BETRAYING FREEDOM: A REVIEW OF LUKIANOFF'S *UNLEARNING LIBERTY* AND POWERS' *THE SILENCING*

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INTRODUCTION

> 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.[1]

Those words, written during an existential war, vindicated the rights of a religious minority to dissent from the prevailing orthodox patriotism of the day. Those words, which reversed a Supreme Court decision from three years before,[2] embody Freedom—a self-evident truth that, along with

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
2. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

Equality, unites a People and defines the American Nation.[3] If our society abandons either Freedom or Equality, then one must question whether the United States "can long endure."[4]

Unfortunately, in the second decade of the third millennium, American higher education is betraying Freedom. In a post-modernist era, academe no longer believes in "freedom for the thought we hate."[5] Instead of creating an environment "where we are comfortable with questioning long held belief in the presence of those who seem different at first but become familiar with each passing moment, word, and deed,"[6] public institutions frequently restrict the speech of students.[7] Instead of encouraging the entire college and university community to "follow the truth wherever it may lead" while tolerating "any error so long as reason is left free to combat it,"[8] colleges and universities punish professors for speech.[9] Instead of implementing institutional policies that promote a market place of ideas, the academe denies the First Amendment rights of student organizations.[10] Instead of pursuing policies promoting both Freedom and Equality,[11] our institutions subordinate or even ignore Freedom in the name

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3. *See* THE DECLARATION OF INDEPENDENCE ¶ 1 (U.S. 1776) ("We hold these truths to be self-evident: All . . . are created equal; and they are endowed by their Creator with certain unalienable rights").

4. *See* Abraham Lincoln, GETTYSBURG ADDRESS ¶ 2 ("Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure").

5. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

6. Eli I. Capilouto, Address to the Lexington Martin Luther King Day Celebration, Lexington, Kentucky (Jan. 18, 2016) (transcript available at https://www.uky.edu/president/sites/www.uky.edu.president/files/MLK_Final_1-18-16.pdf).

7. The examples are numerous. *See* Samantha Harris, Speech Code of the Month, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (2016) https://www.thefire.org/category/speech-code-of-the-month/.

8. Letter of Thomas Jefferson to William Roscoe (December 27, 1820) (describing Jefferson's view of the newly created University of Virginia).

9. Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 561–62 (4th Cir. 2011) (Protected speech did not lose First Amendment protection when included in professor's promotion application and, thus, professor could pursue retaliation laim against public university which denied him a promotion.).

10. *See* Gerlich v. Leath, 2016 WL 360673 (finding Iowa State University violated the First Amendment right of a student organization by refusing to allow the organization to use the Iowa State logo).

11. For public institutions, the Constitution requires the institution to respect both Freedom and Equality. For a discussion of the subtleties of vindicating both values in the particular contexts, *see generally* William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, REGENT UNIVERSITY LAW REVIEW (forthcoming 2016); William E. Thro, *The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education*, 2011 BRIGHAM YOUNG UNIVERSITY EDUCATION AND LAW JOURNAL 571 (2011).

of Equality.[12]

Two recent books illustrate academe's betrayal of Freedom. First, in *Unlearning Liberty: Campus Censorship and the End of American Debate,*[13] Greg Lukianoff, the self-described[14] liberal who serves as President of the Foundation for Individual Rights in Education ("FIRE"),[15]

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12. *See infra* notes 27-119 and accompanying text (Discussion of Lukianoff); *infra* notes 120-179 and accompanying text (Discussion of Powers).

13. GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012).

14. As Lukianoff describes himself:

> I am a lifelong Democrat and have something of a liberal pedigree. I have never voted for a Republican, nor do I plan to. I am one of only a few dozen people honored by the Playboy Foundation for a commitment to free speech; others include Bill Maher, Molly Ivins, and Michael Moore. In March 2010, I received the Ford Hall Forum Louis P. and Evelyn Smith First Amendment Award on behalf of FIRE, which has also been bestowed on Ted Turner, Maya Angelou, and Anita Hill. I have worked at the ACLU and for EnvironMentors, which is an environmental justice mentoring program for inner-city high school kids in Washington, D.C. I have worked on behalf of refugees in Eastern Europe and volunteered for a program educating incarcerated teens in California about the law. I believe passionately in gay marriage, abortion rights, legalizing marijuana, and universal health care. . .
>
> Why is it odd that a liberal should fight for free speech rights? Isn't freedom of speech a quintessentially liberal issue? Some members of the baby boomer generation may be horrified to learn that campus administrators and the media alike often dismiss those of us who defend free speech for all on campus as members of the conservative fringe. While I was once hissed at during a libertarian student conference for being a Democrat, it is far more common that I am vilified as an evil conservative for defending free speech on campus.

Id. at 6.

15. As Lukianoff describes the organization:

> Founded by a conservative-leaning libertarian professor at the University of Pennsylvania (Kors) and a liberal-leaning civil rights attorney in Boston (Silverglate), FIRE is a unique organization in which liberals, conservatives, libertarians, atheists, Christians, Jews, Muslims have successfully worked together for the common cause of defending rights on campus. I am a Democrat and an atheist, our senior vice president is a Republican and Christian, while our legal director, a Democrat and former Green Party activist, works harmoniously alongside our other top lawyers including a Jewish libertarian and a Muslim-raised liberal. I have worked at nonprofits almost all my life and have never even heard of, let alone worked at, a cause-based organization successfully run by people with such different personal politics. But we all agree on free speech and basic rights without hesitation, and we live the benefits of having different perspectives in the office every day. True, it can get a little heated in the office around election season, but we wouldn't have it any other way. At FIRE, we see every day the tribulations of college students who get in trouble for assuming that higher education involves speaking candidly about serious topics, or that telling jokes is always permitted on campus. This book invites you to experience the confusing challenges that students face today. Each chapter opens by putting you in the shoes of a fictional modern student as you progress through high school to the last day of your first semester in college. All of the opening fact patterns are

offers "a theory of how the world of higher education today is harming American discourse and increasing polarization"[16] by revealing "the many ways that today's university's violate basic rights and betray the principles that undergird fundamental liberties."[17] Second, in *The Silencing: How the Left Is Killing Free Speech*,[18] Kirsten Powers, a liberal[19] who contributes to both *USA Today* and *Fox News*, describes how "an alarming level of intolerance emanates from the left side of the political spectrum who express views that don't hew to the 'settled' liberal world view."[20] "It's become clear that attempts—too often successful to silence dissent from the liberal worldview aren't isolated outbursts."[21] Lukianoff and Powers are the canaries in the coalmine. Together, they sound the alarm about higher education's betrayal of Freedom.

This review has three parts. Part I discusses Lukianoff's systematic exposition of how higher education denies free speech, religious liberty, and associational rights. Part II explores Power's survey of the political left's efforts to silence, intimidate, and diminish those who disagree with progressive orthodoxy. Part III explains why Higher Education must reverse course and reaffirm its commitment to Freedom. Freedom is essential to (1) achieving the educational benefits of diversity; [22] (2) ensuring "all members of the University community [have] the broadest

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based on real-life stories and will help illustrate the bad lessons that students are learning about what it means to live in a free society—even before they set foot in a classroom. *Id.* at 13-14

16. *Id.* at 12.

17. *Id.* at 12-13.

18. KIRSTEN POWERS, THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH (2015).

19. In her introduction, Powers describes her upbringing as the child of liberal parents in conservative Alaska, her work as a political appointee in the Clinton Administration, and working for New York Governor Cuomo and the New York Democratic Party. Powers, *supra* note 18, at xi-xii. She admits she rarely encountered political conservatives.

20. *Id.* at xiii. Powers says the effort is not limited to "conservatives and Orthodox Christians," but extends to anyone who deviates "on liberal sacred cow issues." *Id.* at xiii-xiv.

21. *Id.* at xiv.

22. Contrary to conventional wisdom, the compelling state interest in diversity does not mean a specific percentage of underrepresented minorities. Rather, the compelling state interest in diversity means the educational benefits that flow from having a diverse student body. As the Supreme Court explained:

> A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." "That would amount to outright racial balancing, which is patently unconstitutional." "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' "

Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2419 (2013) (citations omitted).

possible latitude . . . to discuss any problem that presents itself;"[23] and (3) promoting a "confident pluralism that conduces to civil peace and advances democratic consensus-building."[24]

I. LUKIANOFF'S *UNLEARNING LIBERTY*

Lukianoff believes "[t]he stifling of expression on campus and the resulting consolidation of self-affirming cliques are harmful to higher education and to our country . . ."[25] As he elaborates:

> In order for free speech to thrive, students need to experience on a regular basis how open discussion and debate and even random bits of comedy can increase tolerance and understanding more effectively than any speech code, residence hall initiative, or ideological "training" ever could. Modern universities are producing college graduates who lack that experience of uninhibited debate and casual provocation. As a result, our society is effectively unlearning liberty. This could have grave long-term consequences for all of our rights and the very cohesion of our nation. If too few citizens understand or believe in free speech, it is only a matter of time before politicians, activists, lawyers, and judges begin to curtail and restrict it, while other citizens quietly go along.[26]

Lukianoff offers three primary reasons for his thesis.[27] "First, when you surround yourself with people who agree with you and avoid debates, thought experimentation, or even provocative jokes around people you disagree with, you miss the opportunity to engage in the kind of exciting back-and-forth that sharpens your critical thinking skills."[28] "Second, the deadening of debate and the fostering of self-affirming cliques also promotes a shallow and incomplete understanding of important issues and other ways of thinking."[29] "Third, and perhaps most importantly, campus censorship poses both an immediate and a long term threat to all our freedoms not just because free speech is crucial to every other freedom, but

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23. University of Chicago, *Report of the Committee on Freedom of Expression* (2015).

24. Christian Legal Soc. v. Martinez, 561 U.S. 661, 734 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting) (quoting Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371)). *See* John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015); *See also* JOHN D INAZU, A CONFIDENT PLURALISM (forthcoming 2016).

25. LUKIANOFF, *supra* note 13, at 10.

26. *Id.* at 12.

27. *Id.* at 10-13.

28. *Id.* at 10.

29. *Id.* at 11.

also because it teaches the wrong lessons about living in a free society."[30]

Lukianoff proves the primary points supporting his thesis through the narrative of the "modern collegiate experience." Over the course of eleven chapters, he takes the reader on a journey from the high school student beginning to search for a college through the admissions process, various aspects of the freshman year and ends with students being enlisted in the culture wars. Along the way, Lukianoff, relying almost exclusively on materials from FIRE's own cases, demonstrates how higher education is betraying freedom and, more significantly, the potential long-term consequences of the betrayal.

Chapter 1, "Learning All the Wrong Lessons in High School," explores how the betrayal of freedom actually starts in high school.[31] "A shameful level of civic knowledge, in combination with the miserable state of student rights in K-12, leaves students uninformed about the importance of free speech and distressingly comfortable with censorship."[32] Lukianoff takes this opportunity to provide a concise overview of both the legal landscape[33] and the philosophical foundation for free speech.[34] After discussing polarization and the importance of free speech in the Internet age,[35] Lukianoff draws on John Stuart Mill's *On Liberty*[36] to critique the culture of censorship on university campus.[37] He concludes the Chapter by stressing seven things that students and parents should know before going to college.[38]

Chapter 2, "Opening the College Brochure," discusses how institutions impose free speech codes.[39] Although he acknowledges the courts invalidated public university speech codes in the late 1980's and early 1990's,[40] Lukianoff argues, "if you dig deeper into university websites and student handbooks, you are likely to find policies seriously restricting free speech."[41] He focuses primarily on university's attempts to define "harassment."[42] The Supreme Court's leading decision on sexual harassment in higher education adopted a narrow definition of

30. *Id.* at 12.
31. LUKIANOFF, *supra* note 13, at 15-35.
32. *Id.* at 17.
33. *Id.* at 18-20.
34. *Id.* at 20-24.
35. *Id.* at 25-27.
36. John Stuart Mill, ON LIBERTY (1859).
37. LUKIANOFF, *supra* note 13, at 27-32.
38. *Id.* at 33-35.
39. *Id.* at 37-60.
40. *Id.* at 39-40.
41. *Id.* at 40.
42. *Id.* at 40-52.

harassment,[43] but colleges and universities have consistently adopted a far broader definition.[44] After briefly detailing how the U.S. Department of Education's Office for Civil Rights 2011 Dear Colleague Letter[45] rejected the Supreme Court's definition and adopted a far broader definition,[46] he explains the chilling effects of speech codes that are on the books but not enforced.[47]

Chapter 3, "The College Road Trip," examines how institutions regulate free speech on campus. [48] Although recent Supreme Court cases suggest the practice is unconstitutional,[49] public universities frequently attempt to confine all expressive activities to a small "free speech zone."[50] Lukianoff believes four factors work against free speech on campus—ignorance, ideology, liability, and bureaucracy.[51] He then recounts how the growth of higher education administration—particularly student affairs officers, student judicial officers, and legal counsel—has led to increased tuition costs.[52]

Chapter 4, "Harvard and Yale," details how our Nation's elite institutions deny free speech rights.[53] Although both institutions are private and, thus not subject to the U.S. Constitution, Lukianoff demonstrates how both Yale[54] and Harvard[55] have consistently pursued practices and policies contrary to the ideals of Freedom. In other words, the abuses are not confined to obscure state colleges and universities.[56]

Chapter 5, "Welcome to Campus!," explores how colleges and universities indoctrinate new students into a particular ideology.[57] Lukianoff explains how orientation programs pressure students to conform[58] and how residence assistants often act as morality police.[59] He

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43. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644–47 (1999) (Interpreting Title IX).

44. LUKIANOFF, *supra* note 13, at 46-52.

45. *See* The United States Department of Education Office for Civil Rights "Dear Colleague" letter (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

46. LUKIANOFF, *supra* note 13, at 52-53.

47. *Id.* at 53-58.

48. *Id.* at 61-76.

49. *See infra* notes 236-43 and accompanying text.

50. LUKIANOFF, *supra* note 13, at 62-67.

51. *Id.* at 67-70.

52. *Id.* at 70-75.

53. *Id.* at 77-94.

54. *Id.* at 78-86.

55. *Id.* at 86-94.

56. LUKIANOFF, *supra* note 13, at 78.

57. *Id.* at 95-114.

58. *Id.* at 96-98.

59. *Id.* at 98-99.

devotes an extensive discussion to the University of Delaware's four-year orientation program, which pursues specific political and ideological goals.[60] He rounds out the Chapter by noting the efforts of many institutions to encourage students to "crusade against intolerance, insensitivity, and ignorance."[61]

Chapter 6, "Now You've Done It! The Campus Judiciary," discusses the relationship between the student disciplinary system and Freedom.[62] Arguing that violations of due process and free speech go hand in hand [63] and lamenting the student judiciary's criminalization of everything,[64] Lukianoff uses Michigan State University's student judicial system as an illustration of institutional overreach.[65] For example, Michigan State imposes mandatory accountability seminars for "slamming a door," "being rude to a dormitory receptionist," and "telling an administrator he is acting like a Nazi."[66] He then provides an extensive overview of the tension between a university's Title IX and constitutional obligations to take effective action in response to sexual assault and the institution's constitutional obligations to provide due process.[67] He concludes the Chapter by explaining that due process, like free speech and the scientific method, requires "recognition of human fallibility, and they require the establishment of processes that make it easier for the truth to come out."[68] Such a system, like any system run by humans, is not perfect, "but it replaced systems based on raw power, superstition, and gut instinct."[69]

Chapter 7, "Don't Question Authority," examines how academe frequently punishes those who dare to criticize the administration.[70] After noting the irony of baby boomers who questioned authority as students now suppressing criticism of their actions as administrators,[71] Lukianoff recounts the saga of a University of Wisconsin at Stout professor who was disciplined for posting a poster of a science fiction character that referred to killing.[72] He then turns to examples of professors being punished for social media posts,[73] sending e-mails to administrators,[74] and swearing.[75]

60. *Id.* at 99-111.
61. *Id.* at 111-13.
62. LUKIANOFF, *supra* note 13, at 115-136.
63. *Id.* at 117-18.
64. *Id.* at 116-17.
65. *Id.* at 118-23.
66. *Id.* at 119-20.
67. *Id.* at 123-33.
68. LUKIANOFF, *supra* note 13, at 134.
69. *Id.*
70. *Id.* at 137-58.
71. *Id.* at 138.
72. *Id.* at 137-42.
73. LUKIANOFF, *supra* note 13, at 143-46.

Acknowledging state governments often promote the suppression of speech by public employees,[76] he concludes the Chapter by arguing the Penn State Child Rape scandal was a result, in part, of a campus valuing "conformity over principled dissent" and forgetting "the role of the dissenter and the whistleblower is as good for a college as it can be for the society as a whole."[77]

Chapter 8, "Student Activities Fair," details institution's efforts to stifle freedom of association on campus.[78] After discussing an incident where Washington State University students disrupted a "politically incorrect play,"[79] Lukianoff details how colleges and universities treat student groups.[80] He notes that faculty members frequently have negative feelings toward Evangelical Christians and Mormons[81] and demonstrates that Christian students have frequently been treated differently from secular groups[82] and Muslim student groups.[83] He recounts the experience of the Central Michigan Young American's for Freedom being taken over by students who were hostile to the group's agenda,[84] the Supreme Court's landmark *Christian Legal Society*[85] decision[86] and its aftermath, [87] the refusal to recognize a gay and lesbian student organization at a historically African-American institution,[88] and other controversial issues.[89] Ultimately, he finishes the Chapter by calling on colleges and universities to abandon efforts "to impose a preconceived notion of what good, moral people should believe."[90] Instead, academe should recognize "people with radically different points of view should get to know each other" and "create greater awareness that ideological, philosophical, or religious opponents can often find common ground."[91]

Chapter 9, "Finally, the Classroom!," explores how institutions

74. *Id.* at 146-48.
75. *Id.* at 148-54.
76. *Id.* at 154-56.
77. *Id.* at 157.
78. *Id.* at 159-84.
79. LUKIANOFF, *supra* note 13, at 160-62.
80. *Id.* at 163-83.
81. *Id.* at 163.
82. *Id.* at 163-67.
83. *Id.* at 167-69.
84. *Id.* at 169-71.
85. Christian Legal Soc'y. v. Martinez, 561 U.S. 661 (2010).
86. LUKIANOFF, *supra* note 13, at 171-75.
87. *Id.* at 178-81.
88. *Id.* at 175-78.
89. *Id.* at 181-83.
90. *Id.* at 183.
91. *Id.*

undermine the freedom of expression in the classroom.[92] Lukianoff demonstrates that many professors require their students to adopt certain assumptions,[93] mandate students to lobby for certain left wing causes,[94] are intolerant of students who disagree with their views,[95] evaluate students' "dispositions,"[96] and punish student writing that makes them uncomfortable.[97] Ending the Chapter with a discussion of a Northern Kentucky University professor who urged her students to exercise their free speech rights by preventing others from expressing their own views,[98] he urges campuses to recognize "one could learn to handle the existence of opinions one dislikes and even welcome them as a chance to learn something new."[99]

Chapter 10, "If Even Your Professor Can Be Punished for Saying the Wrong Thing," discusses institution's abridgement of faculty speech.[100] After briefly recounting the experiences of a Brandeis University professor disciplined for using the term "wetbacks,"[101] Lukianoff provides summaries of several professors who have been fired or disciplined for expression that is, at least arguably, constitutionally protected.[102] He finishes the Chapter by noting the real world consequences of academe's refusal to respect free speech rights.[103]

Chapter 11, "Student Draftees for the Culture War," examines how students, both individually and acting through student governments, engage in censorship.[104] Lukianoff recounts incidents of students destroying student newspapers,[105] student governments adopting "sedition acts" or speech codes,[106] or disrupting outside speakers,[107] particularly those from the right of the political spectrum.[108] Perhaps most alarming, Lukianoff suggests students expect to be insulated from ideas that might be offensive

92. LUKIANOFF, *supra* note 13, at 185-201.
93. *Id.* at 186-88.
94. *Id.* at 191-93.
95. *Id.* at 193-94
96. *Id.* at 195-98.
97. *Id.* at 198-200.
98. LUKIANOFF, *supra* note 13, at 200-01.
99. *Id.* at 201.
100. *Id.* at 203–18.
101. *Id.* at 204–06.
102. *Id.* at 206–13.
103. LUKIANOFF, *supra* note 13, at 216-18.
104. *Id.* at 219–41.
105. *Id.* at 220–25.
106. *Id.* at 225-28.
107. *Id.* at 228-29.
108. *Id.* at 229-32.

to them.[109] He sees indications that our Law Schools, which one would expect to be committed to constitutional values, have little respect for Free Speech.[110] He finishes the Chapter by discussing the free speech implications of anti-bullying laws and policies.[111]

Lukianoff's conclusion, "Unlearning Liberty and the Knee-Jerk Society,"[112] summarizes how "the threat of punishment for expressing the wrong thoughts, the omnipresence of codes warning students to be careful about what they say, and the politicized, self-serving redefinition of tolerance and civility all reinforce the social pressure" to avoid debate all together.[113] In his view, "too many of our educators today are ambivalent about free speech, imagining that if they really did allow all opinions to be expressed, the result would be a nightmarish landscape of non-stop bigotry and ignorance."[114] Instead, he calls on the higher education to practice the "intellectual habits of a free people"[115] and "learn to handle arguments that go against everything you wish to be true, and in the end be wiser."[116] The academy "must stop apologizing for believing in free speech and embrace it as the best tool we have yet devised for the growth of knowledge and understanding."[117]

Overall, Lukianoff presents overwhelming evidence of higher education's systematic betrayal of Freedom and a persuasive argument for why this betrayal has serious consequences. His narrative is well written, well researched, and, quite frankly, terrifying for the individual who takes the Constitution seriously. This book should be read by anyone who cares about higher education; it should be required reading for all public college and university presidents, general counsels, provosts, vice presidents for student affairs, and faculty senate leaders. Hopefully, such a required reading will begin to reverse the hostility toward Freedom on our public college and university campuses.

II. POWERS' *THE SILENCING*

While Lukianoff focuses exclusively on higher education, Powers focuses on society as a whole with a particular emphasis on the media. Consequently, Powers' overall work is not as relevant to the academy as Lukianoff's book. Nevertheless, many elements of her societal critique are

109. LUKIANOFF, *supra* note 13, at 232-34.
110. *Id.* at 234-37.
111. *Id.* at 237-41.
112. *Id.* at 243-46.
113. *Id.* at 243.
114. *Id.* at 245.
115. LUKIANOFF, *supra* note 13, at 245.
116. *Id.* at 245-46.
117. *Id.* at 246.

applicable to higher education, and she offers important lessons for everyone in the College and University community. Indeed, Chapters 4 and 5 focus exclusively on silencing debate on campus.[118] As Powers observes, "[c]ampuses across the United States have become ground zero for silencing free speech. Colleges and universities founded to encourage diversity of thought and debate have become incubators of intolerance where non-sanctioned views are silenced through bullying, speech codes, 'free speech zones,' and other illiberal means."[119]

Chapter 1, "Repressive Tolerance," explores the efforts of some progressives to enforce a particular worldview.[120] Such people believe that those "who express ideological, philosophical, or political views that don't line up with their preferences should be completely silenced."[121] Powers notes political pressure caused the withdrawal of many conservative or moderately progressive commencement speakers in 2014[122] and asserts this reflects Herbert Marcuse's theory of "repressive tolerance"—advancing the progressive agenda by repressing discussion of any contrary ideas.[123] She observes the disconnect between the classical liberal ideas of freedom, as espoused by Montesquieu, Mill, and others, and the current attitudes of what she calls the "illiberal left."[124] Powers declares that the effort to silence dissent harms "all of society by silencing important debates, denying people the right to draw their own conclusions, and derailing reporting and research that is important to our understanding of the world."[125]

Chapter 2, "Delegitimizing Dissent," discusses how some segments of the left seek to attack the character of anyone who disagrees with their worldview.[126] She identifies two specific tactics of character assassination. First, many liberals "will often systematically question and attack the very core of their enemies' human identities."[127] Second, the "illiberal left" will "make racist and misogynist attacks against opponents *and* accuse opponents of being racists, bigots, misogynists, rape apologists, traitors, and homophobes."[128] She rounds out the Chapter by explaining how some liberals and independents are accused of being "conservatives" if they dare

118. POWERS, *supra* note 18, at 69–106.
119. *Id.* at 70.
120. *Id.* at 1–20.
121. *Id.* at 4.
122. *Id.* at 7-8
123. *Id.* at 8.
124. POWERS, *supra* note 18, at 12–17
125. *Id.* at 17.
126. *Id.* at 21–47.
127. *Id.* at 25.
128. *Id.* at 32-33 (emphasis in original).

to question any aspect of the progressive orthodoxy.[129]

Chapter 3, "Illiberal Intolerance and Intimidation," examines actions designed to intimidate individuals and organizations that disagree with certain ideas and beliefs.[130] Powers recounts the campaign against Chick-Fil-A, a fast food chain with a CEO who dared to question same-sex marriage.[131] Turning to higher education, she describes the experiences of Marquette University Professor John McAdams, who criticized a colleague for refusing to allow discussion of same-sex marriage,[132] and University of Virginia Law Professor Douglas Laycock, who dared to support a proposed religious freedom statute in Arizona.[133] She then discusses efforts to exclude Christian religious organizations from participating in public life because the organizations oppose same-sex marriage or regard homosexual conduct as sinful.[134] While noting her personal support for same-sex marriage, she observes, "most people who don't share my opinion—which included, until recently, scores of Democrats—are not bigots but people with sincere and respectable beliefs, often based in a Christian worldview that I otherwise largely share."[135]

Chapter 4, "Intolerance 101: Shutting Down Debate," details some progressive's actions to silence debate on college and university campus.[136] Using the story of a University of California at Santa Barbara professor who physically assaulted a pro-life advocate as an illustration,[137] Powers explains "[t]he root of nearly every free speech infringement on campuses across the country is that someone—almost always a liberal—has been offended or has sniffed out a potential offense in the making."[138] Indeed, "left-leaning administrators, professors, and students are working overtime in their campaign of silencing dissent . . ."[139] Acknowledging the work of Lukianoff's FIRE,[140] she then summarizes many incidents of colleges and universities abusing the free speech rights of students.[141] Powers closes the Chapter with a discussion of trigger warnings and the resulting chill on free speech and inquiry.[142]

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129. *Id.* at 42-47.
130. POWERS, *supra* note 18, at 49–67.
131. *Id.* at 49–53.
132. *Id.* at 53-57.
133. *Id.* at 57-58.
134. *Id.* at 59-62.
135. *Id.* at 53.
136. POWERS, *supra* note 18, at 69-88.
137. *Id.* at 69–76.
138. *Id.* at 76.
139. *Id.* at 79.
140. *Id.* at 79-80,
141. *Id.* at 79-83.
142. POWERS, *supra* note 18, at 85-88.

Chapter 5, "Intolerance 201: Free Speech for Me but Not for Thee," discusses in more detail how colleges and universities use official policies to silence free speech on campus.[143] Again drawing heavily on FIRE's work and experiences with free speech zones,[144] Powers observes, "if students want to exercise their right to free speech they often have to go to court against their own college or university."[145] She then turns to the increasingly common practice of "disinviting" commencement speakers because students and/or faculty disapprove of the speaker's views or actions.[146] Powers then focuses on several incidents where colleges and universities have denied recognition to student religious organizations[147] simply because the organization insists on "adhering to their core values and religious beliefs."[148] She summarizes the Chapter by insisting "the illiberal left expects to be shielded from views they don't want to encounter," but "conservatives have to sit through classes with liberal professors in order to obtain a diploma."[149]

Chapter 6, "The War on Fox News," explores the efforts of the Obama Administration and other media to undermine and delegitimize the conservative Fox News network.[150] Powers recounts how the White House attempted to exclude Fox News reporters[151] and favored reporters from more progressive media.[152] She then explains how other media have attacked Fox News in general[153] and Fox News' female reporters in particular.[154]

Chapter 7, "Muddy Media Waters," discusses efforts to obstruct, chill, and ultimately intimidate the media.[155] Powers explains how the Obama Administration has reduced transparency[156] and harassed reporters.[157] She then describes "the effort by the illiberal left to politically cleanse the already liberal left of all dissent,"[158] with a particular focus on conservative

143. *Id.* at 89–106.
144. *Id.* at 89-91.
145. *Id.* at 91.
146. *Id.* at 92–97.
147. *Id.* at 97–105.
148. POWERS, *supra* note 18, at 97.
149. *Id.* at 105
150. *Id.* at 107–30.
151. *Id.* at 109-16.
152. *Id.* at 116-19.
153. POWERS, *supra* note 18, at 119–30.
154. *Id.* at 119-23
155. *Id.* at 131–48.
156. *Id.* at 131–37.
157. *Id.* at 137–41.
158. *Id.* at 142.

Pulitzer Prize winner George Will.[159]

Chapter 8, "Illiberal Feminist Thought Police," examines attempts to impose orthodoxy on issues related to feminism.[160] Powers describes the "effort to demonize and delegitimize anyone who doesn't agree with the illiberal left's absolutist position on the issue of abortion"[161] and to "turn simple ideological agreements, whether about the federal budget or anything else, into excuses to engage in character assignation, dismissing their opponents as sexists."[162] She recounts how some Democrats have opposed fellow Democrats who are pro-life or favor any form of abortion regulation.[163] She wraps up the Chapter with a summary of feminist criticism of seemingly innocuous humor,[164] certain scientific papers,[165] and statistics that do not comport with the ideological narrative.[166]

Chapter 9, "Feminists against Facts, Fairness, and the Rule of Law," details the supposed "rape culture."[167] In her view, activists "hurl the horrific accusation of being a 'rape apologist' or supporting 'rape culture' with abandon to demonize anyone who has offended them or won't affirm their ideological or partisan world view."[168] Powers demonstrates many of the statistics regarding the frequency of rape on college and university campuses are dubious at best and flat out wrong at worst.[169] She recounts the media's rush to accept the veracity of both the Rolling Stone story on the University of Virginia and the accusations against the Duke University Lacrosse players.[170] She rounds out the Chapter with a scathing criticism of the Obama Administration's guidance[171] to higher education on the handling of sexual assaults.[172]

Powers concludes with a brief "Epilogue" focusing on the future.[173] "The first step toward change is to acknowledge the problem. I hope this book will serve as a starting place for such an acknowledgment among sincere liberals."[174] Powers concludes, "we should make all efforts to

159. POWERS, *supra* note 18, at 145-48.
160. *Id.* at 149–78.
161. *Id.* at 153.
162. *Id.* at 154.
163. *Id.* at 162-65.
164. *Id.* at 171-73.
165. POWERS, *supra* note 18, at 173-76.
166. *Id.* at 176-78.
167. *Id.* at 179–98.
168. *Id.* at 180.
169. *Id.* at 182–86.
170. *Id.* at 186–93.
171. *See* Dear Colleague Letter, *supra* note 45.
172. POWERS, *supra* note 18, at 193-98.
173. *Id.* at 199-202.
174. *Id.* at 201.

invite people who hold different views into our worlds. Contrary to popular thought, familiarity doesn't breed contempt. It breeds understanding and tolerance."[175]

Overall, Powers proves her thesis—the left is attempting to impose a political orthodoxy and silence any dissent. Her narrative is well written, well researched, and, in some respects, more alarming than Lukianoff's volume.[176] Lukianoff confines his focus to the academy and warns of potentially dangerous implications for society as a whole. Powers shows "Liberal Fascism" is already a significant, and in some instances, dominant, force in American society. [177] While Lukianoff should be required reading for those who work in higher education, Powers should be required reading for all thoughtful people, but particularly those on the left.

III. WHY HIGHER EDUCATION MUST REAFFIRM FREEDOM

Lukianoff demonstrates how higher education is betraying Freedom, whether it is free speech, religious liberty, or associational rights. Powers explains how certain segments of the political left betray Freedom to silence those who dare to question progressive orthodoxy. Both suggest this betrayal of Freedom has broader implications for society, both now and in the near future. Yet, the implications for academe are even more severe. Quite simply, by betraying Freedom, higher education is abandoning its commitment to diversity, academic freedom, and its role in promoting a civil society.

A. The Educational Benefits of Diversity

In academe, racial and ethnic diversity is sacrosanct. Yet, institutions may not pursue "simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students," [178] but must focus on "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[179] The rationale for pursuing racial and ethnic diversity is not remedying societal discrimination,[180] it is to ensure

175. *Id.* at 202.

176. Although Lukianoff's prose is more formal, both volumes are an easy read.

177. *See* JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING (2007).

178. Regents of Univ. of California v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J., announcing the judgment of the court).

179. *Id.*

180. Remedying societal discrimination is not and never has been a compelling governmental interest. Grutter v. Bollinger, 539 U.S. 306, 323-24 (2003); *Bakke*, 438 U.S. at 306–10. As the Court explained:

"societal discrimination" does not justify a classification that imposes

increased "exposure to widely diverse people, cultures, ideas, and viewpoints."[181] "[T]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[182] "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."[183] In other words, the Supreme Court's rationale for pursuing racial and ethnic diversity is the free speech ideal.[184]

When colleges and universities betray Freedom by implicitly and explicitly limiting the exchange of ideas and enforcing ideological conformity, the institutions undermine the value of diversity. It is not enough to admit a student because of that person's unique experiences, attitudes, and beliefs; the college and university must encourage students to sit "at the table of friendship to talk, listen, challenge and anew."[185] It is not enough to welcome underrepresented populations to campus, the

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> disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. *Bakke*, 438 U.S. at 310.

Similarly, the Court has rejected the notion of increasing the representation of minorities as a compelling governmental interest. *Grutter*, 539 U.S. at 323-24; *Bakke*, 438 U.S. at 306–10. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307.

181. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

182. Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603, (1967) (citations omitted).

183. Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., announcing the judgment of the Court). *See also* Grutter v. Bollinger, 539 U.S. 306, 324 (2003).

184. As the Supreme Court explained:

> The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body. *Grutter*, 539 U.S. at 333 (citations omitted).

185. Capilouto, *supra* note 6.

students must recognize there is "no need to constrict who you are to measure up to who others are."[186] As Lukianoff explains:

> no two cultures and no two people entirely agree on what speech should and should not be allowed. Indeed, ideas about politeness and propriety differ from economic class to economic class, between genders, among cultures, between different regions of the country, and certainly from one era in history to another.
>
> If we were to put someone in charge of policing politeness or civility, whose ideals would we choose? . . . If we tried to ban everything that offended someone's cultural traditions, class conceptions, or personal idiosyncrasies, nobody could safely say a thing. It has been obvious to me ever since I was little that free speech must be the rule for any truly pluralistic or multicultural community. Far from requiring censorship, a true understanding of multiculturalism demands free speech. [187]

Moreover, when the expression of *any* minority is limited, the majority suffers because it is not exposed to those viewpoints. As Powers explains, "[t]hat is where the illiberal left's silencing of opponents is taking us: to the end of freedom of speech, thought, and debate, to uniformity—-all in the name of diversity."[188] A college and university must be a place "where perspectives are put to the test" and "whether our values and beliefs align or diverge" we are united by "our common humanity."[189]

B. Individual Academic Freedom

Although there is serious debate concerning the rationale for individual academic freedom,[190] whether the Constitution actually protects individual academic freedom,[191] and how to deal with the "*Garcetti*[192] Paradox,"[193]

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186. *Id.*

187. LUKIANOFF, *supra* note 13, at 33.

188. POWERS, *supra* note 18, at 67.

189. Capilouto, *supra* note 6.

190. *See* STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION (2014).

191. *See* Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) ("Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act."). *See also* William E. Thro, *Academic Freedom: Constitutional Myths and Practical Realities,* 19 JOURNAL OF PERSONNEL EVALUATION IN EDUCATION 135 (2007) (endorsing the Urofsky view as a constitutional matter, but insisting institutions must respect individual academic freedom as a matter of policy).

192. Garcetti v. Ceballos, 547 U.S. 410 (2006).

193. As Peter Byrne explains:

faculty members universally assert a right to individual academic freedom.[194] As the "Chicago Statement"[195] defines the concept, individual academic freedom means "all members of the University community [have] the broadest possible latitude to speak, write, listen, challenge, and

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> the Supreme Court's decision in *Garcetti* tees up the question whether the First Amendment protects faculty from reprisals by their institutions for speech within the duties of their job. The Court there held that a county prosecutor would not be protected from adverse actions by his superiors in the office in response to a "disposition memo" prepared as part of his official duties. The Justices thus established another limitation on the right of a public employee to address matters of public concern without reprisals by their government employer. In dissent, Justice Souter expressed the "hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties."' The Court in response, however, explicitly saved for future consideration whether such a limitation on the scope of employee freedom of speech should apply to academic scholarship or teaching. A few lower courts have applied the *Garcetti* rule to professors without discussing the Supreme Court's reservation about doing so, but only in the context of governance disputes rather than in teaching or scholarship.

J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 163-64 (2009) (Reviewing MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009) & STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (2008)) (footnotes omitted).

Scott Bauries elaborates further:

> Based on numerous Supreme Court pronouncements that the Court has neither disclaimed nor chosen to distance itself from, academic speech—including the academic speech of both private and public university professors—is uniquely important to the functioning of American democracy. Yet, under the Court's First Amendment jurisprudence, the academic speech of public university professors is among the *least protected forms of speech*. In fact, it stands on the same footing as obscenity, fighting words, incitement speech, and child pornography, which are all categorically unprotected under the First Amendment due to their "low-value." So, academic speech is indisputably high-value speech, but in the public university workplace, it qualifies for the same protection as indisputably low-value speech—no protection.

Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 715 (2014).

194. Bauries, *supra* note 193, at 678 (individual academic freedom is canonical); Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988) (individual academic freedom is conventional wisdom.)

195. The University of Chicago's 2015 statement on freedom of expression arguably is the twenty-first century's best and the most influential statement of individual academic freedom. Numerous other institution have adopted it and FIRE is urging its adoption nationwide. *See* "Hard to Say: A Statement at the Heart of the Debate Over Academic Freedom," *Economist* (Jan. 30, 2016) (available at http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say).

learn" and "to discuss any problem that presents itself."[196]

When institutions betray Freedom by punishing those faculty and students who express disagreeable ideas, colleges and universities undermine the individual academic freedom.[197] "The basic idea of academic freedom is simple and unanswerable: knowledge cannot be advanced unless existing claims to knowledge can with freedom be criticized and analyzed."[198] To illustrate in a context relevant to higher education lawyers, scholars must be able to criticize the Supreme Court's jurisprudence as unduly *restrictive* of racial preferences;[199] scholars must be able to criticize the Court's jurisprudence as overly *permissive* of racial preferences.[200] Researchers must be able to argue that affirmative action

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196. University of Chicago, *supra* note 23.

197. As the Supreme Court explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967) (citations omitted). Similarly, ten years earlier, the Court observed:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.'

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

198. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 64 (2012).

199. *See* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, & THE LAW (2013). For a positive review of Kennedy's work in this Journal, *see* Michael K. Olivias, *The Burden of Persuasion: Affirmative Action, Legacies and Reconstructing History*; Russell K. Nieli's *Wounds that Will Not Heal: Affirmative Action and Our Continuing Racial Divide and Randall Kennedy's For Discrimination: Race, Affirmative Action and the Law*, 40 J.C. & U.L. 381 (2014). For a negative review of Kennedy's work in this Journal, *see* William E. Thro, *The Future Of Racial Preferences: A Review Of Kennedy's For Discrimination And Nieli's Wounds That Will Not Heal*, 40 J.C. & U.L. 359 (2014).

200. RUSSELL K. NIELI, WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE (2012). For a position review of Nieli's work in

actually hurts those students admitted through such programs;[201] researchers must be able to argue that affirmative action should be expanded to include students from high poverty backgrounds.[202] Although "the ideas of different members of the University community will often and quite naturally conflict," an institution should not "attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."[203] Indeed, "concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some" individuals.[204]

this Journal, *see* Thro, *supra* note 199. For a negative review of Nieli's work in this Journal, *see* Olivas, *supra* note 199.

201. RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP AND WHY UNIVERSITIES WON'T ADMIT IT (2012).

202. SHERYLL CASHIN, PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014). For a review of Cashin's work in this Journal, *see* William E. Thro, *The Coal Miner's Daughter Preference: A Review Of Cashin's Place, Not Race: A New Vision Of Opportunity In America*, 41 J.C. & U.L. 375 (2015).

203. University of Chicago, *supra* note 23.

204. *Id.*

C. Confident Pluralism

In 2010, the Supreme Court held that a state university could condition the recognition of a student religious organization as a student organization on the organization's willingness to admit non-believers as a means of uniting the student body. [205] Justice Alito, joined by three other Justices, sharply dissented and set forth an alternative vision of American life:

> the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. Such practices are not manifestations of "contempt" for members of other faiths. Nor do they thwart the objectives that [the state university] endorses. Our country as a whole, no less than the [state university] values

205. Christian Legal Soc'y. v. Martinez, 561 U.S. 661 (2010). For a critique of the decision, *see generally* Jacob Affolter, *Fighting Discrimination with Discrimination: Public Universities and the Rights of Dissenting Students*, 26 RATIO JURIS 235 (2013); David Brown, *Hey! Universities! Leave Them Kids Alone!: Christian Legal Society v. Martinez and Conditioning Equal Access to A University's Student-Organization Forum*, 116 PENN ST. L. REV. 163 (2011); Zachary R. Cormier, *Christian Legal Society v. Martinez: The Death Knell of Associational Freedom on the College Campus*, 17 TEX. WESLEYAN L. REV. 287 (2011); Michael R. Denton, *The Need for Religious Groups to Be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez*, 72 LA. L. REV. 1055 (2012); Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009-10 CATO SUP. CT. REV. 105 (2010); Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom-A Second-Class Right?*, 61 EMORY L.J. 971 (2012); Erica Goldberg, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association As an Independent Right in A Limited Public Forum*, 16 TEX. J. C.L. & C.R. 129 (2011); Blake Lawrence, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with Christian Legal Society v. Martinez*, 39 HASTINGS CONST. L.Q. 629 (2012); Timothy P. Lendino, *From Rosenberger to Martinez: Why the Rise of Hyper-Modernism Is A Bad Thing for Religious Freedom*, 33 CAMPBELL L. REV. 699 (2011); Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 284 (2012); Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?: Christian Legal Society v. Martinez*, 12 EDUC. L.J. 20 (2011); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847 (2011); William E. Thro, *The Rights Of Student Religious Organizations After Christian Legal Society v. Martinez*, 39 RELIGION & EDUC. 147 (2012); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 ED. L. REP. 473 (2010); Jack Willems, *The Loss of Freedom of Association in Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010)*, 34 HARV. J.L. & PUB. POL'Y 805 (2011). For analysis of how more recent decisions impact the rationale of Christian Legal Society, *see* William E. Thro, *The Limits of Christian Legal Society*, 2014 CARDOZO L. REV. DE NOVO 124 (2014); William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 ED. L. REP. 867 (2013).

> tolerance, cooperation, learning, and the amicable resolution of conflicts. *But we seek to achieve those goals through "[a] confident pluralism that conduces to civil peace and advances democratic consensus-building," not by abridging First Amendment rights*.[206]

Expanding upon Justice Alito's point as well as the ideas of other scholars,[207] Inazu describes a "confident pluralism" as "rooted in the conviction that protecting the integrity of one's own beliefs and normative commitments does not depend on coercively silencing opposing views."[208] Emphasizing both an inherent distrust of state power[209] and a "commitment to letting differences coexist, unless and until persuasion eliminates those differences,"[210] Inazu "seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life" and to "resist coercive efforts aimed at getting people to 'fall in line' with the majority."[211] His vision requires individuals to embrace tolerance,[212] humility,[213] and patience,[214]

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206. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 733-34 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting) (citations omitted) (emphasis added).

207. As Inazu explains:

> The underpinnings of a confident pluralism are also advanced by a number of prominent scholars. Kenneth Karst insists that "[o]ne of the points of any freedom of association must be to let people make their own definitions of community." William Eskridge reaches a similar conclusion: "The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others." And David Richards reflects, "The best of American constitutional law rests . . . on the role it accords resisting voice, and the worst on the repression of such voice."

Inazu, *supra* note 24, at 590-91 (footnotes omitted).

208. *Id*. at 592.

209. Such a distrust is implicit in our constitutional system. *See* Federalist 51 (Madison). Indeed, the Calvinist view of human nature—that everyone is totally depraved—informed and influenced the framing of our Constitution. *See generally* MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 12–40 (2012); Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention* in CHRISTIAN PERSPECTIVES ON LEGAL THOUGht 293, 295 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella, eds. 2001); William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 J.C. & U.L. 491, 504 (2006).

210. Inazu, *supra* note 24, at 592.

211. *Id.* at 592.

212. *Id.* at 597-98. As Inazu explains:

> Tolerance does not mean embracing all beliefs or viewpoints. That kind of tolerance is likely only possible in a society that shares a cognizable common good. It is far less plausible in a society like ours. And for this reason, tolerance admits that individuals in voluntarily chosen groups may in fact suffer moral harms, at least as perceived from the perspective of outsiders to the group. For tolerance to flourish, both the Liberal Egalitarian and the

but his paradigm also requires the government to respect associational freedom,[215] ensure meaningful access to public forums,[216] and provide funding to support pluralism.[217]

Inazu's Confident Pluralism paradigm encompasses the traditional roles, norms, and practices of academe. Historically, higher education has allowed individuals to question long held propositions, even those propositions regarded as objective truths. As long as a certain level of collegiality and civility was maintained, professors and students were able to express profound disagreement with each other. Through this process of questioning and respectful dialogue, individual views were refined and, in some instances, profoundly changed. Unfortunately, as Lukianoff and Powers demonstrate, the academe of the twenty-first century often wishes to silence those who challenge the prevailing view, silence any disagreement with the norm, and avoid any idea that contradicts the "politically correct" view.

To return to its traditional roles by embracing a confident pluralism, higher education must encourage the individual values of tolerance, humility, and patience, but must also act at an institutional level. Inazu's prescription for government—respect associational freedom, ensure access to public forums, and provide funding—must become institutional policy. Adopting such a policy reaffirms freedom.

Indeed, for public institutions, the Constitution requires a respect for associational freedom. There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[218] A public college and university may not favor those student groups that support the institution's views and it may not penalize those students groups with which it disagrees.[219] Similarly, the Court has ruled that

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Conservative Moralist must bear the cost of knowing that unaddressed moral harms persist within the private groups of civil society.

The aspiration of tolerance also requires the hard work of distinguishing *people* from *ideas*. Every one of us in this country holds ideas that others find unpersuasive, inconsistent, or downright loopy. More pointedly, every one of us holds ideas that others find morally reprehensible. The tolerance of a confident pluralism does not impose the fiction of assuming that all ideas are equally valid or morally benign. It does mean respecting people, aiming for fair discussion, and allowing for the right to differ about serious matters. *Id.* at 598 (citations omitted).

213. *Id.* at 599.

214. *Id.*

215. *Id.* at 604-06.

216. Inazu, *supra* note 24, at 606-08.

217. *Id.* at 608-12.

218. Widmar v. Vincent, 454 U.S. 263, 269 (1981).

219. Over forty years ago, the Court declared:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been,

disagreement with a student organization's views does not justify denial of access[220] or funding.[221] Indeed, the practice of requiring students to pay mandatory fees that are then distributed to student groups is permissible only if the institution does not favor particular viewpoints.[222] Quite simply, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas."[223] Thus, a group that holds racist, sexist, homophobic, anti-Semitic, or anti-Christian views is entitled to recognition, access to facilities, and funding.[224] Of course, "students and faculty are free to associate to voice their disapproval of the [student organization's] message,"[225] but "debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community, to be offensive, unwise, immoral, or wrong-headed."[226] If one finds a particular viewpoint irreprehensible, the solution is to promote an alternative viewpoint, not to suppress the irreprehensible viewpoint.[227]

> especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. Healy v. James, 408 U.S. 169, 187-88 (1972).

There is no obligation for a university to recognize or fund student groups, but if a university chooses to do so, then it must treat all student groups the same. *See* 2 WILLIAM A. KAPLIN & BARBARA H. LEE, THE LAW OF HIGHER EDUCATION 1244-46-20 (5th ed. 2013).

220. *Widmar*, 454 U.S. at 267–70.

221. Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 831 (1995).

222. Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 233-34 (2000).

223. *Widmar*, 454 U.S. at 272 n.10. *See also Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate "the free and open exchange of ideas by, and among, its students"); Rosenberger, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

224. However, while the institution may not refuse recognition because of the student organization's viewpoint, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. KAPLIN & LEE, *supra* note 219, at 1245-46 (interpreting *Healy*).

As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a significant part of the campus community dislikes the organization. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. *Healy*, 408 U.S. at 185-86.

225. Rumsfeld v. Forum for Acad. & Inst'l Rights, 547 U.S. 47, 69-70 (2006).

226. University of Chicago, *supra* note 23.

227. If college and university officials are going to express disapproval in the name

Although the federal Constitution allows public colleges and universities to pressure student organizations to include individual members who disagree with the organization's objectives in some limited circumstances,[228] State Constitutions may command a different result.[229] Moreover, in those States with a state Religious Freedom Restoration Acts,[230] student religious groups may have an absolute right to exclude non-believers.[231] Even if there is no state constitutional or statutory

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of the university, they should make certain that they are authorized to speak for the institution. There likely will be situations—particularly at public institutions—where the governing board has a very different attitude toward the student organization.

228. Although nothing in the Court's opinion limits *Christian Legal Society* to a particular context, the reality is that the case arose in an unusual factual situation. Although most public institutions allow student groups to exclude those who disagree with the group's objectives or do not share the group's interests, *Christian Legal Society* involved a policy forbidding any student organization from discriminating for any reason. Under this "all-comers policy," the Young Democrats had to allow Republicans to join; the Vegetarian Society had to include carnivores; and the Chess Club had to allow members who would prefer to play checkers.

If an institution allows some student political organizations or student special interest organizations to exclude those who do not share the group's ideology, interests, or values, then it will be difficult to justify forcing other student groups to admit everyone. Moreover, given the First Amendment's "special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706, (2012), it will be particularly difficulty to justify such a policy with respect to religious groups.

229. Because State Constitutions often are more protective of individual liberty, a student group may have a state constitutional right to exclude those who disagree with the group's views. Indeed, since the Burger Court's decisions prompted a revival of state constitutional law in the early 1970's, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976), "it would be most unwise these days not also to raise the state constitutional questions." William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its State Constitution prohibited the government from pressuring an organization to admit members who disagreed with the organization's objectives. *See* Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes*, 118 HARV. L. REV. 155, 211-12 (2004) (discussing how state court's interpreted state constitutions to provide greater protection for religious liberty in the wake of the U.S. Supreme Court's reinterpretation of the Free Exercise Clause).

230. *See* Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. § 41-1493.01; Ark 2015 SB 975, enacted April 2, 2015; Conn. Gen. Stat. § 52-571b; Fla. Stat. §§ 767, 761.03; Idaho Code § 73-402; Ill. Rev. Stat. Ch. 775, § 35/1; Indiana 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015; Kan. Stat. §60-5301; Ky. Rev. Stat. §446.350; La. Rev. Stat. §13:5231;Miss. Code §11-61-1; Mo. Rev. Stat. §1.302; N.M. Stat. §28-22-1;. Okla. Stat. tit. 51, §251; Pa. Stat. tit. 71, §§ 2403, 2401; R.I. Gen. Laws §42-80.1-1; S.C. Code §1-32-10; Tenn. Code §4-1-407; Tex. Civ. Prac. & Remedies Code §110.001; Va. Code §57-1; For a discussion of these statutes, *see* Christopher C. Lund, *Religious Freedom After Gonzales*, 55 S.D. L. REV. 467, 476 (2011); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALABAMA L. REV. 425, 426 (2010).

231. State Religious Freedom Restoration Acts are state statutes that protect the

mandate, institutions—as a matter of policy—should allow student groups to exclude those who disagree with the organization's values and objectives.[232] "One reason that associational freedom is the fundamental building block of a confident pluralism is that it shields groups and spaces from the reaches of state power. Without this initial sorting . . . the aspirations of a confident pluralism become functionally unworkable."[233]

The Constitution also requires public institutions to permit speech in a wide variety of locations. Colleges and universities often confine expressive activities to a narrow "free speech" zone,[234] but recent Supreme Court decisions suggest such restrictions are unconstitutional. In *Pleasant Grove City v. Summum*, [235] the Court explained that "designated public fora" and "limited public fora" were not interchangeable terms for the same constitutional concept, but were in fact two separate constitutional concepts

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free exercise of religion. The statutes provide more protection for religious organizations than the Free Exercise Clause of the First Amendment as interpreted by the Supreme Court of the United States. Although there is some variance in the scope of the statutes, most acts provide "no government shall impose a substantial burden on the religious exercise" unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." As a practical matter, these statutes codify the legal standard articulated by Sherbert v. Verner, 374 U.S. 398 (1963).

232. As Inazu explained:

> The example of the all-comers policies on a number of different college campuses illustrates the importance of what some have called "institutional pluralism." At Hastings and other public school campuses, these all-comers policies depart not only from the aspirations of a confident pluralism, but also from longstanding *constitutional* constraints. But what about private schools like Vanderbilt University and Bowdoin College? Should these private schools enforce all-comers policies as a normative matter? This is, to me, a far more complicated question than cases involving public institutions. On the one hand, Vanderbilt and Bowdoin are hindering pluralism in the same way that Hastings is in adopting an all-comers policy. Perhaps even more egregiously, their adoption of an all-comers policy cuts against the academic inquiry purportedly at the heart of institutions of higher learning. All of these failures suggest strong normative reasons to criticize Vanderbilt and Bowdoin for adopting the all-comers policy.
>
> On the other hand, Vanderbilt and Bowdoin are themselves private actors, and they contribute to the landscape of institutional pluralism. For this reason, those who are critical of the substantive policies might nevertheless defend the ability of these institutions to implement them. Private actors like universities reinforce the First Amendment insofar as they limit the power of the state, even when they internally neglect those values. That is another reason that the state action doctrine matters—it preserves the integrity of non-state power players because of, rather than in spite of, the power that they wield.

Inazu, *supra* note 24, at 612-13.

233. *Id.* at 604 (emphasis in original).

234. LUKIANOFF *supra* note 13, at 61–76 (Chapter 3); Powers, *supra* note 18, at 89–106 (Chapter 5).

235. 555 U.S. 460 (2009).

and required different levels of scrutiny.[236] By doing so, the Court resolved "the confusion over terminology and scrutiny levels [noticed by lower courts] after the Supreme Court first articulated the concept of a 'limited public forum.'"[237] After *Pleasant Grove*, the open spaces on a public college and university campus are properly viewed a "designated public forum."[238] "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum."[239] Thus, a public institution may impose speech restrictions "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest,"[240] but the college and university "may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[241]

In sum, Inazu's confident pluralism paradigm requires the development of an institutional infrastructure consistent with a commitment to Freedom; the Constitution requires public institutions to provide such an infrastructure.

CONCLUSION

"There is no vaccination against ignorance, but there *is* us. There is

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236. *Id*. at 469. The U.S. District Court for the Southern District of Ohio explained the significance of *Pleasant Grove*:

> The *Gilles* court treated the terms "limited public forum" and "designated public forum" interchangeably But the Supreme Court has subsequently clarified that *designated public fora and limited public fora are distinct types, subject to differing standards of scrutiny.* This *Pleasant Grove* decision "resolves the confusion over terminology and scrutiny levels" created by the Sixth Circuit's earlier decisions, and diminishes the value of *Gilles'* holding that open campus spaces of public universities are limited public fora. Indeed, the Sixth Circuit's most recent decision on the matter holds that such spaces are more appropriately considered designated public fora.

Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams, 2012 WL 2160969, at *4 (S.D. Ohio 2012) (emphasis original) (citations omitted).

237. Miller v. City of Cincinnati, 622 F.3d 524, 535 n. 1 (6th Cir. 2010).

238. *See* McGlone v. Bell, 681 F.3d 718, 733 (6th Cir. 2012) (holding that the open areas of Tennessee Technical University's campus are designated public fora). *See also* Hays Cnty. Guardian v. Supple, 969 F.2d 111, 116 (5th Cir.1992 (holding that the university campus is a designated public forum).

239. *Pleasant Grove*, 555 U.S. at 469-70.

240. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

241. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[higher education]."[242] America's colleges and universities "still have heavy doors to open, unmet obligations to the land and its people."[243] Academe must lead "this nation, and our world towards fulfilling its potential, towards meeting its lofty promises."[244]

If higher education is going to fulfill its obligations to American society, it must clearly and unambiguously embrace Freedom. Freedom is essential to obtaining the educational benefits of diversity. Freedom is at the heart of the university community's ability to "discuss any problem that presents itself."[245] Freedom leads to the confident pluralism that allows society to reach a broad consensus and effective, workable solutions.

Unfortunately, as Lukianoff and Powers explain in their respective volumes, higher education is betraying Freedom. "On college campuses today, students are punished for everything from mild satire, to writing politically incorrect short stories, to having the 'wrong' opinion on virtually every hot button issue, and, increasingly, simply for criticizing the college administration . . ."[246] colleges and universities relentlessly strive to admit a diverse student body, but then insist on conformity to a particular worldview. Institutions articulate platitudes about academic freedom, but then stifle any discussion, inquiry, or research that contradicts the contemporary orthodoxy or offends a particular group. Instead of developing the institutional policies necessary to promote a confident pluralism, academe violates First Amendment rights.[247] This betrayal of Freedom must stop. As Justice Brandeis explained:

> that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[248]

Because "it is only through free debate and free exchange of ideas that

242. Frank X. Walker, *Seedtime in the Commonwealth: On the Occasion of the University of Kentucky's Sesquicentennial*, UNIVERSITY OF KENTUCKY NEWS, (2015), http://uknow.uky.edu/content/seedtime-commonwealth (emphasis in original). Walker's words, which are incorporated into the University of Kentucky's strategic plan, influence and inform the University's on-going efforts to keep its Promise to Kentucky.

243. *Id.*

244. *Id.*

245. University of Chicago, *supra* note 23.

246. LUKIANOFF, *supra* note 13, at 4.

247. Christian Legal Soc'y. v. Martinez, 561 U.S. 661, 733-34 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting).

248. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

government remains responsive to the will of the people and peaceful change is effected,"[249] higher education "has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."[250]

249. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949)
250. University of Chicago, *supra* note 23.