FREE SPEECH ON CAMPUS

ERWIN CHEMERINSKY

HOWARD GILLMAN

Yale
UNIVERSITY PRESS
New Haven and London

[2017]

CHAPTER ONE

The New Censorship

WHERE should we draw the line between protecting free speech on college campuses and protecting an inclusive learning environment? Hardly a week goes by without new tensions around this question.[1] Just in the year 2015, for instance, the following events occurred.

- In February, George "Trey" Barnett, a student at the University of Tulsa, was suspended because of statements his husband made on Facebook. Barnett's husband posted criticisms of other students and University of Tulsa staff members who were involved in a theater production with Barnett. After professor Susan Barrett filed a harassment complaint against Barnett because of the postings,

administrators suspended him from his courses and campus activities and barred him from publicizing his situation. Barnett's husband signed a sworn affidavit that he, not Barnett, was solely responsible for the posts. Barnett was suspended two months before his scheduled graduation, kept from returning to campus for a year, and barred from seeking a degree in his major, musical theater.[2]

- Also in February, Northwestern professor Laura Kipnis wrote an article for the *Chronicle of Higher Education* titled "Sexual Paranoia Strikes Academe," in which she criticized what she called the "layers of prohibition and sexual terror" that have inspired campus rules prohibiting romantic relationships between professors and students. Kipnis wrote: "It's the fiction of the all-powerful professor embedded in the new campus codes that appalls me. . . . If this is feminism, it's feminism hijacked by melodrama. The melodramatic imagination's obsession with helpless victims and powerful predators is what's shaping the conversation of the moment, to the detriment of those whose interests are supposedly being protected, namely students. The result? Students' sense of vulnerability is skyrocketing."[3] She added that students "so committed to their own vulnerability, conditioned to imagine they have no agency, and protected from unequal power arrangements in romantic life" will struggle to deal with the problems and conflicts of the real world.[4]

Two women graduate students filed a complaint against Kipnis, stating that her article had created a hostile learning environment in violation of Title IX, which prohibits educational institutions receiving federal funds from discriminating based on sex. Kipnis was subjected to an investigation lasting several months but ultimately was not disciplined.[5]

- In March, members of the Sigma Alpha Epsilon fraternity at the University of Oklahoma were on a bus, dressed in formal wear, going to a fraternity event. Two students led the others in a racist chant:

  There will never be a nigger at SAE
  There will never be a nigger at SAE
  You can hang him from a tree
  But he'll never sign with me
  There never will be a nigger at SAE

  President David Boren expelled the two students who led the chant and suspended the fraternity from the campus.[6]
- In April, administrators at Youngstown State University ordered the removal of all posters promoting a "straight pride" week. These posters had been placed on university bulletin boards where all students are allowed to post whatever they please. Jack Fahey, the vice president for student affairs, wrote a memo: "As most of you know, an inappropriate flyer announcing 'Straight Pride Week' was posted throughout the campus yesterday. Student

leaders were told to help by taking them down where they saw them."[7]

In July, Texas Christian University upheld the suspension of student Harry Vincent for postings on his Facebook page and on Twitter that expressed conservative views on such topics as the threat of terrorism and the spread of the Islamic State. Some months earlier, a person who self-identified as "Kelsey," who lived in Maryland and was not a TCU student, went on social media and urged people to complain to TCU about Vincent's posts, some of which Kelsey felt were racist. Complaints were filed against Vincent with the university.[8]

In April, Vincent received a letter from TCU's associate dean of campus life, Glory Z. Robinson, charging him with violating provisions of the Student Conduct Code that prohibited "Infliction of Bodily or Emotional Harm" and "Disorderly Conduct."[9] Vincent was found to have violated the provisions and was given a "Suspension in Abeyance" and placed on "Disciplinary Probation" until his graduation from TCU. Under the terms of his suspension, he could be on campus only to attend his classes and could not reside on campus, participate in any co-curricular activities, or use any nonacademic facilities on campus. He was required to complete a course entitled "Issues in Diversity" and to do sixty hours of community service. He appealed this judgment, and in July, a campus appeals panel ruled against him and upheld

the punishments. Student Conduct and Grievance Committee chair Lynn K. Flahive wrote in a letter to Vincent, "The choices you made caused harm to other individuals. These types of comments are not acceptable at TCU."[10]

In October, UCLA suspended its chapters of the fraternity Sigma Phi Epsilon and the sorority Alpha Phi after they co-hosted a "Kanye Western"-themed party, with costumes imitating Kanye West and his wife, Kim Kardashian.[11] The student newspaper, the *Daily Bruin*, had urged these actions against the fraternity and sorority: "By hosting a 'Kanye Western'-themed raid, Sigma Phi Epsilon and Alpha Phi have brought UCLA Greek Life to national attention for the worst reason. The office of UCLA Fraternity and Sorority Relations must take action to ensure such an event doesn't occur again on our campus, and the university must recognize the need to prevent racist incidents that don't necessarily target, but nonetheless demeans UCLA's black community."[12]

- Shortly before Halloween, the Intercultural Affairs Committee at Yale University sent an email to students cautioning them against wearing costumes that could be perceived as "culturally unaware or insensitive."[13] Professor Nicholas Christakis and his wife, Erika, a lecturer in early childhood education, were co-masters (a term that has since been discarded) of one of Yale's residential colleges. In response to complaints by students

about the university's trying to regulate their costumes, Erika sent an email to students saying students should enjoy the holiday and no person could set strict definitions around what is offensive or culturally "appropriative." She asked whether blond toddlers should be barred from being dressed as African American or Asian characters from Disney films. "Is there no room anymore," she wrote, "for a child or young person to be a little bit obnoxious . . . a little bit inappropriate or provocative or, yes, offensive? American universities were once a safe space not only for maturation but also for a certain regressive, or even transgressive, experience; increasingly, it seems, they have become places of censure and prohibition."[14]

In an incident that was videotaped and widely viewed, angry students confronted Nicholas Christakis and demanded that he and his wife resign.[15] Hundreds of Yale students signed a letter disagreeing with Erika Christakis's argument that "free speech and the ability to tolerate offence" should take precedence over other considerations. "To ask marginalized students to throw away their enjoyment of a holiday, in order to expend emotional, mental, and physical energy to explain why something is offensive, is—offensive," the letter said. "To be a student of color on Yale's campus is to exist in a space that was not created for you."[16]

In December, Erika Christakis announced that she would no longer teach at the university.[17]

In November, Thaddeus Pryor was suspended by Colorado College for a comment he posted on the anonymous social media application Yik Yak. In a reply to the comment "#blackwomenmatter" on Yik Yak, Pryor wrote, "They matter, they're just not hot."[18]

Colorado College found that Pryor's post violated its "Abusive Behavior" and "Disruption of College Activities" policies and suspended him from the college until August 28, 2017. He was barred from setting foot on campus and forbidden from taking classes at other institutions for academic credit.[19]

In 2016, we saw more of the same. Every month, if not every week, has brought additional instances of campuses being urged to punish students for their speech. In March and April, for example, some Donald Trump supporters accepted an invitation to participate in "The Chalkening," a plan to aggravate Trump opponents on college campuses by posting pro-Trump messages in chalk.[20] At several campuses—including Tulane and the University of California, San Diego—anti-Trump advocates demanded that the administration punish those responsible not just for slurs like "fuck Mexicans" (which deserve condemnation) but for expressing political views such as "Build That Wall."[21]

In August, University of Chicago dean of students John Ellison sent a letter to incoming freshmen stating, "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."[22] The letter attracted widespread media coverage and both praise and sharp criticism.[23] Most notably, 152 staff members at the University of Chicago signed a letter criticizing Ellison. The staff members said that they "believe trigger warnings and safe spaces allow heated, intellectual discussions to take place, but in an atmosphere that guarantees that everyone, especially the usually marginalized people, are comfortable."[24]

In October 2016, a University of Oregon law professor was suspended for wearing blackface at a Halloween party held at her house.[25] She said that she was doing so to promote a conversation about race. Twenty-three law school faculty members wrote a letter urging the professor to resign. It concluded: "If you care about our students, you will resign. If you care about our ability to educate future lawyers, you will resign. If you care about our alumni, you will resign." The University of Oregon commissioned an investigation which concluded: "We find that Nancy Shurtz's costume, including what constitutes 'blackface' through use of black makeup, constitutes a violation of the University's policies against discrimination. We further find that the actions constitute Discriminatory Harassment."[26]

These and countless other examples show the pervasiveness of issues concerning freedom of speech on college campuses.[27] They are arising at public universities, where the First Amendment applies, and at private universities, where campus rules generally protect speech even though the First Amendment does not apply. Large schools and small schools,

prestigious and less prestigious, urban and rural, all are experiencing this. Sometimes speech that physically occurs on campus is being punished, sometimes the expression is on social media. While student speech has attracted the most attention, expression by faculty members and even staff is hardly immune from calls for regulation and punishment.

OUR EXPERIENCE

A 2015 survey by Yale University's William F. Buckley Program showed that 72 percent of students support disciplinary action against "any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive."[28] We found this sentiment among our own students.

In the Winter 2016 quarter, we co-taught a seminar on freedom of speech on college campuses at the University of California, Irvine. We had fifteen undergraduate students, all freshmen. They were impressive, serious learners. We began each class by posing a real-world problem and polling their views, starting with the incident of the racist chant on the fraternity members' bus at the University of Oklahoma. We asked our class, "if the expelled students sued and claimed that their free speech rights were violated, who should prevail, the students or the university?" The students voted 15–0 in favor of the university; not one member of the class felt that the expelled fraternity members were engaged in speech protected by the First Amendment. All believed such racist speech is harmful and should be punished by campus officials.[29]

This experience was repeated throughout the quarter. On every problem, we found that the students, usually overwhelmingly, favored stopping and punishing offensive speech by faculty and students. They often spoke of the need to stop "microaggressions" and of the importance of creating "safe spaces" for students. Of course, we do not want to generalize from one class and one group of students. But their views are consistent with the William F. Buckley Program's national study and with the instances described above. We learned many things from teaching this class.

This generation has a strong and persistent urge to protect others against hateful, discriminatory, or intolerant speech, especially in educational settings.

This is the first generation of students educated, from a young age, not to bully. For as long as they can remember, their schools have organized "tolerance weeks." Our students often told stories of how bullying at school and on social media had affected people they cared about. They are deeply sensitized to the psychological harm associated with hateful or intolerant speech. Descriptions of this generation of students too often omit this sense of compassion and their admirable desire to protect their fellow students.

Arguments about the social value of freedom of speech are very abstract to them, because they did not grow up at a time when the act of punishing speech was associated with undermining other worthwhile values.

Our students knew little about the history of free speech in United States and had no awareness of how important free speech had been to vulnerable political minorities. The two of us grew up in the time of the civil rights movement and anti–

Vietnam War protests. We saw first hand how officials attempted to stifle or punish protestors in the name of defending community values or protecting the public peace. We also saw how free speech assisted the drive for desegregation, the push to end the war, and the efforts of historically marginalized people to challenge convention and express their identities in new ways. In our experience, speech that was sometimes considered offensive, or that made people uncomfortable, was a good and necessary thing. We have an instinctive distrust of efforts by authorities to suppress speech.

This historic link between free speech and the protection of dissenters and vulnerable groups is outside the direct experience of today's students, and it was too distant to affect their feelings about freedom of speech. They were not aware of how the power to punish speech has been used primarily against social outcasts, vulnerable minorities, and those protesting for positive change—the very people toward whom our students are most sympathetic. Their perception of speech is shaped more by internet vitriol than by the oppression of Eugene Debs, Anita Whitney, John Thomas Scopes, Jehovah's Witnesses who refused to say the Pledge of Allegiance, leftists during the McCarthy era, civil rights activists who were beaten and even killed, Lenny Bruce, draft card burners, or George Carlin. Their instinct is to trust the government, including the public university, to regulate speech to protect students and prevent disruptions of the educational environment.

The students agreed that campuses should not be cleansed of all controversial opinions or all expressions that some might consider offensive. Still, they remained unconvinced of the value of defending hateful or discriminatory speech. They

acknowledged that one could adopt a "more speech" solution rather than an "enforced silence" or punishment solution, but they doubted that this would protect their peers from psychological distress.

Current debates about the appropriate boundaries of campus free speech are not a mere replay of 1990s debates over campus "hate speech" codes.

Obviously some of the incidents we have described involve hate speech, but many involve punishing speech because of the ideas expressed. We can confirm what the Pew Research Center reported in November 2015: this generation of college students is much more supportive of censoring offensive statements about minorities and much less supportive of protecting speech that makes some students uncomfortable.[30] Students are also much less open to countervailing arguments about the need to protect hateful or controversial speech.

As debates continue about the appropriate boundaries of free speech on campus, strong free speech advocates—and we place ourselves in this category—cannot assume that the social benefits of broad free speech protections will be automatically appreciated by a generation that has not itself struggled against censorship and punishment of protestors, dissenters, and iconoclasts. American history amply demonstrates that there is no natural or inevitable intuition to support disruptive, offensive, or even countercultural speech. The country has a much longer history of suppressing unpopular speakers than of protecting them. The pro–free speech case needs to be made anew, even as campuses redouble their efforts to ensure that all students, and especially those who have been traditionally underrepresented, feel protected and included.

WHAT'S DIFFERENT NOW?

The issue of free speech on campus, and when students and faculty can be punished for their expression, is obviously not new. But there are important ways in which it has changed. Very often in the past, especially in the 1960s and 1970s, campus free speech issues arose when administrators sought to restrict student protests. We think of the Berkeley Free Speech Movement, which occurred in the 1964–65 academic year, where a group of students led a protest against the ban of political activities on campus, against the requirement for loyalty oaths, and for the students' free speech rights.[31] We think of the anti–Vietnam War demonstrations, fueled by men who faced the draft, and administrators' efforts to stop the protests. We remember the protests that closed college campuses in the spring of 1970 and the tragic killing of four students by the National Guard at Kent State University on May 4, 1970.

Today, however, it is students who demand that the campus take action against speech they find offensive. This reflects not only the distinctive experiences and concerns of this generation of students, but also the changing demographics of American higher education. Campuses today are much more diverse than was the case when we were students. This means there are more people on campus who can testify to the very real harms associated with hateful or intolerant speech, or the day-to-day indignities of microaggressions. Those who experience or witness these harms often direct their anger at university officials for not taking sufficient action to protect people from speech that they see as creating a hostile learning environment.

The internet also has dramatically changed the nature of freedom of speech, and thus perceptions about it on college campuses. Any person with access to a computer or a smartphone can quickly reach a large audience, and any other person with similar access can get the information. The difficulty of suppressing speech transcends state and national boundaries. But by the same token, the internet and social media can be used to say offensive things to a large audience, to reveal private information, and to bully and harass.[32] In the era of the internet and social media, today's students cannot imagine that free expression could be lost, but they also realize that the omnipresence of these media in their lives makes it impossible to shut oneself off from hateful or offensive speech.

Many students associate free speech with bullying and shaming. Their sense of speech is not sit-ins at segregated lunch counters to bring about positive change. It is Yik Yak, which began as a smartphone application that allows people to anonymously create and view discussion threads within a five-mile radius. Because it has been used for bullying and harassment, a number of high schools have banned Yik Yak, and schools such as Emory University and Wesleyan University have tried to prohibit it.[33] Social media make students think immediately of the harms, not the benefits, of speech.

Another difference is that some students extend the language of "harm" and "threat" to apply not only to traditional examples of so-called hate speech, but also to the expression of any idea they see as contrary to their strongly held views of social justice. More than in the 1990s, some students expect that a supportive campus environment is one in which their views are not challenged. We have heard of many instances of

students walking out of class when other students say things they disagree with, and then demanding protection from the threat of having to listen to such views. The students at Northwestern complained about Laura Kipnis not because she used an ugly epithet, but because she criticized a campus policy that prohibited sexual relationships between faculty and students. The demand to punish those who wrote in chalk "Trump Build that Wall" came because it was a controversial policy idea that was seen as disrespectful of immigrant students.

The U.S. Department of Education's Office of Civil Rights (OCR), and how it interprets campuses' obligations under Title VI and Title IX to ensure a nondiscriminatory learning environment, also contributes to the difference.[34] At times, the OCR seems to foster a sense that the expression of offensive ideas is a form of harassment. At the very least, it has provided students with a rights-based vocabulary for demanding formal investigations of speakers on the grounds that their politically controversial speech creates a "discriminatory learning environment." The complaint against Laura Kipnis is one example. Another occurred on our campus.

Each spring at the University of California, Irvine, campus groups such as Students for Justice in Palestine and the Muslim Student Union bring in speakers who are very critical of Israel. At times unquestionably anti-Semitic things have been said. The Zionist Organization of America filed a complaint with the Office of Civil Rights alleging that by allowing such speech to take place, the university was creating a hostile learning environment for Jewish students. The investigation took months and ultimately concluded that there was no basis

for finding that there was a hostile or intimidating environment for Jewish students on campus. "There is insufficient evidence," the investigators wrote, "to support the complainant's allegation that the University failed to respond promptly and effectively to complaints by Jewish students that they were harassed and subjected to a hostile environment."[35] They added, "In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience."[36] Although the campus was exonerated, it is still remarkable that the expression of ideas was by itself a sufficient basis for a complaint and a long investigation.

The OCR's decision to open an investigation of the University of Mary Washington in late 2015, on the ground that the university failed to monitor the anonymous social media platform Yik Yak, also has First Amendment implications. To compound matters, when the university's president, Richard Hurley, refuted the accusations against the university citing (among other considerations) free speech concerns, the students amended their complaint to the OCR accusing the president of violating Title IX by retaliating against them with a "disparaging letter." This echoes what happened in the Kipnis investigation, when a Title IX retaliation complaint was filed against the faculty member who accompanied Kipnis to her investigation because he told the faculty senate of his concerns about the process.[37]

We have been here before. In 2003, campus officials raised concerns that OCR was encouraging or requiring campuses to adopt speech codes that had previously been deemed unconsti-

tutional. OCR issued a letter clarifying that it has no power to force universities to police speech that is protected by the First Amendment and that public universities could not ban merely offensive speech. Assistant Secretary of Education Gerald A. Reynolds acknowledged that "Some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race, and other classifications."[38] But the First Amendment, he continued, prohibits the government from defining harassment as equivalent to "the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program." Conduct would be evaluated using the standard of a "reasonable person" of the alleged victim's age and position, not simply the complainant's subjective view.[39]

Despite this clarification, OCR's recent decision to instruct the University of New Mexico to punish unwelcome "verbal conduct" of a sexual nature raises concerns that it is once again focusing on climate at the expense of the First Amendment.[40] It has been almost fifteen years since OCR reassured the community of its understanding of free speech protections,[41] and its recent actual and threatened investigations certainly add to the concern over free speech on college campuses.

HOW TO RESPOND?

We find much of what is said about free speech on college campuses unsatisfying. We are deeply troubled by the efforts

to suppress and punish the expression of unpopular ideas. Those who call for punishment of speech that makes students feel uncomfortable fail to recognize the importance of speech and the danger in giving the government the power to regulate it.

But at the same time, much of the criticism of current students and their sensibilities fails to reflect the laudable compassion that motivates them. Greg Lukianoff and Jonathan Haidt, in a cover story published in the *Atlantic* titled "The Coddling of the American Mind," warn that accommodating students' concerns can even undermine their mental health.[42] "Vindictive protectiveness," they write, "prepares [students] poorly for professional life, which often demands intellectual engagement with people and ideas one might find uncongenial or wrong. The harm may be more immediate, too. A campus culture devoted to policing speech and punishing speakers is likely to engender patterns of thought that are surprisingly similar to those long identified by cognitive behavioral therapists as causes of depression and anxiety. The new protectiveness may be teaching students to think pathologically."[43]

But mocking these students or treating their concerns as pathological misses the mark. It is hardly a constructive approach to the tensions over offensive speech on college campuses. Nor is the response that students should "suck it up" and deal with it, which harkens back to a thankfully bygone age when racial and ethnic slurs were more common, disrespect of women was more acceptable, LGBT people were ridiculed and tormented, and teachers and coaches routinely used shaming to discourage poor performance.

Society is better now, and students are right to expect empathy for victims of hate and intolerance. Telling them to "toughen up" does not address their laudable desire to create a campus that is inclusive and conducive for learning by all students. Words can cause real harm and interfere with a person's education. Campuses have the duty to act—sometimes legally, always morally—to protect their students from injury. The challenge is to develop an approach to free speech on campus that both protects expression and respects the need to make sure that a campus is a conducive learning environment for all students.

OUR APPROACH

Our central thesis is that all ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel. But there are steps that campuses can and should take to create inclusive communities where all students feel protected. We will develop this thesis over the next five chapters.

Chapter 2 focuses on the importance of free speech. We were surprised by how little our students had thought about why freedom of expression is a fundamental right and why it must be protected. Any analysis of free speech on college campuses must begin with this.

Chapter 3 discusses the special role of free expression at colleges and universities. However important free speech principles are in society as a whole, they require even stronger protections in academic settings. Our position is absolute: campuses never can censor or punish the expression of ideas,

however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge. Although the First Amendment applies only to public universities, *all* colleges and universities should commit themselves to these values.

In Chapter 4 we turn to the issue of hate speech on campus. We look at the real harms caused by hate speech on campus, review the First Amendment law in this area and the history of hate speech codes, and explain why we believe that although well intentioned, campus bans on hate speech are not desirable.

In Chapter 5 we focus on how to create inclusive learning environments without undermining freedom of speech. We have tried to describe as specifically as possible what campuses can and should do, and can't and shouldn't do, when it comes to regulating speech. They cannot and should not punish speech because it is offensive. But certain speech can be punished: true threats, harassment, destruction of property, and disruptions of classes and campus activities. Campuses can create time, place, and manner restrictions that protect the learning environment while also protecting free expression. Moreover—and this is too often forgotten—campus leaders can engage in more speech, proclaiming the type of community they seek and condemning speech that is inconsistent with it.

Finally, Chapter 6 looks to the future. The high-stakes debate over free speech on campuses, and the desire to protect students from offense, is not going away. Ultimately it is about whether campuses can be places that protect the learning experiences of all students as well as freedom of speech

and academic freedom. Colleges and universities cannot succeed at their mission unless they find a way to do both. If campus leaders allow calls for "safe spaces" to suppress the expression of ideas, little will remain of free speech or academic inquiry. But if campus leaders do not find ways to create a conducive learning environment for everyone, they will discover that they have provided free speech to some but not to all.

CHAPTER TWO

Why Is Free Speech Important?

The controversy over free speech on campuses can be understood only in the context of the history of free speech. In the United States, that context is inseparable from the First Amendment.

Freedom of expression—which includes verbal and nonverbal behaviors that express a person's opinion, point of view, or identity—is considered a fundamental right within our political system. The Supreme Court has called it "the matrix, the indispensable condition, of nearly every other form of freedom"[1] and has ruled that it occupies a "preferred place"[2] in our constitutional scheme.

Such phrases reflect the assumption within American constitutional law that speech claims should be treated as weightier than the reasons typically used to justify the suppression or punishment of speech. In other words, before the

debate even starts, speech has an advantage, even against some very good reasons to limit it.

And there may be good reasons to limit speech. It has been used to mock and bully, and to question the dignity of entire groups of people in ways that put them at risk. It has been used to objectify women, sexualize children, and glorify violence. Speech can invade privacy or ruin a reputation. People have said or published things that threaten national security. Speech can fuel hatred among people, and—as we have seen all too often recently—it can incite people to commit horrific acts of violence against innocents.

There is constant tension between free speech and other values—national security, safety, public morality, privacy, reputation, dignity, equality. The current debate about free speech on college campuses is one example of a long-standing discussion of the best way to reconcile these competing considerations.

Yet despite the real and potential harms and risks, we believe that freedom of expression is an indispensable condition of all other freedoms and deserves a preferred place in our system.

Why believe this?

The history of freedom of speech in the United States provides a longer answer. But first we want to mention the three most common moral and practical reasons why expressive activity deserves broad protection: freedom of speech is essential to freedom of thought; it is essential to democratic self-government; and the alternative—government censorship and control of ideas—has always led to disaster.[3]

Freedom of Thought

First, freedom of speech is essential to freedom of thought because a person cannot develop an independent point of view about the world unless he or she is exposed to different ideas about what is important and what beliefs are most meaningful, and is permitted to converse with others about their experiences or beliefs. Just as totalitarian societies are premised on complete control over people's actions and beliefs, free societies are premised on freedom of thought and freedom of conscience—the right to have beliefs without risking punishment for "thoughtcrime" (the holding of unapproved beliefs and ideas).[4] This freedom can develop only in a society that protects a broad and diverse range of opinion.

This protection is necessary not for those whose beliefs and actions are consistent with dominant opinion (people seldom try to oppress what is accepted and popular), but for those who insist on asserting their individuality against dominant opinion. As Justice Oliver Wendell Holmes put it, "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[5] In this sense, free speech and freedom of thought are essential components of any truly diverse society. Without them, the pressure for conformity will overwhelm potential iconoclasts and outcasts, and there will be no true diversity of experiences, perspectives, or identities within the community.

Moreover, there is little value in allowing people to develop their own conscience, their own commitments, and their own identities if the society then criminalizes the ability to express them to others. To hide who you are and what you believe, for fear that the mere act of expressing yourself risks punishment, is an exceedingly cruel and oppressive circumstance. The rights of conscience and free expression are designed to prevent such a torment.

Free Speech and Democracy

Second, freedom of speech is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials. The act of voting still occurs in many autocratic societies where speech is severely limited and government officials punish people who criticize the government. Many dictators brag about receiving over 90 percent of the vote, not realizing that such numbers cast doubt on their own validity. It is not the act of voting that creates a self-governing society but rather the people's ability to formulate and communicate their opinions about what decisions or policies will best advance the community's welfare. The right to be informed about matters of public interest is considered so fundamental to democracy that Benjamin Franklin called it the "principal pillar of a free government."[6] As Thomas Jefferson put it, "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[7]

Another way of saying this is that freedom of expression is the major bulwark against tyranny in any political system. All successful autocrats start by punishing dissenters, criminalizing speech that might threaten their power, and dominating those institutions that would otherwise be dedicated to incubating independent thought—including newspapers and (especially) universities. A citizenry that is not free to share its common experiences and hear dissenting views is hard-pressed to challenge those who oppress and immiserate them.

In free societies, meanwhile, rights of free expression allow a diverse political community to work through its different views without always succumbing to violence. Political systems are more stable when individuals feel as if they have had a fair chance to have their say, and even if they lose in the short run, will have more opportunities to convince their fellow citizens of the wisdom of their views.

Censorship and Society

Third, history shows that the alternative to freedom of speech—government censorship and control of ideas—is disastrous for a society. These methods have been used throughout history to prevent challenges to people in power, to secure the place of dominant social groups against people considered less worthy of respect, and to prevent the circulation of new ideas that are the essential engine of social progress. To make progress in our thinking about important matters, we need an extraordinary amount of tolerance for wrong hypotheses and strange-sounding ideas, because (as Steven Pinker observes), "everything we know about the world—the age of our civilization, species, planet, and universe; the stuff we're made of;

the laws that govern matter and energy; the workings of the body and brain—came as insults to the sacred dogma of the day."[8]

If one does not know the history of the struggle for free speech, one might think that restrictions on speech can be a force for protecting the vulnerable. But history tells us the exact opposite: censorship has always been on the side of authoritarianism, conformity, ignorance, and the status quo, and advocates for free speech have always been on the side of making societies more democratic, more diverse, more tolerant, more educated, and more open to progress.

This helps us understand why the protection of free speech has been so rare in human history, and is still rare today. Support for free speech is synonymous with a genuine commitment to democracy, diversity, and change. If you value social order and conformity more highly than you value liberty and democracy, then you will not support free speech no matter what else we say. Unfortunately, the prevailing stance of most political systems has been authoritarian, and the prevailing organization of most societies has favored rigid views about how people should behave. Free speech as an idea has developed—slowly, tenuously, over many centuries—only when there have been opportunities to break down more authoritarian and homogeneous structures of government and society. Free speech thrives when members of society agree that individuals should be free to make their own choices about what to believe and how to behave. It thrives when people agree that they should be able to challenge government leaders and advocate for social change. It is valued when people are open to new ideas about how the world works,

how society should be organized, and what values are most important.

The history of free speech in America illustrates these points and provides an essential backdrop to today's debate over free speech on college campuses.

FREE SPEECH IN AMERICA BEFORE THE TWENTIETH CENTURY

There is some evidence that ideas of free speech existed during the short reign of Athenian democracy some 2,500 years ago, and among some leading orators of the troubled Roman Republic. But the first major free speech controversies in western history occurred in England, during the debates over the so-called Licensing Acts of 1643 and 1662, and these debates shaped the views of the generation that ratified the First Amendment to the United States Constitution.

Earlier, in the fifteenth century, European political and social elites had to come to grips with the creation of the printing press, which for the first time made it easy to circulate information and ideas without going through the existing hierarchy of the church and monarchy. The immediate response of the Roman Catholic Church was to impose severe restrictions on the use of the printing press. Pope Alexander VI, explaining in 1501 that the printing press could be "very harmful if it is permitted to widen the influence of pernicious works," determined that "full control over the printers" was necessary.[9] He required that a person obtain an official "license" from a proper authority in order to distribute materials printed on a printing press. If one wanted to print copies of the Bible, one would

receive a license. If one was interested in printing works of dissent or criticism, the license would be denied.

In the spirit of the times, the English Licensing Acts of the 1600s required all persons to obtain official permission before publishing any material, and required the licenser to attest that the manuscript did not criticize Christianity or the government.[10]

The printing press forced political and social elites to make it clear that people could express themselves only if they did not challenge political and social elites. But it also led to the revolutionary idea that the publication of dissent and criticism should be tolerated rather than punished or censored.

The first great expression of this idea came from John Milton, the author of *Paradise Lost*, whose 1644 pamphlet *Areopagitica* is the seminal statement on free speech rights in Anglo-American history. Written just as the English Civil War was heating up, at a time when there were many challenges to existing political and religious authority, Milton (who sided with the Puritans against Charles I and the Church of England) emphasized the value of free speech for discovering truths. He used this argument to explain why it was not appropriate for the government to predetermine what ideas were and were not acceptable for free human beings to hear.[11]

Milton's most famous passage focused on how the licensing laws would have the effect of discouraging "all learning" and undermine the ability of people to understand truth:

> Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to

> the worst in a free and open encounter? . . . [Since] the knowledge and survey of vices is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason?[12]

An important assumption underlying Milton's view is that individual persons should be respected enough to decide for themselves whether a particular view was worthy of their support. Rather than have the government decide in advance what was or was not truthful or worthy of attention, Milton, like many English political and religious reformers of the time, wanted that authority given to every person. In support of this view he beseeched the "Lords and Commons of England" to treat their subjects not as "slow and dull, but of a quick, ingenious and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to."[13]

Parliament refused to renew the Licensing Act when it expired in 1694. By the middle of the eighteenth century, both English and American authorities agreed that freedom of the press meant that government could not pass what became known as "prior restraints." Moveover, increasing numbers of Enlightenment thinkers began to advocate for a world that was more democratic, more tolerant of diverse views, and more supportive of free inquiry. John Locke's "A Letter Concerning Toleration" (1689) made the case that the government should tolerate the proliferation of different religious practices rather than force everyone to accept only the official

religion, and this helped set the stage for broader arguments about freedom of conscience.[14] In the early 1700s prominent English dissenters John Trenchard and Thomas Gordon, writing a series of "letters" under the pseudonym Cato, attacked what they considered to be the increasing corruption of British politics and made a special point in their essay "Of Freedom of Speech" to build on Milton's views:

> Without freedom of thought, there can be no such thing as wisdom; and no such thing as public liberty, without freedom of speech: Which is the right of every man, as far as by it he does not hurt and control the right of another. . . . That men ought to speak well of their governors, is true, while their governors deserve to be well spoken of; but to do public mischief, without hearing of it, is only the prerogative and felicity of tyranny: A free people will be showing that they are so, by their freedom of speech.[15]

While the founders of the American Republic agreed that licensing acts created too strong a choke hold on the expression of innovative or dissenting ideas, they also believed that society had a right to protect itself against dangerous speech. This had become the dominant opinion in English law at the time the U.S. Constitution was written. As the English legal commentator William Blackstone put it in his *Commentaries*, "Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."[16] In the language of constitutional law, prior restraints were prohibited but not "subsequent punishment" of bad speech.

What speech was "improper, mischievous, or illegal"? The main category of speech that could lead to punishment

was "seditious libel," with "sedition" meaning an act designed to subvert lawful authority and "libel" defined as an expression that undermines reputation or brings someone or something into hatred or contempt.[17] Seditious libel was thus a statement or writing about the government or a government official—whether true or false—that would undermine authority and perhaps lead to a breach of the peace. While the American founders disagreed over whether truthful criticisms of the government deserved protection, most believed that "false, scandalous, and malicious" criticism should be punished.

This is one of the reasons why, despite the ratification of the First Amendment just a few years earlier, Congress could pass the Alien and Sedition Acts in 1798, making it harder for an immigrant to become a citizen, allowing the president to imprison or deport noncitizens who were deemed dangerous, and criminalizing false statements that were critical of the federal government.[18] Because the presidency and the Congress were at the time controlled by the Federalist Party, the prohibition against criticizing the government was most enforced against members of the opposition Democratic-Republican Party, led by Thomas Jefferson and James Madison. Using the law, the Adams administration shut down several prominent Jeffersonian newspapers, imprisoned Jeffersonian members of Congress, and even arrested Benjamin Franklin's grandson for libeling President Adams.

In the end, the partisan prosecutions generated enough outrage that the Federalists lost control of the federal government in 1800. After Jefferson became president, he allowed the Sedition Act to expire and pardoned those who had been convicted.

As a result of the controversy surrounding the Sedition Act, notions of free speech rights further developed to shield more people who criticized the government or government officials. But throughout the nineteenth century, United States law still allowed censorship or prosecution of people who engaged in "dangerous or offensive writings."

The most dramatic and important example of this censorship involved anti-slavery advocacy. When abolitionists in the 1830s began insisting on the emancipation of slaves, slaveholders decried their speech as dangerous because it might incite slave rebellions. Some efforts to silence anti-slavery advocacy took the form of mob justice, destroying abolitionist presses and murdering the editors of abolitionist journals. But the censors also used the power of law. While Northern states refused to formally punish abolitionist advocacy, Southern states made it a crime for anyone to express an anti-slavery position.[19] When the American Anti-Slavery Society mailed abolitionist pamphlets to prominent Southern citizens in 1835, Amos Kendell, the U.S. postmaster general, informed local postmasters that they had no obligation to deliver abolitionist literature, explaining that the federal government had a responsibility to protect "States from domestic violence."[20]

The other prominent nineteenth-century example of the suppression of speech was the passage of the Comstock Law in 1873. Pushed by groups such as the New York Society for the Suppression of Vice (led by Anthony Comstock), the law targeted the "Trade in and Circulation of, obscene literature and Articles for immoral use" and made it illegal to send any "obscene, lewd or lascivious" materials or any information or "any article or thing" related to contraception or abortion

through the mail. The passage of the federal law encouraged many states to add laws of their own, and heavy-handed restrictions on contraceptive information and sexually oriented materials continued for many years.

Working as an unpaid special agent of the U.S. Post Office from 1874 until 1915, Comstock presided over the confiscation of some 130,000 pounds of obscene literature and 194,000 lewd pictures and photos. Among the works that would eventually fall under the Act's censorship net were Aristophanes' *Lysistrata*, Chaucer's *Canterbury Tales*, and books by Ernest Hemingway, Honoré de Balzac, Oscar Wilde, F. Scott Fitzgerald, Eugene O'Neill, and John Steinbeck. James Joyce's *Ulysses* was banned in the United States throughout the 1920s after the New York Society for the Suppression of Vice had the work declared obscene. Not until the 1930s, after the development of greater protections for speech and the press, did a court declare the book to be protected by the First Amendment.[21]

By the end of the nineteenth century it was acknowledged that people should have the freedom to criticize the government, government officials, and candidates for office, and to express a range of views on matters of public debate. Yet it was still commonplace to allow the censorship or punishment of speech that was considered "blasphemous," that harmed the reputation of a private individual, or (most expansively) that had a "tendency" to injure "public morals or safety." This last category in particular gave the government extraordinary opportunities to prosecute people for expressing unpopular or dissenting opinions, as became dramatically clear at the turn of the twentieth century.

HOLMES AND BRANDEIS IN DISSENT

In the years leading up to World War I,[22] many Americans feared that the new wave of immigrants from eastern and southern Europe would bring "anti-American" practices and ideas into the country, including socialism and anarchism. These fears were heightened when anarchists at the turn of the century assassinated several heads of state (including President William McKinley in 1901), the Socialist Party in the United States gained an increasing share of the vote in many urban communities, and militant labor leaders threatened mass strikes. Even before the United States entered the war, many Americans were calling for legislation to restrict "disloyal" utterances, usually associated with immigrants. In his State of the Union address in 1915, Woodrow Wilson warned that the increasing presence of American citizens who were "born under other flags" and "have poured the poison of disloyalty into the very arteries of our national life" was making it "necessary that we should promptly make use of the processes of law by which we may be purged of their corrupt distempers."[23]

Views such as these inspired the passage of the Espionage Act of 1917, the Sedition Act of 1918, and many similar state statutes. The Espionage Act made it a federal crime for a person to make a false report that attempted to cause insubordination, disloyalty, mutiny, or refusal of duty, including obstruction of the draft. The Sedition Act extended the range of offenses to cover speech that cast the government or the war effort in a negative light or interfered with the sale of government bonds. It forbade the use of "disloyal, profane, scurrilous,

or abusive language" about the United States government, its flag, or its armed forces, or that caused others to view the American government or its institutions with contempt, and it allowed the postmaster general to refuse to deliver mail containing such language.[24]

Following passage of these laws, more than two thousand persons were arrested for violating federal restrictions on speech, and more than a thousand were convicted. They generally received sentences of five to twenty years' imprisonment.

In sustaining these convictions, the United States Supreme Court initially relied on traditional understandings of government power to regulate speech. *Schenck v. United States* (1919) turned on the question of whether Charles Schenck, the general secretary of the American Socialist Party, had a right to distribute pamphlets condemning the Wilson administration and arguing that the draft was unconstitutional.[25] Among other things, the pamphlet urged readers, "Do Not Submit to Intimidation" and "Assert Your Rights." Schenck was arrested, charged with violating the Espionage Act, and sentenced to ten years in prison. In upholding his conviction, Justice Oliver Wendell Holmes asserted:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. . . . It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.[26]

On this view, just as the government had the power to prosecute people for physically obstructing the draft, it also had the power to prosecute people for using words that had the same effect.

That decision was announced on March 3, 1919. A week later, the Court sustained the conviction of the prominent Socialist leader Eugene V. Debs—who had expressed admiration for three draft evaders and had told a crowd that "you need to know that you are for something better than slavery and cannon fodder"—also under the Espionage Act. Holmes again wrote the majority opinion; this time he asserted that persons could be constitutionally convicted when "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting services."[27]

The Red Scare that followed World War I inspired continued restrictions on political dissent, especially the advocacy of socialist or anarchist views. In April 1919, authorities discovered a plot for mailing thirty-six bombs to prominent political and business leaders, including J. P. Morgan, John D. Rockefeller, Justice Oliver Wendell Holmes, and Attorney General A. Mitchell Palmer. On June 2, 1919, eight bombs simultaneously exploded in eight different locations, including Palmer's house. Afterward, Palmer ordered what became known as the "Palmer Raids," a lawless dragnet designed to capture, arrest, and deport radical leftists from the United States. Over 10,000 persons were arrested; 556 were eventually deported.[28]

Many establishment figures felt that Palmer had gone too far. One result of their outrage was the founding of the American Civil Liberties Union, which published a *Report Upon the Illegal Practices of the United States Department of Justice*.[29]

Prominent legal scholars also began to write treatises advocating for a better approach to free speech protections.[30]

At this point, two Supreme Court justices began to articulate a different understanding of free speech rights. Through a series of dissenting opinions, Justice Oliver Wendell Holmes—who just months earlier had upheld the prosecution of dissenters—and Justice Louis Brandeis began a revolution in the thinking and practice of free speech rights in the United States.[31]

They started late in 1919, in a case where a majority of Supreme Court justices ruled that Jacob Abrams could be sentenced to ten years for urging American workers to protest American intervention against the Bolsheviks in the Russian Revolution.[32] The most famous passage of Holmes and Brandeis' dissent in *Abrams v. United States* asserted the following:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by a free trade of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. . . . We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[33]

When it comes to restricting or punishing speech, in other words, it was not enough for the government to think that certain expressions have a "tendency" to cause bad outcomes. The traditional "bad tendency" basis for limiting speech meant, as a practical matter, that there could be no protection for controversial speech. Holmes and Brandeis argued that any concerns over the harmful effects of speech should be addressed by the "marketplace of ideas"—that is, by people exercising their speech rights to expose the harmful idea's dangers—rather than by government censorship or punishment. The major exception to this rule involved speech that created an "imminent threat" of lawlessness or real danger, such that there was no time for "more speech" to solve the problem (as with, for example, falsely shouting fire in a crowded theater in order to start a panic).

Brandeis reinforced this approach in his opinion in *Whitney v. California* (1927).[34] The case involved Charlotte Anita Whitney, an organizer with the California branch of the Communist Labor Party. She had advocated peaceful political change, but was convicted under the California Criminal Syndicalism Act of 1919 because of her association with the Communist Party. A majority of Supreme Court justices agreed that her actions presented a "danger to the public peace and the security of the State."[35] Brandeis disagreed. "Fear of serious injury," he wrote,

> cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of speech there must be a reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to

> believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[36]

This claim—that in almost every circumstance the best approach to combat the potential harm of speech "is more speech, not enforced silence"—has become the most common argument used by free speech advocates in response to those today who urge censorship and punishment of speech considered offensive or harmful.[37]

THE BENEFICIARIES OF FREE SPEECH PROTECTION

Over the next half century, judges and civil libertarians worked to move American culture and practices toward the views expressed by Holmes and Brandeis in dissent. It was not a steady march of progress, and the full story is long and complicated. Today, judges and analysts still struggle and disagree over how to balance free speech against other important interests.

Yet between the 1930s and 1970s there was a revolution in thinking and practice about freedom of expression in the United States. Not surprisingly, the most important beneficiaries of this new conception of free speech were the most vulnerable members of society and those who most strongly advocated for social change, especially labor unions, religious minorities, political radicals, civil rights demonstrators, antiwar protestors, and nonconformists.

In 1937 the Supreme Court ruled that states could not prosecute people merely for belonging to the Communist Party or speaking at public meetings sponsored by the Communist Party.[38] That same year, Justice Benjamin Cardozo became the first justice to characterize freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[39] During World War II this newly indispensable liberty was invoked to prevent states from punishing the children of Jehovah's Witnesses for refusing to pledge allegiance to the American flag. As Justice Robert Jackson explained in *West Virginia Board of Education v. Barnette* (1943), "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[40] In *Keegan v. United States* (1945), the Court also ruled that persons could not be convicted of obstructing the draft merely for counseling others that the draft was unconstitutional—exactly the offense that sent Charles Schenck to jail in 1918.[41] By 1945, the justices were talking about "the preferred place given in our scheme to the great, indispensable democratic freedoms secured by the First Amendment."[42]

But there were dramatic setbacks in the protection of free speech. In the months before the United States entered World War II, Congress passed the Smith Act of 1940, which made it illegal "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing" the United States government by force.[43] The Second Red Scare of the late 1940s and early 1950s—embodied in Senator Joseph McCarthy's destructive witch

hunts against real and imagined communists and communist sympathizers—led to the Internal Security Act of 1950. This law required communist organizations to register with the Justice Department and established a Subversive Activities Control Board to investigate people suspected of promoting "totalitarian dictatorship."

In the 1951 case of *Dennis v. United States*, decided during the height of McCarthyism, a divided Supreme Court sustained the main anti-communist measures of the 1940s and 1950s.[44] Eugene Dennis was the general secretary of the American Communist Party. In 1948, he and ten other party leaders were indicted for violating the Smith Act of 1940. They were not charged with directly conspiring to overthrow the government but rather with conspiracy to organize "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence." Dennis and nine of his peers were sentenced to five years in prison, and by a 7–2 vote the justices ruled that their conviction was constitutional.[45]

Not until after McCarthy's downfall did the justices reextend protections for political dissenters. In *Yates v. United States* (1957), the Court held that a person could not be prosecuted for "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end."[46] Justice Hugo Black's concurring opinion reiterated the logic of extending broad protections to speech:

> Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But government suppression of causes and beliefs seems to be the very antithesis of what our Constitution stands for. . . . The

> First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.[47]

In the 1950s and 1960s, the most important beneficiaries of newly expanded free speech protections were participants in the civil rights movement. The messages of civil rights protestors were considered deeply offensive, harmful, and dangerous to many southern government officials, and citizens considered the ideas of civil rights protestors "subversive" to southern life in the same way that communist and anarchist ideas were considered subversive to the country as a whole. In fact, much of the language used against protestors minimized their actual concern about civil rights and attempted instead to associate movement leaders with radical, destructive elements in society. J. Edgar Hoover's FBI tried to link Martin Luther King Jr. and other civil rights leaders to communism.[48] Under any standard that allowed the government to censor or punish speech that was offensive or had a tendency to cause harm or danger, the civil rights movement could not have gotten off the ground.

Civil rights leaders were able to maintain the movement because the federal courts were willing to apply stronger free speech principles to stop southern governments from repressing protestors. Many southern political leaders tried vigorously to suppress African American protests by forcing the NAACP to identify its members (so that they could then be targeted for harassment or worse),[49] forbidding NAACP lawyers from soliciting clients for cases attacking the constitutionality of

racial segregation,[50] charging protestors with disturbing the peace,[51] suing civil rights leaders for libeling pro-segregationist community leaders,[52] and limiting speakers' access to public property.[53] The Supreme Court declared all these measures unconstitutional. Given that much of the movement's political strategy depended on exposing repressive southern practices to northern opinion, the free flow of information was fundamental to the movement's success. The extension of First Amendment protections allowed Martin Luther King Jr. and other civil rights leaders to build the national support needed to pass such laws as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

The Supreme Court was also remarkably protective of speech during the Vietnam War. Although the justices did not extend free speech protection to the act of burning a draft card,[54] there was no repeat of the prosecutions of anti-war speech that occurred during World War I. Presidential candidate Eugene McCarthy made the same kinds of statements in 1968 that got presidential candidate Eugene Debs sentenced to prison after he expressed them in 1920.

By the late 1960s the Supreme Court had formally adopted the views of "Holmes and Brandeis in dissent" as the new constitutional standard for evaluating government's authority to censor or punish speakers whose words might be considered a threat to public order, safety, or morality. In *Brandenburg v. Ohio* (1969), the Court overturned the conviction of a Ku Klux Klan member who said during a speech that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [*sic*] taken."[55] The

justices ruled that the government cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[56] And to finally bury the older way of thinking, the justices held: "The contrary teaching of *Whitney v. California* . . . cannot be supported, and that decision is therefore overturned."[57]

Two years later, California prosecuted nineteen-year-old Paul Robert Cohen for disturbing the peace in the corridor of a courthouse by wearing a jacket bearing the words "Fuck the Draft."[58] In *Cohen v. California* (1971) the justices overturned his conviction, asserting that it was not within the power of government to "remove this offensive word from the public vocabulary."[59] Justice John Marshall Harlan acknowledged that this ruling would create a marketplace of ideas that included "verbal tumult, discord, and even offensive utterance," but these were "necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[60] He added, "one man's vulgarity is another's lyric."[61]

The Court's embrace of free speech had other beneficiaries. Historically, people who spoke out against religion could be convicted of "blasphemy," but in 1952 the justices in *Joseph Burstyn, Inc. v. Wilson* ruled that "it is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine."[62] In 1957, copies of Allen Ginsberg's poem "Howl" were seized by customs officials, and a San Francisco bookstore manager was arrested for selling a published copy to an undercover police officer; this would not happen again after the free speech revolution of

the 1960s. (The 2010 film *Howl*, starring James Franco, dramatizes the subsequent trial.) Counterculture celebrities such as the comedian and social critic Lenny Bruce, who was arrested in the early 1960s for using the word "schmuck" (a Yiddish word for penis), eventually benefited from the Court's willingness to accommodate "even offensive utterances" that posed no immediate danger of violence or lawlessness.[63] While obscenity law is not entirely a thing of the past,[64] the contemporary legal and cultural environment is tremendously accommodating of forms of expression that would have landed many people in jail in the era of the Comstock Act.

If today we take for granted that the government cannot put people in jail for asserting "countercultural" attitudes or identities—including forms of expression that challenge traditional religion, prevailing social mores, familiar lifestyle choices, inherited views about sexuality, or historic gender roles—then it is good to keep in mind that this was made possible by the twentieth-century revolution in free speech rights.

The expansion of free speech protection does not prevent the law from addressing many of the harms that can result from speech acts. A person can be censored or punished for revealing national security secrets. A person can be held liable for speech that is an invasion of privacy. There are also narrowly drawn categories of speech that the law treats as unprotected, including incitement of illegal activity, defamation, fighting words, true threats, harassment, and speech that creates an unsafe or discriminatory working or learning environment. Still, all of these categories are bounded in a way that ensures they cannot be used to censor or punish people just for expressing ideas.

Many of today's advocates for censorship believe that denying free speech is a way of protecting vulnerable groups. But social progress has come about not as a result of silencing certain speakers, but by ensuring that previously silenced or marginalized groups are empowered to find their voice and have their say. Our country became better, more just, and more inclusive in the twentieth century in part because of the contributions of expanded protections for free speech. That is why sturdy protection for the expression of ideas should be considered one of the past century's most important accomplishments.

THE LESSONS OF HISTORY

Each generation brings new calls to suppress speech, for reasons that appear noble at the time. Today it is to help create inclusive learning environments for students, and also to stop speech that might help terrorists. Not long ago, it was to stop pornography on the ground that it was discrimination against women. From the 1920s until the 1960s, it was to stop communism. During World War I, it was to preserve the draft and win the war. The specific issues vary, but the underlying question is always the same: when to stop speech that is perceived as harmful. One of the key lessons of history is that almost always, on reflection, society concludes these efforts were misguided. As Justice Holmes put it, "time has upset many fighting faiths."[65]

We cannot think clearly about free speech on campuses today unless we understand this history of freedom of expression. As we continue to debate this issue, it is vital that participants

appreciate the rise of a free speech tradition as a truly historic accomplishment. And as important as free speech is to society as a whole, there are additional reasons why it deserves an even higher degree of protection within institutions of higher education.

Notes

CHAPTER 1. THE NEW CENSORSHIP

1. Steve Szkotak, *"Muzzles" Mine Rich Vein of Speech Limits Among U.S. Colleges*, Associated Press (Apr. 20, 2016), http://www.bigstory.ap.org/article/2187e1e72eef46ce8486b25039066750/muzzles-mine-rich-vein-speech-limits-among-us-colleges.

2. *See U. of Tulsa Suspends Student for Someone Else's Facebook Post*, Found. for Individual Rights in Educ. (Feb. 12, 2015), https://www.thefire.org/u-tulsa-suspends-student-someone-elses-facebook-post/.

3. *See* Laura Kipnis, *Sexual Paranoia Strikes Academe*, Chron. Higher Educ. (Feb. 27, 2015), http://chronicle.com/article/Sexual-Paranoia-Strikes/190351/.

4. *Id.*

5. Laura Kipnis, *My Title IX Inquisition*, Chron. Higher Educ. (May 29, 2015), http://chronicle.com/article/My-Title-IX-Inquisition/230489/.

6. *See* Eugene Volokh, *No, It's Not Constitutional for the University of Oklahoma to Expel Students For Racist Speech [Updated in Light of the Students' Expulsion]*, Wash. Post: Volokh Conspiracy (Mar. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/10/no-a-public-university-may-not-expel-students-for-racist-speech/.

7. Eugene Volokh, *Youngstown State University Student Government Removes "Straight Pride" Posters [Updated]*, Wash. Post: Volokh Conspiracy (Apr. 24, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/24/youngstown-state-university-student-government-removes-straight-pride-posters/.

8. *See Texas Christian University Tramples Student's Rights in Order to Appease Angry Internet Mob*, Found. for Individual Rights in Educ. (July 29, 2015), https://www.thefire.org/texas-christian-university-tramples-students-rights/.

9. *See Findings and Sanction Letter from TCU*, Found. for Individual Rights in Educ. (July 28, 2015), https://www.thefire.org/findings-and-sanction-letter-from-tcu/.

10. *Letter Upholding Findings and Sanctions*, Found. for Individual Rights in Educ. (July 28, 2015), https://www.thefire.org/letter-upholding-findings-and-sanctions/.

11. *See* Eugene Volokh, *UCLA Likely Violating First Amendment in Its Reaction to Kim-Kardashian/Kanye-West-Themed Fraternity/Sorority Party*, Wash. Post: Volokh Conspiracy (Oct. 12, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/12/ucla-likely-violating-first-amendment-in-its-reaction-to-kim-kardashiankanye-west-themed-fraternitysorority-party/.

12. Editorial Board, *Editorial: Greek Life Needs Policing to Prevent More "Kanye Western" Type Raids*, Daily Bruin (Oct. 12, 2015, 1:53 am), http://dailybruin.com/2015/10/12/editorial-greek-life-needs-policing-to-prevent-more-kanye-western-type-raids/.

13. *Email from the Intercultural Affairs Committee*, Found. for Individual Rights in Educ. (Oct. 27, 2015), https://www.thefire.org/email-from-intercultural-affairs/.

14. *Email from Erika Christakis: "Dressing Yourselves," Email to Silliman College (Yale) Students on Halloween Costumes*, Found. for Individual Rights in Educ. (Oct. 30, 2015), https://www.thefire.org/email-from-erika-christakis-dressing-yourselves-email-to-silliman-college-yale-students-on-halloween-costumes/.

15. *See* Greg Lukianoff, *On the Front Lines of the Fight for Free Speech at Yale*, Wash. Post: Grade Point (Nov. 11, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/11/on-the-front-lines-of-the-fight-for-free-speech-at-yale/

16. *Open Letter to Associate Master Christakis*, Down Mag (Oct. 31, 2015), http://downatyale.com/post.php?id=430.

17. *See* Isaac Stanley-Becker, *Yale Instructor at the Center of Racial Protest to Leave Teaching Role*, Wash. Post: Grade Point (Dec. 4, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/12/04/with-her-words-this-instructor-helped-set-off-protests-over-race-and-a-debate-over-free-speech-now-shes-leaving-yale/. A year later, Erika Christakis wrote an op-ed in the *Washington Post* decrying the culture of censorship that forced her out of Yale after this incident. Erika Christakis, *My Halloween Email Led to a Campus Firestorm—And a Troubling Lesson About Self Censorship*, Wash. Post (Oct. 28, 2016), https://www.washingtonpost.com/opinions/my-halloween-email-led-to-a-campus-firestorm--and-a-troubling-lesson-about-self-censorship/2016/10/28/70e55732-9b97-11e6-a0ed-ab0774c1eaa5_story.html.

18. *Colorado College Suspends Student for Two Years for Six-Word Joke on Yik Yak*, Found. for Individual Rights in Educ. (Dec. 7, 2015), https://www.thefire.org/colorado-college-suspends-student-for-two-years-for-six-word-joke-on-yik-yak/.

19. *See id.*

20. *See* Katie Rogers, *Pro-Trump Chalk Messages Cause Conflicts on College Campuses*, N.Y. Times (Apr. 1, 2016), http://www.nytimes.com/2016/04/02/us/pro-trump-chalk-messages-cause-conflicts-on-college-campuses.html.

21. Chris Marchese, *"The Chalkening" Spreads, Tests Universities' Commitment to Free* Speech, Found. for Individual Rights in Educ. (Apr. 13, 2016), https://www.thefire.org/the-chalkening-spreads-tests-universities-commitment-to-free-speech/.

22. Richard Pérez-Peña et al., *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. Times (Aug. 26, 2016).

23. Valerie Strauss, *So You Like the University of Chicago's Rejection of Safe Spaces for Students, Consider This*, Wash. Post (Aug. 30, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/08/30/so-you-like-the-university-of-chicagos-rejection-of-safe-spaces-for-students-consider-this/?utm_term=.636a53767f36.

24. Cameron Luttrell, *University of Chicago Staff Members Critique Dean's Controversial Letter*, http://patch.com/illinois/hydepark/

university-chicago-staff-members-critique-deans-controversial-letter (Sept. 14, 2016).

25. *"Stupid and Offensive,"* UO MATTERS (Nov. 2, 2016), http://uomatters.com/2016/11/stupid-and-offensive.html.

26. *Id.* and *University of Oregon Investigative Report* (Nov. 20, 2016), https://provost.uoregon.edu/sites/provost1.uoregon.edu/files/final investigative_report_redacted_-_final.pdf.

27. A report by PEN America, released in October 2016, came to the same conclusion: "Recent incidents have raised significant concerns about the heated climate for intellectual life on U.S. campuses and the implications for the rising generation of college-educated Americans." *And Campus for All: Diversity, Inclusion, and Freedom of Speech at U.S. Universities*, https://pen.org/sites/default/files/PEN_campus_report_final_online_2.pdf.

28. *Survey: Half of U.S. College Students "Intimidated" When Sharing Views*, WILLIAM F. BUCKLEY, JR. PROGRAM AT YALE (OCT. 26, 2015), http://www.buckleyprogram.com/#!SURVEY-Half-of-US-College-Students-Intimidated-When-Sharing-Views/c18lp/igaxoon420.

29. For the contrary view by a First Amendment professor that the expulsion was unconstitutional, see Eugene Volokh, *No, It's Not Constitutional for the University of Oklahoma to Expel Students For Racist Speech [Updated in Light of the Students' Expulsion]*, WASH. POST: VOLOKH CONSPIRACY (Mar. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/10/no-a-public-university-may-not-expel-students-for-racist-speech/.

30. *See* Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RESEARCH CTR. (Nov. 20, 2015), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.

31. *See* Jo Freeman, *The Berkeley Free Speech Movement*, *in* ENCYC. OF AM. SOC. MOVEMENTS, 1178–82 (Immanuel Ness, ed., 2004).

32. *See* David R. Wheeler, *Do Students Still Have Free Speech in School?* ATLANTIC (Apr. 7, 2014), http://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/.

33. *See* Tasnim Shamma, *Yik Yak Tests Universities' Defense of Free Speech*, NPR (Jan. 23, 2016, 5:12 pm), http://www.npr.org/sections/

alltechconsidered/2016/01/23/463197593/yik-yak-tests-universities-defense-of-free-speech.

34. *See* Nat'l Coalition Against Censorship, NCAC TO DEPT. OF ED: VAGUE DEFINITION OF HARASSMENT THREATENS STUDENT FREE SPEECH, http://ncac.org/resource/are-department-of-education-policies-hurting-campus-free-speech (last visited July 20, 2016).

35. *U. of California at Irvine Cleared in Investigation of Anti-Semitism*, CHRON. HIGHER EDUC. (Dec. 12, 2007), http://chronicle.com/article/U-of-California-at-Irvine/40124.

36. *Two More UC Campuses Cleared in U.S. Probes of Anti-Semitism*, L.A. TIMES (Aug. 28, 2013), http://articles.latimes.com/2013/aug/28/local/la-me-ln-uc-jewish–20130828.

37. *See OCR's Investigation of U. of Mary Washington Raises Free Speech Concerns*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 22, 2015), https://www.thefire.org/ocrs-investigation-of-u-of-mary-washington-raises-free-speech-concerns/.

38. Gerald A. Reynolds, *First Amendment: Dear Colleague*, U.S. DEP'T OF EDUC. (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

39. *Id.*

40. *See* Susan Kruth, *DOJ Demands Clarity from UNM While Mandating Confusing Sexual Harassment Policy*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 27, 2016), https://www.thefire.org/doj-demands-clarity-from-unm-while-mandating-confusing-sexual-harassment-policy/.

41. *See* U.S. Dep't of Educ., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES TITLE IX (JAN. 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html. We discuss the issue of harassment in detail in Chapter 5.

42. Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC at 42–52 (Sept. 2015). Lukianoff also develops this theme in his book, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2014).

43. Lukianoff and Haidt, *The Coddling of the American Mind.*

CHAPTER 2. WHY IS FREE SPEECH IMPORTANT?

1. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

2. *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

3. See Steven Pinker, *Why Free Speech Is Fundamental*, BOSTON GLOBE (Jan. 27, 2015), https://www.bostonglobe.com/opinion/2015/01/26/why-free-speech-fundamental/aaAWVYFscrhFCC4ye9FVjN/story.html, and Thomas L. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (1970), for elaboration on some of these points and additional thoughts.

4. *See* George Orwell, 1984: A NOVEL (1949).

5. *U.S. v. Schwimmer*, 279 U.S. 644, 654–55 (1929).

6. Benjamin Franklin, *On Freedom of Speech and the Press*, PENNSYLVANIA GAZETTE (Nov. 17, 1737).

7. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* 11 THE PAPERS OF THOMAS JEFFERSON, at 48–49 (Julian P. Boyd et al., eds., 1950).

8. *See* Pinker, *Why Free Speech Is Fundamental*.

9. Robert Justin Goldstein, POLITICAL CENSORSHIP OF THE ARTS AND THE PRESS IN NINETEENTH-CENTURY EUROPE 34 (1989).

10. Mark A. Graber and Howard Gillman, 1 THE COMPLETE AMERICAN CONSTITUTIONALISM: INTRODUCTION AND THE COLONIAL ERA, at 356–61 (2015).

11. *See* John Milton, AREOPAGITICA (1961) (1738).

12. *Id.* at 51.

13. *Id.* at 149.

14. John Marshall, JOHN LOCKE, TOLERATION AND EARLY ENLIGHTENMENT CULTURE 680 (2006). Because the idea of toleration was at an early stage of development, it should come as no surprise that there were limits to Locke's version of it. The Roman Catholic Church could not be tolerated in England, he thought, because "all those who enter into it do thereby ipso facto deliver themselves up to the protection and service of another prince." *Id.* at 690. There is controversy among scholars whether Locke was willing to tolerate atheists.

15. John Trenchard and Thomas Gordon, 1 CATO'S LETTERS, at 98 (1723).

16. 5 William Blackstone, COMMENTARIES *151–52.

17. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008).

18. *See* James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117 (1999).

19. *See, e.g.*, *State v. Worth*, 52 N.C. 488 (1860).

20. Richard R. John, *Highland Hall's "Report on Incendiary Publications": A Forgotten Nineteenth Century Defense of the Constitutional Guarantee of the Freedom of the Press*, *in* 41 AMERICAN JOURNAL OF LEGAL HISTORY, at 94 (1997).

21. Janice Ruth Wood, THE STRUGGLE FOR FREE SPEECH IN THE UNITED STATES, 1872–1915: EDWARD BLISS FOOTE, EDWARD BOND FOOTE, AND ANTI-COMSTOCK OPERATIONS 41 (2011).

22. *See* Mark A. Graber, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1992).

23. Woodrow Wilson, *Third Annual Message* (Dec. 7, 1915), *available at* AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29556.

24. *See* Geoffrey R. Stone, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERROR (2005).

25. 249 U.S. 47 (1919).

26. *Id.* at 52.

27. *See Debs v. U.S.*, 249 U.S. 211 (1919). While sitting in prison, Debs ran for president. He received almost a million votes, or 3.4 percent of the popular vote.

28. *See* Christopher Finan, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA (2008).

29. *See* Nat'l Popular Government League, TO THE AMERICAN PEOPLE: REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (1920).

30. *See* Zachariah Chaffee, FREEDOM OF SPEECH (1920).

31. For an explanation of how Holmes came to change his mind about speech protections since his *Debs* opinion, see Thomas Healy, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013).

32. *Abrams v. U.S.*, 250 U.S. 616 (1919).

33. *Id.* at 630.
34. 274 U.S. 357 (1927).
35. *Id.* at 371.
36. *Id.* at 376.
37. *Id.* at 377.
38. *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937).
39. *Palko*, 302 U.S. at 327.
40. 319 U.S. 624, 642 (1943).
41. 325 U.S. 478 (1945).
42. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).
43. *See* Stone, Perilous Times.
44. *Dennis v. U.S.*, 341 U.S. 494 (1951).
45. *Id.* at 511–12.
46. 354 U.S. 298, 318 (1957).
47. *Id.* at 343–44.
48. Taylor Branch, Parting the Waters: America in the King Years, 1954–63, at 181–82, 468–69 (1988).
49. *NAACP v. Alabama*, 357 U.S. 449 (1958).
50. *NAACP v. Button*, 371 U.S. 415 (1963).
51. *Garner v. Louisiana*, 368 U.S. 157 (1961).
52. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).
53. *Bell v. Maryland*, 378 U.S. 226 (1964).
54. *U.S. v. O'Brien*, 391 U.S. 367 (1968).
55. 395 U.S. 444, 446 (1969).
56. *Id.* at 447.
57. *Brandenburg*, 395 U.S. at 449.
58. 403 U.S. 15 (1971).
59. *Id.* at 23.
60. *Id.* at 25.
61. *Id.*
62. 343 U.S. 495, 505 (1952).
63. *Cohen v. Cal.*, 403 U.S. 15, 25 (1971).
64. In *Alexander v. U.S.*, 509 U.S. 544 (1993), a closely divided Supreme Court upheld applying racketeering (RICO) laws to destroy $9 million of merchandise owned by a man who was sentenced to six years in prison for selling seven obscene items.

65. *Abrams*, 250 U.S. at 630.

Chapter 3. *Nullius in Verba*

1. *See* 1 A History of the University in Europe: Universities in the Middle Ages, at 47–55 (Hilde de Ridder-Symoens, ed.) (1992).
2. Gregory W. Dawes, Galileo and the Conflict Between Religion and Science 68 (2016). The Church's position was more nuanced than is commonly believed; *see* Ronald L. Numbers, Galileo Goes to Jail and Other Myths about Science and Religion 68–78 (2010)
3. Maurice A. Finocchiaro, The Galileo Affair: A Documentary History 147 (1989).
4. *See* Freeman J. Dyson, Dreams of Earth and Sky (2015); *see also* the history of the Royal Society as summarized on the official website, The Royal Society, History, *available at* https://royalsociety.org/about-us/history/. At the time it would have been recognized as an abbreviated version of a well-known line of the poet Horace: "Sworn to follow the words of no master."
5. Isaac Newton, Philosophiae Naturalis Principia Mathematica (Project Gutenberg Literary Archive Found., 2009) (1687).
6. The Royal Society, History, *available at* https://royalsociety.org/about-us/history/.
7. *See* Yale U. Libr., Resources on Yale History: A Brief History of Yale, *available at* http://guides.library.yale.edu/yalehistory.
8. *See* Dartmouth Rauner Libr., Dartmouth History: A Dartmouth History Lesson for Freshmen, *available at* http://www.dartmouth.edu/~library/rauner/dartmouth/dartmouth_history.html?mswitch-redir=classic.
9. *See* Stephen J. Nelson, The Shape and Shaping of the College and University in America 186 (2016).
10. Walter P. Metzger, Academic Freedom in the Age of the University 4–5 (1961).
11. 1 American Higher Education: A Documentary History 258 (Richard Hofstadter and Wilson Smith, eds., 1961).