

**EXPLORING FREE SPEECH ON COLLEGE  
CAMPUSES**

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**HEARING**  
OF THE  
**COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS**  
**UNITED STATES SENATE**  
**ONE HUNDRED FIFTEENTH CONGRESS**  
FIRST SESSION  
ON  
EXAMINING FREE SPEECH ON COLLEGE CAMPUSES

—————  
OCTOBER 26, 2017  
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## EXPLORING FREE SPEECH ON COLLEGE CAMPUSES

Thursday, October 26, 2017

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR,  
AND PENSIONS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:05 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Lamar Alexander, Chairman of the Committee, presiding.

Present: Senators Alexander [presiding], Murray, Collins, Isakson, Young, Casey, Bennet, Hassan, Warren, and Kaine.

### OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. Good morning. The Senate Committee on Health, Education, Labor, and Pensions will come to order.

Today, we're holding a hearing on Exploring Free Speech on College Campuses. Senator Murray and I will each have an opening statement, and then we'll introduce the witnesses. We're looking forward to the witnesses. This is an exceptional panel. We look forward to learning from you, and we thank you for coming. After your testimony, we'll each have 5 minutes of questions.

Before we get into the hearing, I want to make a comment about the recommendation that Senator Murray and I made to the Senate, along with 22 other Senators, equally divided Republicans and Democrats, for a short-term bipartisan agreement to reduce premiums and avoid chaos in the individual insurance market during 2018 and 2019.

I'm very encouraged by what has happened since we introduced that a week ago, especially by the report of the Congressional Budget Office yesterday, which said, in effect, that as we believed, the Alexander-Murray proposal, which would continue cost-sharing payments for 2 years, 2018 and 2019, would provide benefits to taxpayers and consumers and not to insurance companies. Senator Murray and I spent a lot of time trying to think of the most effective language to make sure that would be true in our language.

President Trump has said repeatedly he doesn't want to bail out insurance companies. We're convinced our language does not, and the Congressional Budget Office agrees. It says that, on net, CBO and the Joint Taxation Committee estimate that implementing our legislation would reduce the debt by \$3.8 billion over 2018 to 2027, and they expected insurers in almost all areas of the country would

be required to issue some form of rebate to individuals and the Federal Government.

In plain English, that means less taxpayer money for Affordable Care Act subsidies if we pass our legislation. CBO had said earlier that it will be a lot more taxpayer money for Obamacare subsidies if we don't pass it. In fact, they estimate \$194 billion over 10 years in increased debt as a result of the higher subsidies.

I think this is why more Republicans and conservatives over the last week have indicated their support for continuing cost sharing. The Chairman of the Tax Committee, Senator Hatch, and Kevin Brady both said that. Now, they added other provisions to their cost-sharing payments that are different than what Senator Murray and I agreed to, and if they can persuade Senator Murray and Democratic Senators to do that, so much the better. But what that suggests to me is that there's growing support that we need to do something.

In addition to that, I've pointed out that almost every House Republican voted for continuing cost-sharing payments for 2 years when they voted earlier this year to repeal and replace Obamacare.

I thank Senator Murray for her leadership in this area. As usual, when she sets about to get a result, we usually get a result, and I think we will by the end of the year, something close to what we proposed. I thank the 22 other Senators, Democratic and Republican, who joined with us, and I ask consent to put into the record at this point the Congressional Budget Office report since this Committee spent so much time on this subject, devoting four full hearings to it and inviting Senators not on the Committee to four other meetings.

The CHAIRMAN. Senator Murray, would you like to say something on that subject before we move ahead with the hearing?

Senator MURRAY. No. I very much appreciate your remarks, and I just want all of our colleagues to know that we believe this is the right kind of proposal that deals with the short-term economic situation of so many Americans. I'm very excited that we are getting more and more support every day. The CBO report, I think, is especially important for us as we move forward, and we will keep working to get it done.

The CHAIRMAN. Thank you, Senator Murray.

Today, we are talking about free speech on college campuses, the right to speak one's mind without being silenced. As Justice Anthony Kennedy recently wrote, quote, "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment to the Constitution does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."

There is a long history of shouting down speakers with whom students and other members of the university community disagree or take offense on college campuses. Back in the 1930s, a student club at the University of Chicago—the current president of the University of Chicago is here today—invited William Foster, the Communist Party's Presidential candidate, to speak. This led to protests and criticism. The university president defended the deci-

sion, saying that students should have the freedom to discuss any problem that presents itself, and that the cure lies through open discussion rather than through inhibition and taboo.

When I was a student in the 1960s at Vanderbilt University, the John Birch Society wanted D. F. Fleming, my political science professor, fired. They said he was a communist because he thought World War I was a mistake. Vanderbilt defended him and he stayed. I also remember when the poet, Alan Ginsberg, spoke on campus, horrifying parents and some students, but he was allowed to speak.

In his book, *North Toward Home*, Willie Morris wrote how, when he was a student at the University of Texas in the 1960s, the American Association of University Professors rose up because the liberal professors were being squelched. In the mid 60's, Senator Ted Kennedy, later a Chairman of this Committee and a liberal leader in the Democratic Party, was shouted down at the University of Wisconsin and not allowed to speak because he was considered by the hecklers as not liberal enough.

The University of California at Berkeley became famous as the home of the campus free speech movement in the 1960's and was known as a campus that protected all sorts of left wing causes.

Now, the pendulum has swung in the opposite direction.

It is usually voices of conservative professors and speakers that are being squelched. In 2014, after Rutgers students protested and held a sit-in in the president's office, former National Secretary Advisor and Secretary of State Condoleezza Rice withdrew from speaking at commencement.

Earlier this year, out of fears of protests, Berkeley sought to re-schedule Ann Coulter's lecture to a time when fewer students would be on campus. One of our witnesses today, Allison Stanger, was assaulted by students at Middlebury College as she was leaving a disrupted discussion she had moderated by conservative author Charles Murray.

Fortunately, some liberals with long memories are reminding the left when they were the ones who were being shut down. Folk musician Joan Baez, who participated in the free speech movement at Berkeley, said, "Let the Ann Coulters of the world have their say." University leaders such as Dr. Zimmer, who is here, and Berkeley Chancellor Carol Christ, have both taken action to reaffirm their commitment to free speech.

Another is Nadine Strossen, who served as president of the American Civil Liberties Union and is a witness here today. Former Vice President Joe Biden said last week, quote, "Liberals have short memories. When I was coming up through college and graduate school, free speech was the big issue, but it was the opposite. It was liberals who were shouted down when they spoke."

But shouting down speakers isn't the only issue. There is the question of political one-sidedness, that there is a pervasive point of view on many college campuses. Statistics are hard to come by, but most everyone knows it is true, even at our most prestigious institutions.

A 2014 survey by the University of California Los Angeles on the ideological leanings of college faculty members found that the number of liberal professors compared with conservative professors was

about 6 to 1, and in New England, the ratio was to 28 to 1. There are not many registered Republicans in the town of Cambridge, either.

As of February this year, 3.7 percent of voters were registered as Republicans.

When I was on the faculty at the Kennedy School of Government at Harvard, where I was for 2 years before I came here, we laughed that I was part of an affirmative action program for Republicans and conservatives. I have to give credit to Dean Joseph Nye, who actually made a significant effort to bring more conservatives and more Republicans to campus. While I was there, I would tell conservative students that they got the best education. Liberal students could be guilty of lazy thinking because they agreed with their professors, while conservative students learned to be on their toes.

Some campuses and some departments have a conservative bent, but not many. This kind of one-sidedness can result in students feeling uncomfortable when confronted with new ideas.

Then there is the question of deliberately inflammatory speakers and the chaos that results when they show up. We saw that in Charlottesville. We saw it last week at the University of Florida—\$600,000 spent on security, 1,000 law enforcement officials, the Governor declaring a state of emergency.

This is a problem in a country that prizes freedom, and a familiar one. If you're a university president, what do you do about this? How do university presidents respond to the speech and to the reaction to the speech? A recent survey by Brookings Institution found that nearly 20 percent of students believe it is acceptable to use physical force to silence a speaker who makes offensive and hurtful statements. What about a speaker who sets out just to be controversial?

If you create an environment that results in tens or hundreds of thousands of dollars in security costs, a speaker who can't speak, and an audience who can't listen, that's not a very good result.

We have a distinguished panel. We should listen to them and remember Senator Howard Baker's admonition, that the other fellow may be right. Universities, especially, should be the place where people of different views may speak, audiences can listen, and many contrasting viewpoints are encouraged. There should be some sensible ways to allow that while still protecting freedoms guaranteed by the First Amendment.

Senator Murray.

#### STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Chairman Alexander, and I want to thank all of our witnesses who are here today, and thank you for your commitment to protecting free speech on college campuses and elsewhere.

You know, everyone in this room can agree that free speech is a cornerstone of our democracy. It is what allows us to disagree and debate political ideas without fear of retribution. It allows us to speak out, and if our government is acting in a dishonest or unethical or unlawful manner, it allows open and honest discussions of ideas new and old. It's allowed civil rights leaders, including Dr.

Martin Luther King, Jr. and Delores Huerta, to stand up and peacefully fight for what is right.

There is no real debate about whether or not there should be free speech on college campuses or anywhere else. I think that's something we can all agree on, despite some people trying to create strawmen by saying that one side or another doesn't.

But here's the issue that I think is worth discussing today. How can we protect this constitutional right while also making sure our colleges and universities are places where everyone can feel safe so they can learn and respectfully debate ideas? As part of that conversation, we need to discuss how elected leaders and community members and college and university administrators can best exercise their First Amendment right to do everything in their power to push back against those who are driving an agenda of extremism or racism or bigotry or xenophobia and misogyny, and we must also speak out against groups and organizations that are looking to use their right to free speech to divide us, to attack the most vulnerable among us, and to feed on people's fear in the service of hate.

This is a necessary and vital discussion for this Committee and all of us to have. While I believe there are a whole lot of people on campuses across the country who are doing great work on this front, recent events have made it clear we're not there yet. Here's where I want to start with what should be an obvious statement. I think we can all agree there is no place for violence on our college campuses. But, unfortunately, in the last 10 months, we've seen more and more of this across the country, and when you look at who we have in the White House right now, the rhetoric that's being used, some of the people that have been hired, and some of the groups he has encouraged, it should come as no surprise when we see an apparent resurgence of hate and bigotry and xenophobia and misogyny on our campuses.

What we have heard coming out of this White House has been shocking at times. But what has been even more disturbing is how so many others, even those who opposed him previously, allowed that rhetoric and those attacks to be normalized. This normalization of attacks based on how a person worships or who they are or where they come from seems to have somehow emboldened extremist hate groups to now come out of the shadows, and with that, in some parts of the country, we've seen reports of a rise in hate crimes and violence, especially in our college campuses.

For years, there's been a concerted effort to combat hate groups in the courts and in the hearts and minds of American people. As a result, those radical organizations had been steadily pushed to the margins of our society. But in 2015, they found a voice they could rally behind, and it's no secret that leadership in this country has made some disparaging public comments against Mexican Americans or women or Muslims, and unlike before, when those individuals knew they would be shunned by their friends or neighbors or communities for that, this rhetoric has emboldened extreme hate groups to come back out of the shadows.

There are reports of a disturbing rise of racist vandalism and harassment of religious minorities, an uptick in the distribution of hateful flyers on college campuses, and recruitment of students on college campuses, including here in Washington, DC, and in my

home State of Washington. Just yesterday, I met with a very bright young student named Taylor from American University, and she's here today, and I'm so proud of you for what you're doing. Earlier this year, Taylor was actually elected AU's first African American female student body president, and the same day, racist messages were found hanging across that campus, right here in Washington, DC.

While the FBI is investigating those as hate crimes, Taylor is speaking out now to highlight the toll it is taking on the students being targeted by hate speech. Like a true leader, Taylor took that experience to begin a larger dialog about bigotry, working with the university's administration, to make the school a more welcoming and safe place for all students.

That's just one incident. There are so many more. Earlier this summer, as we heard, hundreds of white supremacists organized from around the country to travel to the University of Virginia's campus in Charlottesville. Those individuals marched through the city, shouting Nazi slogans and racist chants, and when a group of counter protesters, many of whom were residents of Charlottesville, and students and staff and faculty at the university stood up and said they would not tolerate that kind of hate in their community, they were attacked.

During the clash in Charlottesville, unconsciously, as we know, a young woman described as, quote, "a passionate advocate for the disenfranchised" was killed, and more than 30 were injured. Now, I want to be clear both sides in Charlottesville were not to blame, and many people on both sides of the aisle here stood up and spoke out to condemn that act of domestic terrorism and to push back against President Trump's response.

It is very clear there needs to be a discussion about what is happening today on college campuses, that we have not yet solved this problem, and I'm glad we're having this here today.

As I said at the beginning, no one is debating the right to free speech. But colleges and universities also have to ensure that campuses are safe and welcoming to all students. That's why this conversation has to include a discussion about the responsibility of community leaders and college administrators to use their own voices to speak out against hate and refuse to normalize racist or otherwise bigoted viewpoints while also respecting the free speech rights of those they disagree with. This conversation has to include a discussion about what colleges can be doing to keep students safe and how to also respect the rights of students who want to speak out against hate and extremism.

College campuses have long been places to discuss and debate ideas, where students learn to think outside the box and get out of their comfort zones. That is one of the greatest strengths of the American higher education system. I'm sure all of our colleagues here today agree that colleges can continue to challenge students' views and perspectives while also doing everything we can to put the safety of students and staff and faculty first and not allow people to incite or invoke violence under the guise of free speech.

I look forward to hearing from all of our witnesses today on how colleges and universities can do more to both speak out against hate speech on their campuses and to protect free speech. By begin-

ning this conversation, we can start to once again push hate groups back into the margins of society, combat the resurgence of extreme ideology and the violence and hate speech that has been enabled.

Mr. Chairman, I appreciate this opportunity today, and I do have several statements I would like to enter into the record.

The CHAIRMAN. They will be.

Thank you, Senator Murray.

Now, we'll welcome our witnesses. There are four of them. We'd like to ask each of you to summarize your remarks in 5 minutes, which will leave more time for conversation back and forth between Senators and you.

Our first is Dr. Robert Zimmer, President of the University of Chicago, in that role since 2006, formerly Provost at Brown University, and before that, 25 years at Chicago. He's an author of mathematics books and more than 80 articles.

Next, Nadine Strossen, John Marshall Harlan II Professor of Law at New York Law School. She has written, taught, and advocated extensively in areas of constitutional law and civil liberties, earning recognition in *The National Law Journal* as one of America's most 100 influential lawyers from 1991 to 2008. She served as President of the American Civil Liberties Union and was the first woman to hold that position.

Our next witness is Dr. Richard Cohen, President of the Southern Poverty Law Center. He's led the Center since 2003. He joined the organization in 1986 as its Legal Director. He has litigated a variety of civil rights cases. He testified earlier in front of the Senate Committee on Judiciary.

Our final witness is Dr. Allison Stanger, the Russell Leng Professor of International Politics and Economics at Middlebury College. She is currently on sabbatical from Middlebury serving as Cybersecurity Fellow at New America. Her work focuses on American Foreign Policy. She's a member of the Council on Foreign Relations. She was a consultant to the Secretary of State's Policy Planning Staff from 2009 to 2011.

We welcome the witnesses, and, Dr. Zimmer, let's begin with you.

#### **STATEMENT OF ROBERT ZIMMER**

Dr. ZIMMER. Thank you very much to Chairman Alexander and Ranking Member Murray for inviting me here today.

I'm going to briefly address three topics related to free expression on university campuses. First, why is it important? Second, what are the Chicago Principles? Finally, what needs to be done to support free expression on campuses?

Why is it important? For all institutions of higher education, whether public or private, free expression and open discourse and their companions, free listening and open questioning, are at the very core of fulfilling their missions of education, research, and impact.

Every student at a university deserves an education that deeply enriches their capabilities. This necessitates acquiring knowledge, but, more importantly, acquiring general skills and habits of mind that are going to enhance their approach to future challenges. They must learn to recognize and evaluate evidence of various sorts,

challenge their own and others' assumptions, effectively argue their position, grasp both power and limitations in arguments, confront complexity and uncertainty, synthesize different perspectives, understand that context and history matter, think through unintended consequences, and take account of change, tradeoffs, and uncertainties.

If the education that we provide does not give students the opportunity to acquire these skills and abilities, they will be underprepared to make informed decisions in the complex and uncertain world they will confront upon entering the workplace. Intrinsic to students attaining these skills is an environment of ongoing intellectual challenge of which free expression and open discourse is an essential part.

Likewise, for research at universities to be of the highest quality, unfettered investigation and a willingness to challenge assumptions and the free expression that goes with it is essential. To limit free expression is quite simply to limit the quality of education and the quality of research.

This has important implications for our country. Nationwide, innovation is driven by faculty research and an inventive alumni body forged by a level of challenge that demands an environment of free expression. To be challenged is also why so many of the leading ambitious young people from around the world have come to the United States, and such is the ultimate importance and stake for our country around these issues. Will our higher education system continue to be the best in the world? Will our research continue to be the most impactful? Will we continue to attract highly talented people? Or will we lose focus on the mission of universities and allow other concerns to erode the efficacy of our institutions?

What are the Chicago Principles? Over the course of its history, as Senator Alexander has already alluded to, the University of Chicago has long stood for and embraced the values of free expression and open discourse. In July 2014, as campuses nationwide saw prominent speakers being dis-invited, disruption and even violence attached to various speaking events, and support for free expression in universities eroding, I charged the faculty committee with providing a concrete statement that encapsulated our longstanding values.

The resulting document is now known as the Chicago Principles, which can be summarized briefly as follows.

First, an unwavering commitment to free expression and open discourse, allowing views to be expressed that may conform to no consensus and may be strongly opposed by any segment or even all of the university community. Second, the university recognizes, indeed, embraces non-disruptive protests as a legitimate means of free expression and supports the rights of all members of the university community to engage in such protests. Third, disruptive protests or other means of limiting the rights of others to engage in free expression, listening, and open discourse is not acceptable and is a violation of the university's commitment to free expression.

What needs to be done? The situation currently is very fluid. There have been a number of university and faculty leaders who have embraced the Chicago Principles or otherwise made powerful

statements in support of free expression. Most, however, have not. Meanwhile, there continue to be inappropriate disruptions on campuses, while at the same time, there is much more open discussion of the topic than was taking place even 18 months ago.

To repair the situation, it will be up to faculty, university leaders, and trustees, who together help define institutional culture over time, to forcefully embrace free expression through clarity of their commitment to excellent education and robust research. Otherwise, we will find ourselves on a path that is antithetical to fulfilling our highest aspirations.

For the sake of our students and their future success, our faculty in their capacity to develop original and impactful research, and our country remaining a magnet for the most talented from around the world, we must embrace free expression, open discourse, and challenging questioning and resist its suppression that we are seeing on college and university campuses.

Thank you very much.

[The prepared statement of Dr. Zimmer follows:]

PREPARED STATEMENT OF ROBERT ZIMMER

Chairman Alexander, Ranking Member Murray, and the rest of the HELP Committee: Thank you very much for inviting me to testify at today's hearing on Exploring Free Speech on College Campuses. This issue is at a critical juncture, with implications for the integrity of universities and the education we offer. There are spillover effects on our Nation as a whole. I am particularly pleased to share my views on this topic, and I am appreciative of your commitment to tackle this issue with the seriousness it deserves.

Let me begin with a story about my first visit to China as president of the University of Chicago about nine years ago. I had been invited to deliver a keynote address at Zhejiang University in Hangzhou to an audience of about 150 students and a group of faculty and university leaders. My hosts asked me to speak about American universities in general, but also about why there were so many Nobel Laureates among the faculty and alumni of the University of Chicago. I was asked, as I have been asked regularly in my many subsequent trips to China, "What is the magic UChicago sauce?"

I replied that its key ingredient was ongoing intellectual challenge and rigorous questioning. Many leading economists, physicists, chemists, and other scholars have prospered at UChicago because of the strong cultural commitment on campus to discourse, argument, and lack of deference. I described the workshops in economics, where Nobel Laureates were not immune from intense, sometimes withering, questioning by colleagues and students. UChicago attracted scholars from around the world because they understood this environment was best for developing and sharpening their ideas. While UChicago may be extreme in this culture among universities, I explained that the lack of deference, the openness to discourse, and ongoing mutual challenge was one of the great strengths of higher education in the United States much more generally. In fact, this attribute of American higher education institutions provided a magnet for talented individuals from around the world.

The students in China were fascinated by this description and how it related to many deep aspects of Chinese culture with its focus on duty, respect, and hierarchy. In fact, over the past decade, many leaders in the Chinese academic world have been explicitly working to inject into their own institutions a tone of significantly more questioning, and with it the accompanying inventiveness.

What I did not anticipate then was that the tone in American institutions of higher education would dramatically change for the worse over the next decade. During this period, academic institutions experienced proliferating demands for decreased freedom of expression and open discourse, demands coming from within the institutions themselves. Invited speakers have been dis-invited because a vocal segment of a university community found their views unsatisfactory; faculty have been pressured to make public apologies for their statements that some deemed offensive; and an entire culture has emerged in which free and open discourse, while still being formally embraced, is explicitly or implicitly being relegated to a lower priority than other concerns. Among a small sample of the dis-invited are Laura Bush, Henry Kissinger, Christine Lagarde, Condoleezza Rice, and Larry Summers. While these

are highly visible public figures, the list of the dis-invited includes individuals from a wide range of fields and disciplines. Such episodes are now so commonplace that in some circles they are viewed as almost normal. Thus, while the Chinese academy aims to inject more argumentation and challenge into their education, many American higher educational institutions are moving in the opposite direction, sacrificing a commitment to challenge and questioning. In doing so, they avoid the difficulties of opposing the chilling effects of an emerging discourse of political correctness.

While it is necessary to focus on the threats from within universities to open discourse and argumentation on campuses, it is important to see that such threats also come from outside universities. These are particularly significant issues for public universities where overly enthusiastic public officials may have a misguided sense of protecting the public from various types of thought. External threats, both to public and private universities, have been present throughout the history of universities and often been more menacing than internal threats. They may appear in extreme forms, for example during the McCarthy era. External threats continue today. The external actors often have totally different perspectives than internal actors—but the intended impacts of both are to limit discourse. Nevertheless, while new threats may materialize quickly, the most active threats in recent years have been from within universities themselves.

These current developments undermine our universities. There are three questions to address in considering this phenomenon: First, why is it important? Second, what are the Chicago Principles, affirming a commitment to free expression and open discourse? Third, what are the drivers of this national shift in discourse within higher education away from free expression?

Let me begin the question of importance by saying what is not involved. I am sure this is well known among the members of the Committee, but because there is a common misperception I want to emphasize that for private universities the First Amendment to the U.S. Constitution is not directly germane to these issues. Rather, what is pertinent are the very purpose and mission of universities. That mission can be summarized in three words: education, research, and impact. Every question about universities' actions and policies needs to be evaluated in light of these core missions. It is here that the roles of free expression and academic freedom—and their companions, free listening and open questioning—are essential.

Every student at a university deserves an education that deeply enriches their capabilities. This necessitates acquiring knowledge, but more importantly acquiring general skills and habits of mind that will enhance their approach to future challenges. They must learn to recognize and evaluate evidence of various sorts, challenge their own and others' assumptions, effectively argue their position, grasp both power and limitations in arguments, confront complexity and uncertainty, synthesize different perspectives, understand that context matters, think through unintended consequences, and take account of change, tradeoffs, and uncertainties. If the education we provide does not give students the opportunity to acquire these abilities, we are simply shortchanging them. They will be under-prepared to make informed decisions in a complex and uncertain environment, which is inevitably the world they will confront upon entering the workplace, independent of the particular path they choose.

Imparting these skills is a tall task. But it is evident from the skills I have listed that exposure to a variety of views and the arguments for and against them is not only critical to this process but lies at its very core. Conversely, permitting an environment in which students' views and assumptions are not challenged, in which they do not develop the habits of mind of recognizing and evaluating their own assumptions, and in which they cannot fully and actively participate in discourse with multiple perspectives is shortchanging them. Simply put, if we want to do an excellent and responsible job of educating students at the highest level, an environment of free expression and open exchange of ideas is critical.

The same is true for an effective research environment. Deep and impactful research entails originality—and this requires seeing in new ways. The Nobel Prize winning biologist Albert Szent-Györgyi famously said, "Discovery is seeing what everyone else has seen, and thinking what no one else has thought." A climate that fosters this level of discovery relies on great intellectual freedom. Gary Becker, a Nobel Laureate in economics at UChicago and one of the most influential social scientists of the second half of the 20th century, provides an illuminating example. Becker, who had been a doctoral student at UChicago, began applying economic ideas to a sequence of societal issues—family, discrimination, crime, drugs, education, and more. For some time, his work was viewed by many either with alarm or as worthy of dismissal. The widely accepted understanding in social science at that time was that economics methodologies had no weight in these very human problems. But Becker persisted, in an environment at UChicago in which these un-

popular ideas were free to be explored, challenged, tested, and developed. Ultimately, his ideas became widely accepted as one valuable approach to these matters and Becker himself was recognized as a great pioneer. If he had been hounded out of higher education because the academy found his ideas offensive, as many did at the time, our understanding today would be much more limited.

Why is this important not only for the nature of universities but for our country? Much of universities' impact is through the power of their faculty's research and the work of their alumni—and, as we have described, such impact at the highest level depends on an environment of free expression and open discourse and the resulting climate of challenge. To be challenged is also why many of the leading ambitious young people from around the world have come to the United States. Such is the ultimate importance and stake for the country—will our higher education system continue to be the best in the world? Will our education continue to be the most impactful? Will we continue to attract highly talented people? Or will we lose focus on the mission of universities and allow other concerns to erode the efficacy of our institutions?

Now let me turn to the second topic, namely the Chicago Principles, which are a forceful statement of one University's commitment to free expression. Unlike all the Universities in the United States that preceded it, save Johns Hopkins, the University of Chicago was established as a research University from its inception. From its early days, the leadership and faculty of the University articulated the importance of free expression and open discourse to its missions of rigorous inquiry and providing an education embedded in intellectual challenge. Throughout its history, the University has stood against suppression of speech, with its faculty and many of its presidents—William Rainey Harper, Robert Maynard Hutchins, Edward Levi, and Hanna Gray as key examples—playing visible leadership roles.

It was in this historical context and against the backdrop of the shifts in the American academy over the past decade, that in July 2014, I appointed and charged a faculty committee chaired by UChicago Law School professor Geoffrey Stone. The committee was charged with *“articulating the University's overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University's community.”* In other words, the committee was asked to provide a concrete statement that encapsulated the underlying and broadly understood culture and views on free expression of the University of Chicago, a culture that had been present at the University since its founding. In response, the Stone Committee put forth a thoughtful, powerful, and clear articulation of the University's stance, laying out a set of principles now becoming known as the Chicago Principles. Below, I will summarize three such principles from the report.

The first principle is a statement of an unwavering commitment to free expression: *“the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.”*

In the same vein, relevant to current considerations, it states:

*“it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.”*

The second principle is that the University recognizes, indeed embraces, non-disruptive protest as a legitimate means of free expression, and as such supports the rights of all members of the University community to engage in such protest.

The third principle the report articulates is that disruptive protest or other means of limiting the rights of others to engage in free expression, work, and open discourse is not acceptable, and is in fact a violation of the University's commitment to free expression. The distinction between non-disruptive and disruptive protest is essential. Preventing others from speaking and listening is arrogating to oneself the right of free expression, but denying it to others.

The Chicago Principles are a powerful statement. However, stating principles is not the same as implementing them. At UChicago, we recognize that implementa-

tion requires constant work. We have the benefit of an institutional culture with a long history of support for free expression, a willingness to express views contrary to popular trends, wide support of the faculty and deans on one hand and the board on the other, and a student body and faculty that, in most cases, are at UChicago because of a commitment to an environment of rigorous inquiry and open discourse. Nevertheless, we have thousands of new students coming to campus every year, and it is essential for us to be articulating, explaining, demonstrating, and engaging in discourse about these principles and how to implement them.

Let me turn now to my third question—what drivers have enabled the current movement against free expression within higher education? I will address four such drivers.

First, free speech is not a natural state of human affairs. Most people actually do not like it. They like the speech of those they agree with, which they will defend at great length—but there are fewer who are so enthusiastic about the free speech of those with whom they disagree. As a result, people are often inclined to silence, or at least condone silencing, those who disagree with them. They justify this in a variety of ways—morality, politics, acceptable behavior, preservation of authority, challenge to authority, opposing change, demanding change, and more. Such individuals rarely imagine that in preventing others from expressing views that they are sowing the wind—and ultimately may reap the whirlwind of someone suppressing their own speech. Fostering an environment of free expression and open discourse starts with the fundamental problem that for many people, free expression itself is suspect.

One consequence for universities is that a necessary part of a student's education is gaining understanding of the importance of free expression within the most enabling and powerful education they can have. Functioning in an environment of free expression and rigorous argumentation is not simple, nor is it necessarily intuitive. It is our collective responsibility in providing an excellent education to help students understand, value, and participate fully in this environment.

Second, suppression of speech today is a misguided response to an important national issue, namely that of diversity and inclusion. Our country, like all countries, has a history of powerful exclusionary behavior. A history of slavery and racism, closing of opportunities for women, discrimination on the basis of religion, and exclusionary and even criminalizing responses to same sex relationships are examples of real and serious issues that the country faces in fulfilling an aspiration of providing opportunities for all. Our country has surely made and continues to make very significant progress, but the legacy of this history remains salient, impactful, and even painful today. From the perspective of a University, what should this mean? It should mean a serious commitment to full inclusion of all our students in the most enriching education we can possibly provide. This in turn entails ensuring that all our students are fully included in open discourse, challenge, free expression, and argumentation that lie at the very core of providing such an education. What it does not mean is protecting students from this discourse. It is a misguided view to think that we are helping students—particularly students from groups who may have been the victims of exclusionary behavior—by protecting them from speech. This misguided view is a major problem—it is in fact just the opposite that should be happening. We should be helping these students—just as we need to help all students—to fully participate. We should not facilitate retreat and separation from the most enriching education we can provide. Doing so would be an abdication of our responsibilities as educators.

Helping students fully participate is itself not simple. Universities often provide educational support for students based on their individual situations. There are times when engaging free expression may be particularly difficult for students who are a target of exclusionary rhetoric. This should be recognized and students appropriately supported. Likewise, all students should be helped to recognize the importance of a civil society. But both issues should be addressed in the context of helping students participate fully in open discourse, not in the context of creating an ambient environment of restricted discourse.

A third driver is too much unreflective moral certainty in too many circumstances—that one knows what is right and that anyone who holds other perspectives is not just wrong but morally flawed. Simply declaring the unacceptable presence of villainy, while not confronting intellectual challenge, is just a short stop away from suppression of speech. Within many aspects of public life, we have seen just how unproductive, even destructive, moral fervor in demonizing others can be. Inside universities, where learning to confront those with whom you may passionately differ is a key part of education, such demonization is particularly and deeply troubling.

The fourth and final driver that I want to address is the all too common de-historicized view of the world, in this case applied to the role of universities. Universities are institutions with a long history and the prospects for a very long future. The particular contributions they alone can make to society—inquiry, discovery, and enriching education—are critical societal needs that will far outlast any particular political issue of the day, no matter how important it is. The environment of free expression, academic freedom, and open discourse that is critical to universities' effectiveness cannot be taken for granted. It has been hard-won over the course of a millennium and history demonstrates its fragility. It is always tempting to respond to the urgency of the present and fail to consider long-term consequences. A de-historicized view of the importance of free expression, in conjunction with an all too easy attitude that allows for minimizing its importance in return for a moment of political expediency, is another contributor to the situation we now confront.

In the many examples of suppression of speech that we are seeing on campuses, some combination of these four forces is at play. It is their complexity, lack of transparency in revealing themselves, and mutual interactions that make combating them a significant challenge.

Now that I have addressed these three questions—namely the importance of free expression, the Chicago Principles, and the drivers of our current situation—let me turn to how reactions in the academic community to the Chicago Principles illuminate the issues.

Two related questions I am frequently asked concerning the Chicago Principles are: first, why doesn't every institution just sign on to them or, alternatively, present its own equivalent statement? Second, why don't those institutions that have made such statements in the past actually live by them?

My answer begins with a reminder that a select number of universities or their faculty have adopted these principles or articulated similar ones, and strive to live up to them. UChicago is not alone. On the other hand, many institutions are still grappling with the issues. This uncertainty, not surprisingly, invites caution in response.

What do I think some institutions and their leaders are uncertain about?

Every institution needs to decide what it is and what it aspires to be. As I have described, at UChicago we have had a great sense of clarity about this since the University's inception. But all universities need not be identical. Institutions can and do—either explicitly or implicitly—make choices that define them. These definitions can differ, legitimately so. Institutions with religious affiliations, those with defined social missions, and military academies are all examples where the Chicago Principles may not be the appropriate articulation of values.

What the current situation and the Chicago Principles pose for many institutions is a clear question—how much are free expression and open discourse, along with all the challenges these present, a central defining feature of its education, or is it just one of the many values they have that can be traded off against others? This in turn raises the question of the actual nature of the education they are committed to—and what they believe is of sufficient importance to this education that they will defend it in challenging circumstances such as we face today?

I believe many institutions remain uncertain and are still clarifying their responses to these questions. Do they subscribe to the Chicago Principles, even if articulated in their own words? What actions would they take in supporting these principles? There is no reason to suppose that all institutions will come to the same conclusion.

Here is an example of what an institution might honestly say if it came to a different conclusion:

"We believe in free expression most of the time, and believe that you as a student will have an inspiring education and that you as a faculty member will have a wonderful environment for research and teaching.

However, this institution will on occasion decide, based on the passionate views of a segment of the community or our own views of morality, that we will disinvite speakers or implicitly condone the disruption of their speech and you will therefore not have the opportunity to hear or question them. This institution will on occasion decide that views expressed by a faculty member are not acceptable and, accordingly, they may be asked to apologize for their statements or to stop raising certain issues. We accept the chilling effect this can have on discourse and the resulting education, because we believe other values are at stake."

As members of the Committee can surmise, I would not be pleased to see many universities take this stance, either explicitly or implicitly, because I do not believe it provides the best education or environment for research. On the other hand, it could be an honest and legitimate institutional stance. But there is a grave danger that by not confronting the question head on, many institutions are drifting into

this position even if they are not stating it in a forthright manner. The combination of uncertainty, lack of clarity about the foundations of education being offered, and the increasing opposition to free expression I have described have led many institutions to reflection and understandable caution. I hope that as institutions think through the issues, many more will conclude the need for a strong articulation of the centrality of free expression and open discourse to the education they offer and the quality of their research, and that their actions will come to reflect this determination.

These considerations lead naturally to my final topic: What is to be done? How do we repair, or at least begin to repair, the situation in which the drift into restricted rather than open discourse is so prevalent?

Addressing these issues ultimately means addressing the culture of an institution. Where the culture of free expression and open discourse is strong, that culture needs to be purposefully reinforced. For every year, thousands of new students come to campus who may be unaware of the centrality of free expression to the efficacy of their education. On the other hand, where the culture of free expression and open discourse is not strong, the institution needs to undertake a purposeful attempt to change this culture. We all know how difficult culture change in an institution can be. It certainly cannot happen quickly and it requires sustained work.

In either situation, leadership is required, and inevitably that means University presidents, provosts, and deans. These individuals are responsible for overseeing and sustaining great universities, where free expression, free listening, and free challenge are indispensable. Therefore, the responsibility of these positions demands that leaders reinforce these values as central to the meaning of universities. To be effective, the president in particular needs the clear support of the Board of Trustees on this matter.

Likewise, in either situation, the role of the faculty and leadership within the faculty is critical. The faculty have ultimate responsibility for educational programs, and a clear view by the faculty on the importance of academic freedom and freedom of expression for the efficacy of that education is necessary. There are a number of institutions in which faculty are grappling with this question, and without a firm commitment from a significant portion of the faculty, it is difficult to imagine progress.

Finally, the receptivity of students to a challenging education of open discourse has a significant impact on a University's culture. College students in particular are at a singular moment in their lives. They will be challenged in new ways—by unfamiliar ideas, varying perspectives, different assumptions, and a diverse community. Embracing this challenge and growing personally through the discomfort it may bring will serve them well for their entire lives. It is also possible for students to take the easy route and seek a framework of comfortable and restricted discourse. This would be to miss a personal opportunity that will not return.

Cultural reinforcement or cultural change is a long process that needs long term commitment and long term focus as a high priority. How many institutions are willing and able to undertake this? We shall see.

Am I optimistic that the trend we see now can be reversed? There are some hopeful signs. Until recently, it was frankly difficult on many campuses to even discuss these issues. Areas where many would not tread are now being openly discussed. There are many more statements coming out in favor of free expression. But there is a long way to go and the outcome, frankly, is not certain. As always, this will come down not simply to what institutions say is good, but to what tradeoffs they are willing to make and what they are prepared to do.

To stifle free expression and open discourse and suppress speech that you don't like is just an invitation for others to do the same. Accepting this behavior sets universities on a path that is antithetical to fulfilling our highest aspirations. For the sake of our students and their future success, our faculty and their capacity to develop original and impactful research, and our country remaining a magnet for the most talented from around the world, all this suppression needs to be resisted.

I thank you very much for the invitation to share my thoughts on this important topic. I again want to express my appreciation to the Chairman, Ranking Member, and the rest of the HELP Committee for convening this forum to discuss this issue that is so important to the academy, to our students, and to our country.

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#### SUMMARY OF ROBERT ZIMMER

In my testimony, I will briefly address three topics related to free speech and universities: First, why is it important? Second, what are the Chicago Principles? Fi-

nally, what is necessary to reinforce or strengthen the climate on college campuses with regard to freedom of expression?

Free speech and open discourse is at the core of the very purpose and mission of universities. That mission can be summarized in three words: education, research, and impact. Every question about universities' actions and policies needs to be evaluated in light of these core missions. It is here that the roles of free expression and academic freedom—and their companions, free listening and open questioning—are essential. Every student at a University deserves an education that deeply enriches their capabilities. This necessitates acquiring knowledge, but more importantly acquiring general skills and habits of mind that will enhance their approach to future challenges. They must learn to recognize and evaluate evidence of various sorts, challenge their own and others' assumptions, effectively argue their position, grasp both power and limitations in arguments, confront complexity and uncertainty, synthesize different perspectives, understand that context matters, think through unintended consequences, and take account of change, tradeoffs, and uncertainties. If the education we provide does not give students the opportunity to acquire these skills and abilities, they will be under-prepared to make informed decisions in a complex and uncertain world they will confront upon entering the workplace.

Free speech is important not only for the nature of universities but for our country. Much of universities' impact is through the power of their faculty's research and the work of their alumni—such impact at the highest level depends on an environment of free expression and its resulting climate of challenge. To be challenged is also why many of the leading ambitious young people from around the world have come to the United States. Such is the ultimate importance and stake for the country—will our higher education system continue to be the best in the world? Will our education continue to be the most impactful? Will we continue to attract highly talented people? Or will we lose focus on the mission of universities and allow other concerns to erode the efficacy of our institutions?

Regarding the Chicago Principles, in July 2014, I charged a faculty committee with providing a concrete statement that encapsulated the underlying and broadly understood culture and views on free expression of the University of Chicago. In response, the Stone Committee lay out a set of principles now becoming known as the Chicago Principles. Those principles are summarized as follows: first, an unwavering commitment to free expression and open discourse; second, the University recognizes, indeed embraces, non-disruptive protest as a legitimate means of free expression, and as such supports the rights of all members of the University community to engage in such protest; and third, disruptive protest or other means of limiting the rights of others to engage in free expression, work, and open discourse is not acceptable, and is in fact a violation of the University's commitment to free expression.

Finally, how do we begin to repair the situation in which we find ourselves? In my testimony, I discuss the drivers that have enabled the current movement against free expression within higher education, which leads me to the conclusion that ultimately, we must address the culture of our institutions. This will require leadership on the part of both the administration and the faculty, as well as a receptivity of students to a challenging education of open discourse. Otherwise, we will find ourselves on a path that is antithetical to fulfilling our highest aspirations. For the sake of our students and their future success, our faculty and their capacity to develop original and impactful research, and our country remaining a magnet for the most talented from around the world, we must resist the suppression of free speech and open discourse on college and University campuses.

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The CHAIRMAN. Thank you, Dr. Zimmer.  
Ms. Strossen, welcome.

#### STATEMENT OF NADINE STROSSEN

Ms. STROSSEN. Thank you so much, Chairman Alexander and—

The CHAIRMAN. Make sure your microphone is on, Ms. Strossen.

Ms. STROSSEN.— Oh, that would help. It takes a scientist to do this. A mere lawyer cannot.

[Laughter.]

Ms. STROSSEN. If I may start again, with amplification, thank you so much, Chairman Alexander and Ranking Member Murray and other Members of this Committee, for holding these hearings on such a vitally important subject.

I really appreciated the opening remarks that both of you gave, and if I could synthesize in a nutshell, Senator Murray, you were rightly saying that on University campuses, as in the rest of our society, we have to equally welcome and provide opportunities for everyone, no matter who they are, and Senator Alexander added to that, no matter what they believe. Unfortunately, today, as Senator Alexander also noted, there are many universities that are deeply committed to every other kind of diversity but not the kind of intellectual diversity that you saw being pursued at the Kennedy school.

Senator Alexander was kind enough to ask me to give some First Amendment background, because, as Senator Murray rightly said, everybody is in favor of free speech, but they have very different concepts as to what freedom of speech actually entails, and most people usually have a “but.” They say, “I believe in freedom of speech, but the one exception I want to make is”—and very often, we have heard even lawyers, probably not graduates of NYU Law School, but other lawyers and other political leaders have said, “Hate speech is not free speech.”

That was a statement that was made, for example, by Howard Dean, and I don’t mean to single him out. Many others have. But in defending Berkeley’s decision not to allow Ann Coulter to speak there, he made that pronouncement, “Hate speech is not free speech.”

I’ve just finished writing a book called *Hate: “Why We Should Resist it with Free Speech, Not Censorship.”* If I may say so, it addresses all of these concerns, because I completely agree, Senator Murray, that we have such a responsibility, including on campus, to combat the hateful rhetoric, the hateful attitudes, the hateful conduct, including violence, that we are seeing.

I also passionately believe, based on research and experience, that the only effective way to do that is to fight censorship, to fight violence, to fight disruption, because those are all manners of repressing speech, and to allow freedom of speech, as the Supreme Court has very sensibly defined it. Interestingly enough, I give some quotes, including from then President Barack Obama, who certainly is an expert on hate speech, having taught constitutional law at the University of Chicago, having been subjected to it himself, saying, “The most effective way to respond to hatred is not through repression, but through counter speech.”

Interestingly enough, we have counter experiences in Western European democracies, including many European countries, Canada, Australia, which have, in fact, criminalized hate speech, that is, speech that is disparaging. It has no technical legal meaning, but the common understanding is speech that is disparaging on the basis of race, gender, religion, and other such factors.

The European countries, Canada, and Australia have increasingly become critical of that repressive approach. Human rights activists and lawyers there are saying, “We should move more in the American direction,” because our society, for all of the problems

that we still have, has been able to move forward by outlawing actual discrimination, by outlawing actual hateful and biased crimes, by outlawing speech that directly causes serious, imminent, specific harm, including the kind of genuine—what lawyers call the genuine threat and intimidation that, unfortunately, were targeted at Taylor Dumpson, and that also constitutes a bias crime, and I understand is being—prosecutor—investigated that way.

We have those tools. But, in addition, we need civil society to speak out and to condemn. There was a movement in this country about 25 years ago to suppress hate speech on campus. It was advocated by a number of prominent law professors, and I've gone back and looked at their articles, and, interestingly enough, they make very important points about the enormous harm to the psyches and equal opportunities of students who were traditionally discriminated against if they are subjected to a barrage of hate speech.

Interestingly enough, their complaints were not so much only about the hate speech, but rather about the failure of society, from university presidents on down, to condemn it, to argue against it, to show support to those who were disparaged by it. We have just seen completely a reversal in that sense, which has been extremely helpful and empowering. What I find most heartening is in all the campus activism that is not disruptive, that is peaceful and constructive, we're having more minority students than ever before speaking up in favor of their own rights.

Freedom of speech, I believe, is empowering. It's best for education, it's best for equality, and it provides intellectual safety and the kind of training we need to welcome full-fledged citizens of every group and of every ideological persuasion into our society.

[The prepared statement of Ms. Strossen follows:]

#### PREPARED STATEMENT OF NADINE STROSSEN

I would like to thank Chairman Alexander and Ranking Member Murray for convening this hearing on such a critically important topic, and giving me the opportunity to participate.

Chairman Alexander has asked me to summarize the legal standards governing freedom of speech in higher education, “and what speech limitations schools may impose, particularly for so-called ‘offensive speech’ or ‘hate speech.’” I am honored to have the opportunity to do this, especially as I have just written a book directly on point: *HATE: Why We Should Resist It With Free Speech, Not Censorship* (Oxford University Press, May 2018).

The research and analysis reflected in my forthcoming book have made me more appreciative than ever of the two most fundamental general First Amendment principles, which are essential pillars of not only individual liberty, but also equality and democracy, including on our Nation's campuses:

—the *viewpoint neutrality principle*, which bars government from punishing any speech based solely on dislike of its viewpoint, no matter how deeply or widely despised that viewpoint might be; and

—the *emergency principle*, which permits government to punish speech when it directly causes specific imminent serious harm, such as constituting a genuine threat, targeted harassment or “bullying,” or intentional incitement of imminent violence.

These robust speech-protective principles have consistently been endorsed for many decades, including in the campus context, by Supreme Court Justices across the ideological spectrum. The Court likewise has neutrally enforced these principles to protect controversial expression ranging across the ideological spectrum: from left-wing protestors burning an American flag, to right-wing demonstrators burning a cross.

In my capacity as a human rights activist, I am convinced, based upon the historic and current record, that these cardinal First Amendment principles are essential for furthering any political or social cause, including human rights. This conclusion is reaffirmed by examining how “hate speech” laws recently have been enforced in other comparable countries; they have disproportionately suppressed dissenting views and disempowered speakers.

Speaking in my capacity as a full-time educator for 33 years,<sup>1</sup> I am also convinced based on experience that these speech-protective principles are essential for effectively educating and empowering our nation’s future leaders and engaged citizens, and thus for maintaining a vibrant democracy. Being exposed to a diverse range of ideas, including those they consider “hateful,” and which they hate, is important for all students, including those who belong to groups that have traditionally been subject to discrimination or marginalization, and those who are engaged in activism. Therefore, when colleges and universities seek to punish such controversial speech, or to shield students from it, they are not only violating the students’ free speech rights, but they are also denying the students the rigorous education they deserve, and hence depriving our society of fellow citizens who are optimally equipped to participate constructively in our democratic self-government.

Significantly, the preceding points have been strongly endorsed by politically diverse leaders who are members of minority groups, and who have themselves experienced the sting of “hate speech,” including former President Barack Obama.

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SUMMARY OF NADINE STROSSEN

**Introduction**

I would like to thank Chairman Alexander and Ranking Member Murray for convening this hearing on such a critically important topic, and giving me the opportunity to participate.

Chairman Alexander has asked me to summarize the legal standards governing freedom of speech in higher education, “and what speech limitations schools may impose, particularly for so-called ‘offensive speech’ or ‘hate speech.’” I am honored to have the opportunity to do this, especially as I have just written a book directly on point: *HATE: Why We Should Resist It With Free Speech, Not Censorship* (Oxford University Press, May 2018).

***Summary of the most important First Amendment principles—which are especially important on campus, for the education and empowerment of all students, including those who have traditionally been subject to discrimination, and those who are activists***

The research and analysis reflected in my forthcoming book have made me more appreciative than ever of the two most fundamental general First Amendment principles, which are essential pillars of not only individual liberty, but also equality and democracy, including on our Nation’s campuses:

—*the viewpoint neutrality principle*, which bars government from punishing any speech based solely on dislike of its viewpoint, no matter how deeply or widely despised that viewpoint might be; and

—*the emergency principle*, which permits government to punish speech when it directly causes specific imminent serious harm, such as constituting a genuine threat, targeted harassment or “bullying,” or intentional incitement of imminent violence.

These robust speech-protective principles have consistently been endorsed for many decades, by Supreme Court Justices across the ideological spectrum. The Court likewise has neutrally enforced these principles to protect controversial expression ranging across the ideological spectrum: from left-wing protestors burning an American flag, to right-wing demonstrators burning a cross. Just this past June, the Court ringingly reaffirmed the First Amendment’s protection even for hateful and hated speech, unanimously striking down a Federal law that denied registration to tradenames that “disparaged” particular individuals or groups. As the Court declared: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’<sup>2</sup>

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<sup>1</sup>The position of ACLU President is unpaid; while I served in that position, I continued to earn my living as an NYLS professor. Before joining the NYLS faculty in 1988, I began my teaching career as a clinical faculty member at NYU Law School (1984-88).

<sup>2</sup>*Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

In my capacity as a human rights activist, I am convinced, based upon the historic and current record, that these cardinal First Amendment principles are essential for furthering any political or social cause, including human rights. This conclusion is reaffirmed by examining how “hate speech” laws recently have been enforced in other comparable countries; they have disproportionately suppressed dissenting views and dis-empowered speakers.

Speaking in my capacity as a full-time educator for 33 years<sup>3</sup> I am also convinced based on experience that these speech-protective principles are essential for effectively educating and empowering our Nation’s future leaders and engaged citizens, and thus for maintaining a vibrant democracy. Being exposed to a diverse range of ideas, including those they consider “hateful,” and which they hate, is important for all students, including those who belong to groups that have traditionally been subject to discrimination or marginalization, and those who are engaged in activism on behalf of various causes. Therefore, when colleges and universities seek to punish controversial speech, or to shield students from it, they are not only violating the students’ (and others’) free speech rights, but they are also denying the students the rigorous education they deserve, and hence depriving our society of fellow citizens who are optimally equipped to participate constructively in our democratic self-government.

Significantly, the preceding points have been strongly endorsed by politically diverse leaders who are members of minority groups, and who have themselves experienced the sting of “hate speech,” including former President Barack Obama. (Appendix A to this testimony includes quotations from him and from other ideologically diverse leaders who are all members of racial minorities, and who all oppose censorship of “hate speech,” including on campus, on the ground that such censorship would undermine equality and meaningful educational opportunities, including for minority students and student activists.)

***List of key points discussed below***

In the remainder of this written testimony, I will elaborate on the above themes by briefly discussing the following points:

1) The Supreme Court has strongly enforced free speech principles on public campuses.

2) Many private campuses, which are not directly governed by the First Amendment, have chosen to protect the same free speech principles that are binding on public campuses, because such principles are consistent with academic freedom and sound pedagogy.

3) “Hate speech,” which has no specific legal definition, may be punished (along with speech conveying any message) when, in context, it directly causes specific imminent serious harm.

This means that hateful speech that poses the greatest danger of harm is already punishable, but such speech may not be punished when it is feared to pose a more speculative, attenuated risk of future harm.

4) “Hate speech” laws are inevitably unduly vague and overbroad, thus leading to enforcement that is arbitrary at best, discriminatory at worst.

5) The First Amendment protects the rights of peaceful, non-disruptive protestors. In contrast, any protest that prevents a speaker’s message from being heard constitutes an impermissible “heckler’s veto,” which violates not only the speaker’s rights, but also the rights of audience members who choose to listen to the speaker.

6) The appropriate response to constitutionally protected “hate speech” is not censorship, violence, or disruption, but rather, “counterspeech,” which counters its ideas and any negative impact they might have. Our society must strive to provide access to educational and communications resources that will facilitate robust counter speech, especially by and on behalf of the most vulnerable members of our communities.

7) Equal rights movements are especially dependent on robust freedom of speech, including the viewpoint neutrality and emergency principles.

8) Shielding students from hateful and hated ideas may well undermine their psychic and emotional well-being, as well as their education and preparation for effective participation in the workplace and the public sphere.

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<sup>3</sup>The position of ACLU President is unpaid; while I served in that position, I—continued to earn my living as an NYLS professor. Before joining the NYLS faculty in 1988 I began my teaching career as a chemical law professor at NYU Law School (1984-88).

**Brief discussion of these key points****1) The Supreme Court has strongly enforced free speech principles on public campuses.**

The Supreme Court has long held that the same basic First Amendment principles that protect speech in the broader public sphere should be enforced especially vigorously on public college and University campuses, recognizing that they constitute special “marketplaces of ideas,” where academic freedom concerns reinforce general free speech concerns. For example, in 1973 the Court upheld students’ right to “disseminat[e] . . . ideas—no matter how offensive,” and accordingly overturned the expulsion of a student for distributing a campus newspaper whose cover page contained a graphic cartoon protesting police brutality; it depicted helmeted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice.

In a 1967 decision, the Court eloquently paid tribute to the supreme importance of freedom of speech on campuses, not only for the sake of the students and faculty, but also for the sake of our society and democracy more generally:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us....That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . . The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.” . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die<sup>4</sup>.)

**2) Many private campuses, which are not directly governed by the First Amendment, have chosen to protect the same free speech principles that are binding on public campuses, because such principles are consistent with academic freedom and sound pedagogy.**

A leading example is the University of Chicago, which has prided itself on defending academic freedom and freedom of speech, and serving as a model in that regard for other higher education institutions, public and private alike. For example, in 2015 the University of Chicago adopted a set of principles that reaffirm the speech-protective tenets that the First Amendment secures on public campuses<sup>5</sup> declaring:

[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

**3) “Hate speech,” which has no specific legal definition, may be punished only when, in context, it directly causes specific imminent serious harm. This means that hateful speech that poses the greatest danger of harm is already punishable, but such speech may not be punished when it is feared to pose a more speculative, attenuated risk of future harm.**

The term “hate speech” has no specific legal meaning. That is precisely because the Supreme Court never has defined a category of constitutionally unprotected “hate speech,” which is excluded from First Amendment protection based on its message or viewpoint. In this critical respect, “hate speech” is different from “obscenity,” the legal label for a subset of sexually oriented speech that the Court has specifically defined in terms of its message and excluded from First Amendment protection. To underscore that “hate speech” has no specific legal meaning, I—like some other commentators—put the term in quotation marks; I note that Chairman Alexander’s letter inviting me to testify here likewise refers to “so-called. . . ‘hate speech.’”

The most generally understood meaning of “hate speech” is expression that conveys hateful or discriminatory views against specific individuals or groups, particularly those who have historically faced discrimination. Beyond this core meaning, many people have hurled the epithet “hate speech” against a diverse range of messages that they reject, including messages about many important public policy issues. Myriad political controversies, and the heated rhetoric they often provoke, have generated charges and counter-charges of “hate speech.” For example, members of the Black Lives Matter movement have been accused of “hate speech”

<sup>4</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 602-603 (1967) [citations omitted].

<sup>5</sup> <https://freexpression.uchicago.edu/page/statement-principles-free-expression>

against police officers, whereas critiques of the Black Lives Matter movement have been denounced as “hate speech” against its supporters or against African Americans generally. Evangelical Christians who charge that LGBT sexuality is sinful have been accused of “hate speech” against gay men and lesbians, whereas those who make these charges against evangelical Christians have been accused of religious “hate speech.”

While “hate speech” (and speech conveying any other message, including an “offensive” one) may never be punished based on its viewpoint alone, it may be punished (as may expression with any other message) when, in context, it satisfies the emergency principle: it directly causes specific imminent serious harm. The Supreme Court has laid out criteria for several types of speech that directly cause particular types of imminent serious harm and hence may be punished consistent with the general emergency principle. Many instances of “hate speech” do satisfy these criteria. For example, the Court has held that government may punish “true threats”: statements through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” and, in consequence, the targeted individuals reasonably fear such violence.

Sadly, some instances of campus “hate speech” do satisfy this “true threat” standard. For example, on May 1, 2017, six pairs of bananas strung in nooses were displayed on American University’s campus under circumstances in which they conveyed a “true threat” to student Taylor Dumpson, who on that date became the University’s first African American student body president. The conclusion that these displays were intended to convey a threat to harm Ms. Dumpson was made clear by messages that were written on them, including: “AKA FREE,” referring to the predominantly African American sorority Alpha Kappa Alpha, of which Ms. Dumpson was a member; and “HARAMBÉ BAIT,” the name of the Cincinnati Zoo gorilla that was killed in 2016 after a child had fallen into its enclosure.

Some “hate speech” also satisfies criteria for additional types of harmful expression that may be punished consistent with the general emergency standard. These include targeted harassment or bullying, which harries or intrudes upon its targets’ freedom or privacy; and intentional incitement of imminent violence, which is likely to occur immediately.

In addition, “hate speech” may be indirectly punished when it constitutes evidence of a “hate crime” or “bias crime.” These terms refer to acts that already constitute crimes (that are not based on any idea expressed)—such as assault or vandalism—when the perpetrator intentionally selects the victim based on discriminatory factors, such as the victim’s race, religion, or sexual orientation. Because these crimes are deemed to cause aggravated harms to both the individual victim and society generally, they are subject to enhanced penalties. Typically, the perpetrator’s discriminatory intent in targeting a particular victim is proved through the perpetrator’s “hate speech” that is directly connected to the specific crime. For example, the American University incident described above is being investigated as a hate crime.

To underscore the fact that some “hate speech” may be punished, in particular contexts when it satisfies the emergency principle, I use the term “constitutionally protected ‘hate speech’” to designate such speech that does not satisfy this standard. Correspondingly, I use the term “‘hate speech’ law” to designate any regulation (including campus codes) that punishes constitutionally protected “hate speech,” therefore necessarily violating both the viewpoint neutrality and emergency principles.

**4) “Hate speech” laws are inevitably unduly vague and overbroad, thus leading to enforcement that is arbitrary at best, discriminatory at worst.**

The Supreme Court has held that any law is “unduly vague,” and hence unconstitutional, when people “of common intelligence must necessarily guess at its meaning.” This violates tenets of “due process” or fairness, as well as equality, because such a law is inherently susceptible to arbitrary and discriminatory enforcement.

Moreover, when an unduly vague law regulates speech in particular, the law also violates the First Amendment because it inevitably deters people from engaging in constitutionally protected speech for fear that they might run afoul of the law. The Supreme Court has therefore enforced the “void for vagueness” doctrine with special strictness in the context of laws that regulate speech. “Hate speech” laws—which suppress speech solely because of its hateful, hated message—inevitably are unduly vague, because they center on concepts that call for subjective judgments, starting with the very concept of “hate” itself. Just consider the examples I cited under Point #3 above, illustrating that one person’s hated “hate speech” is another person’s cherished positive speech.

Another closely related problem endemic to “hate speech” laws is “substantial overbreadth”; their capacious, malleable language encompasses speech that even the

laws' proponents do not seek to punish. This point was well stated by Eleanor Holmes Norton, an African-American civil rights lawyer who was the first woman to chair the Equal Employment Opportunity Commission, and who has been the longtime District of Columbia Representative in Congress. Referring to campus "hate speech" codes, she said: "It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried."

In the United States, virtually all of the many campus "hate speech" codes that courts have reviewed have been struck down on grounds of undue vagueness and overbreadth. Typical is the University of Michigan's "hate speech" code, which was one of the first to be adopted, and which led to the first judicial decision about these unavoidable First Amendment flaws. Federal judge Avern Cohn found that the following key terms, describing the punishable speech, were unduly vague: "stigmatize," "victimize," and "threats to" or "interfering with an individual's academic efforts."

During the oral argument, when Judge Cohn asked the University's attorney how he would distinguish the proscribed speech from other offensive speech, which the attorney conceded was protected, the attorney answered, "Very carefully." Welcome as this answer is in its candor and humor, the point at issue is no laughing matter. When even the University's legal counsel cannot explain the distinction between protected and punishable speech, all members of the campus community face enforcement that is unpredictable and inconsistent at best; and arbitrary, capricious, and discriminatory at worst.

Indeed, the enforcement record under "hate speech" laws, including on campus, has shown that they have (predictably) disproportionately targeted whatever ideas or speakers are relatively unpopular or dis-empowered in that particular community at that particular time. As former Harvard University President Derek Bok warned, in opposing efforts to suppress "hate speech" on campus: "[W]e . . . should remember the long, sorry history of preventing . . . civil rights activists from speaking at Southern universities on grounds that they might prove 'disruptive' or 'offensive' to the campus community, not to mention the earlier exclusion of suspected communists."

***5) The First Amendment protects the rights of peaceful, non-disruptive protestors. In contrast, any protest that prevents a speaker's message from being heard constitutes an impermissible "heckler's veto," which violates not only the speaker's rights, but also the rights of audience members who choose to listen to the speaker.***

The right to dissent extends to peaceful, non-disruptive protestors. They may express their disagreement with speakers in any way that does not interfere with the speaker's right to convey a message or audience members' right to hear it. Examples of such permissible, non-disruptive protest include: displaying picket signs or other symbols that don't obstruct audience members' views of the speaker; turning backs to a speaker or other physical gestures that don't block audience members' views; walking out of a speaker's forum; and even making oral statements that briefly, temporarily interrupt the speaker—for example, momentarily booing, hissing, or heckling. In contrast, any protest that prevents a message from being delivered or heard violates the free speech rights of the speaker and audience members alike. Any such "heckler's veto" should be prevented and punished by campus officials or other law enforcement authorities.

In order to secure our cherished freedom of speech and academic freedom, it is important to prevent, deter, and punish any effort to undermine these precious freedoms: not only official censorship, but also violence by demonstrators or counter-demonstrators, and disruptive protests.

Peaceful protests constitute the very kind of "counterspeech" that the Supreme Court repeatedly has hailed as the appropriate response to hateful, hated speech, because the net result is more speech, not less; in contrast, violent or disruptive protests have the opposite effect, of stifling and reducing speech.

***6) The appropriate response to constitutionally protected "hate speech" is not censorship, violence, or disruption, but rather, "counterspeech," which counters its ideas and any negative impact they might have. Our society must strive to provide access to educational and communications resources that will facilitate robust counterspeech, especially by and on behalf of the most vulnerable members of our communities.***

As Justice Louis Brandeis declared in a historic 1927 opinion that the Supreme Court unanimously embraced in 1969: "The fitting remedy for evil counsels is good ones. . . . 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.”

The term “counterspeech” encompasses any speech that counters a message with which one disagrees. In the context of “hate speech,” counterspeech comprises a potentially broad range of expression, including speech that directly refutes the ideas the “hate speech” conveys; broader, proactive educational initiatives; and expressions of remorse by discriminatory speakers. .

Paradoxically, in some circumstances the most effective form of counterspeech can be silence. By deliberately choosing to ignore provocative, hateful speakers, silence can powerfully convey Implicit messages of disdain, while at the same time denying hateful speakers the attention they seek and often get from sparking controversy.

The Southern Poverty Law Center (SPLC), which “is dedicated to fighting hate and bigotry,” strongly opposes confrontational counter-protests on strategic grounds. In 2017, it issued a guide for students about how to curb the alt-right’s increasing campus recruitment efforts. The guide recommends a number of steps, including: seeking to persuade the group that invited the alt-right speaker to campus to withdraw its invitation; speaking out peacefully against the event; meeting with campus groups that the alt-right targets, such as minority student groups, to provide mutual support; and holding “an alternative event-away from the alt-right event-to highlight your campus’ commitment to inclusion and our Nation’s democratic values.” The first and foremost strategy that the guide recommends, though, is “above all, [to] avoid confrontation with the alt-right speaker and supporters.” explaining: “The alt-right thrives on hostility, and hate feeds on crowds. Video footage of an altercation will only provide cover for the speaker, who can claim to be a victim.”

In 2015 the European Commission against Racism and Intolerance (ECRI) issued a report strongly urging European Nations to pursue non-censorial responses to “hate speech,” including counterspeech. This is especially noteworthy because many European Nations have enacted and enforced “hate speech” laws with the encouragement of regional bodies, including ECRI. But, as a result of its monitoring of the efforts of European Nations to curb “hate speech” and discrimination, ECRI has concluded that alternative, non-censorial measures are “*much more likely*” than “hate speech” laws to prove effective in ultimately eradicating “hate speech” and its potential harmful effects.

Appendix A quotes former President Obama and other, ideologically diverse leaders who are members of minority groups, urging minority students and others who are disparaged by “hate speech” to engage in counterspeech. This can be an empowering experience, thus curbing feelings of shame and loss of self esteem that “hate speech” potentially engenders. Counterspeech transforms into activists those whom “hate speech” laws cast as passive victims of such expression, dependent on government protection.

Of course, not all targets of “hate speech” will respond with counterspeech. The potential adverse psychic and emotional impact of the “hate speech” might be so incapacitating for some that they are unable to engage in effective counterspeech, at least in the short run, and some disparaged people might not have access to means of communication that would make their counterspeech effective. These are serious concerns, which can and must be addressed through the following kinds of measures: proactive counseling and training about encountering and engaging constructively with “hate speech”; education about utilizing social media and other communications vehicles for drawing attention and responding to “hate speech”; providing access to communications devices and technology for people who lack educational and material resources; and information about organizations that track and respond to “hate speech” incidents, and provide resources for enabling others to do so.

Fortunately, we have seen increasing social justice advocacy nationwide, including on campus, with members of minority groups actively leading and engaging in such efforts, including much vigorous (but non-violent and non-disruptive) counterspeech against hateful expression. Moreover, surveys indicate that this encouraging trend promises to continue.

***7) Equal rights movements are especially dependent on robust freedom of speech, including the viewpoint neutrality and emergency principles.***

Equal rights movements always have depended on robust freedom of speech, in particular the viewpoint neutrality and emergency principles, which shelter the egalitarian ideas that many have considered harmful, disturbing, dangerous, and even hateful. By definition, ideas that challenge the status quo and advocate law reform tend to be seen in a negative light by the majority or the power elite. That certainly has been true of expression challenging racial injustice.

The leading pro-slavery advocate, Senator John C. Calhoun, argued that abolitionists who criticized slavery “libeled the South and inflicted emotional injury.” During the 1830’s, many Southern states enacted laws suppressing abolitionist speech, which was feared to spur violence—in particular, slave rebellions—and indeed to threaten the Nation’s very survival. Likewise, Martin Luther King, Jr.’s historic letter came from a Birmingham jail because he had sought to condemn racial segregation and discrimination to audiences who hated and feared those messages.

Given officials’ consistent pattern of enacting and enforcing laws to stifle civil rights advocacy, the NAACP (National Association for the Advancement of Colored People) and other leaders of the twentieth-century Civil Rights Movement opposed viewpoint-based censorship that was inconsistent with the emergency principle, including “hate speech” laws. When such laws were enacted in Skokie, Illinois, in 1977, for the specific purpose of blocking a planned neo-Nazi demonstration, the ACLU, which won a Supreme Court ruling striking them down, pointed out that these laws “could have been used to stop Martin Luther King, Jr.’s confrontational march into Cicero, Illinois, in 1968.” As Congressman John Lewis eloquently observed in 2017: “Without freedom of speech and the right to dissent, the Civil Rights Movement would have been a bird without wings.”

**8) *Shielding students from hateful and bated ideas may well undermine their psychic and emotional well-being, as well as their education and preparation for effective participation in the workplace and the public sphere.***

It might seem self-evident that shielding people from speech that could have negative psychic impacts would be positive for their mental health. But some experts maintain that, at least in some circumstances, people’s mental health is actually undermined by shielding them from speech to which they have negative psychic reactions, including constitutionally protected “hate speech.”

In a 2015 article, NYU psychology professor Jonathan Haidt and Greg Lukianoff, the president of FIRE (Foundation for Individual Rights in Education), summarized the pertinent psychological literature and concluded: “A campus culture devoted to policing speech and punishing speakers . . . may be teaching students to think pathologically,” causing depression and anxiety. They recommend that, to better protect students’ psychic well-being, colleges and universities should abandon rather than enforce restrictive speech codes.

As Northeastern University psychology professor Lisa Feldman Barrett wrote in 2017, while “chronic” stress can cause physical illness, shorter-term stress, including the stress that results from bearing “hate speech,” actually can be beneficial:

Offensiveness is not bad for your body and brain. Your nervous system evolved to withstand periodic bouts of stress, such as fleeing from a tiger . . . or encountering an odious idea . . . . When you’re forced to engage a position you strongly disagree with . . . [it] feels unpleasant, but it’s a good kind of stress—temporary and not harmful to your body—and you reap the longer-term benefits of learning.

Haidt and Lukianoff add that this “good kind of stress” at least “sometimes makes an individual stronger and more resilient,” explaining that “[t]he next time that person faces a similar situation, she’ll experience a milder stress response because . . . her coping repertoire has grown.”

The foregoing teachings from psychologists dovetail with the conclusions of political leaders, including those who are members of racial minority groups, based on their own experience and expertise. I quote a number of these experts in Appendix A, including liberal political activist Van Jones. From his perspective as a political strategist, he recently made this point to a campus audience:

“I got tough talk for my liberal colleagues on . . . campuses . . . . I don’t want you to be safe, ideologically. I don’t want you to be safe, emotionally. I want you to be strong. That’s different. . . . [L]earn how to deal with adversity . . . . I want you to be offended every single day on this campus. I want you to be deeply aggrieved and offended and upset, and then to learn how to speak back. Because that is what we need from you.”

**Conclusion**

If all of us who are committed to equal justice for all would exercise our precious First Amendment rights, we would wield more positive power, for more positive change, than any censorship could ever do. As Dr. Martin Luther King declared: “In the end, we will remember not the words of our enemies, but the silence of our friends.”

**APPENDIX A: Statements by politically diverse minority leaders, opposing censorship of “hate speech,” including on campus, because it undermines equality and education, in particular for minority students and student activists** (LISTED IN ALPHABETICAL ORDER BY LAST NAME)

**Anthony Kapel “Van” Jones, commentator and liberal political activist, speaking at University of Chicago, 2017**

“I got tough talk for my liberal colleagues on these campuses . . . There are two ideas about safe spaces: One is a very good idea and one is a terrible idea. The idea of being physically safe on a campus-not being subjected to sexual harassment and physical abuse . . . —I am perfectly fine with that. But there’s another view that is now . . . ascendant, which I think is just a horrible view, which is that ‘I need to be safe ideologically. I need to be safe emotionally I just need to feel good all the time, and if someone says something that I don’t like, that’s a problem for everybody else including the administration.’

“I think that is a terrible idea for the following reason: I don’t want you to be safe, ideologically. I don’t want you to be safe, emotionally. I want you to be strong. That’s different. I’m not going to pave the jungle for you. Put on some boots, and learn how to deal with adversity. I’m not going to take all the weights out of the gym; that’s the whole point of the gym. This is the gym.

“You can’t live on a campus where people say stuff you don’t like?! These people can’t fire you, they can’t arrest you, they can’t beat you up, they can just say stuff you don’t like-and you get to say stuff back-and this you cannot bear?! This is ridiculous BS, liberals! My parents . . . dealt with fire hoses! They dealt with dogs They dealt with beatings! You can’t deal with a mean tweet?! You are creating a kind of liberalism that the minute it crosses the street into the real world is not just useless, but obnoxious and dangerous.

“I want you to be offended every single day on this campus. I want you to be deeply aggrieved and offended and upset, and then to learn how to speak back. Because that is what we need from you in these communities.”

**Alan Keyes, conservative political activist**

“The . . . protection [of a “hate speech” law] incapacitates. . . . To... be told that white folks have the moral character to shrug off insults, and that I do not. . . .That is. . . the most racist statement of all!”

**Michael Meyers, Executive Director, New York Civil Rights Coalition**

“As a former student activist, and as a current black militant, [I] believe[] that . . . paternalism [and] censorship offer the college student a tranquilizer as the antidote to . . . racism . . . . What we need is an alarm clock . . . more free speech!”

**President Barack Obama, Howard University Commencement Address, 2016**

“[O]ur democracy gives us a process designed . . . to settle our disputes with argument and ideas and votes instead of violence and simple majority rule . . . . So don’t try to shut folks out, don’t try to shut them down, no matter how much you might disagree with them. There’s been a trend . . . of trying to get colleges to disinvite speakers with a different point of view, or disrupt a politician’s rally. Don’t do that no matter how ridiculous or offensive you might find the things that come out of their mouths. Because as my grandmother used to tell me, every time a fool speaks, they are just advertising their own ignorance. Let them talk . . . . If you don’t, you just make them a victim, and then they can avoid accountability.

“That doesn’t mean you shouldn’t challenge them. Have the confidence to challenge them . . . . [Y]ou will have the responsibility to speak up in the face of injustice. But listen. Engage. If the other side has a point, learn from them. If they’re wrong, rebut them. Teach them. Beat them on the battlefield of ideas. You might as well start practicing now, because one thing I can guarantee you—you will have to deal with ignorance, hatred, racism, foolishness . . . . I promise you, you will have to deal with all that at every stage of your life.”

**Theodore Shaw, former President, NAACP Legal Defense and Educational Fund**

“I believe deeply that minority group members who are discriminated against . . . have the . . . responsibility . . . to struggle and speak on their own behalf.”

**Ruth Simmons, first Convocation Address as President of Brown University**

“The protection of speech that is offensive or insulting to us is one of the most difficult things . . . we do. But it is this same freedom that protects us when we

are in turn powerless . . . . I won't ask you to embrace someone who offends your humanity through . . . free speech. But I would ask you to understand that the price of your own freedom is permitting th[at] expression. . . . You know something that I hate? When people say, 'That doesn't make me feel good about myself.' I say, 'That's not what you're here for.' . . . I believe that learning at its best is the antithesis of comfort . . . . [So,] [i]f you come to this [campus] for comfort, I would urge you to walk [through] yon iron gate . . . . But if you seek betterment for yourself, for your community and posterity, stay and fight."

***Gwen Thomas, educator and civil rights activist***

"We have to teach (our young people) how to deal with adversarial situations. They have to learn how to survive with offensive speech they find wounding and hurtful."

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The CHAIRMAN. Thank you, Ms. Strossen.  
Mr. Cohen, welcome.

**STATEMENT OF J. RICHARD COHEN**

Mr. COHEN. Thank you, Mr. Chairman. Thank you, Ranking Member Murray. It's an honor to be here today, especially with such a distinguished group of fellow panelists.

You know, after Charlottesville, this Congress recognized the growing prevalence of hate groups in this country, as Senator Murray pointed out. The current debate about free speech on college campuses is taking place against the backdrop of that growing prevalence, against the backdrop of a white nationalist movement that has been energized by Mr. Trump's rhetoric, and that is targeting our colleges and universities.

As Professor Stanger wrote in a New York Times piece after the incident at Middlebury, political life and discourse in the United States is at a boiling point, and nowhere is the reaction to that more heightened than on college campuses. Over 200 colleges have been targets of white supremacist, white nationalist recruitment in recent months.

Prominent white nationalist figures have gone on college speaking tours. Their goal is to poke a stick in the eye of what they see as the bastions of liberal multiculturalism. They want to spark a backlash so they will ennoble themselves and be able to parade around as First Amendment martyrs.

In the material that we distribute to schools, to students throughout the country, we urge students not to play into the hands of the Richard Spencers of the world. Instead of attending their speeches and giving them the spectacle that they seek, we counsel students to hold alternative events that express our deepest democratic values. If students choose to protest, we urge them to do so peacefully.

Unfortunately, some students have other ideas and have shouted down speakers. In some cases, protests have turned violent, as members of loose knit coalitions of self-described antifascists have stormed college campuses. Obviously, some college students do not have a clear understanding of the First Amendment. Part of the problem is, as Professor Stanger pointed out in her article, that we have a crisis of civic education in our country, particularly at the K through 12 level.

Despite the challenges that universities and colleges face, I completely agree with Professors Strossen and Zimmer that they must

uphold our First Amendment values. Just as students have a right to read what they want, they have a right to listen to whoever they want, however obnoxious and racist those speakers may be. When universities hold their facilities open to outsiders, racists have a right to rent them on the same terms as anyone else. We emphasize this point in the resources that we distribute across the country to campuses.

We also emphasize that it's critical that the voices of college leadership be heard. College presidents need not be neutral. They can and should speak out in support of the First Amendment, because it's among our most highest values and because the presence of racist speakers on campus presents a teachable moment. Just as importantly, college presidents should speak out in support of the values of the 14th Amendment, to distance their universities from racism and to assure students who feel threatened that the University is committed to maintaining an inclusive environment.

Indeed, every prominent person in public life, starting with the President, should speak out in support of these same values. Unfortunately, as Professor Stanger pointed out in her New York Times piece, the President has not always demonstrated fidelity to the First Amendment. He has suggested that the laws protecting freedom of speech in the press, laws that have constitutional underpinnings, should be changed. He has encouraged his supporters at times to use violence against those who protest against him. The implicit message is the silencing of dissent. It is a message, according to Professor Stanger, that has not been lost on college students.

In its post-Charlottesville joint resolution, Congress urged the President to speak out against hate groups that espouse racism, extremism, xenophobia, anti-semitism, and white supremacy. Unfortunately, he has not done so consistently during his campaign or during his Presidency. Indeed, the truth is that President Trump has energized the white Nationalist Movement that is now targeting our colleges and universities. For this reason, the President has a special responsibility to take the air out of the movement, a special responsibility to heed Congress' recent call, to use all resources available to the administration to address the growing prevalence of hate groups in our country.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF J. RICHARD COHEN

The debate over free speech on college campuses is taking place against the backdrop of increased activity by a white nationalist movement that has been emboldened by President Trump's rhetoric and that is targeting Colleges and Universities. As Congress has recognized, there is a "growing. . .prevalence of hate groups" in our country, something that was on full display at the University of Virginia in Charlottesville this August. Since March 2016, white nationalist groups have distributed racist recruitment flyers at more than 200 colleges and universities across the Nation, and white nationalist speakers have appeared at dozens of colleges. Their appearances and that of other controversial speakers have been met by disruptive protests in some cases. There also have been instances of violence carried out by loose-knit, self-described outside groups of anti-fascists.

The messages of white nationalist speakers may be abhorrent, but their First Amendment rights, as well as those of students who wish to listen to them, must be protected. Colleges and Universities are facing difficult issues over the cost of security; however, they may not ban speakers merely because of the anticipated reac-

tion by protestors to their words. To avoid giving white nationalist speakers the spectacle they seek, students should boycott their speeches and hold alternative events that promote our Nation's democratic values. If they choose to protest white nationalist speakers, students should do so peacefully.

Colleges and Universities must protect the First Amendment rights of all speakers. But College and University Presidents also should speak out against racist speakers to distance their schools from them and to reassure students that their schools are committed to maintaining welcoming and inclusive environments. With his bully pulpit, the President should speak out consistently and forcefully against bigotry and in support of the First Amendment. Furthermore, he should take responsibility for his role in energizing the white nationalist movement and heed Congress' call to "address the growing prevalence of . . . hate groups in the United States."

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SUMMARY OF J. RICHARD COHEN

My name is Richard Cohen. I am an attorney and the President of the Southern Poverty Law Center, a civil rights organization founded in 1971. I have testified before numerous Congressional Committees, including the Senate Committee on the Judiciary in June on the subject of free speech on college campuses. I have served on the Department of Homeland Security's Countering Violent Extremism Working Group and am a recipient of the FBI Director's Community Leadership Award. I am honored to appear before you today.

For more than three decades, my colleagues and I have been monitoring and issuing reports about radical right activity in the United States, including at colleges and universities, and have been advising law enforcement officials, civic leaders, and college administrators on how to respond to speeches and rallies held by hate groups and their leaders. A few days before the violent demonstrations in Charlottesville, Virginia, in August, we released a guide with advice to student groups on how to respond when speakers associated with the white nationalist movement come to their campuses.<sup>1</sup> Less than a week after the deadly Charlottesville events, we released a new edition of *Ten Ways to Fight Hate*, our community guide for responding peacefully to hate activity.<sup>2</sup> A few weeks from now, we will be releasing a training video for the law enforcement community on lessons that can be learned from the events in Charlottesville.

I'd like to make three points this morning.

First, the debate over free speech on college campuses is taking place against the backdrop of increased activity by a white nationalist movement that has been emboldened by President Trump's rhetoric and that is targeting colleges and universities.

Second, although University officials and students may find white nationalism abhorrent, they must respect the First Amendment rights of white nationalist speakers and of the students who want to listen to them.

Third, University administrators and public officials, particularly the President, must speak out forcefully against white nationalism and in support of the First Amendment. The President also should heed Congress's call to use his administration's resources to fight the growing prevalence of hate groups in our country.

**White Nationalist Movement Emboldened by the Presidential Campaign Is Targeting Our Nation's Colleges and Universities**

On the night of Friday, August 11, 2017, as the joint resolution unanimously passed by this Congress stated, "hundreds of torch-bearing White nationalists, White supremacists, Klansmen, and neo-Nazis chanted racist, anti-Semitic, and anti-immigrant slogans and violently engaged with counter-demonstrators on and around the grounds of the University of Virginia in Charlottesville."<sup>3</sup> The shocking number of hardcore racists who came to Charlottesville reflects that our country is facing a newly energized white supremacist movement. The fact that the racists marched at the University of Virginia reflects that the movement is targeting our

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<sup>1</sup>*The Alt-Right on Campus: What Students Need to Know* (2017), <https://www.splcenter.org/20170810/altright-campus-what-students-need-know>.

<sup>2</sup>*Ten Ways to Fight Hate: A Community Response Guide* (2017), <https://www.splcenter.org/20170814/tenways-fight-hate-community-response-guide>.

<sup>3</sup>S.J. Res 49, 115th Cong. (2017) (enacted).

colleges and universities. The fact that violence erupted reflects that the threat colleges and universities are facing is very real.

Congress has recognized the “growing prevalence of . . . hate groups” in our country.<sup>4</sup> Our research confirms the point. During the last 2 years—a period that coincided with the Presidential campaign—we documented a surge in the number of hate groups.<sup>5</sup> The growth in the number of hardline anti-Muslim groups last year was particularly dramatic and followed a significant increase in hate crimes against Muslims the year before, according to the FBI.<sup>6</sup> As former President George W. Bush noted during a speech earlier this month, “bigotry seems emboldened.”<sup>7</sup>

Regardless of whether President Trump intended it, his campaign rhetoric “unearthed some demons,” to borrow Representative Mark Sanford’s words.<sup>8</sup> Although white supremacists typically eschew the political process, seeing both parties as irredeemably corrupt, they took the unusual step of rallying around Mr. Trump’s candidacy and celebrating his victory. On his radio show from February 2016, for example, former Klan chief David Duke told his listeners that “voting against Donald Trump. . . is really treason to your heritage.”<sup>9</sup> On election night, he tweeted that “our people played a HUGE role in electing Trump!”<sup>10</sup> During a gathering of white nationalists just blocks from the White House shortly after the election, white nationalist leader Richard Spencer—who later played a prominent role in the Charlottesville demonstrations—prompted Sieg Heils from audience members after quoting Nazi propaganda in German. He responded by shouting, “Hail Trump! Hail our people! Hail victory!”<sup>11</sup>

In the 10 days following the election, we documented nearly 900 bias-related acts of harassment, intimidation, and violence.<sup>12</sup> Sixteen percent of the incidents took place on college campuses. Many of the perpetrators invoked the president-elect’s name or his slogans. *Cf supra* note 8 (quoting Rep. Sanford) (“I’ve talked to a number of people about it back home. They say, ‘Well, look, if the President can say whatever, why can’t I say whatever?’ He’s given them license.”). During the Charlottesville demonstrations, David Duke stated, “We are determined to take our country back. We are going to fulfill the promises of Donald Trump.”<sup>13</sup>

Colleges and universities are a prime target of the newly energized white supremacist movement because it sees them as bastions of liberalism and multiculturalism—institutions that are “infected” with political correctness. From the movement’s perspective, making a speech on a college campus is a highly symbolic act equivalent to going into the belly of the beast. The statistics tell the story: Since March 2016, we have documented 329 incidents of racist recruitment flyers being distributed on 241 different college campuses across the United States—a number that continues to grow.<sup>14</sup>

A group called Identity Evropa, whose members must be of “European, non-Semitic heritage,” has been responsible for the largest number of these recruitment efforts. The group was founded by Nathan Darnigo, a student who was inspired by

<sup>4</sup> *Id.*

<sup>5</sup> *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, Southern Poverty Law Center, Feb. 15, 2017, <https://www.splcenter.org/news/2017/02/15/hate-groups-increase-secondconsecutive-year-trump-electrifies-radical-right>.

<sup>6</sup> Mark Potok, *Anti-Muslim Hate Crimes Surged Last Year, Fueled by Hateful Campaign*, Southern Poverty Law Center, Nov. 14, 2016, <https://www.splcenter.org/hatewatch/2016/11/14/anti-muslim-hate-crimes-surged-last-year-fueled-hateful-campaign>; Fed. Bureau of Investigation, *Hate Crime Statistics, 2015 (2016)*, [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf).

<sup>7</sup> <http://thehill.com/homenews/news/356212-george-w-bush-bigotry-seems-emboldened-in-us>

<sup>8</sup> Karen Tumulty and Robert Costa, *The GOP Inherits What Trump has Wrought* (May 26, 2017), [https://www.washingtonpost.com/politics/the-gop-inherits-what-trump-has-wrought/2017/05/26/4e1943ea-4177-11e7-adba-394ee67a7582\\_story.html?utm\\_term=.bc5a926d86fa](https://www.washingtonpost.com/politics/the-gop-inherits-what-trump-has-wrought/2017/05/26/4e1943ea-4177-11e7-adba-394ee67a7582_story.html?utm_term=.bc5a926d86fa)

<sup>9</sup> David Duke Says a Vote against Trump is Treason to White Heritage, *Hatewatch*, Feb. 26, 2016, <https://www.splcenter.org/hatewatch/2016/02/26/david-duke-says-vote-against-trump-treason-white-heritage>.

<sup>10</sup> David Duke (@DrDavidDuke), Twitter (Nov. 9, 2016, 2: 14 AM), <https://twitter.com/drdaidduke/status/796249464826687488?lang=en>.

<sup>11</sup> Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election with Nazi-Era Salute*, N.Y. Times, Nov. 20, 2016, <https://www.nytimes.com/2016/11/21/us/alt-right-salutes-donald-trump.html?r=90>

<sup>12</sup> *Ten Days After: Harassment and Intimidation in the Aftermath of the Election*, Southern Poverty Law Center, Nov. 29, 2016, [https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidationaftermath\\_election](https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidationaftermath_election).

<sup>13</sup> Libby Nelson, “Why we voted for Donald Trump”: David Duke explains the white supremacist Charlottesville protests, *Vox*, Aug. 12, 2017, <https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-kkk>.

<sup>14</sup> <https://www.splcenter.org/hatewatch/2017/10/17/white-nationalist-flirting-american-college-campuses>.



Much of the violence has been perpetrated not by students but by persons who identify with the so-called Antifa—a loose-knit, self-described anti-fascist movement. Antifa have been involved in bloody street fights with white supremacists for decades. Many are organized under a loose, national network known as Anti-Racist Action (ARA), formed by anti-racist skinheads in Minneapolis in 1988 to combat neo-Nazi skinhead gangs. ARA is dedicated, according to its website, to “eliminating racism, sexism, anti-semitism, Islamophobia, homophobia, transphobia, and discrimination against the disabled, the oldest, the youngest, and the most oppressed people.” Its tenets include “challenging racists and fascists when they attempt to recruit, organize, mobilize, propagandize, and cause harm to people” and “refusing to ignore the violent bigots that comprise racist and fascist groups.”<sup>26</sup>

Clearly, college administrators have their hands full.

### **The First Amendment Rights of All Speakers and Listeners Must Be Protected**

Last week, the organizer of Richard Spencer’s campus speaking tour filed a lawsuit against Ohio State University for refusing to rent a campus venue to him for a Spencer speech.<sup>27</sup> The organizer is likely to win, just as he won a similar lawsuit against Auburn University earlier this year.<sup>28</sup> Although many universities, particularly after Charlottesville, would like to refuse to allow Spencer to speak on their campuses,<sup>29</sup> they will all almost certainly lose if they try to do so, absent unusual circumstances, in light of settled First Amendment jurisprudence.

The First Amendment is a bedrock principle of our diverse democracy. It protects the right to an open dialog, described by the Supreme Court as a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>30</sup> Crucial to that commitment is that the Constitution does not merely protect expression that is beautiful, or moral, or wise. It commits us to protecting speech and acts that may be disagreeable or even downright offensive to some.<sup>31</sup> That commitment safeguards both the rights of students to peacefully protest<sup>32</sup> and the rights of anti-war activists to burn the American flag.<sup>33</sup>

Public colleges and universities are state actors.<sup>34</sup> They must ensure that their campuses both uphold the First Amendment and are safe, welcoming, and supportive environments for students of all backgrounds.<sup>35</sup> Although private school administrators are not legally bound by the same obligations,<sup>36</sup> most typically assume those duties regardless, given their role in building a society in which First Amendment freedoms are paramount.

The First Amendment firmly protects the right to receive information from all manner of sources, from controversial speakers to books and pamphlets.<sup>37</sup> No matter how repugnant one may find a speaker’s views, as long as a college has a policy of allowing student groups to invite people from outside their campus to speak, col-

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*banksdowntown-vandalized/; Events Surrounding White Nationalist Rally in Virginia Turn Fatal, NPR: The Two-Way (Aug. 12, 2017, 5 o'clock AM), <http://www.npr.org/sections/thetwoaway/2017/08/12/542982015/home-to-university-of-virginia-prepares-for-violence-at-white-nationalist-rally>.*

<sup>26</sup>“About Anti-Racist Action,” available at <https://antiracistaction.org/about/>.

<sup>27</sup>Comp!., *Padgett v. Bd of Trs. of The Ohio State Univ.*, No. 2: 17-cv-00919 (S.D. Ohio Oct. 22, 2017), <https://mgtuwcmb.files.wordpress.com/2017/10/osu-complaint.pdf>.

<sup>28</sup>Prelim. Inj., *Padgett v. Auburn Univ.*, No. 3:17-cv-00231 (M.D. Ala. Apr. 18, 2017), ECF No. 9.

<sup>29</sup>Ramsey Touchberry, *Penn State Becomes Fifth University to Deny White Nationalist Richard Spencer*, USA Today College, Aug. 22, 2017, <http://college.usatoday.com/2017/08/22/penn-state-becomes-fifth-university-to-deny-white-nationalist-richard-spencer/>.

<sup>30</sup>*Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>31</sup>*Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Erznoznik v. city of Jacksonville*, 422 U.S. 205, 209-10(1975).

<sup>32</sup>*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>33</sup>*Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>34</sup>*Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988) (“A State university without question is a state actor.”).

<sup>35</sup>*Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); see also Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleagues (Oct. 26, 2010), <https://www.ed.gov/about/offices/list/ocr/letters/colleague-2010010.pdf>.

<sup>36</sup>See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (holding that a private high school for troubled students need not observe First Amendment rights of a teacher fired for criticizing school officials).

<sup>37</sup>See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal citations omitted) (“It is now well established that the Constitution protects the right to receive information and ideas . . . . This right to receive information and ideas, regardless of their social worth is fundamental to our free society.”).

lege administrators cannot pick and choose based on the views the speaker holds.<sup>38</sup> This is why Middlebury College's student chapter of the conservative American Enterprise Institute (AEI) had a right to invite Charles Murray to speak to them on campus.<sup>39</sup> It is why neither other students nor college administrators should be allowed to stop someone from speaking merely because they dislike the speaker's ideas.<sup>40</sup>

When controversial speakers like Richard Spencer come to college campuses without the invitation of a student group, they have the same right as anyone else to use a public space to promote their message: if a school allows those outside its community to use or rent a space on campus, then any group or speaker has just as much of a right to use that space as anyone else.<sup>41</sup>

In the Auburn case, the court stated that the University presented no evidence that Spencer's speech was "likely to incite or produce imminent lawless action."<sup>42</sup> The court also emphasized that the University could not cancel Spencer's speech for fear that protestors would object violently to his message. The court quoted a Supreme Court case stating that "[l]isteners' reaction to speech is not a content-neutral basis for regulation."<sup>43</sup> The court also noted that the University was prepared to provide security and that Spencer had provided insurance against damage and paid for extra security.<sup>44</sup> After a preliminary injunction was entered against the University, it had to pay \$29,000 in attorneys' fees to the lawyer for Spencer's organizer.<sup>45</sup>

Richard Spencer is a wealthy individual. Most controversial speakers will not be able to afford the cost of extra security and, in any event, the law is decidedly against imposing the cost of security on speakers to control those who may violently protest their messages.<sup>46</sup> Were the law otherwise, protestors could raise security costs to such a degree that they would amount to a classic "heckler's veto." This leaves us, as Professor Erwin Chemerinsky, a staunch First Amendment advocate, has pointed out, with a dilemma.

At what point can a University say that it cannot afford the necessary security precautions and therefore must cancel a speaker because public safety cannot be assured? The law provides no clear answer to this question.

Yet, it is a very real and difficult issue. If [Ben] Shapiro [another controversial speaker] and Yiannopolous and others like them announced they were coming every week, no campus could possibly afford it. Never should anyone be prevented from speaking because of his or her views, but there must be a point at which a campus can say the financial bill is just too high. The law needs to develop in this area to provide guidance to campus administrators.<sup>47</sup>

Texas A&M University recently instituted a rule that will require all campus speakers to be sponsored by an organization or person affiliated with the University. Such a rule would prevent strangers to the University, such as the organizer for Spencer's speaking tour, to rent a University venue. "If the University is going to

<sup>38</sup> *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) ("Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.")

<sup>39</sup> See Taylor Gee, *How the Middlebury Riot Really Went Down*, Politico, May 28, 2017, <http://www.politico.com/magazine/story/2017/05/28/bow-donald-trump-caused-the-middlebury-melee-215195>.

<sup>40</sup> See *Healy v. James*, 408 U.S. 169, 187-88 (1972) ("Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the state, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.")

<sup>41</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-09, 112-13 (2001) ("[The school] has opened its limited public forum to activities that serve a variety of purposes . . . [It] engaged in viewpoint discrimination when it excluded the [religious] Club from the afterschool forum.")

<sup>42</sup> Prelim. Inj., *Padgett v. Auburn Univ.*, *supra* note 28, at 2.

<sup>43</sup> *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992).

<sup>44</sup> Prelim. Inj., *Padgett v. Auburn Univ.*, *supra* note 28, at 3.

<sup>45</sup> Jay Reeves, *Auburn to Pay \$29K for Trying to Block Controversial Speaker Richard Spencer*, Montgomery Advertiser, May 16, 2017, <http://www.montgomeryadvertiser.com/story/news/2017/05/16/auburn-pay-29-k-trying-blockcontroversial-speaker-richard-spencer/32466100/>

<sup>46</sup> See, e.g., *Forsyth Cty. v. Nationalist Movement*, 505 U.S. at 136-37.

<sup>47</sup> Erwin Chemerinsky, *Why UC Berkeley Was Right Not to Ban Milo, and Other Lessons from Free Speech Week*, The Sacramento Bee, Oct. 3, 2017, <http://www.sacbee.com/opinion/californiaforum/article176680106.html>.

incur security and overtime costs associated with controversial speakers,” a Texas A&M spokesperson said, “at least it will be for its own students.”<sup>48</sup>

In the SPLC’s student campus guide, we emphasize the critical importance of the First Amendment. “Neither other students nor administrators,” we explain, “can stop someone from speaking merely because they dislike the speaker’s ideas.” We urge students “to deprive the speaker of the thing he or she wants most—a spectacle.”

Alt-right personalities know their cause is helped by news footage of large jeering crowds, heated confrontations and outright violence at their events. It allows them to play the victim and gives them a larger platform for their racist message. Denying an alt-right speaker of such a spectacle is the worst insult they can endure.

While there’s nothing wrong with peaceful student protests against a hateful ideology, it’s best to draw attention to hope instead. Hold an alternative event away from the alt-right event to highlight your campus’s commitment to inclusion and our nation’s democratic values.<sup>49</sup>

If students choose to protest, we urge them to be peaceful. We also recognize that ridicule and mockery, when used peacefully, may be effective tactics “to disarm protesters who espouse bigotry and white supremacy.”<sup>50</sup>

**College Administrators and Public Officials, Including the President, Should Speak Out against White Nationalism and in Support of the First Amendment; the President Also Should Heed Congress’s Call to Address the Growth of Hate Groups**

Although public colleges and universities cannot ban those invited to campus by student groups or forbid speakers whose messages they abhor from using otherwise publicly available facilities, nothing in the First Amendment requires public colleges to respond neutrally to these speakers.<sup>51</sup> As the Supreme Court recently affirmed, “[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.”<sup>52</sup> Colleges and universities may not censor speakers like Richard Spencer, but they can censure them.

Many college presidents have issued forceful statements denouncing the messages of racist speakers and affirming their commitment to maintaining welcoming and inclusive campuses. Often, they have coupled such statements with affirmations of their school’s commitment to the First Amendment as well. The statement issued by Michael Young, the president of Texas A&M University, is a good example.<sup>53</sup>

Freedom of speech is a First Amendment right and a core value of this University, no matter how odious the views may be.

Outrage and indignation are emotions understandably running high; I share these sentiments. At the same time, I am also truly heartened by the clear message that the Aggie community is sending in reaction to this intrusion—the firm resolve to speak up in opposition to these views, the resounding affirmation that they do not represent the Aggie values we espouse and to which we aspire, and the call to action to reject these views.

Both aspects of such statements are important. By denouncing the racist messages of speakers like Spencer and affirming their commitment to maintaining welcoming and inclusive campuses, University presidents distance their schools from racism and reassure students who may be troubled by the presence of incendiary speakers on campus. By affirming their commitment to the First Amendment, University presidents take advantage of a teachable moment at a time when there is widespread confusion among students about the constitutional protections afforded

<sup>48</sup>Christine Hauser, Campuses Grapple with Balancing Free Speech and Security After Protests, N.Y. Times, Mar. 29, 2017, <https://www.nytimes.com/2017/03/29/us/texas-aandm-speaking-policy-richardspencer.html>.

<sup>49</sup>See *supra* note 1.

<sup>50</sup>Tina Rosenberg, Neo-Nazis in Your Streets? Send in the (Coup Clutz) Clowns, N.Y. Times, Sept. 6, 2017, <https://www.nytimes.com/2017/09/06/opinion/comedy-protest-taxes-nazis.html>.

<sup>51</sup>Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”). But see *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468 (2009) (“[G]overnment speech must comport with the Establishment Clause.”).

<sup>52</sup>*Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

<sup>53</sup>“Aggies United” Event Planned for Dec. 6 at Kyle Field (Nov. 29, 2016), <http://president.tamu.edu/messages/aggies-united.html>.

to freedom of expression.<sup>54</sup> It is important, in my view, that statements such as that issued by Mr. Young come from University presidents or other high-ranking officials, rather than from a disembodied institutional office.<sup>55</sup> Actions, of course, speak louder than words.

Ironically, the Goldwater Institute is promoting model legislation that, in the name of protecting free speech on state college campuses, actually could circumscribe the ability of college presidents to speak out against racism.<sup>56</sup> The model legislation provides that state colleges and universities “shall strive to remain neutral, as an institution, on the public controversies of the day.”<sup>57</sup> Although the Goldwater Institute states that this section of its model legislation is “aspirational,” it also states that “[d]espite the aspirational language,” certain policies “would be a fairly straightforward violation of the principle of institutional neutrality.”<sup>58</sup> The model legislation does not define the term “public controversies of the day,” so one is left to wonder.

Fortunately, Congress has not remained neutral. In the joint resolution it unanimously passed after the shocking incidents in Charlottesville in August, it unequivocally “reject[ed] White nationalism, White supremacy, and neo-Nazism as hateful expressions that are contradictory to the values that define the people of the United States.” Congress urged the President to likewise “speak out against hate groups that espouse racism, extremism, xenophobia, anti-semitism, and White supremacy.”<sup>59</sup>

Unfortunately, the President’s post-Charlottesville statements have appeared equivocal at times.<sup>60</sup> He also has sent mixed messages when it comes to his support of the first Amendment.<sup>61</sup> Given his bully pulpit, the President should speak more clearly, more forcefully, and more often about our country’s commitment to the constitutional values embodied in both the First and Fourteenth Amendments. He also should take responsibility for the fact that he has “unearthed some demons,” to use Representative Sanford’s words again,<sup>62</sup> and heed Congress’s call to “use all resources available” to his administration to “address the growing prevalence of . . . hate groups in the United States.”<sup>63</sup>

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The CHAIRMAN. Thank you, Mr. Cohen. Thank you for coming.  
Dr. Stanger, welcome.

#### STATEMENT OF DR. ALLISON STANGER

Dr. STANGER. Thank you. Chairman Alexander, Ranking Member Murray, and distinguished Members of the U.S. Senate Committee on Health, Education, Labor, and Pensions, it is an honor and privilege to share some thoughts with you here today.

Last February, several of my students asked me to moderate a talk with the libertarian scholar, Charles Murray. Dr. Murray was drowned out by students who never let him speak. We were forced

<sup>54</sup> Views among College Students regarding the First Amendment: Results from a New Survey (Sept. 18, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/>.

<sup>55</sup> The statement that Auburn University issued on the eve of Richard Spencer’s appearance on campus is an example of an ineffective one coming from an institutional voice rather than from the university president. Auburn University Statement on Richard Spencer, AUBURN UNN. (Apr. 12, 2017), <http://ocm.auburn.edu/newsroom/news/articles/2017/04/auburn-university-statement-on-richard-spencer.htm>.

<sup>56</sup> Campus Free Speech: A Legislative Proposal (2017), [http://goldwaterinstitute.org/wpcontent/uploads/cms\\_page\\_media/2017/f2/2fX\\_Campus\\_%20Free\\_%20Speech\\_%20Paper.pdf](http://goldwaterinstitute.org/wpcontent/uploads/cms_page_media/2017/f2/2fX_Campus_%20Free_%20Speech_%20Paper.pdf).

<sup>57</sup> *Id.* at 20.

<sup>58</sup> *Id.* at 9 (emphasis added).

<sup>59</sup> <https://www.Congress.gov/115/bills/sjres49/BILLS-115sjres49enr.pdf>.

<sup>60</sup> Hayes: Where Are Trump’s Very Fine People? (Aug. 17, 2017), <http://www.weeklystandard.com/hayes-where-are-trumps-very-fine-people/article/2009330>; Trump Gives White Supremacists an Unequivocal Boost (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html?r=0>.

<sup>61</sup> A Brief History of Donald Trump’s Mixed Messages on Freedom of Speech (Sept. 29, 2017), [https://www.washingtonpost.com/politics/a-brief-history-of-donald-trumps-mixed-messages-on-freedom-of-speech/2017/09/28/dd44160c-a3b6-11e7-ade1-76d061d56efa\\_story.html?utm\\_term=.2be8d2b6dc07](https://www.washingtonpost.com/politics/a-brief-history-of-donald-trumps-mixed-messages-on-freedom-of-speech/2017/09/28/dd44160c-a3b6-11e7-ade1-76d061d56efa_story.html?utm_term=.2be8d2b6dc07).

<sup>62</sup> See *supra* note 8.

<sup>63</sup> S.J. Res 49, 115th Cong. (2017) (enacted).

to retreat to another location to live stream our conversation, and he and I were intimidated and physically assaulted while trying to leave campus.

Why did this happen in the United States of America on a bucolic college campus in the green mountains of Vermont? I think there are three reasons. First, any liberal arts college campus is something of a bubble, but Middlebury College is in the State of Vermont, making it a bubble within a bubble. In that context, Charles Murray was a lightning rod that he might not otherwise have been.

Second, a minority of Middlebury faculty cheered on the protest and did not encourage their students to read Charles Murray or listen to him first before drawing their own conclusions about his work or his character. Some faculty acknowledged publicly that they had not read a thing Charles Murray had written but still knew everything they needed to know about him from what the Southern Poverty Law Center website had to say about him.

Third, some students believed that shutting down speech was a means to social justice. Some Middlebury faculty shared that view, thereby encouraging radical action.

We can and must do better. We need to teach students to think for themselves so they are equipped for democratic citizenship and resisting peer pressure in their pursuit of self-knowledge, truth, and the good. Viewpoint diversity is thus an asset for any college or University. Nothing less than liberal education and the possibility of reasoned political debate is at stake in the debate over campus censorship.

Universities exist to promote an arena in which ideas can be exchanged freely, not to render value judgments on the ideas themselves. Free expression is also the means to greater inclusion and diversity. Reducing group think in the academy is thus a necessary condition, in my view, for reducing it in the electorate. To quote the Chinese dissident, Liu Xiaobo, in his Nobel Peace Prize lecture, "Freedom of expression is the foundation of human rights, the source of humanity, and the mother of truth. To strangle freedom of speech is to trample on human rights, stifle humanity, and suppress truth."

Our constitutional democracy will depend on whether Americans can relearn how to engage civilly with one another. Our national security also depends on it. America's enemies all seek to divide us. We must not allow them to do so. The challenge before all of us, therefore, is to channel our emotions into thinking about how we might better work together as Americans on what Lin-Manuel Miranda's Alexander Hamilton calls "America, you great unfinished symphony."

There is important work for Democrats and Republicans to do together. Let's get to it.

Thank you for your attention, and I welcome your questions.

[The prepared statement of Dr. Stanger follows:]

PREPARED STATEMENT OF ALLISON STANGER

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versation, and he and I were intimidated and physically assaulted while trying to leave campus.

Why did this happen in the United States of America, on a bucolic college campus in the Green Mountains of Vermont? I think there are three reasons.

1. Any liberal arts college campus is something of a bubble, but Middlebury College is in the State of Vermont, making it a bubble within a bubble. In that context, Charles Murray was a lightning rod that he might not otherwise have been.
2. A minority of Middlebury faculty cheered on the protests, and did not encourage their students to read Charles Murray or listen to him first before drawing their own conclusions about his work or his character. Some faculty acknowledged publicly that they had not read a thing Charles Murray has written, but still knew everything they need to know from what the Southern Poverty Law Center (SPLC) website had to say about him.
3. Some students believed that shutting down speech was a means to social justice; some Middlebury professors shared that view, thereby encouraging radical action.

My aim is to teach students to think for themselves so they are equipped for democratic citizenship and resisting peer pressure in their pursuit of self-knowledge, truth, and the good. Viewpoint diversity is thus an asset for any institution of higher learning.

Nothing less than liberal education and the possibility of reasoned political debate is at stake in the debate over campus censorship. Universities exist to promote an arena in which ideas can be exchanged freely, not to render value judgments on the ideas themselves. Free expression is also the means to greater diversity and inclusivity. Reducing group think in the academy is thus a necessary condition for reducing it in the electorate.

To quote the Chinese dissident Liu Xiaobo's Nobel lecture, "Freedom of expression is the foundation of human rights, the source of humanity, and the mother of truth. To strangle freedom of speech is to trample on human rights, stifle humanity, and suppress truth."

Our constitutional democracy will depend on whether Americans can relearn how to engage civilly with one another. Our national security also depends on it. America's enemies all seek to divide us. We must not allow them to do so. The challenge before all of us, therefore, is to channel our emotions into thinking about how we might better work together as Americans on what Lin-Manuel Miranda's Alexander Hamilton calls "America, you great unfinished symphony." There is important work for Democrats and Republicans to do together. Let's get to it.

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#### SUMMARY OF ALLISON STANGER

Chairman Alexander, Ranking Member Murray, and distinguished Members of the U.S. Senate Committee on Health, Education, Labor, and Pensions, you have invited me to testify about my own personal experiences with free speech issues on college campuses and what I have learned from them. It is an honor and a privilege to share some thoughts with you here today.

Last February, several of my students asked me to moderate a talk with the libertarian scholar Charles Murray and another set of students asked me to moderate a talk with Edward Snowden. As I wrote in the *New York Times*, this was a chance to demonstrate a commitment to the free and fair exchange of views in my classroom.<sup>1</sup> While Mr. Snowden's presentation went forward without a problem, Dr. Murray's was drowned out by students who never let him speak, we were forced to retreat to another location to live stream our conversation, and he and I were intimidated and physically assaulted while trying to leave campus.

Why did this happen in the United States of America, on a bucolic college campus in the Green Mountains of Vermont? I think there are three reasons.

First of all, any liberal arts college campus is something of a bubble, but Middlebury College is in the state of Vermont, making it a bubble within a bubble. We are the state that elected Senator Bernie Sanders, and we had the second smallest percentage of Trump voters (30.3%) in the country.<sup>2</sup> In that context, Charles Murray was a lightning rod that he might not otherwise have been.

<sup>1</sup><https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html?r=0>

<sup>2</sup><https://www.nytimes.com/elections/results/president>.

The second reason I wound up injured follows from the behavior of a small minority of Middlebury faculty, who cheered on the protests, which is their right. However, these faculty also did not encourage their students to read Charles Murray or listen to him first before drawing their own conclusions about his work or his character, which was their obligation as educators. There are Members of the Middlebury faculty who acknowledged publicly that they had not read a thing Charles Murray has written, but still knew everything they need to know from what the Southern Poverty Law Center (SPLC) website had to say about him.<sup>3</sup> Just because everybody is saying something about some person or group obviously does not make it true. Exhibit A is 1938 Nazi Germany. Our responsibility as educators is to encourage students to read and think for themselves, not to outsource their thinking to others. The SPLC's blurred lines between advocacy and information also must bear a portion of the blame for what transpired.

The third reason events took place as they did on the Middlebury campus is that some students believed that shutting down speech was a means to social justice; some Middlebury professors shared that view, thereby encouraging radical action. It is important to realize that everyone inside the lecture hall was a member of the Middlebury community, as IDs were checked at the door. Outside agitators were among those protesting outside. Some Members of the Middlebury community would like to draw a distinction between what happened inside the lecture hall and what happened outside it, where I was injured. They are mistaken. Shutting down speech is always an invitation to violence. There was a direct line between the fighting words on campus, the suppression of speech and the angry mob that gave me a concussion. All violence is a breakdown of communication.

I met JD Vance, author of *Hillbilly Elegy*, last week, and he asked me whether what happened to me was a one-off thing related to a particular moment in time or an expression of something larger. It's a good question. I responded that it is both. The overreaction was very much rooted in the bubble within a bubble that is Middlebury College, but it is also a reaction to larger trends that have long been in motion having to do with growing inequities in our country that correlate with unequal K-12 educational opportunities. Middlebury successfully recruits a diverse class of the best and the brightest from all corners of the country and world, but some students of color who arrive on campus from urban areas are confronted for the first time with the challenges of living in one of the whitest states in the union. At Middlebury, they encounter unfathomable privilege, which is sometimes accompanied by a sense of entitlement. Since our Constitution once counted slaves as 3/5 of a human being, when vast inequality aligns with racial difference, it breeds legitimate resentment. None of this is to excuse the shutting down of speech and the violence to which it led, but it is to point out that the emotions the protesters brought to the event were real and justified. There is still much equality work to be done in our country.

Lest I be misunderstood, I want to make it clear that we are talking about a small minority of students and faculty who applauded censorship. But they were loud and vocal, just as those of us were who stood for freedom of expression. A fundamental misunderstanding arose. Instead of seeing freedom of speech as the bedrock of both liberal education and American constitutional democracy, the ground rules through which greater diversity and inclusivity have been and can still be achieved, the opponents of having Charles Murray speak on campus saw a tradeoff between freedom of speech, on the one hand, and inclusivity, on the other hand. Nothing could be further from the truth, since free expression is the foundational means to greater diversity. The idea that there was a tradeoff between free speech and inclusivity, however, initially carried the day in our campus discourse. It could do so only by ignoring both American history and the empirical world beyond the Green Mountains, which provide inescapable evidence that it is precisely the marginalized who suffer most when civil liberties are compromised. The view that inclusivity and free speech are mutually exclusive had and will continue to have popular appeal, since it seems to embrace moderation defined as middle ground between two extremes. It comforted those pained by the conflict they were witnessing, both on campus and beyond, because it meant that one didn't have to choose a side.

There were quite a few brave souls, however, who saw the foundation of the University under challenge and spoke out publicly, including Middlebury's president, Laurie Patton.<sup>4</sup> They understood that academic freedom is a foundation for both knowledge and human excellence, and that it matters what is happening in universities, because democracy and liberal education are intertwined. Two of my col-

<sup>3</sup><https://www.nytimes.com/2017/04/03/education/edlife/middlebury-divided-campus-charlesmurray-free-speech.html>.

<sup>4</sup><https://www.wsj.com/articles/the-right-way-to-protect-free-speech-on-campus-1497019583>

leagues organized a Principles of Free Expression petition that garnered over 100 signatures from Middlebury faculty and was published in the Wall Street Journal in March. There were three general patterns among the signatories:

1. Many supporters had studied or experienced intellectual life under an authoritarian or totalitarian regime.
2. Others had lived in American red states and had loved ones with whom they disagreed politically.
3. Quite a few were older rather than younger.

I myself happen to fall into all three of these categories. I should also add that professors from the STEM fields, religion, and political philosophy were disproportionately represented.

In general, the signatories understood the critical importance of being able to agree to disagree, for the sake of the community, free inquiry, and democracy itself. It was shocking to discover that I had colleagues who did not share my understanding of the academy's and America's core values.

Part of the reason I was shocked by what happened at Middlebury is that I do not encounter captive minds in my classroom. I have been able to shape a learning environment where ideas can freely collide. My students know that I want them to speak their mind without worrying about whether or not what they say might be labeled offensive. If anybody winds up offended by what another student has to say (this rarely happens), they know they must apologize, and we can then move on. Students must feel free to speak their minds, make mistakes, and learn from them if they are to develop both intellectually and emotionally. They must learn to challenge speech with more speech, to think for themselves rather than relying on somebody else to tell them what to think or do, as well as to reflect on how their words and actions affect others. While students must always first demonstrate that they understand an argument on its own terms, I make sure they know that they are free to disagree, both with a particular text and with me. I will grade them on the strength of their argument and the evidence they muster in support of it, not the conclusions they may reach. With these maxims, students not only write better papers, they also learn skills that arm them to fight injustice in all its manifestations.

Because cultivating open-mindedness is so important for learning, I am always on the lookout for challenging alternative viewpoints, as they provide an ideal catalyst for intellectual growth. As a graduate student in the Harvard Government department, civil conversations with conservative professors with whom I disagreed changed my life by forcing me to examine my own biases. In so doing, I came to understand the difference between emotion and reason, both of which are important for human flourishing. Part of the reason I agreed to engage with Charles Murray is precisely because I want my students to benefit from a comparable educational experience. I want them to learn to think for themselves so they are capable of standing on principle and resisting peer pressure in their pursuit of self-knowledge, truth, and the good. Viewpoint diversity is an asset for any institution of higher education.

Nothing less than liberal education and the possibility of reasoned political debate is at stake in the debate over campus censorship. The very values that animated and inspired the founders of our constitutional order are being challenged when protesters chant "Liberalism is white supremacy" and "the revolution will not uphold the Constitution." As a professor of comparative and international politics, I can tell you with complete confidence that those who embrace such logic are misinformed about their relative good fortune in being born in the United States. Because they have seen what happens to civil liberties under authoritarian regimes, African students at Middlebury College tend to view recent events through a different prism than African-American students. We have a civic education crisis in our country today, and it originates in K-12 education.<sup>5</sup>

Looking to the future, what have I learned over the course of the past 7 months? I have three conjectures for your consideration.

First, while the entire University cannot and should not be a safe space, there must be some safe enclaves on campus to foster inclusivity. That commitment, however, must not undermine social interaction across socioeconomic and racial/gender divides. That commitment must not come at the expense of liberal education. Sports teams can function as safe spaces for Team Members and should also be pushed to integrate with the larger community whenever possible. Free discussion in a diverse classroom can help make that happen.

<sup>5</sup> [https://www.washingtonpost.com/news/powemost/paloma/daily\\_2/2017110/23/daily\\_202-the-corrosion-of-support-for-first-amendment-principles-started-before-trump-he-s-supercharged/59ed49b130fb045c8a000926/?utm\\_term=.eba3e92844c5&wpsrc=nl\\_daily202&wpm=1](https://www.washingtonpost.com/news/powemost/paloma/daily_2/2017110/23/daily_202-the-corrosion-of-support-for-first-amendment-principles-started-before-trump-he-s-supercharged/59ed49b130fb045c8a000926/?utm_term=.eba3e92844c5&wpsrc=nl_daily202&wpm=1)

Second, if we are to avoid the implicit endorsement of real violence, such as what happened at Middlebury, institutions of higher learning cannot be in the business of policing symbolic violence. Calling speech symbolic violence, unfortunately, seems to justify physical violence as a reciprocal response. Many protesters rightfully pointed out that Charles Murray's research and thinking have been weaponized. Fair enough, but Pierre Bourdieu's, Jean-Francois Lyotard's, and Kimberle Crenshaw's writings have also been weaponized. What justifies shutting down one and not the other besides ideology? Universities exist to promote an arena in which ideas can be exchanged freely, not to render value judgments on the ideas themselves. There are larger implications to getting this right. Reducing group think in the academy is a necessary condition for reducing it in the electorate.

Third, we need a Treaty of Westphalia between departments and programs on our college campuses.<sup>6</sup> At Middlebury, a student club invited Charles Murray to speak, and the political science department co-sponsored the event. In the campus outcry that ensued, the Sociology/Anthropology department sought to rally the community to censor the Political Science department by demanding that we withdraw our co-sponsorship. In so doing, they abandoned long established norms of tolerance and open-mindedness, as well as collegiality. Universities must denounce efforts by one department to sanction another in this way, even when it is done with the best of intentions. Attempted censorship is a violation of academic freedom.

Allow me to conclude with some wise words from the Chinese dissident Liu Xiaobo, who won the 2010 Nobel Peace Prize while imprisoned for his commitment to democratic values and who died this summer. For his Nobel lecture, he penned the following memorable lines:

"Freedom of expression is the foundation of human rights, the source of humanity, and the mother of truth. To strangle freedom of speech is to trample on human rights, stifle humanity, and suppress truth."<sup>7</sup>

There is a dangerous idea that has recently taken hold on the American left that one must fight fire with fire. As a result, we now have an Alt-Left and an Alt-Right in the US. In resisting what they see as extremism, they embrace extremist tactics. Democracy and reasoned debate have been and will be the main casualties, since the extreme left and extreme right are rebelling against liberalism itself. Upholding freedom of expression protects all of us, because it gives individuals ways to dissent without resorting to violence.

More broadly, our constitutional democracy will depend on whether Americans can relearn how to engage civilly with one another. Our national security also depends on it. America's enemies all seek to divide us. We must not allow them to do so.

The challenge before all of us, therefore, is to channel our emotions into thinking about how we might better work together as Americans on what Lin-Manuel Miranda's Alexander

Hamilton calls "America, you great unfinished symphony."<sup>8</sup>

There is important work for Democrats and Republicans to do together. Let's get to it.

Thank you for your attention, and I welcome your questions.

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The CHAIRMAN. Thank you, Dr. Stanger.

Thanks to all four witnesses. I wish every Member of the Senate could have heard that. We're grateful for your coming. As to civic education, the lowest score on the advanced placement test we have in the United States today for high school students is not in math and science. It's in American history. I think that goes to that point.

We'll now begin a round of 5-minute questions.

Dr. Zimmer and Ms. Strossen, let me start with you. Some lawmakers have suggested that we enact a free speech mandate, which means that students could say whatever they want to say on cam-

<sup>6</sup>The 1648 Treaty of Westphalia ended the wars of religion in Europe by upholding *Cuius regio, eius religio* (Whose realm, his religion), meaning that the ruler of a sovereign state could dictate the religion of those ruled.

<sup>7</sup><https://www.nytimes.com/2017/07/13/world/asia/liu-xiaobo-china-nobel-writings.html>

<sup>8</sup>Lin-Manuel Miranda and Jeremy McCarter, *Hamilton: The Revolution* (Hachette Book Group, 2016), p. 273.

pus. Some other lawmakers have suggested that we enact a speech code, which means there are some things you can't say on campus.

What do you think we should do, we Members of the Congress? Should we enact a free speech mandate for the 6,000 colleges and universities we have or a free speech code, or should we leave that to the presidents, faculty members, universities, and students to interpret the Constitution of the United States on what the First Amendment means?

Dr. Zimmer.

Dr. ZIMMER. This is an important question, and I would be loathe to see at this point any greater Federal regulation imposed upon private colleges and universities than already exist. I think, ultimately, the questions are deeply cultural. They're going to have to be solved by those on campuses. They're not going to be improved by having a debate about which end of the spectrum should apply and what additional type of regulation, but it's going to be solved and enhanced, ultimately, by the very process of free expression and argumentation on college campuses.

Seeing that type of argument evolving and emerging now, I think, is a healthy thing. I think the situation is actually better because people are talking about it, and I think that seeing the culture evolve through discussion on campuses is the proper way to proceed.

The CHAIRMAN. Ms. Strossen, should Congress enact a free speech mandate or a free speech code? While you're at it, why don't you comment—and I've just got 5 minutes—so why don't you comment on your membership, which, I believe, in a group called the Heterodox Academy, a coalition of faculty members who design to address a slightly different problem to make sure that there's a genuine diversity of viewpoint on campus.

Ms. STROSSEN. Absolutely. I would say, with all due respect, Chairman Alexander, with respect to public universities, there is a free speech mandate. It is the First Amendment, and all of the jurisprudence associated with the First Amendment, which the Supreme Court has very firmly, across the spectrum of justice, has said applies fully on public campuses.

As to private universities, I would defend their First Amendment rights to make their own determinations about whom they admit as part of their academic freedom. For example, if it's a religiously oriented University, it should be free to prefer certain religious views and not allow others.

The CHAIRMAN. Well, I agree with you. But what about a free speech code? Do you think Congress should enact a free speech code?

Ms. STROSSEN. I think you can tell that I would not, both because it would violate the most fundamental First Amendment principle, what the Supreme Court has called the bedrock of our First Amendment, viewpoint neutrality, that government may never pick and choose which particular viewpoints to favor or to disapprove, no matter how deeply despised certain views might be.

That brings me to the other point, Chairman Alexander, and I agree here with President Zimmer that we will depend on education and the acculturation that comes through education to stimulate students' critical thinking and their respect for freedom of

speech. I think—and this is part of the mission, central mission, of Heterodox Academy, recognizing that that is going to happen only if students are exposed to multiple points of view, including views that they deeply despise, so that they can learn to effectively respond to it.

The CHAIRMAN. Ms. Stanger, I only have 30 seconds if you want to add to that.

Dr. STANGER. Yes. I would just say that I agree with President Zimmer that it would be a bad idea for Congress to legislate in that fashion. However, I would think that we can all do our part as Senators, as faculty, as students to model the behavior we want to see, and I think that will get us all a step forward to greater—better civil discourse.

Faculty can also support viewpoint diversity and realize its importance in education. Part of the reason I invited Charles Murray to campus is precisely because I wanted my own students to have the chance to interact with conservative thinkers, like I did myself in the Harvard Government Department.

The CHAIRMAN. Thank you.

Senator Murray.

Senator MURRAY. Thank you very much. Thank you to all of our witnesses today. I really appreciate it.

Mr. Cohen, I wanted to go back to something you started your testimony with. You said, quote, “All of this debate is taking place against the backdrop of increased activity by a white nationalist movement that has been emboldened by President Trump’s rhetoric.” Can you expand for us on some of the trends that you and your colleagues have seen as a result of that, and an example or two would be helpful.

Mr. COHEN. In 2013 and 2014, we saw a decrease in the number of hardcore organized hate groups in our country. In 2015 and 2016, we saw an increase in those groups. It was a period that coincided with the Presidential campaign. An unusual thing happened during the Presidential campaign. White supremacists openly endorsed President Trump, whether he wanted them to or not. It’s unusual because, typically, it’s a pox on both their homes. I think both parties are irredeemably corrupt. Not this time. They celebrated his victory. They feel, rightly or wrongly, that they have the ear of the president, or especially when they had Mr. Bannon there.

I hope he sorely disappoints them. I hope he changes his rhetoric. But that’s the state-of-the-art now, and that is why we are seeing this targeting of college campuses by an energized white supremacist movement.

Senator MURRAY. You know, no one person has the market on free speech. It’s a constitutional right. Every person enjoys it, including a school administrator. I know the Southern Poverty Law Center works closely with colleges and universities around the country to promote best practices.

Mr. Cohen, I wanted to ask you, for a college president or a University administrator who might be watching this hearing, I have some questions for you. When a speaker spreads a message of hate or intolerance on campus, should the leadership of the University

exercise their free speech right to provide context for students and to clarify the University's values?

Mr. COHEN. I think it's essential that that happens. When someone like Milo Yiannopoulos is invited to campus, and he's invited by, as happens many times, the Young Republican clubs, the students are like, "My heavens. What kind of school am I going to where my colleagues are inviting this incendiary personality to the school?" I think it's really quite important for University presidents in those situations to separate themselves from the messages of incendiary racist speakers like Mr. Spencer and say, "Our college doesn't believe in that. Our college is here to support you."

I know that Dr. Zimmer, in his testimony, made the same point, that it's critically important for colleges and universities to appropriately support students who have been traditionally marginalized and may feel marginalized by the presence of racist speakers on their campuses.

Senator MURRAY. Well, second, if a speaker is coming to campus, and the administration knows students will want to exercise their right to express disagreement, what should colleges do then? Should they respect the rights of the speaker, respect the right for that speaker to be heard, respect the rights of the students to express their disagreement? What do they do then?

Mr. COHEN. All of the above. They have to respect the right of the speakers, and they have to respect the rights of the students who wish to protest.

Senator MURRAY. How do they do that? What are the best practices?

Mr. COHEN. Well, what we try to do with—what we try to tell students and what we try to tell administrators is to organize an alternative event. If you have kind of a racist speaker coming to campus, don't give them the spectacle that he or she wants. Organize a separate event where one can express kind of the University's true values and values of our country.

We sometimes also suggest that when students learn that there's going to be a racist speaker on campus, particularly one who's been invited by a campus group, go try to persuade them to disinvite the speaker. Try to persuade them that this kind of speaker is only going to sow division on college campuses. We can't force that, but we try to do things like that, hold alternative events, stay away. Those seem like the most important things to be done.

Senator MURRAY. Dr. Zimmer, I wanted to ask you—you heard me talk about Taylor, who is sitting behind you there. She's the survivor of a hate crime on campus. When I was talking with her, I asked her how that made her feel. She said to me—and I want to quote it—"I felt like I didn't belong on campus. I felt like my voice was not wanted."

She's not alone. In August, we saw a white supremacist descend on the University of Virginia, surely making a lot more students feel like Taylor did. Obviously, we need to protect free speech. But I want to know what is a University's responsibility in this situation? You lead the University of Chicago. What should universities do to be making sure that students, like Taylor and many others, feel like they belong and their voice is wanted?

Dr. ZIMMER. This is the question of diversity inclusion on university campuses, a profound one. It's exceedingly important not just to be reactive to a particular situation, but to take a long, sustained, and purposeful approach to inclusion of everybody who comes to campus, every student who's on campus, independent of their background—a sense of inclusion and, indeed, ownership of that environment.

I think that this is something—for example, at the University of Chicago, we're certainly not alone in this and pay an enormous amount of attention to it. There are many programs that begin from the very beginning. I would say that we, like most universities, are still working on how to do this best. I would say places have developed good practices, but there's still a lot of work to do here.

This cuts across a whole range of individuals who are a minority sector for one reason or another. We have long lists of issues in our history connected to racism, to anti-semitism, to misogyny, to homophobia, and so on, and all these individuals at various times because of various behaviors, both of universities themselves and of the people on campus, can be in a situation in which they are feeling excluded or not a full participant, and it's very important that universities work on this.

I would say, in the context of the topic here, that when you say, "what does inclusion mean," what it should mean is inclusion in the best education that we can offer. That's why students are on campus. This tension that gets articulated between inclusion issues on one hand and free speech issues on the other hand, I think, is honestly not the right line to draw. It conflates things that are different, and what we want is to be including all students and helping them learn that the power of the education that they're going to have is going to be enhanced and defined by ongoing open challenge.

Senator MURRAY. Thank you.

The CHAIRMAN. Thank you, Senator Murray.

Senator Young.

#### STATEMENT OF SENATOR YOUNG

Senator YOUNG. Well, thank you, Chairman.

Dr. Zimmer, former University of Chicago scholar and Nobel Laureate Milton Friedman was once at one of his celebrated public forums, and he was fielding tough questions from the student audience, and one of the students asked him shouldn't people, shouldn't his fellow citizens, be intelligent enough to know the difference between deceit and truth. Milton Friedman unequivocally said no, they should be intelligent enough to know to choose among alternative purveyors of truth, which is really what I've heard here today. They can discern truth from falsity only if they hear a variety of opinions.

Then he cited the USSR, which then, of course, still existed. He said so many in the USSR are enormously skeptical of their government, but they only know one truth, or they don't know the truth. They're only exposed to one opinion, and that was by design, in large measure. It was the objective of the USSR to stifle speech

so that civil discourse, civil society couldn't flourish, and that helped the regime stay in power.

To the extent that the habits of mind that you mentioned, things like the ability to challenge assumptions, synthesize different views, and account for uncertainty, are not developed by Americans, whether they're college students or don't happen to go to college. How does this undermine our national unity and handicap our collective capacity for self government?

Dr. ZIMMER. Well, I think these skills are necessary for leadership, for example, in all sorts of human endeavor, I mean, in building human capacity to act thoughtfully, to discern the implications of potential actions, to not act simply but to act in what is inevitably a complex environment, and understand various implications that will take place.

I think these are skills that apply to what I would say is the full range of human endeavor, and the extent to which we are, as a country, producing people who can approach this full range of human endeavor with these types of skills, we will flourish more. The extent to which we don't, we will flourish less.

Senator YOUNG. Ms. Strossen, in the interest of free expression, I'd like to ask for more than one opinion. If you could kindly address that question.

Ms. STROSSEN. I absolutely agree that what we are talking about is vital not only for individuals liberty, but also for education and for democracy, the anti-authoritarian values that you talked about, Senator Young. We the people are the Governors, with all due respect. We elect folks like you to represent us, but you are accountable to us, you and other government officials. How can we hold you accountable unless we are able to express dissenting points of view? How can we feel empowered to do that if we're going to universities where we are indoctrinated in a single point of view?

Senator YOUNG. What are the greatest barriers we face to developing these important habits of mind, the ability to differentiate or, in the best sense of the word, discriminate between different views and opinions and truths, if you will? Are they institutional in nature? Are they a result of a combination of confirmation bias and how we now receive our information?

We live in a different era, when we have access to more opinions than ever. But, psychologically, so many of us are hardwired not to receive multiple perspectives and opinions. In my remaining minute, would one of you like to take this question?

Mr. COHEN. If I could.

Senator YOUNG. Yes, sir.

Mr. COHEN. I think it's quite critical to start at the elementary school level to help students understand the point of view of others, to help them feel safe in their own identity but give them a mirror into other people's views, help them understand that everyone has a perspective that's a valuable thing to offer. We're really, through our work in the education sphere, trying to help students become active citizens in the diverse democracy that we live in, and I think that's a responsibility at every grade, K through 12, because I think if that occurs, the kinds of problems that we have seen on college campuses would be diminished greatly.

Senator YOUNG. Thank you.

The CHAIRMAN. Thank you, Senator Young.  
Senator Bennet.

STATEMENT OF SENATOR BENNET

Senator BENNET. Thank you, Mr. Chairman. I'd like to start by once again saying how much I appreciate your leadership and the Ranking Member's leadership on this healthcare bill, and my fervent hope that we will actually move forward on it.

I also want to thank you for an excellent panel today. This has really been fantastic. Like you, I wish the whole Senate could hear this.

Dr. Zimmer, I had the good fortune for the first time to be at the University of Chicago two or 3 weeks ago, and I can tell you your students were excellent. The questions that they asked—basically, I had a town hall there—were phenomenal, and I also came away with a strong sense that I could never be admitted there.

[Laughter.]

Senator BENNET. Thomas Jefferson wrote during the Constitutional Convention—of course, he wasn't there. He was in Paris at the time. He wrote, "The basis of our government being the opinion of the people, the first object should be to keep that right, and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate for a moment to prefer the latter."

In his second inaugural address, he said that the artillery of the press, he described it, had been leveled against him. But in the end, the answer to that was more speech, not less speech. Today, we have a President who every day, day after day, attacks the free press in America, calls leading journalists in America fake news, attacks edited content, attacks curated content, in favor of opinions that are rendered on the Internet, that are not edited content, that are not curated content.

I wondered, Dr. Zimmer, if I could start with you, what the University of Chicago is doing to ensure that your students can distinguish between what is edited content and the importance of that and what is someone's opinion on the Internet.

Dr. ZIMMER. Well, our entire education is, in fact, built around the question of argumentation so that nothing is left simply as a statement. In fact, somebody said to me the other day they characterized the University of Chicago as a place where you say, "Good morning," and somebody asks you for evidence of that.

[Laughter.]

Senator BENNET. I very much had that sense while I was there.

Dr. ZIMMER. I would say it's simply, again, this matter of culture in which people do not take statements for granted, in which you have to understand what assumptions other people are making, what assumptions you are making, and it's simply an ongoing process, and it's the nature of the education that we offer.

Senator BENNET. I appreciate that, and I believe it's true, and I'd ask the other panelists to talk a little bit about what this wholesale attack on journalism in this country from the President of the United States—what is the effect in your institutions or among the students that you serve? Mr. Cohen, you talked about the importance of elementary school students.

I'm having to have conversations—and I'm a former school superintendent. Every time I have a conversation now with middle school students or a high school student, we have to discuss the importance of edited content and what it means to write a paper now in high school or in middle school, when you have a President who is not just disregarding, but attacking the leading journalists in this country. Professor Strossen?

Ms. STROSSEN. Well, obviously, I defend his freedom of speech to do that, and we all do.

Senator BENNET. As I do.

Ms. STROSSEN. I have to say, as an activist, I always see the glass half full. The reaction that he is causing is, at least, as much galvanizing opposition, as we've heard from some eloquent statements from you and other members of this Committee, and energizing people to not only respond to the allegations that he is making, not only to come to the defense of the critical role that journalism plays, as Thomas Jefferson said, but also educating students from the beginning—and that certainly carries through law school—to fully inform themselves, to use the Internet, which is often demonized because it does allow people to live within bubbles.

But it also has the positive capacity to empower us to discover information, to pick holes in what used to be truths, and I have to say ProPublica recently did a study in which they showed that the U.S. Supreme Court in a number of its opinions had facts that were questionable. While that's disturbing to some extent, I think it's really—to my students, I made it into an illuminating experience, that you have to question literally everything, that just because it's on the pages of the Supreme Court reports doesn't mean it's beyond criticism, but criticism in a constructive vein, not in a destructive, let's shut them down. Let's be more rigorous in the future about examining our facts.

Senator BENNET. If the Chairman will allow it—

The CHAIRMAN. Sure. If you—

Mr. COHEN. I'd just, very quickly—you know, we put out a variety of new teaching tools to promote digital literacy in the high schools and middle schools to help people understand how a tweet from one source can get amplified and suddenly become common wisdom. We're trying to help students understand, or help teachers push their students to ask for evidence, to understand the sources, and to be critical when they look at information.

Dr. STANGER. Just very briefly, Senator Bennet, I think you've put your finger on something very important, that in a fake news world, liberal education becomes only all the more important, precisely because we do live in a big data world where data mining of social media habits has affected the outcome of elections. I think in that context, liberal education teaches us to think for ourselves, and if we're thinking for ourselves, we can't be reduced to an algorithm. We cannot be manipulated by either corporations or our government. Liberal education only becomes all the more important in this world you've described.

Senator BENNET. Thank you.

Mr. Chairman, I just would say to Ms. Strossen on the point on the Supreme Court, I used to say in Colorado that when I read the majority's opinion in Citizens United that it was like reading a sev-

enth grader's American government paper. Then I decided that that was insulting to Colorado's seventh graders, so I don't say it anymore.

[Laughter.]

The CHAIRMAN. See, we have free speech in the Senate too, don't we?

[Laughter.]

Thank you, Senator Bennet.

Senator Isakson.

#### STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Well, thank you, Mr. Chairman, and thank you for calling this hearing. You know, I came here with a set of questions to ask, which I'm going to in just a second. But listening to Dr. Zimmer in the discussion earlier and the three principles of the Chicago Principles reminded me of Dr. King in the south in the 1960's and the 1950's. He took the First Amendment and his belief that people believing contrary to him had the right to speak, too, but all of them needed to be non-violent, and it changed this country.

The Chicago Principles applied to that era and used by Dr. King, and, ultimately, embraced by those who wrote about the Civil Rights Movement as well as those who were confronted with making the decisions to make the Civil Rights Movement work, were based in large measure on what became the Chicago Principles. I just wanted to make that point, that free speech is, as I think Senator Murray said, the most important, if you had to pick one, of all our rights, and used in the proper perspective and without abuse of using it in the proper perspective can make fundamental change.

I commend what you've done by embracing that at the University of Chicago and appreciate all your comments with regard to it. I say that to begin with, because my questions are going to be trivial. But if you'll listen to the end of them, they'll end up making sense.

Dr. Zimmer, are you a Bears fan.

Dr. ZIMMER. I am, yes.

Senator ISAKSON. Your turn is next, Ms. Strossen. You need to listen to this.

You're a Bears fan, and right now, we have a huge issue in the NFL in terms of standing for the National Anthem. Does every Chicago Bear player who is owned by the—I guess the Halas family still owns the Bears—whoever does own them—are they free under our Constitution and under the laws of our country to exercise their right to stand or not stand for the National Anthem?

Dr. ZIMMER. Well, I'm not a constitutional lawyer and you're asking me a constitutional question. I'm going to pass that off to my colleague, who will answer the question.

Ms. STROSSEN. I know nothing about sports, but I do know about the First Amendment. The First Amendment only binds the government, as I'm sure Senator Isakson knows, so that you do not have First Amendment rights, vis-à-vis, a sports team, which is not the government. However, I'm not a labor lawyer, and I understand there are some labor laws that might, in fact, provide protection.

Now, if this were a government matter, so you have—you did have President Trump threatening to impose some kind of sanc-

tions on those football players or other sports players, that would be government abridgement of free speech, if he's throwing around the power of the Presidency. But unless there's a statutory protection, their league owners could, in fact, control their on-the-job behavior.

Dr. ZIMMER. But I will just say that if this was the University of Chicago football team and players wanted to express their views one way or another like that, they would be free to do so. But, again, that's not a constitutional—

Senator ISAKSON. I appreciate you volunteering that. I'll ask you this. The University of Chicago is a private institution—is that correct—and not a public?

Dr. ZIMMER. That's correct.

Senator ISAKSON. As a private institution, you would exercise it that way. What about as a public institution?

Dr. ZIMMER. Well, again, as a public institution, I would seek counsel from my general counsel on what our constraints are.

Ms. STROSSEN. On a public institution, that would absolutely be protected speech. As Thomas Jefferson said, dissent is the highest form of patriotism, so I happen to believe not only that it's constitutionally protected, but that it's actually consistent with our Nation's other values.

Senator ISAKSON. You rallied my—

Dr. STANGER. Am I allowed to just jump in, or how does one get a word in?

Senator ISAKSON. Absolutely.

Dr. STANGER. I'm not a lawyer, but I just did want to add something to this discussion, knowing something about the Civil Rights Movement, and it's always puzzled me about this debate we're having about the NFL, that people don't recognize that taking a knee is a sign of respect, not disrespect. I think that's very important to keep in mind when we view the actions of those players.

Ms. STROSSEN. But we would defend it even if it were disrespectful.

Dr. STANGER. That's taking it to the next level, but yes.

Senator ISAKSON. A public institution.

Dr. STANGER. Yes.

Senator ISAKSON. Well, that answer was very, very helpful, and I appreciate it. I've enjoyed the panel immensely. Thank you for what you've done.

I yield back, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Isakson.

Senator Hassan.

#### STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you, Mr. Chair and Ranking Member Murray, and I, too, want to add my thanks to both of you for the work on the bipartisan healthcare bill and continue to be committed to working on with all of you.

To our panelists, thank you for being here this morning and for this very important discussion.

You know, I come from a state that has a long tradition of very vigorous political discourse, first in the Nation primary and a citizen legislature of 424 members. If you ever hung out with the New

Hampshire legislature, you would hear a range of views that can be quite extraordinary.

One of the things we also do well in New Hampshire is try to moderate and facilitate discussions of opposing views. The University of New Hampshire's Carsey School of Public Policy is home to a program called New Hampshire Listens, which is a civic engagement program, and really tries to take some of our most difficult issues and foster civic dialog. I would hold that out as an important example of a best practice for a public University system.

But I wanted to direct my question mostly today, Mr. Cohen, to you. In your testimony, you note that the First Amendment is a bedrock principle of our diverse democracy, and I couldn't agree more. You also lay out much of the judge made law around the First Amendment that protects speech on college campuses, and you make clear that the law strongly protects controversial speakers, as I believe we all agree it should.

Courts have also recognized that the First Amendment has important constraints. The classic example we all know is that you can't shout "fire" in a crowded building.

A Federal lawsuit recently filed in Virginia alleges that Richard Spencer and others conspired to incite violence in Charlottesville at the so-called Unite the Right Rally. According to the complaint, these co-conspirators told each other to come to Charlottesville to, quote, "conquer the street" and, quote, "defend civilization from the Jew and his dark skinned allies." They said they were ready to "crack skulls"—that's a quote—and traded advice on the legality of running down counter protestors with cars, and we all know a car later drove into a crowd of counter protestors, killing a young woman, Heather Heyer, and injuring dozens of others. The lawsuit states that many organizers and rally goers celebrated this death as, quote, "more than justified," close quote, and one predicted, quote, "a lot more people are going to die before we're done here," close quote.

Just last week, one of the white supremacists in Charlottesville, one who described Heyer's death as justified, was arrested and charged with attempted murder for his role in a shooting at the University of Florida after the speech by Richard Spencer. He and two other Spencer supporters taunted a small group of counter protestors waiting at a bus stop with Nazi salutes and Hitler chants.

After yelling, quote, "I'm going to kill them," unquote, one of Spencer's supporters fired a shot at the counter protestors. Thankfully, no one was killed at the event, but, obviously, it could have happened.

My question is: When does protected speech cross the line into an unprotected incitement to violence? Can't we agree that a University has a responsibility to protect its students from this kind of planned violence?

Mr. COHEN. You know, the situation that you described that's described in the lawsuit tells you something about the atmosphere on a number of college campuses. I think—I've read the complaint in that particular lawsuit. I think it will be difficult perhaps to prove some of the allegations, to be honest.

Clearly, incitement has a very precise legal meaning under the Constitution, incitement to imminent lawless activity. There could be evidence of that, merely, you know, talk bravado in advance, probably not enough. Celebrating someone's demise in that ugly way, clearly not enough. The Supreme Court has said that in the Rankin decision. These issues, I think, are extraordinarily complex.

The issue that you described where we have people intimidating others, harassing others—that's clearly not protected speech. Efforts to provoke a fight, intending to provoke a fight, is also not protected speech. There are limits, but all of these decisions, all these questions, as Professor Strossen, I'm sure, would say are intensely factually specific, and that's the challenge in a situation like Charlottesville to disentangle it.

Senator HASSAN. It's a challenge for University administrators who obviously have an obligation to protect the safety and lives of their students.

Mr. COHEN. Could I make one point about that? The University of Virginia and Charlottesville is in a particular quandary because of Virginia's open carry law. They could not stop people at a public demonstration from brandishing weapons. That's a law that's in effect in more than 30 states, and it truly, truly hamstringing municipalities and counties from ensuring safety at public demonstrations.

Senator HASSAN. Well, thank you.

Mr. Chair, I see that I'm out of time. I do have a question that I'll submit for the record to Ms. Strossen, because I am concerned about some of the way you characterize some psychological research about the impacts of hate speech on people. I don't think hate is a good thing, and I don't think hate speech helps people.

Ms. STROSSEN. Do I have an opportunity to respond to that at some point?

The CHAIRMAN. Well, I think so. Sure. We'll allow time for that.

Ms. STROSSEN. Okay. As you know, Senator Hassan, I was quoting respected social psychologists and also political activists, starting with former President Barack Obama and continuing with somebody who's very respected by college students, Van Jones, who was speaking, in fact, at the University of Chicago. From their different expertise and different perspectives and experience, they concur that given the sad reality that Senator Murray started talking about, the prevalence of hateful attitudes and speech and conduct, it is disempowering to these students to shelter them and shield them, because it is going to undermine their resilience and their ability to effectively respond.

I think we all agree that we're looking in the long run for how are they going to be most effective in a world where hate is a reality and hate groups are a reality.

Senator HASSAN. Mr. Chair—and I see other witnesses want to respond. I do know I'm out of time.

I would suggest to you that telling people who are the victims of hate speech or who might have been traumatized by combination in their past of hate speech and physical violence how they should feel and whether it empowers them is inappropriate. There's a lot of research that you didn't cite that indicates exactly the opposite

of what you did. Again, I know we're out of time, but I just think that people are their own best judges of whether this is——

Ms. STROSSEN. That's exactly why every person that I cited is a minority person who was speaking from an experience of having been subjected to hate speech.

The CHAIRMAN. Thank you, Senator Hassan.  
Senator Warren.

#### STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman, and thank you for holding this hearing today, you and Ranking Member Murray. I appreciate your doing this.

I think we all agree that free speech is not some kind of left versus right issue. It doesn't work that way. I want to see if I can ask a question from a little bit different perspective.

Mr. Cohen, you run the Southern Poverty Law Center, which tracks American hate groups and extremists, and one of those extremists is Charles Murray. We talked a little about him this morning, you know, a man who wears a fancy suit and peddles racist junk science about how white men are, biologically speaking, intellectually superior to everyone else.

Am I correct that you vehemently disagree with his views?

Mr. COHEN. Completely, Senator.

Senator WARREN. Good. Me, too, and as someone who worked as an academic researcher for decades, I think that spouting fake science is extremely corrosive to public policy and should be called out in public at every possible opportunity. We've got that much. Let's go to the next part.

Mr. Cohen, do you believe that powerful institutions of higher learning should ban people like Charles Murray from speaking in public if those institutions or their students or you or I don't like what those speakers have to say?

Mr. COHEN. Just as simply, absolutely not, Senator.

Senator WARREN. Why not?

Mr. COHEN. Well, look, we make progress as a country by having ideas tested, by having critical thought applied to ideas that are expressed in every realm of life. The Supreme Court has recognized the importance of robust debate. It's a bedrock principle of our country, and we would be much worse off if University presidents, students, or anyone could sensor the speech of others simply because they disagree.

Senator WARREN. I agree with you. In fact, I think it's dangerous to suppress speech. First, suppression can backfire. Instead of shutting up individuals with disgusting views, it becomes a launching pad to national attention. Bigots and white supremacists can make themselves out to be First Amendment martyrs——

Mr. COHEN. Absolutely.

Senator WARREN.—— and grow their audiences. Second, suppression suggests weakness. It makes us sound afraid, like we're afraid that we can't defeat evil ideas with good ideas, and I just don't believe that's true. I believe in free speech, but let's be clear. Free speech doesn't mean the speaker is entitled to an audience. Free speech is not about shutting up or remaining silent while someone demeans women or demeans people of color or anybody else.

Students can critique. They can make their voices heard, and they can be very powerful when they do. Free speech means more speech.

Professor Stanger, you moderated an event with Mr. Murray at Middlebury College where you teach. You were physically attacked. Would you agree with me that acts of violence are not protected by the First Amendment?

Dr. STANGER. I absolutely would agree with you, Senator Warren, on that point. But I would disagree with you, respectfully, on your characterization of Charles Murray's work, and maybe I might say a little bit about the Middlebury context, which would illuminate some things for us here today.

Charles Murray was invited by a student group to speak on campus, and then the Political Science Department co-sponsored the talk. We did so because we're almost all Democrats, and we thought it was important for our students to engage with views that are influential in the Republican Party. What proceeded to happen was that another department on Middlebury's campus, Sociology-Anthropology, sought to sensor the Political Science Department.

In my view, this is solved very simply by a Treaty of Westphalia between departments. I mean, let's let—if one department thinks—

Senator WARREN. Let me just say, Dr. Stanger, I appreciate this. But in a limited amount of time, getting into interdepartmental rivalries from the academic world—

Dr. STANGER. Sure. But let me just—

Senator WARREN. —I would actually prefer to spend our time on the Middle East, because it will be easier to solve.

[Laughter.]

Dr. STANGER. This is true. This is true. But may I make one more point, though, that's important? I think it's important.

The CHAIRMAN. I'll give you—

Dr. STANGER. Please.

The CHAIRMAN. I'll give you time, Senator Warren.

Dr. STANGER. Is that Okay? It'll take 10 seconds.

The CHAIRMAN. Senator Warren ran for the Senate in order to escape interdepartmental rivalries.

[Laughter.]

Dr. STANGER. I understand that sentiment completely, Senator Warren.

Senator WARREN. I wanted to come to a place that was more collegiate.

[Laughter.]

The CHAIRMAN. That's right. You should have time to—Senator Warren, I'll give you some extra time to finish your discussion.

Dr. STANGER. The point I just wanted to add that's relevant to this is that no faculty member, to my view, would ever agree for their department to co-sponsor a talk by Richard Spencer. We're really talking about apples and oranges here, and there's a public-private distinction here that needs to be made. At these public universities, I think we're seeing these provocateurs seeking to set up talks that don't really have faculty sponsorship. Let the faculty lead, and I think we'll go in the right direction.

Senator WARREN. Let me just see if I can pull this back, though, to the point about what happens with free speech, whether it gets any special protection. The notion that I just want to underline here is that the people who attacked you get no special protection. Neither does the Charlottesville white supremacist who murdered a woman there, or the three white supremacists who tried to shoot people at the University of Florida last week. They will go to jail.

Free speech is not about violence. It is not about silence. What I'm concerned about is that right now, it is all too easy for all of us to avoid hearing anything that we don't already agree with, and that is an enormous threat to our democracy.

I know that powerful people want us divided, that foreign governments are pouring gasoline on that fire, flooding Facebook and Twitter with angry messages designed to stir up lingering resentments. The President of the United States is pouring even more gasoline on that fire, attacking our free press as a, quote, "enemy of the people," and even threatening to use the awesome power of the government to shut down press outlets for reporting that he doesn't agree with.

I don't care what your politics are. All of us who believe in America and its freedoms need to work harder to put out that fire, and we start by making sure that powerful institutions and individuals don't shut down speech they don't like, and that includes universities, and it definitely includes the President of the United States.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Senator Kaine.

#### STATEMENT OF SENATOR KAINE

Senator KAINE. Thank you, Mr. Chairman, and thanks to the witnesses. I was at a classified hearing on Niger, and I apologize that I didn't hear your statements.

This matters a lot to me, because Virginia was subject to a horrible act of violence on the 12th of August. White supremacists largely from outside of our state came to the University of Virginia in Charlottesville to perpetrate not just bigotry and hatred, but violence and murder. They chanted slogans like "blood in the soil" and "Jews will not replace us" next to synagogues and the Hillel Foundation on campus. They chanted other horrible racist comments. One from southern Ohio used a vehicle to kill a beautiful 32-year-old paralegal, injuring 19 others.

Two state troopers who weren't supposed to be working that day but needed to work that day to try to protect people were killed when their helicopter crashed. I knew both well. One was my helicopter pilot every time I flew as Governor of Virginia, Jay Cullen. The other, Berke Bates, was a member of Governor McAuliffe's security detail. They wouldn't have been working that day had white supremacists, confederates, and neo-Nazis not tried to inflame violence in Charlottesville.

In the aftermath, many of these individuals have not condemned these actions but even celebrated the death of Heather Heyer, the paralegal, one calling her a disgusting Communist, one of the organizers of Unite the Right Rally. I share Senator Warren's belief strongly that colleges should be a place of robust speech and dis-

agreement. We don't need to protect young people from free speech. We need to expose them to different ideas and have them exercise their critical faculties to make their decision about what they think is right and wrong. But I think we cannot use the banner of protecting free speech to allow people to terrorize folks.

I want to put in the record, if I can, Mr. Chair, a sermon that was delivered by a friend of mine, Jake Rubin, who is the Hillel minister at UVA. He's a rabbi, and for the Holy Days commemoration this year, he delivered a sermon about the anti-semitism and the violence that was on display and the connection between Jews and their experience of anti-semitism and other minorities who are targeted.

Senator KAINE. I have another friend in Charlottesville whose daughter was struck in the face by a white supremacist wearing a leaded glove and was injured pretty badly. He has been arrested and has been extradited from Indiana back to Charlottesville to face criminal charges, as should be the case.

I'm sure you got asked this question. But I know trying to draw a line between protecting free speech, but then universities—and I know we have the president of the University of Chicago—I think they have a significant responsibility to protect their campuses from violence. When individuals are coming in who either intentionally—or there's a reasonable probability that their activities could lead to violence, could lead to people being terrorized—I think that universities need to take action to try to protect their communities, not from the speech but from violence that can naturally occur from these.

I wonder what your thoughts are about whether the costs of that protection have to be borne by students and taxpayers or whether they have to be borne by those who would try to come to campuses and foment that kind of activity. That would be a question for anyone.

Ms. STROSSEN. Well, the U.S. Supreme Court has actually held in a case in which the ACLU was defending freedom of speech for a controversial speaker—it happened to be a white nationalist in Georgia—and the Supreme Court held that—and this was part of a series, the most recent of a series of holdings—that government may not fob off onto speakers the costs of providing security, because that's like imposing a tax or a penalty on free speech, and, in particular, government may not impose differential costs, depending on how controversial the speech is.

But, Senator Kaine, as Richard Cohen and I were talking about beforehand, we both see this as a very serious problem, because there are a lot of schools that cannot literally afford the enormous costs that have been borne by Berkeley, for example, or the University of Chicago. As educators, I certainly would not want to cut faculty salaries or raise student tuition, in all seriousness, in order to have to deal with this.

Senator KAINE. Ms. Strossen, can I ask this? I know you're an expert on this. In that Forsyth, the Nationalist Movement case, is it a very unequivocal ruling that no matter what the likelihood of violence is—we're not talking about speech. We're talking about—if you could make a prediction that certain kinds of speech are not just likely, but guaranteed to produce violent—

Ms. STROSSEN. Oh, absolutely, and that—

Senator Kaine. The Supreme Court didn't say in that case that you couldn't charge for necessary security.

Ms. STROSSEN. Oh, no, no, no. That's been the law—that has been the law forever, even when the Supreme Court very strongly protected freedom of speech by rejecting—see, in this country, we used to say any speech that has a bad tendency, that might at some point in the future lead to something harmful. That was what was used to shut down abolitionist speech and civil rights speech and anti-war speech, because—anything that was unpopular.

In 1969, in a case involving the Ku Klux Klan, the Supreme Court unanimously held that you can punish speech because you fear it might induce violence if, but only if, the speaker intentionally incited imminent violence that was likely to happen imminently, and that standard was very important for the Civil Rights Movement, because many of their speakers were being shut down and punished and even incarcerated because of the fear—oh, well, that might lead to violence—in these communities that were hostile.

Senator Kaine. If it's violent and it's so predictable and imminent that you can fairly make that—

Ms. STROSSEN. Government has an obligation to—

Senator Kaine. You don't base it on the content of the speech. You base it on the high likelihood of it producing violence.

Ms. STROSSEN. Exactly. You look at the context.

Senator Kaine. Dr. Zimmer, if I could ask you to comment on this—I really appreciated the statement that you put out at the University of Chicago following the tragedy in Charlottesville, because it was a powerful statement and it spoke to the anti-semitism of this.

The Charlottesville thing was sort of advertised as about statues. That didn't have anything to do with "blood in the soil." That didn't have anything to do with "Jews will not replace us." This was a very significant anti-Semitic, neo-Nazi effort by individuals who came very prepared for violence from around the country, and I appreciated the statement you put out.

Talk about how—because you're pro-free speech in the way a University president should be, but if you could—Mr. Chairman, I'm over my time, I recognize—but I'd love to hear you talk about how you grapple with this question of speech that is likely to lead to violence.

Dr. Zimmer. Again, we have both the advantage and disadvantage of being private, and so we don't particularly need to act precisely on the basis of the First Amendment in every situation. But for us, because we had taken such a clear position on free expression and its importance, we felt it was very important for us to recognize these acts for what they were, and it simply became very difficult to think about people standing with weapons and Nazi symbols in front of a synagogue or a similar situation with symbols of the Ku Klux Klan, again, a weaponized group of people—to think about this as expression that was not threatening. I mean, what is the message that is being delivered.

We made a very strong statement against it for that reason. We would not have weapons on our campus. If a speaker wanted to

come and said, “You know what? I want to have six people standing in back of me with semi-automatic weapons,” we would say, “Sorry, we don’t have semi-automatic weapons on our campus. If somebody has invited you, you can come, you can speak, you can answer questions. We’re not going to pass judgment on what it is you’re saying, but you cannot stand there with weapons that carry an implicit threat.”

If I could just add one example that I think is interesting about the cost issue that you raised. After the Charlie Hebdo incident in France, a woman from Charlie Hebdo made her first speaking appearance at the University of Chicago, and the security concerns, for obvious reasons, were extremely high.

That was an example that, in fact, where we made a conscious decision. It was too important for—and this person had been invited by a student group to be able to speak. Again, we paid the cost of that security. Part of the issue is you start seeing these things on every side, and the cost issue is a complex issue that I don’t think we’ve got actually fully figured out yet, to tell you the truth.

Senator KAINE. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kaine.

Thank you to each of the four of you. We have votes in a few minutes, so we’re going to conclude the hearing. What I’m thinking as I was listening to your terrific testimony is that we’re dealing with a problem here with more—by more speech, because your appearance here today will be noticed and seen by lots of people on college campuses and people who watch CSPAN and who think about these issues, who might not have thought about them in as clear a way as they might, having now heard what you have to say.

I also think it is true that we’ve seen a reaction—Ms. Strossen made this point—where more speech—and some of you—Dr. Stanger, I think you—all four of you, really, are responsible for this—that you’ve spoken out from your various perches in life and have been noticed by the rest of the country, and you’ve had an impact. I mean, more campuses have adopted the Chicago Principles. In a variety of ways, each of you have done that. That’s encouraging that in our country we see these issues taken more seriously.

Also, I think the hearing reminds us of what was said in exchange with one senator and you, which is that we live increasingly in a country where we tend to get our information from people who already agree with us, or we with them, and we don’t, as Senator Howard Baker used to say, consider that the other fellow—or today, he might say the other fellow or the other woman—might be right. That’s what he always said—the other fellow might be right.

We don’t have as much diversity of information—real diversity of information as we should have, and I suppose college education and maybe especially a liberal arts education is a real antidote to that. It makes universities even more important as places where students are exposed to different points of view.

As I mentioned, in my case, when I was at the Kennedy School at Harvard, it was good to have a dean who understood that most people there weren’t Republicans, and he worked hard to get some

there, so at least you could actually meet one, you know, while you were going to graduate school.

I like the “good morning—what evidence do you have for it” line. I’m going to remember that. I would conclude by saying I think you noticed on this panel that this panel of 22 or 23 Senators—you could not find many more diverse views than you can find around this table. But I think on this issue, we listened very carefully to you, and it wasn’t—as Senator Warren said to me as she left, this is not a left-right thing for us, and you presented your testimony in that way.

The one thing I would just conclude with in my own view—I hope that the U.S. Congress won’t do what it often is tempted to do, which is to think that we’ve flown to Washington from our homes and have suddenly become wise enough to tell 6,000 colleges and universities exactly what to do, and that either a free speech mandate, which some advocate, or a free speech code, which other advocate, imposed from Washington on 6,000 colleges and universities is a bad idea.

We have a free speech mandate in the United States Constitution, and it’s up to college—we have University presidents and board members and faculty members and communities who ought to be able to do what you’re doing and argue this out and try to respect everyone’s rights as we move ahead.

Thank you again for your attendance and excellent testimony. I wish every Senator could have heard it, and I know many Americans will benefit from it.

The hearing record will remain open for 10 business days. Members may submit additional information and questions to our witnesses for the record within that time if they would like. The next scheduled hearing before this Committee will be on Tuesday, October 31st, at 2:30, entitled “Implementation of the 21st Century Cures Act: Achieving the Promise of Health Information Technology.”

Thank you for being here today. The Committee will stand adjourned.

[Whereupon, at 11:46 a.m., the hearing was adjourned.]

