

Written Testimony*
Nathan Goetting, MA, JD¹
Professor of Criminal Justice & Jurisprudence
Director of the George W. Romney Institute for Law & Public
Policy
Adrian College

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I. INTRODUCTION

Chairman Young, Vice Chair Manning, Ranking Member Miller, members of the committee, thank you for inviting me to share my views with you on an issue of fundamental importance to both the state of Ohio and our nation as a whole: Freedom of expression, academic freedom, and intellectual diversity on college and university campuses.

My name is Nathan Goetting. I am a Professor of Criminal Justice & Jurisprudence and the Director of the George W. Romney Institute for Law

* This testimony borrows heavily, and sometimes directly, from two writings I recently published on this subject. I've attached copies of these writings to this testimony. They are:

1) "Our Emersonian First Amendment," Published on the Grand Valley State University Koeze Business Ethics Initiative website, January 13, 2022;
<https://www.gvsu.edu/seidman/ethics/module-news-view.htm?siteModuleId=9C6681B1-92E9-F4F1-7B4DF17EDBE5D2DC&storyId=5165E280-0A92-DF0C-602FB8F4F642B401>

2) "A First Amendment Giant Offers a Way Out of Our Free Speech Crisis," *Discourse Magazine*, April 14, 2022; <https://www.discoursemagazine.com/ideas/2022/04/14/a-first-amendment-giant-offers-a-way-out-of-our-free-speech-crisis/>. This magazine piece is itself a revised and abridged version of *Our Emersonian First Amendment*, listed above.

and Public Policy at Adrian College, a small liberal arts college founded in 1859 in Adrian, Michigan, about 40 miles north of Toledo. My scholarly interests include constitutional law, criminal procedure, and the history of the Supreme Court. I have taught at Adrian College for 15 years as a full-time tenure-track and tenured professor. During that time, I have taught courses on the First Amendment as a part-time faculty member at three different law schools and published academic and popular writings on free speech and academic freedom. I have attached my updated academic resume, which includes my teaching and publication history, to this testimony for your consideration.

While I object to parts of H.B. 151, and will describe my objections at the end of this testimony, my primary purpose is to explain the current national free speech crisis in higher education and to emphasize the importance of ensuring intellectual diversity on college and university campuses.

The overarching theme of what follows, and my enduring belief, is that the urgent goal of achieving intellectual diversity in higher education can only be achieved by means consistent with long-recognized First Amendment principles of freedom of expression and academic freedom. In its current form, this bill fails to honor those principles and, without revisions in light of the concerns raised at the end of my testimony, should be found unconstitutional by our courts.²

II. PERSONAL INTERESTS IN H.B. 151

Beyond my general interests as a citizen, writer, and constitutional scholar, I am currently employed as a part-time lecturer at the University of Toledo College of Law (“UT”), an institution that would be directly impacted by this bill if enacted. I have also served as a Faculty Advisor to the *University of Toledo Law Review*, published an article in the same, and been invited by student organizations at the UT College of Law to debate contentious issues of public concern on UT’s campus three times. I enjoy these activities and hope to do them again.

I am a member of the Academic Freedom Alliance,³ a national organization of professors committed to preserving freedom of expression and academic freedom on college and university campuses nationally, issues addressed by H.B. 151.

As a tenured professor at an American College, I have an interest in protecting tenure rights and privileges nationally. Sections of this bill significantly modify these rights and privileges in Ohio.

III. FREEDOM OF EXPRESSION AND ACADEMIC FREEDOM IS IN FREEFALL ACROSS OUR NATION'S CAMPUSES

When Plato founded the first university about 2,500 years ago, he recognized that the most direct route to wisdom and truth was through free-ranging discussion and debate, including on moral and political questions, even those where there was profound disagreement. He also believed that the difference between Greeks, who he thought civilized, and the barbarians outside of the Greek city-states, who would destroy the civilization his type of education would promote, was that when the Greeks disagreed with one another they were capable of setting down their weapons and resolving disputes with speech rather than violence—with reason, not rage. A community that welcomes different perspectives and can debate with itself is strong, confident, and vibrant. One that cannot, shows weakness and signals its own demise.

College and university campuses should strive to be special enclaves carved out of the larger society where every other social interest is subordinate to the pursuit of knowledge. No question sincerely asked, or viewpoint sincerely expressed, however offensive or distasteful some might find them, should be discouraged on our campuses. During intellectual discussion, all conclusions should be tentative, partisanship should give way to inquiry, and thinking independently is just as important as thinking effectively. The impulse to conform with, rather than scrutinize, social, cultural, or political orthodoxy is something that must always be kept in check.

To the extent universities should inculcate any moral or political truth, it is that, as Socrates taught, “the unexamined life is not worth living.” Faculty and students should strive to subject every concept and theory to rigorous truth-testing so free minds can make informed decisions. Freethinkers shouldn't just be protected on our campuses. They should be rewarded.

Dissenting and transgressive views sometimes shock and hurt those who hear them, but they are nonetheless essential features of a worthwhile education. Not only do they sometimes ultimately prove themselves to be true, but they often, as philosopher Immanuel Kant once wrote, “wake us from our

dogmatic slumber” by forcing us to reexamine the underpinnings of our own beliefs and, as result, develop a deeper self-understanding.

Instead of challenging young people to endure the psychological and intellectual discomforts that come with challenging the prevailing orthodoxies on our campuses, many colleges and universities have been limiting debate and protecting students from these necessary growing pains. Rather than teaching students how to grapple with questions, they are preaching answers. Instead of fostering rigor and strength through intellectual adversity, they too often indulge weakness by mislabeling challenging questions as aggressive conduct.

There is an abundance of “safe spaces” on our campuses. Rightly so, in the sense that every student should know that he or she is welcome and supported by faculty and staff. But at the same time every classroom and faculty office should be an intellectual danger zone, where no unsupported answer to a difficult question goes unreviewed. These are fast disappearing.

Professors are merely doing their jobs—caring for and teaching their students—when, in the spirit of inquiry, they challenge deeply held, even sacred, convictions of their students during class discussions. Far from making students “unsafe,” it helps them on their path toward maturity and wisdom.⁴

To achieve these important ends, professors and students need to be free to speak spontaneously and unguardedly, with full access to the English vocabulary and without fear of punishment for unwittingly breaking rules during the given-and-take of real-time discussion. Meaningful intellectual discussion needs room to breathe. Its benefits recede as caution and self-censorship expand. Numerous colleges and universities are aggressively policing language, including seeking to delete words from our collective lexicon, even when used in good faith. They do this through the promulgation of speech codes, often titled “inclusive communications guides.”⁵ While trying to achieve the noble purpose of making vulnerable students feel welcome, these codes destroy the building blocks with which ideas emerge, great literature is written, and progress toward self-understanding is possible. They retard the progress of what’s most important. Advancing societies expand, rather than contract, their vocabularies.

Freedom of speech and academic freedom is in freefall on our campuses. An expanding industry of administrators and accreditors—“orthodoxy sniffers,” to use Orwell’s phrase—have begun policing the thought of faculty and students. Words and opinions long considered benign are now radioactive, triggering social-media shaming, official investigations, suspensions, and firings. With the acquiescence and sometimes even the encouragement of deans and faculty, students are shouting down, mobbing, and sometimes even physically battering visiting speakers simply for performing the essential function of expressing sincerely held, but unpopular, opinions on issues of public concern. An oppressive cloud of fear and self-censorship hangs over the exploration of politics, law, ethics, and society at schools across the country. The Enlightenment values on which the modern university was founded aren’t just being challenged. Their foundations are being repudiated from above, by faculty and administrators, and below, by a rising generation of censorial students inadequately instructed on the benefits of free expression.

For reasons that exceed the scope of this testimony, the First Amendment to the U.S. Constitution, as we’ve come to know it over the past century, is in trouble throughout society. However, nowhere is the problem more acute, and more harmful to the long-term health of the nation, than within higher education.

This crisis stems from two causes. The first is that free speech principles are unnatural and counter-intuitive. This has always been with us and, given human nature, always will be. The second is that now young people are exhorting—demanding, even—that older generations censor more heavily. This is unprecedented in our history and, without immediate and significant action, may prove ruinous to the essential purposes of higher education.

1) Protecting Freedom of Expression and Academic Freedom is a Perpetual Struggle

Freedom of expression and academic freedom are fundamentally unnatural and counter-intuitive. The idea that every professor and student should be allowed to think as he wishes, and speak what he thinks, however unpopular or “harmful” his ideas, is among the most revolutionary and liberating in the history of education. As a political, legal, and pedagogical principle, it’s downright bizarre. Even among the most liberal and permissive nations on earth, it’s never really even been tried. Freedom of Expression, as developed

by the Supreme Court over the past century, including in seminal cases dealing with academic freedom, ranks up there with “turn the other cheek” as a radical and difficult-to-follow moral and political ideal.

One of the core functions of any government, including an academic administration, is to punish harmful conduct. Faculty and students expect that universities will keep them safe and deter bad behavior. They get anxious when that expectation isn’t met. For that reason, every college and university has a student code of conduct. In a well-functioning school, the administration is determined to punish conduct that causes harm. Conduct whose harmfulness might be considered unserious, like occasional beer-drinking or noisiness in the dorms, might be punished moderately or not at all. The severity of a punishment usually exists in proportion to the amount of harm caused. The most serious offenses—sexual assaults, physical fights, and so on—are punished most severely. Faculty and students expect campus leaders to zealously act to rid their environment of these behaviors. It’s an inclination derived from mankind’s most primitive and urgent instinct—self-preservation.

Those who argue that such fearful conduct should go unpunished, or perhaps even just treated a little more leniently, naturally arouse fear and invite suspicion. They’re often condemned as either being indifferent to the harm the conduct causes or, more ominously, carrying a hidden desire to engage in that harmful conduct themselves. Imagine someone who strongly and publicly advocates for ending a ban against academic plagiarism, for example. Or someone petitioning for softer punishments against peeping toms on campus? What initial opinions about those advocating these positions would spring to the minds of most listeners upon hearing those opinions, do you think? Human nature and our shared experiences make the answer self-evident: These speakers are themselves dangerous because 1) Their advocacy might prevail, which would increase the harmful conduct. 2) Some who might otherwise be deterred might be listening and become emboldened to engage in the harmful conduct. And 3) The speaker himself, one suspects, through his advocacy has betrayed a subtle inclination to engage in the harmful conduct.

This fear and revulsion applies with equal fervor to those who advocate “dangerous ideas,” rather than dangerous conduct. When university administrators encounter speech spreading what they believe to be harmful or

offensive beliefs—racism, sexism, homophobia, etc.—they likewise tend to do what comes naturally and intuitively: punish the speaker.

For instance, if sexist conduct that hurts another on campus is wrong so is speech that incites others to engage that conduct, as when one student encourages another to grope a female classmate. After all, such speech is causally connected and just one step removed from the harm. Another step further back, and existing at a higher level of abstraction, are the bigoted doctrines and beliefs underlying both the incitement and the harmful conduct. In the current moral panic on our campuses, those determined to be merely advocating doctrines and beliefs, which don't directly cause any physical harm, are being shunned and silenced. One of the cases described below, that of Prof. David Batson of the Georgetown Law Center, shows that in some cases faculty yet *another* step removed from harmful conduct are being disciplined for failing to intervene and correct those they hear espousing dangerous ideas.

Censorship often spreads like a contagion when we overindulge our natural tendency to purge all we believe harmful from our environment.

The principles that animate our First Amendment stand foursquare against the natural impulses described above. They presume, *require*, actually, a shared national conviction that the very real short-term harms concomitant with tolerating harmful speech—by liars, racists, perverts, terrorists, the entire parade of horrors—are ultimately redeemed by long term benefits that will make us a freer, happier, and more advanced society. To enjoy these benefits, we must constantly work to defeat our urge to silence ideas we hate, especially on our campuses, which should be enclaves where the pursuit of truth is a more important social interest than any other.

The campus community must have faith that, in a free contest of ideas, harmful ones will be exposed, refuted, and cast aside. As Justice Oliver Wendell Holmes, Jr. once put it:

To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas...⁶

This is a daunting task. The First Amendment flatters us with the presumption that our capacity for reason, resilience, and delayed self-gratification is strong enough to remove the coercive power of the state from our intellectual, social, and political disputes. No other nation on earth has dared give human beings so much credit.

This radically libertarian interpretation of the First Amendment didn't fully emerge until, in the midst of patriotic war fever, congress passed laws punishing anti-war speech so severely that two Supreme Court justices, the aforementioned Holmes and Louis Brandeis, began to worry that their enforcement was changing our identity as a nation. The Espionage Act of 1917 and the Sedition Act of 1918 put anti-war speakers around the nation in prison, many, including presidential candidate Eugene V. Debs, with sentences of ten or more years. After originally voting to uphold them, these two Harvard-educated intellectuals eventually realized that what they valued most about America—our democratic governance, individual liberties, the bustling exchange of ideas—seemed to be put in jeopardy by these laws. For many years thereafter they wrote mostly in dissent, but ultimately Holmes and Brandeis would convince the Court, and ultimately the public, that tolerating political unpopular and dangerous ideas was a principle championed by “Those who won our independence” and was at the core of America's greatness. They urged us to take pride in having the courage to embrace "freedom for the thought that we hate."⁷

The Supreme Court overturned the criminal conviction of a political radical for the first time on free speech grounds in 1927.⁸ Since then, free speech, even for the most hated among us, has become a distinguishing feature of our national self-definition. In the 1989 case of *Texas v. Johnson*,⁹ for instance, the Supreme Court ruled that a protesting anarchist in Texas, tailor-made for a 20-year prison sentence in 1919, had a First Amendment right to publicly burn an American flag in opposition to the government. In his opinion for the Court, Justice William J. Brennan, Jr. wrote that the majority of Americans who are offended by the sight of an intentionally burned American flag have a remedy: they are free to wave their own. This is America, after all.

The Court continues to protect these speakers, even though the rage and psychic harm they cause can be substantial. For instance, in 1992 the Court overturned the conviction of a Ku Klux Klan leader who had burned a cross in view of motorists and other onlookers along a public highway during a

gathering. The sight of the fiery cross understandably bothered one of the witnesses in the case. Historically, burning crosses have presaged horrific acts of violence. Certainly, this type of symbolic expression might create a reasonable fear of bodily harm in those belonging to racial minorities who witness it. However, the Court ruled in *Virginia v. Black*¹⁰ that the state law presuming that cross burning conveys an intent to intimidate violated the First Amendment and struck it down, overturning the Klansman's conviction.

A more recent case¹¹ involved an energized gaggle of cultists known as the Westboro Baptist Church. To maximize publicity for their church, members protested outside the funeral of a marine killed in action by carrying signs with insulting, provocative messages on them intentionally designed to shock and cause emotional distress. "God Hates You" and "Thank God for Dead Soldiers" were among the tamest. The dead marine's father successfully sued them and won a large amount in damages. The United States Court of Appeals for the Fourth Circuit reversed the judgement and the Supreme Court upheld the reversal. Quoting Justice Brennan's opinion in another case, Chief Justice John Roberts reminded us that "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"¹² And for that reason, "What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous."¹³

For the past few generations our case law has been replete with such cases. It's extraordinary. In case after case the Court has made it clear that even ideas that cause great pain and attack the values we hold dearest—ideas that the vast majority would have silenced--must be tolerated.

Our faith in this unique "experiment" in freedom of expression, as Justice Holmes called it in a dissent attacking the Sedition Act of 1918,¹⁴ may have reached its zenith, however, in 1969 when the Court unanimously overturned the conviction of another Klansman, Clarence Brandenburg.¹⁵ Amid a torrent of racist nonsense, Brandenburg threatened to take his band of masked and armed would-be marauders to Washington D.C. and take "revenge" against the federal government that, he claimed, had become hostile to whites like himself. *Brandenburg v. Ohio* overturned the last of the repressive World War I-era precedents and implemented a new rule, largely derived

from the opinions of Holmes and Brandeis, that made it nearly impossible for the government to punish politically subversive speech.

2) The Current Crisis on Our Campuses

Today's free speech crisis in many ways replicates those that have plagued campuses in the past, including during the notorious McCarthy period immediately after World War II. For example, instead of anti-communist loyalty oaths like the one the Supreme Court ultimately found unconstitutional in *Keyishian v. Board of Regents of the University of the State of New York*,¹⁶ faculty are now required to show their moral worth and political conformity through "Diversity, Equity, and Inclusion" statements on their syllabi, self-assessments, and hiring and promotion materials. These statements have been criticized as "Higher Ed's New Woke Loyalty Oaths"¹⁷ and faculty have been compelled to sue in order to escape the quintessentially McCarthyite ultimatum of either forswearing core beliefs or being fired.¹⁸

However, the current crisis is also different from those of the past in at least one especially ominous respect. The panics and purges of the previous eras involved the failure of schools to practice what they preached. That is, they failed to live up to the "American" free speech ideals they claimed to espouse. For example, when Harvard forced historian Ray Ginger to resign for refusing to take a loyalty oath in 1954, the university claimed it was because Ginger and other suspected communists wouldn't affirm what were then regarded as core American values, including the free speech principles embodied in our First Amendment.¹⁹ Today it is free speech itself, both in practice and as a constitutional ideal, that is under attack, not just on campuses but throughout society.²⁰

During the McCarthy period the censors were mostly old and, ultimately, were overtaken by a younger generation who, in a burst of freedom, in the 1960s started a radical free speech movement on our campuses. Today, it is the younger generation demanding that the older impose more censorship. Indeed, they often resort to campus shutdowns and riots when they believe those in charge aren't censoring aggressively and pervasively enough. This is a new phenomenon in American history, which could prove devastating to free thought and inquiry in higher education.

Faith in the values of our First Amendment have diminished among students and faculty, certainly, but it is their abandonment by those who run our

higher education institutions, the deans and presidents, that has been most harmful during the current crisis. Ultimately, it is their responsibility to ensure freedom of expression, academic freedom, and intellectual diversity on our campuses. While there have been some refreshing and courageous exceptions, generally administrators have turned their backs to these core principles with alarming universality and have facilitated the current climate of censorship. If there is any category or class on our campuses that legislatures should directly regulate, it is this one. While faculty and students should be permitted to inquire, explore, and discuss with only the minimum possible interference from either administrators or the state, it is important, especially given current circumstances, that the state intervene to hold higher education administrators accountable when they fail to uphold the civil rights most essential to campus life.

A. Ideological Capture of the Faculty

For decades the ranks of conservative and libertarian faculty on campuses have grown thinner. At most institutions, faculty committees play a key role in selecting their new colleagues. Faculty, especially in the liberal arts and social sciences, tend to be politically active and to seek colleagues who share their views. For example, according to a 2021 survey only 3% of Harvard faculty self-identified as “somewhat conservative” or “very conservative.”²¹

Over time this phenomenon of ideological replication has, often unconsciously, had the effect of weeding out conservative and libertarian academics from the professoriate and creating ideological groupthink around political and cultural values. Constant mutual reinforcement and affirmation within the academy create profound social pressure to conform and have turned many campuses into islands of unanimity that no longer reflect the pluralistic and conflicting viewpoints of the nation at large. This problem is exacerbated by the fact that most high-level administrators ascend from faculty ranks. The election of Donald Trump, a repulsive figure to most academics, created a sense of moral urgency among the increasingly like-minded and progressive professoriate. That urgency, coupled with the popular outrage over the death of George Floyd, especially among young adults, created an opportunity, aggressively seized upon, to implement radical change on our campuses.

While ideological capture was created through hiring, now, in addition to hiring primarily like-minded colleagues, it is being enforced by the policing

of political speech. The list of professors who have been investigated and disciplined in recent years for speech infractions is virtually interminable. Here are a few illustrative examples:

Prof. Timothy Boudreau: Tenured Central Michigan University (“CMU”) journalism professor Timothy Boudreau was fired in 2020 after nearly twenty years of employment for using racial slurs as part of a class meant to explain how and why the First Amendment protects the use of hatred racial slurs.²² A student surreptitiously recorded him using a slur and posted the footage on Instagram, resulting in his termination. By firing Professor Boudreau, CMU taught those students the exact opposite lesson about the First Amendment Professor Boudreau had taught them.

Prof. Greg Patton: In 2020, Prof. Greg Patton of the University of Southern California’s (“USC’s”) Marshall School of Business was suspended from teaching for discussing in class the commonly used Chinese word *nei ge*, roughly translated as “that,” and repeating the word during the discussion. A group of students believed the word sounded too much like an English-language racial slur and complained to the University, which thereupon launched an investigation. Professor Patton’s suspension elicited a scholarly discussion of what is allowed in the classroom that was to my knowledge unprecedented and, in less febrile and polarized times, would have seemed surreal. The discussion centered the difference between “semantic harm” (pain caused by words) and “phonic harm” (pain caused by sounds that aren’t words but sound like them).²³

Prof. David Batson: Professor Batson was pulled from his course, placed on leave, and ultimately pressured to resign by the Georgetown Law Center in 2021 after video emerged of him listening and nodding while a colleague, Prof. Sandra Sellers, spoke about grading her students. Sellers was fired for her remarks, the most offensive excerpt of which seems to have been, “I hate to say this. I end up having this angst every semester that a lot of my lower ones are Blacks, happens almost every semester...And it’s like, ‘Oh, come on.’ You know? You get some really good ones. But there are also usually some that are just plain at the bottom. It drives me crazy.” To quote NBC’s reporting, Professor Batson “did not disagree or interject in the video” while his colleague spoke.²⁴ It was his silence, it seems, that doomed him. As with Professors Patton and Boudreau, students saw a video of the speech and demanded action. One student group complained that that by nodding as Professor Sellers spoke Professor Batson

“affirmed” her objectionable comments and that his “response was insufficient.”²⁵ Another group demanded a “public apology” from Professor Batson for “his failure to adequately condemn Sellers’ statements.”²⁶ Professor Batson, for his part, disavowed his colleague’s speech in his resignation letter, suggesting that his nodding might have meant something other than agreement. He further explained that, while reacting in real time, he nonetheless failed in his duty to disagree with Professor Sellers. “When suddenly and unexpectedly faced with such remarks, it is challenging to know how to appropriately respond...I understand, however, that I missed the chance to respond in a more direct manner to address the inappropriate content of those remarks...”²⁷

The complaining students in this case seemed to be urging a standard that would punish faculty for merely witnessing disapproved-of speech and would create a “bystander responsibility” to intervene and correct that speech. Bystander intervention of this kind has been advocated as a campus policy by groups like the Southern Poverty Law Center²⁸ and has been promoted by some colleges and universities, like Clemson University in South Carolina.²⁹

While it makes perfect sense to encourage bystanders to intervene to help those in danger on campuses, stretching bystander responsibility to punish professors for “failing to...condemn” a colleague during an extemporaneous conversation, as Georgetown seems to have done, would be an unprecedented intrusion into academic freedom and freedom of expression. It would compel faculty to recite views, including those they might not agree with, against their will. It would also chill dissent by ensuring that those heard disagreeing with the school’s officially mandated viewpoint must be repudiated by all those within earshot. Put simply, such a policy wouldn’t just destroy free thought and discussion on campus, it would create a dystopian hellscape.

B. Policing the Viewpoints of Guest Speakers

Colleges and universities have always invited speakers from outside their communities to share their perspectives on issues of public concern. The highlight of every commencement ceremony is, or should be, the commencement address, in which an important figure, almost always a visitor, imparts practical advice and wisdom onto the graduating class. Over the past few years, there has been widespread censorship of guest speakers in the form of shoutdowns, and even violence, when speakers espouse conservative or libertarian views.

Shoutdowns are one form of what First Amendment law has come to recognize as a particularly disruptive form of public censorship known as the “Heckler’s Veto.” The heckler’s veto uses constant interruptions and cacophonous noise to prevent audience members from hearing a speaker’s ideas. Activist student groups have used this tactic successfully, and with increasing frequency, across the country in recent years. Representative examples include:

Judge Kyle Duncan at Stanford Law School: On March 9, 2023 Judge Kyle Duncan of the U.S. Court of Appeals for the Fifth Circuit visited Stanford Law School to give a speech titled “Guns, Covid, and Twitter.” Protest signs, many with profane, sexually explicit content, adorned the venue. Students shouted and heckled abuse at Judge Duncan at will. One student screamed “We hope your daughters get raped.”³⁰ Realizing his task was impossible, Judge Duncan asked for the help of an administrator. The law school’s Associate Dean for Diversity, Equity, and Inclusion, Tirien Steinbach, then rose to the podium and delivered a prepared speech that emboldened the students and attacked the speaker.

Ian Haworth at University at Albany, State University of New York (“SUNY Albany”): On April 4, 2023, conservative activist Ian Haworth visited SUNY Albany to give a speech on, of all things, the importance of free speech on campuses. A mob of swearing, screaming, chanting, protesters hurled epithets and even formed a conga line in an effort to silence Haworth. They were successful. His speech was cut short.³¹

Riley Gaines at San Francisco State University: On April 6, 2023, NCAA All-American swimmer Riley Gaines was mobbed, physically attacked, whisked away by police, and put in a secure classroom for her own protection by police while an angry mob raged at San Francisco State University. This occurred after giving a speech in favor of allowing only biological females to compete in women’s sports.³² While, unlike many other speakers, Gaines was able to complete her remarks, her brutal treatment as she left the venue sent a chilling message to those on campus bold enough to repeat her views.

C. Blame Lies with Higher Education Administrators

Academic administrators are neither educators nor scholars—not directly, anyway. At the higher levels—presidents, provosts, and deans—they function as executives and personnel managers. Some may have been promoted from the faculty and may

still teach and publish but, when acting in their administrative capacities, they have assumed a fundamentally different role with separate responsibilities. Their primary purpose is to protect the “great conversation”³³ that should be happening on their campuses by creating the best environment possible for teaching and learning. Guaranteeing open forums for the free exchange of ideas is essential to achieving that purpose. Given the natural inclination to censor when confronted by transgressive speech described above, this is hard work. Administrators must be proactive and vigilant to ensure that discourse on campuses has room to breathe. Instead, too many are helping to smother it.

The abandonment of free speech values by campus administrators doesn’t seem to be the result of negligence or mistake, in most instances, but rather of a new political conviction that other interests—namely those consistent with the illiberal values of the “Great Awakening”³⁴ or what author Wesley Yang calls “The Successor Ideology”³⁵—are more important than the pursuit of truth.

Undoubtedly, hostility to free speech, academic freedom, and intellectual diversity by faculty and students is a national problem.³⁶ However, faculty conduct can be assessed during their performance evaluations and students are subject to the codes of conduct established by the school. Students, especially, have little power to censor on campus that isn’t given to them from above.

Close study of the growing intolerance and speech controls described above point to a common problem: those at the top of college and university organizational charts tend to support it, or, at best, tend to be willing to acquiesce in it. Those who express unpopular beliefs can be subject to stigma, ostracism, and vindictive conduct. According to a recent major study, over 80% of college students censor their own views “at least some of the time.”³⁷ In many instances, these are the students most in need of college administrators’ protection. Instead, their presidents and deans are failing them.

Perhaps the unkindest cut of all, though, has been the alacrity with which administrators’ have thrown faculty caught in public free speech controversies to the wolves. Instead of shielding their employees and teaching the public the importance of free speech values, they have in many instances joined the mass denunciations and shaming. Their treatment of faculty has been especially ungracious given the blurry and constantly shifting standards enforcing the new campus orthodoxy under which professors have had to operate. Consider how the

supervisors of the professors involved in the controversies mentioned above were treated:

Central Michigan University's Firing of Professor Boudreau: Professor Boudreau's student furtively recorded, saved, and, after waiting until after she'd graduated from the university, posted the controversial footage of his lecture on Instagram. Two days later, without any notice to Professor Boudreau and prior to an investigation, University administrators apologized to the student publicly on Instagram.³⁸ An apology, of course, is an expression of contrition that, in this case, concedes precisely what an investigation hadn't yet determined—wrongdoing on the part of Professor Boudreau. Having already determined guilt and expressed contrition, the Instagram post goes on to promise an investigation. Civil liberties, both on campus and in the larger society, are a seamless garment. As free speech rights go, due process and the presumption of innocence follow.

CMU moved aggressively at every stage to affirm their initial presumption of guilt. Provost Mary C. Schutten summoned Professor Boudreau to her office and asked him not to use the racial slur at issue in the classroom again. Professor Boudreau answered his provost by explaining that “The very nature of the course involves offense, often ugly language” but that he'd “weigh very carefully.”³⁹ From that moment on Professor Boudreau, who'd spent nearly twenty years as a successful teacher on CMU's campus, was persona non grata. “Two hours later, I was suspended from the university, told to stay away from campus, from students, turn in my I.D...I felt like I was a criminal.”⁴⁰ He was fired not long thereafter.

USC's Suspension of Prof. Greg Patton: Professor Patton felt bad when he learned that some students were upset that the Chinese term he'd discussed in class was phonically similar to an English-language racial slur. “My heart just sank...The last thing I want to do is distract or hurt my students.”⁴¹ He immediately sent an apology to his students via email.⁴²

An angry clique of USC students demanded that the university fire Professor Patton. “He's a white American. He knows what it sounds like, right?” stated one of the students pushing for his dismissal.⁴³ The student's argument seems to be that a kind of negligence standard should control faculty speech in the classroom, under which a professor should be fired even if he speaks without malicious intent when he fails in his duty not to offend his students. It hardly bears stating that such a standard would eviscerate and instantly render tedious classroom discussions.

Rather than stand by his employee, who plainly intended no offense and was contrite to learn he'd caused any, Dean Geoffrey Garrett suspended Professor Patton from teaching the course and put him under investigation. As has become standard procedure in cases like these, he apologized and conceded wrongdoing prior to any fact-finding. His letter to the campus in response to the Patton controversy is a profile in cowardice. Even if one assumes, as I do, that Dean Garrett doesn't value free speech or academic freedom, his willingness to sacrifice, rather than protect, an employee who taught his students in good faith and, on his own initiative, issued an apology shows a special kind of willingness to push faculty on campus into a state of fear. "Professor Greg Patton repeated several times a Chinese word that sounds very similar to a vile racial slur in English... Understandably, this caused great pain and upset among students, and for that I am deeply sorry. It is simply unacceptable for faculty to use words in class that can marginalize, hurt and harm the psychological safety of our students. We must and we will do better."⁴⁴

The Patton controversy spread off campus into national and international media, where the larger public joined with groups on campus to push back against Professor Patton's mistreatment.⁴⁵ Fortunately, he survived the investigation and continues to teach at USC.

The Georgetown Law Center's Suspension and Investigation of Adjunct Professor David Batson: Following the usual pattern, Dean William M. Treanor initial response was the presumption of guilt and condemnation, in the strongest possible terms, of those who teach under him. While the professor who spoke on the leaked video, Professor Sellers, was fired, Professor Batson, who gravest offense seemed to be nodding and listening, proved a more difficult figure to sacrifice to the mob of outraged students. Instead, Professor Batson was pulled from his course, put on "administrative leave," investigated, and vilified as a racist in a series of public letters to the campus community.

Dean Treanor appears to take the "Bystander Responsibility" standard for faculty speech demanded by the students seriously. In one of his letters, he writes that part of his effort to "do better"⁴⁶ will include the creation of programs that "discuss bystander intervention."⁴⁷ In another letter, Dean Treanor promises that the law school will "work to address the many structural issues of racism reflected in this painful incident, including... bystander responsibility."⁴⁸ The clear implication is that Professor Batson's choice to remain silent, rather than oppose his colleague

when she expressed views forbidden by the school, was morally and professionally unethical and harmed the campus.

Professor Batson was allowed to resign. We don't know the exact role the "Bystander Responsibility" standard played in his suspension, investigation, and likely forced resignation. But all the evidence suggests that it played a major one. As mentioned above, this standard violates core free speech principals by compelling speech professors may not agree with or may even find repugnant. In *West Virginia v. Barnette*,⁴⁹ the Supreme Court ruled that students couldn't be compelled to salute the national flag or recite the Pledge of Allegiance against their will. The opinion for the Court by Justice Robert H. Jackson explains the free speech rights of the students this way:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.⁵⁰

While Georgetown University is a private school, and therefore outside constitutional regulation, the free speech principles of our First Amendment should apply throughout society and nowhere more so than in colleges and universities. Dean Treanor has a law degree from Yale and a PhD from Harvard. His response to this controversy showed a conscious disregard for the most basic concepts of free speech, a repudiation of the essential faculty rights, and a willingness to cast the pall of orthodoxy, deadly to worthwhile discussion, across his campus. Not to mention the grotesque treatment of Professor Batson, who, like so many professors, seems to have been regarded by his dean as little more than an opportunity to show a larger audience how emphatically committed he is to the new prevailing wisdom.

In *Barnette*, Justice Jackson explained that forcing students to appreciate the freedoms symbolized by the flag by taking away one of those core freedoms both teaches them the wrong lesson and changes the meaning of the flag we hope that they will salute. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to

strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁵¹

The Georgetown Law Center is supposed to be educating future lawyers. What lesson are its students learning from Dean Treanor?

University administrators are failing no less egregiously at protecting the rights of visiting campus speakers and those who would listen to them:

Stanford Law School’s Response to the Mob Shoutdown of Judge Kyle Duncan: This controversy is distinct from others in that, in the midst of the disruption, a law school dean ascended the podium and vindicated the student-hecklers by delivering prepared remarks condemning the views of the speaker. Associate Dean Tirien Steinbach’s conduct would have been an extraordinary rejection of free speech principles regardless of the content students were screaming at Judge Duncan. But the salaciousness and profane vitriol hurled at him, in Dean Steinbach’s presence and, ostensibly, with her approval, turned the event into a rank spectacle. Students brandished a sign associating Judge Kyle with a slang term for the clitoris.⁵² And, as mentioned above, at one point a student yelled “We hope your daughters get raped.”

Dean Steinbach’s supervisor, Dean Jenny S. Martinez, has put Dean Steinbach on leave, where she remains as of this writing, apologized to Judge Duncan, and earned widespread praise from many for defending free speech principles in a letter⁵³ addressed to the law school community. Dean Martinez has indeed shown more fidelity to freedom of expression and academic freedom than most of her similarly situated peers. But she has benefitted from that comparison, which has skewed the popular assessment of how she handled the controversy. In previous decades, prior to the recent collapse of academic freedom, her response would have set civil libertarians fuming.

Free speech principles aside, the basic tenets of human decency dictate that any student who interrupts an invited guest, let alone a sitting federal judge, delivering an academic presentation by shouting “We hope your daughters get raped!” should be disciplined. This isn’t a close call. Any high school principal would be quick to suspend such a student. Dean Martinez presides over one of the most prestigious law schools in the world, yet in her letter she states that she will not punish a single student among the unruly mob, including the one publicly wishing rape upon the judge’s daughters. Instead, she announces that students will be

required to participate in a half-day training session “on the topic of freedom of speech and the norms of the legal profession.”⁵⁴

Conduct unpunished by a dean is conduct tolerated by a dean. Students know this. In her letter, Dean Martinez explains that a “failure by administrators in the room” sent “conflicting signals” to students at the event about the appropriateness of their conduct, which made punishing those students difficult. There’s some truth to this. However, some of the hundred or so highly accomplished adult law students that participated in this shutdown engaged in behavior so brazenly inappropriate and antithetical to the mission of the school that, even if positively encouraged by a dean, they should be found culpable. Moreover, if the “administrators in the room” (i.e. Dean Steinbach) are primarily responsible for this fiasco, rather than the students, why, two months later, has she not been fired?

SUNY Albany’s Response to the Shutdown of Ian Haworth: While Mr. Haworth seemed personally satisfied with Vice-President for Student Affairs Michael N. Christakis’s and Chief Diversity Officer & Assistant Vice President Samuel Caldwell’s letter⁵⁵ to the campus community, a quick review shows it to be merely a perfunctory and toothless admonition that will do nothing to deter prevent the series of interruptions—screaming, heckling, even dancing—that forced Mr. Haworth to end his speech early. As usual, the university chose not to punish any students, all of whom were adults, even those hurling the vilest obscenities. Instead, the letter begins by explaining that the university has a “constitutional obligation”⁵⁶ to protect free expression, explains that preventing speech is “unacceptable,” then is conspicuously silent about any remedies for the chaos that took place or how it will prevent it from recurring.

San Francisco State University’s Response to the Mobbing of Riley Gaines: No one was arrested and no students were disciplined by the SFSU administration after a rampaging mob physically attacked and unlawfully confined Riley Gaines to a classroom. Instead, university president Lynn Mahoney published a letter to the campus community that neither criticized the mob nor apologized to Gaines. Gaines, the letter implies, had been the initial aggressor and the university was the victim. Gaines’s speech was “deeply traumatic for many in our trans and LGBTQ+ communities, and the speaker’s message outraged many members of the SF State community...Last week was a hard one for San Francisco State...To our trans community, please know how welcome you are. We will turn this moment into an opportunity to listen and learn about how we can better support you.”⁵⁷ President Mahoney’s failure to discipline even one student, and the content of

her letter, make it very clear how welcome the millions of Americans who share Riley Gaines's views are on San Francisco State's campus

IV. A FREE SPEECH HERO FROM A PAST ACADEMIC PURGE CAN GUIDE US THROUGH THIS ONE

A year after the Court's ruling in *Brandenburg*, a Yale professor named Thomas I. Emerson published a massive tome titled *The System of Freedom of Expression*.⁵⁸ In it he interprets and synthesizes countless judicial opinions as part of an effort to explain how and why, for the first time in world history, a great nation had become committed to this great experiment in freedom of conscience and expression.

Emerson is one of the great unsung warriors against the McCarthyite academic purge of the 1940s and '50s. He watched as colleagues were denied promotion and fired for not having what was then considered to be the right politics and was himself relentlessly attacked as a radical and a subversive. Despite showing fierce independence and devotion to liberal ideals throughout his career, he was nicknamed "Tommy the Commie" and pursued by the FBI for years due to his insistence that the First Amendment rights to freedom of expression and academic freedom applied to all, even members of the Communist Party. In 1957, Emerson successfully argued before the Supreme Court the case of University of New Hampshire Professor Paul Sweezy, whose left-wing background and controversial classroom lectures made him a target of his state's attorney general. *Sweezy v. New Hampshire*⁵⁹ was the first significant case heard by the Supreme Court on academic freedom.

The force of Emerson's reasoning in defense of a Marxist professor, at the height of the Red Scare, prevailed and spurred Chief Justice Earl Warren to issue an opinion on the First Amendment that's a paean to robust, fearless and uninhibited academic freedom. "Scholarship cannot flourish in an atmosphere of suspicion and distrust," Warren wrote. "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."⁶⁰

Warren's landmark opinion in *Sweezy* has guided the court's jurisprudence in higher education academic freedom cases ever since. As a matter of law, the First Amendment protects students and faculty only in state schools, but its principle of academic freedom is enforceable in faculty employment contracts and other

documents binding private colleges and universities. Emerson's ideas helped end an earlier era of repression on our campuses. They can do so again.

In Emerson's book, the academic who defended academics explains the benefits of intellectual diversity, how the harms created by dangerous writers and speakers can be minimized without censorship, and crucial role courts play as a check against the natural inclinations toward censorship that exist throughout society.

Free speech provides four types of benefits, Emerson explains. For reasons of clarity and brevity, I'm going to describe them with titles he never used but I hope he wouldn't have minded.⁶¹

The Socratic Benefit: Freedom of expression is “an essential process for advancing and discovering truth,” Emerson writes. It is indispensable to intellectual advancement. To distinguish truth from falsity one must be able to consider every claim and interrogate, wherever facts and reason dictate, until even the most curious minds are satisfied. Even false or pernicious claims can often be instructive by compelling reexamination and reinforcing old beliefs with new confidence. (Ridiculous ones can simply be ignored.)

It's this premise that animates Justice Oliver Wendell Holmes's storied “marketplace of ideas” theory of the First Amendment. “[T]he best test of truth,” Holmes tells us, isn't adoption or approval by the state but “the power of the thought to get itself accepted in the competition of the market... That at any rate is the theory of our Constitution.”⁶² The First Amendment prioritizes truth-seeking above other social interests, however important, by prohibiting the government from interfering with the free exchange of ideas. “This is the method of the Socratic dialogue employed on a universal scale,”⁶³ Emerson wrote in an article foreshadowing his great treatise.

Emerson has a simple answer to the current trend toward censoring online “misinformation”—regarding elections, vaccines, or anything else. “Discussion must be kept open no matter how certainly true an accepted opinion may seem to be.”⁶⁴ In 1610 the Italian Astronomer Galileo Galilei invented the telescope. Shortly thereafter he published a paper that literally turned the solar system inside-out. By showing that the earth orbited the sun rather than vice-versa, he contradicted centuries of orthodox teaching supported by church and state. For spreading this dangerous

“misinformation” Galileo spent the rest of life under house arrest. Our Emersonian First Amendment removes all constraints from attempts to answer life’s important most questions.

The Aristotelian Benefit: The First Amendment recognizes the natural capacity for creative greatness in human beings by protecting artistic and expressive talents. Aristotle thought of human beings as rational animals who, as they develop their talents, move from a state of potential to actual happiness. Sharing our honest thoughts and feelings with one another, in every medium but especially through works of artistic expression, is a necessary condition for individual flourishing. Free speech is a natural human right and censorship is an “affront to the dignity”⁶⁵ of the individuals being silenced, Emerson writes. Silencing poets, musicians, filmmakers or anyone else expressing himself blocks the personal development of the speaker—and the listener—from realizing his potential for happiness. “For the achievement of this self-realization the mind must be free.”⁶⁶

The Jeffersonian Benefit: The boldest philosophical claim in Thomas Jefferson’s Declaration of Independence is that governments “derive their just powers from the consent of the governed” and that any government that doesn’t deserve to be overthrown. By adopting the Declaration, the Continental Congress insisted on a redefinition—an inversion—of the traditional understanding of state authority. Instead of British subjects, accountable to a king, Americans had decided that they would be American citizens, whose government would be accountable to them. The essence of democracy—even an indirect and often limited one, as would be created a few years later by our Constitution—is self-governance.

Meaningful citizenship—educated voting, reviewing policy, scrutinizing public officials—requires free and ready access to information and the ability to freely discuss politics with fellow citizens. According to Justice Brennan’s landmark opinion for the Court on this topic (which was quoted by Chief Justice Roberts in *Snyder v. Phelps* and referred to above), “debate on public issues should be uninhibited, robust, and wide-open...”⁶⁷ so that the truth-seeking function benefit of the First Amendment can aid the democratic process. Self-governance requires that the state be transparent and that discussion about its activity be unimpeded.

The Emma Goldman (“Safety Valve”) Benefit: The federal government hated early twentieth century anarchist Emma Goldman. J. Edgar Hoover

reportedly called her “the most dangerous woman in America.”⁶⁸ Law enforcement chased, harassed, jailed, and ultimately deported her. She was a fanatic for the cause of individual rights, particularly for workers, immigrants, women and other oppressed classes. No matter what the state did—and it did a lot over the years—she refused to be stopped.

She was a tireless public speaker. She travelled the nation for decades, captivating audiences and angering authorities by proselytizing her anti-government (and pro-free speech) beliefs. With the passage of the Espionage and Sedition Acts, described above, which made her anarchist and anti-war views officially criminal, she raged harder against the government that, she was convinced, was now expressly persecuting her and her comrades. For Goldman, the choice between complying with censorship laws and becoming a criminal was no choice at all. She was promptly arrested, imprisoned, convicted and deported to her native Russia. As the government continued to limit legal opportunities for anarchists like Goldman to express themselves, they made themselves heard through lawless conduct. While Goldman’s resistance seems to have been limited to speech, many on the militant fringe of the movement, now part of a criminal underground, resorted to bombings and other acts of terrorism.

This is the common psychology of members of radical political groups. While censorship may cause the less fervid to conform, this isn’t usually the case with the more zealous. Instead, it tends to reinforce their sense of unjust persecution. The transition from activist to terrorist, words to violence, can be swift.

The First Amendment promotes peace and stability by giving those with unpopular political views the opportunity to non-violently blow off steam. “[P]eople are more ready to accept decisions that go against them if they have a part in the decision-making process,”⁶⁹ Emerson explains. However, while the potential for violence diminishes, the psychic harm caused by protecting these speakers can be particularly severe, as with the Westboro Baptist Church, flag burning, and Klansmen cases described above. Moreover, if unchecked, these speakers might spread convince recruits and metastasize their message. To prevent the spread of bad ideas, the First Amendment allows for two remedies

First, while expression must always be tolerated, harmful conduct needn’t ever be. The government is always free—duty bound, even—to punish those

who attempt to advance their dangerous ideas with criminal activity. For instance, tweeting that protesters should resist arrest might be protected speech, but protesters who enact that advice by actually punching cops can be convicted and sent to jail.

Second, there is counter-speech. There is no surer way to halt the impact of a bad idea than by using reason and evidence to replace it with a good one. If someone finds a belief to be harmful or dangerous the First Amendment gives him the right to harness his contempt into an attempt to convince his fellow citizens not to adopt it. This type of political activity isn't just helpful, it's essential to the realization of the First Amendment's Socratic and Jeffersonian purposes. "The greatest menace to freedom," Justice Louis D. Brandeis writes, "is an inert people."⁷⁰

The First Amendment is, in this way, at war with core human instincts and, for that reason, is always under threat. Our federal courts are composed of judges with life tenure whose mandate is to protect individual liberties, including freedom of expression. They are in a constant struggle with the political branches of government, who are more responsive to the censorial instincts of voters. Free Speech rights usually exist in direct proportion with the judiciary's determination to protect them. Judges must use neutral principles and reasoned judgment to check and balance the will of the legislature and the executive.

V. ADRIAN COLLEGE HAS CHOSEN A DIFFERENT PATH THAT VALUES INTELLECTUAL DIVERSITY

During his 2016 annual convocation speech to the entire campus, Adrian College President, Jeffrey R. Docking publicly announced his full endorsement of the Chicago Statement in support of freedom of expression and academic freedom.⁷¹ Not long thereafter, concerned colleagues and I helped shepherd a resolution adopting the Statement to a unanimous faculty vote. As a result, Adrian College is listed among the 99 colleges and universities pledged to the Statement on the Foundation for Individual Rights and Expression's website.⁷²

There is no confusion by anyone—students, staff, faculty, or the surrounding community—on where Adrian College stands on the importance of intellectual diversity and the free exchange of ideas. Nor is there any doubt that those with unpopular views are welcomed and abuse of their rights won't be tolerated. This

sets us apart from many, if not most, places of higher learning, including those described above.

Consistent with the principles in the Chicago Statement, Adrian College's George W. Romney Institute for Law and Public Policy and Institute for Leadership and Ethics co-sponsors a debate series⁷³ that focuses on controversial issues of public concern. Over the past few years, we have hosted vigorous debates on the most divisive, contentious, and polarizing issues imaginable, including abortion, affirmative action, gun rights, and whether to defend the police. This was by design. The experts we've invited to debate these issues, while holding nothing back, have been models of scholarly decorum. They have also been well-attended by students, most of whom have strong feelings in support of the position of one debater and against that of the other.

Since our adoption of the Chicago Statement, by both our president and faculty in 2016 and 2019 respectively, every speaking event on campus, including those in this highly charged debate series, have been models of cordiality and mutual respect. Some students have shared their strong feelings in opposition to a speaker's presence on campus with me. I usually respond by attempting to teach the student the importance of intellectual diversity on campus and inviting the student to pose the most challenging question possible for the speaker during the question-and-answer period. Just as the debaters should be encouraged to argue as convincingly as they can, students should be encouraged to challenge them as vigorously as they wish.

A few years ago, at the height of the #MeToo movement, when the standards of permissible classroom discussion on issues of sex and sexual harassment were becoming less clear, I conducted a kind of experiment. I wanted to see what would happen if I taught a semester-long course on a special topic that was both of the utmost social and political importance and was also so controversial—so divisive, sensitive, and “triggering”—that it wasn't being offered anywhere else. I would also have to teach the course without shying away from, or preventing students from exploring, any of the controversial issues that would emerge during discussions. I came up with a special topics course titled “Sex Crimes & the Courts.” I taught versions of this course three times—at the undergraduate and graduate levels in the criminal justice program at Adrian College and at the law school level at University of Toledo College of Law. The courses contained units on issues like rape, child sexual abuse, obscenity, prostitution, incest, and revenge pornography, among others. I made clear that all questions and comments made

respectfully and for learning's sake were welcome, however explicit or unpopular. Neither the readings, my students, nor I held back.

The feedback, both informally and on my course evaluations, was universally positive. More specifically, these students, many of whom were studying to be criminal justice professionals, were thankful for special opportunity to speak freely and to learn about issues that meant a great deal to them but that they believed they would never be able to explore in the classroom.

My experience teaching this course and co-sponsoring debates at Adrian College has convinced me that, while drowned out by poorly led activist classmates on other campuses, the vast majority of students nationwide, while not necessarily interested in the unpleasant topics covered in my particular criminal justice course, are eager for the current fever to break so they can speak and listen freely in whatever courses they are interested in taking.

VI. OBJECTIONS TO H.B. 151

While intellectual diversity is essential to the core mission of every college and university, it must be allowed to emerge organically from within an atmosphere of freedom of expression and academic freedom. There are elements of this bill that are inconsistent with these values, unconstitutional and, if implemented, will ultimately undermine the bill's stated purpose of fostering widespread points of view.

1) Tenure Must Be a Lifetime Appointment

Undoubtedly, some professors abuse tenure by becoming indolent, doctrinaire, and unresponsive to their students. However, tenure with lifetime job security (barring a finding of unprofessional conduct) is necessary to ensure that professors can fearlessly research and express unpopular findings, including those that might anger or embarrass their supervisors. H.B. 151's post-tenure review process would diminish that essential job security, which will in turn chill freedom of expression in classrooms, limit bold experimentation in laboratories, and steer research in the liberal arts toward conclusions that gratify administrators.

Poor performance by tenured professors, including viewpoint intolerance, can be dealt with at the front end during the hiring and tenure-track evaluation processes. Faculty hiring committees can vet candidates' commitment to intellectual diversity by studying their history and record prior to appointment. Earning tenure should

be difficult and it can be made into a more rigorous and protracted process. Candidates should be evaluated by students, in the form of course evaluations, peers, and supervisors. It makes perfect sense that part of that evaluation should consider the extent to which a candidate preaches rather than teaches in the classroom.

However, on the other side of that rigorous, years-long process should be recognition that the professor is an expert at the top of his or her field of expertise and that, regarding teaching and research in that field, administrators and trustees should generally refrain from interfering with his or her decisions. Tenure should only be granted to the most excellent professors who, after a long trial period, have demonstrated a likelihood that they won't abuse its privileges. The prize of a strong tenure, earned only after showing years of commitment to fostering an intellectually diverse learning environment, will also incentivize and habituate candidates to better teaching and research and a stronger work ethic. In its current state, this bill betrays and traduces the achievements of current tenured professors who have successfully completed the exacting, career-defining process by diminishing their honors and privilege.

As a result, there will be a steep academic talent drain. The bill disincentivizes tenured professors from Michigan, for instance from accepting a job offer in Ohio and encourages Ohio professors to seek jobs with stronger tenure rights in other states.

2) The State Should Stay Out of Higher Education Curriculum

The “American government or history requirement” in H.B. 151 would, among other things, mandate the teaching of certain texts—like the Declaration of Independence, the Constitution, the Gettysburg Address, etc.—that the legislature deems essential to an adequate college or university education.

Legislatures are comprised of politicians, not academics, and for that reason are incompetent to tell professors which texts belong on their syllabi. This mandate directly violates the First Amendment principles of freedom of expression and academic freedom. Forcing academics to teach books the state approves of is no less censorial and intrusive than punishing them for teaching books the state finds objectionable.

Personally, I admire and have studied closely every one of the patriotic texts that the H.B. 151 would mandate. I hope every college and university in Ohio chooses

to teach them. But that choice is theirs, not yours. I'm looking at a bust of James Madison, author of the First Amendment, perched on the desk in my faculty office, as I type. He would find it ironic, and tragic, that his writings on liberty and those of his friend and mentor, Thomas Jefferson, would be made part of an official state catechism.

Students should acquire familiarity with these texts prior to their arrival on college campuses, anyway. I encourage the committee to instead consider a similar mandate for K-12 schools where, the most part, the free speech principles allow for more legislation.

I urge you to delete the section of the bill which mandates the teaching of "American government or American history" (Sec. 3345.382) in its entirety.

3) The Constitution Prohibits the State from Achieving its Interest in Intellectual Diversity in Higher Education by Compelling Faculty Speech

The First Amendment forbids the state from achieving its goal of intellectual diversity via the means of compelled speech.⁷⁴ Forcing, or even incentivizing, faculty to adopt or promote views they don't sincerely hold, or teach ideas they don't believe to be true, to satisfy any state interest is a direct assault on core constitutional principles. Moreover, it would merely create a faux intellectual diversity that, ultimately, would undermine the credibility and educational mission of higher education in the state.

This bill contains numerous mechanisms designed to impose intellectual diversity from above, including a series of mandated "rubrics"--a word that sends shivers down this professor's spine. These mechanisms will pressure faculty members to tailor their teaching to state requirements. Thankfully, the First Amendment provides a shield against such pressure. I urge you to remove this and other similar provisions that restraints on the academic freedom of professors from the bill.

Generally speaking, the state should refrain from regulating what is taught in colleges and university classrooms. The best way for the state to encourage intellectual diversity, consistent with the First Amendment, is to pass legislation compelling campus administrators to protect and free speech and academic freedom rights of faculty and students so that a genuine intellectual diversity can emerge organically from a vibrant, free-ranging, and uninhibited campus-wide conversation.

Higher education is, indeed, in need of saving, but cannot be saved by these measures.

Thank you for considering my testimony,



Nathan Goetting, MA, JD
Professor of Criminal Justice & Jurisprudence
Director, George Romney Institute for Law and Public Policy
Adrian College
Adrian, MI 49221

¹ This statement reflects my personal views, not necessarily those of my employers.

² While I have a law degree and am a legal academic, I have never taken a bar examination and neither practice law nor carry a law license. My opinions on what the constitution and law requires are those of a scholar, not a professional attorney.

³ *Mission of the Academic Freedom Alliance*, <https://academicfreedom.org/about/>

⁴ See generally Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind* (2019).

⁵ Michigan State University MSU Brand Studio Inclusive Guide, <https://brand.msu.edu/storytelling/inclusive-guide>

⁶ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919).

⁷ *U.S. v. Schwimmer*, 278 U.S. 644, 655 (1931).

⁸ *Fiske v. Kansas*, 274 U.S. 380 (1927).

⁹ 491 U.S. 397 (1989).

¹⁰ 538 U.S. 343 (1992).

¹¹ 562 U.S. 443 (2011).

¹² *Id.* at 452.

¹³ *Id.* at 458

¹⁴ *Supra*, note 6.

¹⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁶ 385 U.S. 589 (1967).

¹⁷ John Sailor, *Higher Ed's New Woke Loyalty Oaths*, *The Tablet*, September 6, 2022, <https://www.tabletmag.com/sections/news/articles/higher-ed-new-woke-loyalty-oaths-dei>

¹⁸ Nanette Asimov, *Forced to Submit Diversity Statement, Professor Sues UC Over Compelled Speech*, May 19, 2023, <https://www.sfchronicle.com/bayarea/article/forced-affirm-dei-belief-professor-sues-uc-18109509.php>

¹⁹ For a short summary of Ginger's ouster from Harvard See Joshua E. Gewolb, *Harvard Admits Role in Forced Resignation*, April 2, 2001, *Harvard Crimson* <https://www.thecrimson.com/article/2001/4/3/harvard-admits-role-in-forced-resignation/>

²⁰ E.g., Michael Berube and Jennifer Ruth, *It's Not Academic Freedom* (2022).

²¹ Natalie L. Kahn, 'An Endangered Species': The Scarcity of Harvard's Conservative Faculty, April 9, 2021, The Harvard Crimson,

<https://www.thecrimson.com/article/2021/4/9/disappearance-conservative-faculty/>

²² Daniel Burnett, *Pushed out of Teaching, Central Michigan University Journalism Professor Has His Own Story to Write*, May 8, 2021, FIRE, <https://www.thefire.org/news/pushed-out-teaching-central-michigan-university-journalism-professor-has-his-own-story-write>

²³ E.g. Mark Tushnet, *N-Word Issues Revisited, and the "Use-Mention" Distinction Questioned*, May 18, 2021, Balkanization Blog, <https://balkin.blogspot.com/2021/05/n-word-issues-revisited-and-use-mention.html>

²⁴ Janhvi Bhojwani and Nicole Acevedo, Georgetown Law Professor Resigns Over 'Insensitive Remarks' About Black Students, March 13, 2021, NBC News, <https://www.nbcnews.com/news/education/georgetown-law-professor-resigns-over-insensitive-remarks-about-black-students-n1261034>

²⁵ Student editors from different Georgetown law journals wrote and signed a public statement that supported the Georgetown Black Law Students Association, who had already called for action against Professors Sellers and Batson. The statement can be read here: <chrome-extension://efaidnbnmnibpcjpcglclefindmkaj/https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/03/Journals-Statement-of-Solidarity-Against-Actions-of-Sellers-Batson.pdf>

²⁶ This group was the Georgetown Law Center's Black Law Students Association. Its letter to the Georgetown Law Center's administration can be read here:

<https://twitter.com/GeorgetownBLSA/status/1369987100792213508/photo/1>

²⁷ Supra, note 24.

²⁸ SPLC on Campus: A Guide to Bystander Intervention, October 5, 2017,

<https://www.splcenter.org/20171005/splc-campus-guide-bystander-intervention>

²⁹ Clemson Student Health Services, Bystander Intervention,

<https://www.clemson.edu/studentaffairs/find-support/shs/divisions/healthy-campus/aspire-to-be-well/bystander-intervention.html>

³⁰ Alyssa Guzman, *Conservative judge abused at Stanford Law School says protesters told him they hoped his daughters would be RAPED, as it's revealed they were angry at him for misgendering transgender pedophile*, March 18, 2023, The Daily Mail,

<https://www.dailymail.co.uk/news/article-11875781/Judge-abused-Stanford-Law-School-say-protesters-told-hoped-daughters-RAPED.html>

³¹ Katherine Donlevy, *SUNY Albany Protesters March, Dance and Destroy Bible to Shut Down Conservative speaker Ian Haworth*, April 6, 2023, The New York Post,

<https://nypost.com/2023/04/06/suny-albany-protesters-try-to-halt-conservative-speaker-ian-haworth/>

³² Alec Regimbal, *Anti-Lia Thomas Activist Whisked Away by Police Amid Protest at San Francisco State*, April 7, 2023, SFGATE, <https://www.sfgate.com/bayarea/article/riley-gaines-speech-san-francisco-state-university-17884740.php>

³³ See generally *The Great Conversation: The Substance of a Liberal Education*, Robert Maynard Hutchins (1955).

³⁴ Matthew Yglesias, *The Great Awakening*, April 1, 2019, Vox,

<https://www.vox.com/2019/3/22/18259865/great-awakening-white-liberals-race-polling-trump-2020>

³⁵The Successor Ideology and the Threat to Our Freedoms (a podcast), June 13, 2022, WSJ Podcasts, <https://www.wsj.com/podcasts/opinion-free-expression/the-successor-ideology-and-the-threat-to-our-freedoms/af093a5e-4f8e-4697-a406-ac06673f09b2>

³⁶ See Jonathan Turley, *You're Triggering My Students": Hunter College Professor Trashes Pro-Life Display*, Res Ipsa Blog, May 21, 2023, for an illuminating list of cases involving professors acting as censors on campus.

³⁷ 2021 Free Speech Rankings, <https://reports.collegepulse.com/college-free-speech-rankings-2021>

³⁸ A photo of Central Michigan University's response on its Instagram page can be viewed here: <https://snworksceo.imgix.net/cml/1e9aa5ee-99a7-4e77-aac6-25f302997235.sized-1000x1000.jpg?w=779.17924925541>

³⁹ Supra note 22.

⁴⁰ Id.

⁴¹ Jason McGahan, *How a Mild-Mannered USC Professor Accidentally Ignited Academia's Latest Culture War*, Los Angeles Magazine, October 21, 2020, <https://www.lamag.com/citythinkblog/usc-professor-slur/>

⁴² Id.

⁴³ Id.

⁴⁴ Jessica Yeung, *USC Professor Under Fire After Using Chinese Expression Students Alleged Sounds Like English Slur*, September 10, 2020, CNN, <https://www.cnn.com/2020/09/10/us/usc-chinese-professor-racism-intl-hnk-scli/index.html>

⁴⁵ See letters to the Los Angeles Times's editor for letter examples of off-campus solidarity with Professor Patton: *A USC professor did not use a racial slur in his class — and he was punished anyway?*, September 10, 2020. <https://www.latimes.com/opinion/story/2020-09-10/usc-professor-did-not-use-a-racial-slur>

⁴⁶ Georgetown Law, *A Message to the Georgetown Law Community (Updated)*, Bill Treanor, March 21, 2021, <https://www.law.georgetown.edu/news/a-message-to-the-georgetown-law-community/>

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁰ Id. at 642.

⁵¹ Id. at 637.

⁵² David Lat, *The Full Audio Recording of Judge Kyle Duncan at Stanford Law*, March 15, 2023, Original Jurisdiction, <https://davidlat.substack.com/p/the-full-audio-recording-of-judge>

⁵³ Letter from Dean Jenny Martinez to Stanford Law School community, March 22, 2023, <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf>

⁵⁴ Id.

⁵⁵ Ian Howarth (@ighaworth), Twitter post, April 7, 2023, <https://twitter.com/ighaworth/status/1644428421781659648>

⁵⁶ Id.

⁵⁷ Matt Reigle, Outkick, *SFSU President: Riley Gaines Incident "Deeply Traumatic for Trans Community"*, April 13, 2023, <https://www.outkick.com/sfsu-president-riley-gaines-incident-deeply-traumatic-for-trans-community/>

⁵⁸ Thomas I. Emerson, *The System of Freedom of Expression* (1970).

⁵⁹ 354 U.S. 234 (1957).

⁶⁰ *Id.* at 250.

⁶¹ *See Supra*, note 58 at 6-7.

⁶² *Supra*, note 6 at 630.

⁶³ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L. J.* 877, 888 (1963).

⁶⁴ *Supra*, note 58 at 7.

⁶⁵ *Id.* at 6.

⁶⁶ *Id.*

⁶⁷ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁶⁸ Briefly Noted, November 28, 2011, *The New Yorker*, <https://www.newyorker.com/magazine/2011/11/28/emma-goldman>

⁶⁹ System page 7

⁷⁰ *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

⁷¹ Model Freedom of Expression Resolution Based on University of Chicago Statement, FIRE, <https://www.thefire.org/research-learn/model-freedom-expression-resolution-based-university-chicago-statement>

⁷² Chicago Statement University and Faculty Body Support, FIRE, <https://www.thefire.org/research-learn/chicago-statement-university-and-faculty-body-support>

⁷³ Chancey Boyce, *Series of Debates Revitalizes Adrian Campus Debate Culture*, April 16, 2022, *The College World*, <https://adriancollegeworld.wordpress.com/2022/04/16/series-of-debates-revitalizes-adrian-campus-debate-culture/>

⁷⁴ *Meriwether v. Hartop*, 992 F.3d 492, 503 (2021), an Ohio case, affirmed that professors are protected against speech compelled by the state.

NATHAN GOETTING
Professor of Criminal Justice & Jurisprudence
Adrian College
110 South Madison Street
Adrian, MI 49221
(517) 265-5161 x4021
ngoetting@adrian.edu

ACADEMIC POSITIONS

ADRIAN COLLEGE

Professor of Criminal Justice & Jurisprudence (with tenure) (2018-)
Associate Professor of Criminal Justice & Jurisprudence (with tenure) (2012-2018)
Assistant Professor of Criminal Justice and Jurisprudence (2009-2012)
Assistant Professor, Department of Sociology and Criminal Justice (2008-2009)

WESTERN MICHIGAN UNIVERSITY COOLEY LAW SCHOOL

Affiliate Professor (2022-)
Adjunct Professor (2011, 2012, 2013, 2015, 2021-2022)

UNIVERSITY OF DETROIT MERCY SCHOOL OF LAW

Adjunct Professor of Law (2012, 2015, 2017, 2018, 2019, 2020, 2021, 2022) (Taught research-based substantive law courses, most of which satisfied the law school's upper-level writing requirement)

UNIVERSITY OF TOLEDO COLLEGE OF LAW

Lecturer in Law (2016, 2018, 2019, 2020, 2022) (Taught research-based substantive law courses that satisfied the law upper-level writing requirement)

AQUINAS COLLEGE

Associate Adjunct Professor of Philosophy and Political Science (Summer: 2011)
Assistant Adjunct Professor of Philosophy and Political Science (Summer: 2007)

GRAND VALLEY STATE UNIVERSITY

Visiting Assistant Professor of Philosophy (2007-2008)
Adjunct Instructor of Communications (2004-2010)
Adjunct Instructor of Criminal Justice (2008)
Adjunct Instructor, Community Working Classics Program (2005-2006)
Adjunct Instructor of Philosophy (2003-2006)

LEWIS AND CLARK COMMUNITY COLLEGE

Adjunct Instructor of Philosophy (Summer: 2000)

SOUTHWESTERN ILLINOIS COLLEGE

(FORMERLY BELLEVILLE AREA COLLEGE)

Adjunct Instructor of Philosophy (Spring: 1999)

EDUCATION

WESTERN MICHIGAN UNIVERSITY COOLEY LAW SCHOOL

Juris Doctor (Constitutional Law and Civil Rights Concentration), 2007

Directed Study: "A Perfect Peace Too Horrible to Contemplate: Justice Holmes and the Perpetual Conviction of Eugene Victor Debs" (Supervised by Philip J. Prygoski)

Directed Study: "Kelo and its Malcontents." (Supervised by Paul J. Carrier)

Certificate of Merit: Jurisprudence

Certificate of Merit (best paper): Federal Indian Law

Certificate of Merit (best paper): Gun Control Seminar

Research Assistant for Philip J. Prygoski (Teaching Assistant Duties) (Fall: 2006)

Intern, Innocence Project (2006)

WESTERN MICHIGAN UNIVERSITY

Master of Arts, Philosophy, 1998

Teaching Assistant for Joseph Ellin (Fall: 1997)

AQUINAS COLLEGE

Bachelors of Arts in General Education, 1997

Magna Cum Laude

COURSES TAUGHT

GRADUATE

Advanced Wrongful Conviction Seminar (Four Sections)

Advanced Death Penalty Seminar (Three Sections)

Advanced Criminal Procedure & the Constitution (Nine Sections)

Advanced Legal Theory (Two Sections)

Legal Research Methods (Two Sections)

Criminal Justice Thesis Defense (Three Sections)

Civil Liberties Seminar (Six Sections)

Advanced Topics in Criminal Justice: Criminal Sentencing & The Constitution

Advanced Topics in Criminal Justice: Sex Crimes & the Courts (Two Sections)

Advanced Topics in Criminal Justice: Custodial Interrogations

Advanced Topics in Criminal Justice: National Security & Subversive Advocacy

Advanced Topics in Criminal Justice: Juvenile Justice & the Constitution

Advanced Topics in Criminal Justice: Advanced Legal Research Methods

Advanced Topics: Government Repression of the Industrial Workers of the World from 1905-1930

Systems Theory and Communication (Three Sections)

Ethics

LAW SCHOOL

Wrongful Convictions Seminar: Making a Murderer II (Two Sections)
Death Penalty in the U.S. (Two Sections)
Death Penalty Seminar
Seminar: Death Penalty
Seminar: Police Interrogations & the Constitution
Seminar: Sex Crimes & the Courts
Seminar: Wrongful Convictions
First Amendment (Two Sections)
First Amendment Seminar: Free Speech during Times of War and Conflict (Three Sections)
Constitutional Law Seminar: Obscenity
Constitutional Law Seminar: The First Amendment during Times of War and Conflict
Constitutional Law Seminar: The System of Freedom of Expression
Selected Topics in Constitutional Law: First Amendment Seminar
Jurisprudence (Two Sections)
Federal Indian Law (Three Sections)

EXPERIENTIAL LEARNING

Advanced Practicum (Graduate) (Seven Sections) (Including Judicial)
Teaching Apprenticeship
Research Assistant (Six Sections)
Criminal Justice Internship (Numerous Sections) (Mostly Judicial)
Elective Internship (Numerous Sections) (Mostly Judicial)

400-LEVEL

Wrongful Conviction Seminar (Four Sections)
Death Penalty Seminar (Four Sections)
Communications Ethics (Two Sections)
Rights Theory and Civil Liberties
Freedom of Expression and Crime
Critical Theory of Society (Two Sections)
Honors Capstone

300-LEVEL

Constitutional Law I: Powers of Government (Five sections)
Constitutional Law II: Individual Liberties (Five sections)
Criminal Procedure & the Courts (12 sections)
Criminal Law (17 Sections)
Civil Liberties (Two Sections)
American Courts (Two Sections)
The War on Terror and the Courts
Law School, Criminal Law & Evidence
Ethics in the Professional Life (Two Sections)

Constitutional Rights and Civil Liberties
Theories of Human Nature
Philosophy of Religion
Great Medieval Philosophers

200-LEVEL

Introduction to Jurisprudence
Legal Research and Case Analysis (Four Sections)
Honors Pre-Professional Scholar
The Law of Sex Discrimination
Critical Interpretation (Communications) (Two Sections)
Contemporary Moral Problems

100-LEVEL

Introduction to Sociology and Social Problems (Five Sections)
Introduction to Philosophy (Four Sections)
Introduction to Film
Introduction to Constitutional Law
Ethics (12 Sections)
Logic

INTERNSHIP PLACEMENT AND OVERSIGHT

United States District Court for the Eastern District of Michigan
Innocence Project (Thomas M. Cooley Law School)
Lenawee County (MI) Circuit Court
Lenawee County (MI) District Court
Lenawee County (MI) Probate Court
Lenawee County (MI) Prosecutor's Office
Lenawee County (MI) Public Defender's Office
Hillsdale County (MI) Prosecutor's Office

TEACHING AWARD

Adrian College, Ross Newsome Outstanding Teaching Award. Faculty-wide for excellence in teaching. 2022.

EDITORSHIPS

Articles Editor, *National Lawyers Guild Review* (2019-2020)

Editor-in-Chief, *National Lawyers Guild Review* (formerly *Guild Practitioner*) (2010-2019)

--Authored or co-authored preface to every issue

Editor-in-Chief, *Guild Practitioner*, National Lawyers Guild Journal of Theory and Practice (2009-2010)

--Authored preface to every issue

Interim Editor-in-Chief, *Guild Practitioner*, National Lawyers Guild Journal of Theory and Practice (2009)

--Authored preface to every issue

Editorial Board Member, *Guild Practitioner*, National Lawyers Guild Journal of Theory and Practice (2008-2009)

PUBLICATIONS

Innocence is not Enough Without Good Counsel, Discourse Magazine, February 13, 2023; <https://www.discoursemagazine.com/culture-and-society/2023/04/10/innocence-is-not-enough-without-good-counsel/>

Prosecutors Shouldn't Be Above the Law, Discourse Magazine, February 13, 2023; <https://www.discoursemagazine.com/culture-and-society/2023/02/13/prosecutors-shouldnt-be-above-the-law/>

Snitches Get...Rewards, Discourse Magazine, January 17, 2023; <https://www.discoursemagazine.com/culture-and-society/2023/01/17/snitches-get-rewards/>

The Supreme Court Can Substantially Reduce the Number of False Confessions, Discourse Magazine, December 1, 2022; <https://www.discoursemagazine.com/culture-and-society/2022/12/01/the-supreme-court-can-substantially-reduce-the-number-of-false-confessions/>

The Supreme Court is Doing Nothing to Reduce Wrongful Convictions: Eyewitness Misidentification is the Leading Cause of Wrongful Convictions. Yet the Supreme Court is Doing Nothing to Solve the Problem. Discourse Magazine, October 11, 2022; <https://www.discoursemagazine.com/culture-and-society/2022/10/11/the-supreme-court-is-doing-nothing-to-reduce-wrongful-convictions/>

The Supreme Court's Actual Innocence Problem, Discourse Magazine, September 29, 2022; <https://www.discoursemagazine.com/culture-and-society/2022/09/29/the-supreme-courts-actual-innocence-problem/>.

The Furman Filtration Problem: Why the Death Penalty Will Always be a Cruel and Unusual Punishment, The University of Toledo Law Review, 53 U. Tol. L. Rev. 407 (2022).

A First Amendment Giant Offers a Way Out of Our Free Speech Crisis, Discourse Magazine, April 14, 2022; <https://www.discoursemagazine.com/ideas/2022/04/14/a-first->

amendment-giant-offers-a-way-out-of-our-free-speech-crisis/
Revised and Abridged version of *Our Emersonian First Amendment*, listed below.

Our Emersonian First Amendment, Published on the Grand Valley State University Koeze Business Ethics Initiative website, January 13, 2022;
<https://www.gvsu.edu/seidman/ethics/module-news-view.htm?siteModuleId=9C6681B1-92E9-F4F1-7B4DF17EDBE5D2DC&storyId=5165E280-0A92-DF0C-602FB8F4F642B401>

Flowers and False Promises: What to Expect After the Supreme Court's Latest Ruling on Race and Jury Selection, MONOGRAPH SERIES, NATIONAL ASSOCIATION OF AFRICAN AMERICAN STUDIES AND AFFILIATES, 897 (2020).

The Second Amendment Hustle, 77 Nat'l Law. Guild Rev. 45. (2020).

Putting Scalia in Perspective, co-authored with David Gespass and Meredith Osborne, 73 Nat'l Law. Guild Rev. 245 (2016).

More than Just the Last Gay Marriage Case, 72 Nat'l Law. Guild Rev. 55. (2015)

Moral Panic over Sex Offenses Results in Cruel and Self-defeating Overpunishment, Published in Collateral Consequences Resource Center, January 16, 2015, <http://ccresourcecenter.org/2015/01/16/moral-panic-sex-offenses-results-cruel-self-defeating-overpunishment/>. Excerpted from the preface to 71 Nat'l Law. Guild Rev. No. 3 (2014).

Gay Marriage is a Fundamental Right, 70 Nat'l Law. Guild Rev. 137 (2013).

Racism by Degrees: Fisher v. University of Texas and the Fate of Diversity in American Education, MONOGRAPH SERIES, NATIONAL ASSOCIATION OF AFRICAN AMERICAN STUDIES AND AFFILIATES, 1305 (2013).

Thomas I. Emerson: Brave During the Scare, 69 Nat'l Law. Guild Rev. 146 (2012).

The National Defense Authorization Act: Battlefield Earth, 68 Nat'l Law. Guild Rev. 247 (2011).

Mega-Corporatism and the Authoritarian State, 67 Nat'l Law. Guild Rev. 125 (2010).

On The Torture Lawyers, 66 GUILD PRAC. No. 1 (2009). Used as Preface.

Red Cloud's Mark: When Peace Treaties Become Weapons of Mass Destruction, MONOGRAPH SERIES, NATIONAL ASSOCIATION OF AFRICAN AMERICAN STUDIES AND AFFILIATES, 997 (2011).

The Marshall Trilogy and the Constitutional Dehumanization of American Indians,

65 GUILD PRAC. 207 (2008)
Republished: 21 Indigenous Policy Journal No. 3 (2010).

On White Scholars Teaching Federal Indian Law, 65 GUILD PRAC. 204 (2008).
Republished: MONOGRAPH SERIES, NATIONAL ASSOCIATION OF AFRICAN
AMERICAN STUDIES AND AFFILIATES, 282 (2011).

**A Perfect Peace Too Horrible to Contemplate: Justice Holmes and the Perpetual
Conviction of Eugene Victor Debs**, 63 GUILD PRAC. 135 (2006).

**BOOK REVIEW: *Freedom for the Thought That We Hate: A Biography of the First
Amendment* by Anthony Lewis.** 66 Nat'l Law. Guild Rev. 176 (2009).

CONFERENCE PRESENTATIONS AND INVITED TALKS

“Does Free Speech Need Limits? A Debate on how Free Speech Should Be Understood
in our Times.” Debater. Grand Valley State University. Seidman College of Business.
Koeze Business Ethics Initiative. October 14, 2022.

“Constitutional Rights and Liberties: What is Left After COVID-19?” Debater.
Sponsored by the Toledo Chapter of the Federalist Society. April 28, 2022.

“Capital Punishment: Does the Death Penalty Violate the Eighth Amendment?” Debater.
University of Toledo College of Law. Sponsored by the Federalist Society and the
National Lawyers Guild. October 12, 2021.

“Social Media, Free Speech, and the Disinformation Age: Against Paperless Book
Burning and Toward an Emersonian Vision of Radically Free Online Speech.” Presenter.
Grand Valley State University Koeze Business Ethics Initiative Speakers Series. April 9,
2021.

“Flowers and False Promises” (On Racist Jury Selection in Criminal Cases). Presenter.
National Association of African American Studies Annual Conference. February 18,
2020.

“Is Everything Criminal?” Debater. University of Toledo College of Law. Sponsored by
the Criminal Law Society and the Federalist Society. February 13, 2020.

“Assault Weapons Ban, or Assault on the Second Amendment?” Debater. University of
Toledo College of Law. Sponsored by the Federalist Society. November 6, 2019.

“Debating the Constitution.” Debater. Gerald R. Ford Presidential Library (Sponsored by The Hauenstein Center for Presidential Studies at Grand Valley State University), September 14, 2017.

“Community Forum to Discuss Police Use of Force.” Panel discussant. Adrian College Institute for Ethics, Adrian College. March 31, 2015.

“Ethics, Constitutional Law, and the Hobby Lobby Case.” Invited speaker. Koeze Business Ethics Initiative Event, Grand Valley State University, September 30, 2014.

“Blinding the All-seeing Eye: Reclaiming the Right to Privacy in the Digital Age.” Invited Speaker. Business Ethics Center, Grand Valley State University, March 24, 2014.

“Radical History of Working Together: The *National Lawyers Guild Review*’s 75th Anniversary Issue.” Panel Discussant. Inter-generational Roundtable at the National Lawyers Guild Annual Convention, October, 25, 2013.

“The History of Marriage Equality before the United States Supreme Court.” Invited speaker/panel discussant. Thomas M. Cooley Law School Constitution Day Event, September 20, 2013.

“The National Defense Authorization Act: Battlefield Earth.” Presenter. Academy of Criminal Justice Sciences Annual Meeting. March 20, 2013.

“Racism by Degrees: Fisher v. University of Texas and the Fate of Diversity in American Higher Education.” Presenter. National Association of African American Studies Annual Conference, February 14, 2013.

State Bar of Michigan Professionalism in Action Ethics Roundtable, Thomas M. Cooley Law School. Discussion Leader. September 6, 2011.

Law School Discernment Process: Considerations before Law School. Panel discussant. University of Detroit-Mercy College of Law and Council for Legal Education Opportunity. March 4, 2011

“On White Scholars Teaching Federal Indian Law.” Presenter. National Association of Native American Studies Annual Conference, February 17, 2011.

“Capitalism or Community?” Panel discussant. Business Ethics Center, Grand Valley State University. January 24, 2010.

State Bar of Michigan Professionalism in Action Ethics Roundtable. Panel discussant. Thomas M. Cooley Law School. Discussion Leader. September 2, 2010.

“Taking Rights Unseriously: The Many Injustices of the Constitutional Harmless Error Doctrine.” Presenter. Community Working Classics Program at Grand Valley State University. December 4, 2009.

“On Being Human under the Constitution.” Presenter. Adrian College Institute for Ethics. November 5, 2009.

“Red Cloud’s Mark: When Peace Treaties Become Weapons of Mass Destruction,” National Association of Native American Studies Annual Conference, February 9, 2009.

“Free Speech and the Evolving Jurisprudence of Oliver Wendell Holmes,” Philosophy Department Colloquium, Grand Valley State University, Fall 2007.

RESEARCH AWARD

Adrian College. Creative Activity, Research, and Scholarship Award (faculty-wide for best contribution to one’s field). For scholarship on the Supreme Court’s Same-sex Marriage Jurisprudence. 2016.

SUPERVISED RESEARCH

LAW REVIEW FACULTY ADVISOR

The University of Toledo Law Review, 2021-2022.

MASTERS THESIS COMMITTEE CHAIR

“Subversive Advocacy: Assessing the Supreme Court’s Response during Two Eras of Panic.” Kaycee Berente. 2016.

“Swaying the Theoretical Pendulum: From a Due Process Model to a Perpetual Militarized Crime Control Model for Combating Terrorism.” Christopher Kimball. 2013.

“The Authoritarian Presidency: How Signing Statements and Other Measures Have Emboldened the President to Write the Law to his Own Will.” Jeffrey LeRoy. 2013.

MASTERS THESIS COMMITTEE MEMBER

“Judicial Activism, Judicial Restraint, and the Polarization of the Supreme Court,” Nicole Olson, 2022.

“Youth Delinquency Based on Parental Gender Roles,” Victoria Harshman. 2020.

“Perceptions of Offenders who were Victims of Crime.” Courtney Carter. 2019.

“Where do Americans Draw the Line? Public Perception of Civil Liberties and National Security.” Alyssa Graff. 2019.

“Establishing Police Legitimacy through Procedural Justice.” Carlin O’Malley. 2018.

“The Impact of Use of Force on Police-Community Relationship.” Miccoy Drzewiecki. 2018.

“Juveniles’ Awareness of Legal Rights and Understanding of Legal Process.” Donna Dickerson. 2014.

“Police Use of Force as a Product of Human Ecology.” Brian Lunn. 2014.

“Juveniles’ Awareness of Legal Rights and Understanding of Legal Process.” Donna Dickerson. 2014.

UNDERGRADUATE HONORS CAPSTONE ADVISOR

“Race and Revolutionaries: How Racial Identity Has Determined the Legacy of Nat Turner and John Brown.” Chelsea Easter. 2010. Published in *National Association of African American Studies 2011 Annual Monograph Series*, 706-724.

SERVICE ACTIVITIES AT ADRIAN COLLEGE

Director, George Romney Institute for Law and Public Policy (2010-2013, 2014, 2020-)

--Directed Adrian College Pre-law Program

--Established and Directed Annual Constitutional Day Address on Campus

--Established and Directed Monthly Lectureship Series (2010-2013)

Faculty Representative to the Board of Trustees for Academic Affairs (2018-)

Academic Status Review Committee (2013-2014, 2016-) (Hearing appeals from students who have been academically dismissed)

National Collegiate Athletic Association Faculty Representative (2020-2021)

Faculty Co-Advisor, American Civil Liberties Union Club (2017-2020)

Faculty Liaison/Special Assistant Coach, NCAA Wrestling Team (2014-2020)

Library Advisory Committee (2013-14)

College Environment Committee (2008-2010, 2015-2016)

Honors Committee (2010-2015)

Chair, Department of Sociology & Criminal Justice (2011-14, 2020)

--Co-authored Master of Arts in Criminal Justice Program accredited by The Higher Learning Commission of the North Central Association (2012)

--Chaired Sociology Faculty Search Committee (2011-2012)

--Chaired Criminal Justice Faculty Search Committee (2011-2012)

Pre-Law Club Adviser (2008-2014)

Ad Hoc peer-review Committee (Formed to assist Peer-review Committee) (2014)

Peer-review Committee (Evaluating applications for tenure and promotion and conducting periodic review) (2012-13)

Director of Public Safety Search Committee (2012)

Lieutenant, Public Safety Search Committee (2012)

Graduate Policy Committee (2012-2013)

Internship Committee (2010-2013)
Strategic Planning Committee for Student Life (2010-2011)
Alpha Phi Sigma (Criminal Justice Honors Fraternity) Advisor (2010-2012)
Creativity Committee (2010-2011)
Ronald E. McNair Post-Baccalaureate Achievement Program Mentor (2009-2010)
Pre-Law Committee (2008-2009)

Seidman College of Business - Koeze Business Ethics Initiative

News

OUR EMERSONIAN FIRST AMENDMENT: AN ESSAY BY NATHAN GOETTING

January 13, 2022



By Nathan Goetting

Professor of Criminal Justice & Jurisprudence

Adrian College

OUR EMERSONIAN FIRST AMENDMENT

We're in the midst of a free speech crisis. The First Amendment to the U.S. Constitution, as we've come to know it over the past century, is in trouble.

Our relationship with our own free speech principles has always been more aspirational than actualized. Over the past century the censorial periods like the McCarthy era, COINTELPRO during the Vietnam War, and the federal government's overreaction to 9/11 resulted in repressive legislation, surveillance, and censorship that challenged our resolve as a nation committed to freedom of conscience and expression. However, after each of these temporary panics, we eventually came to our senses and reverted back to our liberal ideals. Joseph McCarthy was censured by the U.S. Senate and died in disgrace. Vietnam draft dodgers were pardoned by President Jimmy Carter. Adversarial journalists won Pulitzer Prizes for reporting on the illegal surveillance networks put in place after the attacks of 2001. The changes were scary but not permanent.

Today's free speech crisis might be different. Those of the past involved a failure to live up to our ideals. Lately we've begun to lose faith in them altogether.

The problems stem from two causes. The first has always been with us and, given human nature, always will be. The second is unprecedented and, like a political whirlwind, is beginning to wipe free speech from the landscape.

1) Free Speech is Unnatural and Counter-intuitive

The idea that every citizen should be allowed to think as he wishes, and speak what he thinks, is among the most revolutionary in history. As a political and legal principle, it's downright bizarre. Even among the most liberal and permissive nations on earth, it's never really been tried. Freedom of Expression, as developed by the Supreme Court over the past century, ranks up there with "turn the other cheek" as a radical and difficult-to-follow moral and political ideal.

One of the core functions of government is to punish harmful conduct. Citizens expect that from the state and get anxious when that expectation isn't met. For that reason, every western nation has a lengthy criminal code. In a well-functioning criminal justice system, the government is most determined to punish conduct that it's most certain causes harm. Conduct whose harmfulness is in question, like marijuana possession or exploding certain types of firecrackers, might be punished reluctantly or not at all. The severity of a punishment usually exists in proportion to the amount of harm caused. The most serious crimes, murder, rape, kidnaping, and so on, are those that the government is certain will cause a lot of harm. Peoples expect their governments to zealously act to rid these behaviors from society. It's an inclination derived from our most primitive and urgent instinct—self-preservation.

Those who argue that such fearful conduct should go unpunished, or perhaps even just treated a little more leniently, naturally arouse fear and invite suspicion. They're condemned as either being indifferent to the harm the conduct causes, more ominously, carrying a hidden desire to engage in it themselves. Imagine someone who strongly advocates for the decriminalization of dogfighting, for example. Or someone convinced that the laws punishing peeping toms are actually unfair, when you think about it. What instinctive reactions would most have when hearing those opinions, do you think?

These truisms apply to speech, as well. Western democracies may be permissive in countless other ways, but only the United States has anything like a First Amendment protecting the expression of harmful ideas. Canada, for example, has enacted a series of criminal laws proscribing "hate speech," the violation of which can be years in prison.

Danish human rights activist Jacob Mchangama has written with alarm that Germany's online censorship regime—implemented under the Network Enforcement Act of 2017 and known as the "Digital Berlin Wall"—is finding eager imitators around the world, in democracies and autocracies alike. In every corner of the globe, it seems, states regard an unregulated internet, chock-full of offensive ideas and pictures, as an intolerable threat. (That any government, but especially the German government, is confident enough in its own omniscience and moral standing to punish "hate speech" and "misinformation" is an irony perhaps you'll join me in savoring.) Because the Canadian and German governments are convinced that hate speech and misinformation cause harm, they do what comes naturally and intuitively—they punish it.

Our First Amendment stands foursquare against these impulses. It presumes, *requires*, actually, a shared national conviction that the short term harms concomitant with tolerating harmful speech—by liars, racists, perverts, terrorists, the entire parade of horrors—are ultimately

redeemed by long term benefits that will make us a freer, happier, and more advanced society. To enjoy these benefits, we must constantly work to defeat our urge to silence ideas we hate. As Justice Oliver Wendell Holmes, Jr. once put it:

To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas...

This is a daunting task. The First Amendment flatters us with the presumption that our capacity for reason, resilience, and delayed self-gratification is strong enough to remove the coercive power of the state from our intellectual, social, and political disputes. No other nation on earth has dared give human beings so much credit.

This radically libertarian interpretation of the First Amendment didn't fully emerge until, in the midst of patriotic war fever, congress passed laws punishing anti-war speech so severely that two Supreme Court justices, the aforementioned Holmes and Louis Brandeis, began to worry that their enforcement was changing our identity as a nation. The Espionage Act of 1917 and the Sedition Act of 1918 put anti-war speakers around the nation in prison, many, including presidential candidate Eugene V. Debs, with sentences of ten or more years. After originally voting to uphold them, these two Harvard intellectuals eventually realized that what valued most about America—our democratic governance, individual liberties, the bustling exchange of ideas—seemed to be put in jeopardy by these laws. For many years they wrote mostly in dissent, but ultimately Holmes and Brandeis would convince the Court, and ultimately the public, that tolerating political dissent was a principle of "Those who won our independence" and at the core of America's greatness. They urged us to take pride in having the courage to embrace "freedom for the thought that we hate."

The Supreme Court overturned the criminal conviction of a political radical for the first time on free speech grounds in 1927. Since then free speech, even for the most hated among us, has become a distinguishing feature of our national self-definition. In the 1989 case of *Texas v. Johnson*, for instance the Supreme Court ruled that a protesting anarchist in Texas, tailor-made for a 20-year prison sentence in 1919, had a First Amendment right to publicly burn an American flag in opposition to the government. In his opinion for the Court, Justice William J. Brennan, Jr.

wrote that the majority of Americans who are offended by the sight of an intentionally burned American flag have a remedy: they are free to wave their own. This is America, after all.

The Court continues to protect these speakers, even though the rage and psychic harm they cause can be substantial. For instance, in 1992 the Court overturned the conviction of a Ku Klux Klan leader who had burned a cross in view of motorists and other onlookers along a public highway during a gathering. The sight of the fiery cross understandably bothered one of the witnesses in the case. Historically burning crosses have presaged horrific acts of violence and this type of symbolic expression could create a reasonable fear of bodily harm. However, the Court ruled in *Virginia v. Black* that the state law presuming that crossburning conveys an intent to intimidate violated the First Amendment and struck it down, overturning the Klansman's conviction.

A more recent case involved an energized gaggle of cultists known as the Westboro Baptist Church. To maximize publicity for their church, members protested outside the funeral of a marine killed in action by carrying signs with insulting, provocative messages on them intentionally designed to shock and cause emotional distress. "God Hates You" and "Thank God for Dead Soldiers" were among the tamest. The dead marine's father successfully sued them and won a large amount in damages. The United States Court of Appeals for the Fourth Circuit reversed the judgement and the Supreme Court upheld the reversal. Quoting Justice Brennan's opinion in another case, Chief Justice John Roberts reminded us that "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" And for that reason "What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous."

For the past few generations our case law has been replete with such cases. It's extraordinary. In case after case the Court has made it clear that even ideas that cause great pain and attack the values we hold dearest—ideas that the vast majority would have silenced--must be tolerated.

Our faith in this unique "experiment" in freedom of expression, as Justice Holmes called it in a dissent attacking the Sedition Act of 1918, may have reached its zenith, however, in 1969 when the Court unanimously overturned the conviction of another Klansman, Clarence Brandenburg. Amid a torrent of racist nonsense, Brandenburg threatened to take his band of masked and armed would-be marauders to Washington D.C. and take "revenge" against the federal government that, he claimed, had become hostile to whites like himself. *Brandenburg v. Ohio* overturned the last of the repressive World War I-era precedents and implemented a new rule,

largely derived from the opinions of Holmes and Brandeis, that made it nearly impossible for the government to punish politically subversive speech.

A year after the Court's ruling in *Brandenburg*, a Yale professor named Thomas I. Emerson published a massive tome titled *The System of Freedom of Expression*. In it he interprets and synthesizes countless judicial opinions as part of an effort to explain how and why, for the first time in world history, a great nation had become committed to this great experiment in freedom of conscience and expression. Emerson explains, with grand vision and in granular detail, the benefits of tolerance, how the harms created by dangerous speakers can be minimized without censorship, and crucial role the Supreme Court plays as a check against the natural inclinations toward censorship that exist throughout the rest of society.

Free speech provides four types of benefits. Emerson call them "premises." For reasons of clarity and brevity, I'm going to describe them with titles he never used but I hope he wouldn't have minded.

1. The Socratic Benefit: Freedom of expression is "an essential process for advancing and discovering truth," Emerson writes. It is indispensable to intellectual advancement. To distinguish truth from falsity one must be able to consider every claim and interrogate, wherever facts and reason dictate, until even the most curious minds are satisfied. Even false or pernicious claims can often be instructive by compelling reexamination and reinforcing old beliefs with new confidence. (Ridiculous ones can simply be ignored.)

It's this premise that animates Justice Oliver Wendell Holmes's storied "marketplace of ideas" theory of the First Amendment. "[T]he best test of truth," Holmes tells us, isn't adoption or approval by the state but "the power of the thought to get itself accepted in the competition of the market...That at any rate is the theory of our Constitution." The First Amendment prioritizes truth-seeking above other social interests, however important, by prohibiting the government from interfering with the free exchange of ideas. "This is the method of the Socratic dialogue employed on a universal scale," Emerson wrote in an article foreshadowing his great treatise.

Emerson has a simple answer to the current trend toward censoring online "misinformation"—regarding elections, vaccines, or anything else. "Discussion must be kept open no matter how certainly true an accepted opinion may seem to be." In 1610 the Italian Astronomer Galileo Galilei invented the telescope. Shortly thereafter he published a paper that literally turned the

solar system inside-out. By showing that the earth orbited the sun rather than vice-versa, he contradicted centuries of orthodox teaching supported by church and state. For spreading this dangerous “misinformation” Galileo spent the rest of life under house arrest. Our Emersonian First Amendment removes all constraints from attempts to answer life’s important most questions.

2. The Aristotlean Benefit: The First Amendment recognizes the natural capacity for creative greatness in human beings by protecting artistic and expressive talents. Aristotle thought of human beings as rational animals who, as they develop their talents, move from a state of potential to actual happiness. Sharing our honest thoughts and feelings with one another, in every medium but especially through works of artistic expression, is a necessary condition for individual flourishing. Free speech is a natural human right and censorship is an “affront to the dignity” of the individuals being silenced, Emerson writes. Silencing poets, musicians, filmmakers or anyone else expressing himself blocks the personal development of the speaker—and the listener—from realizing his potential for happiness. “For the achievement of this self-realization the mind must be free.”

3. The Jeffersonian Benefit: The boldest philosophical claim in Thomas Jefferson’s Declaration of Independence is that governments “derive their just powers from the consent of the governed” and that any government that doesn’t deserves to be overthrown. By adopting the Declaration, the Continental Congress insisted on a redefinition—an inversion—of the traditional understanding of state authority. Instead of British subjects, accountable to a king, Americans had decided that they would be American citizens, whose government would be accountable to them. The essence of democracy—even an indirect and often limited one, as would be created a few years later by our Constitution—is self-governance.

Meaningful citizenship—educated voting, reviewing policy, scrutinizing public officials—requires free and ready access to information and the ability to freely discuss politics with fellow citizens. According to Justice Brennan’s landmark opinion for the Court on this topic and quoted by Chief Justice Roberts in *Snyder v. Phelps*, “debate on public issues should be uninhibited, robust, and wide-open...” so that the truth-seeking function benefit of the First Amendment can aid the democratic process. Self-governance requires that the state be transparent and that discussion about its activity be unimpeded.

4. The Emma Goldman (“Safety Valve”) Benefit: The federal government hated early twentieth century anarchist Emma Goldman. J. Edgar Hoover reportedly called her “the most dangerous

woman in America.” Law enforcement chased, harassed, jailed, and ultimately deported her. She was a fanatic for the cause of individual rights, particularly for workers, immigrants, women and other oppressed classes. No matter what the state did—and it did a lot over the years—she refused to be stopped.

She was a tireless public speaker. She travelled the nation for decades, captivating audiences and angering authorities by proselytizing her anti-government (and pro-free speech) beliefs. With the passage of the Espionage and Sedition Acts, described above, which made her anarchist and anti-war views officially criminal, she raged harder against the government that, she was convinced, was now expressly persecuting her and her comrades. For Goldman, the choice between complying with censorship laws and becoming a criminal was no choice at all. She was promptly arrested, imprisoned, convicted and deported to her native Russia. As the government continued to limit legal opportunities for anarchists like Goldman to express themselves, they made themselves heard through lawless conduct. While Goldman’s resistance seems to have been limited to speech, many on the militant fringe of the movement, now part of a criminal underground, resorted to bombings and other acts of terrorism.

This is the common psychology of members of radical political groups. While censorship may cause the less fervid to conform, this isn’t usually the case with the more zealous. Instead, it tends to reinforce their sense of unjust persecution. The transition from activist to terrorist, words to violence, can be swift.

The First Amendment promotes peace and stability by giving those with unpopular political views the opportunity to non-violently blow off steam. “[P]eople are more ready to accept decisions that go against them if they have a part in the decision-making process,” Emerson explains.

However, while the potential for violence diminishes, the psychic harm caused by protecting these speakers can be particularly severe, as with the Westboro Baptist Church, flag burning, and Klansmen cases described above. Moreover, if unchecked, these speakers might spread convince recruits and metastasize their message. To prevent the spread of bad ideas, the First Amendment allows for two remedies

First, while expression must always be tolerated, harmful conduct needn’t ever be. The government is always free—duty bound, even—to punish those who attempt to advance their dangerous ideas with criminal activity. For instance, tweeting that protesters should resist

arresting police officers might be protected speech, but protesters who enact that advice by actually punching cops can be convicted and sent to jail.

Second, there is counter-speech. There is no surer way to halt the impact of a bad idea than by using reason and evidence to replace it with a good one. If someone finds a belief to be harmful or dangerous the First Amendment gives him the right to harness his contempt into an attempt to convince his fellow citizens not to adopt it. This type of political activity isn't just helpful, it's essential to the realization of the First Amendment's Socratic and Jeffersonian purposes. "The greatest menace to freedom," Justice Louis D. Brandeis writes, "is an inert people."

This Emersonian First Amendment is at war with human nature and, for that reason, is always under threat. Our federal courts are composed of judges with life tenure whose mandate is to protect individual liberties, including freedom of expression. They are in a constant struggle with the political branches of government, who are more responsive to the censorial instincts of voters. Free Speech rights usually exist in direct proportion with the Court's determination to protect them.

2) Continued Political Polarization Is Sure to Kill Freedom of Expression

Since Donald Trump's capture of the Republican Party in 2016 the U.S. has been bifurcating into two angry and epistemically closed monocultures, red and blue, largely defined by their hostility toward one another. The past two presidential elections have resulted in the losing candidate's party challenging the victor's legitimacy as a fairly elected leader. Leading Democrats claimed President Trump's 2016 electoral victory was the result of "collusion," if not outright treason, with Russia. For years they promoted this view in media and most of that party's controlling faction still seems convinced of it. The Democratically controlled House of Representatives impeached Trump twice, unprecedented in U.S. history, after nearly completely partisan votes. On the other side, President Trump himself still leads the Republican party and continues to insist that the 2020 election was "stolen" from him. Such internecine rancor hasn't existed since the Civil War.

Each side is developing its own political, media, and social institutions inside of which of sympathy for ideological opponents is unwelcome and punished with shaming and exile. To unite in a common commitment to understand one another by engaging in public discussion and good-faith debate is to harm society by "platforming" and to "legitimizing" dangerous persons and

ideas.

The divide isn't just political. It's begun to suffuse every aspect of American life, even public school board meetings. Large areas of civil society that before 2015 had at least been nominally non-partisan and non-ideological, like journalism, academia, Wall Street, and Silicon Valley have picked sides. Angry people are always more certain and less curious. Everywhere there is less truth-seeking and more truth-preaching.

Republicans in the pre-Trump era would often appear on MSNBC and CNN, Democrats on Fox News. Not anymore. Newspapers and cable news networks have picked sides and they understand that the challenging, instead of repeatedly reinforcing, the views of their audience will cost them ratings. The gratification that comes from confirmation bias controls the content. Blue state universities are firing professors for uttering previously uncontroversial terms and phrases in class and letting their students heckle and harass guest speakers with unpopular opinions. They forget, or perhaps have chosen not to appreciate, that no two words are exactly alike. Each embodies a unique idea. Progressing societies expand, rather than contract, their vocabularies. To delete words from our collective lexicon, regardless of context and even when used in the spirit of inquiry, is to destroy the building blocks with which great literature and, through it, self-understanding is built. It calls the very purpose of the university into question.

Meanwhile, with equal contempt for academic freedom, red state legislatures are banning "critical race theory" from public school curricula. To both sides, winning is becoming more important than learning.

Instead of a shared national commitment to the benefits of freedom of expression, cultural leaders on both sides have, to use Orwell's term, begun to function as "orthodoxy-sniffers." They police their tribe's ideological borders, using public humiliation, firings, and other forms of "cancellation" to their own tribe in line and the other at bay.

Both sides have already begun openly advocating for formal speech controls, each saying the understanding of the First Amendment we've grown accustomed to is incapable of thwarting the special dangers posed by the other.

Columbia University Law Professor Timothy Wu, a "Special Assistant" to President Joe Biden, has argued that the traditional liberal understanding of the First Amendment "obsolete," a view that is rapidly becoming something close to Democratic Party orthodoxy. Because, for now, the Roberts Court can be relied on to enforce the First Amendment's prohibition on direct government censorship of the internet, the Biden administration is censoring indirectly encouraging and assisting tech companies as they remove "misinformation" from their

platforms. The President's Press Secretary, Jen Psaki, has publicly acknowledged that the Biden administration "flags" content for these companies to censor on social media.

Meanwhile, Democrats in congress regularly threaten the leaders of these companies with regulation and public condemnation if they fail to scrub the internet of content they disapprove of. Trump himself has, of course, been effectively blacklisted from every major social media platform, as have many of his supporters. These may be the first few bricks in the American version of the "Digital Berlin Wall."

That the Supreme Court prohibited the type of indirect censorship-by-pressure the Democrats are engaging in as far back as the 1963 case of *Bantam Books, Inc. v. Sullivan* hasn't served as a deterrent. It will, as always, be up to the Court to enforce the First Amendment's mandates if and when a case challenging these efforts reaches them.

Trump-Republicans no longer control either of the political branches. Now that they feel the force of the other side's censorship, they've predictably resorted to using the First Amendment as a shield. Trump himself literally argued during his second impeachment trial that the Court's *Brandenburg* ruling protects him from punishment for his January 6, 2020 speech to his followers amassed in Washington D.C., in which he urged them to "fight like hell" or "they won't have a country anymore." This newfound appreciation for the First Amendment is pure self-interest and expediency. "Free speech for me but not for thee," no different than the Democrats.

Trump's contempt for free speech and a free press was hardly hidden during his presidency. He regularly deployed phrases, like "fake news," that were designed to discredit adversarial news media. Another slogan, repeated endlessly, "enemy of the people" echoed history's worst dictators. Meanwhile, media that praised him were treated as friends and rewarded with special access to his administration. Sean Hannity got plenty of prime time interviews.

In 2016 Trump threatened to "open up our libel laws" so that he could sue journalists and "win lots of money." In a 2018 tweet he warned the press that he might begin revoking White House Press Corp credentials as a response to negative—"fake"—coverage. According to Maggie Haberman of the *New York Times*, Trump's Justice Department furtively collected the phone records of journalists working for *The Washington Post*, *CNN*, and *The New York Times* as part of an effort to discover the identity of confidential sources. The list of his attacks on freedom of expression is nearly interminable.

With each side increasingly describing the other as a mortal threat, the impulse to censor becomes more indomitable and our collective belief that all of us benefit from listening to one another becomes less tenable. Our experiment with an Emersonian First Amendment can't last forever under these conditions.

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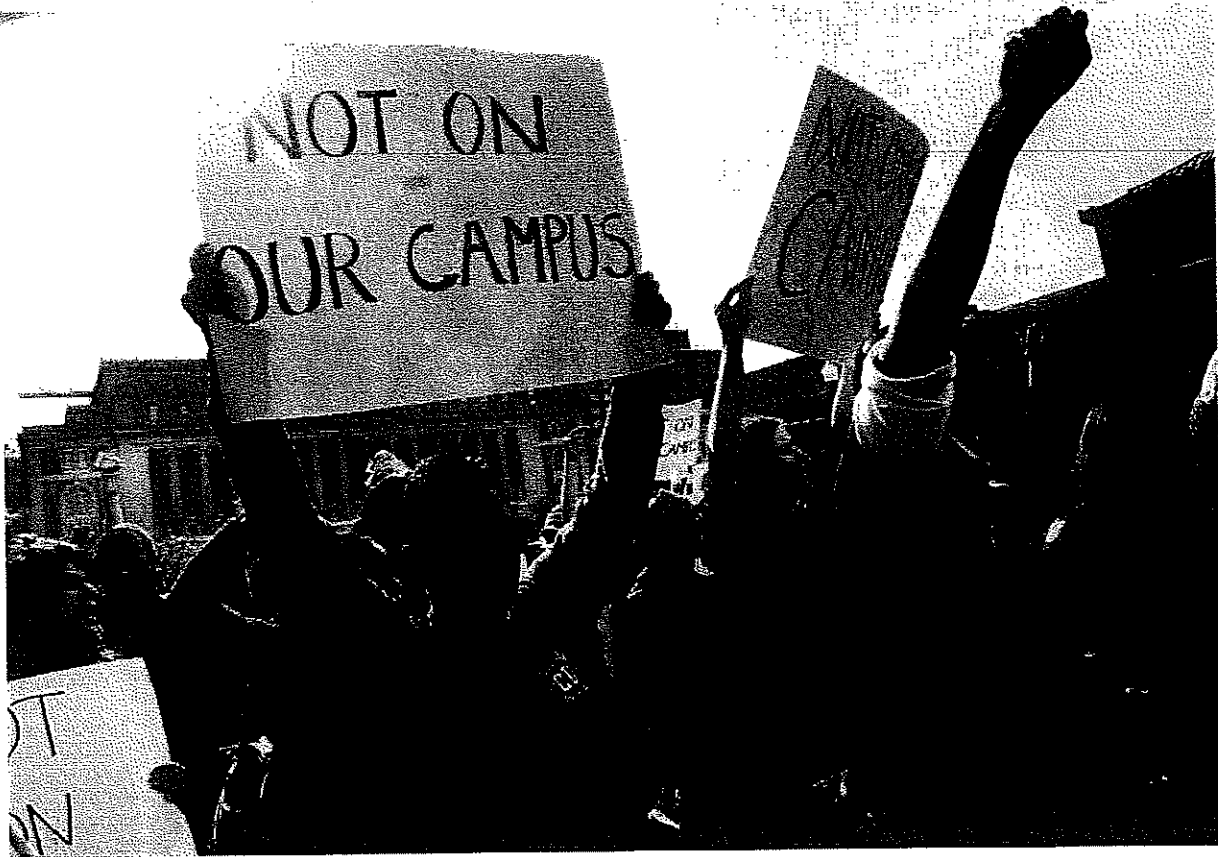
A First Amendment Giant Offers a Way Out of Our Free Speech Crisis

*As open expression is crippled on campus and
elsewhere, let's look to how Thomas I. Emerson
helped guide us out of a similar crackdown in the
1950s*

Nathan Goetting (<https://www.discoursemagazine.com/author/nathan-goetting/>)

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Perhaps nowhere is the threat to freedom of expression in the U.S. more dire than in higher education. A cadre of administrators and accreditors—“orthodoxy sniffers,” to use Orwell’s phrase—is policing thought at colleges that once promoted a free exchange of ideas. Words and opinions long considered benign are now radioactive, triggering social-media shaming, official investigations and strict punishments. Thanks to this illiberalism, an oppressive cloud of self-censorship hangs over the exploration of politics, law and society at schools across the country.

Crackdowns on free thought are so routine that they’ve become an accepted part of academic life. Here are three cases in the news this year:

- In a tweet on Jan. 26, former Cato Institute scholar Ilya Shapiro criticized President Biden’s decision to consider only Black women for his Supreme Court nominee. Shapiro wrote that

instead of the most qualified person for the job, “a lesser black woman” would be chosen. He quickly deleted the tweet and apologized for his “inartful” language. He was supposed to start a new job on Feb. 1 as a senior lecturer at Georgetown University’s law school and executive director of its Center for the Constitution. Instead, the school suspended him with pay pending an investigation, which is still going on. His view hardly put him out of the mainstream: 76% of Americans agreed in an ABC News poll that Biden should not have restricted the pool of candidates.

- Amy Wax, a tenured law professor at the University of Pennsylvania’s law school who has a history of arousing controversy, is under fire for comments she made about Asian immigration on economist Glenn Loury’s podcast in December. The school is in the process of deciding whether to sanction her.
- In February, the State University of New York at Fredonia suspended philosophy professor Stephen Kershner and barred him from campus while it investigates comments he made about adult-child sex in a podcast. However repugnant his views might be, he’d been speaking and writing on the topic for years without condemnation or penalty—but times have changed.

A Lesson From the Past

The road map for resolving this crisis on campus has been left to us in the writings of attorney, civil libertarian and First Amendment scholar Thomas I. Emerson, one of the great unsung warriors against the McCarthyite academic purge of the 1940s and ’50s. In 1957, Emerson successfully argued before the Supreme Court the case of University of New Hampshire Professor Paul Sweezy, whose left-wing background and controversial classroom lectures made him a target of his state’s attorney general.

The force of Emerson’s reasoning spurred Chief Justice Earl Warren to issue an opinion on the First Amendment that’s a paean to robust, fearless and uninhibited academic freedom. “Scholarship cannot flourish in an atmosphere of suspicion and distrust,” Warren wrote. “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.”

Warren's landmark opinion in *Sweezy v. New Hampshire* has guided the court's jurisprudence in academic freedom cases ever since. As a matter of law, the First Amendment protects students and faculty in only state schools, but its principle of academic freedom is enforceable in faculty employment contracts and other documents binding private colleges and universities. Emerson's ideas helped end an earlier era of repression on our campuses. They can do so again.

Emerson's Classic Treatise

After working as a lawyer in President Franklin D. Roosevelt's administration, Emerson taught at Yale Law School for more than three decades and pursued numerous constitutional law cases before his death in 1991 at age 83. After his Supreme Court victory in *Sweezy*, he continued to develop his ideas on free speech. His 1970 book, "The System of Freedom of Expression," extended the vision of an intellectually uninhibited system of higher education that he promoted while arguing that case.

It describes a free, democratic society capable of peacefully resolving even the most rancorous controversies—including those over free speech—in a way that fosters engagement and enlightenment. He explains in detail the benefits of tolerating unpopular views. In a liberal democracy that fully embraces free speech, rebutting offensive and dangerous speakers instead of shutting them down can improve our culture, on campus and beyond, and strengthen our democratic institutions.

In "The System of Freedom of Expression," Emerson describes four benefits of free speech:

1) The Socratic benefit: Freedom of expression is "an essential process for advancing and discovering truth," he writes. It is indispensable to intellectual advancement. To distinguish truth from falsity, people must be able to consider every claim and keep asking questions, wherever facts and reason dictate, until they are satisfied. Even false claims can be instructive if they compel us to reexamine old beliefs and this reinforces our beliefs by giving us more confidence in their value.

It's this premise that animated former Supreme Court Justice Oliver Wendell Holmes's "marketplace of ideas" theory of the First Amendment. "The best test of truth," said Holmes, isn't its adoption or approval by the state but "the power of the thought to get itself accepted in the competition of the market. ... That at any rate is the theory of our Constitution." The First Amendment ranks truth-seeking above other social interests by prohibiting the government from interfering with the free exchange of ideas. "This is the method of the Socratic dialogue employed on a universal scale," Emerson wrote in an article foreshadowing his book.

2) The Aristotelian benefit: The First Amendment recognizes the natural capacity for creative greatness in people by protecting artistic and expressive talents. Aristotle thought of human beings as rational animals who, as they develop their talents, move from a state of potential to actual happiness. Sharing our honest thoughts and feelings in every medium, but especially through works of artistic expression, is necessary for individual flourishing.

Free speech is a human right and censorship is an "affront to the dignity" of the individuals being silenced, wrote Emerson. Silencing poets, musicians, filmmakers or anyone prevents them—and their listeners and viewers—from realizing their potential for happiness. "For the achievement of this self-realization the mind must be free."

3) The Jeffersonian benefit: The boldest philosophical claim in Thomas Jefferson's Declaration of Independence is that governments "derive their just powers from the consent of the governed" and that any government that doesn't enjoy this consent deserves to be overthrown. By adopting the declaration, the Continental Congress insisted on a redefinition—an inversion—of the traditional understanding of state authority. Americans decided that instead of being British subjects, accountable to a king, they would be American citizens, whose government would be accountable to them.

The essence of democracy—even an indirect and limited democracy such as the one our Constitution created a few years later—is self-governance. Self-governance requires that the state be transparent and that discussion about its activity be unimpeded.

4) **The Emma Goldman (“safety valve”) benefit:** The federal government hated early-20th-century anarchist Emma Goldman. J. Edgar Hoover wrote that she was one “of the most dangerous anarchists in this country.” Law enforcement harassed, jailed and ultimately deported her. She was a fanatic for the cause of individual rights, particularly for workers, immigrants, women and others she saw as oppressed. No matter what the state did, she refused to be stopped.

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As the government continued to limit legal outlets for anarchists to speak, they made themselves heard through lawless conduct. While Goldman’s resistance seems to have been limited to speech, many on the militant fringe of the movement went underground and resorted to bombings and other acts of terrorism.

Censorship Is Never the Answer

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Emerson’s liberal approach to freedom of expression promotes peace and stability by giving people with unpopular political views the opportunity to nonviolently blow off steam. “People are more ready to accept decisions that go against them if they have a part in the decision-making process,” he explains.

To prevent the spread of bad ideas, the First Amendment allows for two remedies. First, while expression must always be tolerated, harmful conduct need not be. The government may punish anyone who attempts to advance dangerous ideas with criminal activity.

Second, there is counter-speech. There is no surer way to halt the spread of a bad idea than by using reason and evidence to replace it with a good one. If people find a belief to be dangerous, the First Amendment gives them the right to persuade fellow citizens not to adopt it. This is essential to the realization of the First Amendment's Socratic and Jeffersonian purposes. "The greatest menace to freedom," wrote former Supreme Court Justice Louis D. Brandeis, "is an inert people." Ultimately, whether free speech endures will rest on our faith that these remedies work.

Our Emersonian First Amendment is both a means and an end, a path toward a free society and a way of maintaining one. Reaffirming our commitment to it will heal the distrust dividing us. It also will maximize our aptitude for freedom, knowledge and happiness going forward.

Editor's note: This is an abridged version of an essay published in January

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