

**Written Testimony to the House Committee on Education and the Workforce
Subcommittee on Higher Education and Workforce Development**

Hearing on “Diversity of Thought: Protecting Free Speech on College Campuses”

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Chairman Owens, Ranking Member Wilson, and distinguished members of the Subcommittee, thank you for this opportunity to share my thoughts about the alarming state of free speech at our nation’s institutions of higher learning. I’ve long been a First Amendment scholar and advocate, including on college campuses, but more recently I’ve also had my own “lived experience” with this issue. Now my academic scholarship, legal briefing, and popular writing are all informed by that personal brush with collegiate cancel culture. I’m now all too aware of the toxic climate that foments self-censorship as students and professors alike walk on eggshells lest they cross the politically incorrect frontier and have their careers threatened by an illiberal mob.¹

Just over a year ago, I had the most direct and acute exposure to a higher-ed culture that’s hostile to free speech and civil discourse. Indeed, “shut up” was the response, except in more obscene terms, that I got from students at the University of California Hastings College of Law (since renamed UC Law SF) when I tried to speak there on March 1, 2022. They prevented the event from taking place, chanting and banging as if it were Occupy Wall Street.² It’s the first time I’d ever been protested in more than a thousand speaking events and it’s a damning indictment of the state of academia at a time when a toxic cloud has enveloped all of our public discourse.

Although the Federalist Society chapter had booked a room and invited me to discuss a subject on which I’d written a book, *Supreme Disorder: Judicial Nominations and the Politics of America’s Highest Court*, a “heckler’s veto” prevailed: a situation in which someone who disagrees with a message causes the speaker to be silenced. Of course, protests are protected by the First Amendment and university free-speech policies but, as Berkeley Law Dean Erwin Chemerinsky has written, “Freedom of speech does not protect a right to shout down others.”³

In my case, activists applied a bad-faith lens to a poorly phrased tweet in which I criticized President Biden’s criteria for his forthcoming Supreme Court nomination, thereby adjudging me a racist misogynist and my expertise illegitimate. Specifically, in January 2022, I criticized the president’s decision to limit his candidate pool by race and sex, in fulfillment of a campaign promise to appoint a black woman. I argued that the chief judge of the D.C. Circuit, Sri Srinivasan (who happens to be an Indian-American immigrant), was the best choice, meaning that *everyone*

¹ See, e.g., Heterodox Academy, “Campus Expression Survey,” <https://heterodoxacademy.org/campus-expression-survey> (presenting annual data for 2019-22 and showing how most students feel unfree to discuss many issues).

² See Ilya Shapiro, “Mob Rule and Cancel Culture at Hastings Law School,” *Wall Street Journal*, Mar. 22, 2022, <https://on.wsj.com/3THtpzt>.

³ Erwin Chemerinsky & Howard Gillman, “Free Speech Doesn’t Mean Hecklers Get to Shut Down Campus Debate,” *Washington Post*, Mar. 24, 2022, <https://wapo.st/3ni0Cp1>. See also Erwin Chemerinsky, “UC Irvine’s Free Speech Debate,” *L.A. Times*, Feb. 18, 2010, <https://lat.ms/3z2WImL> (“There is simply no 1st Amendment right to go into an auditorium and prevent a speaker from being heard, no matter who the speaker is or how strongly one disagrees with his or her message.”).

else in the entire world was less qualified. So if Biden kept his promise, he would pick a less-qualified—or, as I inartfully characterized given Twitter’s character limit, a “lesser”—black woman. I deleted the tweet and apologized for my poor choice of words, but I maintain that Biden should’ve considered “all possible nominees,” as 76% of Americans agreed in an ABC poll.⁴

Nevertheless, I was suspended from my new position at Georgetown’s Center for the Constitution pending an investigation into whether my comments violated university policies on harassment and discrimination. And now a secondary effect of my tweet and suspension was that students at another law school were determined not to allow me to express my ideas.

The vocal minority of students who shut down my event wanted to hear neither my reasoning about President Biden’s selection criteria nor my broader analysis of the confirmation battle now that there was an actual nominee. And they did so in the vilest language imaginable, several times getting literally in my face or blocking my access to the lectern.

The protestors also castigated their own law school for allowing me to speak, and in a concurrently circulated letter called for “a committee of diverse student representatives” to approve speakers, among other demands about mandatory training in critical race theory for students and faculty. Never mind that Hastings, as a public institution, would be violating the First Amendment if it disapproved speakers based on the content of their speech.

And never mind that, as one of Hastings’ deans advised the protestors in the few minutes when they weren’t chanting and banging, not allowing a duly invited speaker to speak went against school rules. As the school’s chancellor David Faigman pointed out in a community-wide email the next day, “Disrupting an event to prevent a speaker from being heard is a violation of our policies and norms, including the Code of Student Conduct and Discipline, Section 107 (‘Harmful Acts and Disturbances’), which the College will—indeed, must—enforce.”

But it wasn’t enforced, and nobody was disciplined, as the chancellor’s further long email detailed a month later. You’d think that law students should have a *greater* appreciation for spirited and open engagement with provocative ideas than undergraduates. After all, they’ll be facing much harder situations in their legal careers than bad tweets.

But my experience was no isolated incident—not even for that month of March 2022! The following week, a similar thing happened at Yale, ironically over a panel bringing together lawyers from the left and right who agreed on the importance of free speech. Yale Dean Heather Gerken basically buried her head in the sand. Then it happened again at the University of Michigan, when students obstructed a debate on Texas’s heartbeat bill. And that’s just law schools; forget the craziness that’s been going on for some time on undergraduate campuses!

The only thing these events had in common was that speakers were presenting ideas that some students found objectionable. We’ve gotten to a place where questioning affirmative action or abortion is outside the academic Overton window, the acceptable range of policy views.

This problem isn’t limited to ivory towers and leafy quads. The trend of canceling speakers rather than challenging them also represents the loss of grace in our culture more broadly, the desire to ascribe malign motives to one’s political enemies and unwillingness to think of them as merely wrong, rather than evil.

Given the Left’s control of the commanding heights of culture, education, and technology, those expressing conservative views are much more often targeted by both online and real-world mobs. But it happens to those on the left too, like Whoopi Goldberg—who has shown ignorance

⁴ Brittany Shepherd, “Majority of Americans Want Biden to Consider ‘All Possible Nominees’ for Supreme Court Vacancy: POLL,” ABC News, Jan. 29, 2022, <https://abcn.ws/42zf2Bt>.

about the Holocaust (and many other things), not antisemitism. Even worse, it happens to regular people whose meager donations to politically incorrect causes gets them doxed, boycotted, fired, or—such as in Canada during protests over Covid policy—frozen out of their bank accounts.

This cancel culture is easy to diagnose, but hard to remedy. Too many people have lost sight of the golden rule of treating others as they want to be treated. Although often ascribed to the Bible, that principle predates Christianity and indeed needs not be tied to any faith. Still, as American society has secularized, politics has replaced religion to fill the spiritual needs that humans have had since time immemorial. In that context, it's easy to see one's political opponents as heretics—and then of course their sacrilege isn't worth hearing.

The problem goes far beyond speech on campus, worrying as developments here are for the next generation. It's even more important to have a national reckoning about our inability to discuss controversial issues without canceling those with whom we disagree. How are we to continue as a nation if every policy dispute is existential and every election a Manichean battle?

Soon after my Georgetown scandal broke, I jokingly tweeted at Whoopi that she and I ought to go on Joe Rogan's podcast to hash stuff out. Indeed, I'm willing to go anywhere to debate constitutional law or the importance of civil discourse—as I have, at law schools and on media programs around the country. But it'll take more than canceled professors and pundits to get us back to a place where we can disagree without wanting to ruin the lives of people with whom we have those disagreements. It'll take real courage from political leaders and cultural influencers to disrupt the current toxic moment.

As for me, after a *four-month* investigation into that tweet, the Georgetown University Law Center reinstated me in early June 2022. But after full consideration of the report I got from the Office of Institutional Diversity, Equity and Affirmative Action, or IDEAA, and on consultation with counsel and trusted advisers—especially my wife, a better lawyer than all of us—I concluded that remaining in my job was untenable.

Dean Bill Treanor cleared me on the technicality that I wasn't an employee when I tweeted—a junior associate at WilmerHale, the white-shoe firm Georgetown hired to advise them, must've looked at a calendar—but the IDEAA implicitly repealed the university's Speech and Expression Policy. They set me up for discipline the next time I transgress progressive orthodoxy. Instead of participating in that slow-motion firing, I resigned.

IDEAA speciously found that my tweet criticizing President Biden for limiting his Supreme Court pool by race and sex required “appropriate corrective measures” to address my “objectively offensive comments and to prevent the recurrence of offensive conduct based on race, gender, and sex.” Treanor reiterated these concerns in a public statement, further noting the “harmful” nature of my tweets. But IDEAA made clear that there's nothing objective here: “The University's anti-harassment policy does not require that a respondent intend to denigrate,” the report says. “Instead, the Policy requires consideration of the ‘purpose or effect’ of a respondent's conduct.” That people were offended, or claim to have been, is enough to break the rules.

IDEAA asserted that if I “were to make another, similar or more serious remark as a Georgetown employee, a hostile environment based on race, gender, and sex likely would be created.” *Any* comment that *anyone* found offensive would've subjected me to discipline. Consider the following all-too-real hypothetical situations:

- If I lauded the Supreme Court decisions that overruled *Roe v. Wade* and protected the right to carry arms—as I would go on to do—you can imagine that an activist could've claimed

that my comments “deny women’s humanity” and make her feel “unsafe” and “directly threatened with physical violence.”

- If I had met with students concerned about my ability to treat everyone fairly, which I would’ve been happy to do even if Dean Treanor hadn’t asked me to, one attendee could’ve filed a complaint calling me “disingenuous” and the “embodiment of white supremacy.”
- When the Supreme Court heard the Harvard and UNC affirmative-action cases last fall, if I opined in media interviews and op-eds that the Constitution bans racial preferences—as I did—hundreds of Georgetown stakeholders could’ve signed a letter that, borrowing language from Treanor’s statements, asserted that my comments “are antithetical to the work that we do here every day to build inclusion, belonging, and respect for diversity.”
- In a class I’d be teaching on Supreme Court practice, a student could’ve felt uncomfortable or even “harmed” with his assigned position in a mock oral argument in *303 Creative v. Elenis*, the case that considers whether a designer can be compelled to create a website for a same-sex wedding. “To argue that someone can deny service to members of the LGBTQIA2S+ community is to treat our brothers and sisters as second-class citizens, and I will not participate in Shapiro’s denigrating charade,” he’d write on the student listserv.

I could go on, but you get the idea. It’s the Georgetown administrators who created a hostile work environment *for me*.

Fundamentally, what Treanor did—what he allowed IDEAA to do—is to repeal the Speech and Expression Policy that he claims to hold dear. The freedom to speak is no freedom at all if it makes an exception for speech someone finds offensive or counter to some nebulous conception of equity. And Georgetown showed how the university applies even these self-contradicting “principles” inconsistently. Contrast my case with these recent examples:

- In 2018, Prof. Carol Christine Fair of the School of Foreign Service tweeted during Justice Kavanaugh’s confirmation: “Look at this chorus of entitled white men justifying a serial rapist’s arrogated entitlement. All of them deserve miserable deaths while feminists laugh as they take their last gasps. Bonus: we castrate their corpses and feed them to swine? Yes.” Georgetown held this to be protected speech.
- In 2020, law professor Heidi Feldman tweeted that “law professors and law school deans” should “not support applications from our students to clerk for” judges appointed by President Trump. “To work for such a judge,” she continued, “indelibly marks a lawyer as lacking in the character and judgment necessary for the practice of law.” These comments could threaten the careers of all conservative and libertarian students, or anyone who clerks for duly confirmed but disfavored judges. But Georgetown took no action.
- In April 2022—months after my tweet—Feldman tweeted: “We have only one political party in this country, the Democrats. The other group is a combination of a cult and an insurrection-supporting crime syndicate.” She went on: “The only ethically and politically responsible stance to take toward the Republican ‘party’ is to consistently point out that it is no longer a legitimate participant in U.S. constitutional democracy.” Unlike I was going to be doing, Feldman teaches first-year law students in mandatory courses. Yet this pattern

of remarks created a hostile environment for Republican students—a protected class under D.C. law. The tweets were quietly deleted without apology or disciplinary action.

- The following month, after the leak of the *Dobbs* draft opinion, law professor Josh Chafetz tweeted: “The ‘protest at the Supreme Court, not at the justices’ houses’ line would be more persuasive if the Court hadn’t this week erected fencing to prevent protesters from coming anywhere near it.” He added, “When the mob is right, some (but not all!) more aggressive tactics are justified.” Later, he invited “folks” to “snitch tag @GeorgetownLaw” and taunted that the school was “not going to fire me over a tweet you don’t like.”

Chafetz was right about the last point, because it’s free speech for thee, not for me. To be clear, my point is not that these professors should’ve been disciplined, but that the sham investigation into my speech should never have been launched.

It’s all well and good to adopt strong free-speech policies, but it’s not enough if university administrators aren’t willing to stand up to those who demand censorship. Proliferating DEI (Diversity, Equity, Inclusion) offices enforce an orthodoxy that stifles intellectual diversity, undermines equal opportunity, and excludes dissenting voices. Even the deans of elite law schools buck these political commissars at their peril.

What Georgetown subjected me to, what it would’ve subjected me to if I had stayed, is a heckler’s veto that leads to a Star Chamber. “Live not by lies,” warned Aleksander Solzhenitsyn. “Let the lie come into the world, let it even triumph. But not through me.” I couldn’t live that way, so I made what lawyers call a noisy exit and am using this moment and the platform I’ve been given to shine a light on the rot in academia.

Last fall, when Justice Thomas withdrew from the class he’d been teaching at the George Washington University Law School, it was just one more example of the poisonous atmosphere in academia that makes it impossible to have a free exchange of ideas. GW administrators had admirably stood up to the mob demanding he be canceled for his vote to overturn *Roe v. Wade*, citing academic-freedom guidelines that don’t shield students from “ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.” Still, the justice presumably figured it wasn’t worth the aggravation and heightened security. It’s a shame that Justice Thomas felt the need to withdraw—and a stark contrast to the announcement that the newly retired Justice Breyer would be teaching at Harvard. That’s a shameless double standard.

I’m generally long on America—like Justice Kavanaugh, I live on the sunrise side of the mountain—but I’m pessimistic about academia. Perhaps we’re past “peak woke” in society writ large, as normal people, concerned with their families and livelihoods rather than performative virtue-signaling, call out progressive fads that don’t survive contact with reality. But we may have passed the point of no return in terms of the illiberal takeover of higher education.

And I do mean *illiberal*. What we’re seeing isn’t the decades-old complaint about liberal professors—I don’t think the ideological ratio has changed much since I was in college 25 years ago or law school 20 years ago—but weak administrators who placate the radical Left. What began as mere bureaucratic bloat—around 2010, schools started having more non-teaching staff than full-time faculty, and eventually many began to have more administrators *than students*—has exploded into vast DEI bureaucracies. A 2021 survey of the “power conferences” (65 large universities representing 16% of all students at four-year institutions) found, using publicly available data, that the average school has more than 45 people devoted to DEI, which is more than the average

number of professors they have teaching history.⁵ Indeed, DEI is the fastest-growing segment of the educational bureaucracy, with staffs on average four times larger than those that provide legally mandated accommodations to students with disabilities. (The study was careful to exclude people whose primary responsibility was in Title IX, equal employment opportunity, or other legal obligations to comply with federal/state civil rights laws.)

DEI offices have broadened terms like “harassment” and “discrimination” not to promote equal opportunity or a welcoming campus environment—they seem to fail on their own terms⁶—but to enforce progressive ideology. And they have every bureaucratic incentive to do so, to justify their power and budgets by addressing petty grievances in heavy-handed, public ways.

So I’m pessimistic that anything will change at any school where academic freedom and free speech aren’t supported and where rules against hecklers’ vetoes aren’t followed. Too few administrators follow the example of then-University of Chicago President Robert Zimmer, who, in response to pressure to punish Prof. Dorian Abbot for criticizing affirmative action, reaffirmed the university’s commitment to faculty members’ freedom to disagree with any university policy.

One very recent example of a positive pronouncement in this regard came from Stanford Law School Dean Jenny Martinez, who responded to the March 9 disruption of Judge Kyle Duncan’s speech by issuing a forthright and scholarly 10-page letter regarding her commitment to free speech. (That incident was the worst manifestation of the illiberal trends I’ve identified, not because it involved a federal judge but because the officials in attendance did nothing to stop it and indeed DEI Dean Tirien Steinbach—who has been placed on leave—encouraged it and also berated the invited speaker in prepared remarks.) Notably, Dean Martinez explained how “our commitment to diversity and inclusion means that we must protect the expression of all views.” It really is a remarkable document; one particular section merits extended quotation:

Moreover, there are many ways to support diversity, equity, and inclusion that are not inconsistent with a commitment to academic freedom. For example, as an educational institution dedicated to training future lawyers, we support diversity, equity, and inclusion by encouraging thoughtful and critical discourse about the law and legal system, by training students to offer substantive critiques of injustice that they encounter, by teaching future lawyers how to marshal evidence that supports their point of view and how to make arguments that convince others. We support diversity, equity, and inclusion when we encourage people in our community to reconsider their own assumptions and potential biases. We support diversity, equity, and inclusion when we encourage students to connect with and see one another as people. We support diversity, equity, and inclusion when we teach each and every one of our students how to be the best possible lawyer they can be, and take those skills of advocacy out into the world.

⁵ Jay Greene and James Paul, “Diversity University: DEI Bloat in the Academy,” Heritage Foundation Backgrounder No. 3641, July 27, 2021, https://www.heritage.org/sites/default/files/2021-07/BG3641_0.pdf.

⁶ See, e.g., Jonathan Haidt and Lee Jussim, “Hard Truths About Race on Campus,” *Wall Street Journal*, May 6, 2016, <https://on.wsj.com/3n8ffLA> (showing how diversity programs do not help race relations, but actually hurt them, especially for black students); Frank Dobbin and Alexandra Kalev, “Why Diversity Programs Fail,” *Harvard Business Review*, July-Aug. 2016, <https://bit.ly/3ngIYSI> (“The positive effects of diversity training rarely last beyond a day or two, and a number of studies suggest that it can activate bias or spark a backlash.”); Scott Yenor, “How Texas A&M Went Woke,” Report of the Claremont Institute Center for the American Way of Life, Feb. 2023, <https://bit.ly/3neb1St> (showing how DEI programming increased racial tensions and decreased all students’—but especially black students’—sense of belonging).

At the same time, I want to set expectations clearly going forward: our commitment to diversity, equity, and inclusion is not going to take the form of having the school administration announce institutional positions on a wide range of current social and political issues, make frequent institutional statements about current news events, or exclude or condemn speakers who hold views on social and political issues with whom some or even many in our community disagree. I believe that focus on these types of actions as the hallmark of an “inclusive” environment can lead to creating and enforcing an institutional orthodoxy that is not only at odds with our core commitment to academic freedom, but also that would create an echo chamber that ill prepares students to go out into and act as effective advocates in a society that disagrees about many important issues. Some students might feel that some points should not be up for argument and therefore that they should not bear the responsibility of arguing them (or even hearing arguments about them), but however appealing that position might be in some other context, it is incompatible with the training that must be delivered in a law school. Law students are entering a profession in which their job is to make arguments on behalf of clients whose very lives may depend on their professional skill. Just as doctors in training must learn to face suffering and death and respond in their professional role, lawyers in training must learn to confront injustice or views they don’t agree with and respond as attorneys.

One can quibble with some aspects of Dean Martinez’s “next steps”—especially the decision not to discipline anyone who violated Stanford’s anti-disruption policy—but her memo is the strongest exposition of free-speech values that we’ve seen from a university official in this critical period.

Wherever deans and presidents stand up for free speech and the core truth-seeking mission of any academic institution, the mob disperses, but most university officials are careerist bureaucrats. The problem isn’t that deans like Treanor and Gerken are woke radicals. It’s that they’re spineless cowards who are unwilling to confront the illiberal inmates who have taken over their institutions—including as fellow administrators in burgeoning DEI offices. Mere statements about academic freedom and declining to fire Supreme Court justices aren’t enough; schools have to affirmatively instill a culture of respect for opposing views and civil discourse.

It also means dismantling bureaucracies that undermine the liberal values of free speech and due process—the DEI offices superfluous to and at war with Dean Martinez’s above description of diversity, equity, and inclusion—and it means ending compelled speech or loyalty oaths in the form of diversity statements.⁷ University presidents and law school deans are very good at instilling whatever values they care about: public service, inclusion, social-justice, entrepreneurship, whatever. (They used to care about excellence and academic rigor, but according to Stanford, those terms are now racist triggers.⁸) They can do the same for free speech, as the University of Chicago regularly does and as Dean Martinez has now set out to do.

When I left Georgetown, I wasn’t holding my breath at the prospect of reform, but perhaps now we’re finally seeing a backlash against our illiberal inquisitors. But it can’t all be done from within, so we need external controls from state legislators and attorneys general, as well as congressional oversight tied to federal funding. You can absolutely require all recipients of federal

⁷ See Christopher F. Rufo, Ilya Shapiro, and Matt Beienberg, “Abolish Bureaucracies and Restore Colorblind Equality in Public Universities,” Manhattan Institute Issue Brief, January 2023, <https://bit.ly/3Z8TkkP>.

⁸ Editorial, “The Stanford Guide to Acceptable Words,” *Wall Street J.*, Dec. 19, 2022, <https://on.wsj.com/3FHNfF6>.

higher-ed funds to certify that they will not violate the Constitution, for example, and that they will comply with the codified sense of Congress regarding the protection of student speech and association rights,⁹ just as they certify compliance with a host of other rules and requirements. To quote the late Dr. Mike Adams, who testified at a similar hearing nearly five years ago:

Each of you has taken an oath to uphold the Constitution. You can take a great step toward fully honoring that oath by withholding federal funding from public universities that are engaged in a war against our basic constitutional principles. Only then will these institutions live up to the ideal of being a “marketplace of ideas” where all viewpoints are truly welcomed and debated.¹⁰

We also need exogenous shocks like the boycott of Yale for clerk-hiring by 14 judges, led by Fifth Circuit Judge Jim Ho. And we need public exposure: the day after the *Wall Street Journal* published John Sailer’s exposé of how Texas Tech used job applicants’ diversity statements as ideological litmus tests, the university announced it would end its use of such statements for faculty hiring.¹¹

There’s still a long way to go before universities return to their mission of seeking truth and knowledge, and law schools return to their goal of teaching future lawyers to uphold the rule of law. But the battle has been joined.

⁹ 20 U.S.C. § 1011a (Pub. L. 89–329, title I, § 112, as added Pub. L. 105–244, title I, § 101(a), Oct. 7, 1998, 112 Stat. 1591; amended Pub. L. 110–315, title I, § 104, Aug. 14, 2008, 122 Stat. 3090).

¹⁰ “The State of Intellectual Freedom in America,” testimony of Dr. Mike S. Adams before the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice, prepared June 21, 2018, and delivered Sept. 27, 2018, <https://bit.ly/3JImgKD> (written text on file with author).

¹¹ John D. Sailer, “How ‘Diversity’ Policing Fails Science,” *Wall Street Journal*, Feb. 6, 2023, <https://on.wsj.com/404x1Oz>; “Texas Tech Reverses DEI Statement Requirement after Biology Dept. Featured in WSJ Piece,” KCBD, Feb. 8, 2023, <https://bit.ly/42x4liD>.