup>728</sup> These same critics argued that offensive speech directed at a protected class does not rise to the level of affecting a student's educational opportunity, an argument that is disputed by supporters of speech codes.<sup>729</sup> Silverglate and Lukianoff, two of the strongest opponents of speech codes, recognize that administrators use speech codes to "communicate to students the kind of society to which we all should aspire," but argue this is "the most pernicious of all justifications, for it makes unexamined assumptions about the power of administrators to reach intrusively into the hearts and consciences of students."<sup>730</sup> While conservatives continued to attack speech codes, some liberal scholars questioned their motivations.

While conservatives criticized speech codes for limiting the First Amendment rights of students, others argued that the crusade against speech codes had more to do with conservative issues than a defense of the First Amendment. John Wilson accused the crusade against speech codes by conservatives as an attempt "to convince the public that 'thought police' are enforcing political correctness on the nation's campuses," while simultaneously supporting efforts to censor campus life by restricting the activities of gay and lesbian students on campus.<sup>731</sup> To support his argument, Wilson pointed to the threat from conservative lawmakers to withhold funding from the University of Texas at Austin, if they chose to spend student health fee funds to promote safe sex among gay and lesbian students. In another example, the College Republicans at Kent State University led efforts to prevent a course called "Sociology of Gays and Lesbians"

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<sup>728</sup> Silverglate, French, and Lukianoff, *FIRE's Guide to Free Speech on Campus*, 21; Chemerinsky and Gillman, *Free Speech on Campus*, 19.

<sup>729</sup> Chemerinsky and Gillman, *Free Speech on Campus*, 108; Matsuda et al, *Words that Wound*.

<sup>730</sup> Harvey A. Silverglate and Greg Lukianoff, "Speech Codes: Alive and Well at Colleges," *Chronicle of Higher Education* 49, no. 47 (August 1, 2003): B7.

<sup>731</sup> John K. Wilson, "Many of the Most Vocal Critics of Political Correctness Simply Want to Impose Their Own Version," *Chronicle of Higher Education* 41, no. 46 (July 28, 1995): B3.

from being offered. In another example of conservative censorship, Apple Computer asked historians who had produced a CD-ROM for use in elementary and secondary schools to remove all references to homosexuality, birth control, and abortion. Wilson believed that these examples demonstrated attempts by conservatives to promote their own form of ‘political correctness,’ and established significant threats to academic freedom.

### ***Academic Bill of Rights and Students for Academic Freedom***

The attention that speech codes received from the media helped to fuel a campaign to establish an Academic Bill of Rights by conservative activist, David Horowitz. To understand how Horowitz came to lead this movement, it is important to understand his affiliations. Although he identified as a leftist radical in the 1960s, by the 1970s, Horowitz had aligned himself with conservatism.<sup>732</sup> In 1988, Horowitz co-founded the Center for the Study of Popular Culture (CSPC), a non-profit organization that promotes conservatism. Over the years, the CSPC has received significant financial support from conservative foundations including the Scaife Foundation and the Bradley Foundation. Between 1998 and 2005, the two foundations contributed \$3.5 million to CSPC.<sup>733</sup> One of the early projects of the CSPC was a survey of the voter registrations of professors in the social sciences on forty different campus. The survey indicated that the majority of professors surveyed identified with the Democratic party. Horowitz used the results of this study to conclude that campuses were biased against conservative faculty.<sup>734</sup>

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<sup>732</sup> Jennifer Jacobson, “What Makes David Run,” *Chronicle of Higher Education* 51, no. 35 (May 6, 2005): A8-A12.

<sup>733</sup> Jacobson, “What Makes David Run.”

<sup>734</sup> David Horowitz, “The Campus Blacklist,” *FrontPageMagazine.com*, last modified April 18, 2003, <http://www.freerepublic.com/focus/f-news/896046/posts>.

In 2003, Horowitz founded the Students for Academic Freedom, a watchdog student group monitoring campus faculty. Horowitz was motivated to start this organization because of his desire to liberate conservative students from their leftist faculty. In tours across campuses, Horowitz noted that he regularly had to point out to conservative students that “they have been abused and should think about protesting the abuse.”<sup>735</sup> His advice to conservative students was to use the liberals’ arguments against themselves.

I encourage them to use the language that the left has deployed so effectively in behalf of its own agendas. Radical professors have created a ‘hostile’ learning environment for conservative students. There is a lack of ‘intellectual diversity’ on college faculties and in academic classrooms. The conservative viewpoint is ‘under-represented’ in the curriculum and on its reading lists. The university should be an ‘inclusive’ and intellectually ‘diverse’ community.<sup>736</sup>

Horowitz also encouraged students to demand that their schools adopt an academic bill of rights to ensure their protection on campus. By 2005, there were Students for Academic Freedom groups on 150 campuses. The groups were supported by three full-time staff who encouraged members to help their peers file complaints about professors indoctrinating students in leftist ideology as well as investigate student fee expenditures to ensure that they promoted a diverse range of speakers.<sup>737</sup> Students were also encouraged to recommend to campus administrators that they adopt Horowitz’s Academic Bill of Rights (ABOR).<sup>738</sup> Because campuses were not willing to adopt the ABOR, Horowitz and the Students for Academic Freedom decided to take their appeals to state legislatures. By 2005, a dozen states including Pennsylvania, Ohio, and Florida were all considering adopting an ABOR.<sup>739</sup>

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<sup>735</sup> Horowitz, “The Campus Blacklist.”

<sup>736</sup> Horowitz.

<sup>737</sup> The allocation of student fees was a central issue in *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819 (1995).

<sup>738</sup> Jacobson, “What Makes David Run.”

<sup>739</sup> June Kronholz, “Congress Wades into Campus Politics: Republicans Push for Academic Bill of Rights to Ensure ‘Dissenting Viewpoints’ in Class,” *Wall Street Journal*, October 4, 2005.

While the language in Horowitz's ABOR is decidedly neutral, the campaign to pass legislation in support of the ABOR drew criticism from groups within higher education.<sup>740</sup> Critics of the ABOR argued that it was a solution in search of a problem. Early efforts to gain legislative support were not successful because legislatures found that most higher education institutions already had processes and procedures in place to handle student grievances against faculty.<sup>741</sup> The American Association of University Professors (AAUP) accused the ABOR of not only being redundant, but "infring[ing] academic freedom in the very act of purporting to protect it."<sup>742</sup> The AAUP believed Horowitz's demand for diverse viewpoints on campus would make hiring decisions political rather than based on academic criteria. The AAUP opposed political infringement into hiring decisions as well as course content. According to Princeton student Asheesh Siddique, "[c]ollege students are much smarter and more capable of distinguishing between propaganda and informed opinion than Horowitz and his supporters think."<sup>743</sup> Siddique argued that elected leaders should be focused on issues of real concern to students like student loans and skyrocketing tuition rather than trying to restrict the free exchange of ideas on campus. Despite these criticisms, the ABOR continued to receive support from conservative foundations.

### ***Foundations and Firms***

The success of conservative attacks on higher education including the P.C. narrative would not have been possible without significant contributions from conservative foundations.

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<sup>740</sup> Stephen H. Aby, ed., *Academic Bill of Rights Debate: A Handbook* (Westport, CT: Praeger Publishers, 2007).

<sup>741</sup> Stephen H. Aby, "Academic Freedom in Perilous Times," in *Academic Bill of Rights Debate: A Handbook*, ed. Stephen H. Aby (Westport, CT: Praeger Publishers, 2007), 1-16.

<sup>742</sup> "AAUP-David Horowitz Exchange," in *Academic Bill of Rights Debate: A Handbook*, ed. Stephen H. Aby (Westport, CT: Praeger Publishers, 2007), 53-65, 53.

<sup>743</sup> Asheesh Kapur Siddique, "Thought Police in the Lecture Hall," *Washington Post*, October 28, 2006.

While many conservative organizations including Horowitz's CSPC claim to be grassroots organizations, the core of their financial support generally comes from conservative foundations.<sup>744</sup> Conservative attacks on the liberal bias of universities often originated in foundations funded by Republican donors. According to Donald Lazere,

conservative foundations and think tanks established in the past 30 years were designed to be, in effect, public relations agencies or lobbies for the Republican Party and the political and economic interests of their corporate sponsors, many of whose executives have also been visibly partisan, influential figures in that party, such as Richard Mellon Scaife (Scaife Foundation), the Coors family (Heritage Foundation), William Simon (Olin Foundation), and William Baroody (American Enterprise Institute).<sup>745</sup>

One critic of conservative foundations likened them to 'an old-fashioned political patronage machine' that paid intellectuals to write essays in support of Republican party positions.<sup>746</sup> For those scholars who chose to benefit from such financial patronage, the reward could be substantially more than financial. Conservative intellectuals, funded by conservative foundations, have also enjoyed significant access to political administrations where they have had the opportunity to shape policies. Several former academics including William Bennett, Lynne Cheney, Irving Kristol, William Kristol and Chester Fin would go on to work directly in Republican administrations demonstrating a close tie between conservative foundations, scholars, and politicians.<sup>747</sup>

The National Association of Scholars is another example of the ties between conservative foundations, scholars, and politicians. The organization enjoys significant financial support from the Bradley Foundation and the Olin Foundation. According to its members, the National

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<sup>744</sup> Jacobson, "What Makes David Run."

<sup>745</sup> Donald Lazere, "Money and Motives," *Inside Higher Ed*, last modified July 20, 2005.  
<https://www.insidehighered.com/views/2005/07/20/money-and-motives>.

<sup>746</sup> Lazere, "Money and Motives."

<sup>747</sup> Lazere.

Association of Scholars “promotes the study of Western culture and offers a forum to professors who have felt inhibited from questioning affirmative action programs, required courses on ethnic diversity, and other issues whose advocates are increasingly being described as ‘politically correct.’”<sup>748</sup> Liberal policies such as campus speech restrictions, mandates to hire minority faculty, and the overhaul of Western culture courses fueled interest in the organization by conservative scholars. Alan Kors, co-author of *The Shadow University*, was one of the founding members of the National Association of Scholars. Kors expressed his frustration with the lack of intellectual pluralism on campus, stating:

Universities do not put on page one of their catalogues: ‘We believe you to be the racist, sexist, homophobic progeny of a wicked America, and for \$30,000 a year, we will redress historical wrongs... They don't say that. But that's what they do.’<sup>749</sup>

Kors’ words reflect not only the frustration with ‘political correctness’ on campus, but the belief that higher education was becoming increasingly anti-American.

In addition to funding faculty groups, conservative foundations have contributed to student organizations such as the Leadership Institute, the Intercollegiate Studies Institute, and Young America’s Foundation. These organizations have been actively involved in the promotion of the conservative P.C. narrative and the debate about free speech on campus. In addition to sponsoring an annual leadership training program for conservative students, the Leadership Institute also manages the CampusReform.org website, which markets itself as a watchdog organization.<sup>750</sup> Students are encouraged to submit stories to CampusReform.org that highlight

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<sup>748</sup> Carolyn J. Mooney, “Academic Group Fighting the ‘Politically Correct Left’ Gains Momentum,” *Chronicle of Higher Education* 37, no. 15 (December 12, 1990): A1.

<sup>749</sup> Denise K. Magner, “10 Years of Defending the Classics and Fighting Political Correctness,” *Chronicle of Higher Education* 44, no. 16 (December 12, 1997): A12-A14.

<sup>750</sup> Jason M. Shepard and Culver, “Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times,” *San Diego Law Review* 55, no. 1 (2018): 87-158, 1010.

the liberal bias pervasive on college campuses. These stories are often picked up by conservative media outlets and then broadcasted to a larger audience. The Intercollegiate Studies Institute also encourages students to bring campus issues to the local media. A program director for the Intercollegiate Studies Institute shared with students that the media was “champing at the bit for PC stories.”<sup>751</sup> Students involved in the Young America’s Foundation were advised to promote their campus organizations as ‘Free Speech Associations,’ rather than align themselves with national groups that might be perceived as ‘politically-incorrect.’<sup>752</sup> The Young America’s Foundation gives out an annual anti-P.C. award of \$10,000 for faculty who fight political correctness on campus. The first recipient of the award was Jeffrey Hart, an English professor at Dartmouth, who was one of the only faculty to support the conservative independent newspaper, *The Dartmouth Review*, which was accused of publishing inflammatory and racist articles.<sup>753</sup>

Another organization that has been actively engaged with the conservative network is the Foundation for Individual Rights in Education (FIRE). FIRE seeks to educate students about their First Amendment rights and hold colleges and universities accountable to upholding the First Amendment.<sup>754</sup> Although FIRE maintains it is a nonpartisan organization, where it falls on the political spectrum is highly debated.<sup>755</sup> Conservative libertarian Charles Kors, a history professor at the University of Pennsylvania, and attorney Harvey Silverglate founded FIRE in 1999 just shortly after the release of their book, *The Shadow University*, which delivered a strong rebuke of political correctness on campus.<sup>756</sup> Further, FIRE regularly positions itself in

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<sup>751</sup> “Notebook,” *Chronicle of Higher Education* 37, no. 47 (August 7, 1991): A23.

<sup>752</sup> “Notebook.”

<sup>753</sup> “A Foundation Helps to Fight ‘Political Correctness,’” *Chronicle of Higher Education* 39, no. 2 (September 2, 1992): A15.

<sup>754</sup> Silverglate, French, and Lukianoff, *FIRE’s Guide to Free Speech on Campus*.

<sup>755</sup> Lukianoff, *Unlearning Liberty*; Southworth, *Lawyers of the Right*.

<sup>756</sup> Batchis, *The Right’s First Amendment*.

opposition to the liberal policies of universities, which led one *National Review* editor to declare that FIRE was considered a conservative group.<sup>757</sup> A look into FIRE's financial history reveals they have received over \$10 million dollars in donations from conservative foundations including the Charles G. Koch Charitable Foundation, Donor Trust, Dick and Betsy DeVos Family Foundation, and the Lynde and Harry Bradley Foundation.<sup>758</sup> Further, in recent years, FIRE has aligned with the conservative Goldwater Institute to promote their model legislation for free speech on campus.<sup>759</sup> There is strong evidence to suggest that FIRE aligns itself with conservatives in their attack on higher education and support of the First Amendment on campuses.

A final beneficiary of conservative foundations that has played an active role in debates about the state of the First Amendment on campus is the Alliance Defending Freedom (ADF), one of the largest conservative-funded legal organizations. The ADF was founded in 1994 as the Alliance Defense Fund by prominent Christian leaders Larry Burkett and James Dobson among others.<sup>760</sup> ADF's mission is to "reverse the growing threat against religious freedom" and they have actively defend court cases involving freedom of religion.<sup>761</sup> Since its founding, the organization has received significant funding from conservative foundations including the Richard and Helen DeVos Foundation and Bolthouse Foundation. In their 2016 tax filings, ADF

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<sup>757</sup> Batchis, *The Right's First Amendment*, 123.

<sup>758</sup> "Conservative Transparency: Basic Search," Conservative Transparency, accessed July 16, 2018, <http://conservativetransparency.org/basic-search/>.

<sup>759</sup> Jeremy Bauer-Wolf, "Experts: States Likely to Keep Abolishing Free-Speech Zones," Inside Higher Ed, last modified February 2, 2018, <https://www.insidehighered.com/news/2018/02/02/experts-states-likely-keep-abolishing-free-speech-zones>.

<sup>760</sup> "Our Leadership Team," Alliance Defending Freedom, accessed July 14, 2018, <https://www.adflegal.org/about-us/leadership>.

<sup>761</sup> "Our Leadership Team."

reported just over \$50 million dollars in revenue.<sup>762</sup> In addition to the over 2,000 affiliated lawyers, the ADF website lists a host of allies including the Family Research Council, the Heritage Foundation, Foundation for Individual Rights in Education, and Ratio Christi Student Apologetics Alliance.<sup>763</sup>

While the ADF has defended religious freedom cases in a variety of settings, it has attracted attention from higher education for focusing on cases involving students' First Amendment right to freedom of religion. In 2006, the ADF successfully defended the case of *Sklar v. Clough*, a complicated case that addressed multiple First Amendment issues due to restrictive speech codes and speech zones, the funding of student organizations based on content, and violations of the establishment clause.<sup>764</sup> The case was brought on behalf of Ruth Malhotra and Orit Sklar, both active members of the College Republicans, who claimed Georgia Tech's policies discriminated against their religious beliefs.<sup>765</sup> At the center of the case was the institute's "Safe Zone" training program, "which purported to tell students what the 'correct' interpretation of the Bible was regarding homosexual behavior."<sup>766</sup> The U.S. District Court for the Northern District of Georgia ruled against Georgia Tech's speech code and ordered the removal of religious information from the Safe Space program on the grounds that it was in violation of the establishment clause, which forbids states from preferencing one religion over

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<sup>762</sup> "Financial Report," Alliance Defending Freedom, accessed July 14, 2018, <https://www.adflegal.org/about-us/who-we-are/financials>.

<sup>763</sup> "Allies," Alliance Defending Freedom, accessed July 14, 2018, <https://www.adflegal.org/about-us/allies>.

<sup>764</sup> "*Skylar v. Clough*," ADF Center for Academic Freedom, accessed November 14, 2018, <http://centerforacademicfreedom.org/cases/sklar-v-clough/>. At the time this lawsuit was filed, the ADF was working under the name Alliance Defense Fund.

<sup>765</sup> "Ruth Malhotra and Orit Kwasman," ADF Center for Academic Freedom, accessed November 14, 2018, <http://www.adflegal.org/detailspages/client-stories-details/ruth-malhotra-and-orit-sklar>.

<sup>766</sup> "*Skylar v. Clough*," ADF Center for Academic Freedom, accessed November 14, 2018, <http://centerforacademicfreedom.org/cases/sklar-v-clough/>.

another.<sup>767</sup> The ADF also reached a settlement with Georgia Tech to eliminate its free speech zones.<sup>768</sup> The ADF has been involved in multiple First Amendment cases against colleges and universities in subsequent years.

While many conservative organizations enjoy significant funding from conservative foundations, organizations that were formed to push back on the rhetoric of political correctness and free speech on campus have had mixed success. Teachers for a Democratic Culture was formed by faculty who wanted to speak out against the rhetoric of the National Association of Scholars. According to Houston Baker, a faculty member at the University of Pennsylvania, “The need is to speak back and say, ‘This is misinformation, this is distortion, this has a political agenda behind it.’”<sup>769</sup> Unfortunately, the group does not have the same financial support as National Association for Scholars, so its influence has been limited in the public sphere. The Center for Campus Organizing, which was founded in 1991 as an electronic clearinghouse for social justice activities, was forced to close in 2002 due to a lack of financial support.<sup>770</sup> Media Matters launched in 2004 as a “progressive research and information center dedicated to comprehensively monitoring, analyzing, and correcting conservative misinformation in the U.S. media.”<sup>771</sup> Unlike the other groups, Media Matters has attracted significant funding from liberal

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<sup>767</sup> “Court: Georgia Tech “Safe Space” Program Not Safe From Constitution,” ADF Center for Academic Freedom, last modified May 1, 2008, <http://www.adfmedia.org/New/PRDetail/2224?search=1>.

<sup>768</sup> Malhotra and Sklar graduated from Georgia Tech and began careers with conservative and faith-based initiatives. At the 2009 Conservative Political Action Conference, they became the youngest recipients of the Ronald Reagan Award. In 2018, Malhotra testified before the Georgia Senate in support of Senate Bill 339, a bill addressing free speech on campus.

<sup>769</sup> Scott Heller, “Scholars Form Group to Combat ‘Malicious Distortions’ by Conservatives,” *Chronicle of Higher Education* 38, no. 4 (September 18, 1991): A19.

<sup>770</sup> “Campus Organizing Guide for Social Justice Groups,” Campus Activism, accessed February 2, 2020, <http://www.campusactivism.org/uploads/orgguide.pdf>, 2.

<sup>771</sup> “About Us,” Media Matters, accessed February 2, 2020, [mediamatters.org/about-us](http://mediamatters.org/about-us).

groups including Moveon.org, the Center for American Progress, and George Soros and continues to operate today.

### ***Higher Education and the Supreme Court***

In addition to cases at the state level such as *Sklar v. Clough*, higher education has continued to face challenges at the Supreme Court. Emboldened by the ruling in *Widmar v. Vincent*, conservative Christian groups began to challenge campus rules regarding student fees and student organizations. Once again, these groups claimed that university policies were interfering with their First Amendment rights. While the courts ruled in favor of the students in *Rosenberger v. Rectors and Visitors of University of Virginia*, they would reverse the trend and support universities in the cases of *Board of Regents, University of Wisconsin System v. Southworth* and *Christian Legal Society Chapter of University of California, Hastings College of Law v. Martinez*.

In *Rosenberger v. Rector*, the Supreme Court further clarified its public forum doctrine related to universities and the rights of students. At issue in the case was the constitutionality of funding a Christian newspaper with student activity fees paid to the University of Virginia by students.<sup>772</sup> Once again, the Supreme Court relied on the precedent of *Widmar v. Vincent* to articulate the competing interests in the Speech Clause and the Establishment Clause. The case involved the University of Virginia and its refusal to fund the newspaper of Wide Awake Productions, one of several student groups on campus.<sup>773</sup>

The University of Virginia had established a process whereby students could petition the University for recognition as a “Contracted Independent Organization” (CIO), which would

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<sup>772</sup> *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).

<sup>773</sup> *Rosenberger v. Rector*, 819.

allow them access to some university benefits, but also require them to publicly state that they were independent of the university.<sup>774</sup> Some CIOs were authorized to apply for funding from the Student Activities Fund (SAF) which was designated to support a broad range of extracurricular activities that furthered the educational mission of the University of Virginia.<sup>775</sup> One of the eleven categories of students groups permitted to seek SAF support included “student news, information, opinion, entertainment, or academic communications media groups.”<sup>776</sup> WAP was assigned this designation by the university, which made it eligible to apply for funding.

WAP published a student newspaper called *Wide Awake: A Christian Perspective on the University of Virginia* and applied for funding from SAF to print its newspaper. The Appropriations Committee of the Student Council denied WAP’s request for funding on the grounds that it violated SAF Guidelines which prohibited the funding of religious activities that promoted belief in a deity or ultimate reality.<sup>777</sup> WAP alleged that they were being discriminated against on the basis of their religious editorial viewpoint, which violated their rights under the First Amendment and the Fourteenth Amendment. The District Court ruled in favor of WAP. The United States Court of Appeals for the Fourth Circuit held that the SAF Guidelines discriminated on the basis of content, but that the University was justified because of its compelling interest in separation of church and state.<sup>778</sup> The case was then reviewed by the Supreme Court.

Justice Kennedy, writing the majority opinion for the Supreme Court, argued that the SAF represented a forum even if it was not a physical space, thus it was subject to the principles

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<sup>774</sup> *Rosenberger v. Rector*, 823.

<sup>775</sup> *Rosenberger v. Rector*, 824.

<sup>776</sup> *Rosenberger v. Rector*, 824.

<sup>777</sup> *Rosenberger v. Rector*, 827.

<sup>778</sup> *Rosenberger v. Rector*, 828.

of a public forum.<sup>779</sup> The University of Virginia, quoting language from *Widmar v. Vincent*, argued the SAF Guidelines were permissible because they represented content-based academic judgments to determine the best use of university resources.<sup>780</sup> However, the Supreme Court disagreed with the university's interpretation and clarified that the university was only entitled to make content-based decisions related to its own speech, not when it "expends funds to encourage a diversity of views from private speakers."<sup>781</sup> Because the university had taken clear steps to disassociate from CIOs, it could not reasonably infer that WAP's *Wide Awake* was speaking as a representative of the university. Further, WAP had been designated a CIO eligible for funding because of its primary role as a student media and communications group. If other groups within this category were eligible for funding, to deny funding to WAP because of its Christian content would represent viewpoint discrimination.

The University of Virginia argued further that it was compelled by the Establishment Clause not to fund religious activities. Relying on similar logic as in *Widmar v. Vincent*, the Court argued that the SAF program was neutral toward religion and there was no indication that the university used it to advance religion.<sup>782</sup> The student fees that were used to fund SAF were easily distinguished from "a tax levied for the direct support of a church or group of churches" as they were designed to introduce a broad range of ideas to the campus community.<sup>783</sup> Justice Kennedy recognized that there was a critical difference between government speech endorsing religion under the Establishment Clause and private speech endorsing religion which is protected

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<sup>779</sup> *Rosenberger v. Rector*, 830.

<sup>780</sup> *Rosenberger v. Rector*, 833.

<sup>781</sup> *Rosenberger v. Rector*, 834.

<sup>782</sup> *Rosenberger v. Rector*, 840.

<sup>783</sup> *Rosenberger v. Rector*, 840.

under the Free Speech Clause and the Free Exercise Clause.<sup>784</sup> For the reasons outlined, the Supreme Court ruled in favor of Rosenberger and reversed the decision of the Court of Appeals.<sup>785</sup> In a concurring opinion, Justice O'Connor stated that this ruling helped to ensure that "funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective."<sup>786</sup> Finally, an interesting point that O'Connor mentions in her concurrence was the possibility that the Free Speech Clause could be used by a student to challenge the use of student fees for speech with which he or she disagrees.<sup>787</sup> This point would become relevant in *Board of Regents v. Southworth*.

Justice Souter, in the dissenting opinion in *Rosenberger v. Rector*, stated unequivocally that the decision of the Court, "for the first time, approves direct funding of core religious activities by an arm of the State."<sup>788</sup> Souter provides a much more robust description of *Wide Awake* than was included in the majority opinion. Specifically, Souter references the *Wide Awake*'s mission "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."<sup>789</sup> He references the inclusion in the paper of religious poetry, religious textual analysis and commentary, instruction on religious practices, and suggested prayers and contemplative questions about biblical texts as further evidence of the newspaper's mission to promote Christianity.<sup>790</sup> Souter claims that the content of the newspaper is "not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit," and

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<sup>784</sup> *Rosenberger v. Rector*, 841.

<sup>785</sup> *Rosenberger v. Rector*, 846.

<sup>786</sup> *Rosenberger v. Rector*, 846.

<sup>787</sup> *Rosenberger v. Rector*, 851.

<sup>788</sup> *Rosenberger v. Rector*, 863.

<sup>789</sup> *Rosenberger v. Rector*, 865.

<sup>790</sup> *Rosenberger v. Rector*, 866.

amounts to the direct subsidization of religious preaching forbidden under the Establishment Clause.<sup>791</sup> Even though the majority determined that WAP was not a religious organization, Souter believed its actions were indicative of one. Because the SAF Guidelines prohibited funding all religious activities, the decision not to fund WAP would not result in viewpoint discrimination and would be permissible in Souter's view.<sup>792</sup> This case was significant for higher education because it opened up the opportunity for religious organizations to receive public funds, which had previously been denied, through the student activity fee allocation process.

As Justice O'Connor predicted in the concurrent decision in *Rosenberger v. Rector*, in 1996 a group of law students at the University of Wisconsin alleged that the "imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment."<sup>793</sup> The students alleged that the university must allow them the opportunity to deny funding to organizations that are offensive to their personal beliefs, particularly environmental groups, multicultural groups, and LGBT organizations.<sup>794</sup> The students involved in the case relied on jurisprudence in cases involving members of labor unions and bar associations that were required to pay fees that the groups then used to fund speech the members found objectionable.<sup>795</sup> However, in an unanimous decision in *Board of Regents v. Southworth*, the Supreme Court found in favor of the Board of Regents and the University of Wisconsin.

Relying on jurisprudence from earlier cases, the Supreme Court affirmed the right of the University of Wisconsin to charge its students an activity fee to fund a wide variety of

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<sup>791</sup> *Rosenberger v. Rector*, 868.

<sup>792</sup> *Rosenberger v. Rector*, 895.

<sup>793</sup> *Board of Regents, University of Wisconsin System v. Southworth*, 529 U.S. 217, 221 (2000).

<sup>794</sup> *Board of Regents v. Southworth*, 222.

<sup>795</sup> *Board of Regents v. Southworth*, 221. For more information on those cases, see *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) and *Keller v. State Bar of Gal.*, 496 U.S. 1 (1990).

extracurricular student speech, given the program that disseminated those funds did so in a manner that was viewpoint neutral.<sup>796</sup> The Court recognized that it was “inevitable that fees will result in subsidies to speech which some students find objectionable and offensive to personal beliefs,” but as the mission of the university is to facilitate a range of speech, the Court was not in a position to mandate the university to refund students who found some speech objectionable.<sup>797</sup> The University of Wisconsin was acting within its rights to administer a program that allowed a wide variety of registered student organizations (RSO) to qualify for allocable funding generated from the segregated fee.<sup>798</sup> There was, however, a concern from the Court that the student referendum aspect of the funding program demonstrated inconsistencies in viewpoint neutrality and this portion of the case was remanded for further consideration.<sup>799</sup> This case was significant because it upheld the right of universities to fund diverse viewpoints even in a political environment that accused campuses of being ‘politically correct.’

In a final examination of a case involving students’ rights at a university, *Christian Legal Society v. Martinez* addressed the rights to free speech, free association, and the free exercise of religion of students involved in the Hastings College of Law’s Christian Legal Society (CLS) chapter.<sup>800</sup> Hastings required that student groups seeking recognition as a Register Student Organization (RSO) must agree to abide by the college’s Policy on Nondiscrimination, which “mandate[d] acceptance of all comers.”<sup>801</sup> Because the CLS was unwilling to agree to the Policy on Nondiscrimination, they had been denied recognition as a RSO, but were still able to access

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<sup>796</sup> *Board of Regents v. Southworth*, 221.

<sup>797</sup> *Board of Regents v. Southworth*, 232.

<sup>798</sup> *Board of Regents v. Southworth*, 223.

<sup>799</sup> *Board of Regents v. Southworth*, 230.

<sup>800</sup> *Christian Legal Society Chapter of University of California, Hastings College of Law v. Martinez*, 561 U.S. 661 (2010).

<sup>801</sup> *Christian Legal Society v. Martinez*, Opinion I.

college facilities for meetings and events. At the outset, Justice Ginsberg, writing for the majority, “emphasized that the First Amendment generally precludes public universities from denying student organizations access to school sponsored forums because of the groups’ viewpoints,” specifically referring to the decisions in *Rosenberger v. Rector, Widmar v. Vincent*, and *Healy v. James*.<sup>802</sup> In this particular case, the point in question was “whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.”<sup>803</sup>

Regarding the CLS’s allegation that the all-comers policy limits free speech and expressive association, Ginsburg argued that a government entity maintains the right to place limitations on speech and access to a limited public forum, like the RSO program, as long as the limitations are reasonable and content neutral.<sup>804</sup> The Policy on Nondiscrimination established by Hastings ensured that all leadership, educational and social opportunities at the college would be open to all students. Further, Hastings required all groups seeking RSO recognition to agree to comply with the policy to ensure that “no Hastings student is forced to fund a group that would reject her as a member.”<sup>805</sup> The rationale for the Policy on Nondiscrimination was viewed as rational by the Court and viewpoint neutral because it applied equally to all groups.

CLS argued that the Hastings’ all-comers policy was “absurd” because it prohibited groups from forming around viewpoints.<sup>806</sup> The CLS worried that “if organizations must open their arms to all...saboteurs will infiltrate groups to subvert their mission and message.”<sup>807</sup> The

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<sup>802</sup> *Christian Legal Society v. Martinez*, Opinion I.

<sup>803</sup> *Christian Legal Society v. Martinez*, Opinion II.

<sup>804</sup> *Christian Legal Society v. Martinez*, Opinion IIIA.

<sup>805</sup> *Christian Legal Society v. Martinez*, Opinion IIIC2.

<sup>806</sup> *Christian Legal Society v. Martinez*, Opinion IIIC4.

<sup>807</sup> *Christian Legal Society v. Martinez*, Opinion IIIC4.

Court held there was no evidence provided to suggest such a situation would occur and that RSOs maintained the ability to condition eligibility for membership or leadership on some neutral requirement to ensure that students join “because of their commitment to a group’s vitality, not its demise.”<sup>808</sup> After considering the evidence presented in the case, the majority affirmed the rulings of the lower courts that the all-comers policy is constitutional.<sup>809</sup>

Justice Alito, writing in the dissent, strongly opposed the majority decision of the Court believing it to be in direct opposition to the longstanding free speech jurisprudence which sought to protect speech with which we might hate or disagree. He stated,

Today’s decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.<sup>810</sup>

Alito argued that the Court conflated Hastings’ Policy on Nondiscrimination with an all-comers policy, which was not an official record of the College. The Dean of the College of Law said that the Policy on Nondiscrimination has been interpreted to mean that all students must have access to membership in all student organizations. Because CLS wished to exclude students based on religion and sexual orientation, Hastings was unwilling to approve the CLS as a RSO. Alito argued that the Policy on Nondiscrimination permitted viewpoint discrimination against religious viewpoints because “religious groups were not permitted to express a religious viewpoint by limiting membership to students who shared their religious viewpoint.”<sup>811</sup> Additionally, Alito argued the policy discriminated on the basis of viewpoint regarding sexual morality because the group was prohibited to express its views that sexual conduct should take place only in the

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<sup>808</sup> *Christian Legal Society v. Martinez*, Opinion III C4.

<sup>809</sup> *Christian Legal Society v. Martinez*, Opinion IV.

<sup>810</sup> *Christian Legal Society v. Martinez*, Dissent I.

<sup>811</sup> *Christian Legal Society v. Martinez*, Dissent IV.

bounds of marriage between a woman and a man.<sup>812</sup> For these reasons, Alito viewed the decision of the Court to be objectionable.

The decision in *Christian Legal Society v. Martinez* drew significant ire from conservatives and proponents of the First Amendment. They viewed the court's decision as a means of restricting the freedom of expressive association and failing to protect a diversity of viewpoints on the campus.<sup>813</sup> FIRE shared with its supporters its displeasure with the Supreme Court's ruling, stating, "The majority opinion takes the bizarre position that belief-based student organizations may not 'discriminate' on the basis of belief, ignoring the fact that this kind of 'discrimination' is precisely what freedom of association is designed to protect."<sup>814</sup> In the aftermath of the ruling, colleges and universities have strengthened their nondiscrimination policies because they believe these policies support their educational message and are one of the few avenues left by the courts to protect students on campus.<sup>815</sup> Facing setbacks in the courts, the conservative movement would shift their focus to legislative bodies to force colleges and universities to protect the interests of conservative students, while placing restrictions on the free speech rights of their opponents.

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<sup>812</sup> *Christian Legal Society v. Martinez*, Dissent IV.

<sup>813</sup> Jonathan Winters, "Thou Shall Not Exclude: How *Christian Legal Society v. Martinez* Affects Expressive Associations, Limited Public Forums, and Student's Associational Rights," *University of Toledo Law Review* 43 (2012): 747-777.

<sup>814</sup> "'Christian Legal Society v. Martinez': Frequently Asked Questions," FIRE, last modified April 30, 2010, <https://www.thefire.org/christian-legal-society-v-martinez-frequently-asked-questions/#Question3>.

<sup>815</sup> Melanie Crouch, "The Public University's Right to Prohibit Discrimination," *Houston Law Review* 53 (2016): 1369-1400.

## 6 FREE SPEECH AND CAMPUSES TODAY

The last ten years have heightened attention to higher education as the conservative P.C. narrative has evolved into a free speech narrative that charges colleges and universities with colluding with liberal students to prohibit freedom of expression on campus. The rise of social media during this period has made it easier to spread stories of intolerance on campus from both conservatives and liberals. Students have harnessed the power of social media for activism as well as to raise the alarm regarding pervasive intolerance that continues to plague campus communities. Meanwhile, conservatives have continued to target higher education through legal means and a concerted effort to pass legislation to ensure campuses are safe spaces for conservative students, while looking to curb the influence of liberal student activists.

### *Student Activism in the Age of Social Media*

Although not wholly a student movement, the Occupy Wall Street movement was one of the first movements to embrace social media and many students were active participants in the movement. In September 2011, a group of activists gathered at Zuccotti Park in the heart of the financial district, Wall Street, to protest the growing gap in wealth between the richest and poorest in society.<sup>816</sup> Eventually the protest spread to college campuses where students voiced a “call for relief from the tremendous amount of student debt held nationally.”<sup>817</sup> The opportunity to connect with others over frustrations with the economy, the lack of career prospects, and mounting student debt helped people to feel the shared burden of income inequality. A petition was circulated among Occupy movement sites that encouraged people to sign a pledge that they

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<sup>816</sup> John Erde, “Constructing Archives of the Occupy Movement,” *Archives and Records* 35, no. 2 (2014): 77-92.

<sup>817</sup> Adam Gismondi and Laura Osteen, “Student Activism in the Technology Age,” *New Directions for Student Leadership* 153 (Spring 2017): 63-74, 66.

would not repay their student loans if one million people supported the petition.<sup>818</sup> While the Occupy movement began as physical demonstrations with activists taking over prominent locations, it eventually spread through social media.<sup>819</sup> Most significant to the Occupy Wall Street movement was the prevalence of a single account on Tumblr entitled, “We are the 99 Percent,” where people shared their personal stories of economic hardship and galvanized support for the movement.<sup>820</sup> Facebook and Twitter were used to organize offline events including notifying people about event times and locations in real time. YouTube videos allowed people to share what was happening at individual sites to fellow activists around the country. It was social media that drew attention to the Occupy movement at the University of California at Davis.

On November 18, 2011, a group of students affiliated with the Occupy movement at the University of California at Davis sat in a line on the campus quad to protest the decision by the campus administration to clear the Occupy UC Davis encampment.<sup>821</sup> Earlier in the week, students had set up camp to protest the increase in tuition rates. The administration determined they did not want the encampment to remain up over the weekend, so they deployed the police to break up the encampment and remove the students.<sup>822</sup> When police began removing tents, students locked arms in a line around the encampment in peaceful protest. In a scene that would spread rapidly over social media, “the seated protestors [were] doused with a bright orange spray

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<sup>818</sup> Eric Hoover, “Debt Protestors Denounce Colleges for Broken Promises,” *Chronicle of Higher Education* 58, no. 15 (December 2, 2011): A1-A8.

<sup>819</sup> Erde, “Constructing Archives of the Occupy Movement.”

<sup>820</sup> Gismondi and Osteen, “Student Activism in the Technology Age.”

<sup>821</sup> Corey Golden, “Katehi, Chief Huddled with 13 on Decision to Remove Camp,” *Davis Enterprise*, December 11, 2011.

<sup>822</sup> Brian Stelter, “U.C. Davis to Investigate Use of Pepper Spray at Protest,” *New York Times*, November 20, 2011.

by campus officers, whose body language appeared surprisingly casual.”<sup>823</sup> One observer noted that the officers moved nonchalantly along the line, spraying students with pepper spray, as if the officers were spraying weeds. By Friday evening, videos of the incident were spreading on social media with one YouTube video being viewed over 200,000 times by Saturday.<sup>824</sup> Once the videos of the students being pepper sprayed by police began to spread, students on more than sixty campuses protested in solidarity with the University of California at Davis students.<sup>825</sup> The ACLU came out in support of the students asserting that the use of pepper spray on nonthreatening crowds violated the right of peaceful assembly.<sup>826</sup>

The Occupy Wall Street movement reawakened the student movement on campuses and in some ways was reminiscent of the activism of the 1960s. Students involved in the Occupy movement participated in teach-ins, rallies, and occupations of campus spaces in much the same way as activists from the 1960s. The students involved in the Occupy movement also shared another more subtle similarity to anti-war activists of the 1960s, who generally were more privileged than the average student and tended to attend elite colleges and universities. A study of Occupy protestors in New York City found that the majority of protestors were white, financially stable, and had attended college at elite institutions.<sup>827</sup> Asal, Testa, and Young argue that students from privileged backgrounds have more access to resources to participate in protest as well as more flexibility to join a movement that might last several days or weeks. The Occupy movement activists also enjoyed the support of faculty as well as the AAUP who publicly

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<sup>823</sup> Katharine Q. Seelys, “Pepper Spray’s Fallout, From Crowd Control to Mocking Images,” *New York Times*, November 22, 2011.

<sup>824</sup> Stetler, “U.C. Davis to Investigate.”

<sup>825</sup> Victor Asal, Alexander Testa and Joseph Young, “Occupy This: Why Some Colleges Had Occupy Wall Street Protests,” *Dynamics of Asymmetric Conflict* 10, no. 2/3 (July-November 2017): 81-103.

<sup>826</sup> Hoover, “Debt Protestors Denounce Colleges.”

<sup>827</sup> Asal, Testa, and Young, “Occupy This.”

declared to stand in solidarity with the protestors.<sup>828</sup> The Black Lives Matter movement, which also spread to campuses, did not enjoy the same support as the Occupy Movement.

In a similar manner as the Occupy movement, the Black Lives Matter movement relied on social media to spread its message and connect activists around the country. While a number of events have come to be affiliated with the Black Lives Matter movement, the acquittal of George Zimmerman in the death of Trayvon Martin ignited the hashtags #blacklivesmatter and #blm online as people looked for opportunities to share their grief and frustration at the court's decision.<sup>829</sup> The Black Lives Matter hashtag was created in 2012 by three black queer organizers and activists from the San Francisco area, Alicia Garza, Patrisse Cullors, and Opal Tometi.<sup>830</sup> While the Occupy movement has enjoyed the support of faculty and the AAUP, the support for the Black Lives Matter movement has primarily come from faculty already invested in racial justice programs on campus.<sup>831</sup> Despite the lack of widespread support on campuses, student activists involved in the Black Lives Matter movement have worked to bring the movement to campuses. Activists have focused the Black Lives Matter movement on campuses on issues that have persisted on campuses for decades: the lack of faculty diversity, shortage of ethnic studies classes and programs, and the well-being of students of color.<sup>832</sup>

In the fall of 2015, the Black Lives Matter movement intersected with unrest at the University of Missouri. In a matter of months, several racially charged incidents had occurred on the campus including a swastika drawn in feces on a residence hall wall and racial slurs being

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<sup>828</sup> Donna Hunter and Emily Polk, "Academic Responses to Occupy Wall Street and Black Lives Matter," *Peace Review: A Journal of Social Justice* 28, no. 4 (October – December 2016): 444-450.

<sup>829</sup> Gismondi and Osteen, "Student Activism in the Technology Age."

<sup>830</sup> Hunter and Polk, "Academic Responses to Occupy."

<sup>831</sup> Hunter and Polk. As of 2015, the AAUP had not issued a statement of support for Black Lives Matter and the *Chronicle of Higher Education* had only mentioned the movement six times.

<sup>832</sup> Sandhya Somashekhar, "How Black Lives Matter Became a Campus Force," *Washington Post*, November 18, 2015.

directed at the student body president as well as African American students rehearsing for a homecoming event.<sup>833</sup> Students on campus grew increasingly frustrated by the university administration's lack of response to these racial incidents. On September 12, the student government president, Payton Head, posted on Facebook about his personal experience with racism in the campus community including a story about "some guys riding on the back of a pickup truck...continuously scream[ing] NIGGER at me."<sup>834</sup> Within hours, hundreds of people had read Head's story and began to communicate their concerns directly to the administration through social media tags. Activists relied heavily on social media to connect concerned students together and organize protest activities.

On October 10, 2015, eleven students wearing t-shirts that read "1839 was built on my B(L)ACK," interrupted the homecoming parade.<sup>835</sup> The students announced the reason for their protest over a megaphone and shared critical racial incidents in the history of the university. Then, they blocked the convertible carrying President Wolfe and his wife in the parade. Parade attendees grew frustrated with the activists and began mocking the protestors while Wolfe looked on without comment. Following the parade, the activists announced the formation of the group #ConcernedStudent1950, a nod to the year that Missouri admitted its first African American student. Over the next few weeks, the group would continue to express their frustration with the lack of response from President Wolfe.

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<sup>833</sup> Evan Frederick, James Sanderson, and Nicholas Schlereth, "Kick These Kids Off the Team and Take Away Their Scholarships: Facebook and Perceptions of Athlete Activism as the University of Missouri," *Journal of Issues in Intercollegiate Athletics* 10 (2017): 17-34.

<sup>834</sup> Paige Alfonzo and Christina R. Foust, "Campus Activism in the Digital Age: An Ecological Chronology of #Concernedstudent1950," *Journal of Contemporary Rhetoric* 9, no. 3 (2019): 87-111, 92.

<sup>835</sup> Alfonzo and Foust, "Campus Activism in the Digital Age."

On November 2, an African American graduate student, Jonathan Butler, announced he was going on a hunger strike to force the removal of President Timothy Wolfe, whom Butler believed had failed to meet the responsibilities of a campus president as demonstrated by Wolfe's decision to ignore racial incidents, end Planned Parenthood services on campus, and refuse to respond to #ConcernedStudent1950.<sup>836</sup> In a move that infuriated sports fans in the conservative state, the African American players on the football team announced on November 7 that they were going on strike in support of Butler and #ConcernedStudent1950.

The football team's solidarity with the hunger strike on campus was announced on social media. A statement was made on Twitter that the players would not practice or compete in any football games until Butler ended his hunger strike.<sup>837</sup> A picture of the players locking arms with Butler was widely circulated on Twitter along with a message that "athletes of color at the University truly believe 'Injustice Anywhere is a threat to Justice Everywhere.'"<sup>838</sup> Throughout the strike and the weeks leading up to it, "Twitter functioned as a central locus to organize the protest – from breaking news to building public networks and allowing positions to be narrated in an interconnected context."<sup>839</sup> On November 8, the coaching staff and the remainder of the football team declared their support for the players in a move that was widely publicized because it threatened to bring financial sanctions on the university if they failed to honor their upcoming game with Brigham Young University. Within two days after the football team's boycott of practices and games, Wolfe resigned his position at the University of Missouri.<sup>840</sup>

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<sup>836</sup> Gismondi and Osteen, "Student Activism in the Technology Age."

<sup>837</sup> Grace Yan, Ann Pegoraro, and Nicholas Masafumi Watanabe, "Student-Athletes' Organization of Activism at the University of Missouri: Resource Mobilization on Twitter," *Journal of Sport Management* 32, no. 1 (2018): 24-37.

<sup>838</sup> Alfonzo and Foust, "Campus Activism in the Digital Age," 104.

<sup>839</sup> Yan, Pegoraro, and Watanabe, "Student-Athletes' Organization of Activism," 25.

<sup>840</sup> Gismondi and Osteen, "Student Activism in the Technology Age."

In the midst of the protest and strike, the University of Missouri received over 4,700 messages related to the incident from long-time supporters and alumni. One woman wrote the following message of outrage to the athletic director:

It is an outrage that Missouri University football players threatened to refuse playing ball unless their demands are met...Along with other supporters of the program I will consider dropping my support...I would rather the team forfeit the game this Saturday than to give in to their demands.<sup>841</sup>

One alum accused the football team of blackmailing the university. Other alumni wrote to say they would no longer donate to the university and would be destroying all paraphernalia associated with the university. A parent wrote, “Free speech is under assault on campus by immature, spoiled, thin skinned punks...I am seriously considering removing my son after this semester. I will never allow him to take politically correct ‘racial sensitivity training’ if required.”<sup>842</sup> The activism at the University of Missouri put the issues of free speech and political correctness on campuses back in the spotlight and demonstrated the conservative limits on free speech.

In a study of the Facebook responses to the football team’s boycott, researchers found that messages from white people were likely to chastise and condemn the athletes for “having the audacity to challenge the status quo.”<sup>843</sup> In many of the messages, activism was seen as something that athletes should not be involved in, which supports research that finds athletes who engage in activism face a backlash from constituents who believe sports and politics should not mix. Frederick, Sanderson, and Schlereth found the backlash ironic, “considering it was the individuals who commented on Facebook that introduced politics (i.e., Constitutional rights) into

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<sup>841</sup> Jillian Kay Melchoir, “New Revelations about Mizzou Crisis,” National Review, last modified April 26, 2016, <https://www.nationalreview.com/2016/04/mizzou-firings-chronicle-campus-crisis/>.

<sup>842</sup> Melchoir, “New Revelations about Mizzou Crisis.”

<sup>843</sup> Frederick, Sanderson, and Schlereth, “Kick These Kids Off the Team,” 28.

the discussion, not those who were engaged in the activism itself.”<sup>844</sup> These individuals do not appear to see the hypocrisy in complaining about the state of free speech on campus, while simultaneously trying to shut down the speech of athletes with whom they disagreed.

While parents and alumni were actively complaining about the free speech rights of the athletes, activists on the ground during the protest were also found to interfere with the rights of journalists to cover the protest. In the aftermath of the Wolfe’s resignation, students who had been camping on the campus, in solidarity with the protest, erupted in celebration and media descended on the campus to document the event.<sup>845</sup> Activists with the #ConcernedStudent1950 group did not want reporters near the encampment and they began chanting, “hey, hey, ho, ho, reporters have got to go.”<sup>846</sup> Tim Tai, a freelance student photographer for ESPN, attempted to take photos of the student camp and tried explaining to the activists that he had a First Amendment right to be there just like them. The students at the scene argued that Tai was being unethical because he failed to respect their request for privacy.<sup>847</sup> In a moment that would spread quickly through the media, communications faculty member, Melissa Click, attempted to stop Tai from covering the scene. She appeared to reach for his camera, while yelling, “Who wants to help me get this reporter out of here? I need some muscle over here.”<sup>848</sup> Although she later apologized for her actions, Click could not undo the firestorm of media attention that ensued, reigniting conversations about excessive political correctness on campuses.<sup>849</sup>

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<sup>844</sup> Frederick, Sanderson, and Schlereth, “Kick These Kids Off the Team,” 28.

<sup>845</sup> Ben Trachtenberg, “The 2015 University of Missouri Protests and Their Lessons for Higher Education Policy and Administration,” *Kentucky Law Journal* 107 no. 1 (2018): 61-122.

<sup>846</sup> “Obstruction of Free Speech,” *Washington Post*, November 11, 2015.

<sup>847</sup> Austin Huguelet and David Victor, “‘I Need Some Muscle’: Missouri Activists Block Journalists,” *New York Times*, November 9, 2015.

<sup>848</sup> Huguelet and Victor, “‘I Need Some Muscle.’”

<sup>849</sup> Heidi Kitrosser, “Free Speech, Higher Education, and the PC Narrative,” *Minnesota Law Review* 101, no. 5 (May 2017): 1987-2064; “Campus Crazy,” *National Review* 67, no. 22 (December 7, 2015): 16.

### *Speaker Disinvitations and Security Fees*

A series of highly publicized speaker disinvitations in 2016 also contributed to the narrative that campuses were hostile to free speech. Although the media narrative has focused on disinvitations prompted by left-leaning students, evidence from FIRE's speaker disinvitation database suggests that attacks come from both the left and right of the political spectrum. Left-leaning groups are most likely to attempt to block speakers due to concerns about racial issues, gender issues, civil liberties, or views on evolution. Right-leaning groups are most likely to block speakers from discussing sexual orientation, abortion, contraception, and the Israeli-Palestinian conflict.<sup>850</sup> Since 1998, FIRE has tracked 441 attempts to block speakers from campus with 267 attempts coming from the left of the speaker and 126 attempts coming from the right of the speaker.<sup>851</sup> Left-leaning groups have successfully blocked 111 speaker invitations, while right-leaning groups have blocked 70 speaker invitations. A closer look at the list of speakers who have generated controversy on campuses indicates that speakers from the right tend to generate multiple disinvitations, while this is less common for speakers from the left. For example, only three speakers have been blocked three or more times by the right including Norman Finkelstein, Ward Churchill, and William Ayers. In comparison, six speakers have been blocked three or more times by the left including Ben Shapiro, Charles Murray, James Watson, Jim Gilchrist, Milo Yiannopoulos, and Nonie Darwish. Milo Yiannopoulos currently holds the record with seven successful disinvitations and nine more attempted disinvitations.

Yiannopoulos represents one of the challenges that campuses have when it comes to speakers. According to PEN America, some speakers come to campus with the intention of

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<sup>850</sup> "Disinvitation Database," FIRE, accessed February 5, 2020, <https://www.thefire.org/research/disinvitation-database/>.

<sup>851</sup> "Disinvitation Database."

stoking controversy by using shocking, offensive, and antagonistic language that does not promote the ideal of open and intellectual discourse.<sup>852</sup> Yiannopoulos, a former editor at Breitbart is known for using racist, sexist, and homophobic commentary in his speeches. In 2016, he embarked on the “Dangerous Faggot Tour,” where he was scheduled to visit twenty-three campuses with the support of the College Republicans, Young America’s Foundation and Turning Point USA.<sup>853</sup> During many of his campus visits, students came out to protest him, sometimes holding signs silently and other times chanting in protest. Yiannopoulos received the most attention when he attempted to visit Berkeley.

Yiannopoulos was scheduled to speak at the University of California at Berkeley on February 1, 2017, but his speech was canceled due to violent protests led by activists associated with the “black bloc,” a militant leftist group committed to shutting down fascist speech at all costs.<sup>854</sup> Right-wing groups attempted two more times in the following months to hold rallies in Berkeley and each time, the rallies were canceled due to violence. The repeated cancellation of right-wing speakers and rallies has made Berkeley a target for right-wing celebrities like Ann Coulter, Ben Shapiro, and Yiannopoulos because “they know that the violent response to their appearance will vividly illustrate the right’s view of the left as intolerant and vile.”<sup>855</sup> Bob Ostertag, a University of California at Davis professor, warned that the repeated cancellations of Yiannopoulos events and the accompanying violence have been “such a debacle for the national

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<sup>852</sup> “Chasm in the Classroom: Campus Free Speech in a Divided America,” PEN America, last modified April 2, 2019, <https://pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf>, 32.

<sup>853</sup> “Chasm in the Classroom,” 32-33. Turning Point USA was founded in 2012 by Charlie Kirk. This mission of the organization is to “identify, educate, train, and organize students to promote the principles of freedom, free markets, and limited government.” “About TPU,” Turning Point USA, accessed February 5, 2020, <https://www.tpusa.com/about>. This is one of the latest student organizations to join the conservative coalition and it has been active in a number of lawsuits against universities.

<sup>854</sup> Raymond Barglow, “Radically Wrong in Berkeley,” *Skeptic* 22, no. 4 (2017): 32-35.

<sup>855</sup> Raymond Barglow, “Radically Wrong in Berkeley,” 33; and Purnima Bose, “For Campus Free Speech,” *Against the Current* 33, no. 2 (May/June 2018): 7-10.

opposition to Trump that it almost defies belief...At exactly this moment, because of what happened at Berkeley, the Trump regime gets to present itself as the guardian of free speech in America,” despite the administration’s own attempts to block the press from events and punish reporters.<sup>856</sup> In September 2018, Yiannopoulos announced that he would return to Berkeley for a weeklong event called “Free Speech Week” with other conservative speakers like Heather MacDonald, Charles Murray, and Steve Bannon.<sup>857</sup> The event did not materialize as the other speakers had not actually been invited and the group responsible for inviting Yiannopoulos to campus never completed the necessary paperwork to gain access to campus spaces. Despite these obstacles, Yiannopoulos was determined to speak on the Berkeley campus, so he held an event in in Sproul Plaza, an open area of the campus, during the noon hour. The speech lasted just twenty minutes but cost the university \$800,000.

Another challenge for universities in the free speech debate is the exorbitant cost of security when controversial speakers come to campus. Because public universities cannot make content-based decisions about campus reservations, they are often left footing the bill when controversial speakers target their campuses. In 2016, Ben Shapiro’s visit to the University of California at Berkeley cost the university \$600,000 in security fees.<sup>858</sup> When Richard Spencer visited the University of Florida in October 2017, the university paid \$500,000 in security fees.<sup>859</sup> The University of Florida was particularly concerned about Spencer’s presence on campus after the violent clash near the University of Virginia’s campus rotunda between alt-right

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<sup>856</sup> Bob Ostertag, “The Debacle at Berkeley,” Huffington Post, last modified February 6, 2017, [https://www.huffpost.com/entry/the-debacle-at-berkeley\\_b\\_58978689e4b0985224db56b0](https://www.huffpost.com/entry/the-debacle-at-berkeley_b_58978689e4b0985224db56b0).

<sup>857</sup> “Chasm in the Classroom,” 34.

<sup>858</sup> Purnima Bose, “For Campus Free Speech.”

<sup>859</sup> Jason Wilson, “Charlottesville: Far-Right Crowd with Torches Encircles Counter-protestors,” Guardian, last modified August 12, 2017, <https://www.theguardian.com/world/2017/aug/12/charlottesville-far-right-crowd-with-torches-encircles-counter-protest-group>.

protesters and student counter-protestors during the Unite the Right rally in Charlottesville.<sup>860</sup>

The rising cost of security is a real concern for public colleges and universities already facing budget constraints. The fact that public universities are more constrained in their ability to limit outside speakers has made them a favorite target of conservative speakers like Shapiro and Yiannopoulos. When denied access to campus, these individuals have threatened to sue universities for denying them a platform.<sup>861</sup>

### Legal Cases

The number of legal cases against universities for First Amendment violations has continued unabated for the last several years. Many of these cases have been brought by students associated with conservative student organizations including the College Republicans, Young America's Foundation, and Turning Point USA. The Goldwater Institute, FIRE, and the Alliance Defending Freedom have been involved in cases involving the First Amendment rights of students that identify with conservative causes. A close inspection of the cases reveals that lawyers from the Alliance Defending Freedom are often involved in cases involving the First Amendment right to freedom of religion. Examples of cases from the last few years provide insight into the primary conservative concerns regarding free speech on campus.

The case of *Keeton v. Anderson-Wiley* was brought on behalf of Jennifer Keeton by the Alliance Defending Freedom. Keeton alleged that her First Amendment rights to free speech and free exercise of religion were denied by faculty at Augusta State University.<sup>862</sup> Keeton was enrolled in the Counselor Education Program at the university seeking a degree in school

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<sup>860</sup> Louis P. Nelson and Claudrena N. Harold, eds., *Charlottesville 2017: The Legacy of Race and Inequity* (Charlottesville: University of Virginia Press, 2018).

<sup>861</sup> "Chasm in the Classroom," 35.

<sup>862</sup> *Keeton v. Anderson-Wiley, et al.*, No. 10-13925 (11<sup>th</sup> Cir. 2011).

counseling. After her first year in the program, Keeton was asked to participate in a remediation plan before she could participate in the program's clinical practicum, which was a requirement for graduation.<sup>863</sup> Keeton was referred for remediation because "she believed that the GLBTQ population suffers from identity confusion, and...intended to attempt to convert students from being homosexual to heterosexual."<sup>864</sup> These views were incompatible with the American Counseling Association's (ACA) Code of Ethics, which the university was obligated to adopt in order to receive accreditation for its counseling program.<sup>865</sup> The faculty prepared a remediation plan for Keeton that could prepare her to become a multiculturally competent counselor and allow her to comply with the ACA Code of Ethics.<sup>866</sup> Keeton insisted that she was being forced by the program to alter her personal religious beliefs. After initially agreeing to participate in the remediation plan, she withdrew from the program and filed suit against the University.

The United States Court of Appeals for the Eleventh District eventually considered Keeton's case against Augusta State University. The court sought to address the charges of viewpoint discrimination, retaliation against Keeton for exercising her First Amendment rights, and compelling Keeton to express beliefs with which she disagreed.<sup>867</sup> The court ruled that the counseling program constituted a nonpublic forum, which allows reasonable, viewpoint neutral restrictions on speech.<sup>868</sup> Given this context, if the university had imposed the remediation plan on Keeton because of her personal views on homosexuality, it would have been a violation of her rights. However, the court argued that the plan was not mandated because of Keeton's personal

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<sup>863</sup> *Keeton v. Anderson-Wiley*, 3.

<sup>864</sup> *Keeton v. Anderson-Wiley*, 5.

<sup>865</sup> *Keeton v. Anderson-Wiley*, 6.

<sup>866</sup> *Keeton v. Anderson-Wiley*, 7.

<sup>867</sup> *Keeton v. Anderson-Wiley*, 11.

<sup>868</sup> *Keeton v. Anderson-Wiley*, 13.

views, but because “she expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics.”<sup>869</sup> Further, because all students in the program were required to comply with the ACA Code of Ethics, the expectation that Keeton comply was considered viewpoint neutral. On the question of the reasonableness of the plan, the Court found that ASU had a “legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics,” which made the plan reasonable.<sup>870</sup> Because the remediation plan was found to be viewpoint neutral, Keeton’s allegation that it was retaliation for exercising her First Amendment rights was unfounded.<sup>871</sup> Finally, because the university was not requiring Keeton to personally affirm homosexuality, only to comply with ethical standards in counseling clients about homosexuality, her claims to being compelled to express beliefs which she did not believe in were denied.<sup>872</sup>

The case of *Uzuegbunam v. Precweski*, another Alliance Defending Freedom case, brought national attention to Georgia, when the Department of Justice under Jeff Sessions filed a Statement of Interest in the case.<sup>873</sup> The case involved two students, Chike Uzuegbunam and Joseph Bradford who alleged that their First and Fourteenth Amendment rights were denied by Georgia Gwinnett College.<sup>874</sup> Uzuegbunam, while a student, was preaching in a plaza on campus when he was approached by campus police for violating the College’s free speech zone policy.<sup>875</sup> After being informed of the campus policy, Uzuegbunam completed the steps to reserve space in

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<sup>869</sup> *Keeton v. Anderson-Wiley*, 14.

<sup>870</sup> *Keeton v. Anderson-Wiley*, 24.

<sup>871</sup> *Keeton v. Anderson-Wiley*, 27.

<sup>872</sup> *Keeton v. Anderson-Wiley*, 30.

<sup>873</sup> “Department of Justice Files Statement of Interest in Defense of Campus Free Speech,” The United States Department of Justice, last modified September 26, 2017, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-defense-campus-free-speech>.

<sup>874</sup> *Uzuegbunam v. Precweski*, No. 1:16-CV-04658-ELR (N.D. Ga. 2018).

<sup>875</sup> *Uzuegbunam v. Precweski*, 2.

the free speech zone. However, during his reserved time, he was asked to stop due to his presence causing a disturbance. According to campus police, Uzuegbunam violated the policy on disorderly conduct by disturbing listeners in the area.<sup>876</sup> Bradford claimed that he was interested in distributing religious literature and speaking in the same manner as Uzuegbunam but was deterred by the actions of the college. The plaintiffs sought declaratory and injunctive relief as well as damages in the United States District Court for the Northern District of Georgia. After the plaintiffs filed suit, the College amended both its speech zone and speech code policies. The Court determined that it was a moot case, since Uzuegbunam was no longer a student and the College had adjusted its policies to ensure compliance with the Constitution. The Alliance Defending Freedom appealed the case to the Eleventh Circuit Court of Appeals, which upheld the ruling of the lower court, agreeing that the case was moot. The ruling in a new case from Speech First suggests that universities may no longer be protected in moot cases.

A relative newcomer in First Amendment litigation is Speech First, which has ties to the conservative network including affiliations with the Koch brothers.<sup>877</sup> Speech First has recently been involved in cases against universities regarding their use of speech codes, bias response teams, and campus climate response teams. In the last two years, they have filed suit against the University of Illinois, the University of Michigan, the University of Texas, and Iowa State University.<sup>878</sup> The Alliance Defending Freedom and FIRE both submitted amicus briefs in support of Speech First cases. In *Speech First v. Schissel et al.*, Speech First brought a case against the University of Michigan for its anti-bullying and harassment policy, claiming that it

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<sup>876</sup> *Uzuegbunam v. Preczewski*, 3.

<sup>877</sup> Daniel Moattar, "Dark Money Behind Campus Speech Wars," *The Nation*, last modified July 9, 2018, <https://www.thenation.com/article/archive/dark-money-behind-campus-speech-wars/>.

<sup>878</sup> "Court Battles," Speech First, accessed February 7, 2020, <https://speechfirst.org/court-battles/>.

was overly broad and infringed on students' First Amendment rights.<sup>879</sup> They also challenged the university's Bias Response Team. Speech First "alleged that the University's policies and the threat of punishment from the Bias Response Team had chilled their speech."<sup>880</sup> Speech First sought an injunction against the university to prohibit the enforcement of the policy and halt the activities of the Bias Response Team. The injunction was initially denied and the University of Michigan removed the definitions of bullying and harassment that were in question. However, despite the changes, the appeals court determined that the case could not be moot because there was no guarantee that the university would not reenact the policy at a later date.<sup>881</sup> On appeal to the Sixth Circuit, the court found that the group did have standing to sue and remanded the case for reconsideration. The ruling in this case has caused some alarm among legal experts because it allowed the plaintiffs to seek damages although there was no evidence of direct harm in the case.<sup>882</sup> This raises concerns about the future ability of campuses to proactively manage incidents of bullying and harassment on campus.

### **Free Speech Legislation**

In the last three years, conservative groups have turned their attention to legislative remedies to ensure the First Amendment rights of students on campuses. As of the end of 2018, twenty-eight states were considering some legislation related to the First Amendment on college campuses.<sup>883</sup> By 2019, seventeen states had passed campus free speech legislation and legislation

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<sup>879</sup> "Recent Case: *Speech First v. Schlissel*," Harvard Law Review Blog, last modified October 7, 2019, <https://blog.harvardlawreview.org/recent-case- speech-first-v-schlissel/>.

<sup>880</sup> "Recent Case: *Speech First v. Schlissel*."

<sup>881</sup> "Speech First, INC. v. Schlissel," Global Freedom of Expression, accessed February 7, 2020, <https://globalfreedomofexpression.columbia.edu/cases/speech-first-inc-v-schlissel/>.

<sup>882</sup> "Recent Case: *Speech First v. Schlissel*."

<sup>883</sup> "Chasm in the Classroom," 82-84.

was still pending in other states.<sup>884</sup> The two most prominent legislative proposals directed at the states have come from the Goldwater Institute and the American Legislative Exchange Council. The Campus Free Expression Act sponsored by FIRE and the Free Expression in Education Act introduced by Senator Orrin Hatch have received limited support.

The Goldwater Institute, a libertarian think tank located in Phoenix, Arizona, was the first organization to release model legislation. The stated purpose of the Goldwater Institute is to advance free market principles and neoliberal ideas as well as protect the freedoms outlined in the United States Constitution.<sup>885</sup> The Goldwater Institute develops model legislation for states as well as utilizes litigation to meet their stated purpose. The Campus Free Speech model legislation that the group released was recognized with an award from the State Policy Network, an umbrella organization for several conservative and libertarian organizations that work directly to influence state policies. The model legislation proposal provides insight into the key concerns of this libertarian group related to campus free speech.

The executive summary accompanying the legislative proposal opens with a quote from Brown University President Christina Paxson responding to a question about safe spaces. Specifically, she states, “What on earth are they referring to?...Idea free zones staffed by thought police, where disagreement is prohibited?”<sup>886</sup> This quote references a common conservative narrative that ridicules the idea of safe spaces on campus as protecting fragile students, or “snowflakes.” The reference to safe zones being over-policed and idea-free is not consistent with

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<sup>884</sup> Jeremy Bauer-Wolf, “Free Speech Laws Mushroom in Wake of Campus Protests,” InsideHigherEd, last modified September 16, 2019, <https://www.insidehighered.com/news/2019/09/16/states-passing-laws-protect-college-students-free-speech>.

<sup>885</sup> Stanley Kurtz, James Manley, and Jonathan Butler, “Campus Free Speech: A Legislative Proposal,” Goldwater Institute, last modified January 30, 2017, [https://goldwaterinstitute.org/wp-content/uploads/2019/03/Campus-Free-Speech-A-Legislative-Proposal\\_Web.pdf](https://goldwaterinstitute.org/wp-content/uploads/2019/03/Campus-Free-Speech-A-Legislative-Proposal_Web.pdf).

<sup>886</sup> Kurtz, Manley, and Butler, “Campus Free Speech,” 2.

how the idea of safe spaces has generally been constructed on campuses. When safe spaces emerged on campuses, they represented places where traditionally marginalized groups, primarily LGBT students, could seek refuge or support. They were not necessarily intended to encompass entire campuses and all students as is often implied by conservative critics. The remainder of the executive summary asserts that the attack on free speech on campus is widespread and pervasive and that student support for speech restriction is at historic heights imperiling the integrity of higher education. Given the impending death of free expression on campus, the legislative proposal is presented as the last defense of the First Amendment.

The Goldwater model legislation has seven stated goals that address the institute's primary concerns about the state of free speech on campus. Briefly, these goals include: establishing free expression policies and eliminating speech codes; preventing disinvitation of speakers to campus; establishing sanctions for students who violate others' free speech rights; allowing for individuals to recover attorney fees from universities if their rights have been violated; affirming the need for universities to remain content neutral; mandating that students be informed of free expression policies; and authorizing establishment of a committee to oversee institutions' handling of free speech issues and report to the public, governors, and legislatures on how these issues have been handled.<sup>887</sup> Interestingly, in these goals, there is an emphasis on establishing sanctions for students and creating accountability structures for universities, which seems counter to libertarian beliefs about less government involvement. The focus on sanctions even drew criticism from the Charles Koch Institute, a long-time donor to the Goldwater Institute. One of the directors of the Koch Institute argued that conservatives were "giving in to

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<sup>887</sup> Kurtz, Manley, and Butler, "Campus Free Speech," 2-3.

the same fragility of which they so freely accuse their liberal counterparts.”<sup>888</sup> Despite some of the concerns that were raised about the model legislation, it has been embraced by conservative lawmakers in several states.<sup>889</sup>

The American Legislative Exchange Council (ALEC) describes itself as a “nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.”<sup>890</sup> In May 2017, ALEC introduced its own version of a campus free speech bill, which was similar in many ways to the proposed legislation from the Goldwater Institute. The original legislative proposal was finalized on June 23, 2017, but it was later amended on December 26, 2018.<sup>891</sup> As of the end of 2018, five states were considering adopting ALEC’s proposed legislation, the Forming Open and Robust University Minds (FORUM) Act.<sup>892</sup>

The FORUM Act focuses on seven goals that echo many of the ideas in the Goldwater Institute’s model legislation. The FORUM model policy calls for the following: abolishment of free speech zones on campus; protection for individuals engaged in lawful expression; protection of student groups from disciplinary action for lawful expression including protection of belief-based groups; educational programs to alert students of their First Amendment rights; requirement of administrators and police to understand their duties to protect free expression;

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<sup>888</sup> Jeremy W. Peters, “In Name of Free Speech, a Crackdown on Campus Protests,” *New York Times*, June 15, 2018.

<sup>889</sup> “Chasm in the Classroom.” The following states have considered or pass Goldwater Institute inspired legislation: Arizona, California, Georgia, Illinois, Michigan, Minnesota, Nebraska, North Carolina, Tennessee, Wisconsin, and Wyoming.

<sup>890</sup> “About ALEC,” American Legislative Exchange Council, accessed February 7, 2020, <https://www.alec.org/about/>.

<sup>891</sup> “Forming Open and Robust University Minds (FORUM) Act,” American Legislative Exchange Council, last modified May 5, 2017, <https://www.alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/>.

<sup>892</sup> “Chasm in the Classroom,” 82-84. The states considering legislation based on the FORUM Act as of the end of 2018 are Iowa, Oklahoma, South Carolina, Virginia, and West Virginia.

establishment of a policy to require campuses to provide a report of free speech issues prior to legislative appropriation processes; and the opportunity for those whose rights have been denied to bring a cause of action for the violation.<sup>893</sup> The FORUM Act differs in two notable ways from the Goldwater proposal by creating an exemption from disciplinary actions for belief-based organizations as well as opening campuses to any individual for free expression.

The first notable difference between the Goldwater proposal and the FORUM Act is the specific inclusion of exemption of belief-based groups from campus disciplinary action. The text of the proposed legislation reads, “No public institution of higher education may deny a religious, political or ideological student organization any benefit or privilege available to any other student organization, or otherwise discriminate against such an organization, based on the expression of the organization.”<sup>894</sup> It also specifically mentions that organizations may require that leaders or members adhere to the organization’s beliefs. This particular focus in the proposed legislation attempts to challenge the ruling in *Christian Legal Society v. Martinez*, which allowed colleges and universities to require groups to adhere to non-discrimination policies. If passed by a state, the FORUM Act would allow student organizations at public universities to discriminate and exclude students from their student organizations based on the personal beliefs of the organization’s members. The second notable difference is that the FORUM Act would allow “[a]ny person who wished to engage in non-commercial expressive activity on campus [to] be permitted to do so freely, as long as the person’s conduct is not unlawful and does not materially and substantially disrupt the functioning of the public institution.” The FORUM Act does allow for reasonable time, place, and manner restrictions, but

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<sup>893</sup> “Forming Open and Robust University Minds.”

<sup>894</sup> “Forming Open and Robust University Minds.”

in general, is opening up the campuses more broadly than was conceived in *Widmar v. Vincent*, which established campuses as a type of limited public forum.

The Campus Free Expression Act was introduced by FIRE. The purpose of the Campus Free Expression Act is to “prohibit public colleges and universities from limiting speech and expressive activity to unconstitutionally restrictive ‘free speech zones.’”<sup>895</sup> Speech zones have long been a target for FIRE and this bill seeks to raise awareness about them and motivate states to take action to make outdoor spaces on public campuses open for students as well as the public to exercise their First Amendment rights. Missouri was the first state to pass the Campus Free Expression Act in March 2015. Under the new state law, the campus must be open to any individual seeking to engage in noncommercial expressive activity and members of the campus community must be free to “spontaneously and contemporaneously assemble.”<sup>896</sup> This act represents just one of the components of the FORUM bill and potentially opens campuses up to significant outside influence that administrators will have little ability to manage.

The final active legislative proposal is the Free Right to Expression in Education (FREE) Act that was introduced in the United States Senate by Senator Orrin Hatch.<sup>897</sup> The purpose of the proposed legislation is to prevent colleges from “quarantining free expression and end unconstitutional zones used to stifle student speech.”<sup>898</sup> If passed, the FREE Act would stop public institutions of higher education from preventing “a person from freely engaging in

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<sup>895</sup> “Frequently Asked Questions: The Campus Free Expression (CAFE) Act,” FIRE, last modified December 17, 2015, <https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/>.

<sup>896</sup> “Campus Free Expression Act – Missouri Senate,” MO.gov, accessed February 7, 2020, <https://www.senate.mo.gov/15info/pdf-bill/perf/SB93.pdf>.

<sup>897</sup> Orrin Hatch, “Protecting Freedom of Speech Where it Matters Most, on the College Campus,” National Review, last modified February 7, 2018, <https://www.nationalreview.com/2018/02/free-speech-college-campuses-legislation-ensure-it/>.

<sup>898</sup> “Rooney Introduces Bill to Ensure College Campuses Allow Free Speech Everywhere,” House of Representatives, last modified March 12, 2019, <https://francisrooney.house.gov/news/documentsingle.aspx?DocumentID=447/>

noncommercial expressive activity in an outdoor area on the institution's campus if the person's conduct is lawful.”<sup>899</sup> The bill still allows for time, place, and manner restrictions. Senate Bill 2394, Free Right to Expression in Education Act, was introduced into the Senate on February 7, 2018 and referred to the Senate Committee on Health, Education, Labor and Pensions. No additional action has been taken on the bill.<sup>900</sup> On March 11, 2019, Representative Francis Rooney of Florida introduced the FREE Act in the United States House of Representatives and it was referred to the House Committee on Education and Labor.<sup>901</sup> The bill was sent to committee, but has not since been reviewed. As with the Campus Free Expression Act, if passed, this legislation would open up campuses as traditional public forums and give administrators little leeway to prevent the public from accessing the majority of public campus spaces for free speech.

Prompted by the surge in legislation addressing campus speech, the American Association of University Professors (AAUP) released a statement outlining the history of campus free speech legislation and its concerns about the current direction of legislation.<sup>902</sup> Most notably, the AAUP called out the Goldwater Institute for “its declaration that the ultimate goal is to ‘change the balances of forces contributing to the current baleful national climate for free speech.’”<sup>903</sup> The AAUP argues that the “existence or nonexistence of free speech cannot be gauged by the specific content of the views that the people choose to express.”<sup>904</sup> The AAUP

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<sup>899</sup> “H.R. 1672 – Free Right to Expression in Education Act.”

<sup>900</sup> “S.2394 – Free Right to Expression in Education Act,” Congress.gov, last modified February 7, 2018, <https://www.congress.gov/bill/115th-congress/senate-bill/2394/text>

<sup>901</sup> “H.R. 1672 – Free Right to Expression in Education Act,” Congress.gov, last modified March 11, 2018, <https://www.congress.gov/bill/116th-congress/house-bill/1672>.

<sup>902</sup> “Campus Free-Speech Legislation: History, Progress, and Problems,” American Association of University Professors, accessed July 12, 2018, <https://www.aaup.org/report/campus-free-speech-legislation-history-progress-and-problems>.

<sup>903</sup> “Campus Free-Speech Legislation,” 10.

<sup>904</sup> “Campus Free-Speech Legislation,” 11.

views the Goldwater Institute's goal to bring a balance to free speech as merely an attempt to protect conservative voices on campus. The Goldwater Institute's proposal of sanctions for counter-protestors is specifically a measure that would benefit conservative activists more than liberal activists. According to the AAUP, the failure of groups like Goldwater to address campus concerns such as recording faculty lectures or placing faculty on watchlists as well as the continued attempts to legitimate discrimination against LGBT students demonstrate the limits to the conservative free speech narrative.

### ***Recommendations***

The conservative attack on campuses regarding the First Amendment is multi-faceted and well-funded, which makes it difficult for colleges and universities to counteract the negative attention and accusations that the First Amendment is not valued or respected on campuses. The Nixon administration made it acceptable to denigrate campus activists who were expressing their First Amendment rights on campuses. The P.C. narrative of the 1990s only further positioned campuses as overly sensitive and out of touch with mainstream America. Today, the stories shared on social media only exacerbate the tensions between conservatives and liberals on and off campus. Given the current situation, how can campus administrators make a difference?

#### **Connect institutional values and student values.**

College and university administrators today are understandably hesitant to talk about their values. In many ways, they are in an impossible position. When they issue statements about incidents of concern to historically marginalized students, they are accused by the conservative press of coddling students. However, if they fail to recognize these same incidents, students accuse them of being unresponsive and call for their resignations. Despite these challenges, it is

imperative that administrators articulate the values of their institutions in a manner that draws in students across the political spectrum.

Jonathan Haidt has written extensively on the motivating values of liberals, conservatives and libertarians and his ideas are worth considering.<sup>905</sup> Haidt asserts that there are six values that make up our moral matrix, but liberals, conservatives, and libertarians are drawn to different values within the matrix to guide their decisions and actions. The six values are care, liberty, fairness, loyalty, authority, and sanctity. Administrators should consider how these values manifest in students and how they can connect with these different values to build stronger communities on campus.

Liberals are drawn to care, liberty, and fairness, which makes them more likely to care for victims of oppression.<sup>906</sup> Consider the student activists of the 1960s who were fighting for equal rights for African Americans and against a war they felt was unjust and imperialistic and the activists of today who want to ensure that campuses are inclusive of diversity, these activists are motivated by liberal values. Liberal radio host, Garrison Keilor's description of himself exemplifies the spirit of liberals:

I am a liberal, and liberalism is the politics of kindness. Liberals stand for tolerance, magnanimity, community spirit, the defense of the weak against the powerful, love of learning, freedom of belief, art and poetry, city life, the very things that make America worth dying for.<sup>907</sup>

What stands out most in his statement is the appreciation of diversity and when diversity is threatened, liberals become defensive. To the extreme, there are groups like the Weather Underground or Antifa that are willing to utilize violence to protect these values. To connect

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<sup>905</sup> Jonathan Haidt, *Righteous Mind: Why Good People are Divided by Politics and Religion* (New York: Vintage Books, 2012).

<sup>906</sup> Haidt, *Righteous Mind*, 345-350.

<sup>907</sup> As quoted in Haidt, *Righteous Mind*, 345-346.

with liberals on and off campus, administrators should highlight values of diversity and inclusion and demonstrate actions that their institutions have taken to address these issues. When groups are threatened on campus, administrators should acknowledge how the incident may have affected those groups in order to demonstrate the value of care.

Libertarians are drawn to the values of liberty and fairness. Will Wilkinson suggested that “libertarians are basically liberals who love markets and lack bleeding hearts.”<sup>908</sup> Libertarians are generally against government intervention or restrictions in the market or in private matters such as sex and drug use. Libertarian activists are those most likely to protest policies on campus that place any restrictions on personal liberty. Consider the students who have brought court cases against campuses that attempted to limit their speech to a particular area on campus. In order to reach these students, administrators have to emphasize the freedom of choice that students have on campus, although it obviously has its limitations. Administrators should review campus rules and regulations to ensure they serve a necessary and important priority for the institutions and, when possible, eliminate those that are no longer relevant. In doing this, administrators demonstrate that they value the individual liberties of their students as much as possible.

Finally, while conservatives are drawn to all of the values in the moral matrix, they place a stronger emphasis on the values of loyalty, authority, and sanctity. Conservatives are more attuned to threats to institutions and traditions than liberals. According to Haidt, “[t]hey do not oppose change of all kinds (such as the Internet), but they fight back ferociously when they believe that change will damage the institutions and traditions that provide our moral exoskeletons (such as the family).”<sup>909</sup> Consider conservative activists that fought to protect the

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<sup>908</sup> As quoted in Haidt, *Righteous Mind*, 351.

<sup>909</sup> Haidt, *Righteous Mind*, 357.

Silent Sam statue at the University of North Carolina despite its representation of the Confederacy, which was an affront to some students on campus.<sup>910</sup> For conservative students, these changes represent a loss of tradition and connection to a common identity. Administrators should be sensitive to the feelings of loss and articulate the value of care when traditions are phased out. Administrators should focus on the traditions within the university that can unite rather than divide its constituents. Further, administrators should engage students in developing new traditions that are inclusive of all students on campus to create a stronger sense of community. Consider those values that are shared across the community and emphasize those in communications to demonstrate a desire to build bridges between the various constituents within the community.

**Keep the spotlight on the issues.**

The conservative backlash against student activism that occurred during the Nixon administration started a dangerous trend that has only escalated in recent years. By focusing on “campus unrest,” Nixon effectively made student activists the problem rather than the social justice issues that students were trying to draw attention to. Multiple commissions and hearings were held on campus unrest that indicated time and again that students were upset about racial injustices and an unjust war, however, Nixon did not choose to address these issues with the students. Politicians joined the Nixon administration in casting students as the problem and focusing more attention on student behavior than the issues that students were raising. Just as Nixon’s strategy focused attention on students and away from issues, the P.C. narrative in the 1990s minimized the concerns of the campus community by labeling issues of racial and sexual

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<sup>910</sup> Brock Read, “UNC Will Give Silent Sam to a Confederate Group – Along with a \$2.5-Million Trust,” *Chronicle of Higher Education* 66, no. 14 (December 6, 2019): 1.

harassment as P.C. The term P.C. protected the perpetrators of harassment on campus because it erased the actual concerns from the conversation. The media was no longer focused on the rise in racial and sexual harassment as well as hate crimes on campus, instead it was talking about overly sensitive students, faculty, and administrators who lacked the maturity to deal with conflict.

Today, there are multiple distractions from the issues of concern to student activists. When controversial speakers come to campus, the media focuses on the behavior of students rather than the underlying issues that motivated that behavior. Students are cast as villains, while controversial speakers become the standard bearers for free speech. There is also an inherent assumption that students are unaware of the views of the speakers they are protesting. In many cases, students come to protest because they are keenly aware of the views and disagree with those views. The right for students to voice their displeasure with a speaker is rarely viewed as an expression of their own First Amendment rights. Legislation that seeks to punish counter-protestors also fails to recognize that it is in effect chilling the speech of students on campus.

Social media provides an opportunity to amplify, but also distract from the issues of concern to students. On the one hand, students have an opportunity, as in the cases of the Occupy movement and the Black Lives Matter movement, to connect with other activists and build awareness about the issues of concern. On the other hand, social media can be used to spread misinformation, amplify incendiary incidents, and misrepresent positions. The viral nature of social media makes it difficult to monitor, which risks the message being lost or permanently distorted. The sheer volume of content on social media can overwhelm the issues of concern with cat videos and memes. Social media also perpetuates what Palfrey refers to as a hype cycle:

it would start with the original dispute, then turn to the campus reaction to the dispute – including statements for and against free expression – and then to the fallout from the reaction, which inevitably drew alumni and families right into the on-campus fray.<sup>911</sup>

Consider what happened at the University of Missouri with their football team. What started as an issue on campus was amplified because of the reaction from the administration and ultimately the administration drew the ire of parents and alumni. By the time the cycle ends, the original issue has been tossed aside in the rush to amplify the ensuing conflicts. Unfortunately, this is a cycle that is repeated all too frequently on campuses today.

Conservative politicians and media today also seek to erase and minimize the concerns of students by calling them “snowflakes” and implying that students are too fragile to handle tough conversations or disagreements. They point to talk of safe spaces, trigger warnings, and microaggressions as evidence that campuses are coddling students.<sup>912</sup> In a 2017 speech at Georgetown University criticizing safe spaces and trigger warnings, then-Attorney General Jeff Sessions argued that:

the American university was once the center of academic freedom – a place of robust debate, a forum for the competition of ideas. But it is transforming into an echo chamber of political correctness and homogeneous thought, a shelter for fragile egos.<sup>913</sup>

Safe spaces are often portrayed in the conservative media as rooms filled with pillows where students blow bubbles, but they are generally spaces identified on campus where students can go to decompress and explore ideas in a supportive environment.<sup>914</sup> It could be a lounge on campus, a residence hall room, or a campus office. In 2016, the president of the University of Chicago,

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<sup>911</sup> John Palfrey, *Safe Spaces, Brave Spaces: Diversity and Free Expression in Education* (Cambridge, MA: The MIT Press, 2017), 7-8.

<sup>912</sup> Palfrey, *Safe Spaces, Brave Space*

<sup>913</sup> Jeff Sessions, “A National Recommitment to Free Speech on Campus is Long Overdue,” *Vital Speeches of the Day* 83, no. 11 (November 2017): 334-337.

<sup>914</sup> Palfrey, *Safe Spaces, Brave Spaces*, 28-29.

John Ellison, sent a letter to the first-year class that was widely circulated outside of the university. In the letter, he warned students:

Our commitment to academic freedom means that we do not support so-called ‘trigger warnings,’ we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual ‘safe spaces’ where individuals can retreat from ideas and perspectives at odds with their own.<sup>915</sup>

Although adamant that his campus did not condone safe spaces, Ellison himself was listed on the campus’s Safe Space Ally Network for LGBT students.<sup>916</sup> Although the remainder of the letter also focuses on the need to build a campus that is welcoming to people from all backgrounds, the media focused on the condemnation of trigger warnings and safe spaces and erased the issue that is important to academic freedom, which is a robust discussion of diverse ideas.

Just as safe spaces have been misrepresented in the media, trigger warnings and microaggressions have also been taken out of their appropriate context. Trigger warnings are used to alert students about topics that can be upsetting to some students. While this can come across as coddling, it also can convey to students concern and prepare them to confront topics that may be difficult to discuss such as sexual assault or domestic violence. As long as faculty have the option to give students a warning on content and are not asked to avoid “triggering” topics, then trigger warnings are not overtly dangerous.

The issue of microaggressions is one that is often used to dismiss the concerns of traditionally marginalized students. When the language of microaggression is used in some media outlets, it is used to erase the action that was marginalizing. The focus is on the student who was offended by some “microaggression,” which is minimizing in and of itself, rather than

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<sup>915</sup> “Dear Class of 2020 Letter,” University of Chicago, accessed on February 7, 2020, [https://news.uchicago.edu/sites/default/files/attachments/Dear\\_Class\\_of\\_2020\\_Students.pdf](https://news.uchicago.edu/sites/default/files/attachments/Dear_Class_of_2020_Students.pdf)

<sup>916</sup> Palfrey, *Safe Spaces, Braces Spaces*, 29.

the student who was unnecessarily followed around the bookstore because he was African American or the African American woman who decided to take a nap in the lounge and had the police called in to investigate. These are real experiences that communicate to students that their peers and others on campus do not believe that they belong. Rather than minimize the students' experiences, the media should be talking about how these encounters can be minimized.

As I have demonstrated in just these few examples, too often the concerns of students have been minimized or erased from the public view. Campus administrators should use their positions of power to amplify the concerns of students. Too often, administrators rely on language that emphasizes that the campus is open to all viewpoints, but they do not take the time to reiterate the viewpoints in question. If the viewpoints of students are consistent with the shared values of the institution, administrators should affirm those shared values. When students bring up social justice issues, administrators should at least take the time to acknowledge their concerns and discuss how these concerns might become the topic of conversation in a meaningful and productive manner on campuses.

### **Educate students on their rights and responsibilities.**

There is a significant lack of understanding when it comes to speech and expression that are protected by the First Amendment. Many students falsely believe that hate speech is unlawful and not protected by the Constitution, so when they hear hate speech on campus, they expect the campus administration to punish the speaker. There needs to be more education about the limits of free speech, so that students understand what permissible speech is and what unprotected speech is. When it comes to the campus, students should be told that they have the right to freely express themselves, but also be warned about time, place, and manner restrictions, so they do not inadvertently step outside of the bounds of permitted speech.

Proponents of unlimited free speech often say that the only remedy for hate speech is more speech. They suggest that students should use their voices when the voices of others are offensive to them. However, this becomes a bit risky for students with the various legislation that now prohibits counter-protesting that inhibits another person's freedom of expression. Considering the potentially life-altering sanctions of suspension or expulsion, students need to hear examples of behaviors that would rise to the level of disrupting someone else's freedom of expression. This is an area where administrators must pressure legislators and governing boards to be more specific. Vague rules about counter-protests are just as chilling to free speech as the much-despised speech codes.

Finally, faculty and administrators must continue to challenge students to participate in meaningful conversations around diverse ideas. Outside of the classroom, administrators can develop co-curricular programs that provide students with a forum to discuss controversial ideas and learn more about issues, so they can better understand different points of view. Students should be taught media literacy and encouraged to develop critical thinking skills that would allow them to better gauge the resources that they rely on to form their opinions. By providing spaces for students to engage in "controversy with civility," students learn to listen to other's ideas, ask questions, and avoid the instinct to immediately shut down when their ideas are challenged.<sup>917</sup> Thoughtful and sincere dialogue across difference should be the goals of these encounters. Students should never be required to engage with hateful and incendiary speakers who are not interested in meaningful dialogue and discussion.

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<sup>917</sup> Susan R. Komives, *Leadership for a Better World: Understanding the Social Change Model of Leadership Development* (San Francisco, CA: Jossey-Bass, 2009).

### Reconsider tolerance.

In the extensive literature about the First Amendment, scholars often share examples of hate speech directed at people of color, religious minorities and women, but hold that despite these instances of hate speech, an absolutist view of tolerance is necessary for a democratic society.<sup>918</sup> They repeat the mantra that the only way to fight hate speech is with more speech. Nadine Strossen, president of the ACLU from 1991 to 2008, stands firm in the belief that campuses should be a space where ideas are freely debated and discussed. In her view, “[e]ncountering ‘unwelcome’ ideas, including those that are hateful and discriminatory, is essential for honing our abilities to analyze, criticize, and refute them.”<sup>919</sup> This absolutist argument for tolerance and free speech unfairly burdens those individuals who are the repeated targets of abuse.

In her research, Mari Matsuda found that the typical reactions to hate speech, particularly racially motivated hate speech, varied depending upon whether or not the individual being questioned was a member of a targeted group.<sup>920</sup> Individuals in targeted groups were more likely to be alarmed by racist propaganda and call for some form of redress. Meanwhile, non-targeted individuals were likely to “consider the incidents isolated pranks, the product of sick but harmless minds.”<sup>921</sup> Consider the response at Cornell when a burning cross was thrown outside of an African American housing facility. Matsuda contends that this dismissal of systemic racism leads people to claim that there is no public need to respond to these types of incidents because

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<sup>918</sup> Chemerinsky and Gillman, *Free Speech on Campus*; Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* (New York: Oxford University Press, 2018), Keith E. Whittington, *Speak Freely: Why Universities Must Defend Free Speech*, (Princeton: Princeton University Press, 2018); Lukianoff, *Unlearning Liberty*.

<sup>919</sup> Strossen, *Hate*, 2.

<sup>920</sup> Mari J. Matsuda, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993).

<sup>921</sup> Matsuda, et al., *Words that Wound*, 20.

they do not represent a “real and pervasive threat that requires the state’s power to quell.”<sup>922</sup> The result of this failure to offer redress leaves a significant portion of society without protection from hateful and ultimately harmful speech and forced to tolerate such abuse. Sadly, history shows that hate speech and propaganda lead to violence and a failure to intervene puts people at significant risk.

In the United States, an absolutist interpretation of tolerance has prevailed at the expense of the most vulnerable among us and it is worth rethinking tolerance. Herbert Marcuse offers a critique of free speech as a form of repressive tolerance.<sup>923</sup> Marcuse argues that an absolutist view of tolerance has been “extended to policies, conditions, and modes of behavior which should not be tolerated because they are impeding, if not destroying, the chances of creating an existence without fear and misery.”<sup>924</sup> An absolutist view of tolerance allows neo-Nazis to march through the streets of Skokie, Illinois and white supremacists bearing tiki torches to confront students in Charlottesville, Virginia, despite the danger that these hate groups might create for targeted populations. In support of Marcuse’s position, Matsuda asserts that allowing absolutist free speech principles to apply to hate speech such as that promulgated by white supremacists is an intentional “choice to burden one group with a disproportionate share of the costs of speech promotion. Tolerance of hate speech thus creates superregressivity – those least able to pay are the only ones taxed for this tolerance.”<sup>925</sup> Despite the knowledge that hate speech unfairly burdens historically marginalized groups, the United States has been reluctant to place limits on hate speech.

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<sup>922</sup> Matsuda, et al., *Words that Wound*, 20.

<sup>923</sup> Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* (Boston, MA: Beacon Press, 1965).

<sup>924</sup> Wolff, Moore, and Marcuse, *A Critique of Pure Tolerance*, 83.

<sup>925</sup> Matsuda, et al., *Words that Wound*, 48.

In the United States, an absolutist view of free speech has been embraced and to offer alternatives to this view is often seen as anti-American. The First Amendment has never granted individuals equal access to free speech, but the idea of it has become so ingrained in our culture that it is difficult to challenge. The First Amendment was written into the Constitution by those individuals in power to ensure their own political and personal success. The neutral interpretation of the First Amendment perpetuates this imbalance of power in society. Supporters of an absolutist view of free speech argue that we must tolerate speech we abhor in order to protect minority groups within society, who might be unfairly targeted by those in power. Marcuse argues that absolute tolerance only protects the status quo and those already in power within society and “actually protects that already established machinery of discrimination.”<sup>926</sup> In maintaining the status quo, we suppress alternative ways of conceptualizing society. Fringe groups are granted the right to free speech as long as they do not move from words to actions that threaten the power structure.<sup>927</sup> Consider the response to student activists after the 1960s. Once people outside of campuses began to pay attention to student demands for societal change, conservative actors worked aggressively to discredit the students and silence their voices.

Proponents of free speech on campus champion the idea of ‘the marketplace of ideas,’ where all views can be considered. Marcuse challenges the idea that all views are considered or should even be considered. According to Marcuse, “the ‘marketplace of ideas’ is organized and delimited by those who determine the national and the individual interest.”<sup>928</sup> When the limits of the marketplace have been determined by those in positions of power, tolerance serves to protect and preserve a repressive society. All views are not truly considered. Further, Marcuse argues

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<sup>926</sup> Wolff, Moore, and Marcuse, *A Critique of Pure Tolerance*, 85.

<sup>927</sup> Wolff, Moore, and Marcuse, 86.

<sup>928</sup> Wolff, Moore, and Marcuse, 110.

that perhaps not all views deserve to be heard equally because that in and of itself can be inherently dangerous because

the stupid opinion is treated with the same respect as the intelligent one, the misinformed may talk as long as the informed, and propaganda rides along with education, truth with falsehood. This pure toleration of sense and nonsense is justified by the democratic argument that nobody, neither group nor individual, is in possession of the truth and capable of defining what is right and wrong, good and bad. Therefore, all contesting opinions must be submitted to ‘the people’ for its deliberation and choice.<sup>929</sup>

Marcuse believes that a truly democratic argument requires that people are “capable of deliberating and choosing on the basis of knowledge, that they must have access to authentic information, and that, on this basis, their evaluation must be the result of autonomous thought.”<sup>930</sup> Given the abundance of information that individuals have access to today, it is more important than ever that people be able to determine what is true. As Marcuse suggests, an abundance of misinformation and propaganda is a threat to democracy. Misinformation and propaganda have been demonstrated to influence violence, so allowing them to spread unabated in the name of tolerance is dangerous.<sup>931</sup>

Given the history of discrimination in the United States and the very real consequences that result from it, it is time to rethink tolerance and how the embrace of absolute tolerance has become a repressive tolerance. If campus administrators want to truly advance society, they should challenge this absolutist view of tolerance and free speech. They should not be afraid to support measures that would offer a remedy to the absolutist view of the First Amendment. Critical race theorists have suggested remedies to hate speech, but these suggestions have been largely ignored in favor of an absolutist free speech.<sup>932</sup> However, Matsuda raises an important

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<sup>929</sup> Wolff, Moore, and Marcuse, 94.

<sup>930</sup> Wolff, Moore, and Marcuse, 95.

<sup>931</sup> Matsuda, “Public Response to Racist Speech.”

<sup>932</sup> Matsuda, et al., *Words that Wound*.

point that the United States already has embraced limits to free speech through the law of defamation and privacy, which recognizes that certain forms of expression should not be protected because they negatively influence the reputation of an individual. If we can recognize the harm in speech in these types of cases, we should question why we resist seeing the harm in instances of hate speech.

### *Conclusion*

In tracing the history of student activism and the First Amendment on college campuses, I have demonstrated the ways in which actors outside of campus have increasingly influenced the campus response to students' access to the First Amendment. There is mounting evidence to suggest that the conservative 'defense' of free speech on campus is motivated by a desire to amplify conservative voices on campus and limit the influence of liberal-leaning students and student organizations. To create campuses that live up to the values of academic freedom and operate as a true marketplace of ideas, administrators must be willing to stand up for their own values and push back against the narrative that paints colleges and universities as the enemy of free speech.

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