Campus Protests and Competing Marketplaces: A Legal Examination of Operative Tension Between the Marketplace of Ideas and the Neoliberal Marketplace

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CAMPUS PROTESTS AND COMPETING MARKETPLACES: A LEGAL EXAMINATION OF OPERATIVE TENSION BETWEEN THE MARKETPLACE OF IDEAS AND THE NEOLIBERAL MARKETPLACE

A Dissertation

Submitted to the Graduate Faculty of the Louisiana State University and Agricultural and Mechanical College in partial fulfillment of the requirements for the degree of Doctor of Philosophy in The School of Education

by

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ABSTRACT

This dissertation analyzes the marketplace of ideas analogy, a longstanding force in First Amendment jurisprudence, as it evolves within the same operational contexts as neoliberal economic policy in higher education. To accomplish this, the study focuses on students, the campus population whose activism patterns are distinctively associated with renewed public debate over free speech in university settings. The study combined legal and qualitative research methods to explore a modern campus environment, rife for student dissent, that exists in unresolved tension between the legal underpinnings of the marketplace of ideas analogy and institutional behaviors increasingly linked to neoliberalism. After all: findings from a legal-historical analysis of student speech jurisprudence from 1969-2019, when postured in tandem with a multiple-case study analysis of four campus speaker incidents between 2017-2019, suggest that higher education’s polarized climate is not the result of a free speech ‘crisis,’ an interpretation predominantly employed by conservative lawmakers and student litigants at present. Rather, student dissent patterns on campus could be increasingly interpreted as a consequence of neoliberalism and its influence on operations in the academy. These findings are, relatedly, indicative of a disproportionately focused public and political discourse toward student speech on campus, which I argue will continue to misdiagnose and exacerbate the nature of campus dissent in future operations.
CHAPTER 1
INTRODUCTION

For over a century, the “marketplace of ideas” has served as a stalwart legal defense of free speech.1 Notably, the marketplace analogy first rooted itself in First Amendment doctrine via dissent, following the majority opinion of Abrams v. United States.2 Justice Oliver Wendell Holmes, Jr., alongside concurrence with Justice Louis Brandeis, proved cautious against a society where varying ideas and opinions were prohibited from entering into the “competition of the market,”3 and instead posited a utopian logic that truth would eventually emerge from such competition.4 The metaphor’s use has largely persisted because it acutely reflects the strong classical underpinnings of individual liberty and progress that were opined, with particular influence, by 17th century philosophers John Milton and John Locke, and, two centuries later,

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1 Abrams v. United States, 250 U.S. 616, 630 (1919), (Justices Oliver Wendell Holmes, Jr., & Louis Brandeis, dissenting, “…the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market…”). See also, e.g., C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. REV. 968 (1978), and Joseph Blocher, Institutions in the Marketplace of Ideas, 57 DUKE L.J. 821 (2008) (where Abrams v. United States is acknowledged as the introduction of the marketplace of ideas metaphor into legal dicta).

2 Abrams v. United States, 250 U.S. 616 (1919), (Justice John Hessin Clarke delivered the 7-2 majority opinion that five plaintiffs violated the Espionage Act through the dissemination of pamphlets criticizing war between the U.S. and Germany).

3 Id. at 630.

4 Id.
John Stuart Mill—and postures what they considered “fundamental natural rights” within the operational context of the United States’ laissez-faire economic system.

Thus: despite the obvious difference between the marketplace as it relates to a tangibly functioning free-market economy, and the marketplace as it relates to a First Amendment metaphor that has endured a sustained period of judicial deference, I argue in this dissertation that there exists a certain level of both theoretical and operational symbiosis where these two marketplaces are concerned. Specifically, I argue that free speech jurisprudence and neoliberal economic policy, as both have evolved in the United States (often on parallel timelines), coexist in operational reciprocity under the politicized premise that they share theoretical tenets of individual freedom over everything. Neoliberalism, in this study, is utilized as the economic market counterpart to the marketplace of ideas theory, given that it currently serves as the

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6 Robert Trager, Susan Dente Ross, & Amy Reynolds, THE LAW OF JOURNALISM AND MASS COMMUNICATION, 57 (6th ed., 2018) (explaining that John “Locke first said that all people have fundamental natural rights, including life, personal liberty and self-fulfillment. Freedom of expression is central to these natural rights.”)


8 See Joseph Blocher, Institutions in the Marketplace of Ideas, 57 DUKE L.J. 825 (2008) (offers a preliminary list of landmark Supreme Court cases that acknowledged the marketplace of ideas defense of free speech in proceedings.)

9 See, e.g., Edward P. St. John, Nathan Daun-Barnett, & Karen Moronski-Chapman, PUBLIC POLICY AND HIGHER EDUCATION: REFRAMING STRATEGIES FOR PREPARATION, ACCESS, AND COLLEGE SUCCESS, 13 (1st Ed., 2013) (explains the neoliberal ideology as one “valuing individual rights over the social good”).
principal market system in the United States—a system that functions on capitalist, global competition and necessitates individualized freedom to drive such competition.  

As this dissertation seeks to explore, institutions of higher education serve as particularly salient organizations from which to analyze operational challenges that emerge from failures in either marketplace. Higher education is uniquely positioned in an increasingly difficult balance between its fundamental public good mission, which posits an educational experience for all students to learn, grow, and participate in later upwards social mobility, and its need to operate in a corporatized fashion that generates sustainable revenue. Its inherent operational framework, then—which Weisbrod, Ballou, and Asch conceptualized as a “two-good” framework—demonstrates a perpetuating tradeoff between mission and revenue that seemingly facilitates a climate for dissent on campus. Given that, dissent, as with Abrams v. United States, is often approached from a legal lens via First Amendment interpretation, I argue that the true failing marketplace operation in higher education—neoliberalism—is incongruously absent from

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10 St. John, Daun-Barnett, & Karen Moronski-Chapman, supra note 9, at 6 (where “neoliberalism is appropriately characterized as valuing freedom of choice over individual rights…”).

11 See Ingber, supra note 7, at 5, for a note on how both marketplaces are susceptible to certain conditions: Although the laissez-faire theory asserts that desirable economic conditions are best promoted by a free market system, today’s economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas…


13 Id. at 59:

The two-good framework provides guidance. First, we view each school as pursuing a particular mission. The school is seen as a producer of one or more “mission goods.” …Second, we view each school as struggling to provide more funds by devoting resources to “revenue goods.”

14 “While these protections have been tested time and time again throughout our country’s history, the result has been a long history of jurisprudence repeatedly re-affirming both the civic importance of, and the legal right to, public protest.” PEN America, Arresting Dissent: Legislative Restrictions on the Right to Protest, 9 (May 2020), https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf. See also Abrams v. United States, 250 U.S. 616 (1919).
societal and political scrutiny, and instead current discourse unduly focuses on the scope of the marketplace of ideas legal analogy.

From a free speech standpoint alone, higher education provides an exceptional context for examining the connection between the neoliberal economic marketplace and the legal marketplace of ideas, given its inimitable mission for intellectual progress and truth-seeking that has resulted in special protection from the courts; a particularly important narrowing of the marketplace analogy emerged from *Keyishian v. Board of Regents* in 1967.\(^{15}\) In *Keyishian*, Chief Justice William Brennan, Jr. argued that “the classroom is peculiarly the ‘marketplace of ideas’…[and] the Nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth.”\(^{16}\) The Supreme Court’s decision in *Keyishian* deemed that a New York state “plan, formulated partly in statutes and partly in administrative regulations”\(^{17}\) was unconstitutional, in that it held employment status for state employees at the University of Buffalo provisional to their disclosure of any dealings or affiliations with Communism.\(^{18}\) While the *Keyishian* decision specifically analyzed freedom of expression for faculty members at public institutions, the Supreme Court took part in landmark decisions beginning in the latter half of the 1960s that soon involved another population within the higher education marketplace: students.\(^{19}\)


\(^{16}\) *Id.* at 603.

\(^{17}\) *Id.* at 591-592.

\(^{18}\) *Id.*

\(^{19}\) *See, e.g.*, Justin Driver, *The Schoolhouse Gate: Public Education, The Supreme Court, and the Battle for the American Mind*, 71 (2018) (“In the late 1960s, the Supreme Court began contemplating how the First Amendment’s commitment to ‘the freedom of speech’ should protect the right of students to introduce their own ideas into the schoolhouse.”).
In a manner befitting of the cyclical nature of free speech disputes on campus, many of the Supreme Court decisions during the 1960s and 70s sought to remedy the dual-need for students to thrive in a safe, structured learning environment, while also benefitting as quasi-autonomous actors in the marketplace of ideas. Much of this judicial analysis, as evidenced by the landmark decision in *Tinker v. Des Moines Independent Community School District*, stemmed from student-led activism or perceived rebellion against the historically disciplinarian schoolhouse model. *Tinker* arose after students John Tinker, Mary Beth Tinker, and Christopher Eckhardt were suspended from school after wearing black armbands signifying opposition to the Vietnam War (despite a hastily drawn up policy by the school district forbidding such action). The students’ protests were but one example of anti-war demonstrations occurring within educational settings during the 1960s, in part an objection to wartime violence and in larger part a rallying cry for the ability to speak out freely against government action—even on school grounds.

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20 See Erwin Chemerinsky & Howard Gillman, *FREE SPEECH ON CAMPUS*, preface: xix (2018) (“Controversies over freedom of speech on college campuses have existed as long as there have been college campuses. But the specific issues vary with each generation.”)

21 See Driver, *supra* note 19, at 73, explaining the necessary educational balance affirmed in *Tinker*: Tinker asserted that students must not be viewed as mere empty vessels that teachers—and teachers alone—fill with knowledge on discrete topics. That conception offered an impoverished understanding of education. Instead, *Tinker* insisted, students must be permitted to exchange independent ideas with one another—on an extensive array of topics—because those exchanges constitute an essential part of the educational process itself.

22 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (Supreme Court determined that three secondary school students were within their constitutional right to free speech after wearing black armbands to school as a peaceful protest against U.S. participation in the Vietnam War.)

23 Id. at 504.

24 See Chemerinsky & Gillman, *supra* note 20, at 74-75 (where they argued that higher education’s origination as a climate/forum to where protests and opposing viewpoints can thrive beyond the classroom emerged from the Berkeley Free Speech Movement in the mid- to late-1960s). See also, *e.g.*, Jerusha O’Conner, *THE NEW STUDENT ACTIVISTS: THE RISE OF NEOACTIVISM ON COLLEGE CAMPUSES*, loc. 172 (2020) (ebook).
The University of California, Berkeley was particularly a hotbed of student speech protests during that decade; Chemerinsky and Gillman argued that the resulting “Berkeley Free Speech Movement helped establish within American higher education the rights of students to express themselves outside the academic context.”

This movement, legally reinforced by the precedent set in *Tinker* that neither “students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” acted as a turning point in broadening access of the classic marketplace of ideas model to that of the student body.

Theoretically, then, the marketplace of ideas as a legal precedent makes allowance for differences in opinion, contrasting avenues of thought, and even controversial rhetoric that results in heated public discourse. Increased freedom to engage in unfettered discourse on campus, similarly, has continually connected the higher education institution to the broader societal, economic, and political environment, and thus should protect, in principle, the special status of universities as intellectual trailblazers in the search for truth. This dissertation, however, first examines recent criticisms of free speech on campus that have emerged from conflicting legal and economic marketplace ideologies—theoretical conflicts that, as argued

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25 See Chemerinsky & Gillman, *supra* note 20, at 76.


before, will inherently operationalize in dissent, and that which could permanently alter the landscape of higher education if left ignored. Student dissent patterns, in particular, are indicative of a rising tension between higher education as a public good and higher education as a neoliberal entity with tight profit margins.\(^{30}\) Giroux noted that student activism on campus is often a condemnation of higher education’s behavior during its latter pursuit:

…there is more at stake here in turning the university into an adjunct of the corporation: there is also an attempt to remove it because it is one of the few remaining institutions in which dissent, critical dialogue, and social problems can be critically engaged. Young people in the United States now recognize that the university has become part of a Ponzi scheme designed to impose on students an unconscionable amount of debt while subjecting them to the harsh demands and power of commanding financial institutions for years after they graduate. Under this economic model of subservience, there is no future for young people, there is no time to talk about advancing social justice, addressing social problems, promoting critical thinking, cultivating social responsibility, or engaging noncommodified values that might challenge the neoliberal world view.\(^{31}\)

As a result of intensified student dissent, campus speech is once again a topic of vociferous debate, polarized and often partisan political action, and divided media coverage.\(^{32}\) Of particular focus in such divergent national rhetoric, according to Labanc, Fernandez, Hutchens, and Melear, concerns “the issue of controversial speakers on campus and how institutions should respond to hateful or demeaning speech that has created tension at several institutions, resulting in media and public scrutiny.”\(^{33}\) Following multiple incendiary skirmishes between polarizing

\(^{30}\) See generally Weisbrod, Ballou, & Asch, supra note 12 (provides an extensive overview of the tricky balance struck between mission and revenue.)


campus speakers and student activists—which this dissertation delves into at length in later case studies—many institutions have scrambled to remedy mixed (yet vocal) reactions in public opinion.  

Such media scrutiny after those incidents has even alerted several state and federal lawmakers—as well as a growing number of higher education stakeholders—to consider perceived shortcomings in First Amendment doctrine in the university setting, some going so far as to classify the current free speech climate on campus as a “crisis.”

Undoubtedly the most glaring example of this perception occurred in March 2019, when then-President Donald Trump signed an executive order calling for institutions to prioritize and protect individual free speech on campus; to fail to do so would run the risk of losing federal funding. Yet, is there a free speech “crisis” on campus? Additionally, what is it about student protests toward controversial speakers that indicates such a problem that First Amendment precedent is rendered ineffective to solve the issue on its own?

President Trump’s executive order, among other state legislative actions of recent, help demonstrate this dissertation’s central thesis: that a functioning marketplace of ideas and

34 “Provocateurs are not new to college campuses, yet higher education institutions across the country have faced news headlines that have been unflattering evaluations of how campus leaders have addressed free speech, campus safety, diversity and inclusion, and community concerns.” Jeffrey C. Sun & George S. McClellan, STUDENT CLASHES ON CAMPUS: A LEADERSHIP GUIDE TO FREE SPEECH, 2 (2020).


37 See Panuccio, supra note 35.

38 See generally Katherine Mangan, If There is a Free-Speech ‘Crisis’ on Campus, PEN America Says, Lawmakers are Making It Worse, THE CHRONICLE OF HIGHER EDUCATION (April 2, 2019), https://www.chronicle.com/article/If-There-Is-a-Free-Speech/246031, for general coverage of lawmaker efforts to safeguard free speech on campus.

institutions’ ability to compete in the economic market are currently contingent on perceived reciprocity.\textsuperscript{40} This also sheds light on the way in which university participants (here, students) act in response to macro-environmental factors—and, with particular focus in this research study, to economic factors. Because of that, it becomes near-impossible to analyze the current condition of the marketplace of ideas, and, specifically, the efficacy of the analogy within student speech jurisprudence, without considering how economic principles have also evolved in the United States.\textsuperscript{41} Namely, student speech litigation patterns on campus must be cross-analyzed with increasing neoliberal economic behaviors pervasive in higher education.\textsuperscript{42}

From the outset—which aids in shaping the cross-comparative focus of this dissertation—neoliberalism and student speech jurisprudence have both similar timelines and theoretical underpinnings.\textsuperscript{43} For instance, neoliberalism emerged in the early 1970s as a fiscal antidote intended to combat U.S. struggles in a regenerative “global marketplace.”\textsuperscript{44} The introduction of a new economic system in response to global affairs during that period very


\textsuperscript{41} “…Neoliberalism took hold in the 1980s…[and] has been the prevailing orthodoxy in the United States for several decades…” O’Conner, \textit{supra} note 28, at loc. 172 (ebook).

\textsuperscript{42} Ryan King-White, \textit{SPORT AND THE NEOLIBERAL UNIVERSITY}, 4 (2019) provides the following definition of neoliberalism: “Put simply, neoliberalism is the dominant economic, social, and political ideology found in the United States and throughout much of the developed world for the past few decades.”

\textsuperscript{43} See King-White, \textit{supra} note 42, at 4. See also Giroux, \textit{supra} note 31, at 1, and O’Conner, \textit{supra} note 28, at loc. 172 (ebook).

\textsuperscript{44} King-White, \textit{supra} note 42, at 4.
much aligns with the seminal campus protests (and ensuing legal cases) of the late 1960s that often criticized those same U.S. actions within the international community.\textsuperscript{45}

From a theoretical standpoint, so too does neoliberalism reflect parallel foundations to that of the marketplace of ideas analogy in First Amendment dicta.\textsuperscript{46} Particularly strong comparisons draw from the emphasis on individual liberty as a vessel for enduring progress.\textsuperscript{47} Ryan King-White described neoliberalism’s evolution as such:

Inspired by the belief that laissez-faire capitalism provides individual rights and freedoms, American political leaders (particularly conservatives and libertarians, but also some contemporary liberals) have put in place policies, practices, and laws that have undercut social contracts between the state and its people and given rise to the radical individual. The usual understanding here is that the individual will operate solely in her or his own self-interest and therefore will succeed or fail based on her or his own merits.\textsuperscript{48}

Again, this ideology is contingent on the assumption that individual liberties, shorn of government interference, will foster an environment where the best possible product—and, relatedly, the most successful purveyors of that product—emerge from relentless market competition.\textsuperscript{49} Halewood and Young more succinctly describe neoliberalism as “an ideological system which equates free markets with freedom and democracy,”\textsuperscript{50} thereby further associating

\textsuperscript{45} Id. See also Jeffrey C. Sun & George S. McClellan, \textit{Student Clashes on Campus: A Leadership Guide to Free Speech}, 65 (2020) (arguing that \textit{Tinker v. Des Moines} in 1969 is “the case which undergirds much of the controlling case law and legal thinking” around student speech, even today). And see Chemerinsky & Gillman, supra note 20, at 76.

\textsuperscript{46} See, e.g., \textit{Abrams v. United States}, 250 U.S. 616 (1919). See also Ingber, supra note 7, at 5 (reiterating the connection between the legal marketplace of ideas analogy and laissez-faire economic behavior).

\textsuperscript{47} See Lawrence Hill, supra note 5. See also Stanley Fish, \textit{The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump}, 33 (2019), where he argues that with the “core tenets of liberalism, (you can find a canonical account of them in Mill’s \textit{On Liberty}), it is easy to see why the First Amendment is quintessential liberal doctrine.”

\textsuperscript{48} King-White, supra note 42, at 5.

\textsuperscript{49} Id.

\textsuperscript{50} Peter Halewood & Donna Young, \textit{Rule of Law, Activism, and Equality: Growing Antisubordination Norms Within the Neoliberal University}, 50 J. MARSHALL L. REV. 266 (2017).
this economic behavior with liberty. This system is entirely reflective of the model marketplace of ideas that Justice Louis Brandeis reiterated during Whitney v. California in 1927, where “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”51 The parallels of this logic are well-defined: the more speech there is, the more ability there is for individuals to make informed and democratic decisions based on truth.52 Likewise, the more competition there is in an industrial market with limited federal oversight, the more incentive there is for those to try and succeed within the global economy.53 Legal scholars and economists alike, particularly in the 1990s and onward, have begun to examine these theoretical similarities—paired with their analogous timelines of societal development—to conduct research both comparing and contrasting (and critiquing) these two conceptual frameworks in diverse societal contexts.54 This study expands on such work and was developed from a similar conceptual exercise based on extant literature, the result of which is illustrated in Figure 1.1.

51 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. and Wendell Holmes, O., provided a separate concurrence following the majority opinion that upheld the conviction of the plaintiff, Charlotte Anna Whitney, on the grounds that she violated the California Criminal Syndicalism Act. While they concurred, Brandeis warned that prohibiting/punishing free speech should only occur when harm seems obvious and inevitable). See also Chemerinsky & Gillman, supra note 20, at 40, where they assert that Brandeis’ call for more speech as a means to limit harm is now “the most common argument used by free speech advocates…”

52 Id.

53 King-White, supra note 42, at 5.

54 See Paul H. Brietzke, How and Why the Marketplace Fails, 31 VAL. U.L. REV. 951 (1997) (argues that “analogy is the weakest form of argument in logic, but frequently the best we have in law,” thereby sustaining judicial deference to the marketplace of ideas despite its inherent failure to meet certain assumptions. For instance, an unequivocally free market still has certain regulations, as has free speech jurisprudence when considering obscenity or navigating the question of hate speech; similarly, the idea of ‘truth’ that is so coveted is often more subjective to the individual than is presumed by the concept). See also Ingber, supra note 7 (argues that the marketplace of ideas as an associated analogy to laissez-faire market behavior inherently benefits—and both perpetuates—the power of elite stakeholders by prolonging the perception that the United States fiercely protects and values individual speech). And see more recently, Blocher, supra note 8 (explored the rise and tenets of New Institutional Economics, which seeks to account for market failures, but argued that the marketplace of ideas as it remains in its classical model will continue to contradict this new system by not accounting for its own failures as well).
While the conceptual framework of this dissertation topic was achieved by full saturation of literature, there were notable pieces of scholarship that facilitated clarity and theoretical underpinnings, among other benefits. See Weisbrod, Ballou, & Asch, supra note 12 (introducing the “two-good” framework between mission and revenue operations). See Ernest T. Pascarella, Mark H. Salisbury, Georgianna L. Martin, & Charles Blaich, Some Complexities in the Effects of Diversity Experiences on Orientation Toward Social/Political Activism and Political Views in the First Year of College, 83 THE JOURNAL OF HIGHER EDUCATION 467 (2012) (acknowledging higher education as a leading environment in which students become privy to diversity, social issues, and other areas that commonly lead to increased activism). See O’Conner, supra note 28 (introducing the concept of “neoactivism” in recent campus activity). See Sheila Slaughter & Gary Rhoades, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION (2009) (ebook) (introducing academic capitalism as a theory that explains modern institutional behavior as a reaction/response to global, neoliberal economic policies). And see Ingber, supra note 7 (offers extensive comparison to the marketplace of ideas analogy and laissez-faire economic principles).
As mentioned prior, higher education provides a timely context in which the marketplace of ideas has been afforded considerable attention—however, there is still a relative lack of scholarship that bridges theoretical and operational tenets of current campus legal standards with evolving economic trends.\(^56\) Therefore, this dissertation seeks to fill a knowledge gap by analyzing how neoliberalism and student-led campus protest litigation operationalize on a university campus. The purpose of this dissertation, then, is to acknowledge current discourse surrounding free speech on campus, which largely involves the legal parameters of student activism within the postsecondary setting. I examine litigation patterns concerning students as actors in higher education, where a uniquely protected marketplace of ideas\(^57\) and a federally garrisoned neoliberal marketplace converge.\(^58\) In doing so, this dissertation determines to what extent, if at all, a free speech ‘crisis’ does exist at present, while posturing subsequent legal conclusions alongside inferences from its modern theoretical counterpart: neoliberalism.

Implementing the study in this way painstakingly compares both marketplaces as they function in tandem in higher education—as well as provides a comprehensive means to clearly address the implications of their interconnectedness.

The execution of this dissertation ultimately consists of two overarching methodological sections. First, I conducted a thorough legal-historical analysis of student speech cases between

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\(^{56}\) The importance of cross-examining economic behaviors on campus alongside free speech standards will be of particular importance when analyzing how institutions and lawmakers act when issues arise. See Labanc, Fernandez, Hutchens, & Melear, supra note 33, at 3 (2020), where the authors “contend that legal standards alone should not control how institutions and campus leaders think about and respond to free speech matters.”

\(^{57}\) Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

\(^{58}\) See, e.g., O’Conner, supra note 28, at loc. 319 (ebook), where she argued that, at a particularly intense level, “Donald Trump represents the epitome of neoliberalism. In his administration, one of the core functions of government is to unshackle and expand markets, reflecting the neoliberal ideology that free markets should be unencumbered to create wealth…”
1969 and 2019, which not only provided necessary background information to understand the legal evolution of student speech on campus, but also the broader economic, political, and social circumstances from which these legal matters emerged. Accordingly, the legal-historical analysis continued to underscore my assertion that the student speech issues addressed in this dissertation are much more impacted by economic realities currently facing higher education than law. This assertion, which is expanded upon later in the study, is consistent with and furthers an emergent body of literature that links modern student activism as a consequence of neoliberal behavior, one scholar going so far as to coin a new term for the phenomenon: “neoactivism.”

The dissertation is then supplemented by a case study approach of four institutions of higher education that, from 2017-2019, grappled with how to legally (and logistically) handle student-led campus protests concerning controversial speakers. While each of the four universities analyzed experienced varying levels of conflict and aftermath, their institutional actions all managed to reach the broader community and permeate public discourse in

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59 See, e.g., Driver, supra note 19, at 73, where Driver recognizes Tinker v. Des Moines as a decision in which “the Court in 1969 heartily embraced the principle that students retain affirmative free speech rights in school. Of greater significance, though, Tinker reconceptualized the roles of both the student and the school in American society.” See also Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969).

60 O’Conner, supra note 28, at loc. 214 and 250 (ebook), conducted research on student activism patterns on college campuses from 2014-on. While she did not explicitly focus on the free speech element of student activism, her definition and description of “neoactivism” does acknowledge the watershed student protests of the 1960s and how they remain important today:

Although college student groups today differ in some ways from the student activists of the 1960s, the two groups share commonalities. I introduce the term neoactivist to describe one subset of contemporary college student activists who deliberately link their social justice work to the pioneering activist efforts of their predecessors and whose critical consciousness and intersectional perspective set them apart from their more conservative contemporary counterparts. I use neo intentionally to place neoactivism into conversation with neoliberalism, showing how the former speaks back to the logic of the latter.

61 The four institutions sampled in the case study approach are University of California, Berkeley, University of Washington (Seattle campus), Middlebury University, and Auburn University.
mainstream media coverage. The result of such widespread news coverage has been continued scrutiny by lawmakers and “purposive organizations” alike on the university’s role as a marketplace of ideas—a timely dynamic that this dissertation seeks to better understand and act on. To accomplish this requires that the study is grounded with the following research questions:

1. What, if any, shifts in student protest litigation patterns—from 1969-2019—are indicative of a free speech ‘crisis’ on campus?

2. To what extent is there an operative tension between the marketplace of ideas as a legal defense of free speech, and the marketplace of ideas as a neoliberal analogy of open-market economic behavior?

3. How do recent (2017-2019) campus speaker conflicts exhibit operative tension between the marketplace of ideas as a defense of free speech, and the marketplace of ideas as a neoliberal economic analogy?

While the legal-historical analysis and supporting case studies are intended to provide a widely accessible, holistic, and original resource from which to analyze free speech on campus, there remain certain limitations in execution that warrant acknowledgement. First, three of the

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63 Michael Olivas, *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS*, 66 (2014) (describes purposive organizations in higher education as representative groups, typically with conservative political leanings, that litigate on behalf of aggrieved plaintiffs following a university incident. Examples pertinent to this dissertation include the Goldwater Institute and Foundation for Individual Rights in Education (FIRE)).
four institutions involved in the study—University of California, Berkeley, University of Washington, and Auburn University—are all large public research universities, each serving a minimum of 30,000 students.\(^{64}\) In contrast, Middlebury College holds designation as a private, liberal arts institution with roughly 2,500 enrolled undergraduate students.\(^{65}\) Middlebury College was included in this study to juxtapose the public/private university dichotomy that emerges in First Amendment issues; namely, “whereas public institutions are usually subject to the plenary authority of the government that creates them, the law protects private institutions from such extensive governmental control.”\(^{66}\) While many private institutions adhere to First Amendment tenets as part of longstanding institutional policies\(^{67}\) or state action, they are not bound by the same overarching constitutional standards as public institutions.\(^{68}\) Conversely, however, Middlebury’s inclusion in the study also serves to demonstrate the relative ubiquity of neoliberal


\(^{65}\) See Middlebury College, *Quick Facts* (n.d.), http://www.middlebury.edu/about/facts, for an enrollment estimate of “about 2,500 students.”


\(^{68}\) Kaplin & Lee, *supra* note 66, at 602. See also Neal Hutchens & Kaitlin A. Quigley, *Legal Dimensions in Higher Education Governance, in Contemporary Issues in Higher Education Law*, 35 (Richard Fossey & Suzanne Eckes, eds., 3rd Ed., 2015), for the explanation that “while private institutions may be subject to considerable state regulation, they generally operate with a degree of legal control over their internal affairs greater than that of many of their public counterparts.”
marketplace competition and subsequent behaviors that both private and public institutions currently take part in.\textsuperscript{69}

Although this dissertation does incorporate both public and private institutions, and also contrasts three large, research-intensive universities with a small liberal arts program, the universities selected for the case study are not fully all-encompassing of postsecondary institution types in the United States today.\textsuperscript{70} Nor are the selected institutions inclusive of all four designated regions by the United States Census Bureau,\textsuperscript{71} which naturally excludes a large portion of the national student body. Conversely, all four institutions do exhibit disparate campus political leanings, ranging from “a bastion of American liberalism”\textsuperscript{72} to a survey-earned spot in the top 100 most conservative schools in the United States.\textsuperscript{73} The sheer variety of campus political climates in this study, then, must be acknowledged when comparing

\textsuperscript{69} See Giroux, supra note 31, at 107, where he argues that widespread state and federal disinvestment in higher education creates sector-wide fiscal burdens that suggest:

The academic mission of the university is now less determined by internal criteria established by faculty researchers with knowledge, expertise, and a commitment to the public good than by external market forces concerned with achieving fiscal stability, and, if possible, increasing profit margins.

\textsuperscript{70} The College Board differentiates postsecondary institutions between 2-year (including community colleges) and 4-year schools, as well as public, private, and for-profit, before also delving into other factors such as size, religious affiliation, or same-sex vs. coeducational. See The College Board, Type of School (n.d.), https://bigfuture.collegeboard.org/college-search.

\textsuperscript{71} The U.S. Census Bureau splits the United States into four separate regions: West, Midwest, South, and Northeast. Both University of California, Berkeley and the University of Washington fall into the West region, Auburn University falls into the South region, and Middlebury College falls into the Northeast region. As a result, there is no case study that geographically includes the Midwest region. See United States Census Bureau, Census Regions and Divisions in the United States (n.d.), https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf.


institutional responses to a highly polarized topic; neglecting to do so could make the comparative research more susceptible to adverse partisan assumptions.

That said, this dissertation will also reference widespread examples of state and institutional action in response to the aforementioned debates over student speech, and in doing so will seek to validate that current discourse over free speech on campus is a national (and even global) phenomenon. Once again, the increasingly universal nature of student-led protests (and responses) in postsecondary settings is consistent with the increasing dependence on neoliberalism as an economic tool under the former Trump administration.76

74 One example of state action that will be addressed in this dissertation comes from the Midwest region: Wisconsin’s recent legislative efforts to uphold free speech at its public universities—and, particularly, the disciplinary standards to which conservative lawmakers hope to achieve that—has sparked quite the debate. See Nuha Dolby, Wisconsin State Legislature Introduces Bill Protecting Free Speech on UW Campuses, THE BADGER HERALD (Aug. 16, 2019), https://badgerherald.com/news/2019/08/16/wisconsin-state-legislature-introduces-bill-protecting-free-speech-on-uw-campuses/.

75 See Giroux, supra note 31, at 155, where “from Paris, Athens, and London to Montreal and New York City, young people are challenging the current repressive historical conjuncture by rejecting its dominant premises and practices.” His text continues to argue that neoliberalism has (and continues) to have internationally reaching, negative consequences for higher education, and includes a case study from students in Quebec in his thesis.

76 See O’Conner, supra note 28, at loc. 319 (ebook), where she notes that “in addition to attempting to undo any Obama-era policy that represented government intervention in the markets…Trump has overseen massive deregulation.”
CHAPTER 2
JUSTIFICATION OF THE CASE MODEL APPROACH

The purpose of this dissertation is to analyze the efficacy of the marketplace of ideas analogy in modern First Amendment jurisprudence when it operationalizes on a neoliberal university campus. More specifically, this study focuses on students—the campus stakeholder group that has most publicly stoked the embers of societal discourse regarding free speech on campus in recent years—to determine the extent to which the marketplace of ideas as a legal defense of free speech conflicts with (or exacerbates) the neoliberal market behaviors that institutions nationwide increasingly rely on, even if their theoretical principles exhibit parallel logic.

To attain a full understanding of the issue first required a legal-historical analysis, a research approach intended to provide both foundational context and preliminary inferences for the first two research questions. The benefits of a legal-historical analysis for this study were two-fold. First, the approach served to amass a comprehensive, chronological account of First Amendment jurisprudence pertaining to student speech, which informs the posterior inquiry cross-analyzing concurrent legal status with economic behaviors. The execution of this analysis relied heavily on “binding primary authority” in the form of U.S. Supreme Court opinions, statutes, and federal regulations, such as President Trump’s March 2019 executive order. Second, as Phillips contended, to examine how and why laws have evolved over time—especially laws concerning constitutionally protected freedoms, with the First Amendment as a

1 Amy E. Sloan, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES, 15 (7th Ed., 2018) (ebook). To emphasize the importance of binding primary authority, Sloan utilized a combination of four categories: constitutions, court opinions, regulations, and statutes.

prime example—it becomes all the more persuadable that “legal developments cannot be separated from other historical trends.”³ Phillip’s taxonomy, which stresses the importance of bridging law and history in research,⁴ gave legs to the decision to utilize a legal-historical analysis when seeking to synthesize literature and simultaneously posit conclusions based on legal dicta. The 1969 decision in Tinker v. Des Moines served as the starting point for the analysis due to its enduring significance as a Supreme Court decision that expanded the speech rights of students.⁵ The most recent case that this dissertation examined is Turning Point United States v. Rhodes, which was adjudicated at the district court level in August 2019 and is reflective of a number of litigation patterns that have emerged from the latest manifestations of student speech conflict.⁶


⁴ Id. at 294-295, where Phillips goes on to provide a self-described “taxonomy” of four reasons as to why studying legal history is so essential:

…legal history teaches us about the contingency of law, about its fundamental shaping by other historical forces…legal history shows us that while law is shaped by other forces, it can be at the same time relatively autonomous…legal history, perhaps paradoxically, frees us from the past, allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have…legal history exposes the presence of many variants of legal pluralism in both the past and the present.


In short, Tinker represented a momentous innovation in the recognition of students’ constitutional rights. For the first time, the Supreme Court recognized that students retain the essential power to communicate their ideas to one another; such communication is not extraneous to the educational process but instead forms an integral part of that process; and public schools have an acute responsibility to tolerate dissident speech, so both the marketplace of ideas functions properly and citizens will be prepared to participate in the freewheeling debate that characterizes the United States.

⁶ Turning Point United States v. Rhodes, 409 F. Supp. 3d 677 (E.D. Ark., 2019) (an Arkansas State University (ASU) student sought to form a campus chapter of Turning Point USA, which is known nationally for its conservative values and free-market idealism. Following a heated exchange with the administration, she and an organizational representative challenged ASU’s policy on tabling in certain free speech ‘zones’ on campus. Yet, the policy had been repealed prior to the court’s hearing of the issue by the Arkansas FORUM Act; thus, the plaintiffs’ argument was essentially deemed as moot). See also Turning Point USA, About TPUSA (n.d.), https://www.tpusa.com/about. See also Ark. 92nd Gen. Assemb., Sess. 2019, Senate Bill 156 (2019) (Titled the “Forming Open and Robust University Minds (FORUM) Act”).
While the legal-historical analysis was guided largely by binding primary authority, extensive secondary authority was also utilized to achieve a broader scholarly framework. Secondary authority, as defined by Sloan, is “commentary on and analysis of the law.” Given the evolution of First Amendment law through steadily increasing “common law constitutionalism” since Abrams v. United States, shifts in jurisprudence have resulted in myriad scholarship of varying commentary that warrant recognition. Additionally, there has been widespread media recognition of campus protests in recent years, which has increased commentary on this topic even further. The subsequent case study approach was largely inspired by this ubiquitous commentary. As such, this dissertation not only made use of secondary authority in the form of law reviews, books, and peer-reviewed articles, but also encompassed considerable content from newspapers and other periodicals that continue to play focal roles in current discourse and thereby helped shape the study. Studying a broad assortment of topical material also helped to achieve saturation, which occurs when “the researcher stops collecting

7 Sloan, supra note 1, at 15.


9 Id. Wasserman’s main thesis held that Justice Oliver Wendell Holmes, Jr.’s dissent in Abrams v. United States in 1919 was a watershed moment despite it not being part of the majority opinion. He argued further that, from Abrams and extending nearly fifty years to New York Times v. Sullivan in the 1960s, changes in precedent that explicitly addressed societal circumstances of the time shaped what can now be considered “the modern First Amendment.” See also Abrams v. United States, 250 U.S. 616 (1919).

10 See Jeremy W. Peters, In the Name of Free Speech, States Crack Down on Campus Protests, THE NEW YORK TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html. Peters noted that Wisconsin’s efforts to protect free speech on campus arose after the University of California, Berkeley and Middlebury College protests, which “had focused national attention on the question of whether college campuses were shutting out politically unpopular points of view.”

11 See Sloan, supra note 1, at 285, where even though a wide variety and yield of sources may seem counterintuitive to a focused legal project, “secondary sources can help you identify the key authorities and otherwise limit the scope of the information on the issue.”
data because new data no longer sparks new insights or reveals new properties.”\textsuperscript{12} The diversity of content utilized in this dissertation spans both sides of the political aisle, the public/private funding dichotomy of higher education institutions, and over fifty years of evolving legal and economic circumstances in order to properly triangulate data.\textsuperscript{13}

To increase the qualitative validity of the research, a multiple-case study approach was also employed, naturally linking the historical context of the legal analysis to contemporary events that indicate an unfinished opportunity for research.\textsuperscript{14} The use of case studies also, as Permuth, Mawdsley, and Silver noted, pushes legal inquiry past the question of “what is the law”\textsuperscript{15} into the qualitative paradigm that seeks to explain the “why and how.”\textsuperscript{16} Exploring the why and how grounded the execution of this dissertation, because—as the forthcoming legal-historical analysis demonstrates—further explanation was needed to reconcile current student speech discourse with findings based on up-to-date judicial precedent. The multiple-case studies also facilitate results that could be made more accessible and solution-oriented to diverse higher education communities.\textsuperscript{17}

Considering that education law espouses a relative duality of

\textsuperscript{12} John W. Creswell, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES, 248 (4\textsuperscript{th} Ed., 2014).

\textsuperscript{13} \textit{Id.} at 201 (Creswell recommended that, to achieve qualitative validity, the researcher should “triangulate differing data sources and [use] it to build a coherent justification for themes.”)

\textsuperscript{14} \textit{See generally} Robert K. Yin, CASE STUDY RESEARCH AND APPLICATIONS: DESIGN AND METHODS, 9 (6\textsuperscript{th} Ed., 2018) (notes that choosing a case study approach in research should be dependent on three stipulations: “(a) the form of question posed, (b) the control a researcher has over actual behavioral events, and (c) the degree of focus on contemporary as opposed to entirely historical events.”)

\textsuperscript{15} Steve Permuth, Ralph Mawdsley, & Susan Silver, RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION, 28 (2\textsuperscript{nd} Ed., 2015).

\textsuperscript{16} \textit{Id. See also} at 28, where Permuth, Mawdsley & Silver argue that exploring the why/how of the law can also lead to “questions about the effects of consequences of the law,” a goal of this dissertation.

\textsuperscript{17} Creswell, \textit{supra} note 12, at 203, warned that making qualitative research findings too generalizable could diminish its overall reliability, which was considered during the research process. \textit{But see} Permuth, Mawdsley & Silver, \textit{supra} note 15, at 28, who argued that qualitative research methods help broaden the scope of who benefits from legal research.
audiences, it remains important that this dissertation can be understood and acted upon by various practitioners. Additionally, both legal analysis and qualitative inquiry operate synergistically, in that both research designs accommodate “iterative”\textsuperscript{18} phenomena. Thus, while this dissertation refrains from predicting the legal future of student speech on campus—as well as the feasible longevity of neoliberalism—the ensuing research should provide a timely, comprehensive piece of scholarship that also makes room for ever-evolving judicial interpretation and economic fluctuation.\textsuperscript{19}

The four case studies in this dissertation focus on particularly polemic student speech incidents at University of California, Berkeley, University of Washington, Middlebury College, and Auburn University, all of which have occurred within the last four academic years. As previously mentioned, the multiple-case study approach was used in conjunction with the legal-historical analysis as an in-depth means of exploring a contemporary issue; Yin argued that, in the scheme of case study research, ‘‘contemporary’’ [means] a fluid rendition of the recent past and the present…beyond what might be available in a conventional historical study.”\textsuperscript{20}

The criteria behind the purposeful selection of these cases included timeliness (those occurring within the last four academic years to counterbalance the legal-historical analysis), and relevance to the topic at hand, given that the phenomena studied in this dissertation explicitly covers student protests in response to controversial campus speakers.\textsuperscript{21} Other criteria, which further narrowed down the case study candidates, entailed an attempt at diversifying the institutions studied by geographical region and public/private designation. Perhaps the most

\textsuperscript{18} Permuth, Mawdsley & Silver, supra note 15, at 30.

\textsuperscript{19} Id.

\textsuperscript{20} Yin, supra note 14, at 12.

\textsuperscript{21} Id. at 106.
important condition to the purposeful sampling process, however, echoed Yin’s recommendation that the most qualified cases will “have the most available data sources.”\textsuperscript{22} Whether in scholarly literature, case law, state policy, or media coverage, all four of these cases were noteworthy enough to offer considerable data from which to initially observe and interpret.

The analytic technique supporting the multiple-case study approach is a cross-case synthesis.\textsuperscript{23} Opting to undertake this mode of analysis was intentional, given that similar tenets of cross-case synthesis emerge from legal analysis.\textsuperscript{24} Each of the individual cases were analyzed for “within-case patterns”\textsuperscript{25} that inductively affirmed the presence of a consistent, generalizable phenomenon derived from theory, while also acknowledging any distinctions between them in order to compensate for potential “rival interpretations.”\textsuperscript{26} Another benefit to this analytic technique (and also on par with legal commentary) is the stipulation that “cross-case patterns will rely strongly on argumentative interpretation…strong, plausible, and fair arguments that are supported by your data.”\textsuperscript{27} Thus, while this study pulled from both traditional legal research and

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 105.
\item \textit{Id.} at 194.
\item \textit{Id.} at 198, where Yin explained why iterations of cross-case synthesis have similarities in legal research: Similar discussions have been critical in related fields such as case law, where the individual legal cases are inevitably unique (at a minimum, they will differ in temporal and locational dimensions). Arguments about the similarities in the material nature of any related cases must then be made to support the applicability of the legal principles or interpretations from one case to another.
\item \textit{Id.} at 196. \textit{See also} Permuth, Mawdsley & Silver, \textit{supra} note 15, at 43, for the stipulation that conducting qualitative research in addition to legal research must carry “the mindset that it is inductive rather than deductive.”
\item \textit{Id.} at 199. Yin recommends that researchers consider various avenues of inquiry that may foster “plausible rival interpretations,” in order to either address them head-on or utilize them as future openings for research.
\item \textit{Id.} at 198.
\end{enumerate}
\end{footnotesize}
qualitative research design, all ensuing arguments or implications presented in concluding chapters are appropriate under the binary research designs.\textsuperscript{28}

Much of the primary and secondary authority used in this dissertation was collected from two major legal databases: Nexis Uni and HeinOnline. Both services provide a litany of peer-reviewed journal articles and law reviews; Nexis Uni, a subsidiary of LexisNexis, was a particularly essential resource for gleaning relevant case law for the legal-historical analysis. Supporting secondary authority—particularly from the social science disciplines of education, anthropology, and economics—was largely collected from Project MUSE, Wiley Online Library, and ERIC (Educational Resources Information Center). Relatedly, \textit{The Chronicle of Higher Education} has served as a steadily dependable media resource from which to consume news (with both internal and external perspectives) on campus speech debates, legal developments, and economic trends facing the sector, before then casting outward for additional media coverage. And, of particular help when combating the wariness of using proper “legalese,”\textsuperscript{29} and navigating Bluebook citation as a novice legal researcher, the free Legal Information Institute (LII) offered by Cornell Law School was greatly valuable.\textsuperscript{30}

The case law and other primary and secondary authority aggregated from the aforementioned databases surfaced from a series of keyword and full-phrase search strings. For

\textsuperscript{28} Expanding the legal argument with qualitative research is a key tactic for making legal research more accessible to institutional stakeholders. The arguments that emerge from this type of research help bridge legal standards and real-world applications. See Permuth, Mawdsley & Silver, \textit{supra} note 15, at 46, where “qualitative research methods can be very helpful in assisting school districts to address emerging issues where changes to established societal customs and evolving legal standards pose new issues and responsibilities.”

\textsuperscript{29} This term refers to certain verbiage that is routinely used in legal writing, and thus fledgling legal researchers should take heed to use the “language to convey ideas or legal principles.” Permuth, Mawdsley & Silver, \textit{supra} note 15, at 238.

this, Nexis Uni was incredibly effective. Landmark case law on student speech, such as *Tinker v. Des Moines*, 31 *Hazelwood School District v. Kuhlmeier*, 32 and *Morse v. Frederick* 33 were gleaned from the simple search terms (“free speech” and “student speech”). Although these Supreme Court cases dealt with student speech in the K-12 pipeline, their verdicts have been nonetheless valuable to student speech litigation in the university setting. However, university-specific cases of resembling significance, including *Healy v. James*, 34 *Widmar v. Vincent*, 35 and *Board of Regents v. Southworth*, 36 were found by searching (“college student speech”) or (“college students” and “free speech”).

The combination of pertinent student speech outcomes from both K-12 and postsecondary levels of education fostered a strong foundation from which to study and notice emergent conflict patterns. As a result, derivative court cases were able to be found via increasingly specific search strings that mirrored those fledgling litigation themes; among them, (“university student organizations” and “free speech”) or (“free speech zones on campus” and/or “campus speaker protests”) were the most successful. The use of increasingly specific keywords, paired with a firm timeline of court opinions between 1969-2019, also helped narrow and filter search results for relevance to the topic at hand. Blanket free speech terminology, unsurprisingly, cast quite a wide net and—given that higher education has a unique and multi-faceted

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governance structure—even introducing a search parameter of (“university” and “free speech”) yielded thousands of search results concerning not only students, but also faculty, administrators, and other stakeholders.

Approximately 250 student speech cases that fit between the narrowed timeline were eventually whittled from the mass of results, and selecting only those germane to the study occurred in two ways. The first tactic involved reading through the court opinions in order to see how and if the keywords and search terms contextualized appropriately within the constraints of this dissertation topic. The second tactic served to corroborate my initial judgments, particularly for cases at the lower district and appellate court levels—this was done by Shepardizing the aforementioned landmark Supreme Court cases, as well as more recent cases, such as *Christian Legal Society Chapter of the University of California v. Martinez* in 2010. Shepardizing significant or timely rulings to assess how successive court opinions have drawn from them made it possible to find applicable, yet diverse court opinions. By the conclusion of this process, 65 cases were selected for the qualitative coding process that grounded the legal-historical analysis. These cases were coded using a template that, by way of cataloging case facts, judicial rationales, established rule of law, and other details, allowed for the researcher to visually and pragmatically record key patterns [Appendix A]. Such a process also ensured that there were a

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37 See generally Ellie Margolis, *Surfin’ Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J. L. & TECH. 92 (2008) (noting that Shepardizing is a “basic task” and necessary step of competent legal research). See also LEGAL INFORMATION INSTITUTE (LII) (Cornell Law School, n.d.), at https://www.law.cornell.edu/wex/shepardize, which provides a definition of from Nolo’s Plain-English Law Dictionary that ‘Shepardizing’ is “a method of locating the subsequent history of a case…this process can locate a list of decisions which either follow, distinguish, or overrule a case.”


39 The coding sheet of case law for the legal-historical analysis is based off of a course template from a mass media law course at Louisiana State University. See Coyle, E. (April 1, 2019). Sample Coding Sheet [Microsoft Word Document]. Retrieved from LSU Course Moodle.
minimum of seven court opinions from each decade of the selected timeline. This not only helped to facilitate ample comparison (and contrasts) when coding the selected case law, but also helped break the data analysis into a digestible, sequential order, where patterns soon emerged that vividly connected with the broader historical analysis.\textsuperscript{40}

For the multiple-case study approach, data was collected via document analysis, which Bowen defined as “a systematic procedure for reviewing or evaluating documents—both printed and electronic (computer-based and Internet-transmitted) material.”\textsuperscript{41} The decision to employ document analysis for the data collection phase of the case studies is, again, largely due to the substantial and readily accessible public discourse that this topic incites. In the midst of each campus speaker incident at the selected case sites, media channels (both online and print) were inundated with news reports, op-eds, Senate hearing testimonies, social media posts, court injunctions, and other forms of applicable material to analyze.\textsuperscript{42} As such, these extensive documents were pored over and “organized into major themes, categories, and case examples”\textsuperscript{43} that triangulate, support, and advance the similarly systematized findings from the legal-historical analysis.\textsuperscript{44} An additional, yet no less important, justification for utilizing document

\textsuperscript{40} The emergence of patterns is consistent with the qualitative data analysis process. See Permuth, Mawdsley & Silver, supra note 15, at 44 (“You will no doubt begin to see patterns in the data you are collecting. As you collect the data, make note of these ideas about interconnections or patterns.”)

\textsuperscript{41} Glenn A. Bowen, Document Analysis as a Qualitative Research Method, 9 Qualitative Research Journal 27, 27 (2009).


\textsuperscript{43} Bowen, supra note 41, at 28.

\textsuperscript{44} Id. While document analysis can (and does) stand alone as a data collection method, Bowen cited that it is typically employed in tandem with other qualitative approaches in order to foster a multi-step process of triangulation.
analysis also emerged during the coding process of pertinent case law; given that, in many circumstances, First Amendment jurisprudence has remained clear and steady, documents from each of the case study narratives served as a way to observe recent developments in economics, policy, or other regulatory entities.\textsuperscript{45}

To maintain an ethical and accurate process, it is important to note certain limitations in this study. Perhaps the most cogent limitation is found in the case study approach. While each of the four institutions studied are relatively diverse in regard to incident details/outcomes, campus location, public/private designation, and student body demographics, this dissertation cannot generalize or predict certain student behaviors on campuses nationwide, nor generalize or predict responses by lawmakers.\textsuperscript{46} Instead, the case studies provide a more contextualized and contemporary understanding of how the marketplace of ideas analogy interacts with the neoliberal marketplace in higher education, with student speech conflict as the vessel through which it becomes possible “to expand and generalize theories.”\textsuperscript{47}

The second limitation concerns personal bias; an introspective disclosure of possible bias is, per Creswell, “a core characteristic of qualitative research,”\textsuperscript{48} and therefore it would be remiss to conduct this study without reflecting on how impartiality may be affected. While there were no past or present affiliations with any of the four selected institutions in the case study, my dual-role as a current graduate assistant and student does provide a level of experience within and

\begin{itemize}
\item \textsuperscript{45}“In sum, documents provide background and context, additional questions to be asked, supplementary data, a means of tracking change and development, and verification of findings from other data sources.” Bowen, \textit{supra} note 41, at 30-31.
\item \textsuperscript{46}Yin, \textit{supra} note 14, at 20.
\item \textsuperscript{47}\textit{Id.} Yin also noted that the ultimate goal of case study research is to effectively make those “analytic generalizations” from theory.
\item \textsuperscript{48}Creswell, \textit{supra} note 12, at 202.
\end{itemize}
support for higher education that many participants in the widespread student speech debate may not possess. And, while the traditional legal research approach helps with maintaining a measure of objectivity—as judicial decisions and precedents are formed beyond civilian control—the oft-politicized topics of speech, economics, and institutional behavior addressed in this study requires a bipartisan method of analysis that in some ways may contradict my personal views.49

In a similar chord, the body of case law used for this dissertation was selected and analyzed independently. A multi-step process of evaluation preceded the legal-historical analysis, but there remains the possibility that relevant court opinions were missed during this stage.50 Acknowledging the relative subjectivity that comes with the document analysis of the case study data—as well as the interpretation of existing case law—is also important, because the execution of both analyses requires a degree of individual conviction that may be countered elsewhere.51

Lastly, the decision to openly identify the institutions in the multiple-case study was not intended to garner reproach or paint their legal pressures as solitary incidents; rather, naming the institutions serves to demonstrate the increasing prevalence of media coverage and external discourse (as well as external streams of revenue52) that all institutions currently handle. The

49 See Yin, supra note 14, at 85 (arguing that mitigating bias in case study research is to “understand the relevant theoretical or policy issues because analytic judgments have to be made throughout data collection.” Executing this successfully necessitates that various theories/policy positions and motivations are considered).

50 Finalizing or refining legal research always requires some level of personal autonomy to determine an endpoint. See Sloan, supra note 1, at 283 (“…you can always keep looking for one more case or more more article to support your analysis, but at some point the benefit of continuing to research will be too small to justify the additional effort.”)

51 Permuth, Mawdsley & Silver, supra note 15, at 43 (emphasizes the importance of addressing bias in the qualitative research process, particularly at the data analysis stage). See also Bowen, supra note 41 at 32, where he notes one of the inherent limitations of document analysis is “biased selectivity.” Thus, triangulating the document analysis with case law serves to corroborate this dissertation’s findings.

52 See e.g., Sheila Slaughter & Gary Rhoades, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION, loc. 96 (2009) (ebook), where they introduced the theory of academic capitalism to
legal-historical analysis provides an extensive background of student speech jurisprudence, replete with important sociological, economic, and political contexts, and such a background confirms that—while these institutions may have weathered particularly intense media hype—their situations are reflective of broader influences at work.

explain that “… groups of actors—faculty, students, administrators, and academic professionals—[use] a variety of state resources to create new circuits of knowledge that link higher education institutions to the new economy.”
CHAPTER 3
LEGAL-HISTORICAL ANALYSIS OF THE MARKETPLACE ANALOGY

The construction of this study resulted from a review of applicable literature that guided the following legal-historical analysis. For the purposes of clarity and later usefulness of the case studies, this chapter consists of two broad sections of analysis. The first section provides a legal outline of evolving First Amendment jurisprudence in regard to student speech on campus, with literature interjected periodically to provide both historical and current context. The legal analysis, while ordered chronologically, is also organized into sections reflective of broader themes that emerged during the case law codification process.

The latter section serves to link the findings of the former section—including a determination of whether or not there appears to be a free speech crisis on campus—with a defined theoretical framework that further develops the hypothesized connections of neoliberalism in both economics and law. Navigating both of these sections separately will offer a greater degree of context from which to observe the operative tension in the marketplace that emerges vis-à-vis student speech conflict on campus.

3.1. The Tinker Doctrine and the Extension of the ‘Schoolhouse Gate’ to Universities

Much like the marketplace of ideas analogy was born out of dissent in Abrams v. United States,¹ so too was discord a running theme in Tinker v. Des Moines. In fact, Driver argued that there was very little indication, based on broader societal events and dominant political views at the time, that the Supreme Court would rule in favor of the three students who wore armbands to school in silent opposition of the Vietnam War.² Tensions over U.S. involvement in the war, the

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¹ Abrams v. United States, 250 U.S. 616, 630 (1919) (Justices Oliver Wendell Holmes, Jr., & Louis Brandeis, dissenting).
² See Justin Driver, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND, 82 (2018), where “the notion that Tinker was far from an assured triumph for student rights finds
Civil Rights movement, and other issues of social inequity were exacerbated by the presidential race between Hubert Humphrey and Richard Nixon, the latter of whom criticized organized demonstrations. Nixon “promised to restore ‘law and order’” in response to those passionate displays of opposition, a precursory nod to then-President Trump’s verbatim phrase on June 1, 2020, in the midst of nationwide Black Lives Matter protests.

In the 1960s, however, there was little rule of law that afforded students the right to engage in defiant behavior at school without disciplinary consequences. This gap in jurisprudence soon clashed with Nixon’s militaristic political climate and an enormous growth in further support when one contemplates the events swirling outside the Court in the late 1960s.” See also Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

3 “President Nixon would purport to speak on behalf of ‘the forgotten Americans,’ an assemblage that was chiefly defined by not assembling—in order to protest the Vietnam War, or anything else for that matter.” Driver, supra note 2, at 83.

4 Driver, supra 2, at 82.


   The use of the phrase “law and order” came into common presidential parlance during the late 1960s as President Richard Nixon sought to soothe a (white) populace unnerved by the assassinations of Robert Kennedy and Martin Luther King, Jr., as well as the protests and riots that broke out in reaction to King’s slaying.

6 A notable example of disciplinary consequences for students who resisted status quo or school policy occurred prior to (and was referred in) the Tinker v. Des Moines decision, largely involving students who refused to recite the Pledge of Allegiance in the classroom (for religious or otherwise personal reasons). In the 1940s, the Supreme Court initially upheld that public schools could mandate recitation for the Pledge of Allegiance while saluting the flag, or else prohibit still-resistant students from attending school. See Minersville School District v. Gobitis, 310 U.S. 586 (1940). Three years later, this mandate was overturned in West Virginia State Board of Education v. Barnette, after two Jehovah’s Witnesses were expelled from their public school for refusing to adhere to the then-mandated Pledge of Allegiance decorum. See West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). While Gobitis was indeed overturned prior to Tinker, its initial ruling exhibits continual reluctance on the part of the Supreme Court (a mere thirty years earlier) to allow students to act in opposing ways to traditional school propriety. And see Driver, supra note 2, at 72, where he noted that the precedent in Barnette did not translate automatically to an easy decision in Tinker:

   …Barnette did not establish that students possessed an affirmative right to advance their own opinions, on topics of their own selection, much less in the face of school officials’ objections. The right to sit out, in other words, did not necessarily confer the right to speak out.
postsecondary student enrollment after World War II. Additionally, student activists in the 1960s were still bound by the lingering oversight of in loco parentis by university administrators; the ability to protest societal issues, or even voice opposition toward institutional operations, hinged on legal reinforcement from rulings like Tinker that students were entitled to expressive autonomy in the schoolhouse.

Certainly, then, the combination of these factors did not expressly guarantee the ruling in Tinker, with a reluctance to depart from the disciplinarian academic model evident in the lower court rulings of the case. The district court, for instance, initially held that “it is the disciplined atmosphere of the classroom, not the plaintiff’s right to wear arm bands on school premises, which is entitled to the protection of the law.” The Supreme Court reversed, furthering the test first introduced in Burnside v. Byars that restrictions of student expression should only be permitted if the expression “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”

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7 “Campus enrollments swelled from 3.6 million in 1960 to 8.5 million by 1970.” Christopher J. Broadhurst & Georgianna L. Martin, “Radical Academia?” Understanding the Climates for Campus Activists, 167 NEW DIRECTIONS FOR HIGHER EDUCATION, 7 (2014) (authors attested this unprecedented growth to the need for research, as U.S. fought for preeminence over the Soviet Union during the Cold War, as well as the Baby Boomer population aging into postsecondary schooling.)

8 See generally Vimal Patel, The New ‘In Loco Parentis,’ THE CHRONICLE OF HIGHER EDUCATION (Feb. 18, 2019), https://www.chronicle.com/interactives/Trend19-InLoco-Main, who noted that the end of in loco parentis was catalyzed by court rulings in the 1960s that expanded student autonomy:

The legal demise of in loco parentis came in the 1960s, when student activists demanded, and the courts affirmed, constitutional rights of free speech...courts came to view colleges as bystanders, not in control of or responsible for the moral development of their students.


10 Burnside v. Byars 363 F.2d 744, 749 (5th Cir., 1966) (A principal in Mississippi attempted to initiate a ban on students wearing “Freedom Buttons,” which signified collective efforts to garner more voting participation for civil rights initiatives. His argument was that the buttons would cause a disruptive discourse to the detriment of classroom activities. The court disagreed, ruling that there was minimal disruption from the button-wearing, and without any evidence of chaos from that form of expression, students could be permitted to wear them and remain in school under First Amendment interests.) See also Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969) (Supreme Court found no evidence under the material and substantial disruption test that those symbolic black armbands deserved discipline).
criteria, the extension of student speech precedent to higher education remained murky until the Court presided over *Healy v. James* in 1972.\(^\text{11}\)

Three court decisions in the analysis, all of which followed *Tinker* yet came before *Healy*, exhibited a hesitance in the lower courts to intervene or prevent institutions from regulating student speech.\(^\text{12}\) The plaintiffs in *Lieberman v. Marshall*, for instance, were participants in Florida State University’s (unrecognized) chapter of Students for a Democratic Society (SDS), an organization whose mission comprised of very liberal-thinking, left-leaning social justice initiatives in the 1960s.\(^\text{13}\) This same organization—which garnered a national reputation for prolific campus demonstrations calling for racial equality, reduced involvement in international wars, and limits to corporatization, among other causes—was also behind the issue that emerged in *Healy*, when Central Connecticut State College (CCSC) refused to grant official recognition to its SDS chapter out of concerns for campus disruption.\(^\text{14}\) The Supreme Court of Florida’s ruling in *Lieberman* posited a similar apprehension of unrest, noting that, even under the *Tinker* precedent, dissent did not have unbridled liberty on a college campus:

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\(^{11}\) *Healy v. James*, 408 U.S. 169 (1972) (Supreme Court ruled that Central Connecticut State College could not deny recognition of a Students for a Democratic Society chapter on the grounds of their political conduct.)

\(^{12}\) The three cases are *Lieberman v. Marshall*, 236 So. 2d 120 (Fla., 1970) (Court ruled that Florida State University administrators were within their rights to prohibit Students for a Democratic Society from using campus grounds to host a guest speaker, on the grounds that the speaker would most likely cause disruption); *Bayless v. Martine*, 430 F.2d 873 (5th Cir., 1970) (ten students at Southwest Texas State University had their suspension upheld after holding a Viet Nam Moratorium demonstration in an area of campus, and for longer of a time slot, than campus officials had originally permitted); and *Sword v. Fox*, 446 F. 2d 1091 (4th Cir., 1971) (Madison College students wanted to protest staffing changes at the university via a “sleep-in” in an academic building. The college’s refusal to permit the indoor demonstration was upheld by the court, seeing that it was a content-neutral policy.)

\(^{13}\) *Lieberman v. Marshall*, 236 So. 2d 120 (Fla., 1970). Also see Todd Gitlin, *What Was the Protest Group Students for a Democratic Society? Five Questions Answered*, SMITHSONIAN MAGAZINE (May 4, 2017), https://www.smithsonianmag.com/history/what-was-protest-group-students-democratic-society-five-questions-answered-180963138/ (“…there was no single political doctrine; for most of its existence (1962-69), SDS was an amalgam of left-liberal, socialist, anarchist and increasingly Marxist currents and tendencies.”)

Dissent is built into the policy of our constitution, but it must be contained within the framework of the constitutions. University officials are entitled—indeed, they have the unavoidable duty—to maintain campus order and discipline, to protect the campus from undue disruption and violence, and to pursue educational goals.15

Such is the tenuous balance between a safe educational environment and freedom of speech that Tinker began to refine, but which was not fully remedied in higher education in its immediate aftermath.16 Healy v. James served to further the conversation, however, with the Supreme Court ruling that CCSC erred in its rejection of Students for a Democratic Society’s recognition as a registered student organization (RSO); to restrict the organization from participating on campus on the basis of its controversial (and, at times, incendiary) viewpoints would be a content-based infringement of free speech.17

Yes, institutions of higher education had been focal points of increasingly sizeable demonstrations in the mid to late 1960s, and it was without question that a select few of those protests had taken a violent turn.18 As such, the demise of traditionally disciplinarian schoolhouse operations was not overly welcomed by general society.19 Yet the joining power of

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16 For further support that a post-Tinker education system still left plenty of uncertainty for higher education, see Charles Alan Wright, The Constitution on the Campus, 22 VAND. L. REV. 1027, 1038 (1969):

…This does not mean that precedents about the meaning of the First Amendment in other areas of life can be indiscriminately transferred to the university setting. Instead, as the Court said in Tinker, First Amendment rights must be “applied in light of special characteristics of the school environment.”

17 “…the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility…” Healy v. James, 408 U.S. 169, 194 (1972).

18 An example of a protest on campus that turned violent during that era occurred at Kent State University in 1970, when protestors clashed with the National Guard during an antinuclear demonstration. See Broadhurst & Martin, supra note 7, at 10, where “images of protesters weeping over the bodies of their fallen comrades quickly flooded the media, and across the nation students’ outrage over the shootings triggered the largest student protest in American history.”

19 “In a Harris poll taken only one month after Tinker, 52 percent of respondents opposed granting rights to student protesters, and only 38 percent of respondents supported granting such rights.” Driver, supra note 2, at 84.
Tinker v. Des Moines and Healy v. James facilitated a broadening of the legal ability of students to express themselves on campus, even in organizations that at the time were viewed as volatile groupings of “the radical young.”

The Time, Place, and Manner of Student Speech

The Supreme Court ruling in Healy v. James widened the legal threshold for allowing student speech, even in the context of vocal activism, to find its place on campus. The remainder of the 1970s and 1980s may not have been years inherently linked with abundant campus protests, but during the coding process I found that case law from those years remains significant. This analysis located fourteen cases from the 1970s and 1980s that helped to refine and expand legal precedents surrounding student speech. For instance, a more structured dichotomy between regulation and freedom emerged during these decades. Out of six court rulings that occurred during the 1970s (and after Healy), four of those cases ruled in favor of student speech, and two cases set parameters for student speech.

Unsurprisingly, the aforementioned four cases emerged in tandem with societal discourse, and so much of the resulting student speech incidents stemmed from decidedly

20 Man and Woman of the Year: The Middle Americans, TIME MAGAZINE (Jan. 5, 1970), http://content.time.com/time/subscriber/article/0,33009,943113-1,00.html. See also Jeffrey C. Sun & George S. McClellan, STUDENT CLASHES ON CAMPUS: A LEADERSHIP GUIDE TO FREE SPEECH, 34 (2020) who cited that “the data from 1971 mark one of the highest levels of liberal leaning freshmen in the history of the [UCLA] survey with 40.9% declaring either far left or liberal.”

21 “Although traditional forms of protests did decline after May 1970, contrary to popular perception, students were far from apathetic.” Broadhurst & Martin, supra note 7, at 10.


23 Jenkins v. Louisiana State Bd. of Education, 506 F. 2d 992 (5th Cir., 1975) (protest on campus grounds that caused property damage was not protected under First Amendment); and Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (Court refused to intervene on behalf of institutional and faculty procedures regarding the removal of students who did not meet academic standards).
progressive endeavors. Two of the cases—*Wood v. Davison* in 1972 and *Gay Students Organization of University of New Hampshire v. Bonner* in 1974—developed from efforts to strengthen and empower the presence of the LGBTQ+ community on college campuses. In both instances, LGBTQ+ student groups vying to gain status and campus facility access as registered student organizations (RSOs) were found to be well within their First Amendment rights to do so, regardless of moral judgments from the administration, donors/taxpayers, or state political actors. The court opinions each re-emphasized the standard that speech regulations must remain content-neutral. The district court in *Wood v. Davison* also further removed university oversight from the principle of *in loco parentis*, arguing that “it is now clear that constitutional restraints on authority apply on campuses of state supported educational institutions with fully as much sanction as public streets and in public parks.”

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25 *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972) (district court permitted Committee on Gay Education to gain status as an RSO after the University of Georgia initially denied recognition); See also *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652, 657-658 (1st Cir. 1974), during which Judge Frank Coffin aptly outlined tension between liberal student organizations and conservative leadership, both internal and external:

First, this case deals with a university attempting to regulate student activity—in the *in loco parentis* tradition which most judges, being over thirty, acknowledged without much question during their years of matriculation. Second, the campus group sought to be regulated stands for sexual values in direct conflict with the deeply imbued moral standards of much of the community whose taxes support the university.

26 See *Wood v. Davison*, 351 F. Supp. 543, 549 (N.D. Ga. 1972) (“…it is not the prerogative of college officials to impose their own preconceived notions and ideals on the campus by choosing among proposed organizations, providing access to some and denying a forum to those with which they do not agree”). *See also Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652, 660 (1st Cir. 1974) for a similar judicial rationale:

Communicative conduct is subject to regulation as to “time, place and manner” in the furtherance of a substantial governmental interest, so long as the restrictions imposed are only so broad as required in order to further the interest and are unrelated to the content and subject matter of the message communicated.

Two of the other cases arose from student publications.\textsuperscript{28} \textit{Papish v. Board of Curators of the University of Missouri}, which reached the Supreme Court in 1973, involved the expulsion of a University of Missouri student who disseminated a newspaper called “Free Speech Underground.”\textsuperscript{29} The newspaper criticized, in provocative written content and graphics, incidents of police brutality around the nation.\textsuperscript{30} In contrast, \textit{Thonen v. Jenkins} emerged after an East Carolina University student newspaper published an op-ed that employed a curse word to disparage the university president’s decision-making.\textsuperscript{31} Yet, both cases yielded positive results for the student-driven publications, with the Court once again pulling from \textit{Healy} to reinforce that student speech cannot be regulated on the basis of unfavorable content.\textsuperscript{32} And, through reinforcement of such precedent, the student’s place within the campus’ marketplace of ideas was also strengthened in legal dicta:

\begin{quote}
We think \textit{Healy} makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of “conventions of decency.”\textsuperscript{33}
\end{quote}

That said: \textit{Healy v. James} intentionally left open the ability of institutions to regulate student speech on the basis of time, place, and manner restrictions,\textsuperscript{34} and there were two

\begin{footnotes}
\item[28] The Supreme Court case was \textit{Papish v. Board of Curators of the University of Missouri}, 410 U.S. 667 (1973), followed by \textit{Thonen v. Jenkins}, 491 F.2d 722 (4th Cir. 1973).
\item[29] \textit{Papish v. Board of Curators of the University of Missouri}, 410 U.S. 667 (1973).
\item[30] \textit{Id.}
\item[31] “The letter was critical of parietal regulations and ended with a ‘four-letter’ vulgarity referring to the president of the university.” \textit{Thonen v. Jenkins}, 491 F.2d 722, 723 (4th Cir. 1973).
\item[33] \textit{Id.}
\item[34] “Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected.” \textit{Healy v. James}, 408 U.S. 169, 192-193 (1972).
\end{footnotes}
subsequent cases in the 1970s that did successfully place some level of restriction on student speech. In *Jenkins v. Louisiana State Bd. of Education*, the Court of Appeals for the 5th Circuit ruled that protesters at Grambling State University were not protected under the First Amendment after a demonstration resulted in damage to campus property. Material damage or disruption, as with *Tinker*, was considered a point at which constitutionally protected peaceful assembly was crossed, allowing for the Court to remedy “the frequently recurring conflict between student exercise of First Amendment rights and legitimate rules of school authorities.”

The second case, *Board of Curators of the University of Missouri v. Horowitz*, dealt with whether to intervene on behalf of a student who, after dismissal from a Kansas City medical school on the grounds of substandard academic performance, claimed that the institution “had not accorded her procedural due process prior to her dismissal.” When presiding over the issue of academic decisions within the classroom, however, the Supreme Court refused to question or criticize the procedural oversight of faculty.

Two landmark Supreme Court decisions at the K-12 level during the 1980s were considered applicable to the study, given that they both held positions akin to the *Board of

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36 “The actions of appellants resulted in a material disruption of the campus and of the rights of others. They were not protected under the First Amendment.” *Jenkins v. Louisiana State Bd. of Education*, 506 F. 2d 992, 1002 (5th Cir., 1975).

37 *Id.*

38 *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 80 (1978) (the student plaintiff had allegedly shirked professional and personal hygienic practices that were expected during the medical program’s clinical rotations, and the Supreme Court argued that the evaluations measuring this academic performance were fairly enacted by the university). “Courts are particularly ill-equipped to evaluate academic performance.” *Id.* at 92.

39 *Id.* at 90, where the Court said, “[w]e decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.”
Curators of the University of Missouri v. Horowitz—namely, that the Court routinely defers to teachers’ discretion in exercising academic freedom, justifying grades, and facilitating candid but otherwise constructive conduct in academic-specific facilities. So too did those cases—Bethel School District v. Fraser and Hazelwood v. Kuhlmeier—circumscribe the legal limits on student activism or misbehavior, to the point where a school would be expected to tolerate rebellious conduct, but did not have to promote such conduct within its official operations. For instance, a student leader could be disciplined for standing on stage at a school-sanctioned assembly and orating a speech filled with sexual overtones, and a school-sanctioned class newspaper could potentially refuse to publish an article over trepidations about community privacy. Hazelwood in particular was a divisive ruling, and neither of those precedents have always translated to the higher education sector, given the unique position at many universities where legal adults live

40 Bethel School District v. Fraser, 478 U.S. 675 (1986) (Supreme Court upheld the suspension of a student leader whose speech at an assembly was filled with explicit innuendos, thereby causing general chaos and frustration from school officials); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) (Supreme Court ruled that a school had the right to cut potentially controversial content from the official student newspaper, on the grounds that the newspaper was a representative appendage of the school and had to remedy this with competing privacy interests).

41 See Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 270-271 (1988), where Justice Byron R. White noted the difference between non-suppression and promotion of speech:

   The question whether the First Amendment requires a school to tolerate particular speech—the question that we addressed in Tinker—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression…the latter question concerns educators’ authority over school-sponsored…expressive activities…”

42 “The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.” Bethel School District v. Fraser, 478 U.S. 675, 685 (1986).


44 See Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 286 (1988) (Justices William Brennan, Jr., Thurgood Marshall, and Harry Blackmun, dissenting, “[t]he mere fact of sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity”).
and study in the same campus vicinity.\textsuperscript{45} That said, the rulings remain important to both the K-12 and higher education sectors because of the judicial importance that was placed on speech regulation in expressly academic areas, such as the classroom.

*Bethel* and *Hazelwood* also came at the heels of four Supreme Court cases in the 1980s that sought to cultivate a nuanced judicial standard of forum analysis.\textsuperscript{46} *Widmar v. Vincent* was of particular significance, given that it directly presided over the use of public facilities on college campuses.\textsuperscript{47} In *Widmar*, the University of Missouri at Kansas City adopted a new regulation that prohibited religiously affiliated student organizations from utilizing certain campus facilities.\textsuperscript{48} The Supreme Court argued that the regulation was content-based: it would be unconstitutional to deny one group, on the basis of their non-secular speech, the ability to utilize a space that had previously been permitted for use by other registered student organizations.\textsuperscript{49} While the university was still legally entitled to regulate speech on a content-neutral basis of time, place, and manner, the ‘place’ in question had already been established as a public forum,

\begin{itemize}
  \item \textsuperscript{45} For an example of a higher education case when the Court did not automatically follow K-12 precedent for student speech regulation, see a ruling as recent as *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 247 (3rd Cir., 2010):
  
  \textquote{…At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.}


  \item \textsuperscript{47} *Widmar v. Vincent*, 454 U.S. 263 (1981).

  \item \textsuperscript{48} *Id.* at 265, where “the exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds ‘for purposes of religious worship or religious teaching.’”

  \item \textsuperscript{49} *Id.*
\end{itemize}
and there was no way to deny that public space to religious groups without discriminating on the basis of viewpoint.50

Affirming judicial rationales for narrowly tailored time, place, and manner restrictions in public forums also emerged outside of the higher education setting in the 1980s, including Clark v. Community for Creative Non-Violence and Ward v. Rock Against Racism.51 In Clark, the Supreme Court upheld the decision by the National Park Service (NPS) to regulate a demonstration by Community for Creative Non-Violence (CCNV) that sought to shed light on homelessness.52 The demonstration was allowed, but the Court ruled that the NPS successfully denied CCNV the ability to sleep overnight in the National Mall as part of the operation, provided that such a regulation had and would continue to be enforced for organizations of all viewpoints.53 The same judgment also emerged in Ward—after a slew of noise complaints from residents near an outdoor concert venue in Central Park, New York City attempted to mitigate the grievances through the adoption of a new noise ordinance for performers.54 The Supreme Court ruled that the policy was constitutional through the time, place, and manner doctrine, given that it was “narrowly tailored to serve the substantial and content-neutral governmental interests

50 Id.
53 Id. at 295, where the Supreme Court noted that even with the time, place, and manner restrictions in place, the demonstration could still go on and be conducted in ways that would convey the original point (and not, conversely, serve as a suppression of speech):
    The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.
of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground.”

Of course, schools are not unequivocally public forums; on any given campus, there are traditional/designated public forums, limited public forums, and nonpublic forums, which all have varying levels of First Amendment protection (and institutional regulatory ability). In *Perry Education Association v. Perry Local Educators’ Association*, two competing teacher groups battled over the use of a school inter-mail system. Because one of the teacher groups won sole access to the system by way of an employment relations board vote, the Supreme Court argued that it was not classified as a public forum. Therefore, excluding certain parties from the system was permissible in that it still left “open ample alternative channels of communication.”

Similar logic applies to the designation of residence halls or classrooms as nonpublic forums, or the ability to regulate limited public forums on a viewpoint-neutral basis.

As evidenced, then, the 1970s and 1980s were decades that buttressed student speech, while also formulating refined standards for schools to regulate speech in public forums on the

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55 *Id.* at 803.

56 For an in-depth explanation of different operative forums on campus, see generally Neal Hutchens & Kerry Brian Melear, “Open” Campus Areas and Students’ First Amendment Speech Rights, in *Controversies on Campus: Debating the Issues Confronting American Universities in the 21st Century*, 269-281 (Joy Blanchard ed., 2018).


58 *Id.* at 40 (the election was undertaken by the Indiana Education Employment Relations Board).

59 *Id.* at 45.

60 *See* Mark A. Paige & Joseph C. Beckham, *Student Speech*, in *Contemporary Issues in Higher Education Law*, 333-362, 337 (Richard Fossey & Suzanna Eckes ed., 3rd Ed., 2015), for the confirmation that “facilities such as residence halls have typically been regarded as closed forums, thus requiring a reasonableness standard for regulation of speech.” *See also* Hutchens & Melear, *supra* note 56, at 272, where they note that in “a limited public forum, government may open a space to certain groups (e.g., students) or for specific types of speech…[but] must adhere to viewpoint neutrality.”
basis of time, place, and manner. It was also made clear by the preceding case law that faculty and staff can reasonably limit or discipline disruptive student speech when it comes to speech in a non-public forum, such as the classroom.\footnote{“When a nonpublic forum has been judicially recognized, institutions need only articulate a legitimate pedagogical basis for restricting free speech.” Paige & Beckham, \textit{supra} note 60, at 336. \textit{See also Board of Curators of the University of Missouri v. Horowitz}, 435 U.S. 78 (1978), \textit{Hazelwood School District v. Kuhlmeier}, 484 U.S. 260 (1988), and \textit{Bethel School District v. Fraser}, 478 U.S. 675 (1986), for case law where schools’ regulations/disciplinary procedures were found to be constitutionally valid.} These cases support the decision in this dissertation to focus on extracurricular types of student speech, because—as will be elucidated by the following sections—it is (and remains) the co-curricular expression and conduct of students in limited-public or public forums that make up the majority of First Amendment-related legal battles today.\footnote{“Public college students periodically clash with institutional officials over access to open campus areas to engage in speech and expressive activities.” Hutchens & Melear, \textit{supra} note 56, at 279. \textit{See also Paige & Beckham, \textit{supra} note 60, at 338, who affirm that “most controversies involving student speech fall within the context of a designated or limited open forum,” the middle ground between nonpublic forums and public forums on a campus.}

\textit{Widmar v. Vincent} also signaled a turning point in student demographics at public institutions of higher education in the 1980s; the institution’s attempt at endorsing the endeavors of more secular groups versus religious student organizations reflected a larger falloff of religiously affiliated students on campus.\footnote{\textit{See} Kevin Eagan, Ellen Bara Stolzenberg, Joseph J. Ramirez, Melissa C. Aragon, Maria Ramirez Suchard, & Cecilia Rios-Aguilar, \textit{The American Freshman: Fifty Year Trends 1966-2015}, \textit{Higher Education Research Institute, UCLA}, 7 (2016), https://www.heri.ucla.edu/monographs/50YearTrendsMonograph2016.pdf, who outline the decrease in religious student demographics by the 1980s:

In 1966, more than half (54.8\%) of all first time, full-time college students described themselves as Protestant with just more than one-quarter (28.3\%) identifying as Catholic. Just 6.6\% of students in 1966 reported being unaffiliated with any religion. By 1985, the proportion of religiously unaffiliated students had increased by nearly 50\% to 9.4\%.

\textit{See} Eagan \textit{et al}., \textit{supra} note 63, at 6.} At the same time, decreasing levels of student and curricular piousness intersected with vast increases in student diversity: women began to edge out male students in enrollment, and minority student populations (especially Black students) also swelled.\footnote{\textit{See} Eagan \textit{et al}., \textit{supra} note 63, at 6.
An ever-diversifying student body, however, was not without a number of incidents on campus in the 1990s, some of which entered legal settings and pitted free speech against a competing institutional objective: equality.\textsuperscript{65} Student plaintiffs in much of the case law of the 1990s, and subsequent decades, are also indicative of an ideological (and political) shift—the student demographic of ‘\textit{who}’ has routinely had to defend expressive conduct under the tenets of free speech is now less aligned with the liberal movements of Students for a Democratic Society, and is increasingly linked to religious, conservative, and/or Republican-identifying student populations.\textsuperscript{66}

\textbf{Equality Poses a Challenge to the Marketplace of Ideas}

Prior to the 1990s, much of the institutional balance between a safe learning environment and free speech emerged during clashes over forums and student autonomy. Increasingly, however, this mission-oriented equilibrium developed into nationwide attempts by institutions to safeguard their most vulnerable student populations from discriminatory behavior.\textsuperscript{67} A proliferation of racist incidents on campuses during this period also presented a salient ideological challenge to the marketplace of ideas analogy—one that has not necessarily resolved itself even in present day.\textsuperscript{68} Despite scholarly debate on whether or not to accept

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\textsuperscript{65} “Beginning in the 1990s, campus activism often centered on issues of promoting diversity, group identity, and multiculturalism.” Broadhurst & Martin, \textit{supra} note 7, at 11.

\textsuperscript{66} These preliminary findings arose from the coding process of case law from the 1990s to 2019, but are also supported by literature. \textit{See generally}, Keith E. Whittington, \textit{Speak Freely: Why Universities Must Defend Free Speech}, 11 (2018), who notes that a lot of current dissent surrounding the operations of higher education are currently linked to those who identify with the Republican Party; that “the Republican Party in particular have developed sharply negative views on the contribution of institutions of higher education to the United States.”

\textsuperscript{67} \textit{See generally} Erwin Chemerinsky & Howard Gillman, \textit{Free Speech on Campus}, 82 (2018), where “in the 1990s, persuaded by the powerful arguments for its regulation, over 350 colleges and universities adopted codes restricting hate speech.”

\textsuperscript{68} Certain scholars have argued that explicitly racist or hateful speech, when crossing a certain point of abhorrence, should not be considered as viable contributions to the marketplace of ideas. \textit{See} Stanley Fish, \textit{The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump}, 59 (2019)
detestable speech within the academic marketplace, however, there remains fairly consistent legal precedent on the matter.69 For instance, this analysis included five cases, three of which occurred on a college campus, between 1989 and 1993; all five cases ruled in favor of speech over attempts to regulate on the basis of mitigating bigotry.70

The University of Michigan was one of the first institutions to initiate a campus conduct policy condemning racial discrimination, introducing their “Policy on Discrimination and Discriminatory Harassment of Students in the University Environment” in 1988.71 There were multiple occasions on campus that heralded this attempt at change, including the moment when “a student disc jockey permitted racist jokes to be broadcast from a campus radio station.”72

who, while skeptical of legal success in regulating hate speech under the marketplace of ideas theory, notes that some scholars have called to look at hate speech less as ‘speech’ and more as “hateful acts the state has every right to regulate.” See also Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L. J. 431, 435-436 (1990), where he warns of the potential of parsing free speech against equality:

It is not my purpose to belittle or trivialize the importance of defending unpopular speech against the tyranny of the majority. There are very strong reasons for protecting even racist speech...[but]
I fear that by framing the debate as we have—as one in which the liberty of free expression is in conflict with the elimination of racism—we have advanced the cause of racial oppression and have placed the bigot on the moral high ground, fanning the rising flames of racism.

69 Legal dicta—especially after the Supreme Court’s ruling of R.A.V. v. City of St Paul—has demonstrated a deference toward protecting even the worst of racist speech, which extends to universities. See R.A.V. v. City of St Paul 505 U.S. 377 (1992). See also Lawrence Friedman, Regulating Hate Speech at Public Universities After R.A.V. v. City of St. Paul, 37 How. L.J. 1, 2 (1993), where “in R.A.V., the Court changed the boundaries of the ‘marketplace of ideas,’ stretching them to include speech previously proscribed under certain conditions, thus making the university’s goal of limiting hate speech more difficult to attain.” This hesitance to punish discriminatory speech also extends beyond racism and to other areas of patently chauvinistic speech. See, e.g., American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir., 1985) (the Court ruled that Indianapolis could not legally enforce an ordinance that banned sexually graphic/pornographic representations of women, because the First Amendment protects even sorid speech).


71 See, e.g., J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO. L.J. 399, 412 (1991).

While laudable, the policy was contested by a graduate student who felt that the relatively ambiguous, far-reaching directives would result in overly punitive measures after any type of contentious conduct. The district court in *Doe v. University of Michigan* agreed, determining that the policy was unconstitutionally vague and overbroad; although they noted that “it is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict,” freedom (in the form of free speech) emerged as the legal victor. This has not been a judicial outlier, either—Chemerinsky and Gillman noted that the 1990s entailed a flurry of over 350 institutions attempting to enact their own versions of anti-discrimination policies or hate speech codes, and “every court to consider such a code declared it unconstitutional.”

Another unsuccessful attempt, for instance, occurred a couple of years later in Wisconsin. The University of Wisconsin system released a “Design for Diversity” after a number of racist incidents occurred on its campuses, particularly abundant within campus fraternities. Shortly after the new policy was disseminated to the university system and enacted into operations, at least nine students at different campuses were disciplined under its directives, despite attempts to narrow the parameters of the policy from University of Michigan’s

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73 *Doe v. University of Michigan*, 721 F. Supp. 852, 858 (E.D. Mich., 1989) (“Doe said that certain controversial theories positing biologically-based differences between sexes and races might be perceived as ‘sexist’ and ‘racist’ by some students, and he feared that discussion of such theories might be sanctionable under the Policy.”)

74 *Id.* at 853.

75 Chemerinsky & Gillman, *supra* note 67, at 82.


77 *Id.* at 1164.

78 “For example, several highly publicized incidents involving fraternities occurred at the University of Wisconsin-Madison.” *Id.* at 1165.
unsuccessful effort. They were similar to those in Doe v. University of Michigan, sued on behalf of the same vagueness and overbreadth guidelines, and the court ultimately agreed. The policy was too overbroad to prohibit only speech that would successfully fall within the fighting words doctrine from Chaplinsky v. New Hampshire in 1942, and thus it left open enough ambiguity to infringe on constitutionally protected free speech.

While the two aforementioned policies attempted to regulate racist speech both inside and outside of the classroom, the U.S. Court of Appeals for the 4th Circuit soon deliberated on whether problematic speech of extracurricular organizations could still be held accountable. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University emerged after a Sigma Chi fraternity chapter organized an ‘ugly woman contest,’ complete with short skits involving members dressed up as “caricatures of different types of women, including one member dressed as an offensive caricature of a black woman.” Following outcry from a large section of the student body, George Mason University administrators attempted to discipline the fraternity.

79 Id. at 1166. To be sanctioned under the University of Wisconsin System’s policy, discipline could only ensue if four stipulations were met:
   (1) Be racist or discriminatory; (2) Be directed at an individual; (3) Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual addressed; and (4) Create an intimidating, hostile or demeaning environment for education, university-related work, or other university authorized activity.

80 Id. at 1181. See also Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (the ‘fighting words’ test, which is not protected under the First Amendment, was standardized in this case after a preaching Jehovah’s Witness hurled direct insults at law enforcement that stoked the potential of violence by an outraged crowd.)

81 Id., where once again, a court laments the issue of racism in higher education but contends that equality efforts cannot come at the expense of free speech:
   The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction.

82 Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University., 993 F.2d 386 (4th Cir. 1993).

83 Id. at 388.
chapter—yet, when challenged later in court, the skit (despite its discriminatory connotations) was found to be protected as a permissible form of expression.\textsuperscript{84}

Although data from the 1990s “reported that incidents of ‘hate speech’ on college campuses and universities could be calculated at between 800,000 to one million per year,”\textsuperscript{85} these three higher education-specific cases were still all resolved quickly and in favor of free speech at lower court levels. The Supreme Court then ruled over two cases, a mere three days apart in June 1992, that furthered the strength of judicial precedent surrounding discriminatory speech.\textsuperscript{86}

The first case, \textit{Forsyth County v. Nationalist Movement}, materialized following a heated confrontation between Civil Rights demonstrators in a predominantly white county in Georgia, and the hundreds of counter-protestors from the Ku Klux Klan and White Nationalist Movement who showed up in opposition.\textsuperscript{87} Following the skirmish, the county attempted to enact a policy that would require organizations to pre-register for demonstrations, as well as pay a fee to help cover costs of security, residual damage, and other expenses.\textsuperscript{88} The issue, however—which was declared unconstitutional by the Supreme Court—was that the required fee would fluctuate

\textsuperscript{84} Id. at 393 echoes the sentiment postured by multiple courts during the 90s and beyond:

The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express.

\textsuperscript{85} Those metrics came from a 1990 study from the National Institute Against Prejudice and Violence and were cited in Wendy L. Moore & Joyce Bell, \textit{The Right to Be Racist in College: Racist Speech, White Institutional Space, and the First Amendment}. 39 LAW & POLICY 99, 100 (2017).

\textsuperscript{86} There two cases were \textit{Forsyth County v. Nationalist Movement}, 505 U.S. 123 (1992) and \textit{R.A.V. v. City of St Paul} 505 U.S. 377 (1992).


\textsuperscript{88} Id. at 127.
depending on the amount of chaos or controversy that the county anticipated. Deciding on what to charge different groups prior to their demonstrations, even with a fee limit, would suggest a content-based regulation of speech.

A similar judicial rationale was employed days later during *R.A.V. v. City of St Paul*; specifically, that discriminatory speech—unless it escalates to the point where it tangibly satisfies the fighting words doctrine—warrants the same First Amendment protections as other speech. The issue emerged, as with the other four cases analyzed in this section, with a community entity attempting to curb hateful, racially charged expression by way of regulations. In this case, the city of St. Paul sought to enforce punitive measures under the St. Paul Bias-Motivated Crime Ordinance after a group burned a cross in the yard of a Black household. The Supreme Court, however, argued that the ordinance was unconstitutional in that it inherently censored certain unpopular viewpoints (albeit, detestable viewpoints) from entering into the marketplace. Nor did the ordinance succeed in prohibiting only non-protected fighting words. However, despite the unanimous ruling due to the content-based restrictions in St. Paul’s

89 *Id.* at 137:

Similarly, the provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations.

90 *Id.*


92 *Id.* at 379.

93 *Id.* at 396, where Justice Antonin Scalia concluded the ruling with an oft-quoted analogy: “Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible…but St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”

94 *Id.* at 393, which includes the justification of the majority opinion that symbolic cross-burning does not fall under the fighting word doctrine:

As explained earlier, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.
ordinance, separate concurrences took issue with the idea that courts have been able to categorize fighting words, but have not legally categorized specific hate speech expressions within the fighting words doctrine without impacting viewpoint neutrality. As such, R.A.V. v. St. Paul at once became a forceful precedent for allowing discriminatory speech to occur, while also a solemn acknowledgment by the Supreme Court that such jurisprudence would mandate a certain level of tolerance for potentially harmful expression:

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone’s lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment. Indeed, by characterizing fighting words as a form of “debate” …the majority legitimates hate speech as a form of public discussion.

Emergent patterns after years 1969-1999. The multitude of Supreme Court decisions from the 1960s to the 1990s fostered strong judicial precedent for student speech, most of which helped to increase levels of student autonomy and activism on campus. The marketplace of ideas analogy was defended and perpetuated as a central mission of the university by preceding First Amendment jurisprudence, even at the detriment to other competing institutional goals, such as equality.

At this point, then, it becomes necessary to point out a trend that emerged during the remainder of the case law coding process: of the 30 relevant cases occurring between 2000 and 2019 that were analyzed in this dissertation, 25 (83%) were resolved in either district or appellate

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95 Id. at 401 (Justices Byron R. White, Harry Blackmun, Sandra Day O'Connor, and John Paul Stevens (in part), concurring with the overall ruling but arguing against all of the rationales other than content-based restrictions). See also Chemerinsky & Gillman, supra note 67, at 95, who also argue that the fighting words doctrine has become almost unworkable because it operates at present as a “Catch-22…a law punishing fighting words in general will be struck down as too broad and vague…but a narrower law, based just on certain kinds of fighting words, will be struck down as a content-based distinction…”

96 Id. at 402.
court settings. And, of the five Supreme Court cases selected for analysis within that same time period, all were decided prior to 2011, and only two pertain explicitly to the postsecondary sector.

This indicates that—while there has still been a profusion of free speech cases brought on by university student/student organization plaintiffs—most of the complaints in the 21st century have been resolved at the lower court levels, due to the Supreme Court’s estimation that the legal issues addressed have already been remedied by strong existing precedent. For instance, the judicial tendency to leave grades and other curricular matters to the acumen of the professoriate continued with Brown v. Li in 2002, when the circuit court upheld the decision of University of California, Santa Barbara administrators who refused to archive a thesis that included an expletive-filled “Dis-Acknowledgements” section. So too were multiple harassment/sexual harassment policies and speech codes deemed unconstitutional by the courts on the basis of

97 But see Uzuegbunam v. Preczewski, 781 Fed. Appx. 824 (11th Cir., 2019) (a student at Georgia Gwinnett College was disciplined for disseminating pamphlets amiss of a stringent school policy, where such behavior was to be confined to two small areas, for limited time, and only with prior permission from administrators). While the district and appellate courts held similar rulings (largely in favor of the college over mootness: the students have not only graduated, but Georgia Gwinnett has also since altered the policy to involve far less speech regulation), the Supreme Court did grant a writ of certiorari on July 9, 2020 to hear the case. The case will likely be considered when the Court reconvenes in late 2020. The outcome of this case in the Supreme Court could alter these metrics. See Maureen Downey, U.S. Supreme Court Will Hear Free Speech Case Against Georgia Gwinnett, THE ATLANTA JOURNAL-CONSTITUTION (July 10, 2020), https://www.ajc.com/news/local-education/supreme-court-will-hear-free-speech-case-against-georgia-gwinnett/XYkXBScZUSKCKr2A1C8bCK/.

98 The five Supreme Court cases from 2000-2019 that were selected for this analysis were Board of Regents v. Southworth, 529 U.S. 217 (2000); Good News Club v. Milford Central School, 533 U.S. 98 (2001); Virginia v. Black, 538 U.S. 343 (2003); Morse v. Frederick, 551 U.S. 393 (2007); and Christian Legal Society Chapter of the University of California v. Martinez, 561 U.S. 661 (2010). Of these cases, only Christian Legal Society and Board of Regents specifically dealt with speech issues for students on college campuses.

99 The Supreme Court receives a staggering amount of case petitions each year, but it usually only accepts cases via writ of certiorari “if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or have precedential value.” United States Courts, Supreme Court Procedures, USCOURTS.GOV (n.d.), https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

100 Brown v. Li, 308 F.3d 939, 943 (9th Cir. 2002). Another ruling that bolstered this precedent at the K-12 level occurred in Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995).
overbreadth, vagueness, and/or content-based discrimination. Institutions attempting to limit near-unfettered or disruptive expression by way of establishing controversial ‘Free Speech Zones’ have often been successfully challenged as well: courts in Pro-Life Cougars v. University of Houston and University of Cincinnati Chapter of Young Americans for Liberty v. Williams, for instance, determined that pre-established policies for speech in public forums cannot amend permissiveness based on the content of the speech, nor can institutions declare almost the entire campus a limited public forum for regulatory purposes.

Finally, R.A.V. v. St. Paul was routinely used as the judicial standard with which to declare vague harassment guidelines unconstitutional, as well as to defend even the most egregious instances of discriminatory expression, including the controversial act of cross-burning.

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101 Examples of these more recent (and legally unsuccessful) regulatory policies include Bair v. Shippensburg University, 280 F. Supp. 2d 357 (2003) (two students successfully challenged Shippensburg University’s speech clause of the Student Code of Conduct, which, as part of a diversity and inclusion initiative, attempted to limit certain speech to limited zones on campus); Saxe v. State College Area School District, 240 F.3d 200 (3rd Cir., 2001) (student plaintiffs argued against an anti-harassment code enacted by a local school district, and the appellate court agreed that its overbreadth could result in viewpoint discrimination); and DeJohn v. Temple University, 537 F. 3d 301 (3rd Cir., 2008) (a graduate student argued that the sexual harassment policy at Temple University was overbroad to the point where his views on women in military leadership roles would result in discipline, and the court agreed).

102 Pro-Life Cougars v. University of Houston, 259 F. Supp. 2d 575 (S.D. Tex., 2003); and University of Cincinnati Chapter of Young Americans for Liberty v. Williams, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio, 2012). See also Jeremy Bauer-Wolfe, The Death of College Free-Speech Zones, INSIDE HIGHER ED (Feb. 2, 2018), https://www.insidehighered.com/news/2018/02/02/experts-states-likely-keep-abolishing-free-speech-zones. But see, Uzuegbunam v. Preczewski, 781 Fed. Appx. 824 (11th Cir., 2019), where the court—while positing similar rationales to both Pro-Life Cougars and University of Cincinnati regarding intrusive speech zones and prior review protocols of campus speech—noted that Georgia Gwinnett had already made effective changes to the contested policies. Given that the students graduated before benefitting from the increased institutional permissiveness, the real issue to be determined by the Supreme Court in late 2020 largely involves whether the students could retroactively argue that their speech rights were infringed, and benefit from damages as a result.

103 One example of R.A.V.’s enduring influence emerged during Saxe v. State College Area School District, 240 F.3d 200, 207 (3rd Cir., 2001). Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.
during *Virginia v. Black* in 2003.\(^{104}\) When combined, most student speech on campus (but especially in extracurricular settings) has, and still is, permitted to occur, with the only consistently approved regulation in public fora coming from a narrowly tailored and viewpoint neutral time, place, and manner constraint.

Additionally, the precedent from *Widmar v. Vincent* has had a sustained influence on the legal ability for religious organizations—both students and non-students—to operate at educational institutions in myriad ways, including the utilization of public campus facilities for worship, the promotion of doctrine in campus publications, or the protest of adversative social issues (such as abortion) in public forums.\(^{105}\) Interestingly, the multitude of post-*Widmar* plaintiffs in every religion-themed case analyzed for this dissertation were all affiliated with Christian, Catholic, or Evangelical-Catholic denominations; however, Roy argued that this becomes less of a surprising finding when postured within the dichotomy of steadily decreasing

\(^{104}\) *Virginia v. Black*, 538 U.S. 343 (2003) (Virginia attempted to make illegal the act of cross-burning after repeat incidents with the Ku Klux Klan, but the Supreme Court argued that cross-burning could be used not just for racist intent but also as an expressive mode of political speech, which warrants protection).

\(^{105}\) A handful of cases concerning the free speech rights of practicing religious persons/organizations on campus emerged after *Widmar* in the 1980s and have extended to rulings as recent as *Uzuegbunam v. Preczewski* in 2019. Cases at the K-12 level include *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (an external church group wanted to utilize school facilities through a rental agreement that other organizations had gone through; the Supreme Court mandated that the school allow them access to that forum, because not allowing it would classify as a content-based restriction) and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (the Supreme Court ruled that an external religious group, Good News Club, be permitted to utilize school grounds after school, as this was a practice that the school had tolerated for other organizations). Relevant case law in the higher education sector include *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (the Supreme Court ruled that University of Virginia could not withhold reimbursement subsidies to a Christian RSO based on views espoused in their extramural publication, since they reimbursed secular RSOs); *Orin v. Barclay*, 272 F. 3d 1207 (9th Cir., 2001) (a non-student protester was allowed to hold an anti-abortion protest on campus, but the court ruled that when the institution attempted to restrict his controversial speech by not allowing any related talk of religion to occur, such a regulation was inherently unconstitutional); and, in a bit of a departure from the other cases, *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010) (while the Christian Legal Society was a recognized RSO at a public law school and therefore entitled to fairly extensive protection of speech, the Supreme Court argued that the school enacted a valid, viewpoint neutral rule that prohibited the chapter from denying members with opposing lifestyles/morals (i.e., homosexuality). *And see*, most recently, *Uzuegbunam v. Preczewski*, 781 Fed. Appx. 824 (11th Cir., 2019) (student plaintiff was a devout Evangelical who sued after he was prevented from passing out religious flyers in a campus space not designated as a public forum; the appellate court ruled that the case was moot, but the Supreme Court will preside over this case in late 2020).
religious membership in students, and institutional efforts to broaden student diversity, equality, and social justice endeavors from the 1980s-onward:

That free speech would come to be the central victory of evangelical efforts in the courts is itself somewhat of an irony. On one level, the central intensity with which rank and file evangelicals care about cultural issues—abortion, euthanasia, homosexual marriage, school prayer, etc.—fueled fundraising for a legal agenda that would later include those things, but primarily featured the defense of free speech, hardly an important issue to either conservatives or evangelicals.106

With the observation of these litigation patterns, which overall have consistently protected student speech of most (even controversial or intolerant) viewpoints, as well as viewpoint-neutral access to facilities or resources from which such speech can emerge, there develops a preliminary tapering of the possibility that a “free speech crisis”107 exists on campus. Yet, the perception that a First Amendment-related crisis persists to present day means that the legal issues of 1969-1999 have since evolved to pose new uncertainties for student speech; whether these new issues tender challenges to the law itself, to higher education operations, or to public opinion (or a combination of the three) is examined in the following sections of the legal historical analysis.

**Student Fees: Increasing Intersections Between Finance and Freedom**

Student antagonism over mandatory fees began as early as 1975 in *Good v. Associated Students of University of Washington*,108 thereby linking higher education finance and free

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108 See *Good v. Associated Students of Univ. of Wash.*, 86 Wn. 2d 94, 105 (Wash., 1975), where the court ruled that mandatory fees may not require membership or overlook the importance of subsidizing various student viewpoints: The cases which the university relies upon to sustain mandatory student fees recognize the delicate balance between the rights of the dissenters who must finance controversial programs and the desirability of the university providing a forum for wide-ranging ideas. Yet these cases are
speech early on; yet only intermittent case law until the mid-1990s truly focused on this matter.\textsuperscript{109} Most of the legal battles concerning fees during that era also mirrored the general population’s reluctance to support or promote increasingly liberal student endeavors.\textsuperscript{110} With the influx of student organizations fighting for societal change and using student fees to do so, as with Students for a Democratic Society, students with antithetical views broached a legal question: is it an infringement of free speech to mandate that students pay fees to subsidize costs for organizations that they ideologically or politically oppose?

Almost unwaveringly, courts have sided and empathized with the need for institutions to require student fees—after all, fees are historically used to help fund student undertakings, particularly those occurring outside of the classroom.\textsuperscript{111} Additionally, these fees have long been considered to be of great importance to the marketplace of ideas, bringing the legal analogy closer to a tangible marketplace where this funding source for the institution “ensures that a variety of groups will participate in the overall exchange of ideas.”\textsuperscript{112}

That said, this permissiveness rides on the equally compelling interest of maintaining viewpoint neutrality when allocating funds or associating with student fee recipients. For

\begin{quote}
premised on the proposition that there must be in fact a spectrum presented, not a single-track philosophy.
\end{quote}

\textsuperscript{109} This analysis identified only four main cases between 1975 and 1993 that dealt with student fees: \textit{Good v. Associated Students of Univ. of Wash.}, 86 Wn. 2d 94, 105 (Wash., 1975); \textit{Galda v. Rutgers}, 772 F.2d 1060 (3rd Cir., 1985); \textit{Carroll v. Blinken}, 957 F. 2d 991 (2nd Cir., 1992); and \textit{Smith v. Regents of University of California}, 4 Cal. 4th 843 (Cal., 1993).

\textsuperscript{110} See generally Driver, supra note 2, at 83, for a note that student protests on social justice issues were not taken kindly by the general population in the 1960s and 1970s.

\textsuperscript{111} “Universities levy fees on students in order to fund a variety of student groups and services ranging from athletics to student government to politically active student groups such as a student newspaper or a Public Interest Research Group (‘PIRG’).” Christina E. Wells, \textit{Mandatory Student Fees: First Amendment Concerns and University Discretion}, 55 U. CHI. L. REV. 363 (1988).

\textsuperscript{112} \textit{Id.} at 368.
instance, the SUNY-Albany plaintiffs in *Carroll v. Blinken* succeeded in persuading the court that, while an institution can “constitutionally allocate students’ activity fees to a group with whose speech some students disagree…a campus group may not define its membership to include all paying students.”

A similar balance was struck during *Smith v. Regents of University of California* in 1993. Certain student populations at University of California, Berkeley were dismayed that their mandatory student activity fee was helping to fund off-campus political endeavors and activist efforts from leaders within the Associated Students of the University of California (ASUC). The court ruled that, again, institutions could mandate fees to benefit and enrich the educational experience, but extramural lobbyist ventures were not necessarily a protected part of that mission, and therefore plaintiffs could opt to apply for refunds.

An even more stern approach emerged in *Galda v. Rutgers*, which dealt with student opposition regarding a specific fee allocation to the respective state’s Public Interest Research Group (PIRG). PIRGs mushroomed on college campuses in the 1970s and 1980s and operated under decidedly partisan agendas; students at Rutgers argued that they should not have to pay a

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113 *Carroll v. Blinken*, 957 F. 2d 991, 992-993 (2nd Cir., 1992). See also *Smith v. Regents of University of California*, 4 Cal. 4th 843 (Cal., 1993) (University of California, Berkeley students who opposed the extramural and at times polemic endeavors of the Associated Students of the University of California (ASUC) wanted to be precluded from the mandatory fees supporting their agendas. The court agreed, arguing that it was legal for the institution to mandate fees, but it would allow for students who objected the ASUC to potentially receive refunds).

114 *Smith v. Regents of University of California*, 4 Cal. 4th 843 (Cal., 1993).

115 *Id.* at 849.

116 *Id.* at 889:

   An appropriate remedial system would provide for general notice of the approved budget, the opportunity to file a written objection to a particular expenditure within a specified time period, an escrow for the pro rata amount of the objecting students’ fees at issue pending determination of the merits of the objection, and an impartial arbitration panel.

separate mandatory fee for New Jersey’s PIRG, given that its political agenda ran contrary to their own, and the appellate court agreed.\textsuperscript{118}

Many of the court rulings concerning student fees and free speech pulled from collective bargaining case law precedent; a particularly strong standard emerged from \textit{Abood v. Detroit Board of Education} in 1977.\textsuperscript{119} The issue in \textit{Abood} developed in a similar manner: Michigan attempted to mandate that all teachers under the employment umbrella of the Detroit Board of Education pay dues to the Detroit Federation of Teachers Union, even if they were not union members.\textsuperscript{120} Those opposed to unionization and/or activities of the union argued against this “agency shop”\textsuperscript{121} compulsory fee system, but the Supreme Court largely upheld the mandate, maintaining that so long as the union utilized fee-funded expenditures for its specific collective bargaining mission, it could require fees without overt encroachment on public employees’ First Amendment rights.\textsuperscript{122}

\textit{Abood v. Detroit Board of Education}’s mission-oriented opinion quickly translated to the higher education sector, and it has often provided a model from which to follow—for instance, the court in \textit{Galda v. Rutgers} noted that \textit{Abood} set the standard of permitting the mandate of fees

\textsuperscript{118} \textit{Id.} at 1067-1068. During the ruling, the judges considered whether the PIRG provided valuable educational opportunity, and decided that its agenda was one with topics that could be covered in class:

Nothing in the record here demonstrates that in its ordinary operations the University is unable to offer students the opportunity to learn about environmental or consumer concerns or similar matters advocated by PIRG.

\textsuperscript{119} \textit{Abood v. Detroit Board of Education}, 431 U.S. 209 (1977).

\textsuperscript{120} \textit{Id.} at 211-212.

\textsuperscript{121} \textit{Id.} at 211.

\textsuperscript{122} \textit{Id.} at 235, where the Supreme Court struck a compromise between requiring public sector employees (and even non-union members) to pay fees to the overarching union, but also noting that the use of these funds should be narrowly tailored to fit the union’s mission:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.
until a certain point of political speech, “substantially unrelated to the union’s central purpose,” is crossed.\textsuperscript{123} \textit{Abood} was also a strong reference point during another Supreme Court case in 2000, this time expressly re-entering the higher education setting.\textsuperscript{124} In \textit{Board of Regents v. Southworth}, the Supreme Court ruled that students at the University of Wisconsin could be billed a fee for co-curricular activities, and have it “facilitate extracurricular student speech if the program is viewpoint neutral.”\textsuperscript{125} As part of that stipulation to maintain viewpoint neutrality in fee allocation, however, the Court rebuked a portion of Wisconsin’s fee program where students could vote on whether to fund/defund registered student organizations.\textsuperscript{126} To fully maintain the premise that extracurricular student activities advance the marketplace of ideas, fee allocation needs to ensure that “minority views are treated with the same respect as are majority views.”\textsuperscript{127} Here, the analogical marketplace, institutional mission, and essential funding model were all combined into a system of operative and legal symbiosis.

Paired together, \textit{Abood} and \textit{Board of Regents} facilitated quite a focused, enduring model for adjudicating student fee-related litigation.\textsuperscript{128} However: despite relatively dependable case law precedent for mandatory student fee allocation in higher education, its links to collective bargaining jurisprudence means that court rulings are provisional to two important realities.

\begin{enumerate}
\item \textit{Galda v. Rutgers}, 772 F.2d 1060, 1073 (3rd Cir., 1985).
\item \textit{Board of Regents v. Southworth}, 529 U.S. 217 (2000).
\item \textit{Board of Regents v. Southworth}, 529 U.S. 217, 221 (2000).
\item \textit{Id.} at 235-236.
\item \textit{Id.} at 235. See also Sarah Brown, \textit{Six Years of Campus Debate Over Diversity of Thought}, \textit{The Chronicle of Higher Education} (Sept. 22, 2019), https://www.chronicle.com/article/Six-Years-of-Campus-Debate/247163 (cites that, as recently as April 2019, Texas State University administrators had to reiterate this precedent after the student government attempted to disband its campus chapter of Turning Point USA. Under \textit{Southworth}, this move would surely be considered unconstitutional if challenged in the courtroom).
\item The fact that \textit{Abood} was decided in 1977 and \textit{Board of Regents} was decided in 2000, with similar rationales, indicates that such precedent lasted for over twenty years.
\end{enumerate}
First, this perpetuates a legal connection between free speech and finance. And, while consistent legal tenets of free speech may have persisted, the financial climate of higher education is not nearly as stable. At the point in the mid-1970s where Abood was decided, state subsidization—historically the major funding source for higher education—was at its zenith. In contrast, PEW reported that “over the past two decades and particularly since the Great Recession, spending across levels of government converged as state investments declined, particularly in general purpose support for institutions.”

A closer look at disinvestment patterns in higher education since the 1980s is important to the scope of this dissertation; for one, disinvestment in higher education hastened during the Ronald Regan presidential era, an administration commonly associated as a catalyst for neoliberal economic policy. Two, plaintiffs in the fee-specific case law analyzed for this study largely focused their complaints on speech and viewpoint—with little consideration regarding the amount of the fee itself. Thus, while student fees have emerged as ever-increasing confirmation that institutions have had to respond to neoliberal disinvestment in the sector by procuring alternate streams of revenue, disproportionate legal efforts and dialogue on campus have historically been put toward challenging the marketplace of ideas analogy, versus challenging major (and often simultaneous)

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129 “Public universities are subject to swings in state funding…private universities are more subject to the vagaries of financial markets…yet private and public universities alike are subject to a similar set of cost drivers…” Robert B. Archibald & David H. Feldman, WHY DOES COLLEGE COST SO MUCH? 8 (2011).

130 Archibald & Feldman, supra note 129, at 144. As of the publication of this text, the authors cited a near 40-percent decline in state funding from the 1970s—indicating that while higher education sector has grown, funding has dropped precipitously.


132 “[Ronald Regan’s] presidency has been widely recognized as the turning point in educational policy in the shift to neoliberalism” Edward P. St. John, Nathan Daun-Barnett, & Karen Moronski-Chapman, PUBLIC POLICY AND HIGHER EDUCATION: REFRAMING STRATEGIES FOR PREPARATION, ACCESS, AND COLLEGE SUCCESS, 6 (1st Ed., 2013).
economic policy shifts. Consequently, what was once a subsidy for co-curricular activities that would broaden the marketplace of ideas has evolved into a fiscal lifeline for universities.\textsuperscript{133} Kelchen conducted a study that corroborates such a transition:

Between 1983–84 and 2013–14 academic years, inflation-adjusted tuition and fees increased by 153\% at private four-year colleges, 164\% at community colleges, and 231\% at public four-year universities (Baum & Ma, 2013). As colleges and universities scramble for additional revenue to fund academic and non-academic pursuits, student fees (separate from tuition) have become an increasingly common funding source. Student fees have traditionally been used to fund specific campus programs such as student unions and recreational facilities, but the number and type of fees have increased substantially over the past two decades.\textsuperscript{134}

Archibald and Feldman cited three particularly salient factors behind this continual decrease in funds, the first involving attempts to re-allocate portions of higher education funding to other sectors, such as the K-12 pipeline or healthcare.\textsuperscript{135} The motivation behind this decision emerged from a diminishing resource pool—and therefore a second factor—beset by the increasing presence of “tax or expenditure limitation”\textsuperscript{136} policies in the 1980s and 1990s. The third factor explains why the higher education sector in particular faced such an onslaught of budget reductions, with neoliberalism at the helm; with its mission able to be financed by tuition and fee revenue, institutions were considered more self-sustaining than other arms of state-funded operations.\textsuperscript{137}


\textsuperscript{134} \textit{Id.}

\textsuperscript{135} Archibald & Feldman, \textit{supra} note 129, at 145.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}
Yet, how sustainable could those revenue channels, fees firmly included, be? Similar to Kelchen’s research, data show that “between 2001 and 2015, the cost of tuition, room, and board at public institutions rose 61% to $19,548.” Student fees have risen precipitously; for instance, the court in *Good v. Associated Students of University of Washington* cited that “in the 1969-70 academic year the [mandatory services and activities] fee was $35 per quarter.” As of Fall 2019, full-time students who live on that same University of Washington flagship campus are required to pay $141 per quarter under that same services and activities fee category. Unequivocally, the burden of college cost has shifted to that of the student, and maintaining postsecondary affordability has largely pivoted to the provision of federal financial aid: a finite resource pool that has caused institutions to compete nationally for quality students.

While challenging, it is important to reiterate that this intensifying competition for talent across state lines, and for a limited share of resources, is consistent with neoliberal economic behavior. Slaughter and Rhoades have gone so far as to introduce the theory of ‘academic

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138 Kelchen, supra note 133.

139 Eagan et al., supra note 63, at 12.

140 *Good v. Associated Students of Univ. of Wash.*, 86 Wn. 2d 94, 95 (Wash.,1975).


142 See generally Archibald & Feldman, supra note 129, at 164-165. It is also important to note that the authors consider this battle over talented students and prestige to be an arms race (Id. at 165-166):

The number of instructions that are direct competitors for particular students has risen over time.

As this competition expands, some institution has to find itself on the bottom of the ranking of institutional grants, and will have to respond…this sounds a lot like a positional arms race, and once it starts the momentum may be difficult to overcome.

capitalism’ to help explain this increasingly privatized and competitive institutional behavior. While academic capitalism is further described in the latter section of the legal-historical analysis, it ultimately rests on the assumption that institutions of higher education increasingly conduct operations not “as a public service, as universities historically had…[but] as a privatized and commercialized enterprise” that instead reflects the external market. Student fee case law alone is not indicative of these massive policy and operational shifts, even with its direct ties to school financial structures—again, the major dispute considered by the courts has involved the First Amendment implications of fee allocation and use within the marketplace of ideas—which is why cross-analyzing speech litigation with economic trends and related theories is so integral to the study’s central thesis that dissent thrives within this operational dissonance.

Yet, this observed reciprocity also lends itself to a second legal reality—that student fee precedent is likewise contingent on the likelihood that collective bargaining jurisprudence in the public sector remains unswerving. This too is no longer the case. As recent as 2018, Abood was overturned by a divisive ruling in Janus v. American Federation of State, County, and Municipal Employees, Council 31. The Janus decision was divided completely between Republican/Democrat political ideologies, with the majority leaning conservative. The ruling

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144 “While universities were not primary players in creating the neoliberal state, they often endorsed initiatives, directly or indirectly.” Sheila Slaughter & Gary Rhoades, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION, loc. 473 (2009) (ebook).

145 Slaughter & Rhoades, supra note 144, at loc. 4671 (ebook).


147 Id. The justices delivering the majority opinion were Samuel Alito, Jr.; John Roberts, Jr.; Anthony Kennedy; Clarence Thomas; and Neil Gorsuch. Conversely, Sonia Sotomayor; Elena Kagan; Ruth Bader Ginsburg; and Stephen Breyer dissented. See also Alana Semuels, Is This the End of Public-Sector Unions in America? THE ATLANTIC (June 27, 2018), https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/, who affirmed that the ruling was “split over partisan lines.”
ultimately determined that public employees do not have to pay mandatory fees to finance unions with ideologies contrary to their own, thereby overturning the *Abood* precedent in its entirety:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the part 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.148

By ringing what some consider to be an eventual death knell for public sector unions,149 the precedent from *Janus* established a current judicial inclination to fiercely protect the idea of dissent in First Amendment jurisprudence.150 This holding is very much on par with the classical interpretation of the marketplace of ideas analogy that first arose in *Abrams v. United States*.151 However: dissent, in this case, comes readily affixed with a price tag. Justice Elena Kagan, for instance, warned of a “vicious cycle”152 where, faced with the voluntary departure of opposing employees, more and more financially strapped employees will quit the union until collective bargaining units dissolve altogether.153 She also explicitly accused the majority of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in

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148 Id. at 2485-2486.


151 See Stanley Fish, supra note 68, at 33, where a fully permissive First Amendment, under the tenets of the marketplace of ideas analogy, “democratizes viewpoints and opens up a space for the emergence and development of dissent.”


153 Id.
economic and regulatory policy.”

Such an fierce assertion lambasted the majority opinion that placed the First Amendment squarely into the defense of unregulated and unfunded governance efforts, which is, again, reminiscent of the tenets of neoliberalism and thus the basis of cross-analysis.

The Janus precedent has yet to emerge within higher education litigation, and the potential of its influence on collective bargaining efforts at universities extends beyond the scope of this dissertation. However, its focus on how free speech operationalizes within public sector funding schemes—as well as the political affiliation of judges who presented the majority opinion—bears significant relevance to case law between 2000-2019. As it stands, the complete overhaul of precedent—combined with a renewed permissiveness of dissent in the public sector by conservative judges—furthers findings from the analysis, where 18 of the 30 student speech cases between 2000-2019 dealt with controversy around co-curricular student/student organization conduct with distinctly partisan ideologies.

Table 3.1. provides a visual timeline and breakdown of these cases, along with the partisan leanings associated with the litigants.

154 Id. at 2501.

155 “The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.” Id. at 2502.

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<th>CASES</th>
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<th>Did the student/student organizations exhibit any partisan leanings or were they represented by a purposive organization? (Y/N; If yes, identify)</th>
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<td>Young America’s Found. v. Kaler, 370 F. Supp. 3d 967</td>
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<td>Y - Conservative Student Group</td>
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<td>Y - Student was/is represented by Alliance Defending Freedom</td>
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<td>Y - Conservative Student-Run Publication</td>
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</table>
During the process of organizing those 30 cases into the above table, I found that the vast majority of those cases ruled in favor of the individual students and/or student organizations, whether through successful challenges over fee allocation, protest forums and content, invited speakers, or publications. Even three cases where student plaintiffs did not prevail in court were still, for the most part, operative triumphs—the controversial student protests in *Rock for Life-UMBC v. Hrabowski* and *Abbott v. Pastides*, the former hotly decrying the act of abortion and the latter promoting sexually and racially charged speech at the periphery of free speech protections—were both able to hold events free of discipline.\(^{157}\) The third case, *Uzuegbunam v. Preczewski*, was considered moot by both district and appellate courts, given that publicized conflict over a religious student’s campaigning efforts pushed Georgia Gwinnett College to overhaul and make more lenient existing speech policies.\(^{158}\) And, *Christian Legal Society v. Martinez*,\(^{159}\) one court ruling that did actually permit an institution to intervene on the

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\(^{157}\) *Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541 (4th Cir., 2010) (University of Maryland-Baltimore County attempted to mitigate controversy on campus by moving the Rock for Life’s (an RSO) “Genocide Awareness Project” demonstration to a lesser-trafficked area of campus. While the court did chastise the school for acquiescing to the idea of heckler’s veto, the demonstration was ultimately able to be held three different times on campus, and no members of the RSO were ever disciplined). *Abbott v. Pastides*, 900 F.3d 160 (4th Cir., 2018) (two conservative student groups at University of South Carolina held a free speech-themed event, which included some sexual, racial, and otherwise offensive or discriminatory content. It was fervently opposed by members of the USC student body, and because of complaints, USC conducted an investigation. While the groups challenged the investigation’s constitutionality, the court held that a) neither of the groups were disciplined, and the demonstration was allowed to occur, and b) universities are well within their rights to perform standard investigative procedures.)


\(^{159}\) *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010), supra note 105: While the Christian Legal Society was a recognized RSO at a public law school and therefore entitled to fairly extensive protection of speech, the Supreme Court argued that the school enacted a valid, viewpoint neutral rule that prohibited the chapter from denying members with opposing lifestyles/morals (i.e., homosexuality).
exclusionary operations of a religious registered student organization, was met by heated criticism from conservative-leaning Supreme Court justices:

The proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’ Today’s decision rests on a very different principle: no freedom of expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.\textsuperscript{160}

While political correctness is not a new reproach,\textsuperscript{161} contemporary research shows that higher education has re-emerged in public perception as a bastion of politically correct, liberal operations; this take is especially prevalent among those affiliated with the Republican party, and is often conflated with concerns over the ever-increasing cost of a college education to altogether foster a growing mistrust in the sector.\textsuperscript{162} Survey data from the PEW Research Center in 2018 reported that over half (54\%) of respondents felt that institutions were “too concerned about protecting students from views they might find offensive.”\textsuperscript{163}

Increasingly, however, case law involves the price of the political correctness debate. In \textit{Koala v. Khosla}, the\textit{ Koala}—a satirical student newspaper run by a Registered Student Organization at the University of California, San Diego—successfully argued retaliation and an infringement of First Amendment rights after student government leaders introduced a new

\textsuperscript{160} Id. at 706 (Justices Samuel A. Alito, Jr., Antonin Scalia, & Clarence Thomas, dissenting).

\textsuperscript{161} “Charges of a leftist, politically correct environment in academia is nothing new…more recently, however, political entrepreneurs have turned a generalized complaint into a very specific political movement.” Robert Maranto, Richard E. Redding, & Frederick M. Hess, \textit{The PC Academy Debate: Questions Not Asked, in THE POLITICALLY CORRECT UNIVERSITY: PROBLEMS, SCOPE, AND REFORMS}, 3-4 (Robert Maranto, Richard E. Redding, & Frederick M. Hess ed., 2009).


\textsuperscript{163} \textit{Id}. The survey also found that half (50\%) of respondents also found serious issue with “professors bringing their political and social views into the classroom.”
policy intended to defund print media RSOs from student fee allocation. This new Media Act came mere days after The Koala published an article titled, “UCSD Unveils New Dangerous Space on Campus,” which lampooned institutional attempts to adopt safe spaces and trigger warnings on campus and caused an uproar from offended students. The Court of Appeals for the 9th Circuit reversed the prior district court ruling on the premise that, once UCSD instituted an overarching, mandatory student activity fee for all RSOs to benefit from, it established a limited public forum that must remain viewpoint neutral. Attempts to defund/remove controversial student publications from campus facilities that have been previously established as public or limited public forums have routinely been considered content-based regulations, and nonphysical student fees are now firmly included in this dicta.

While the Koala v. Khosla decision re-affirmed that the RSO operations of intentionally offensive/non-politically correct publications are protected under the First Amendment—and,

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164 Koala v. Khosla, 931 F. 3d 887, 891 (9th Cir. 2019).

165 Id. See also UCSD Unveils New Dangerous Space on Campus, THE KOALA (Nov. 16, 2015), https://thekoala.org/2015/11/16/ucsd-unveils-new-dangerous-space-on-campus/. The article employed overtly controversial verbiage (including racial slurs) in the article’s lead, beginning with: “Too long have trigger warnings plagued the airwaves. Too long has the no-blacks rule been removed from our campus. Too long have students not been free to offend their hypersensitive peers.”

166 Koala v. Khosla, 931 F. 3d 887, 891, 904 (9th Cir. 2019). The circuit court argued that the main First Amendment infringement in this case arose when UCSD attempted to cut a previously included area of student activities from the funding scheme:

UCSD’s newly defined forum, proposed ex post during contentious litigation around sensitive cultural and political topics, runs the real risk of silencing divergent views by slicing off just enough of an existing forum (the student activity fund) to isolate offensive speech, then closing the redefined forum (the Media Funds category of the student activity fund) under the guise of content neutrality.

167 Id. See also OSU Student Alliance v. Ray, 699 F.3d 1053 (9th Cir., 2012) for a similar judicial rationale in the last decade. Although a conservative student newspaper, The Liberty, was entitled to publication, officials at Oregon State University had its distribution bins removed from spaces where other publications were still promoted. The court ruled that, under public forum doctrine, the university erred in enacting a vague policy to prohibit The Liberty from utilizing those distribution spaces.
therefore, entitled to benefit from viewpoint neutral fee allocation\textsuperscript{168}—other areas of student speech have intersected with institutional finance with increasing vigor. Of the 12 coded court opinions occurring after 2016, when former President Trump took office and neoliberalism fully took hold as a dominant economic policy,\textsuperscript{169} four cases specifically cited the issue of security fees for campus speakers.\textsuperscript{170} This sizeable proportion justified the decision to conduct a multiple-case study approach concerning campus speaker issues on campus, and, as will be further explored, highlights a number of salient new factors in the money/expression dichotomy.

\textbf{Contemporary Safety vs. Speech: Security Costs and Speakers}

External campus speakers are not new to university operations, but regulations and circumstances around their motivations have certainly evolved. For instance, just five years prior to \textit{Tinker v. Des Moines}, “65 percent of the institutions had no written policy on off-campus speakers, and even where written policies existed they usually allowed considerable discretion to administrative officers.”\textsuperscript{171} While that has changed over the last fifty years, exceptionally controversial speaker-related incidents in the last four years have pushed numerous institutions to reexamine existing policies.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{169} See generally Jerusha O’Conner, \textsc{The New Student Activists: The Rise of Neoactivism on College Campuses} (2020), loc. 319 (ebook), who delineates the resolute hold on neoliberal economic policy that the Trump administration secured.
\item \textsuperscript{170} The four cases addressing security fee costs for speakers were \textit{Young America’s Found. v. Kaler}, 370 F. Supp. 3d 967 (D. Minn., 2019); \textit{Mandel v. Bd. of Trs. of the Cal. State Univ.}, 2018 U.S. Dist. LEXIS 39345 (N.D. Cal., 2018); \textit{Young America’s Foundation v. Napolitano}, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018); and \textit{College Republicans of the University of Washington v. Cauce}, 2018 U.S. Dist. LEXIS 22234 (W.D. Wash, 2018).
\item \textsuperscript{171} Charles Alan Wright, \textit{supra} note 16, at 1050.
\item \textsuperscript{172} See Jeremy Bauer-Wolf, \textit{Reclaiming Their Campuses}, \textsc{Inside Higher Ed} (March 21, 2018), https://www.insidehighered.com/news/2018/03/21/colleges-changing-their-policies-after-visits-controversial-speakers, where he describes increasing attempts by administrators to balance safety and speech:
\end{itemize}
Before 2016, when litigation did arise over off-campus speakers, a considerable amount of attention went toward forum analysis and speech regulations over itinerant preachers. This litigation trend reflects the aforementioned findings by Roy that, particularly in the early years of the 21st century, those associated with evangelism entered into free speech discourse and successfully challenged a number of public forum suits. Campus speakers, in a similar manner to campus demonstrations, are permissible in public forums but can be regulated on the basis of time, place, and manner restrictions. And, a modern precedent set in University of Cincinnati Chapter of Young Americans for Liberty v. Williams—that a university cannot simply classify the entire campus as a limited public forum—provides an ever-wider berth for campus speakers to get their narratives across.

The case law involving itinerant preachers indicated that some of those protections could extend to those unaffiliated or uninvited by members of the institution. For outside speakers, institutions had greater leeway from which to regulate on time, place, and manner—for instance, schools could limit the space or frequency that a speaker utilized in order to accommodate a rotation of speakers from all backgrounds—but all of these public forum regulations were first

While always being hotbeds for issues of free expression, colleges in the past year have dealt with provocateurs who invite themselves to campus—and some administrators are responding by making more restrictive their policies on outside speakers (or are at least reviewing those rules).

173 The following cases considered the extent to which universities could restrict the speech of itinerant preachers or other, largely evangelical, orators on campus: Sonnier v. Crain, 613 F.3d 436 (5th Cir., 2010); Bourgault v. Yudof, 316 F. Supp. 2d 411 (N.D. Tex., 2004); and Bloedorn v. Grube, 631 F.3d 1218 (11th Cir., 2011).


175 University of Cincinnati Chapter of Young Americans for Liberty v. Williams, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio, 2012). The court ruled that the 5 to15-day prior notice for demonstrations by co-curricular organizations was unconstitutional because it provided a level of censorship to the peaceful assembly process. Additionally, at 29, the court ordered the University of Cincinnati to re-do their policies so as to be less restrictive in public fora: Defendants shall revise the student speech policies to craft more narrowly tailored regulations that regulate student expressive activities in designated public fora only as are necessary to serve a compelling government interest; and Defendants may impose content-neutral time, place, or manner restrictions in such a way so as not to burden substantially more speech than is necessary to serve a compelling University interest.
scrutinized for content-neutral, narrowly tailored guidelines.\textsuperscript{176} And, in this topical case law, the idea of security fees was also fairly cut and dry. In Sonnier v. Crain, for instance, the prospect of security fees was the one regulatory area where Southeastern Louisiana University erred: the part of the institution’s policy indicating that the requisite security fee could change depending on the speaker was deemed unconstitutional under the Forsyth County v. Nationalist Movement precedent.\textsuperscript{177}

What happens, then, in the middle area where external campus speakers are invited by recognized, fee-funded extracurricular student organizations? Recent case law, after all, deals less with the vocal presence of a random evangelical preacher, and more so with politically or ideologically slanted speakers who have been monetarily sponsored by institutional stakeholders, chiefly student groups.\textsuperscript{178} Goldberg argued that the Forsyth precedent, while a strong standard, was not necessarily a seamless fit when adjudicating cases that arise from these conflicts:

> When applying Forsyth to a public university’s imposition of security fees for divisive speakers…the analysis becomes more complicated. The Supreme Court has been somewhat inconsistent in applying First Amendment standards to student organizations at public universities. Further, security fees directly affect the speech of outside, non-student speakers, not the student organizations themselves.\textsuperscript{179}

\textsuperscript{176} “Undoubtedly, SLU has a significant interest in preserving its property for educational purposes and limiting where outside speakers may assemble or demonstrate is narrowly tailored to that purpose.” Sonnier v. Crain, 613 F.3d 436, 448 (5th Cir., 2010) (the Court noted that Southeastern Louisiana University could not restrict a preacher from entering open campus areas and proselytizing to students, but they were within their rights to follow a content-neutral policy barring outside speakers from certain places on campus, as well as collecting identifiable information and limiting the amount of times that one speaker can utilize the provided spaces to make room for other viewpoints). See also Bourgault v. Yudof, 316 F. Supp. 2d 411 (N.D. Tex., 2004); and Bloedorn v. Grube, 631 F.3d 1218 (11th Cir., 2011), which both posited similar rulings.

\textsuperscript{177} Id. See also Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).


Such an assertion strengthens the analysis of case law after 2016, which was suggestive of two particularly salient influences in the legal debate. Both of these influences help explain why security fees have become such a source of operative contention. The rise of conflict via “New Heckler’s Veto,” and the litigant presence of “purposive organizations” utilizing student groups as figurative campus proxies, have not only succeeded in further conflating heated discourse between the university environment and external society (and media), but have also exacerbated the potential of security/legal costs during a time where institutional resources continue to dwindle.

**New Heckler’s Veto.** The original heckler’s veto would be much simpler to adjudicate on a college campus, which has a long-accepted legal right to reasonably maintain a balance between speech and safety; its original connotation emerged during *Feiner v. New York* in 1951 and involved a palpably violent outburst from a crowd opposed to the anti-segregation tirade of Irving Feiner (a college student). In *Feiner*, the Supreme Court argued that the threshold for protected free speech was crossed, not on the basis of content, but instead as a consequence of the onlookers’ response, which they determined stemmed from Feiner’s “incitement to riot.” Such a ruling initially pushed the burden of maintaining a reasonably nonviolent crowd to that of

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181 Michael Olivas has conducted extensive research on purposive organizations. *See* Michael A. Olivas, *Who Gets to Control Civil Rights Case Management? An Essay on Purposive Organizations and Litigation Agenda-Building*, 2015 Mich. St. L. Rev. 1617, 1626 (2016), where “as the number of purposive organizations has grown, so have the centripetal forces at play in controlling the crowded pathways to litigation and, equally important, who gets to create and engage in the discursive narrative...”


183 *Id.* at 321.
the speaker, but as two recent cases demonstrate, the New Heckler’s Veto has operationalized on
campus in a much different fashion.\textsuperscript{184}

The cases, \textit{Center for Bio-Ethical Reform, Inc. v. Black}, and \textit{Mandel v. Board of Trustees
of the Cal. State University}, both arose from accusations that the plaintiffs’ own controversial
expression was quashed by large hordes of student counter-protesters—however, violence,
unlike in \textit{Feiner}, was not part of the onlooker’s response.\textsuperscript{185} In \textit{Center for Bio-Ethical Reform},
anti-abortion activists from State University of New York at Buffalo’s Students for Life chapter
argued that their “Genocide Awareness Project,” which consisted of huge, macabre murals, was
spoiled by counter-protesters.\textsuperscript{186} The protestors, rather than resorting to violence, however,
attempted to “use signs, umbrellas, and bed sheets to block the photo-murals from view.”\textsuperscript{187} The
district court agreed with the UB Students for Life plaintiffs—that, between attempts to move the
protest to a lesser-trafficked area on campus, and the allowance of counter-protestors ‘heckling’
the demonstration to the point where their chosen mode of expression (murals) was suppressed,
the student plaintiffs had successfully argued that their viewpoint was unlawfully stymied.\textsuperscript{188} In
this case, then, the legal burden shifted over to the expressive conduct of counter-protestors (and,

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\textsuperscript{184} The two cases are \textit{Center for Bio-Ethical Reform, Inc. v. Black}, 234 F. Supp. 3d 423 (W.D. NY, 2017) and

\textsuperscript{185} \textit{Center for Bio-Ethical Reform, Inc. v. Black}, 234 F. Supp. 3d 423 (W.D. NY, 2017) and


\textsuperscript{187} \textit{Id.} at 428.

\textsuperscript{188} \textit{Id.} at 435-436. The district court found that the student plaintiffs effectively argued that their First Amendment
rights were violated, and they settled with UB out of court for $30,000. \textit{See Center for Bio-Ethical Reform v. Black

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by representative proxy, the administration): a direct contrast from *Feiner*, yet still able to be remedied at the lower court level.\textsuperscript{189}

A similar situation presided over one year later during *Mandel v. Board of Trustees of the Cal. State University*. *Mandel* arose following an on-campus skirmish between Hillel, a student group at San Francisco State University who hosted a speaking engagement by the Mayor of Jerusalem, and pro-Palestinian student groups who interrupted the speech “with chants and shouts and used sound amplification devices.”\textsuperscript{190} In a manner akin to *Center For Bio-Ethical Reform*, the plaintiffs in *Mandel* also cited that SFSU administrators first attempted to mitigate potential conflict by moving the speaking engagement to a less central, and fee-required, room on campus.\textsuperscript{191} Rather than focus on the solitary event and its First Amendment implications, however, the plaintiffs brought on an extensive list of allegations regarding the environment at SFSU that the court eventually dismissed in entirety.\textsuperscript{192} However, the court did briefly address (and reject) claims that SFSU, “by failing to prevent or stop the protestors and by issuing the ‘stand down’ order to the police, went against protocol and facilitated or sanctioned the disruption of the event.”\textsuperscript{193}

These two court decisions occurred in 2017 and 2018, respectively. The timing of these rulings coalesced with what was initially coined “the year of the shout-down” by conservative

\textsuperscript{189} *Id. See also Feiner v. New York*, 340 U.S. 315, 316-317 (1951).

\textsuperscript{190} *Mandel v. Bd. of Trs. of the Cal. State Univ.*, 2018 U.S. Dist. LEXIS 39345, 10 (N.D. Cal., 2018).

\textsuperscript{191} *Id.* at 6-8 (details the back-and-forth between Hillel and administrators to secure a room for the speaking engagement.)

\textsuperscript{192} *Id.* at 69.

\textsuperscript{193} *Id.* at 36. In the same delivery, though, the court noted their reasoning for dismissing one of the First Amendment claims:

Without facts plausibly suggesting that Administration Defendants did so because of the content of the Barkat speech or because of the race, religion, or national origin of the plaintiffs who wished to hear Barkat speak, this claim does not survive.
media, and then the following year, during which rates of “shout-downs” grew even more.\textsuperscript{194} Yet, as the two cases also evidenced, the ‘shout-down’ was slightly more difficult to adjudicate than a hostile ‘shut-down;’ this is because, as Nary argued, the decision rests on weighing “two competing private free speech interests. The government is therefore placed in a difficult position of having to choose which rights deserve protection.”\textsuperscript{196}

From a contemporary case law perspective, however, courts have mostly protected those whose expressive conduct is heckled; this may not have been the case in \textit{Feiner}, but courts during the Civil Rights unrest of the 1960s quickly realized that the original heckler’s veto standard could quell dissent from marginalized communities fighting for equality.\textsuperscript{197} Because of this, later rulings such as \textit{Forsyth County v. Nationalist Movement} shifted the heckler’s veto narrative to one that shielded the speaker, no matter how provocative, from liability for ensuing chaos.\textsuperscript{198} Once again, the evolution of First Amendment dicta has fiercely defended the right of citizens to dissent, particularly in settings where their viewpoints may be in the minority. \textit{Forsyth} even presented the concept of security fees as a potential barrier to speech, with the majority arguing that “speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”\textsuperscript{199}

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\textsuperscript{195} See, \textit{e.g.}, Nary, \textit{supra} note 180, at 306, where he noted that the 2017-2018 year was marked by even more “shout-downs” than the previous year.
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\textsuperscript{196} Id. at 309.
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\textsuperscript{197} “During the 1960s, the heckler’s veto was being used as a tool to prevent advances during the Civil Rights Movement, when black protestors were frequently arrested for peacefully occupying segregated areas because their acts unnerved and unsettled onlookers.” Nary, \textit{supra} note 180, at 309.
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Because of this existing precedent, faultless in the ‘shout-down’ era or not, universities are put in a bit of a functional catch-22 when dealing with provocative campus speakers. On one end, the majority of case law following *Feiner v. New York* has dismissed attempts to block speakers in *anticipation* of unrest, with that *Forsyth* standard holding strong as recently as *Padgett v. Auburn University* in 2017. In *Padgett*, a district court judge issued a preliminary injunction so that Richard Spencer, a prominent White Nationalist on a polemical college tour, would be permitted to speak at Auburn University. The judge ruled that Auburn’s concerns over the potential of speech-related violence were not a) financially excusable, given that both Spencer and the institution had contributed significant funds toward security and insurance, and b) unconstitutional on the premise that denying him for any other reason would be content-based. Content-neutrality has routinely been the justification for institutions looking to avoid litigation from preemptive cancellation of controversial speakers, even those *not* endorsed by students or other institutional stakeholders; East Carolina University, for instance, made clear in a statement that judicial precedent required them to serve as a campaign stop for former President Trump in 2019:

> As you know and was stated several times, East Carolina University did not sponsor, host, or endorse the event. As a public university, however, we must follow federal, state, and UNC System guidelines regarding free speech. The Trump Campaign rented Mines Coliseum, which is available for any for-profit or non-profit groups. With this event and any event on our campus, the University does not control, and is not responsible for the content of speech.

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201 *Id.*

202 “…Discrimination on the basis of message content ‘cannot be tolerated under the First Amendment,’ and ‘listeners’ reaction to speech is not a content-neutral basis for regulation.’” *Id.* at 3.

On the other end of operations, Lasson argued that most courts have likewise maintained that “in the immediate face of violence, authorities can remove the speaker to quell the hecklers.” And, as will be addressed in later case studies, a select few speeches have prompted a violent opposition from counter-protesters. The mere potential for incitement, then, has compelled universities to balance free speech with security fees as an attempt to fund a safe, educational environment. However: the cost of security is noteworthy. For instance, in preparation for a Richard Spencer appearance, the University of Florida spent approximately “$500,000 on security—more than it pays for football games at a stadium that holds 90,000 people.” Because heckler’s veto litigation has evolved under the assumption that decision-making by the institution to stop a speaker or student counter-protesters has to be reactive in nature (unless the prior threat of violence is imminent), it really only leaves one legal option: allow a contentious speaker to come, but pay out for security in the event of disruptive shout-downs or violence. If not, institutions may be saddled with both security fees and legal fees, as with Auburn: in addition to security-related costs for Richard Spencer, the institution also had to shell out $29,000 to the student plaintiff who sued on behalf of Spencer.

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205 Two examples of speaker-related protests that turned violent, both of which will be addressed at length in later case studies, occurred at Middlebury College and University of California, Berkeley. See e.g., Katharine Q. Seelye, Protesters Disrupt Speech by ‘Bell Curve’ Author at Vermont College, THE NEW YORK TIMES (March 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html?_r=0. Also see e.g., Phil Helsel, Protests, Violence Prompt UC Berkeley to Cancel Milo Yiannopoulos Event, NBC NEWS (Feb. 2, 2017), https://www.nbcnews.com/news/us-news/protests-violence-prompts-uc-berkeley-cancel-milo-yiannopoulos-event-n715711.


207 Id.

It is clear, then, that while case law on off-campus speakers is decently consistent, even with the new iteration of heckler’s veto, such conduct by students comes at a significant price: both in funding and in campus climate. Data from Gallup and The Knight Foundation show that the majority of students (61%) find it unacceptable to “shout down speakers, or to engage in violence to stop a speech, protest, or rally (87%),”209 but so too did most students (61%) exhibit an inclination to disinvite a speaker when such violence could occur.210 This indicates a somewhat contradictory outlook from today’s students, where the majority want to allow speakers to come and express their views, but the greater part of respondents also want institutions to restrict speakers from coming if there could be violence. Such a dichotomy of speaker-related attitudes could conceivably result in greater conflict amongst the student body and administration.

Additionally, the excuse of resource scarcity has historically not proven to be accepted as a justification for limiting speech; therefore, it remains to be seen (but seems unlikely) that the increasing price tag of security costs will serve as a legal defense for preemptively disinviting or disallowing controversial speakers.211 As early as 1995, the Supreme Court discussed diminishing financial resources in *Rosenberger v. Rector & Visitors of the University of Virginia*, when UVA attempted to deny reimbursement costs for a patently religious, but fee-funded, student publication.212 The divided Court rejected UVA’s argument that financial restraints were a reasonable justification for withholding printing compensation to a non-secular group:

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210 *Id.* at 29.


212 *Id.*
The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.\(^{213}\)

Recent litigation patterns indicate that universities have attempted to mitigate the financial stress of security costs by placing the financial burden on the sponsoring student organizations—however, this has also been successfully challenged by student plaintiffs.\(^{214}\) In *College Republicans of the University of Washington v. Cauce*, student representatives of the University of Washington College Republicans specifically challenged the security fee policy at the institution, “which requires student organizations to pay the anticipated costs of security for on-campus events.”\(^{215}\) The group intended to host a rally on campus with their invited guest, right-wing activist Joey Gibson, whose controversial views the administration believed would stoke a significant presence of heckler’s veto; because of this, the University of Washington determined initially that the student organization would have to reimburse the university for $17,000 in security fees following the event.\(^{216}\)

The College Republicans chapter argued that the $17,000 was egregious and an unconstitutionally subjective cost estimation, and the court agreed with the latter assertion under

\(^{213}\) *Id.* at 835.


\(^{216}\) *Id.* at 3.
Similarly to Rosenberger, the district court—while sympathetic to the institutional economic stresses put on by security costs—found no legal issue with the high security fee itself, but instead argued that it was the fluctuant way “by which it was assessed, that chills the exercise of First Amendment speech and expression.”

Another challenge to institutional security attempts occurred during Young America’s Foundation v. Napolitano. Once again, the plaintiffs involved a chapter of College Republicans, who contested that University of California, Berkeley’s cancellation of invited conservative speakers, such as Ann Coulter and Ben Shapiro, was due to an unconstitutional (and previously unwritten) speaker policy that was only enacted after violence broke out preceding a speech from Milo Yiannopoulos. Significant spikes in requested security fees from UC-Berkeley was included in the complaint; the student group asserted that, after the policy was introduced, they were initially charged $5,788 for an engagement with David Horowitz and $15,738 for Ben Shapiro’s speech, even though Shapiro’s speech took place in the same campus space that Supreme Court Justice Sonia Sotomayor had spoken years earlier…for one-third of that cost of security. In regard to the “substantial difference in those fees, without any

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217 “The Court finds that the Security Fee Policy is neither reasonable nor viewpoint neutral.” Id. at 7.

218 Id. at 11, where the court identified (but also refuted as a legal defense) the financial injury that speaker security costs can bring to an institution:

The Court recognizes the difficult position faced by UW and other public universities across the country, many of which have recently expended millions of dollars in public funds to ensure safety and security at campus events featuring controversial or provocative speakers. At the same time, the Court observes that college and university campuses are where many students encounter, for the first time, viewpoints that are diverse and different than their own.

219 Id. at 9.

220 Young America’s Foundation v. Napolitano, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018).

221 Id. at 3-4.

222 Id. at 23-24.
explanation discernable from the facts alleged in the complaint,” the court decided that the students’ grievance regarding fee fluctuation had merit.\footnote{Id. at 29.}

A third case also involved Young America’s Foundation, this time representing the Students for a Conservative Voice Chapter at the University of Minnesota.\footnote{Young America’s Found. v. Kaler, 370 F. Supp. 3d 967 (D. Minn., 2019).} The district court opinion in Young America’s Found. v. Kaler immediately made note of the operative tension that arises when universities balance speech with the overarching educational mission:

This case arises at the intersection of two competing freedoms: the freedom of public university student groups, and their invited guest speakers, to exercise their First Amendment rights, and the freedom of public universities to manage their facilities in the manner that best advances the University’s educational mission.\footnote{Id. at 974.}

The decision itself was analyzed through limited public forum doctrine, as much of the complaint arose from the fact that—under the reasoning of inadequate security precautions for conservative commentator Ben Shapiro’s speech—the University of Minnesota attempted to restrict the student group from reserving a central facility formerly used by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Senator Amy Klobuchar, among others.\footnote{Id. at 977.} The institutional move to allow the speaker, but prevent them from speaking in the heart of campus where extreme heckler’s veto is most likely to occur, was similar to that of Michigan State University’s decision to host Richard Spencer at a campus-owned farm miles from campus.\footnote{Sarah Brown, Richard Spencer Will Speak at Michigan State—Way Out on a Farm, THE CHRONICLE OF HIGHER EDUCATION (Feb. 28, 2018), https://www.chronicle.com/article/Richard-Spencer-Will-Speak-at/242684.} But, while the court dismissed a fair amount of claims by Students of a Conservative Voice, noting that institutions have a responsibility to maintain a safe environment and have broader abilities to do
so under limited public forum doctrine, the issue of viewpoint neutrality could be potentially challenged in an amended, focused complaint.\textsuperscript{228} The fact that University of Minnesota had moved the speech to a decentralized facility without any tangible evidence of an impending security issue suggests that there was some level of unconstitutional viewpoint assessment involved, which could be tested in court in a similar fashion to prior battles over security fee discretion.\textsuperscript{229}

**Purposive organizations.** The sheer frequency of litigation funded and represented in part by Young America’s Foundation in the last two years is indicative of an increasingly salient influence on the operative and legal endeavors of extracurricular student organizations nationwide: purposive organizations.\textsuperscript{230}

Olivas argued that purposive organizations arose with gusto in the 1970s, and were representative of the many liberal social justice causes that were fought for by student activists during the same era.\textsuperscript{231} Many of these organizations endeavored to recruit like-minded individuals and functioned in a similar structure to that of the American Civil Liberties Union (ACLU), which was founded in 1920:

> The organization has a broad and identifiable policy focus, a network of community interests and identity, a large national community-based membership that supports its goals and provides resources and expertise, and many hundreds of disputes that arise on a regular basis to produce litigation.\textsuperscript{232}

\textsuperscript{228} *Id.* at 995.

\textsuperscript{229} *Id.*

\textsuperscript{230} See Young America’s Foundation, *Our Mission* (n.d.), http://www.yaf.org/about/, which describes their mission: Young America’s Foundation is committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values...as the principal outreach organization of the Conservative Movement, the Foundation introduces thousands of American youth to these principles.

\textsuperscript{231} Olivas, *supra* note 181, at 1622.

\textsuperscript{232} *Id.* at 1621.
When tailored to this description, it becomes easy to see why extracurricular student groups are so often represented in court by these organizations. While the legal system has time and again connected the social and educational benefits of co-curricular activities to that of higher education’s overarching mission, the entire premise of these organizations requires students to pick and choose their extracurricular involvement based on shared interests, actions, or ideologies. Additionally, the courts have required universities to maintain neutrality of both funding and viewpoint so that the marketplace of ideas can thrive outside of the classroom.233 Because of this compelling interest, university campuses are hubs of diverse interest groups, many of which, as with the 1960s, still reflect and advocate for myriad causes.234 Purposive organizations can look to student organizations for widespread, national recruitment to further their chosen cause, all while providing the necessary capital, legal representation, and political power should litigation arise.235

While these purposive organizations have and continue to span both sides of the political aisle, two observations about their current operations in higher education were made during the case law analysis. The first is that the profusion of purposive organizations in the 1970s and beyond has been linked as a major contributor to unprecedented political polarization today; Karol argued that “the polarization of Democrats and Republicans reflects the incorporation of

233 See e.g., Board of Regents v. Southworth, 529 U.S. 217 (2000), for the judicial emphasis on maintaining a viewpoint neutral and widespread array of student activities.

234 Broadhurst & Martin, supra note 7, at 12.

235 “It is clear that purposive groups across ideologies have successfully coordinated legislation and litigation projects to secure their aims…they can call upon a number of lawyers and law firms for support…” Olivas, supra note 181, at 1625-1626.
new groups in party coalitions since the 1970s.” He also noted that activism has traditionally served as a strong means of influencing policies, making higher education a particularly conducive environment for polarized interest groups to converge and expand. This too reflects findings from Broadhurst and Martin that the modern student activists on campus have not veered into entirely new societal causes since the 1960s; from LGBTQ+ rights, to racial equality, to free markets, “they are continuing battles that have existed for generations.” The severity of conflicts over these activist ventures, however, appears exacerbated by an increasingly divergent partisan environment, spurred and financed by influential and purposive organizations.

The second observation is somewhat related. Nary emphasized that, operationally, shout-downs and counter-protests over campus speakers have occurred regardless of political affiliation; for instance, Milo Yiannopoulos was met by heated counter-protestors for his conservative viewpoints, but an ACLU representative was also shouted-down at William and Mary College. However, free speech case law since 2017 shows a disproportionate amount of litigation on behalf of conservative student groups and their equally right-wing representative organizations.


Id.

Broadhurst & Martin, supra note 7, at 12.

Karol, supra note 236, at 76.

“While it appears to be primarily a tool to shut down conservative-leaning speakers, like Charles Murray, the New Heckler’s Veto has also been invoked to shut down events featuring more liberal speakers as well.” Nary, supra note 180, at 312.
Of the 12 cases analyzed that were decided between 2017-2019, national interest groups served as the litigants and/or plaintiffs in five of them.\textsuperscript{241} In all five of those cases, the student plaintiffs were part of and backed by conservative or religious organizations. In \textit{Center for Bio-Ethical Reform, Inc. v. Black}, for instance, the SUNY-Buffalo Students for Life organization was backed by the Center for Bio-Ethical Reform, a non-profit that “operates on the principle that abortion represents an evil so inexpressible that words fail us when attempting to describe its horror.”\textsuperscript{242} Young America’s Foundation, another national non-profit, served as a legally resourced envoy in both \textit{Young America’s Foundation v. Kaler} and \textit{Young America’s Foundation v. Napolitano}.\textsuperscript{243} \textit{Uzuegbunam v. Preczewski}, a case that will continue its determined path to the Supreme Court in late 2020/2021, has been relentlessly financed and promoted by Alliance Defending Freedom, a conservative organization that uses litigation to “reclaim religious liberty, the sanctity of life, and marriage and family.”\textsuperscript{244} And, in the most recent case that this dissertation analyzed—\textit{Turning Point United States v. Rhodes in 2019}—plaintiffs were represented by Turning Point USA, whose “mission is to identify, educate, train, and organize students to promote the principles of freedom, free markets, and limited government.”\textsuperscript{245}


\textsuperscript{242} Center for Bio-Ethical Reform, \textit{What We Do} (n.d.), https://www.abortionno.org/what-we-do/.


\textsuperscript{244} Alliance Defending Freedom, \textit{About Us} (n.d.), http://www.adfmedia.org/Home/About/.

This particular organization inherently purports a balance between free speech and free markets, the latter of which is consistent with neoliberalism.\textsuperscript{246} It also serves as a relentless watchdog for exposing any partisan bias on campus through action and media coverage: on its website, Turning Point USA presents an entire student activism section, replete with informative resources, a “professor watchlist,”\textsuperscript{247} and financial grants for prospective members to engage in campus/chapter activism. Litigation patterns in the last two years are heavily linked to Turning Point USA and similarly structured organizations, such as Foundation for Individual Rights in Education (FIRE)—FIRE presents as nonpartisan but correspondingly catalogues any perceived First Amendment or due process infractions on a massive internet database, equipped with legal resources for aggrieved higher education stakeholders to utilize.\textsuperscript{248} Overwhelmingly, however, it appears that conservative entities are far more likely to file suit over a perceived free speech violation on campus at present, and are sufficiently equipped with the monetary and political resources to make those attempts. The quantity of free speech suits by conservative organizations also reflects the analogous views of the recent Republican-led presidential administration: that is, higher education is currently facing a free speech ‘crisis.’\textsuperscript{249}

\textsuperscript{246} See generally O’Conner, supra note 169, at loc. 319, where she describes “the neoliberal ideology that free markets should be unencumbered to create wealth…”

\textsuperscript{247} “The mission of Professor Watchlist is to expose and document college professors who discriminate against conservative students and advance leftist propaganda in the classroom.” Professor Watchlist, About Us, TURNING POINT USA (n.d.), https://professorwatchlist.org/aboutus.

\textsuperscript{248} Despite its assertions that it operates as a nonpartisan entity, FIRE holds similar views to that of conservative groups in present discourse; namely, that “freedom of speech is under continuous threat at many of America’s campuses, pushed aside in favor of politics, comfort, or simply a desire to avoid controversy.” See FIRE, Mission (n.d.), https://www.thefire.org/about-us/mission/.

\textsuperscript{249} See Panuccio, supra note 107.
Conclusion: Is There a Free Speech Crisis On Campus?

The central research question that this legal-historical analysis sought to answer was: What, if any, shifts in student protest litigation patterns—from 1969-2019—are indicative of a free speech ‘crisis’ on campus? After extensively coding 65 cases from 1969-2019, and simultaneously conducting a widespread literature review with both primary and secondary authority, this study found no indication that there is a First Amendment-related crisis on college campuses today. On the contrary: findings from this analysis suggest that First Amendment dicta for students in postsecondary settings, while evolving over the last fifty years, has consistently protected the student populations who sought to dissent against the majoritarian status quo, regardless of political affiliation. Recent data from Gallup and The Knight Foundation suggest that ‘the court of public opinion’ plays a major role in perpetuating a contrary perspective; namely, more liberal-leaning students dissent against offensive ideas, whereas Republican-identifying students are more likely to actively contend that their views are silenced amidst social justice efforts.250 The case law, however, indicates a relatively stalwart impartiality to partisan leanings.

For instance, the foundational precedents set by the Supreme Court in Tinker v. Des Moines and Healy v. James from 1969-1972 allowed New Left, democratic students to engage in activism on campus to fight for Civil Rights, to rail against war, and to pose opposition to increasingly corporatized structures on campus.251 During that era, case law emerged from predominantly liberal litigants (and representative organizations) who felt that their expressive

250 The Knight Foundation & Gallup, supra note 209, at 2 (executive findings summarized that students who feel the least able to have their personal views shared on campus are most likely to identify with Republican students, but many liberal-leaning and/or minority respondents shared that they have endured and/or reported offensive behavior on campus).

251 Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Healy v. James, 408 U.S. 169 (1972). See also Driver, supra note 2, at 84 and Broadhurst and Martin, supra note 7, at 8.
liberties were unconstitutionally regulated by both the government, and university administrators.\textsuperscript{252} Now, those protections, further solidified in recent case law such as \textit{Rosenberger v. Rector & Visitors of the University of Virginia}, \textit{University of Cincinnati Chapter of Young Americans for Liberty v. Williams}, \textit{Padgett v. Auburn University}, and \textit{College Republicans of the University of Washington v. Cauce}, enable religious and right-wing conservative student organizations to legally remedy the same perceived issues: to utilize campus facilities, engage in activism, and invite controversial speakers to campus under the same funding structure as other viewpoints.\textsuperscript{253} The underpinning, permissive standards of First Amendment law after \textit{Tinker} have never been reversed nor altered to the point where university students are excluded from the analogical marketplace of ideas—and, from a legal standpoint, this could arguably even point to the First Amendment’s ability to remain non-partisan when these polarized issues arise on a college campus.

The analysis did find considerable stressors to free speech-related discourse on campus, even beyond public opinion—namely, increased political polarization via purposive organizations,\textsuperscript{254} which has facilitated a climate favorable to greater instances of heckler’s veto,\textsuperscript{255} and financial strains on students and universities alike as they attempt to balance speech with other mission-oriented objectives.\textsuperscript{256} Yet, does unprecedented polarization or financial

\textsuperscript{252} \textit{See, e.g.}, Broadhurst and Martin, \textit{supra} note 7, at 7-8.


\textsuperscript{254} \textit{See, e.g.}, Karol, \textit{supra} note 236, at 76.

\textsuperscript{255} \textit{See, e.g.}, Nary, \textit{supra} note 180.

\textsuperscript{256} \textit{See, e.g.}, Archibald & Feldman, \textit{supra} note 129.
stress equate to gaps in First Amendment jurisprudence? Not necessarily—although it could conceivably contribute to more frequent flare-ups under the premise of a free speech debate. The marketplace of ideas, as Whittington argued, is “crowded…one challenge of participating in that marketplace is simply to gain attention.”

Cause-based protests on both sides of the partisan debate, exacerbated by ideologically slanted external speakers and organizations, is natural in such a setting, where students “try to increase the change of being heard, to demand attention.” The rise in polarized activism on campus, however, fits within an argument presented by Vincent Blasi in 1985—that, it is during the most impassioned times, when limits of the First Amendment are particularly challenged, that free speech will be indisputably defended by the legal system in order to continue its fundamental objectives:

My thesis is that in adjudicating First Amendment disputes and fashioning First Amendment doctrines, courts ought to adopt what might be termed the pathological perspective. That is, the overriding objective at all times should be to equip the First Amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The First Amendment, in other words, should be targeted for the worst of times.

Now, this dissertation makes no claims as to whether or not this is the “worst of times.” However: it could be argued once more that the aforementioned analysis of student speech case law, particularly from 1985-on, does adhere to tenets of the pathological perspective that Blasi postured, where the Supreme Court routinely broadened and re-affirmed the importance of free speech in higher education—even at the expense of competing political or

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257 Whittington, supra note 66, at 98.

258 Id.


260 Id. On the contrary, this dissertation takes more of a Charles Dickens-style approach to current events. See Charles Dickens, A TALE OF TWO CITIES, 2 (1859) (“It was the best of times, it was the worst of times…”).
legal pressures. Much of the coded case law from the 21st century was also able to be resolved at lower court levels, implying that such strong student speech precedent is likely to withstand frequent challenges. The district court in College Republicans v. Reed even posited a similar idea to that of Blasi in 2007, in order to defend dissenting or controversial student speech:

   It is important to emphasize here that it is controversial expression that it is the First Amendment’s highest duty to protect. By political definition, popular views need no protection. It is the unpopular opinions that are in the greatest peril—and it was primarily to protect their expression that the First Amendment was adopted.  

Although this dissertation remains cognizant to the reality that that institutions of higher education may have occasionally erred in responding operationally to free speech-related conflicts, which may distort a relatively dependable evolution of First Amendment dicta in public perception, the argument remains that there is no crisis on campus that could be derived from expressly legal shortcomings. That said: satisfying the first research question is only part of this dissertation’s intention, and the increasing connectedness between finance and free speech observed in the most recent of legal cases necessitates a closer analysis of neoliberalism’s role in higher education as the sector navigates this publicized idea of a ‘crisis.’

The following section will focus largely on the theoretical tenets of the marketplace of ideas analogy, including the principles of liberalism that underscored the analogy’s origination, before comparing the marketplace’s theoretical foundations to its operationalization on a neoliberal college campus. Such an analysis will seek to answer the following research question:

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261 Id. at 514:

The central function of First Amendment adjudication is not to resolve everyday disputes over communication but rather to protect and implement the core commitments to the freedoms of speech, press, and assembly when those commitments are most in jeopardy.

262 College Republicans v. Reed, 523 F. Supp. 2d 1005, 1018 (N.D. Cal., 2007).

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To what extent is there an operative tension between the marketplace of ideas a defense of free speech, and the marketplace of ideas as an economic analogy of open-market behavior?

3.2. Theoretical Framework:
Intertwined Tenets of Neoliberalism in Economics and Law

A number of the purposive organizations introduced in the prior section posit mission statements that vehemently uphold free speech as core tenet of an individuals’ fundamental rights. For instance, Turning Point USA seeks to encourage “principles of freedom,”263 and FIRE’s mission statement furthers delineates those principles of freedom—“freedom of speech, freedom of association, due process, legal quality, religious liberty, and sanctity of conscience—[as] the essential qualities of liberty.”264

These objectives, while promoted in contemporary operations, still pull from the foundational notion that individuals possess and are entitled to unalienable, natural human rights, which emerged as the leading political philosophy during the assembly of the United States Constitution.265 This dissertation intends to further explore this philosophy as it relates to First Amendment jurisprudence, given that it was from similar fundamental principles that the marketplace of ideas analogy first emerged in early 20th century case law.266 In doing so, this section will analyze any changes or challenges to the marketplace of ideas metaphor within the same timeline (1969-2019) as the legal-historical analysis, thus factoring in changes to the

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263 Turning Point USA, About TPUSA (n.d.), https://www.tpusa.com/about.


265 “At the founding, political philosophy and moral reasoning took the form of natural rights and the laws of nature. These ideas explained the way Americans of that time thought about government…” Thomas E. Baker, Constitutional Theory in a Nutshell, 13 WM. & MARY BILL OF RTS. J. 57, 89 (204).

266 See, e.g., Jared Schroeder, Shifting the Metaphor: Examining Discursive Influences On The Supreme Court’s Use of the Marketplace Metaphor in Twenty-First Century Free Expression Cases, 21 COMM. L. & POL’Y 383, 384 (2016) (“Nearly three centuries after [John] Milton contended that ‘opinion in good men is but knowledge in the making’ in Areopagitica, the marketplace-of-ideas metaphor was first utilized by the Court…”). See also Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. & Brandeis, J., dissenting).
marketplace of ideas via judicial precedent and the nation’s economy in the wake of neoliberalism. This will facilitate a broader framework of the competing phenomena at play in higher education operations before undertaking the multiple-case study process.

**Liberalism Embedded within First Amendment Jurisprudence**

The marketplace of ideas, conceptually, rests on the assumption that individuals’ ideas are acknowledged in a relentless search for truth, regardless of political, economic, or societal power structures.\(^{267}\) This underlying premise was emphasized in the making of the Constitution, where a fledgling United States endeavored to create a governmental system where “individuals consent to the government and yield some personal autonomy to society that in turn exercises this sovereignty to protect the individual’s right to the pursuit of happiness.”\(^{268}\) Such an emphasis of this idea, that democratic participation is achieved through individual progress, was heavily influenced by the idea of “liberalism.”\(^{269}\) However, as Fish noted, liberalism as a political and constitutional philosophy should not be misconstrued with liberal ideologies linked to today’s Democratic Party:

> By “liberalism” I don’t mean a set of policies identified with the Elizabeth Warren wing of the Democratic Party. I mean, rather, the political principles given to us by the writings of Immanuel Kant, John Lock, J.S. Mill, Isaiah Berlin, John Rawls, and other Enlightenment thinkers. The core of that liberalism is a shift in the location of political authority from the powers that be to the individual.\(^{270}\)

\(^{267}\) See, e.g., John Lawrence Hill, *The Father of Modern Constitutional Liberalism*, 27 Wm. & Mary Bill of Rts. J. 431, 445 (2018) (explains the emphasis on the individual/individual’s rights that were valued by John Locke and similar philosophers in the Enlightenment Era.)

\(^{268}\) Baker, *supra* note 265, at 90.

\(^{269}\) See Stanley Fish, *supra* note 68, at 32-33.

\(^{270}\) Id.
Using this philosophical description, it becomes easier to see how the marketplace of ideas analogy—even though it was introduced first in a dissenting Supreme Court opinion—eventually became a focal argument in First Amendment jurisprudence.271 And, after higher education was established as a particularly critical forum of idea-exchanging activity by the Supreme Court in Keyishian v. Board of Regents, tenets of liberalism were safeguarded even more stringently by the marketplace of ideas precedent.272

A multitude of what were identified as landmark Supreme Court decisions in the legal analysis, for instance, both utilized and expanded the marketplace metaphor when ruling in favor of individual students or specific student groups desiring to participate fully in campus discourse.273 Individuals’ rights to freedom of speech were routinely supported using First Amendment dicta over competing interests of the collective that would require regulation of expressive conduct. In Healy v. James, for instance, the Supreme Court broadened the reach of the marketplace to that of the entire campus, arguing that “the college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”274

Over time, and equally consistent with the findings of the legal-historical analysis, Supreme Court rulings shifted the marketplace of ideas metaphor to encompass physical, often extracurricular space, as well as money.275 Calvert argued that Widmar v. Vincent, and then over

271 Id. at 33 (“...it is easy to see why the First Amendment is the quintessential liberal doctrine”).


273 “The Supreme Court would soon extend the marketplace of ideas metaphor beyond the narrow confines of the classroom.” Clay Calvert, Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace, 53 Me. L. REV. 53, 63 (2001)


275 Calvert, supra note 273.
a decade later, *Rosenberger v. Rector & Visitors of the University of Virginia*, were both prime examples of how the marketplace of ideas analogy has persisted, despite evolving circumstances present in student speech litigation patterns.\(^{276}\) In regards to the *Widmar* decision, Calvert argued that the marketplace of ideas became much more of a corporeal standard, as opposed to a somewhat amorphous paradigm for utilitarian liberalism:

> Widmar suggests that the university-as-marketplace vision set forth by the Court encompasses not just some theoretical ideal about the search for truth or an in-class philosophy about education, but also the actual physical premises of the university. Widmar, in brief, gave bricks and mortar to the marketplace metaphor.\(^{277}\)

If *Widmar* was the brick and mortar, *Rosenberger* represented the capital needed to continue construction on the marketplace. The number of student fee-related court cases in the mid-1990s and into the early 21st century, developed from *Rosenberger*’s ruling, aligns with Calvert’s assertion that a “fiscal marketplace”\(^{278}\) was similarly created on college campuses via First Amendment litigation. Courts’ deliberations over forum analysis and viewpoint neutrality when discussing the constitutionality of security fee decision-making in recent years appears to fit with this judicial pattern as well—courts focused far less on the monetary value itself when adjudicating free speech cases in higher education, and instead focused far more on the damage that fluctuant fee appraisals could do to the marketplace of ideas.\(^{279}\) Further demonstrating

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\(^{276}\) *Id.* at 64. See also *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

\(^{277}\) *Id.*

\(^{278}\) *Id.* See also *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 843 (1995), where the Supreme Court argues that the lower courts erred in “focusing on the money that is undoubtedly expended by the government, rather by the nature of the benefit received by the recipient.” The benefit, under this reasoning, would be the freedom of expression as a registered student organization.

\(^{279}\) Examples of cases where the courts weighed free speech against fee assessments/allocation included *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Young America’s Found. v. Kaler*, 370 F. Supp. 3d 967 (D. Minn., 2019); *Young America’s Foundation v. Napolitano*, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018); and *College Republicans of the University of Washington v. Cauce*, 2018 U.S. Dist. LEXIS 22234 (W.D. Wash, 2018).
reciprocity between First Amendment law and finance was liberalism’s policy impact on institutional funding and resource allocation; St. John, Daun-Barnett, and Moronski-Chapman argued that “liberalism values equal opportunity, which predisposes proponents toward need-based aid and other programs that equalize opportunity for education, health care, and so forth.”

However, some scholars have argued that fundamental liberalism, as it was first introduced by John Locke and the like, transformed amidst watershed political and economic shifts in the 1970s, beset by the residual impact of the Great Depression and World Wars. Specifically, as Forrester contended, “the 1970s mark the collapse of social liberalism that surged to dominance after the war, enabled by the concrete political and economic successes of capitalist welfare states.” Included in this shift, and once again aligned in a similar timeline to the beginning of post-*Tinker* student speech jurisprudence, was the initial surge of neoliberal economic policy.

This presents an interesting dichotomy when postured against the findings of the case law analysis. First, the disassembly of classic liberalism, as it was originally envisioned by Enlightenment-era philosophers and framers of the U.S. Constitution, is on par with Calvert’s argument that the marketplace of ideas became less of a nebulous analogy of democratic

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282 Id.

283 Id. Forrester provided yet another source that placed neoliberalism’s rise in the 1970s, directly after *Tinker v. Des Moines* was decided in 1969. See also St. John, Daun-Barnett, & Moronski-Chapman, *supra* note 132, at 7, who noted that this decline in liberalism had enormous impact on the idea of equal opportunity in school policy: (“The national trajectory shifted from a sustained period of movement toward liberal social programs from the Depression through the 1970s to the neoliberal period that emerged full scale in the 1980s.”)
participation as First Amendment case law evolved; instead, it evolved with case law to remedy new legal issues, such as facility use and finances. This evolution occurred over several decades, during which the United States increasingly engaged in capitalist ventures, promoting global competition, free markets and, as a byproduct, a more corporatized structure to higher education.

If, theoretically, liberalism (as it relates to free speech) and neoliberalism share a lot in common, it is because neoliberalism operates as a renewed iteration of liberalism within the context of economics—the classic fiscal model from which the marketplace of ideas analogy was first employed. The emphasis on the individual, on laissez-faire government and financial oversight, on the idea that more is better to ignite competition and advance toward truth…all were values inherently promoted by classic liberalism and which now are upheld, in theory, by neoliberalism.

However, the vast majority of plaintiffs in the most recent of case law analyzed for this dissertation were associated with organizations that posited free speech and free markets. Given that the legal analysis found no indication of deleterious gaps in First Amendment

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284 Calvert, supra note 273, at 64.

285 See O’Connor, supra note 169, at loc. 464 (describes increasing neoliberalism in the university.) See also Broadhurst & Martin, supra note 7, at 10 (describes postwar economic state of United States).


287 Id. However, at 1, Singh Grewal and Purdy noted that neoliberalism in the United States is not a complete resurgence of classic liberal economics; rather, it is mainly the “intensification of a familiar and longstanding ‘anti-regulatory politics.’”

288 Court cases from 2017-2019 that were brought on or financed by complaints from certain organizations (such as Young America’s Foundation and Turning Point USA), who posit freedom of speech and free markets as part of their respective missions, included Young America’s Found. v. Kaler, 370 F. Supp. 3d 967 (D. Minn., 2019); Young America’s Foundation v. Napolitano, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018); and Turning Point United States v. Rhodes, 409 F. Supp. 3d 677 (E.D. Ark., 2019). See also Turning Point USA, About TPUSA (n.d.), https://www.tpusa.com/about and Young America’s Foundation, Our Mission (n.d.), http://www.yaf.org/about/.
jurisprudence for student speech, and paired with subsequent findings that neoliberal policies in the United States (and thereby higher education) have only increased in the 21st century, this case law pattern emerges as an inherent paradox. After all, a postsecondary education sector with strong First Amendment precedents and a proclivity toward neoliberal market behavior is theoretically aligned by fundamentally paralleled marketplaces—operationally, however, it appears that there remains a tension that requires further examination.

**Competing Markets: Academic Capitalism v. Marketplace of Ideas**

In an attempt to unpack the operative tension between the marketplace of ideas analogy and the neoliberal marketplace, specifically within the confines of a university campus, I utilized academic capitalism theory as a university-specific, theoretical point of comparison. The theory of academic capitalism was officially introduced late in the 20th century, but served as a product of continual scholarly scrutiny toward higher education’s post-1970s transition to “an alienable service rather than a public good.”289 The use of theory to explain economic policy shifts in higher education is not new; for instance, St. John, Daun-Barnett, & Moronski-Chapman argued that, under the tenets of liberalism prior to the early 1980s, higher education economic policy was typically influenced by tenets of “human capital theory,”290 which was “perceived as an investment with returns to society in the form of educated workers who pay back society”291 in myriad ways. Academic capitalism theory, then, was selected to better explain neoliberalism’s

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289 Slaughter & Rhoades, *supra* note 144, at loc. 115.


291 *Id.*
distinct characteristics, as well as its ensuing impact on higher education economic policy—particularly the increasing stronghold on generating revenue goods versus mission goods.292

After all, an increasingly neoliberal authority was cited as a salient influence for higher education’s transition into a “knowledge economy,”293 where products of education—such as research patents, or public-private partnerships with external corporations—enter the outer markets to compete for funding as an entrepreneurial entity.294 This funding is essential to the operations of most institutions, given the continual decrease in state subsidization after the 1970s.295 And, in addition to securing external circuits of funding, higher education institutions have also shifted organizationally to mimic that of a corporate business model; among those changes are fewer “courses offered, increasing class sizes, using more graduate assistants in the classroom, and reducing support for libraries, laboratories, information technology, and other support services.”296 Put simply, neoliberal institutions now need to operate in a manner that successfully obtains privatized funding streams by prevailing over other competing institutions, while also doing so under maximum efficiency, whether that means becoming ever-reliant on contingent faculty and staff or federal student loan offerings to appeal (and compete) for their

292 Burton A. Weisbrod, Jeffrey P. Ballou, & Evelyn D. Asch, MISSION AND MONEY: UNDERSTANDING THE UNIVERSITY (2008), at 58 (again, the “Two-Good Framework” explains the balance between revenue good and mission goods that universities have historically tried to manage). See also St. John, Daun-Barnett, & Moronski-Chapman, supra note 132, at 12 (“…the core value became economic rather than social development…”).

293 Id. at loc. 648.

294 Id. at loc. 189. One example of this behavior that Slaughter and Rhoades presented was from the “Missyplicity Project” at Texas A&M University, where a benefactor hired veterinary scientists from the university to clone his pet dog, Missy. The scientists were given the capital to fund research (and the ensuing prestige if their efforts were successful), in exchange for partnering with a private donor and tying their research agenda to the project.

295 See generally Archibald & Feldman, supra note 129, at 144.

296 Id. at 91.
most profitable consumers: students. To resist operating in this neoliberal manner, according to Slaughter and Rhoades, could increasingly have long-lasting, negative consequences for both the procurement of revenue streams and overall competitiveness in the sector:

In many ways, the new economy depends on the neoliberal state for ground rules that create and sustain a global playing field…Those colleges and universities unable or unwilling to integrate with the new economy have difficulty accessing new programs and opportunities. Similarly, programs, departments, or colleges that resist, ignore, or are unable to intersect the new economy within institutions that are generally pursuing an academic capitalist knowledge/learning regime rarely share in its rewards and incentives.

A focused analysis on academic capitalism theory as it operationalizes in higher education is important, given that the evolving organizational and economic structure of higher education was evident in the first section of the legal-historical analysis. The sharp increase in student fee litigation patterns in the analysis, which spiked in the 1990s and early 2000s, mirrored collective bargaining jurisprudence, indicating an organizational resemblance between external public unionization efforts and collective bargaining trends for campus stakeholders fighting for workplace protections. Subsequent litigation regarding security fees for controversial speakers was also postured as a free speech issue, but brought institutions’ financial procedures to the forefront. Some scholars link the corporatization of higher education, which

297 Id. See also Slaughter & Rhoades, supra note 144, at loc. 481.

298 Slaughter & Rhoades, supra note 144, at loc. 511-520.

299 The cases in the 1990s and 2000s that battled over student fee allocation were Galda v. Rutgers, 772 F.2d 1060 (3rd Cir., 1985); Carroll v. Blinken, 957 F. 2d 991 (2nd Cir., 1992); Smith v. Regents of University of California, 4 Cal. 4th 843 (Cal., 1993); and Board of Regents v. Southworth, 529 U.S. 217 (2000).

300 Slaughter & Rhoades, supra note 144, at loc. 511, describe the influx of collective bargaining efforts on campus as neoliberalism takes hold:

Public sector faculty unionization has increased for part-timers as well as full-timers. The National Labor Relations Board has supported part-time faculty organization, as it has graduate student unionization in private as well as public education.

301 Three cases that addressed security fees for controversial speakers were Young America’s Found. v. Kaler, 370 F. Supp. 3d 967 (D. Minn., 2019); Young America’s Foundation v. Napolitano, 2018 U.S. Dist. LEXIS 70108 (N.D.}

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formulates much more of a dependence on market needs to influence research and other endeavors, to the “unravelling [of] the project of liberal education.”\textsuperscript{302} This, paired with existing case law patterns, indicates that higher education’s transition into a market-conditional performance system may actually conflict with its foundational mission of liberal, unfettered edification.\textsuperscript{303} And, when this operational conflict occurs, it becomes more understandable as to why the marketplace of ideas legal analogy could be perceived by the public as a fallible judicial standard. Public sentiment, according to Cain, exacerbates the “complicated and widespread”\textsuperscript{304} interconnectedness of “finances and academic freedom”\textsuperscript{305} in higher education; while his research mostly involves faculty governance concerns in the neoliberal era, he also noted that “some of the most talked about modern issues involve conflicts over who gets to speak on college campuses and what ideas get to be shared,”\textsuperscript{306} an issue closely linked to student dissent

\textsuperscript{302} Cris Shore, \textit{Beyond the Multiversity: Neoliberalism and the Rise of the Schizophrenic University.} 18 SOCIAL ANTHROPOLOGY 15, 16 (2010). See also Michael S. Roth, \textit{Beyond the University: Why Liberal Education Matters}, 2 (2014). Roth has extensively studied and advocated for a renewed focus on liberal education, given that certain consequences of the neoliberal university appear antithetical to it:

These days the words “college education” are more likely to be linked with the words “excessive debt” than “liberal learning.” Parents want their children’s education to be immediately useful, and with a dramatically shrinking job market, undergrads themselves are often eager to follow a straight and narrow path that they imagine will land them that coveted first job. A broad liberal arts education, with a significant opportunity to explore oneself and the world, is increasingly seen as a luxury for the entitled, one that is scarcely affordable in a hypercompetitive world.

\textsuperscript{303} See Whittington, \textit{supra} note 66, at 31, where he notes the liberal mission that institutions were founded on centuries ago:

Reacting against the system in which political and religious authorities routinely suppressed dissent and enforced orthodoxy, liberal thinkers argued that humanity would be better off if individuals were freed to hear competing ideas and make up their own minds. A society that was intellectually free would be generally more free and more just than one that was intellectually fettered.

\textsuperscript{304} Timothy Reese Cain, \textit{“Friendly Public Sentiment” and the Threats to Academic Freedom}, 58 HISTORY OF EDUCATION QUARTERLY 3, 431 (2018).

\textsuperscript{305} Id.

\textsuperscript{306} Id. at 434.
patterns as well. Under this line of reasoning, academic capitalism theory—in accordance with neoliberalism—may inherently stymie equal access to the marketplace of ideas by concentrating institutional research, teaching, and service initiatives under the influence of the “wealthy organizations and individuals”307 who finance them. And, when this occurs, can the marketplace of ideas fully function in operations to the degree to which its legal precedent was developed?

The pervasiveness of public sentiment toward free speech and finance is also notable. Data from a PEW Research Center survey in 2018 demonstrates that free speech and finance are two top reasons as to why society feels that higher education is trending in the wrong direction, but there are distinctly partisan discrepancies.308 Many more Republicans than Democrats, for instance (79% vs. 17%), argue that professors too often proselytize their own personal views in class.309 Acquiring tangible skills in these courses that lead to successful postsecondary employment, relatedly, is also a predominantly Republican (73%) concern.310 Conversely, a majority Democrat respondent base “are somewhat more likely to say high tuition is a major reason the system isn’t working (92%, compared with 77% of Republicans).”311 In the tipping scale of finance and free speech, then, Republicans are more likely to find fault with speech or pedagogy-related issues, whereas Democrats appear more concerned with rising college costs.

307 Id. at 432. See, for an example, Dave Levinthal, Koch Foundation Proposal to College: Teach Our Curriculums, Get Millions, THE CENTER FOR PUBLIC INTEGRITY (May 7, 2018), https://publicintegrity.org/politics/koch-foundation-proposal-to-college-teach-our-curriculum-get-millions/ (the Charles Koch Foundation attempted to leverage a multi-million dollar donation to Florida State University, but the deal was contingent on the school’s economics department adhering to pedagogical and staffing requirements set by the foundation).

308 Anna Brown, supra note 162.

309 Id.

310 Id.

311 Id.
Unprecedentedly high tuition rates, paired with an increasingly corporatized structure of higher education that appears less mission-based and instead more susceptible to revenue generating activities and purposive benefactors,\textsuperscript{312} again appears consistent under neoliberalism’s individualistic and competitive underpinnings. Academic capitalism theory helps to explain this phenomenon.\textsuperscript{313} However, the protection of the marketplace of ideas in First Amendment jurisprudence, particularly in its classical liberal form, has been long described by the courts as a central piece of higher education’s mission.\textsuperscript{314} The divergence from mission-oriented behavior into actions more commonly associated with a commercial service has, as O’Conner argued, propelled the current generation of students to engage in widespread campus activism in order to challenge institutions to renew its promise to provide a “public good.”\textsuperscript{315} This contemporary wave of student activism, with a number of student populations directly at odds with neoliberalism, is what O’Conner coined “neoactivism.”\textsuperscript{316} And, as the following section observed, neoactivism parses together neoliberalism and free speech on campus in a way that furthers both the original thesis and the preliminary findings of this dissertation: that the perceived political schism in higher education at present is not the result of a free speech crisis, but rather, should be increasingly interpreted as an consequence of unchecked neoliberalism in

\textsuperscript{312} Weisbrod, Ballou, & Asch, supra note 292, at 58 (again, the “Two-Good Framework”). See also Timothy Reese Cain, “Friendly Public Sentiment” and the Threats to Academic Freedom, 58 HISTORY OF EDUCATION QUARTERLY 3 (2018).

\textsuperscript{313} Slaughter & Rhoades, supra note 144.

\textsuperscript{314} See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), which set a firm legal precedent for prioritizing higher education’s mission of free-flowing inquiry and expression: 
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.

\textsuperscript{315} O’Conner, supra note 169, at loc. 473.

\textsuperscript{316} Id. at loc. 260.
the academy. Relatedly, neoactivism helps to demonstrate that the marketplace of ideas and the neoliberal marketplace, regardless of theoretical similarities, operationalize in divergent ways on campus that inherently elicits student dissent.

**Campus Speakers: Igniting ‘Neoactivism’**

Neoactivism is new in scholarship, but it benefits from the same protections in First Amendment dicta as student activists in the 1970s came to benefit from the *Tinker* and *Healy* doctrines. In this context, neoactivism is to the student activists of the Civil Rights era as neoliberalism is to the liberal, laissez-faire economics espoused centuries earlier. Grewal and Purdy argued that “the ‘neo-’ means not just that they are back, but also that they are different, a new generation of arguments.” University campuses, as evidenced by the first section of the legal-historical analysis, provide a unique, evolving, and arguably microcosmic space for these two phenomena to converge.

While issues over campus speakers were not the sole catalysts of neoactivism, the timeline of O’Conner’s neoactivist framework aligns with the ‘shout-down years’ of particularly publicized (and debated) campus speaker incidents. The years 2015-2018 also support the marked trend of legal cases that emerged from 2016-on and entailed fallout over

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319 *Id.* at 1.


During these years, speech was often pitted against speech as student neoactivists, particularly from left-leaning political ideologies, engaged in large-scale protest activities against perceived administrative shortcomings, as well as against student groups or speakers whose viewpoints appeared antithetical to social progress:

> On hundreds of campuses across the country, the 2015-2016 academic year saw student activism once again claim the national spotlight. Student activists staged dramatic acts of resistance to campus policies, protested guest speakers, and forced administrators to engage in long-overdue conversations about institutionalized racism and sexism…Though their activism did not generate the same number of headlines during the 2016-2017 and 2017-2018 school years as it had prior to the election…they have engaged their institutions both as targets and as sites of resistance during the Trump era.323

What modern campus speaker-related litigation did help remedy, however, were the legal limits to neoactivism under the First Amendment. For instance, New Heckler’s Veto precedent has largely accepted that speech, even that which is controversial and may stir an indignant crowd, needs to be able to reach the marketplace of ideas—and substantial disruption, even in the form of shouts versus violence, should not be permitted as a suppressive tool.324 Therefore, in the midst of reinvigorated activism on campus against systemic issues that have


323 O’Connor, supra note 169, at loc. 417 and 446.

324 See Center for Bio-Ethical Reform, Inc. v. Black, 234 F. Supp. 3d 423 (W.D. NY, 2017) and Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), where the courts upheld the legal ability for controversial speakers/groups to express themselves without the potential of heckler’s veto as a barrier.
often been weighed secondary to free speech—such as racial equality,\textsuperscript{325} or chauvinism\textsuperscript{326}—free speech dicta was tested by new activist tactics. Such an environment called major public attention to First Amendment deliberations over modern issues such as New Heckler’s Veto,\textsuperscript{327} despite consequent findings that the law still held reliably in favor of alternative or dissenting viewpoints.

The profusion of conservative plaintiffs from 2016-on is also consistent with such an observation, seeing as many of the student groups or purposive organizations involved both agree with and vehemently endorse neoliberalism;\textsuperscript{328} in addition, many of those groups are supporters of the most recent presidential administration, which similarly advocated for free market capitalist ventures.\textsuperscript{329} In an increasingly neoliberal economy and higher education structure, then, this helps to explain why supporters of neoliberalism, bolstered by heightened levels of political polarization, would find more perceived fault with modern demonstration tactics of neoactivists than the dominant economic philosophy at play.


\textsuperscript{326} Two cases in the analysis defended First Amendment principles over sexist or otherwise chauvinistic speech: \textit{American Booksellers Association v. Hudnut}, 771 F.2d 323 (7th Cir., 1985) and \textit{Feminist Majority Foundation v. Hurley}, 911 F. 3d 674 (4th Cir., 2018).

\textsuperscript{327} Clay Calvert, \textit{Reconsidering Incitement, Tinker, and The Heckler’s Veto on College Campuses: Richard Spencer and the Charlottesville Factor}, 112 NW. U. L. REV. ONLINE 109, 109 (2018), provided three factors behind the focus on First Amendment issues when it comes to campus speakers:

1) Overheated by a politically polarized climate; 2) stoked by a U.S. Attorney General who asserts that “[f]reedom of thought and speech on the American campus are under attack;” and 3) punctuated by verbal gusts of searing air from President Donald J. Trump.

\textsuperscript{328} Prolific litigants, particularly Turning Point USA and Young America’s Foundation, are staunch supporters of capitalism and neoliberal regulatory policies. See Turning Point USA, \textit{About TPUSA} (n.d.), https://www.tpusa.com/about and Young America’s Foundation, \textit{Our Mission} (n.d.), http://www.yaf.org/about/.

\textsuperscript{329} O’Conner, supra note 169, at loc. 319.
Additionally: with increased polarization between the student groups fighting for neoliberalism, and the student groups fighting against certain corollaries of neoliberalism (such as socioeconomic inequality), it appears that attention was disproportionately given to the free speech aspect of the demonstrative efforts, rather than the economic issues underpinning such widespread dissent. This was also substantiated in PEN America’s 2019 report, *Chasm in the Classroom*, where “at times, protests and forms of expression are treated as if they are incursions of free speech when in fact they are manifestations of free speech.” However, this may not go away any time soon. O’Conner, along with Halewood and Young, contested that neoactivist student behavior is an evolutionary response as decades of neoliberalism in higher education shifted the sector’s organizational structure (and, at times, mission). Where neoliberalism exists, then, neoactivism will theoretically exist—and, in times of amplified political polarization, such as the 2020 presidential election—this synergetic relationship may very well perpetuate the impression of a crisis, regardless of longstanding First Amendment precedent.

330 See Henry A. Giroux, *Neoliberalism’s War on Higher Education*, 3 (2014), where he presents additional repercussions for neoliberal policy:

…the increasing incarceration of young people, the modeling of public schools after prisons, state violence waged against peaceful student protesters, and state policies that bail out investment bankers but leave the middle and working classes in a state of poverty, despair, and insecurity.


332 “My core argument is that neoactivists are developing within and challenging a neoliberal higher education context.” O’Conner, supra note 169, at loc. 542. See also Peter Halewood & Donna Young, *Rule of Law, Activism, and Equality: Growing Antisubordination Norms Within the Neoliberal University*, 50 J. MARSHALL L. REV. 249, 252 (2017):

Corporatization of universities, and the neoliberalism which drives it, has been an ongoing, decades-long process. Their effects are now being exposed by campus activism and might force university administrations and boards to reassess the current direction of higher education given the fundamental threats posed to it by Trumpism.


**Conclusion**

This section of the legal-historical analysis sought to shed light on the following research question: To what extent is there an operative tension between the marketplace of ideas as a legal defense of free speech, and the marketplace of ideas as a neoliberal analogy of open-market economic behavior? Following a review of primary and secondary authority, which both expanded and substantiated findings from the case law codification process, there was found to be considerable tension in the respective marketplaces when operationalized on a contemporary college campus.

This conclusion was reached following an extensive, comparative analysis of classic liberalism, academic capitalism theory, and neoactivism, which were all inherently introduced in different eras of evolving First Amendment jurisprudence and which continue to merge historical situations with contemporary legal developments.\(^{334}\) This comparison was also necessary because the marketplace of ideas, as a free speech analogy, *theoretically* benefits from all of those models. Liberalism, as it was conveyed by Enlightenment-era thinkers such as John Locke and John Milton, exhibited an esteem for individual thought and inquiry that, when allowed to be pursued, would benefit democracy.\(^{335}\) And when postured in an economic context, academic capitalism’s focus on privatized, commercialized ventures in higher education to connect a monetized product—knowledge—to the broader global economy is also relatively undeviating from the competitive marketplace of ideas analogy.\(^{336}\) Finally, the concept of neoactivism also

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\(^{335}\) See, e.g., Stanley Fish, *supra* note 68, at 33.

\(^{336}\) Slaughter & Rhoades, *supra* note 144, at loc. 4671. *See also Abrams v. United States*, 250 U.S. 616, 630 (1919), (Justices Oliver Wendell Holmes, Jr., & Louis Brandeis, dissenting, “…the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market…”).
necessitates that student dissent on campus, whether fighting for social justice or challenging administrative decision-making, is protected by First Amendment dicta, thus allowing for even potentially unpopular or controversial expression to occur.\textsuperscript{337} Given that the marketplace of ideas analogy was born out of judicial dissent, its enduring protections aided in the emergence of neoactivism.\textsuperscript{338}

When operationalized within the institutional environment, however, tensions emerge. Neoliberalism rests on the stipulation that global market trends drive competition and progress, but this fosters an increasing reliance for resource-strapped institutions to shape their research or production plans in order to benefit from those external revenue channels—which inherently conflicts with the classically liberal interpretation of unfettered academic freedom.\textsuperscript{339} Along with increased neoliberal behavior on campus, neoactivism has emerged with vigor from the student population; yet, once again, certain neoactivist populations are often at odds and protest what they perceive as blatant outcomes from neoliberal operations.\textsuperscript{340} In doing so, partisan student groups clash against other student groups who remain ardent supporters of the neoliberal economy and its effects, and modern free speech developments identified from the legal

\begin{itemize}
\item\textsuperscript{337} O’Conner, \textit{supra} note 169, at loc. 483.
\item\textsuperscript{338} \textit{Abrams v. United States}, 250 U.S. 616, 630 (1919), \textit{supra} note 336.
\item\textsuperscript{339} Slaughter & Rhoades, \textit{supra} note 144. \textit{See also Keyishian v. Board of Regents}, 385 U.S. 589, 603 (1967), \textit{supra} note 314.
\item\textsuperscript{340} O’Conner, \textit{supra} note 169, at loc. 493, described some of the ways that commercialized higher education could be disadvantageous to a student-focused mission: …sexual assault complaints are covered up to protect the university’s brand, student activists are suppressed (particularly when those activists are critiquing the business practices that generated the profits that are channeled into their universities), research projects are designed to serve corporate rather than public interests, and the quality of education itself is compromised, with increasing class sizes and a greater reliance on adjunct professors.
\end{itemize}
analysis—such as new heckler’s veto and purposive organizations—demonstrate how free speech has become such a source of heated contention during these clashes.\footnote{See e.g., Olivas, \textit{supra} note 181, at 1621 (conducted extensive research on purposive organizations from the 1970s to present day). \textit{See also}, Nary, \textit{supra} note 180, at 310 (Explained the legal and operational evolutions of Heckler’s Veto to New Heckler’s Veto in higher education).}

Student-driven skirmishes over campus speakers, while certainly not the only verification of such conflict, is aligned with neoactivism in both recent timeline and in public discourse.\footnote{O’Conner, \textit{supra} note 169, at loc. 417. O’Conner specifically analyzed activism patterns between the 2015-2018 years, but this dissertation was able to research 2019 as well.} Therefore, campus speaker incidents on campuses in the last four academic years provide the basis of the forthcoming case study approach. The multiple-case study approach intends to offer four in-depth analyses of campus speaker-related situations at University of Washington, University of California, Berkeley, Middlebury College, and Auburn University—situations that, while unique to each institution, have underpinning themes that further the following research question: How do recent (2017-2019) campus speaker conflicts exhibit operative tension between the marketplace of ideas as a defense of free speech, and the marketplace of ideas as a neoliberal economic analogy?
CHAPTER 4
TENSION IN THE MARKETPLACES: FREE SPEECH CASE STUDIES

The four universities selected for the following multiple-case study approach were chosen in an attempt to provide a holistic and far-reaching analysis of student speech on campus. Each university served as the site of at least one highly publicized (and politicized) campus speaker incident within the last four academic years,¹ which was a large criterion for selection in order to guarantee ample documents for data collection.² Relatedly, these clashes—which all, to varying extent, involved and were predicated on student dissent—have tested the threshold of public sentiment,³ to the point where purposive organizations and lawmakers alike have opted to intervene on First Amendment-related operations on campus. It was from these incidents, among others, that the idea of a free speech “crisis”⁴ emerged, with both public and private institutions


² Glenn A. Bowen, Document Analysis as a Qualitative Research Method, 9 QUALITATIVE RESEARCH JOURNAL 27, 31 (2009) (arguing that one of the many advantages to document analysis is that many documents applicable to the data collection process are readily and widely available nowadays. These case sites, after a brief search, fit that availability criteria).

³ Timothy Reese Cain, “Friendly Public Sentiment” and the Threats to Academic Freedom, 58 HISTORY OF EDUCATION QUARTERLY 3 (2018). It should also be noted that this public discourse was aligned with the “shout-down” years of student unrest, as described by conservative media, thereby echoing a similar sentiment in the White House. This made these four case sites even more consistent with the findings of the legal-historical analysis. See Stanley Kurtz, Year of the Shout-Down: It Was Worse Than You Think, NATIONAL REVIEW (May 31, 2017), https://www.nationalreview.com/corner/year-shout-down-worse-you-think-campus-free-speech/.

included in that perception. Thus, now that the legal-historical analysis has overwhelmingly refuted that such a legal crisis exists, and has instead introduced neoliberal economic policy as a conflicting, yet increasingly symbiotic, campus marketplace for student dissent (a la “neoactivism”) to thrive, it becomes integral to focus on the widely contested scenarios where neoactivism is theorized to have occurred. And, relatedly, the 2017-2019 timeline also aligns with assertions made by Kezar, DePaola, and Scott, who identified 2018 as the year in which “academic capitalism and neoliberal policies had become the dominant regime in higher education.” Because of this, neoliberalism is firmly inserted within the respective case site situations and their outcomes, thereby building onto distinct insights from litigation patterns that emerged during the legal-historical analysis: among them, partisan student organizations, security costs, viewpoint neutrality, and heckler’s veto.

The data for this case study were collected through document analysis, which O’Leary defined as “collection, review, interrogation, and analysis of various forms of text as a primary source of research data.” While document analysis does involve a level of data analysis within its methodology, I opted to specifically analyze the data following Yin’s approach to cross-case synthesis—the focus on student speech phenomena across the entire United States higher education sector warranted a comparative analytic technique. For each of the four case study

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5 Middlebury College is a private college, and was specifically chosen to provide that distinct perspective.


7 Id.

8 Adrianna Kezar, Tom DePaola, & Daniel T. Scott, THE GIG ACADEMY: MAPPING LABOR IN THE NEOLIBERAL UNIVERSITY, 3 (2019) (“Fueled by the larger gig economy that has become part of the fabric of business and society, the neoliberal trends are amplified and embedded within academe in recent years.”)


sites, I thoroughly examined 25 documents and interrogated them\textsuperscript{11} using a coding rubric [Appendix B].\textsuperscript{12} The 25 documents collected for each case site allowed for a sufficient variety of the five document types that O’Leary introduced.\textsuperscript{13} I also collected all documents from publicly available Internet sources, located with increasingly precise search strings and snowball sampling techniques,\textsuperscript{14} in order to accurately reflect the online resources currently contributing to widespread public discourse.

In total, 100 diverse documents were reviewed and coded for this document analysis, which provided a successful climate for cross-case synthesis to occur. One of the main limitations of document analysis hinges on credibility—both in “author’s bias”\textsuperscript{15} and in “researcher’s bias”\textsuperscript{16}—but the coding sheet intentionally included a section on author background and potential partisan leanings to mitigate both underlying or overt partiality toward

\textsuperscript{11} O’Leary, supra note 9, at 179. “Interrogate,” in this context, comes after the initial collection and review of the data. It is the step of document analysis where the researcher should “extract background information…explore content…[and] look for ‘witting evidence’” of meaning.

\textsuperscript{12} This coding sheet was adapted from a mass media law course at Louisiana State University, similarly to the case law analysis coding sheet in Appendix A. See Coyle, E. (April 1, 2019). Sample Coding Sheet [Microsoft Word Document]. Retrieved from LSU Course Moodle. See also O’Leary, supra note 9, at 177-180, which provided a step-by-step breakdown to document analysis that helped when categorizing the coding sheet.

\textsuperscript{13} O’Leary, supra note 9, at 178. The five document types that O’Leary presented were “authoritative sources” (data-driven or otherwise official sources), “the party line” (politically skewed in some manner), “personal communication,” “multimedia” (media coverage patterns), and “historical documents” (records from past events, initiatives, or policies). I reviewed at least five documents in each of these categories (totaling a minimum of 25 documents) per case site.

\textsuperscript{14} A number of the documents in the sample were located via hyperlinks to other articles, or references made to certain court documents, blogs/social media posts, and other document types necessary for collection. See O’Leary, supra note 9, at 110, who described the snowball sampling process as one that “involves building a sample through referrals.” The total sample of documents was also triangulated with the scholarly literature employed in the legal-historical analysis to ensure that a representative sample of documents was collected.

\textsuperscript{15} Id. at 178.

\textsuperscript{16} Id.
the topic. This ultimately allowed for reduced bias on my part as well; with potential author biases openly recognized, I was able to include and analyze documents with diverse “agendas.”17

The use of existing documents as a data collection strategy also provided a strong timeline of events—both for the initial situations and their subsequent repercussions [Appendix C]. To remain clear and consistent with the narrative structure of the legal-historical analysis, the findings of the multiple-case study are organized in a chronological narrative reflected by the timeline. I also utilized a computer-assisted tool, Dedoose, during this multi-step coding process.18 The use of this software ensured that all visual tabulation of the wide-ranging document themes were organized in a manner conducive to an unbiased cross-case synthesis.19 The initial coding rubric was critical for “systematically organizing”20 the data that I had collected, with emphasis on note-taking and engaging in an open coding process that Creswell defines as “coding the data for its major categories of information.”21 I then used Dedoose during the creation of the formal qualitative codebook, which broke down four major themes identified

17 Id. at 179.

18 Yin, supra note 10, at 166, explained that computer-assisted tools are increasingly used for qualitative data analysis: “Essentially, the tools and guidance can help you code and categorize large amounts of data. Such data…may have been collected from open-ended interviews or from large volumes of written materials, such as documents and news articles.”

19 Id.

20 O’Leary, supra note 9, at 187. O’Leary also noted that preliminary organization of the data also aids in the ability to “screen the data for any potential problems” before uploading it into a computer-assisted tool.

21 John W. Creswell, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES, 85 (4th Ed., 2014). Also see, at 87, where Creswell explains the open coding process as one that benefits the narrative and cross-comparative structure of this dissertation:

In open coding, the researcher forms categories of information about the phenomenon being studied by segmenting information. Within each category, the investigator finds several properties, or subcategories, and looks for data to dimensionalize, or show the extreme possibilities on a continuum of the property.
within the documents through a more defined axial coding process. These overarching themes are (a) stakeholder incongruence (b) neoliberal assumptions indicative in crisis reserves, (c) price of damaged prestige and (d) policy changes to reduce costs of reactivity.

For additional cohesiveness from the legal-historical analysis to the multiple-case study approach, all emergent themes were analyzed under two major “theoretical propositions” that were utilized in prior sections: the marketplace of ideas First Amendment model, as it was first conceptualized in the higher education sector in Healy v. James, and academic capitalism theory, which helps to explain the gradual influx of neoliberal economic behavior into higher education operations. I had originally hypothesized that these two theoretical underpinnings were pervasive yet conflicting pillars of Weisbrod, Ballou, and Asch’s “two-good framework” in higher education operations, and more recent scholarship from Kezar, DePaola, and Scott also validates that a discord between mission and revenue was acknowledged in Academic Capitalism, albeit in a strictly economic/organizational context at the time.

The following multiple-case study findings extend that seminal observation to a modern legal context, given that the marketplace of ideas analogy has theoretical ties to neoliberal

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22 Id. at 85. And see, Id., at 190 (describing a codebook as a tool that “articulates the distinctive boundaries for each code and plays an important role in assessing inter-rater reliability among multiple coders.)”

23 Yin, supra note 10, at 168 (arguing that theoretical propositions should be considered in the event that such theoretical foundations had already guided research questions, the literature review, and data collection).


26 Burton A. Weisbrod, Jeffrey P. Ballou, & Evelyn D. Asch, Mission and Money: Understanding the University, 58-59 (2008). See also, for reference, the conceptual underpinnings depicted in Figure 1.1.

27 Kezar, DePaola, & Scott, supra note 8, at 14 (“Academic Capitalism argues that tension exists between free-market logic and a residual public-good regime that is more collectivist and egalitarian in its aims…”)

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assumptions and operational ties to a mission-driven defense of free speech. The analysis overwhelmingly found that, while such tension was rarely explicitly documented, recurring tenets of neoliberalism were implicitly woven into the conflict/post-conflict responses for each of the case sites—an imbalanced relationship that may have lasting implications for the sector.


The University of Washington, Seattle was postured to exemplify that of a functional marketplace of diverse ideas leading up to the 2016 presidential election. As early as August 2, 2016, UW’s president, Ana Mari Cauce, issued a statement preparing the campus community for the potential of contentious campus speakers:

As we head into the home stretch of the election season there is a heightened potential for visits to the UW by candidates or speakers invited by campus groups to speak on topics that may be quite controversial. That makes it a good time to remind ourselves of the fundamental importance of freedom of expression to our University and our nation.

The importance of free speech was once again opined by Cauce post-election, shortly after it was announced that Milo Yiannopoulos, a far-right public figure, would speak on campus as part of an unabashedly provocative nationwide tour—a tour that had already endured a

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28 Weisbrod, Ballou, & Asch, supra note 26 (explaining the mission and revenue dichotomy of the marketplace of ideas analogy).

29 See O’Conner, supra note 6, at loc. 436 (ebook) (acknowledging that student activism was very much part of this polarized environment during the Fall 2016 semester, given that the election was “dominating mainstream media and claiming much of the public’s political energy.”)


31 Ana Mari Cauce, The Test of Free Expression is Protecting Speech the Offends (Dec. 19, 2016), https://www.washington.edu/president/2016/12/19/test-of-free-speech/ (responding to the many calls to disinvite or cancel the speech, Dr. Cauce reiterated that “as a public university committed to the free exchange of ideas and free expression, we are obligated to uphold this right.”)
varying combination of (uncontested) preemptive cancellations and responsive protests.\textsuperscript{32}

Despite such an emphasis resting on convivial campus discourse, however, Milo’s speaking engagement at the University of Washington resulted in one of the first of a multitude of campus speaker incidents in 2017 that this dissertation analyzed.\textsuperscript{33} Flaring tempers between Milo supporters who had not yet entered Kane Hall and vehement counter-protesters—both, parties with a number of suspected non-students among them—escalated in a central part of campus to the point where a counter-protester was shot and hospitalized.\textsuperscript{34} The speech went on, but local and national debate over the incident had only just begun.

**Stakeholder Incongruence in the Marketplaces**

Notably, the data analysis indicated that—while Milo’s speech may have acted as a metaphorical ‘powder keg’ for dissent on campus in 2017, the University of Washington’s efforts to balance speech and safety has persisted.\textsuperscript{35} A considerable factor in the continuing conflict at the University of Washington, but which was similarly observed at the other three case sites, appears to stem from stakeholder incongruence when campus speaker issues occur.

\textsuperscript{32} “His talks at New York University, North Dakota State University and Iowa State University were canceled because of security concerns...his talk at the University of Minnesota was met with a small protest, and at West Virginia University with a larger one.” Katherine Long, *UW, WSU Brace for Speech by Milo Yiannopoulos, Breitbart Editor Banned from Twitter*, THE SEATTLE TIMES (Dec. 19, 2016), https://www.seattletimes.com/seattle-news/education/uw-wsu-brace-for-speech-by-breitbart-editor-banned-from-twitter/.


\textsuperscript{34} Id.

\textsuperscript{35} See, for example, Steve Kolowich, *Fear and Loathing in the Campaign’s Wake*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 8, 2017), https://www.chronicle.com/article/fear-and-loathing-in-the-campaigns-wake/, where he noted both the initial issue of Milo’s appearance, as well as the implications of the event for campus climate: But it was his appearance at the University of Washington, a week and a half earlier, that revealed how the incursion of Mr. Yiannopoulos’s brand of politics can leave a public university smoldering even if no campus property is set to flame. Whether it exposed existing fault lines or created new ones, Mr. Yiannopoulos’s tor forced administrators and students to confront the fact that campus culture is now bitterly contested territory—a space in which free speech and safety can seem like conflicting values.
The marketplace of ideas, theoretically, explains and protects the varying viewpoints that emerge when controversial speakers arrive, but the costs associated with these events often leave institutional leaders having to manage both the burden of the operational cost and the burden of conciliating the many campus stakeholders playing various roles in those operations.

**Presidents’ public role as mediator and steward of speech.** An emergent pattern within this theme, for instance, involved the public balancing act between free speech and safety that university presidents must tackle when campus speakers are posed to shake up that tenuous equilibrium. Cauce’s 2016 addresses on free speech proved to be just the beginning; the analysis located an additional five presidential statements between 2017 and 2019, directed toward the full campus community, that consistently reiterated the importance of civil discourse and the need for a public institution to maintain its identity as a marketplace of ideas. Four of those statements, while all re-affirming the same commitment to free speech, were published during periods that corresponded with particularly divisive campus speakers—in UW’s case, Milo Yiannopoulos and later, Joey Gibson, who helms the conservative group Patriot Prayer—

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36 See Cauce, supra notes 30 and 31.


both in the days leading up to their respective speaking engagements and in their ensuing aftermaths.⁹

In all of the statements from Cauce, the sentiment was clear: while the institution stands in opposition with the views and values espoused by certain speakers, the legal obligation for public universities to host speakers of all viewpoints, especially when invited or sponsored by a student organization, leaves very little option of cancellation:

First, there is the legal right of our student groups to invite speakers, even when a controversial one whose message is anathema to many, including me. We are bound by law. But beyond that, canceling the event would have sent the message that a risk of disruption or conflict can be used to overwhelm our rights.⁴⁰

Cauce was not the only leader from the case study sites who constantly articulated the legal underpinnings of free speech in the face of polemic, student group-invited campus speakers.⁴¹ Chancellor Nicholas Dirks, leader of University of California, Berkeley, also published a preemptive statement affirming Milo Yiannopoulos’ right to speak before he was postured to arrive on campus in February.⁴² And, in spite of the violence that flared up on both

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⁴¹ Although Auburn University presented a slight contrast to this trend, given that its president did not issue personalized statements regarding Richard Spencer’s controversial appearance on campus, other leaders of the university, such as the Provost and Chief Diversity Officer, did. See Letter from Provost and Chief Diversity Officer Regarding Spencer Event (April 18, 2017), http://ocm.auburn.edu/newsroom/news_articles/2017/04/letter-from-provost-and-chief-diversity-officer-regarding-spencer-event.php.

⁴² UC Berkeley Public Affairs, Chancellor’s Message on Campus Appearance by Milo Yiannopoulos, BERKELEY NEWS (Jan. 26, 2017), https://news.berkeley.edu/2017/01/26/chancellor-statement-on-yiannopoulos/ (“This sometime tension between rights and values is at the heart of the current controversy concerning the planned visit to
campuses as a result of Yiannopoulos’ planned presence, Berkeley also remained firm on its commitment to free speech in subsequent months—Chancellor Dirks’ successor, Chancellor Carol Christ, utilized her August 2017 address to forewarn the campus community that provocative campus speaker events would likely (and legally) occur throughout the new academic year. Such a trend by presidents to explain and defend certain speaker choices also bridged the public/private dichotomy. Laurie Patton, president of Middlebury College, even introduced conservative scholar Charles Murray prior to his highly objected lecture, noting that, despite having opposing opinions, he was entitled to express his views and research in a viewpoint-neutral campus forum.

Yet, with First Amendment jurisprudence as defined as it was underscored by institutional leadership in their respective public statements, the question becomes: why is there such an apparent need for university leaders to repeatedly (and publicly) defend the speaking rights for problematic campus speakers and their sponsoring registered student organizations? Findings from the analysis pointed to a need for university presidents, even in the most

\[\text{Berkeley of Milo Yiannopoulos…") Milo’s speech was sponsored by the Berkeley College Republicans, similarly to his invitation to the University of Washington by the UW College Republicans.\]

\[\text{See, e.g., UC Berkeley Public Affairs, Milo Yiannopoulos Event Canceled After Violence Erupts, BERKELEY NEWS (Feb. 1 2017), https://news.berkeley.edu/2017/02/01/yiannopoulos-event-canceled/ (reporting that violent clashes and property damage from protesters forced the administration to cancel the event). And see, e.g., Scott Jaschik, Shooting Outside Campus Talk, INSIDE HIGHER ED (Jan. 23, 2017), https://www.insidehighered.com/news/2017/01/23/shooting-u-washington-tensions-grow-over-milo-yiannopoulos-speeches (reporting that, during Milo’s speech at UW, a protestor outside was shot and injured by another protestor).}\]

\[\text{UC Berkeley Public Affairs, Chancellor Christ: Free Speech is Who We Are, BERKELEY NEWS (Aug. 23 2017), https://news.berkeley.edu/2017/08/23/chancellor-christ-free-speech-is-who-we-are/ (“The law is very clear: Public institutions like UC Berkeley must permit speakers invited in accordance with campus policies to speak, without discrimination to point of view.”)}\]

\[\text{Charles Murray, Reflections on the Revolution at Middlebury, AEIDEAS (Mar. 5, 2017), https://www.aei.org/society-and-culture/reflections-on-the-revolution-in-middlebury/ (also noting that “President Patton did not cancel it even after a major protest became inevitable. She appeared at the event, further signaling Middlebury’s commitment to academic freedom.”)}\]
traditional sense, to manage myriad stakeholders on and off campus, from students to faculty to
donors or governing boards. However, increasingly, a university president’s “most important
duty is raising money,” a finding reported by The Chronicle of Higher Education following an
audit of over 200 presidential job postings in 2019 alone. This means that managing competing
stakeholder interests or values could pose a progressively dire financial risk in addition to
ideological schisms on campus promoted by speakers among the likes of Milo Yiannopoulos.

Open responses to open letters. Although President Cauce and other university leaders
directed their statements to a generalized campus community, a number of them also served as
broad responses to publicized rhetoric from various campus stakeholders—periodically
published as open letters in blogs, campus newspapers, or national op-eds, and occasionally co-
signed by hundreds of participants. Two competing Change.org petitions, for instance, were

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47 Id.

48 Id. It should also be noted, however, that the article also referenced results of a 2017 survey, which reported that “nearly 60 percent of presidents said fund raising was one of the main things that occupied their time.” As such, the focus on revenue generation was arguably very much entrenched in President Cauce’s duties, even in 2017.

49 For an example of Milo Yiannopoulos’ rhetoric that sparked many a protest on college campuses in 2017, See Katherine Long, UW, WSU Brace for Speech by Milo Yiannopoulos, Breitbart Editor Banned from Twitter, THE SEATTLE TIMES (Dec. 19, 2016), https://www.seattletimes.com/seattle-news/education/uw-wsu-brace-for-speech-by-breitbart-editor-banned-from-twitter/;
Yiannopoulos, who is gay, uses a homophobic slur in the title of his college speaking tour. He has, among other things, attacked specific college professors with personal insults, and described “rape culture” on college campuses as a myth.

created by University of Washington students, with one calling for the cancellation of Milo’s Inauguration Day speech, and the other calling for the university to protect free speech by allowing for him to speak.51 The petition in favor of Milo’s appearance received 740 signatures, compared to 4,637 signatures in opposition,52 such metrics further demonstrating the tension between free speech and other stakeholder values of the institution.

The University of Washington remained steadfast in their decision to host Milo Yiannopoulos on behalf of the UW College Republicans, but ensuing violence from protestors during the speech resulted in over $75,000 in police overtime costs, over three times as costly as even the most expensive security figures associated with UW football games.53 The considerable financial setback beset by necessary security action undoubtedly influenced President Cauce in early 2018, as the UW College Republicans once again sponsored a hotly contested conservative organization—Patriot Prayer—and were asked to pay nearly double the cost of security as was required for Milo Yiannopoulos’ speech.54 This time, however, the main source of public contention came from over twenty members of the UW faculty, who cited nearly 70 years of First Amendment jurisprudence in an open letter criticizing the fee:

say-over-500-alumni/ (Over 500 alumni penned a blog post in opposition to Charles Murray’s speech at Middlebury).


52 Id.

53 Daniel Gilbert, Milo Yiannopoulos at UW: A Speech, a Shooting, and $75,000 in Police Overtime, SEATTLE TIMES (March 26, 2017), https://www.seattletimes.com/seattle-news/crime/milo-yiannopoulos-at-uw-a-speech-a-shooting-and-75000-in-police-overtime/ (“University officers billed for just above $20,000 in overtime for the most expensive games; the average came out to $15,000”).

54 Id. (reporting that the UW College Republicans had needed to reimburse UW $9,120 for security). See also Ronald K. L. Collins, U. of Washington Faculty Urged Against Security Fees for Student Events, THE FREE SPEECH CENTER (April 18, 2018), https://www.mtsu.edu/first-amendment/post/114/u-of-washinton-faculty-urged-against-security-fees-for-student-events.
If, instead of inviting a speaker from Patriot Prayer, the College Republicans had arranged for a speech by a head of the NAACP or Planned Parenthood, there would have been no hostile audience, and no $17,000 fee imposed by the University. The College Republicans cannot be required to pay a fee that would not be imposed on other organizations which invite speakers whose views on controversial issues such as race, abortion, or gender discrimination, are more liberal and thus, in this region of the nation, more popular.

As the legal-historical analysis found during a breakdown of *College Republicans of the University of Washington v. Cauce*, a district court also sided with the faculty stance on fee fluctuation when challenged by the UW College Republicans. Consequently, the University of Washington was ordered to pay $122,500 in legal fees as part of a settlement agreement to the UW College Republicans. In this case, scholarship correctly predicted the legal outcome.

Somewhat surprisingly, however, the profusion of open letters published by faculty members at each of the case sites varied in terms of viewpoint, adding complexity and challenge to the ability for university leaders to navigate a highly divided stakeholder climate when campus speakers come to campus. For instance, both of Berkeley’s chancellors were the recipients of publicized statements from hundreds of faculty members, respectively, advocating for the institution to refuse Milo Yiannopoulos on two separate occasions—with the second iteration

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Administrators relying on instances of past protests, either for or against a student organization or speaker, will inevitably impose elevated fees for events featuring speech that is controversial or provocative and likely to draw opposition. Assessing security costs in this manner impermissibly risks suppression of “speech on only one side of a contentious debate.”


planning a full boycott of classes during Milo’s planned “Free Speech Week” in September 2017.  

Numerous Middlebury professors also addressed an open letter to President Patton in their campus newspaper, arguing that Charles Murray’s scholarship was “an insult to the intellectual integrity of Middlebury College.” Middlebury in particular endured a maelstrom of publicized strife between faculty members, given that one academic department co-sponsored Murray’s event with the Middlebury American Enterprise Institute student club. In the months following the calamitous event, other members of the professoriate were reproached by their colleagues for both encouraging and joining in on the eventual student protests; these accusations were refuted in a series of clashing, public editorials.

Such strife within public online forums demonstrates the near-impossible mediation efforts that university leaders are faced with when a polarizing figure is invited to campus, but the University of Washington case in particular illustrates the potential financial toll that comes from either decision. While public statements can attempt to assuage and remind audiences of an institutions’ legal obligation to free speech, there is no operational option selected by a

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58 McNamara & Shyamsundar, supra note 57.


60 Rachelle Peterson, Middlebury Admissions Tells Alumni How to Talk About the Protest Over Charles Murray, NATIONAL ASSOCIATION OF SCHOLARS (March 9, 2017), https://www.nas.org/blogs/article/middlebury_admissions_office_tells_alumni_how_to_talk_about_the_protest_ove.

61 Sabine Poux, Allison Stanger Appearances Show Faculty Rift, THE MIDDLEBURY CAMPUS (Mar. 14m 2018), https://middleburycampus.com/38046/news/stanger-appearances-show-faculty-rift/ (“While intra-faculty discord is not usually so apparent to students, statements like the feuding op-eds published post-Murray have made tensions more overt”).

62 This refers to the $75,000 in security and law enforcement that UW had to pay when they allowed Milo Yiannopoulos to speak as planned in January 2017, and then the $122,500 in a settlement agreement resulting from their attempt to charge a sponsoring student group with higher security fees in 2018.
university leader that does not carry a price tag of some capacity—forcing administrative leadership into a catch-22 that leaves at least one stakeholder group openly displeased.63

**Conflict as public fuel for student crowd-sourcing.** In the open letter addressed to President Cauce voicing disapproval for administration’s $17,000 security fee request, participating faculty warned that “student organizations should not be conscripted into becoming fundraisers for the University because they invite a highly controversial speaker.”64 From a First Amendment perspective, particularly under the *Forsyth County v. Nationalist Movement* precedent, this is clear.65 But, once again, the operational context of this analysis indicated that the institutions themselves were far more “financially burdened”66 than the sponsoring student groups, due in part to hugely successful crowd-sourcing efforts across all case sites.

As a prime example: Milo Yiannopoulos was considered the cheapest option for the University of Washington College Republicans to host, but the group was still expected to reimburse the university for roughly $9,000 in security costs following the event.67 The student group set up a public GoFundMe page in promotion of the event and promptly raised over $12,000 to cover the eventual reimbursement,68 while also increasing membership within its

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63 *See* Kolowich, *supra* note 35.
65 *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992) (referring to the precedent that a “hostile mob” is not sufficient grounds for financially crippling speech by controversial groups).
66 *Id.*
68 *See* Kolowich, *supra* note 35.
When Milo’s tour turned to Berkeley, the College Republicans there received a $6,000 anonymous donation to be used for security. Of course, this support from external community members worked both ways—when Richard Spencer, a white supremacist, originally declared his intent to speak at Auburn University in April 2017, a GoFundMe was created by an Auburn student in attempts to raise money for a concurrent campus program focused on unity. In just about a week, $1,285 was raised to combat Spencer’s lecture with alternate programming.

Perhaps the greatest crowd-sourcing opportunity for student organizations, however, links back to an observation first made in the legal-historical analysis: purposive organizations often have strong litigation resources for students. Indeed, this was the case with the University of Washington College Republicans during College Republicans of the University of Washington v. Cauce; the group was represented pro-bono by Freedom X, a conservative law firm. Not all

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69 Eric Mandel, Flyer Calls UW Republican President ‘Racist’ for Hosting Alt-Right Speaker, AM 770-KTTH (Jan. 5, 2017), https://mynorthwest.com/503634/flyer-calls-uw-republican-president-racist-for-hosting-alt-right-speaker/ (interviewing Jessie Gamble, then-UW College Republicans president, who spoke about new members because of Milo’s speech).

70 Peter Beinart, Milo Yiannopoulos Tested Progressives—and They Failed, THE ATLANTIC (Feb. 3, 2017), https://www.theatlantic.com/politics/archive/2017/02/everyone-has-a-right-to-free-speech-even-milo/515565/ ([Berkeley] “required the College Republicans to come up with funds for additional security themselves; an anonymous patron contributed $6,000 to help them.”)


72 Eliott C. McLaughlin (@ByEliott), Twitter (April 18, 2017, 4:37 PM), https://twitter.com/ByEliott/status/854463999148257281 (“#AuburnUnites prepares to counter Richard Spencer’s speech with pizza & music.”)


74 College Republicans of the University of Washington v. Cauce, 2018 U.S. Dist. LEXIS 22234, 9 (W.D. Wash, 2018). See also Natalie Brand, supra note 67 (reporting that the UW College Republicans were represented pro-bono). And see, Freedom X, Freedom X Sends Letter to Univ of Washington Demanding it Cancel Security Fees Imposed on College Republicans Hosting Patriot Prayer’s Joey Gibson (Feb 2, 2018), (https://freedomxlaw.com/freedom-x-sends-letter-univ-washington-demanding-cancel-security-fees-imposed-
of the student organizations in the case study received free representation—for the Berkeley College Republicans in *Young America’s Foundation v. Napolitano*, the $70,000 settlement from the university did not completely cover their legal fees—but the legal victory stoked major online publicity for conservative groups around the nation, which in turn presents a lucrative advantage. This finance pattern suggests that student groups draw strong community support.

**Conclusion.** The preliminary pattern first observed by the University of Washington in the aftermath of its 2017 Milo Yiannopoulos event—but also evident in the other analyzed case sites—reflected a marketplace of ideas that incorporated the opinions of myriad campus stakeholders. Open and competing letters from faculty, petitions from students, and responsive statements from faculty on a contentious issue emerged as expected across both private and public university campuses, and President Cauce in particular affirmed that such discourse is “the hallmark of our mission as educators and learners.” Yet, as Figure 4.1 breaks down, university leaders responsible for making decisions on controversial campus speaker events have far more of a financial onus to navigate than other stakeholders of the institution, complicating decisions made in regard to these events.

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75 *Young America’s Foundation v. Napolitano*, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018). See also, Natalie Orenstein, *UC Berkeley and College Republicans Settle Free Speech Case*, BERKELEYSIDE (Dec. 3, 2018), https://www.berkeleyside.com/2018/12/03/uc-berkeley-and-college-republicans-settle-free-speech-case (“She said the amount did not represent ‘100% of the attorney fees—that is customary in a settlement,’ but declined to state how much her clients had paid.”).

76 “Troy Worden, who was president of the club when the lawsuit was filed, was among many on the right who celebrated the settlement online Monday.” Orenstein, supra note 75.

And, while First Amendment jurisprudence has little tolerance for institutional resources as an excuse for restricting speech of certain viewpoints,\textsuperscript{78} the operational tension between balancing mission and revenue becomes more palpable under the “theoretical proposition”\textsuperscript{79} of academic capitalism theory. As mentioned prior, data show that university presidents are increasingly “hired for their skills in budget and strategy and with much less regard for the importance of understanding the mission of the institution and how to support it.”\textsuperscript{80} If this trend continues, stakeholder incongruence may be reflected in presidential management of speaker logistics that weigh financial stakes comparably with traditional mission.

\textsuperscript{78} See Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). And see, Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 835 (1995) for a re-emphasis on resource neutrality: “It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.”

\textsuperscript{79} See Yin, supra note 23, for a description of theoretical prepositions in the analytical process.

\textsuperscript{80} Kezar, DePaola, & Scott, supra note 8, at 73 (adding that “twenty percent of US college presidents in 2012 came from fields outside academia, up from 13 percent six years earlier.”)
### University of Washington, Seattle Campus Speaker Incidents, 2017-2019: By The Numbers

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>$9,120</td>
<td>The amount that the University of Washington College Republicans reimbursed the institution in security fees for Milo Yiannopoulos’ speaking engagement on campus. The Registered Student Organization had raised more than $12,000 for the event through a GoFundMe campaign.</td>
</tr>
<tr>
<td>$20,007</td>
<td>Overtime costs associated with the University of Washington Police Department during Milo Yiannopoulos’ speech.</td>
</tr>
<tr>
<td>$55,335</td>
<td>Overtime costs associated with the Seattle Police Department during Milo Yiannopoulos’ speech (for a combined total of $75,342).</td>
</tr>
<tr>
<td>$15,000</td>
<td>Average of overtime costs associated with the University of Washington Police Department during UW home football games, 2013-2017</td>
</tr>
<tr>
<td>$57,000</td>
<td>Overtime costs associated with the Seattle Police Department over a two-day period (compared to Milo’s one-day appearance) when President Barack Obama came to campus to speak in 2010</td>
</tr>
<tr>
<td>$17,000</td>
<td>Security fee imposed by the University of Washington, Seattle to the UW College Republicans ahead of hosting Joey Gibson and his conservative group, Patriot Prayer, in their “Freedom Rally.”</td>
</tr>
<tr>
<td>$0</td>
<td>Legal fees for the UW College Republicans, who contested the $17,000 security fee in court via the pro-bono aid of the conservative Freedom X legal firm.</td>
</tr>
<tr>
<td>$122,500</td>
<td>Settlement costs for the University of Washington following the outcome of College Republicans of the University of Washington v. Cawce.</td>
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</tbody>
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**Figure 4.1. University of Washington Campus Speaker Incidents, By the Numbers**

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4.2. Costs of Crisis: University of California, Berkeley

The University of California, Berkeley, was the site of the student-led Free Speech Movement in the 1960s. Strong patterns of student activism, therefore, are rooted in the legacy of the institution, and this was reiterated by Chancellor Carol Christ prior to the Fall 2017 semester, when right-wing figures such as Milo Yiannopoulos and Ben Shapiro had scheduled appearances. The renewed appeal to Berkeley’s tradition as a bastion of unfettered student expression was understandable, however, following a tumultuous spring. Milo Yiannopoulos’ speech on campus in February was cancelled when protests took a violent turn, along with approximately $100,000 in property damage. A residual threat of violence and logistical obstacles in April also led to a cancelled appearance by Ann Coulter, another conservative commentator, further stoking public discourse and criticism by those who felt that Berkeley was repeatedly succumbing to heckler’s veto. Most notable of the public criticisms, however, came from then-President Trump on Twitter after Milo’s speech cancellation; he tweeted that “if U.C.

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82 See, e.g., Erwin Chemerinsky & Howard Gillman, Free Speech on Campus, 76 (2018).

83 See UC Berkeley Public Affairs, Chancellor Christ: Free Speech is Who We Are, BERKELEY NEWS (Aug. 23 2017), https://news.berkeley.edu/2017/08/23/chancellor-christ-free-speech-is-who-we-are/, where Chancellor Christ appealed to the institutional tradition of free speech:

Berkeley, as you know, is the home of the Free Speech Movement, where students on the right and students on the left united to fight for the right to advocate political views on campus. Particularly now, it is critical that the Berkeley community come together once again to protect this right. It is who we are.

84 See, e.g., UC Berkeley Public Affairs, Milo Yiannopoulos Event Canceled After Violence Erupts, BERKELEY NEWS (Feb. 1 2017), https://news.berkeley.edu/2017/02/01/yiannopoulos-event-canceled/. See also Katy Steinmetz, Fighting Words: A Battle in Berkeley Over Free Speech, TIME MAGAZINE (June 1, 2017), https://time.com/4800813/battle-berkeley-free-speech/ (reporting on the $100,000 property damage estimate).

Berkeley does not allow free speech and practices violence on innocent people with a different point of view - NO FEDERAL FUNDS?"\(^{86}\)

The tweet was the first of a number of efforts by the Trump administration to command free speech on campus—and, while many of those initiatives are covered in Chapter 5, it was notable that Berkeley weathered continued scrutiny from the federal government after the Milo Yiannopoulos and Ann Coulter debacles. One telling example emerged when the Department of Justice released an official Statement of Interest in *Young America’s Foundation v. Napolitano*, with the Associate Attorney General quoted as saying, "‘The Department of Justice will not stand by idly while public universities violate students’ constitutional rights.’"\(^{87}\)

Under the attentive watch of political and public stakeholders, Berkeley sought to emphasize free speech both in mission and in operations in Fall 2017; yet, with Ben Shapiro on the speaker docket, and Milo Yiannopoulos set to return with an assemblage of controversial speakers for a ‘Free Speech Week,’ the costs of securing those First Amendment rights skyrocketed.\(^{88}\) As a result, Berkeley’s efforts to finance the plethora of campus speakers shed

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\(^{88}\) “This September, Ben Shapiro and Milo Yiannopoulos have both been invited by student groups to speak at Berkeley…we will invest the necessary resources to achieve that goal.” UC Berkeley Public Affairs, *supra* note 83. *See also* Audrey McNamara & Harini Shyamsundar, *UC Berkeley Faculty Members Call for Boycott of Classes During ‘Free Speech Week,’ The Daily Californian* (Sept. 14, 2017), https://www.dailyww.com/2017/09/13/uc-berkeley-faculty-members-call-boycott-classes-free-speech-week/ (letter from 132 faculty members describing the ‘Free Speech Week’ and its potential impact on campus safety).
light on a reality consistent with neoliberalism: that free speech comes at a cost, and not all institutions may be able to allocate their budgets effectively to meet those cyclical costs.\textsuperscript{89}

**Neoliberal Assumptions Indicative in Crisis Reserves**

It should be noted that the University of California, Berkeley bore the highest costs of all analyzed case sites over a course of time where controversial campus speakers seemed to stoke discord on a near-monthly basis. As Figure 4.2 illustrates, Ann Coulter’s April speaking engagement—despite its eventual cancellation—cost the university over $600,000, a metric closely replicated by Ben Shapiro’s security costs in September.\textsuperscript{90} September’s events in total required Berkeley to spend nearly $4 million on security, even though Milo Yiannopoulos’ ‘Free Speech Week’ eventually shrank to one 20-minute address.\textsuperscript{91}

While Berkeley’s security costs reached totals higher than any of the other case sites, its circumstances were often reported as a prime example of an institution caught between its mission to protect its marketplace of ideas, and its ability to pay for that marketplace to function.

For instance, Quintana described Berkeley as a university that has struggled to navigate its free speech battles, even with its strong legacy preceding it:

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\textsuperscript{89} Teresa Watanabe, *UC System Will Chip in at Least $300,000 to Help Berkeley Pay Security Costs for Controversial Speakers*, LOS ANGELES TIMES (Sept. 20, 2017), https://www.latimes.com/local/lanow/la-me-ln-uc-berkeley-security-20170920-story.html (citing a quote from the University of California system president that “free speech is not free, it turns out.”)


The kerfluffle and subsequent recriminations show just how charged the political atmosphere is for Berkeley, heralded as the cradle of the free-speech movement on college campuses. And the events highlight lessons other colleges might have to learn in order to both honor their dedication to free speech and protect the safety of students and speakers.92

Berkeley, along with other case sites, demonstrated that even longstanding public universities with considerable operating budgets are not immune to the financial strains imposed by controversial campus speakers and their necessary security resources. On one hand, large operating budgets are often used to justify an institution shouldering the costs of high-profile speakers. In the open letter by members of the University of Washington faculty, for instance, a ‘no excuses’ rationale for shifting the brunt of the security cost to students was employed under the Forsyth precedent: “the county’s share of the cost of protecting the 1987 civil rights demonstrations was undoubtedly a far greater portion of that rural county’s budget than the proposed $17,000 fee would be of the University’s overall budget of approximately $7 billion.”93

This was also a point of contention from a Free Speech Commission at Berkeley following the chaos of 2017—the security costs associated with the events were so high that the commission debated (and never reached full accord) on whether to place a limit on security fees subsidized by the institution and risk litigation.94 Those in disagreement, however, noted that “any cap on expenses the campus sets may seem arbitrary in the context of the campus’s operating budget ($2.7 billion) and the University of California’s considerably greater resources.”95

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93 See Collins, supra note 50.


95 Id. at 13.
| **Figure 4.2. UC-Berkeley Campus Speaker Incidents, By the Numbers** |

| **$10,000:** The amount that the Berkeley College Republicans had to cover in security fee estimates for Milo Yiannopoulos’ speaking engagement on campus in February 2017. The College Republicans were gifted **$6,000** by an anonymous donor. |
| **$100,000:** Damage cost estimate following the campus skirmishes prior to Milo Yiannopoulos’ February 2017 speaking engagement on campus, which was eventually cancelled due to the violence. |
| **$665,000:** Approximate costs associated with the law enforcement for Ann Coulter’s already-cancelled speech on April 27, 2017 (compared to the **$200,000** annual police/protest budget set by the institution). |
| **$300,000:** Financial contribution extended by University of California system leadership to UC Berkeley to help offset the price tag of security for Ben Shapiro’s speech scheduled in September 2017. The total figure for Shapiro’s speech ended up being **$836,421**. |
| **$3,900,000:** Approximate security fee expenditures by UC Berkeley from August 2017 to September 2017. |
| **$2,883,434:** Security costs associated specifically with ‘Free Speech Week’ at UC Berkeley, September 2017. |
| **$150,000,000:** Budget deficit at UC Berkeley that institutional officials were required to shrink, by nearly two-thirds, by June 2018. |
| **$70,000:** Settlement agreement that covered the plaintiffs’ legal fees (in addition to a few policy changes) charged to UC Berkeley following the outcome of Young America’s Foundation v. Napolitano. |

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On the other hand, Figure 4.2 demonstrates that that operating budget figure alone was not indicative of Berkeley’s financial tribulations in the 2017-2018 academic years. In the midst of its massive expenditures to host Milo Yiannopoulos and others, Berkeley also faced a budget deficit of “more than a hundred million dollars, with less funding coming from the state in recent years.”

The pressure to lower that deficit to $56 million within one fiscal year came at direct odds with the millions shelled out for extracurricular speech initiatives.

While these competing financial pressures were notable, areas of Berkeley’s response also reflect certain resource benefits that other institutions may not have, which may inherently widen both a reputational and financial gap between those who are able to allocate resources to campus speaker costs and others who may be unable to maintain those costs into the future. After all, Jeremy Bauer-Wolf reported that these polarized conflicts may persist in coming years, and there is little solution thus far:

Representatives from public institutions said they are meeting their constitutional obligation to provide a space for these speakers, but they remain relatively lost for a long-term strategy for paying for security. Colleges and universities can adjust after these appearances and consider trimming costs, but none interviewed have settled on any financially viable plan. And, likely, the tours of these political lightning rods will not slow.

Berkeley, when faced with the mounting costs of September 2017, was able to receive aid from the University of California system; the system president, Janet Napolitano, offered

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97 Andrew Marantz, How Social-Media Trolls Turned U.C. Berkeley into a Free-Speech Circus, THE NEW YORKER (June 25, 2018), https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus. See also Report of the Chancellor’s Commission on Free Speech, supra note 94, at 12, where “security for the September 2017 Shapiro and Yiannopoulos visits cost the campus nearly $4 million. This is not sustainable, especially for a campus in the throes of eliminating a $150+ million deficit.”

98 Watanabe, supra note 89.

assistance in the form of half the costs of security needed for speeches that month.\textsuperscript{100} Both Napolitano and Chancellor Carol Christ emphasized that, while the funds would likely rather be used in other areas of campus operations, it was deemed essential in order to allow for legally permissible speech to occur.\textsuperscript{101} That said, the aid was by no means a guarantee, then or in future instances—Napolitano noted that “UC would underwrite security costs through ‘Free Speech Week’…but that such support may not continue.”\textsuperscript{102}

Another advantage to Berkeley’s institutional response could, perhaps, also be attributed to a longstanding tradition of student activism: even during years of little action by way of invited campus speakers, the university sets aside approximately $200,000 to be used for safety precautions during protests.\textsuperscript{103} In contrast, Middlebury College’s inexperience with protests of such magnitude as was evidenced by the Charles Murray unrest was exacerbated by a lack of personnel equipped for conflict mitigation efforts.\textsuperscript{104} Since then, Middlebury has begun to re-work its security protocols, an effort estimated at around $200,000 as well.\textsuperscript{105} Yet how many

\textsuperscript{100} The move by the University of California system to contribute funds to Berkeley was depicted as a rather exceptional circumstance. See Rick Seltzer, \textit{UC President to Pay Half of Costs for Shapiro, Yiannopoulos, INSIDE HIGHER ED} (Sept. 21, 2017), https://www.insidehighered.com/quicktakes/2017/09/21/uc-president-pay-half-security-costs-shapiro-yiannopoulos, where he reported on this undertaking: Normally, an individual campus would be responsible for paying security costs associated with hosting a speaker. But the extraordinary cost associated with the controversial appearances at the free speech focal point of Berkeley led UC President Janet Napolitano to help foot the bill, she said Wednesday in an interview with reporters in Washington.

\textsuperscript{101} See Dinkelspiel, \textit{supra} note 90 (reporting on a statement from Chancellor Christ, where she admitted that “‘We would have certainly preferred to expend these precious resources on our academic mission…’”). \textit{See also} Seltzer, \textit{supra} note 100 (reporting that Napolitano “admitted institutions are in a difficult position, stuck between respecting free speech rights while also protecting the safety and security of students and staff.”)

\textsuperscript{102} Watanabe, \textit{supra} note 89.

\textsuperscript{103} Hussain, \textit{supra} note 90.

\textsuperscript{104} \textit{Id.} (“Its public-safety officers are not sworn police officers: They do not have arresting authority and don’t carry weapons.”)

institutions are able to allocate funds of that magnitude to security efforts, particularly in the era of neoliberal pressures to maximize efficiency and engage in an increasing “competition for scarce resources?” ¹⁰⁶ And what could happen to the average institution when the necessary expenditures exceed that allocated budget?

**Cyclical conflict inhibits long-term financial planning.** While implications of rising security costs were overwhelmingly absent in the documents selected for analysis, Berkeley’s efforts to balance safety and speech came the closest to serving as an overt cautionary tale after *The Chronicle of Higher Education* compared its resources and conflict response with that of Evergreen State College. ¹⁰⁷ Again, Berkeley’s predilection for periods of particularly expensive protest patterns arguably aided in its ability to (a) weather this period of particular scrutiny and sacrifice revenue in lieu of legally bound mission, ¹⁰⁸ and (b) maintain an annual protest budget that, in periods of less conflict, may not be needed in full. ¹⁰⁹ The breakdown of Berkeley’s yearly security costs in Figure 4.3, which was provided to *Inside Higher Ed* by the university, indicates the cyclical nature of student protest patterns that makes it difficult to predict, plan, or allocate funds:

¹⁰⁶ Kezar, DePaola, & Scott, *supra* note 8, at 77.

¹⁰⁷ See Hussain, *supra* note 90.

¹⁰⁸ While the numbers associated with the 2017 fiscal year at Berkeley reached million-dollar figures for security, this was the second time within a decade that this occurred. In 2009, following a large student protest over the removal of oak trees on campus, expenditures reached about $1.5 million. Figure 4.3 also shows that costs nearly reached the million-mark in both fiscal years 2012 and 2013. *See* Jeremy Bauer-Wolf, *Speakers Stress University Pocketbooks*, INSIDE HIGHER Ed (Oct. 13, 2017), https://www.insidehighered.com/news/2017/10/13/colleges-search-answer-high-spending-controversial-speakers.

¹⁰⁹ *Id.* Figure 4.3, which uses metrics that were published in this article, shows that in years 2014-2016, the protest budget actually fell under the $200,000 budgeted metric.
Table representing Fiscal Year Security Expenditure Totals:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Security Expenditure Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fiscal Year 2016</td>
<td>$142,410</td>
</tr>
<tr>
<td>Fiscal Year 2015</td>
<td>$181,294</td>
</tr>
<tr>
<td>Fiscal Year 2014</td>
<td>$177,803</td>
</tr>
<tr>
<td>Fiscal Year 2013</td>
<td>$619,764</td>
</tr>
<tr>
<td>Fiscal Year 2012</td>
<td>$744,443</td>
</tr>
<tr>
<td>Fiscal Year 2011</td>
<td>$263,762</td>
</tr>
<tr>
<td>Fiscal Year 2010</td>
<td>$320,224</td>
</tr>
<tr>
<td>Fiscal Year 2009</td>
<td>$1,587,720</td>
</tr>
</tbody>
</table>

Figure 4.3. UC-Berkeley Security Expenditures, Fiscal Years 2009-2016\(^{110}\)

Evergreen State College, however, proved to be a point of contrast around the same time. Suhauna Hussain noted that, “while it too is a public college, it is not touted as the epicenter of the free-speech movement and student activism. And it does not set aside money in its yearly budget for protest management.”\(^{111}\) Logistical problems associated with this lack of resources were made especially apparent following a publicized crisis in June 2017, when a professor openly challenged a twist on an annual campus inclusivity initiative.\(^{112}\) The professor’s reciprocal and increasing hostility with student protestors escalated to the point where external security resources, repairs to damaged property, and graduation planning shifts carried a

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\(^{110}\) *Source:* This graphic uses metrics provided by the University of California, Berkeley, to Jeremy Bauer-Wolf, reporter for Inside Higher Ed. For its context within the article: See Jeremy Bauer-Wolf, *supra* note 108. It was re-formatted to ensure consistency with the other graphics in the dissertation.

\(^{111}\) *See* Hussain, *supra* note 90.

\(^{112}\) “It started with a suggestion that white students and professors leave campus for a day, a twist on a tradition of black students voluntarily doing the same.” Anemona Hartocollis, *A Campus Argument Goes Viral. Now the Campus is Under Siege,* THE NEW YORK TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/evergreen-state-protests.html.
monetary expense of approximately $257,000.113 Compared to trends over the last decade at Berkeley, this would be considered almost a normal budget year. To Evergreen, however, this was unplanned, and not even a symptom of external campus speakers, but of sheer polarized discord within its community.114

Further setting apart Evergreen from the likes of Berkeley—or, as evidenced from a lack of financial implication discourse, from the likes of all three public universities in this case study—is the residual impact on reputation that may also have a current effect on college finances. After all: Berkeley managed to withstand threats of withholding federal funding from the Trump Administration,115 on top of multi-million dollar expenditures for campus speaker security, only to reach some semblance of operational peace a year later.116 Evergreen State, on the other hand, has continued to hemorrhage enrollment; while not the sole factor, nor a full reversal from prior enrollment trends, multiple media platforms have noted the particularly steep drop in student numbers after 2017:

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113 See Hussain, supra note 90, for a breakdown of these costs:
Evergreen State contracted with the Washington State Patrol for additional security staffing, costing about $135,000 in recent weeks, and about $12,000 in police assistance from the Thurston County Sherriff’s Office (a cost absorbed by the county). This was aside from the $100,000 in costs for moving the commencement at the last minute to a stadium in Tacoma, Wash., maintaining a police presence at that ceremony, and covering an estimated $10,000 in property damage to the campus…

114 “What also sets the Evergreen turmoil apart is that it began not with a controversy-courtin guest speaker like Ann Coulter or Milo Yiannopoulos, but a Bernie Sanders-backing biology professor who has been a fixture at the college for 15 years.” See Hartocollis, supra note 112.


116 See, e.g., Jeremy Bauer-Wolf, Civility at Berkeley, INSIDE HIGHER ED (Nov. 28, 2018), https://www.insidehighered.com/news/2018/11/28/new-policies-student-groups-change-culture-free-speech-berkeley, (reflecting on the high costs of 2017 but also the strides the Berkeley community has made to host controversial speakers, particularly right-wing speakers, without huge financial and/or logistical sacrifice.)
But deep unrest at Evergreen in 2017, when student protests erupted over a series of complex race-related issues, attracted negative national attention; Evergreen’s enrollment has since plummeted about 27%, to 2,854 students this fall from just over 3,900 students in 2017.117

Conclusion. The concept of reputation and prestige as a factor in revenue-generation is particularly important for the higher education sector, and yet still fully entrenched in neoliberal assumptions.118 While Evergreen State College provided a sharp contrast to the enduring reputation and resources associated with free speech initiatives at Berkeley, the price of impacted prestige and institutional reputation extended beyond the public university paradigm to involve that of private institutions engaged in free speech conflicts as well.

4.3. Prestige as Operational Catalyst: Middlebury College

Slaughter and Rhoades, in Academic Capitalism, emphasized the systematic impact of prestige on institutional success and sector-wide hegemony:

Greater prestige attracts more applicants. The greater number of applicants, the more the institution is able to turn down and thus the greater the exclusivity and prestige of the institution…[this] fashions a virtual circle of competition in which students and institutions in the same (elite) market segments compete ever more vigorously with and for each other, contributing to the instantiation of an academic capitalism knowledge/learning regime.119

117 Hannah Furfaro, Enrollment Drops, Evergreen State Changes Academic Programs, THE ASSOCIATED PRESS/SEATTLE Times (Dec. 28, 2019), https://www.usnews.com/news/best-states/washington/articles/2019-12-28/enrollment-drops-evergreen-state-changes-academic-programs. See also Lilah Burke, A New Path for Evergreen, INSIDE HIGHER ED (Jan. 10, 2020), https://www.insidehighered.com/news/2020/01/10/evergreen-addresses-enrollment-decline-academic-changes. But see Anemona Hartocollis, Long After Protests, Students Shun the University of Missouri, THE NEW YORK TIMES (July 9, 2017), https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html (indicating that enrollment at public institutions may also dip as a result of not protecting or listening to the needs of student protestors on social issues enough; it was reported that, after a period of racial tension at the University of Missouri, “freshman enrollment at the Columbia campus, the system’s flagship, has fallen by more than 35 percent in the two years since” those protests).

118 “Universities, however, are driven by more than revenue—there is a broader economy of prestige intersecting the Gig Academy, which currently has no parallel in the consumer gig economy.” Kezar, DePaola, & Scott, supra note 8, at 34.

119 Slaughter & Rhoades, supra note 25, at loc. 929 (ebook).
Middlebury College was included in this analysis as a contrasting institution type, seeing as private institutions remain unbound by First Amendment obligations. However, Middlebury’s commitment to its legacy as a liberal arts institution places it at direct odds with neoliberalism’s emphasis on lucrative productivity, instead valuing tenets of free-exchanging inquiry and academic discovery more reflective of a marketplace of ideas. Such an emphasis on free speech and inquiry was also reiterated by multiple stakeholders at the institution, both before and after Charles Murray’s lecture. However, operational efforts to manage the public outcry after an “angry mob” disrupted the session, injuring faculty moderator, Allison Stanger, indicated that quelling negative perceptions also may have had underlying monetary motivations. And, as such, includes private institutions in the tension that appears increasingly clear between the marketplace of ideas and the neoliberal marketplace.

120 See, e.g., Chemerinsky & Gillman, supra note 82, at xxi (“We recognize, of course, that the First Amendment applies only to public colleges and universities”).

121 Michael S. Roth, BEYOND THE UNIVERSITY: WHY LIBERAL EDUCATION MATTERS, 8 (2014), where he notes that there is an operational tension between economic conservatism and liberal education: If higher education is conceived only as a job-placement program for positions with which we are already familiar, than liberal learning does not make much sense. But if higher education is to be an intellectual and experiential adventure and not a bureaucratic assignment of skill capacity, if it is to prize free inquiry rather than training for “the specific vocations to which students are destined,” then we must resist the call to limit access to it or to diminish its scope.

122 “We fully support the core liberal arts principle that contact with other intellectual viewpoints and life experiences than one’s own is integral to a beneficial education.” Charles Murray at Middlebury: Unacceptable and Unethical, Say Over 500 Alumni, BEYOND THE GREEN: COLLECTIVE OF MIDDLEBURY VOICES (Mar. 2, 2017), https://beyonthegreenmidd.wordpress.com/2017/03/02/charles-murray-at-middlebury-unacceptable-and-unethical-say-over-500-alumni/. And see, Laurie L. Patton, Letter from President Patton Concerning Last Night’s Events (Mar. 3, 2017), http://www.middlebury.edu/about/presidentAddresses/2017Addresses/node/545919 (“We must find a path to establishing a climate of open discourse as a core Middlebury value, while also recognizing...the other factors that too often divide us”).


124 Id.
Price of Damaged Prestige

The coded documents pertaining to Middlebury College shed very little insight on the financial implications of its March 2017 clash between Charles Murray—a scholar whose best-known work, *The Bell Curve*, has faced condemnation by many “for not only its conclusions, but its methodology and for the way it considers issues of race”125—and members of the Middlebury community and beyond. Part of this is due to the lack of security costs or personnel that the institution needed to allocate in the past, given its relatively small student body in an even smaller town in Vermont.126

A large area of public scrutiny instead focused instead on campus climate, exacerbated further by the fact that Allison Stanger, a democratic professor with opposing views to Murray, was caught up and injured in the crossfire of protests.127 Further partitioning the campus community into two ideological factions was Charles Murray’s insistence that, operationally, Middlebury administrators had done everything in their power to allow the speech to occur; he even noted that “I wish that every college in the country had the backbone and determination that Middlebury exhibited.” This placed even more inherent blame on the students and campus stakeholders engaged in the protest.128 For years after the event, the Middlebury community

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126 “Middlebury College…has a relatively small campus in rural Vermont. Its public-safety officers are not sworn police officers: They do not have arresting authority and don’t carry weapons.” See Hussain, *supra* note 90.

127 Charles Murray (@charlesmurray), Twitter (March 4, 2017, 6:00 AM), https://twitter.com/charlesmurray/status/838011321660674049 (tweeting that Allison Stanger “is on the left. And fearless, funny, smart as can be, and as devoted to academic freedom as anyone I’ve ever met”). See also Allison Stanger, *Understanding the Angry Mob at Middlebury that Gave Me a Concussion*, THE NEW YORK TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html (explaining her injuries as a result of the protests).

128 Id.
grappled with its differing views on engaging with campus speakers—and, as mentioned prior, such dialogue was often taken to public online forums, or even to federal testimonies. But the documented narrative overwhelmingly focused on mission and campus identity, rather than funding.

Where the market-forward behaviors became evident, however, were in attempts at managing institutional reputation, and this was particularly clear in the efforts by Middlebury College to salvage alumni influence in a variety of ways. Immediately following the Murray event, for instance, Middlebury Admissions sent out an information sheet to alumni with carefully curated answers to common questions about the protests. Middlebury annually utilizes the help of nearly five thousand alumni in their “Alumni Admissions Program,” where

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129 One particular instance of publicized division emerged from two competing blog posts—the first, an affirmation of the importance of free speech on campus that was co-signed by numerous Middlebury professors, and the second, a direct response and refutation by Middlebury students in a blog post of the same design/formatting. See *Free Inquiry on Campus: A Statement of Principles by over One Hundred Middlebury College Professors* (Mar. 6, 2017), https://freeinquiryblog.wordpress.com. And see *Broken Inquiry on Campus: A Response by a Collection of Middlebury Students* (Mar. 12, 2017), https://brokeninquiryblog.wordpress.com.

130 Allison Stanger was asked on multiple occasions to testify about campus speech before federal entities. When she did, an undercurrent of culpability was often taken toward some of her Middlebury colleagues. See *Exploring Free Speech on College Campuses: Hearing Before the Senate Committee on Health, Education, Labor, and Pensions* (Oct. 26, 2017) (Statement of Allison Stanger):

The second reason I wound up injured follows from the behavior of a small minority of Middlebury faculty, who cheered on the protests, which is their right. However, these faculty also did not encourage their students to read Charles Murray or listen to him first before drawing their own conclusions about his work or his character, which was their obligation as educators.

131 See, e.g., *Final Report, Committee on Speech and Inclusion at Middlebury College* (Jan. 2018), http://www.middlebury.edu/system/files/media/Middlebury%20Committee%20on%20Speech%20and%20Inclusion%20Report%20Jan%202018.pdf (results of a task force created in April 2017 to help combat residual community tension and conceptualize a path forward that would be more conducive to lasting discourse).


alumni engage in preliminary interviews with prospective students around the world.\textsuperscript{134} Clearly, the institution prioritized setting a consistent and constructive tone to those conversations in order to mitigate any negative impact on enrollment that the publicized crisis may have contributed to.\textsuperscript{135}

That alumni were given resources necessary to navigate the post-Murray climate when appealing to prospective students is consistent with neoliberalism and, through an inherent focus on external reputation versus the institutional environment for current students, a facilitator of neoactivism:

\begin{quote}
Rather, the neoliberal university caters to prospective students…the neoliberal university conceives of prospective students as consumers and current students as commodities that are manufactured for the workplace by the university, marketed in promotional materials to entice even more high-paying potential consumers, and eventually parlayed into revenue streams as donors.\textsuperscript{136}
\end{quote}

However, alumni themselves proved to be a salient financial challenge to Middlebury. A year after the protests, \textit{The Middlebury Campus} reported a notable drop-off in alumni donations, with advancement administrators at the college noting that the protests may have played a role.\textsuperscript{137} So too did evidence of alumni disapproval come after a Middlebury ‘phonathon’ effort, where reports of divided views emerged and the metrics showed that, “in the end, the phonathon only achieved half of its $300,000 goal.”\textsuperscript{138}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item “We recognize some Middlebury volunteers may be asked about events surrounding the Charles Murray appearance…This fact sheet should help you answer any questions you may have or that you may receive.” Peterson, \textit{supra} note 132.
\item O’Conner, \textit{supra} note 6, at loc. 464 (ebook).
\item Id.
\end{enumerate}
\end{footnotesize}
Middlebury was not the only private, liberal arts institution with diminished alumni donations immediately following a period of campus unrest; Amherst College and Princeton University also endured sharp drops in both overall donor participation and donation amounts after student protests.\textsuperscript{139} What makes this trend particularly notable is the reliance on donations that private universities have in order to fund their operations, which myriad scholarship has linked to reputation.\textsuperscript{140} Holmes, for instance—who utilized data in her research from Middlebury—reported that “in 2004, alumni at private liberal arts colleges generated nearly 43% of total voluntary support and funded 21.5% of total institutional expenditures.”\textsuperscript{141} And, in a cyclical manner, high numbers of alumni giving leads to even more alumni giving over time, a “snowball effect”\textsuperscript{142} of alumni philanthropy observed by Faria, Mixon, and Upadhyaya “where alumni donations raise a university’s reputation, which in turn generates additional alumni donations.”\textsuperscript{143} Thus, while Middlebury may not have been as overtly impacted by former President Trump’s threat of withholding federal funds as the three public institutions in the case

\textsuperscript{139} Anemona Hartocollis, \textit{College Students Protest, Alumni’s Fondness Fades and Checks Shrink}, \textit{The New York Times} (Aug. 14, 2016), https://www.nytimes.com/2016/08/05/us/college-protests-alumni-donations.html: At Amherst, the amount of money given by alumni dropped 6.5 percent for the fiscal year that ended June 30…the lowest participation rate since 1975, when the college began admitting women…at Princeton, where protesters unsuccessfully demanded the removal of Woodrow Wilson’s name from university buildings and programs, undergraduate alumni donations dropped 6.6 person from a record high the year before…


\textsuperscript{141} Holmes, \textit{supra} note 140, at 18.

\textsuperscript{142} Faria, Mixon, & Upadhyaya, \textit{supra} note 140, at 163.

\textsuperscript{143} \textit{Id.}
study, it shows that private universities are also financially vulnerable when it comes to campus speaker conflict.

**Rankings also influence perception of campus identity.** Middlebury was certainly not the only institution in this case study that had to handle reputational issues as the result of divisive public discourse. Coverage of University of California, Berkeley, repeatedly amplified the “narrative of the radical Berkeley student” and the institution worked intensely to re-work that image in a pro-free speech, but anti-disruption lens. President Cauce, in one of her addresses to the University of Washington community, also sought to dispute a “common narrative about free speech issues” that presented students as “coddled” in the midst of potentially harmful (but legal) expression.

Yet, Middlebury’s institutional designation as a private college in the northeast may stymie those efforts in the context of public perception and rankings. Typically, rankings such as *U.S. News & World Report* and other performance-driven metrics depict Middlebury in a strong light; in 2019, *Forbes* ranked the institution #36 out of all colleges, and noted too the exclusive 17% acceptance rate.

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146 For details on some of those efforts, *See* Bauer-Wolf, *supra* note 116.


148 *Id.*

speech rankings—Foundation for Individual Rights in Education (FIRE), along with RealClearEducation, surveyed almost 20,000 students at over fifty institutions in the United States in 2020. Although Middlebury College was not part of the survey’s sample, the overall findings looked unfavorably on schools of its general composition:

Seven of the colleges that ranked in the top 10 in the College Free Speech Rankings are public state universities with undergraduate enrollments over 15,000…in contrast, seven of the college ranked in the bottom 10 are private, with undergraduate enrollments at five of those seven below 10,000. Three of the bottom 10 colleges are in the Northeast, including two members of the Ivy League.151

**Conclusion.** While the newness of these survey results limit too much prognostication for Middlebury’s financial future, they are representative of a student perception disproportionately critical of free speech efforts at small, elite institutions in a particular region of the United States. As such, it adds to the encumbrance of reputational preservation that may follow Middlebury in future operations, and which may now carry a financial influence under a neoliberal paradigm where institutions must “avoid scandal, mitigate risk, and present themselves in the best possible light with regard to student satisfaction.” Efforts to try and limit potentially expensive and reputation-harming events through active change, however, once again transcend the private/public dichotomy. Richard Spencer’s speech at Auburn University in April 2017, and Auburn’s later policy changes, was resoundingly indicative of that.154

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151 Id. at 2.

152 Id.

153 O’Conner, supra note 6, at loc. 3220 (ebook).

4.4. Policy Changes at the Battleground: Auburn University

Auburn University’s initial free speech conflict arose in a slightly different and originally more cost-effective manner than the other three case sites. Richard Spencer and his team, after all, intended to pay Auburn $700 to rent out a campus space used for other public speakers, and to staff necessary security personnel for the event.\footnote{See, e.g., Connor Sheets, Richard Spencer Paid Auburn $700 to Use University Space, Security; Students Plan Protests, AL.COM (April 13, 2017), https://www.al.com/news/2017/04/richard_spencer_paid_auburn_70.html.} Impending protests, however—not to mention, the highly publicized instances of protests-turned-violent preceding this event, via the University of Washington,\footnote{See, e.g., Scott Jaschik, Shooting Outside Campus Talk, INSIDE HIGHER ED (Jan. 23, 2017), https://www.insidehighered.com/news/2017/01/23/shooting-u-washington-tensions-grow-over-milo-yiannopoulos-speeches.} University of California, Berkeley,\footnote{See, e.g., Beth McMurtrie, supra note 145.} and Middlebury College\footnote{See, e.g., Peter Beinart, A Violent Attack on Free Speech at Middlebury, THE ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/.}—pushed Auburn University to reverse course and cancel Spencer’s speech with days to spare.\footnote{Updated Information on Spencer Event at Auburn (April 14, 2017), http://ocm.auburn.edu/newsroom/news_articles/2017/04/updated-information-on-spencer-event-at-auburn.php (reporting that “in consultation with law enforcement, Auburn canceled the Richard Spencer event scheduled for Tuesday evening based on legitimate concerns and credible evidence that it will jeopardize the safety of students, faculty, staff, and visitors”).}

As was explained in the legal-historical analysis, Richard Spencer’s team challenged Auburn’s cancellation and successfully acquired a court-ordered injunction, mandating that the event proceed as planned.\footnote{Padgett v. Auburn University, 2017 U.S. Dist. LEXIS 74076 (M.D. Ala., 2017). See also Richard “5%” Spencer (@RichardBSpencer) Twitter (April 18, 2017, 2:14 PM) https://twitter.com/RichardBSpencer/status/854427979115614213 (tweeting a video outside of the courthouse in Montgomery, Alabama, mere hours before his now-permissible speech at Auburn, where he claimed that this was a “great victory for the Alt-Right but also for free speech”).} While Auburn fared better in managing the protests than the other speakers (using Auburn as one example of institutions who have attempted to mitigate the financial and reputational repercussions of campus speakers through policy changes).
three case sites (although three participants were still arrested),\(^{161}\) the resulting security costs were also compounded by a $29,000 settlement fee from *Padgett v. Auburn University*\(^{162}\). In the span of just about a week, then, Auburn went from a $700 yield to a minimum loss of $30,000, in addition to the publicized coverage from national media surrounding the back-and-forth free speech battle.\(^{163}\)

**Policy Changes to Reduce Costs of Reactivity**

After Auburn legally erred in its preemptive cancellation of Richard Spencer’s speech, the institution subsequently began tweaking policies that would minimize having to vacillate between permitting or prohibiting external campus speakers in the first place.\(^{164}\) As made clear from First Amendment jurisprudence—even just from the legal outcomes involving the three public institutions in this case study\(^{165}\)—the potential of violence is not often enough to prohibit speakers in a public forum. The University of Florida even struggled to make that argument

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White nationalist Richard Spencer’s speech at Alabama’s Auburn University was preceded by controversy and punctuated Tuesday night by protests, arrests and some violence. Hundreds of people, some chanting and carrying signs, demonstrated outside Auburn’s Foy Hall on Tuesday. City of Auburn police Capt. Lorenza Dorsey told NPR that three people were arrested on disorderly conduct charges.


when Richard Spencer was scheduled to speak on campus in a post-Charlottesville environment, eventually having to accommodate his speech and finance the massive security measures needed for it.166

Auburn has since reworked one of its external speaker policies to, at the very least, limit campus speakers to those who are specifically invited by current members of the campus community.167 This would not have made much of a difference at the other case sites, where the campus speakers had been invited and funded in part by active student organizations,168 but it does reduce the likelihood of having to manage unanticipated and unwelcome speakers, such as Richard Spencer, whose 2017 campus tour was executed via one graduate student from Georgia State University who exploited the absence of restrictive policies by booking venues in the name of free speech.169 Texas A&M University made that same change to their policy following a


167 “University space can only be reserved for events and activities sponsored by an officially recognized Auburn University student organization or an Auburn University academic or administrative unit.” External Party Space Reservation Policy, Auburn University (Aug. 29, 2017), https://sites.auburn.edu/admin/universitypolicies/Policies/ExternalPartySpaceReservationPolicy.pdf.

168 The University of Washington College Republicans and the University of California, Berkeley College Republicans were responsible for Milo Yiannopoulos’s presence on their respective campuses, and Charles Murray was invited to Middlebury by the American Enterprise Institute Student Club.


Spurred on by the success at Auburn, Padgett continued to reserve spaces for Spencer to hold events at other public universities (though notably not at his home campus, Georgia State). He attempted to book Spencer at Michigan State University, the University of Florida, Louisiana State University, Ohio State University, Penn State and the University of North Carolina-Chapel Hill.”
speech from Richard Spencer, but the legality of these policies hinge on the ability for these restrictions on speakers to remain viewpoint-neutral.170

While helpful, Auburn’s efforts to mitigate the operational costs of free speech while also prioritizing campus safety seems about as proactive as institutions are legally able to get. The other institutions in the case study have also grappled with ways to reduce costs of reactivity (or have dabbled with the idea of crossing that legal threshold) when it comes to controversial campus speakers, but little can be done that would operationalize without infringing on free speech rights.171 As mentioned previously, for instance, the UC-Berkeley Commission on Free Speech originally entertained a cap on security cost estimations as the point at which a registered student organization’s application for a campus speaker would be denied.172 However, that only created more uncertainty, with the Commission members musing: “how high would this threshold be? Is $4 million enough? Would $40 million be enough? The Commission is divided about whether to recommend establishing a cap on security costs and defending whatever litigation follows.”173 And Middlebury College, while exempt from much First Amendment-related litigation, strayed away from its institutional value of free-flowing inquiry (that was opined prior to the Charles Murray incident) when it preemptively cancelled a speech by a right-

170 “The Texas A&M policy would be considered content neutral because it applies to everyone and on paper wouldn’t single out Spencer based on the offensiveness of his views.” Bauer-Wolf, supra note 154.

171 See, e.g., UC Berkeley Public Affairs, Chancellor’s Message on Campus Appearance by Milo Yiannopoulos, BERKELEY NEWS (Jan. 26, 2017), https://news.berkeley.edu/2017/01/26/chancellor-statement-on-yiannopoulos/ (explaining that, “from a legal perspective, the U.S. Constitution prohibits UC Berkeley, as a public institution, from banning expression based on its content or viewpoints, even when those viewpoints are hateful or discriminatory”).

172 The original motivation behind that idea was that “the campus should not have to expend scarce resources to protect celebrity provocateurs seeking to promote their brand…when so many essential needs go unfunded or underfunded.” Report of the Chancellor’s Commission on Free Speech, supra note 94, at 13.

173 Id.
wing Polish scholar in 2019. The proactive cancellation drew ire around the academic community, indicating once again that reactivity in regards to campus speakers, while potentially more expensive, is integral for both public and private institutions to adhere to.

Promoting an analogical marketplace over a battleground. The various attempts at policy changes and funding deliberations that all four institutions grappled with in the wake of their respective incidents is reflective of a marketplace of ideas analogy that, in times of particular polarization, seems to morph into more of a metaphorical battleground on a college campus. Various participants in these case study documents specifically referred to their situations as such, albeit in various contexts. Middlebury’s Allison Stanger, for instance, argued that higher education “must be a battleground for competing ideas, not a megaphone for a particular point of view.” Conversely, leaders at the University of Washington and Berkeley lamented the use of a university campus, with its uniquely protected emphasis on free speech, as an iterative battlefield at which students and non-students war over social and political issues.


175 Id. (“As word spread Wednesday about another conservative figure being unable to speak at Middlebury, some academics far from campus spoke out about what happened…”).


177 See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (explaining the judicial precedent behind higher education’s specific marketplace of ideas distinction).

178 See Steve Kolowich, An Internet Troll is Invited to Speak: What’s a College President to Do? The Chronicle of Higher Education (Feb. 10, 2017), https://www.chronicle.com/article/an-internet-troll-is-invited-to-speak-whats-a-college-president-to-do/ (reporting during an interview with University of Washington’s president, Ana Mari Cauce, that “administrators have been forced to weigh the value of promoting free speech against the desire not to become a staging ground for the ideas they find detestable”). See also Berkeley Public Affairs, New Message from Chancellor About Possible Coulter Visit, BERKELEY NEWS (April 26, 2017), https://news.berkeley.edu/2017/04/26/new-message-from-the-chancellor-about-possible-coulter-
The battleground metaphor, unsurprisingly, was also used by the divisive campus speakers themselves; right before Milo Yiannopoulos’s ‘Free Speech Week’ was supposed to take off at Berkeley, he announced a “eve of battle’ press conference.” Students have also added to that narrative; in an interview with The Chronicle of Higher Education, a member of a bipartisan student organization at Berkeley, BridgeUSA, noted that “people are using our campus community and UC Berkeley as a battleground…it’s resulting in a terrible situation for our perception in the nation. It’s resulting in a terrible situation for the safety of our student body.” And, sure enough, all four of the institutions did have this perception exacerbated by non-student instigators. While students did engage in protests against the speakers at each of these institutions, ensuing violence and destruction was overwhelmingly attributed to opportunists outside of the campus community who seized the chance to engage in an

visit?utm_content=bufferfa415&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (“This is a university, not a battlefield. We must make every effort to hold events at a time and location that maximizes the chances that First Amendment rights can be successfully exercised and that community members can be protected.”

Rosie Gray, supra note 91.

See Quintana, supra note 92.

Non-students were speculated to have participated in each of the major incidents, often linked to the ensuing violence. See Ana Mari Cauce, Through Civil Debate, We Can Tackle Difficult Issues (Feb. 9, 2018), https://www.washington.edu/president/2018/02/09/through-civil-debate-we-can-tackle-difficult-issues/ (“This week, UWPD obtained credible information that groups from outside the UW community are planning to join the event with the intent to instigate violence”). See UC Berkeley Public Affairs, New Message from Chancellor About Possible Coulter Visit, BERKELEY NEWS (April 26, 2017), https://news.berkeley.edu/2017/04/26/new-message-from-the-chancellor-about-possible-coulter-visit/?utm_content=bufferfa415&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (“Groups and individuals from the extreme ends of the political spectrum have made clear their readiness and intention to utilize violent tactics in support or in protest of certain speakers at UC Berkeley”). See Stephanie Saul, Dozens of Middlebury Students Are Disciplined for Charles Murray Protest, THE NEW YORK TIMES (May 24, 2017), https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html (“When he was done and left the building, several masked protestors, who may have come from off campus, began pushing and shoving Mr. Murray…”). See Emanuella Grinberg & Eliot C. McLaughlin, Against its Wishes, Auburn Hosts White Nationalist Richard Spencer, CNN.COM (April 19, 2017), https://www.cnn.com/2017/04/18/politics/auburn-richard-spencer-protests/index.html (“Inside, hundreds of people packed Foy Hall, many of whom appeared too old to be traditional students, as Spencer delivered on his reputation for inflammatory rhetoric.”

179 Rosie Gray, supra note 91.

180 See Quintana, supra note 92.

181 See Ana Mari Cauce, Through Civil Debate, We Can Tackle Difficult Issues (Feb. 9, 2018), https://www.washington.edu/president/2018/02/09/through-civil-debate-we-can-tackle-difficult-issues/ (“This week, UWPD obtained credible information that groups from outside the UW community are planning to join the event with the intent to instigate violence”). See UC Berkeley Public Affairs, New Message from Chancellor About Possible Coulter Visit, BERKELEY NEWS (April 26, 2017), https://news.berkeley.edu/2017/04/26/new-message-from-the-chancellor-about-possible-coulter-visit/?utm_content=bufferfa415&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (“Groups and individuals from the extreme ends of the political spectrum have made clear their readiness and intention to utilize violent tactics in support or in protest of certain speakers at UC Berkeley”). See Stephanie Saul, Dozens of Middlebury Students Are Disciplined for Charles Murray Protest, THE NEW YORK TIMES (May 24, 2017), https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html (“When he was done and left the building, several masked protestors, who may have come from off campus, began pushing and shoving Mr. Murray…”). See Emanuella Grinberg & Eliot C. McLaughlin, Against its Wishes, Auburn Hosts White Nationalist Richard Spencer, CNN.COM (April 19, 2017), https://www.cnn.com/2017/04/18/politics/auburn-richard-spencer-protests/index.html (“Inside, hundreds of people packed Foy Hall, many of whom appeared too old to be traditional students, as Spencer delivered on his reputation for inflammatory rhetoric.”

181 Non-students were speculated to have participated in each of the major incidents, often linked to the ensuing violence. See Ana Mari Cauce, Through Civil Debate, We Can Tackle Difficult Issues (Feb. 9, 2018), https://www.washington.edu/president/2018/02/09/through-civil-debate-we-can-tackle-difficult-issues/ (“This week, UWPD obtained credible information that groups from outside the UW community are planning to join the event with the intent to instigate violence”). See UC Berkeley Public Affairs, New Message from Chancellor About Possible Coulter Visit, BERKELEY NEWS (April 26, 2017), https://news.berkeley.edu/2017/04/26/new-message-from-the-chancellor-about-possible-coulter-visit/?utm_content=bufferfa415&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (“Groups and individuals from the extreme ends of the political spectrum have made clear their readiness and intention to utilize violent tactics in support or in protest of certain speakers at UC Berkeley”). See Stephanie Saul, Dozens of Middlebury Students Are Disciplined for Charles Murray Protest, THE NEW YORK TIMES (May 24, 2017), https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html (“When he was done and left the building, several masked protestors, who may have come from off campus, began pushing and shoving Mr. Murray…”). See Emanuella Grinberg & Eliot C. McLaughlin, Against its Wishes, Auburn Hosts White Nationalist Richard Spencer, CNN.COM (April 19, 2017), https://www.cnn.com/2017/04/18/politics/auburn-richard-spencer-protests/index.html (“Inside, hundreds of people packed Foy Hall, many of whom appeared too old to be traditional students, as Spencer delivered on his reputation for inflammatory rhetoric.”

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environment caught between fulfilling the legal obligations of free speech and also maintaining enough revenue to stay afloat.\footnote{182}

**Conclusion.** What makes the battleground metaphor in these case sites even more critical, then, is that a battleground operationalizes in a far different manner than the functional marketplace of ideas would theoretically operationalize on campus. It still implies that there is an inherent competition in speech, thus still aligned with tenets of neoliberalism under academic capitalism theory,\footnote{183} but with a much more chaotic, adversarial twist. So, when campuses become these metaphorical ‘battlegrounds’ of ideology, resulting in unprecedented and, arguably, unsustainable expenditures—is it truly a combat zone, which fits the narrative of a free speech crisis, or instead the consequences of marketplace friction, as neoactivism purports?\footnote{184}

Based on results from the legal-historical analysis and these multiple-case study findings, the latter conclusion appears far more cogent, and chapter five expands on this argument.

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\footnote{182}{*Id.* See also Pranav Jandhyala, *I Invited Ann Coulter to Speak at UC Berkeley. Here’s Why,* THE WASHINGTON POST (April 27, 2017), https://www.washingtonpost.com/posteverything/wp/2017/04/27/i-invited-ann-coulter-to-speak-at-uc-berkeley-heres-why/, where he notes the unfortunate use of campus space and free speech protections as battleground versus a marketplace:

> It pains me to see our campus being used as a pulpit for bad actors, people whose goal is to elevate themselves by inciting violence, without a thought for the safety of students who live and attend school here…Sproul Plaza is becoming a battleground, and the ones who are left to pick up the bill of consequences is the Berkeley student body, which is vilified every day in the press for destruction that outside groups are responsible for.}

\footnote{183}{See, e.g., Slaughter & Rhoades, *supra* note 25, at loc. 592 (ebook) (“…market and marketlike behaviors are defined by competition for external resources…”).}

\footnote{184}{O’Conner, *supra* note 6, at loc. 290 (ebook), explains how market failures affiliated with neoliberal policies are hotly contested by students:

> Another distinguishing feature of neoactivists is that they recognize the failures of markets—which obscure histories, elide structural inequalities, and redistribute resources upward such that wealth becomes further concentrated—and governments that are more responsive to moneyed interests than they are to everyday citizens’ concerns, particularly those who have been marginalized.}
CHAPTER 5
CONCLUSION

This dissertation utilized both legal and qualitative research methodologies to explore a hypothesized tension occurring when the marketplace of ideas and neoliberal market behaviors operationalize in higher education. The first methodological section employed a legal-historical analysis of 65 student speech cases, spanning 1969-2019, to consider an influential public narrative attributing recent student dissent patterns with a free speech “crisis”\(^1\) in higher education. The legal-historical analysis firmly contested the idea that a free speech crisis is an accurate depiction of student expression today—and instead reaffirmed that the marketplace of ideas First Amendment metaphor, although repeatedly challenged over the last five decades, has remained steadfast in its fortification of free speech on campus. That said: the analysis also introduced a number of economic trends that developed within the same timeline (also spanning theory and operations)\(^2\) that have become salient enough in higher education operations in recent


\(^{2}\) There were three intersecting economic concepts that were introduced in the latter half of the legal-historical analysis, all gradually forging an ever-dominant presence in higher education operations within the last fifty years. These three concepts were Neoliberalism, Academic Capitalism Theory, and Neoactivism. See, e.g., Adrianna Kezar, Tom DePaola, & Daniel T. Scott, THE GIG ACADEMY: MAPPING LABOR IN THE NEOLIBERAL UNIVERSITY, 13-16 (2019) for a summation on neoliberalism in higher education as it has evolved to present day. See, e.g., Sheila Slaughter & Gary Rhoades, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION (2009) (ebook) for the seminal work on academic capitalism theory, with neoliberal behaviors interwoven in ways that would serve to perpetuate this theory’s relevance in the field. And see Jerusha O’Conner, THE NEW STUDENT ACTIVISTS: THE RISE OF NEOACTIVISM ON COLLEGE CAMPUSES (2020) (ebook), which introduces a new (yet, theoretically, consequential) phenomenon that explains postsecondary student resistance to neoliberalism in higher education.
years to pose considerable pressure on the institutional behaviors that prioritize free speech as a core institutional mission.³

Findings from the legal-historical analysis postured these competing economic influences with what was identified to be the most challenging free speech issue at present: managing external campus speakers—particularly those invited by student groups⁴—whose controversial and often politically polarizing views could stoke customary student activism at best, and widespread, expensive violence at worst. As a result of this disruptive potential, student groups and university administrators have increasingly battled over which stakeholder group should subsidize the brunt of the security costs for these volatile events.⁵ While the legal analysis indicated that institutions, and not their student groups, are largely responsible for handling these costs to preserve a marketplace of ideas,⁶ there was very little discussion on the financial

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³ As was originally hypothesized, these economic pressures foster discord in mission-driven operations as the result of an operational relationship that has been coined “The Two-Good Framework.” See Burton A. Weisbrod, Jeffrey P. Ballou, & Evelyn D. Asch, MISSION AND MONEY: UNDERSTANDING THE UNIVERSITY, 58-59 (2008).


⁵ Case law from 2016-on indicated this increasingly pervasive pattern where security fees have entered the free speech context, with four cases in this timeline (of 12) deliberating over this issue: Young America’s Found. v. Kaler, 370 F. Supp. 3d 967 (D. Minn., 2019); Mandel v. Bd. of Trs. of the Cal. State Univ., 2018 U.S. Dist. LEXIS 39345 (N.D. Cal., 2018); Young America’s Foundation v. Napolitano, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018); and College Republicans of the University of Washington v. Cauce, 2018 U.S. Dist. LEXIS 22234 (W.D. Wash, 2018).

⁶ Id.
implications of this legal obligation. These results, then, were notable as a scholarly contribution to any current public debate surrounding student speech, but the increasing costs associated with these campus speaker events left an additional research question unanswered: How do recent (2017-2019) campus speaker conflicts exhibit operative tension between the marketplace of ideas as a defense of free speech, and the marketplace of ideas as a neoliberal economic analogy?

To explore this question, chapter four employed a qualitative case study approach of four institutions—three public research universities who had endured highly publicized campus speaker conflict and both financial and legal ramifications from these incidents—and a private liberal arts institution, for contrast, to assess the implications from its campus speaker-related mishap as well. The data was collected via document analysis, and over 100 documents of varying medium, viewpoint, and length were analyzed and coded to compare/contrast emergent themes across each of the sites. Importantly, preliminary postulation during the legal-historical

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7 If anything, certain Supreme Court decisions in the analysis demonstrated a lack of receptiveness to the financial challenges that many institutions face. See Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) and Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 835 (1995).

8 The three public institutions were University of Washington, University of California, Berkeley, and Auburn University, and all were involved in a First Amendment-related legal case within the last few years. See College Republicans of the University of Washington v. Cauce, 2018 U.S. Dist. LEXIS 22234 (W.D. Wash, 2018) (University of Washington); Young America’s Foundation v. Napolitano, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal., 2018) (University of California, Berkeley); Padgett v. Auburn University, 2017 U.S. Dist. LEXIS 74076 (M.D. Ala., 2017) (Auburn University).


11 The data was analyzed in this way to remain consistent with Yin’s cross-case synthesis, which not only has similarities in execution to legal research, but also indicates “a familiarity with the prevailing thinking and discourse about the case study topic,” an observation area that influenced this dissertation in the first place. See Robert K. Yin, CASE STUDY RESEARCH AND APPLICATIONS: DESIGN AND METHODS, 199 (6th Ed., 2018).
analysis had resulted through observing a disproportionately documented focus on the legal lens of modern student speech issues. Often, the narrative reported and/or contributed to polarized discourse on students’ perception of the marketplace of ideas versus considering the infusion of neoliberal tendencies into both student speech litigation patterns\(^\text{12}\) or the enduring logistical challenges of campus speaker issues.

The case study findings proved no different. Although the documents selected for analysis are all accessible online and thus aid in informing public discourse, there was very little discussion of institutional finances in a neoliberal market system, nor were evolving fiscal behaviors ever explained by an introduction of academic capitalism theory, nor was there any mention of student dissent as a corollary of neoliberalism, as neoactivism supports. The financial implications of costly campus speaker logistics were overwhelmingly absent from the narrative, and the documents that did briefly acknowledge a potential operational issue between managing funds and managing legal and mission-oriented rights came largely from sector-specific publications\(^\text{13}\) or post-conflict task force reports by institutional stakeholders.\(^\text{14}\) As such, even a brief recognition that institutions increasingly face a difficult decision between free speech and

\(^{12}\) Two of the most recent student speech patterns observed in the legal-historical analysis involved student fees and security fees.


the costs associated with free speech is mostly limited to those already within or privy to the sector’s unique organizational structure.

And yet, while subtle or otherwise unnoticed, there were four emergent themes from the analyzed documents that collectively contributed to further confirmation that an inherent tension in the marketplace of ideas—stemming from its dual-identity as a free market-based analogy and an operational legal foundation—exists when campus speaker conflicts occur. Specifically, the four themes were (a) stakeholder incongruence in the marketplace (b) neoliberal assumptions indicative in crisis reserves, (c) price of damaged prestige, and (d) policy changes to reduce costs of reactivity, and all of the case sites furthered the subsequent breakdown of those respective themes while also serving as a point of comparison with similar institutional crises around the nation.

Through extensive interrogation\textsuperscript{15} of the themes present within the various documents, pressures from neoliberalism within higher education operations began to test the commitment to maintain a functioning marketplace of free inquiry and viewpoint. Institutional leaders vehemently advocated for free speech and civil discourse between stakeholders via repeated public addresses, while having to manage unprecedentedly tight budgets and fundraising goals.\textsuperscript{16} The case sites also greatly varied in their financial resources, both institutionally and from their...

\textsuperscript{15} See O’Leary, supra note 10, at 179.

\textsuperscript{16} President Ana Mari Cauce, of the University of Washington, presented the greatest example of this. See, e.g., Ana Mari Cauce, \textit{On Free Expression, Universities Must Light the Way} (Aug. 2, 2016), https://www.washington.edu/president/2016/08/02/on-free-expression-universities-must-light-the-way/ (just once example of her public addresses to the community calling for public discourse). \textit{And see, e.g.,} Audrey Williams June, \textit{We Analyzed 200 College-President Job Ads. Nearly All of Them Wanted This Skill}, THE CHRONICLE OF HIGHER EDUCATION (Mar. 1, 2020), https://www.chronicle.com/article/we-analyzed-200-college-president-job-ads-nearly-all-of-them-wanted-this-skill/?cid2=gen_login_refresh&cid=gen_sign_in (reporting a measured need for presidents to manage funds as a principal job of institutional leadership).
respective state/system supports, highlighting funding disparities between institutions as well as a more universally challenging situation when budgeting for protest security during (often) nonconsecutive years of particular campus strife. Of course, a lack of financial or logistical planning for campus speaker protests could have an adverse effect on institutional reputation in the event of considerable disruption—while Middlebury College, as a private institution, was particularly vulnerable to economic fallout from reputational damage, stakeholder perception and reputation were reflected in the undercurrent of financial tensions for public universities as well. In order to mitigate the reactive fees associated with law enforcement overtime costs, litigation settlements, or damaged prestige in public perception, some institutions have


18 See, e.g., Suhana Hussain, supra note 13 (providing an example of UC-Berkeley’s security enforcement costs and planning, versus Middlebury College, which had no official law enforcement or much campus speaker protest protocol prior to Murray’s speech).


attempted to proactively introduce new regulations, albeit only on non-invited campus speakers on a content-neutral basis. Still, there is little legal solution that institutions can adhere to when it comes to proactively barring student groups from inviting and hosting a public figure of their choice, which means that campus speakers will continue to present financial and ideological challenges in the sector.

This, then, is where the ubiquitous nature of this issue emerges within higher education as a whole. While these case sites all served as particularly publicized, expensive, and intense iterations of campus speaker conflict within the last few years, they will surely not be the last. However, in times when the cyclical nature of campus speech shifts to that of marked polarization, and campus speakers serve as either catalysts or aggravators of existing discord, an especially critical observation from the case study analysis is made clear: the marketplace of ideas analogy—while upholding a legal obligation to maintain free speech, as evidenced by the campus speaker operations at each of the case sites—has the potential of dissolving from an analogical marketplace to that of a battleground. And, when this analogical transition occurs in public discourse, so too do the costs mount, highlighting a rising tension as civil discourse wanes and expenses increase. Perhaps the strongest indicator of this observation occurred with Berkeley—three different stakeholders within their free speech saga used the phrasing of a free

berkeley-hardens-new-battle-lines-on-free-speech/ (reporting on the reputational impact that Berkeley dealt with, both in legacy and in its recent conflict).

speech “battleground,” and subsequently endured multi-million dollar expenditures to handle such an environment—but the presence of this new analogy at each of the case sites implies that the marketplace of ideas, when pushed past a certain point, is less transactional and more combative in operation than the predisposed neoliberal market assumptions reflected in its theoretical underpinnings, where a competition for truth, as with tangible resources, is necessary for societal progress.

5.1. Exacerbation of Marketplace Tension: Current Efforts in Policy & Law

Now, there will not always be battleground years, but with little legal alternative for institutions (and strong legal jurisprudence for students), the focus within these free speech contests and in public discourse should instead turn to the implications of campus speaker costs when these periods of inflection do occur. As mentioned previously, there remains very little analysis on implications or sustainability of these expenditures. Potentially exacerbating the

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27 See, e.g., Jared Schroeder, Shifting the Metaphor: Examining Discursive Influences On The Supreme Court’s Use of the Marketplace Metaphor in Twenty-First Century Free Expression Cases, 21 COMM. L. & POL’Y 383, 392 (2016), where he describes how the marketplace of ideas metaphor arose from Enlightenment-era ideals: Despite such differences between traditional Enlightenment thought, and Justice Holmes’s personal philosophy, his dissent in Abrams carries a strong conceptual relationship with Milton’s contentions regarding protecting the exchange of ideas, testing truth against falsity, and the ability of individuals to make sense of the world around them.

28 But see, Bauer-Wolf, supra note 24, who did acknowledge that no lasting solution has yet been put into operations to mitigate campus speaker costs.
tension between free speech and institutional funding in the near future, however, are a number of federal, state, and societal influences that have developed in response to these campus speaker incidents.

**State Efforts: Decorum over Debate**

When the University of California, Berkeley faced significant expenses prior to its September 2017 speaker slate, the University of California system aided in underwriting a percentage of the costs.29 So too did the system’s Regents speak out against President Trump’s threat of revoked federal funds, including Gavin Newsom, current governor of California.30

Other state or system reactions to campus speaker conflict, however, were far more punitive—and, largely, unaccommodating to the financial impositions that institutions face. Much of the movement from states to tackle a perceived free speech crisis on campus derived from the Campus Free Speech Act, a model bill introduced in 2017 by the conservative Goldwater Institute.31 Among many arguments presented in the model legislation were policies and guidelines that ran contrary to the handling of campus speakers at all four case sites: under these standards,32 institutions would be prohibited from cancelling controversial speakers33 or

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29 See, e.g., Watanabe, *supra* note 17.

30 Gavin Newsom (@GavinNewsom), Twitter (Feb. 2, 2017, 8:47 AM), https://twitter.com/gavinnewsom/status/827181557026689026?lang=en (“As a UC Regent I’m appalled at your willingness to deprive over 38,000 students access to an education because of the actions of a few.”)


32 Manley, Kurtz, & Butcher, *supra* note 1, at 2.

from speaking out against the views of said controversial speakers. While many of these stipulations were already identified as strong legal precedents for student speech during the legal-historical analysis, the model bill focused further on political and social accountability measures in place for all stakeholders on a public university campus:

Students will know from the moment they enter the university that they must respect the free expression of others, and will face significant consequences if they do not. An annual report on the administrative handling of these issues will either hold university presidents accountable, or be subject to public criticism for failing to do so. The overall effect will be to break the vicious cycle that has placed campus free speech in increasing peril.

While not all of the accountability measures place an overtly economic pressure on the institution, one in particular blatantly outlines that institutions would become far more vulnerable to litigation (and considerable costs of litigation) if student groups or campus speakers felt that their rights were infringed; the measure “empowers persons whose free-speech rights have been infringed to seek legal recourse and recover court costs and attorney’s fees.”


35 Manley, Kurtz, & Butcher, supra note 1, at 5.


37 Manley, Kurtz, & Butcher, supra note 1, at 5.
While this model legislation was just that in 2017—a model—iterations of this bill and other similar models have been formally adopted into numerous state legislatures.\footnote{See Brown, supra note 31 (“As of September 2019, at least 17 states have passed free-speech laws, many of which contain some elements of the model legislation”). See also Eric T. Kasper, Public Universities and The First Amendment: Controversial Speakers, Protests, and Free Speech Policies, 47 CAP. U. L. REV. 529, 531-532 (2019) (”Measures like this have been passed by state legislatures and signed into law in Arizona, Arkansas, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, North Carolina, South Dakota, Tennessee, Utah, and Virginia”).} Although an exhaustive foray into each of these policies could itself serve as a separate dissertation, there are a couple of particularly notable examples that are pertinent to this study. Arkansas, for instance, passed the Forming Open and Robust University Minds (FORUM) Act in 2019,\footnote{See PEN America, Chasm in the Classroom: Campus Free Speech in a Divided America (April 2, 2019), https://pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf (reporting that this bill was an iteration of the FORUM Act prototype published by the American Legislative Exchange Council (ALEC)). See also Forming Open and Robust University Minds (FORUM) Act, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC) (May 5, 2017), https://www.alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/;} a major factor behind the eventual moot declaration in \textit{Turning Point United States v. Rhodes}.\footnote{Ark. 92nd Gen. Assemb., Sess. 2019, Senate Bill 156 (2019). See also \textit{Turning Point United States v. Rhodes}, 409 F. Supp. 3d 677, 684 (E.D. Ark., 2019) (“In March the Arkansas General Assembly passed the FORUM Act, which prohibits state-supported universities from limiting expressive activities to only designated areas. Soon afterwards, the ASU Board of Trustees repealed the [plaintiff contested] Policy”).} This bill also made clear that any student or student group feeling restricted from acting within their First Amendment rights was encouraged to pursue legal recourse\footnote{Ark. 92nd Gen. Assemb., Sess. 2019, Senate Bill 156, 7-8 (2019).} and, as the legal-historical analysis and case studies showed, student suits on this topic have been largely successful.

Other states, such as Wisconsin, opted to focus even more substantially on disciplinary measures for students whose participation in campus protests moved beyond a certain threshold of disruption.\footnote{Wisc. Legis. Assemb., A-444. Reg Sess. 2019-2020 (2019).} Wisconsin’s legislation is particularly stringent—it essentially gives student dissenters three demerits prior to expulsion.\footnote{Id. at 2:} It also calls for members of the campus community
to serve as reporters in order to better identify and discipline the students involved. This operational burden on disciplinary measures, often for considerable numbers of student activists at a time, was something that Middlebury College had to take on in the aftermath of its Charles Murray event. Middlebury disciplined nearly 70 students, including some suspensions, but it is notable that the overall measures (a) were still not punitive enough to satisfy Charles Murray, and yet (b) the long, multi-step investigative process itself resulted in decreased mental health and feelings of lacking institutional support by many of the involved students.

Additionally: state-mandated provisions for free speech, such as educational materials for various stakeholders and disciplinary procedures undertaken by the institution, still carry inherent costs, and this financial burden comes in direct contrast with consistent declines in state

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The policy must require a formal investigation and disciplinary hearing the second time a student is alleged to have interfered with the expressive rights of others. If a student is twice found responsible for interfering with the expressive rights of others at any time during his or her enrollment, the student must be suspended for a minimum of one semester…a third time, the student must be expelled.

44 *Id.* ("The bill also requires the policy to allow any person to make a report that another person has violated the policy").


46 Sarah Asch, *Two Years After Murray, Students Reflect on the Disciplinary Process*, The MIDDLEBURY CAMPUS (Mar. 21, 2019), https://middleburycampus.com/44012/news/two-years-after-murray-students-reflect-on-the-disciplinary-process/ ("[Students] reported that going through the judicial process after the protest negatively impacted their mental health, made it more challenging to focus on their studies and permanently changed the way they view the college and administration").


Develop materials, programs, and procedures to ensure that those persons who have responsibility for discipline or education of students, such as administrators, campus police officers, residence life officials, and faculty, understand the policies, regulations, and duties of state-supported institutions of higher education regarding free expression on campus…

48 Wisc. Legis. Assemb., A-444, Reg Sess. 2019-2020, 6 (2019) ("Include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who engages in violent or other disorderly conduct that materially and substantially disrupts the free expression of others").
funding for public higher education.\textsuperscript{49} Such legislation, then, is consistent under neoliberalism—where state funds decrease, private revenue streams increase, and institutions compete for those revenue channels\textsuperscript{50}—but they simultaneously compound existing legal pressures for institutions to finance free speech, while \textit{adding} to this tension in the form of leveraged funding or tarnished public reputation (or both). These measures are also all-encompassing of all state universities within the respective state; this allows for far less distinction made between unique circumstances and protest environments, despite the four case sites demonstrating varied experiences and unanticipated interactions with non-students as well.\textsuperscript{51} Kasper also noted the irony of states adding costs to the marketplace of ideas while often concurrently reducing the funds needed to meet these costs:

\begin{quote}
\ldots Increasing the educational opportunities regarding the freedom of expression will take additional funding to pay for materials, programming, and personnel\ldots if public universities must bear these costs without additional state support, it requires them to do at least one of three things: raise student tuition, engage in additional fundraising, or make cuts to other university functions. If state legislatures are truly committed to the First Amendment rights of all parties, they must recognize that protecting these rights is not free for institutions of higher education.\textsuperscript{52}
\end{quote}

Of course, legislative pressures from states are not the sole potential aggravators when it comes to the marketplace of ideas operationalizing within a dominant neoliberal market in higher education.

\textsuperscript{49} See Kasper, \textit{supra} note 38, at 583.

\textsuperscript{50} See, e.g., Kezar, DePaola, & Scott, \textit{supra} note 2, at 77 (“Privatization is achieved through market-based values that defund public higher education and encourage a competition for scarce resources, which also reinforces individualism”).

\textsuperscript{51} See e.g., Liam Adams, \textit{Heckling is a Staple of Controversial Campus Speeches. Should Colleges Intervene?} \textsc{The Chronicle of Higher Education} (Oct. 19, 2017), https://www.chronicle.com/article/Heckling-Is-a-Staple-of/241504 (reporting that many scholars worry about these pieces of state legislation, noting that they may be overly far-reaching). \textit{See also} PEN America, \textit{Chasm in the Classroom: Campus Free Speech in a Divided America}, 74 (April 2, 2019), https://pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf (arguing that some of these bills also have reporting mandates that could easily fall vulnerable to politicization).

\textsuperscript{52} See Kasper, \textit{supra} note 38, at 583.
education. Conflicting federal demands from the Trump Administration also emerged in recent years, with near-unprecedented scrutiny,\(^5\) to add an additional level of funding-leveraged accountability to the free speech/finance context.\(^5\) And, even with election results that will overturn such directives, the climate for discord may remain in years to come, further emboldened these state legislative efforts.\(^5\)

**Federal Efforts: Free Speech, But Without Dissent or Anti-Semitism**

Rhetoric from various members of the federal government in 2017-2018—criticizing the overall state of free speech on campus\(^5\) and, chiefly, criticizing students,\(^5\) soon evolved into more official efforts to hold institutional stakeholders accountable for any perceived affronts to First Amendment protections. One shift included increased oversight and involvement in campus

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\(^5\) One example of this criticism came from Attorney General, Jeff Sessions, at a speaking engagement held by TurningPoint USA in 2018. See, e.g., Chris Quintana, *Colleges are Creating ‘A Generation of Sanctimonious, Sensitive, Supercilious Snowflakes,’ Sessions Says*, THE CHRONICLE OF HIGHER EDUCATION (July 24, 2018), https://www.chronicle.com/article/colleges-are-creating-a-generation-of-sanctimonious-sensitive-supercilious-snowflakes-sessions-says/.
speech matters by both the Department of Justice and the Department of Education, spurred on by heightened media coverage and the work of purposive litigants, such as FIRE. While supposedly bipartisan in intent, however, the circumstances behind the federal investigations reflect a politicization of the issue; Fischer reported that “almost every incident that has grabbed the national spotlight has involved a conservative speaker or cause,” and such partisan orientation was also exhibited in the recent case law analyzed in this dissertation.

President Trump’s March 2019 Executive Order, “Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities,” also echoed many of the criticisms disproportionately espoused by identifying Republicans: that higher education is occasionally intolerant to various viewpoints, and that a postsecondary experience has diminishing value while coming at an increasingly expensive cost. Yet, as the case studies demonstrated, mandating free inquiry and placing the blame and subsequent responsibility of


59 See, e.g., Mangan, supra note 53.


61 Id. Fischer also noted that the state legislations were also largely “proposed by Republican lawmakers.”


63 See, e.g., The Knight Foundation & Gallup, The First Amendment on Campus 2020 Report: College Students’ Views of Free Expression, 5 (2020), https://knightfoundation.org/wp-content/uploads/2020/05/First-Amendment-on-Campus-2020.pdf (reporting that ‘partisan students’ views of the five First Amendment freedoms also differ significantly. Democrats (63%) and independents (59%) are more likely than Republicans (52%) to say freedom of speech is secure”).

64 See Fischer, supra note 60 (“Opinions of higher education are poor and worsening especially among conservatives. Fewer than four in 10 Republican voters have confidence in higher ed, a drop of 17 percentage points in just three years”). And see 2020 College Free Speech Rankings, FIRE.ORG, 30 (Sept. 29, 2020), https://www.thefire.org/research/publications/student-surveys/2020-college-free-speech-rankings/2020-college-free-speech-rankings-view-rankings/ (“In 2015, 54% of Republicans said higher education had a positive effect. By 2017 this proportion had decreased to 36%, and in 2019 it stood at a dismal 33%”).
lessening college affordability on the institutions—for instance, the order specifically instructs institutions to “take into account likely future earnings when establishing the cost of their educational programs”\(^6^5\)—engenders a tension between free speech and financial behaviors that is all but unsustainable.

Multiple directives that emerged from the Trump Administration after March 2019 also appear at odds with the focus on unequivocal free speech, further muddying the response and operations of institutions saddled with them.\(^6^6\) In December 2019, for instance, President Trump published another executive order predominantly catered toward campus climate; this time, however, the order sought preventative measures against acts of anti-Semitism, in which he noted that “students, in particular, continue to face anti-Semitic harassment in schools and on university and college campuses.”\(^6^7\)

Managing this harassment, while also ensuring that all constitutionally protected free speech is permitted to occur in order to sustain federal funding, poses a somewhat divergent operational focus for public institutions to navigate.\(^6^8\) Auburn University, as a case site, provided a strong example of this. In early April 2017, Auburn was forced to investigate an unofficial

\(^{6^5}\) Exec. Order No. 13864, 84 FR 11401, 11401 (2019).


\(^{6^7}\) Exec. Order No. 13899, 84 FR 68779 (2019).

\(^{6^8}\) See Exec. Order No. 13864, 84 FR 11401 (2019) (Executive order on free speech). See Exec. Order No. 13899, 84 FR 68779 (2019) (Executive order on anti-Semitism). And see Mangan, supra note 66, who pondered how these executive orders could work in conjunction with one another:

How, for instance, should a campus respond when white nationalists declare that “Jews will not replace us,” as they did in 2017 during a violent confrontation in Charlottesville, Va.” And will colleges that are worried about running afoul of the latest order be more likely to punish activists who criticize Israel’s occupation of the West Bank? Getting those decisions wrong could mean losing a lot of federal money.
student organization called “Auburn White Student Union,” an alt-right group that many associated with “the recent emergence of anti-Semitic flyers on the Alabama campus.” Shortly after this investigation was started, however, Auburn University was legally required to host a talk from Richard Spencer, a non-student member of the alt-right whose anti-Semitic views are well-documented. The paradoxical nature of these executive orders, then, is clear—but the threat of federal funding loss leaves little option but to attempt to balance their respective demands, while new legal questions continue to emerge about words and their ability to incite violence following the storming of the United States Capitol Building on January 6, 2021. PEN America, for instance, reported that there are “debates afoot among legal scholars about whether the definition of incitement should be adjusted to allow the law to better deal with dangerous rhetoric” from leaders or, potentially, campus stakeholders deploying harmful expression.

Another conflicting trend has also continued to take shape, and involves both presidential influence and state legislation: declining tolerance for dissent. The election of Donald Trump, while not the sole catalyst for neoactivist responses to social, political, or economic issues within

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70 Id.


73 Id. (“As a legal matter, however, the standard for incitement is very stringent and narrow, requiring intentional advocacy of violence, and that violence be both imminent and likely.”)
the last decade,\textsuperscript{74} sparked unprecedented numbers of protests around the nation, including on college campuses.\textsuperscript{75} O’Conner reported that, by the same month that Trump introduced his executive order on free speech (March 2019), “the online protest tracker CountLove had identified 12,991 protests since Trump’s inauguration.”

In response—but particularly after 2017, aligned with the timing of highly publicized campus speaker protests occurring at the each of this study’s case sites (and at other campuses), increasing numbers of state lawmakers have attempted to pass legislation that cracks down on protests.\textsuperscript{76} PEN America reported on these metrics:

Out of a total of 116 bills proposed from the beginning of 2015 to the end of 2019, 23 have become law across 15 states. Nearly a third of all states have implemented new regulations on protest related activity in the past five years. Starting in 2017, PEN American has found, passage rates for such bills are approximately 20.9 percent.\textsuperscript{77}

However, as with recent litigation patterns on student speech and the executive orders introduced by the Trump Administration, these bills, whether successful or not, have all seemingly followed instances where protesters specifically railed against conservative views or policies introduced by a Republican-run government.\textsuperscript{78} PEN America argued that this inclination

\textsuperscript{74} See, e.g., O’Conner, supra note 2, at loc. 348-357 (ebook) (citing pre- Trump social movements such as the “2013 March on Washington for Gun Control,” “People’s Climate March in 2014,” and the “Occupy Wall Street Movement” in 2011).

\textsuperscript{75} Id. at loc. 338 (ebook) (“People who had never before been politically active are showing up to protests, attending organizing meetings, and running for office”). See also PEN America, Arresting Dissent: Legislative Restrictions on the Right to Protest, 5 (May 2020), https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf. The sudden increase in the number of anti-protest bills introduced at the state level in 2017 coincided with a burst of public protests following the election of President Donald Trump, from the Women’s March the day after the 2017 inauguration to spontaneous demonstrations against the Trump administration’s travel ban at airports across the country in early 2017.


\textsuperscript{77} Id.

\textsuperscript{78} See, e.g., O’Conner, supra note 2, at loc. 328-338 (ebook). See also PEN America, supra note 76, at 4.
for politicization is dangerously “verging on viewpoint specific restraints of free speech,” but there have been very few legal challenges to the successfully passed bills. ⁷⁹

And, in the absence of legal tests for these anti-dissent bills, rhetoric from President Trump continued to present the concept of dissent as a partisan phenomenon, where protests from left-leaning, liberal citizens are often unpatriotic ⁸⁰ and destructive, a sharp contrast from those with right-wing views. ⁸¹ Such a narrative, clearly echoed at the state level by certain lawmakers, suggests that these efforts to constrain protests and social unrest may continue into the future—and schools will be a central target of blame when that occurs. ⁸² As recently as September 2020, for instance, President Trump argued that widespread, national protests were in and of themselves an iteration of heckler’s veto for his supporters:

> Whether it is the mob on the street, or the cancel culture in the boardroom, the goal is the same: to silence dissent, to scare you out of speaking the truth, and to bully Americans into abandoning their values, their heritage, and their very way of life…as many of you testified today, the left-wing rioting and mayhem are the direct result of decades of left-wing indoctrination in our schools. ⁸³

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⁷⁹ PEN America, supra note 76, at 4 (“Out of the 23 bills that have become law, only two have actually been challenged in court thus far…”). See also Nora Benavidez, First Amendment Rights—If You Agree With The President, THE ATLANTIC (June 1, 2020), https://www.theatlantic.com/ideas/archive/2020/06/first-amendment-rights-if-you-agree-with-the-president/612211/?utm_source=newsletter&utm_medium=email&utm_campaign=masthead-newsletter&utm_content=20200606&silverid-ref=NjAxNzE4OTQ4MzE2S0, arguing that these bills, whether challenged legally in coming years or not, may serve as deterrents for folks exercising their First Amendment right to protest:

> The unfortunate likelihood is that those laws will place a heavy burden on civilians to weigh their civic interest in exercising First Amendment rights against the very real potential of being arrested or jailed. That’s a betrayal of a First Amendment that works for all.


⁸² Id.

⁸³ Id.
Such disparagement for dissent by citizens with adverse views, however, is once again indicative of a finding from the legal-historical analysis—that levels of political polarization and opposition spike occasionally to what Blasi referred to as a “pathological” age, where the “existence of certain dynamics [emerge] that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe,” particularly by members of the federal government. It is during these times, according to Blasi, that the tenets of the First Amendment for all societal participants should be re-affirmed by the courts if needed; and the legal-historical analysis suggested that such strong jurisprudence, particularly for student activists, would indeed withstand these challenges.

Additionally, as of this writing, incumbent president Donald Trump was defeated by democratic challenger-turned-President-Elect, Joe Biden. With this change in executive leadership, certain executive orders and other initiatives, which had gained so much momentum during the Trump Administration, will be reversed in time. One of those executive reversals, for instance, has already dealt a fatal blow to the Presidential Advisory 1776 Commission that


85 *Id.*

86 *Id.* (“Those dynamics may operate primarily in the legislative or executive branches of government…”).

87 *Id.* at 453.

88 See, e.g., Anderson, *supra* note 55 (reporting on the potential change of climate that Biden’s election win may have on higher education discourse).

the Trump administration had formally created in November.\(^9\) This commission would have also added a considerable challenge to the free speech/school funding paradigm, as it once again leveraged federal funding to ensure that public institutions’ curriculums emphasize patriotism (replete with historical inaccuracies)\(^9\) and prohibit the promotion of diversity and inclusion scholarship, including the teaching of critical race theory (CRT).\(^9\)

This shift may be telling. Wright argued that cyclical state legislative pressures on higher education operations may also wane in the event of reduced fervor, when “reasonable legislators come to see that when they short-change the university because of some development on campus they do not like, the ultimate harm is to the young men and women of the state, and to the state itself.”\(^9\) This may eventually lend itself to reversals of more anti-dissent bills in the future. However, this is not a guarantee, and already there are Republican-led states that appear ready to continue the fight—Governor Kristi Noem of South Dakota, for instance, has recently pushed for an overhaul of the civics requirements in her state, complete with patriotic insignia around the schools and a curriculum where students learn “‘why the U.S. is the most special nation in the history of the world.’”\(^9\)


\(^9\) Id. (“The document lacks citations, fails to mention Native Americans entirely…and bemoans the ‘radicalization of American politics’ from the 1960s onward.”)


That said: 2020 alone brought with it a series of unprecedented challenges to the nation, spanning social issues and economic strains, and higher education is not immune to them. As such, the following section breaks down a few of what could be impending financial stressors into the future, even with new federal leadership and/or potential civility at the state level.

**COVID-19 and Online Culture: Impending Financial Stressors**

Now, it is not the intention of this dissertation to prophesize on the financial, social, and legal future of the sector based on events of one year; however, 2020 has presented multiple circumstances that will, in all likelihood, continue to impact higher education in ways that reflect the operational free speech and economic tension observed in this study.

**Costs of COVID-19.** The rapid response within higher education to the COVID-19 pandemic in March 2020 and in subsequent months is one that serves as both a deviation from student speech patterns and an intensified outlier for institutional finances. The first abnormality, namely impacting campus demonstrations, is the reduced number of students on physical college campuses around the nation this year.95 O’Conner both noted the profusion of student-led protests and other activist efforts on college campuses before, during, and after the 2016 election,96 drawing publicized attention of myriad stakeholders. Given that 2020 was an election year, it was likely in pre-COVID operations that similar demonstrations would have emerged in physical campus spaces.97 Yet, as the following section purports, student activists and others

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96 O’Conner, supra note 2, at loc. 338 (ebook).

97 See also Christopher J. Broadhurst & Georgianna L. Martin, “Radical Academia?” *Understanding the Climates for Campus Activists*, 167 NEW DIRECTIONS FOR HIGHER EDUCATION, 12 (2014) (arguing that student activists in the 21st century, while incorporating new mediums (such as social media) to protest social issues, many still “more
have largely pivoted to off-campus or entirely online formats,\(^9^8\) which may affect later perceptions about student investment on timely social issues\(^9^9\) or protest patterns in general.

While shifts in the number of physical student protests on campus during a polarizing year hold certain implications for activism trends in the future, perhaps the most obvious and damning institutional drawback to COVID-19 is financial in nature. *The Chronicle of Higher Education*, along with Ad Astra and Davidson College, surveyed 162 colleges of various type and size to better assess the financial toll of COVID-19.\(^1^0^0\) The results suggested shrinking resources at nearly all levels of institutional operations:

Many colleges enrolled significantly fewer students than they would have in a typical year, cutting into tuition revenue at a time when higher education was already desperate to attract bodies. And although getting to the end of the [Fall 2020] semester prevented institutions from having to issue refunds on room-and-board fees, occupancy was down in residence halls across the country. And then there were the financial hits from canceling fall athletics, buying personal protective equipment for faculty and staff members, and retrofitting buildings for spread-out classes.\(^1^0^1\)

Evident in both the legal-historical analysis and the case study findings were the operational effects of decreased funding for higher education, where institutions increasingly commonly utilize such long-practiced tactics as marches, sit-ins, teach-ins, and street theater to further their agendas”.

\(^9^8\) See, e.g., Bautista *supra* note 95. *See also* Courage, *supra* note 95:
Before the COVID-19 pandemic, activism took many forms, often involving large demonstrations, door-to-door canvassing, or asking strangers for signatures on petitions. But the arrival of the novel virus has shifted a lot of these traditional practices away from in-person contact.

\(^9^9\) See, e.g., Bautista *supra* note 95. (“While the conditions that shape the ‘new normal’ have made it exceedingly difficult for community members on campus to safely organize, they have only made activism and advocacy more urgent”).


\(^1^0^1\) *Id.*
adapted to a more corporatized and competitive structure reflective of neoliberalism.\textsuperscript{102} The financial drawbacks of COVID-19 will undoubtedly serve to exacerbate those diminished revenue streams and responsive neoliberal behaviors. Of course, a major implication of such a massively disadvantageous fiscal catalyst in the sector is that not all institutions may be able to weather it.\textsuperscript{103} Or, to combat these losses and avoid closures, the most afflicted institutions may have to operate in even more privatized, revenue-oriented ways, including but not limited to more contingent staff, added “performance and accountability systems,”\textsuperscript{104} and faculty whose research is increasingly targeted to secure external funding.\textsuperscript{105} Even now, university research agendas are trending in that direction; Ellis reported that research has typically been “integral to how colleges showed their impact on their local economies…the pandemic may throw such dynamics into sharper relief by exacerbating divisions in institutional resources.”\textsuperscript{106} And, at that point, what happens to mission-driven endeavors that are less than profitable?

After all, each of the four institutions in the multiple-case study demonstrate susceptibility to the financial dilemma beset by COVID-19. According to the survey results from \textit{The Chronicle of Higher Education}, revenue loss has been particularly prevalent at small, private

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\item \textsuperscript{102} See, e.g., Kezar, DePaola, & Scott, \textit{supra} note 2, at 77.
\item \textsuperscript{103} See, e.g., Carlson, \textit{supra} note 100 (reporting that “the survey confirms some assumptions about the pressures colleges are facing and indicates that institutions with size, prestige, and higher graduation rates…will pull away from smaller, poorer institutions”).
\item \textsuperscript{104} See, e.g., Kezar, DePaola, & Scott, \textit{supra} note 2, at 79.
\item \textsuperscript{105} \textit{Id.”} (“Instead. Individual faculty stars are refashioned into entrepreneurs and rewarded for bringing in substantial grants, patents, and licenses, regardless of the focus of the projects”).
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institutions, like Middlebury College.\textsuperscript{107} While prestige was considered a ““preservative effect,””\textsuperscript{108} and Middlebury’s exclusivity may aid in its ability to combat losses from COVID-19,\textsuperscript{109} it places even more economic influence on the ability of private institutions to maintain a strong reputation. Campus speaker conflict, then, may pose even greater risk in the future. The large public universities in this study may also face financial issues later on due to revenue shortfalls at both state and institutional levels. Over 60 percent of doctorate-granting, NCAA-affiliated schools with football, like Auburn University, lost critical athletics-based funds this year.\textsuperscript{110} Other institutions may face even greater deficits in state subsidization due to revenue loss in other essential sectors, such as social security or natural disaster management.\textsuperscript{111}

All of these factors contribute to a heightened focus on institutional finance and streams of remaining revenue, which certainly may act as a financial stressor moving forward—and, in the context of neoactivism, may eventually result in eventual objections by students to increased evidence of neoliberal behaviors in academia.\textsuperscript{112} Additionally, it is important to note that student

\begin{footnotesize}
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\item \textsuperscript{107} Carlson, \textit{supra} note 100.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{110} Carlson, \textit{supra} note 100.
\item \textsuperscript{111} \textit{Id.}, explaining the state subsidization issues as a result of COVID-19 and other influences, including wildfires, which impacted many states in the west in 2020, including California and Washington: Many states already have significant obligations to public retirement accounts and may have mounting bills associated with their responses to the coronavirus, even as the economic crisis surrounding COVID-19 undermines the tax base. In Oregon in particular, the state must also cope with the financial impact of the devastating summer wildfires.
\item \textsuperscript{112} O’Conner, \textit{supra} note 2, at loc. 290 (ebook). \textit{And see Tuition Strike: Spring 2021} (Dec. 2020), https://docs.google.com/forms/d/e/1FAIpQLSfCIW_Qre0b4iULsk-DeKpAWFmZFZptuJR8cn0bLPa8HP2w/viewform (as of this writing, 1,629 Columbia University students have signed an online petition to participate in a tuition strike in the spring if Columbia refuses to cut tuition costs, increase financial aid and grants, cooperate with campus unions and transparently engage in law enforcement reallocation and business/research dealings that better benefit the community of West Harlem. It should also be noted that the students are advocating for these changes but advocating against financing these changes in manners consistent with privatization and academic capitalism; for instance, the petition maintains that expenditures needed
\end{enumerate}
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activism, regardless of executive leadership and the physical ability to congregate on campus, has not slowed; if anything, events of summer 2020, which shed renewed focus and criticism on societal inequalities in the United States, ensured that “the urge to organize and advocate for the communities impacted by racial and economic inequality is more powerful than it has ever been.”

**Online culture.** In the midst of COVID-19, then, many student activist efforts and other discourse—including discourse on (virtual) campus speakers—moved either online, off-campus, or utilized a hybrid of the two. PEW Research Center, for instance, conducted an activism-related survey in June 2020, amidst fierce public outcry against police brutality after the deaths of George Floyd and others, and noted that “over half of social media users ages 18 to 29 (54%) say they have used [social media] in the past month to look for information about rallies or protests happening in their area.” Higher numbers of these social media searches were also found among the Black population and with those identifying as Democrats.

Adding to social media utility during this period of a particularly polarized climate were students who, even at home, sought to hold their institutions accountable for their response to these issues. Over the summer, Anderson reported that student activists kept a close watch on their universities from a distance via social media, and this has extended to the current semester:

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113 See, e.g., Bautista *supra* note 95.

114 Brooke Auxier, *Activism on Social Media Varies by Race and Ethnicity, Age, Political Party*, PEW RESEARCH CENTER (July 13, 2020), https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/ (also reporting that these metrics lowered as age increased; the 30-49 age group had 36 percent, at 50-64 it was 26 percent, and 65-plus was 20 percent).

115 *Id.* Hispanic populations also utilized social media for protest searches more than White populations in the survey.
Students at colleges across the U.S. have been actively watching and critiquing the words spoken and steps taken by administrators at their colleges to address [George] Floyd’s death and the larger issues of racism and white supremacy in this country. They have monitored the social media posts of their peers for offensive language and demanded their universities cut ties with local police departments.\textsuperscript{116}

While social media has been an enormously helpful tool in maintaining student activism and, in regard to institutional operations, iterations of neoactivism online,\textsuperscript{117} it also means that institutions are still not impervious to free speech conflict even in a virtual format, nor the partisanship or publicity that routinely accompany those issues. And, as the case studies indicated, these issues may carry an economic impact. For instance, Wichita State University cancelled what was going to be a virtual commencement speech by Ivanka Trump in June, once again reflecting institutional pressures stuck between free speech and social responsibility that students were clamoring for this summer.\textsuperscript{118} Ivanka Trump accepted the decision, but noted her dismay in a tweet critical of higher education and general “cancel culture.”\textsuperscript{119} This ire also reportedly extended to a prominent donor of Wichita State: Swaim and Lefler noted that Trump’s virtual dis-invitation “threatens a multi-million dollar relationship with Wichita’s largest private


\textsuperscript{117} \textit{Id.}, reporting that students are still able to challenge their institutions to focus on social good in a virtual format: While most students are not on campus and able to lead demonstrations directed at their own colleges, the students believe they are uniquely positions to demand institutional responses to racism in American society and use the strength and platforms of their student-led organizations and leverage their colleges’ donor networks to support organizations actively demonstrating and lobbying for change.

\textsuperscript{118} See, e.g., Jack Stripling, When Ivanka Trump was ‘Canceled,’ Calls Came to Cancel Wichita State’s Chief, Too, THE CHRONICLE OF HIGHER EDUCATION (June 10, 2020), https://www.chronicle.com/article/When-Ivanka-Trump-Was/248970.

\textsuperscript{119} Ivanka Trump (@IvankaTrump), Twitter (June 5, 2020, 5:13 PM), https://twitter.com/IvankaTrump/status/1269044636590497792 (“Our nation’s campuses should be bastions of free speech. Cancel culture and viewpoint discrimination are antithetical to academia”).
corporation, Koch Industries.” The highly conservative, free-market advocating Koch brothers have been linked to agenda-driven institutional funding operations at many other campuses as well. Thus, even without legal standing, Ivanka Trump’s dismissal as a virtual campus speaker may still bring financial and operational obstacles to the institution.

While the legality of student or institutional expression online or off-campus remains outside the scope of this dissertation, it has been made evident that the shift to mostly virtual learning and campus discourse is still not without its First Amendment-related issues for institutional operations, some which may muddy otherwise strong student speech jurisprudence. And, combined with impending financial struggles from the COVID-19 pandemic, the tension


121 See, e.g., Dave Levinthal, Koch Foundation Proposal to College: Teach Our Curriculums, Get Millions, THE CENTER FOR PUBLIC INTEGRITY (May 7, 2018), https://publicintegrity.org/politics/koch-foundation-proposal-to-college-teach-our-curriculum-get-millions. (reporting that in 2012, the Koch brothers “combined to spread more than $12.7 million among 163 colleges and universities.” However, as with Florida State University, these massive donations often come only under the condition that certain classes syllabi, faculty hiring, etc., are ideologically oriented under the Koch brothers’ neoliberal principles).

122 See, e.g., Swaim and Dion Lefler, supra note 120.

123 Such a topic may become increasingly more important to research as COVID-19 continues to shape how many institutions will work and study in the long-term, thereby impacting the nature of student speech. See, e.g., Robert Trager, Susan Dente Ross, & Amy Reynolds, THE LAW OF JOURNALISM AND MASS COMMUNICATION (6th ed., 2018). Robert K. Yin. CASE STUDY RESEARCH AND APPLICATIONS: DESIGN AND METHODS, 121 (6th Ed., 2018) (ebook) (arguing that there have been somewhat inconsistent rulings for off-campus or online student speech regulation ever since Morse v. Frederick in 2007, which in itself blurred Tinker doctrine that “only when speech inside or adjacent to the school during school hours disrupts school activities may it be punished”). See Morse v. Frederick, 551 U.S. 393 (2007) (divisive ruling that the suspension of a high school student who held up a profane poster during a televised event/off-campus field trip was constitutional). Rulings on online posting, especially with college-aged students, have also emerged in decisions that seemingly contradict Tinker v. Des Moines and Healy v. James. See, e.g., Keefe v. Adams, 840 F. 3d 523 (8th Cir., 2016) (ruling that a nursing student, after making unprofessional and unnerving Facebook posts, was permissibly removed from the program with no infringement on free speech). And See, e.g., Tatro v. University of Minnesota, 816 N.W. 2d 509, 521 (Minn., 2012):

We acknowledge the concerns expressed by Tatro and supporting amici that adoption of a broad rule would allow a public university to regulate a student’s personal expression at any time, at any place, for any claimed curriculum-based reason. Nonetheless, the parties agree that a university may regulate student speech on Facebook that violates established professional conduct standards.
between a decidedly active (virtual or otherwise) marketplace of ideas and neoliberal market behaviors may intensify to unprecedented levels.\textsuperscript{124}

\section*{5.2. Concluding Recommendations and Future Research}

Grewal and Purdy argued that neoliberalism, while largely linked to economic behavior, “is also associated with a kind of ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally ‘economic’ areas.”\textsuperscript{125} As this dissertation explored, such ideological expansion has increasingly operationalized in the context of institutions’ efforts to maintain a marketplace of ideas when controversial campus speakers—and their financial liabilities—challenge strong legal and mission-oriented theoretical underpinnings. One final question emerged, then: what might administrators at institutions do in order to reconcile the increasing pressures of free speech and neoliberal market demands?

At the institutional level, much of the effort to mitigate high-profile (and often, high-cost) speaker conflict has focused on both supporting and training students to engage in effective forms of activism. This is important due to the nature of student activism in a postsecondary climate, when freshmen typically become part of a larger and more diverse class demographic than ever before; Pascarella et. al, for instance, cited empirical evidence that experience within diverse environments is “significantly and positively associated with growth during college in


orientation toward social activism or agency.”

Even more impactful than diversity in the classroom, however, was activism as a result of participation in peer-oriented extracurricular activities, which adds to findings from the legal-historical analysis where campus speaker conflict typically parsed ideologically differing student groups against one another.

Activism and dissent from students, then, is unequivocally guaranteed to occur on a college campus (whether physical or virtual), and subsequent actions from the case sites indicate that institutions have accepted that reality and instead have focused on ways to maintain a marketplace of competing ideas versus a battleground. At Middlebury College, for instance, all freshmen are now required to take orientation workshops on activism within the confines of the college’s reworked “Policy on Open Expression.” At the University of California, Berkeley, students took on more of a commanding role and formed multiple registered student organizations, such as BridgeUSA and Berkeley Conservative Society, to provide events for students to engage in critical discourse on polarizing social topics. Other institutions, including Auburn University and University of Washington, have leaned heavily into counter-

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127 Id. at 482 (“Interactional diversity had a substantial positive influence on social/political activism, while classroom diversity had a very modest positive influence that was, nevertheless, statistically significant”).


130 Id. (“BridgeUSA…has arranged a series with the university called ‘Conversations Across Political Divides,’ in which two parties with different views on one issue will sit and discuss it”).
programming when controversial student group initiatives or speakers arise. Many community members at the University of Washington, for instance, promoted and attended annual Polynesian Day celebrations instead of a concurrent “Affirmative Action Bake Sale” that the UW College Republicans put on in May 2019. From a legal and instructional standpoint, providing counter-programming or information on best practices for student activism when controversial issues take place is advisable, although future research should consider (a) the efficacy of these efforts on student dissent patterns in the long-term, (b) the amount of money and time needed to provide effective resources, which may vary across institutions, and (c) how these practices may need to adapt to a virtual campus, where activism resoundingly still exists, but where First Amendment jurisprudence for students is still evolving.

However: the legal-historical analysis, followed by the multiple-case study, also explored the concept of neoactivism, where students respond and object to perceived neoliberal behaviors in academia. This does not always end in chaos—O’Conner argued that neoactivism has the potential to “culminate with not only the university and student supporting and strengthening one another…but also with their empowering and emboldening one another as


133 Id. (Across the pathway and to the right, the UW College Republicans (UWCR) Affirmative Action Bake Sale stood in the shadow of Poly Day’s celebration”).

134 For a note on the research avenue pertaining to online/off-campus student activism efforts: See Trager, Ross, & Reynolds, supra note 123.

135 O’Conner, supra note 2, at loc. 260 (ebook) (“While neoliberalism seeks to divorce people from their histories and to discount legacies of injustice, neoactivists are interested in the history of student activism…’”).
powerful political actors in a broader public sphere.”136 Yet, it *does* suggest an enduring reciprocity between activism and neoliberalism, and therefore the potential of costly conflict is also present, particularly when partisan figures from outside the campus community add pressures to the legal, financial, and social climate of an institution.

Thus, perhaps just as important as preparing students with tools for effective discourse and activism, institutional stakeholders should look more critically at certain financial realities that may stoke such activism in the first place. The case site circumstances emphasized that neoliberalism and its current trajectory within higher education operations is hardly maintainable,137 and financing free speech while managing funding threats or funding losses will only serve to exacerbate that course.138 Kezar, DePaola, and Scott also cited doubts for the long-term ability for institutions to balance mission and revenue when tasked against these economic trends, particularly when it comes to managing various stakeholders:

*We argue that the higher education enterprise, at its core, is a relational and people-driven enterprise and that the exploitation of the people that support and maintain the enterprise is not sustainable or ethical.*139

Greater advocacy at institutional, state, and federal levels, then, is needed to counter diminished (and often partisan) skepticism of higher education’s worth,140 and to advocate for

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136 *Id.* at loc. 513 (ebook).


138 *See, e.g.*, Kasper, *supra* note 38.

139 Kezar, DePaola, & Scott, *supra* note 2, at 3.

increased subsidization (and for elected officials who champion education funding) in order to
place less of a financial burden on the student.141 Student debt, in particular, is an area that will
need greater support, but “increasing public funding for education is critical for ameliorating
faculty and staff working conditions, addressing student debt, making public higher education
affordable, and other means of advancing equity.”142

There is also an emergent body of research that speaks to the proliferation of collective
bargaining efforts at all levels of the institution, in part a tangible response to privatization
alongside neoactivism.143 The recent judicial precedent of Janus v. American Federation of
State, County, and Municipal Employees, Council 31, as mentioned in the legal historical
analysis, creates a considerable area for future research if/when its decision reaches the context
of higher education.144 However, collective bargaining’s ties to First Amendment rights,145 as

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141 This student-focused effort will aid in the doubt and cynicism of higher education’s value, while also making it
more accessible to increasingly diverse populations—a mission-based initiative that student activists often clamor
for. See, e.g., Henry A. Giroux, Neoliberalism’s War on Higher Education, 164-165 (2014):
Student protesters have also strongly argued for a wholesale transformation of higher education in
terms of both its mission and how it is funded…the protesters have argued for higher education to
be not only free and accessible to all students but also dedicated to the role of educating students
to take intellectual risks, think imaginatively, and assume the social responsibilities of critically
engaged citizens.

142 Kezar, DePaola, & Scott, supra note 2, at 163.

143 See, e.g., Kezar, DePaola, & Scott, supra note 2, at 153 (“Though we may be armed only with collective power
and decisive action, it is worth remembering that the most significant labor rights victories in our history were
achieved with little else”). Also see Robert A. Rhoads & Gary Rhoades, Graduate Employee Unionization as a
Symbol of and Challenge to the Corporatization of U.S. Research Universities, 76 The Journal of Higher


145 See, e.g., Rhoads & Rhoades, supra note 143, at 247 (noting that unionization in higher education—specifically
that of graduate students, in this case—is partly a product of the Free Speech Movement from public institutions in
the late 1960s, where the legal-historical analysis began):
After all, graduate employee unionization largely was born of the student anti-war and free speech
movements of the 1960s and early 1970s, arising most vociferously at campuses such as the
University of Wisconsin, University of Michigan, University of Oregon, and University of
California, Berkeley.
with Janus,⁴⁴⁶ suggest that these increasing attempts to democratize higher education operations via collectively shared interests, social justice, and research are reflective of attempts to maintain a more equitable, mission-oriented marketplace to participate in.⁴⁴⁷ And—as the findings of this dissertation suggest—such an operational goal in the fiscal behaviors of higher education institutions would result in far less tension with the marketplace of ideas.

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¹⁴⁶ Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448, 2501 (2018) (Elena Kagan’s dissent in Janus argued that, “most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy”). This is, as with the case study findings, reminiscent of the free speech battleground analogy rather than a functioning marketplace of ideas.

¹⁴⁷ See, e.g., Kezar, DePaola, & Scott, supra note 2, at 159 (“If our basic goal is to build power through organizing, such power must be equitably and broadly distributed or invariably it will falter”).
## APPENDIX A
### SAMPLE CODING SHEET FOR CASE LAW ANALYSIS

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Facts of the case:</strong></td>
<td>What happened?</td>
</tr>
<tr>
<td><strong>Issue of the case:</strong></td>
<td>What is the issue that the courts are trying to solve? What question is trying to be answered?</td>
</tr>
<tr>
<td><strong>Judicial Analysis, Opinion, Rationale:</strong></td>
<td>What did the court decide and why? Were there any concurring/dissenting opinions?</td>
</tr>
<tr>
<td><strong>Rule of Law:</strong></td>
<td>What standard/precedent was created/applied for this ruling? Is it still rule of law today?</td>
</tr>
<tr>
<td><strong>Case Law Comparison:</strong></td>
<td>Were any other cases or areas of law cited in this ruling? If so, in what contexts?</td>
</tr>
<tr>
<td><strong>Topical Analysis:</strong></td>
<td>Was anything said that would help further analyze/impact/clarify our topic?</td>
</tr>
<tr>
<td><strong>Thematic Patterns:</strong></td>
<td>Are there any patterns that are beginning to emerge? Any recurring language to other cases?</td>
</tr>
</tbody>
</table>

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1 The coding sheet of case law for the legal-historical analysis is based off of a course template from a mass media law course at Louisiana State University. See Coyle, E. (April 1, 2019). Sample Coding Sheet [Microsoft Word Document]. Retrieved from LSU Course Moodle.
## APPENDIX B

SAMPLE CODING SHEET FOR DOCUMENT ANALYSIS


<table>
<thead>
<tr>
<th>Type of Document</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author/Speaker Background</strong></td>
<td>Who was speaking? Faculty member, politician, student, member of the public? Any explicit partisan leanings?</td>
</tr>
<tr>
<td><strong>Free Speech Angle</strong></td>
<td>Is this a critical, defensive, or neutral of the free speech climate on campus? Was legal precedent cited? If not, how was free speech contextualized? Also: Is free speech postured as activism or dissent (or both)?</td>
</tr>
<tr>
<td><strong>Neoliberalism/Finance:</strong></td>
<td>Were there any references made to institutional finances, fees, neoliberalism, etc.? If so, how were they contextualized?</td>
</tr>
<tr>
<td><strong>Keywords:</strong></td>
<td>Include 5 keywords that help summarize or explain this document.</td>
</tr>
</tbody>
</table>

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2 This coding sheet was employed during the dissertation’s qualitative data collection/analysis, which was executed via document analysis. It is adapted from a mass media law course at Louisiana State University, similarly to the case law analysis coding sheet in Appendix A. See Coyle, E. (April 1, 2019). Sample Coding Sheet [Microsoft Word Document]. Retrieved from LSU Course Moodle.
APPENDIX C
TIMELINE OF CAMPUS SPEAKER CONFLICT AT SELECTED CASE SITES, 2017-2019

Figure C.1. Timeline of Campus Speaker Conflict at Selected Case Sites, 2017-2019

(fig. cont’d.)

1 While not fully exhaustive, this timeline provides a condensed overview of major events at each of the case sites. The timeline was parsed together during the coding process of the document analysis in order to better organize and understand free speech incidents in higher education between 2017-2019, thus a helpful resource for both researcher and reader.
<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 2018</td>
<td>Middlebury College</td>
<td>Middlebury’s Committee on Speech and Inclusion releases a final report with recommendations and launches a “Critical Conversations” website with free speech resources for students.</td>
</tr>
<tr>
<td>February 9, 2018</td>
<td>University of Washington, Seattle</td>
<td><em>College Republicans of the University of Washington v. Cauce</em> UW President refuses to drop security costs for Feb. 10 event. In response, a district judge files a restraining order against UW.</td>
</tr>
<tr>
<td>April 8, 2018</td>
<td>University of Washington, Seattle</td>
<td>UW faculty sends a letter to the UW president (Cauce) urging her to change the policy that charged student groups the speaker security fee costs.</td>
</tr>
<tr>
<td>February 5, 2018</td>
<td>University of Washington, Seattle</td>
<td>The UW College Republicans requested to host right-wing figure, Joey Gibson, in a Prayer Rally on campus. They were charged $17,000 for security and wrote a letter to the UW President threatening to sue if the fees were not dropped.</td>
</tr>
<tr>
<td>February 10, 2018</td>
<td>University of Washington, Seattle</td>
<td>Prayer Rally went on, five arrests were made and the use of pepper spray by police was used.</td>
</tr>
<tr>
<td>April 25, 2018</td>
<td>University of California, Berkeley</td>
<td><em>Young America’s Foundation v. Napolitano</em> was decided. The fee fluctuation set for right-wing speakers had merit, and it moved to a settlement process.</td>
</tr>
<tr>
<td>December 3, 2018</td>
<td>University of California, Berkeley</td>
<td><em>Young America’s Foundation v. Napolitano</em> Berkeley’s official statement for the case is filed, with the settlement requiring a new speaker/security fee policy and $70,000 paid out to plaintiffs.</td>
</tr>
</tbody>
</table>

(fig. cont’d.)
March 26, 2019  
**General**  
The Trump Administration publishes an executive order, “Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities,” which was focused on strengthening free speech and viewpoint neutrality on campus.

May 6, 2019  
**University of Washington, Seattle**  
The UW College Republicans host an Affirmative Action Bake Sale on campus in protest of Washington’s repeal of an affirmative action ban. Permitted to go on, but draws ire from campus community.

April 2019  
**Middlebury College**  
Middlebury preemptively cancels a speaking event by a far-right Polish scholar, Ryszard Legutko, based on concerns of campus unrest. National criticism followed.

November 7, 2019  
**University of Washington, Seattle**  
The UW College Republicans chapter had to vacate campus office shared by UW College Democrats.

October 31, 2019  
**University of Washington, Seattle**  
The UW College Republicans chapter has its registered student organization status revoked after the national College Republican organization denounces it.

November 21, 2019  
**Middlebury College**  
Middlebury adopts and officially recognizes new “Open Expression” policy, the result of a task force/working group, which includes a FAQ page with information on the “substantial disruption” legal standard, protest and activism limits on campus, etc.
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Bayless v. Martine, 430 F.2d 873 (5th Cir., 1970).


Brown v. Li, 308 F.3d 939 (9th Cir. 2002).


DeJohn v. Temple University, 537 F. 3d 301 (3rd Cir., 2008).


Galda v. Rutgers, 772 F.2d 1060 (3rd Cir., 1985).

Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974).

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University., 993 F.2d 386 (4th Cir. 1993).


Koala v. Khosla, 931 F.3d 887 (9th Cir., 2019).

McCauley v. University of the Virgin Islands, 618 F.3d 232 (3rd Cir., 2010).

Orin v. Barclay, 272 F. 3d 1207 (9th Cir., 2001).

OSU Student Alliance v. Ray, 699 F.3d 1053 (9th Cir., 2012).


Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995).

Sonnier v. Crain, 613 F.3d 436 (5th Cir., 2010).

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VITA

Gillian Patricia Foss, of Old Orchard Beach, Maine, studied journalism and public relations as a student at Marist College before focusing extensively on non-profit public relations work during her master’s degree program at Iona College. Following a transformative professional experience at The Fresh Air Fund in New York, NY, Gillian’s interest in non-profit higher education institutions—and the systems currently in place that finance, litigate, and communicate postsecondary opportunity—catalyzed her eventual Ph.D. journey in Louisiana State University’s Higher Education Administration program. Accordingly, Gillian's research interests include higher education law and policy, with an increasing focus on First Amendment protections for faculty and students and institutional strategic communications practices. She anticipates graduating in May 2021.