

MANAGING DISSENT

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*In his insightful new book, *Managed Speech: The Roberts Court's First Amendment* (2017), Professor Greg Magarian criticizes the Roberts Court for adopting a "managed speech" approach in its First Amendment cases. According to Professor Magarian, that approach gives too much power to private and governmental actors to manage public discourse, constrain dissident speakers, and instill social and political stability. This Article argues that at least insofar as it relates to many forms of public dissent, the managed speech approach is both deeply rooted in First Amendment jurisprudence and culturally prevalent. Historically, First Amendment jurisprudence has expressed support for narrowly managed public dissent. Expressive activities that pose no threat of actual disruption, and that do not risk undermining social and political stability, have been granted a preferred position. Managed speech attitudes and principles are part of our contemporary culture and politics. Public and private actors manage dissent from statehouses, to college campuses, to National Football League stadiums. Legislatures and executive officials have sought to curb public protests, universities have acted to limit campus dissent, and the NFL has faced pressure to dismiss players who refuse to stand at attention during the playing of the national anthem. In these contexts, officials and private institutions have sought to curb, tame, and marginalize public dissent. Efforts to manage dissent cut sharply against the alternative "dynamic diversity" model that Professor Magarian advocates in his book. Achieving that ideal will take more than a few Supreme Court decisions. It will require changing political and cultural attitudes concerning the meaning and value of public dissent.*

INTRODUCTION

In his recently published book, *Managed Speech: The Roberts Court's First Amendment*,¹ Professor Greg Magarian criticizes the Roberts Court for adopting what he calls a "managed speech" approach that "seeks to reconcile substantial First Amendment protection for expressive freedom with aggressive preservation of social and political stability."² Thus, in "government preserves" such as public streets and parks, the Roberts Court has generally upheld the authority of property owners to manage expressive

1. GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT* (2017).

2. *Id.* at xv.

activities.³ The same holds largely true, Professor Magarian argues, with regard to public universities.⁴ Private speech has been protected—one might alternatively say tolerated—mostly insofar as it has not been disruptive of social order or the political status quo. Professor Magarian concludes: “The Roberts Court, with a consistency and potency unique in the Supreme Court’s history, has authorized established, powerful institutions . . . to exercise managerial control over public discussion, with the apparent goal and typical result of pushing public discussion away from destabilizing, noisy margins and toward a stable, settled center.”⁵

In fact, “managed speech,” as Professor Magarian defines it, has long been a staple of First Amendment jurisprudence concerning public dissent. Although on a few occasions Professor Magarian refers to the Burger and Warren Courts, his analysis does not, for perfectly understandable reasons, generally cut across Courts. If it had, the study would have found that although the Supreme Court has at times extolled the virtues of dissent and disruption, it has generally supported public contention only insofar as the means are peaceful and non-disruptive. As Professor Magarian charges, the Roberts Court has generally empowered institutions to curb private dissent and manage government preserves in ways that maintain a certain kind of social and political stability. Although some of its decisions may have exacerbated this situation, the Roberts Court was not working on a blank slate. In most cases, it was applying deeply ingrained managerial speech attitudes, principles, and doctrines.

Although we are a nation both literally and figuratively built on public dissent, restrictions on acts of dissent—public assembly, protest, and demonstrations—have been commonplace since at least the nineteenth century.⁶ The prevailing attitude is written into the First Amendment’s Assembly Clause, which protects not the right to assemble but the right to “peaceably” do so.⁷ Of course, dissenters have no First Amendment right

3. See TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2009).

4. Many commentators have been critical of this distinction, and in particular of the Court’s “state action” doctrine which applies constitutional limitations only to an increasingly narrow category of “state actors.” See, e.g., Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C. R.-C. L. L. REV. 145 (2017); John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569 (2005); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004); Erwin Chemerinksy, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

5. MAGARIAN, *supra* note 1, at xv.

6. See generally Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011).

7. U.S. CONST. amend. I (protecting “the right of the people peaceably to assemble, and petition the Government for a redress of grievances”).

to engage in violent or criminal acts, but today's "peaceable" assemblies and protests are managed far beyond these obvious limitations. To be sure, political dissenters and a virtual rogue's gallery of speakers have won notable and celebrated victories at the Supreme Court. However, as discussed below, many of those victories occurred precisely because the speaker did not disrupt social expectations or challenge the political status quo. Again, the Roberts Court has followed this pattern by continuing the Court's long tradition of upholding measures that curb and tame public dissent.

What is more disturbing, there is mounting evidence that Americans have largely internalized and accepted the strict management of dissent by public and private actors. Consider the recent spate of proposals put forward by many state legislatures that would crack down on public dissent and protest. Starting in early 2017, and in response to high-profile public protests, state legislatures across the nation proposed or enacted a bevy of measures designed to manage public dissent by making it more difficult, expensive, or even dangerous. As discussed in Part II, some of the proposals would increase penalties for obstructing traffic or engaging in other kinds of disruptive behavior. Others would apply rioting and racketeering laws to protest organizers. Some would authorize the seizure of assets belonging to protesters, in the event that a protest became violent. Further, some states have proposed measures that would make it easier for law enforcement to simply shut down events such as mass protests. Others, in response to heckling incidents, have moved to impose stiffer penalties for threatening, intimidating, or harassing public officials. Finally, a few states have considered holding harmless any driver who inadvertently strikes a protester who is blocking a roadway.⁸

Executive officials have not been immune to this anti-dissent fervor. A woman who laughed (involuntarily, she says) at the confirmation hearing of Jeff Sessions to be Attorney General of the United States was tried and convicted for disorderly conduct and "demonstrating" on the Capitol grounds.⁹ For this audacious act of public dissent, she faced a hefty fine and up to a year in prison. Prosecutors finally dropped the case, but only after winning a jury verdict that was tossed out and announcing that they would retry the case.¹⁰ On a broader scale, the Justice Department has aggressively pursued more than 200 individuals who allegedly participated in inaugural

8. See Christopher Ingraham, *Republic Lawmakers Introduce Bills to Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017), <https://perma.cc/ALY3-ZP29>.

9. Maya Salam, *Case is Dropped Against Activist Who Laughed at Jeff Sessions's Hearing*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/07/us/jeff-sessions-laughter-protester.html>.

10. *Id.*

day protests. In that case, it sought digital records relating to participation in public protests and charged the group of protesters with felony conspiracy to engage in a riot.¹¹

Unfortunately, these are not the only examples that suggest a strong backlash against public forms of dissent. As discussed below, at many colleges and universities, administrators have cracked down on offensive and disruptive expression by students, faculty, and outsiders. They have adopted and enforced detailed codes that model the regulatory regime applicable outside campus to places within campus gates.¹² Some universities have disinvited or refused to host controversial outside speakers.¹³ Some students have likewise embraced managed speech. For example, students have physically interfered with access by outside speakers or reacted violently to their presence. Others have interrupted invited speakers whose messages they consider too controversial or hurtful. Students have also used their own free speech rights to shout down speakers. All of this activity has resulted in the effective silencing of speech, in the name of keeping students safe from certain controversial messages or speakers. In response, lawmakers and administrators are beginning to respond with a cure that may be as bad as or worse than the disease. For instance, the University of Wisconsin recently adopted student conduct rules that would result in the suspension and possible expulsion of students who engage in what is arguably a form of counter-speech.¹⁴ This sort of administrative response could further suppress the vigorous exchange of ideas on university campuses.

Managed speech has also been manifested more broadly, in notable social and political conflicts. The recent controversy concerning NFL players' racial justice protests during pre-game ceremonies, in particular during the singing of the national anthem, are one example. Official pressure has been brought to bear on these dissenters. President Trump has opined that players should stand at attention during the national anthem and flag ceremonies, or be disciplined by team owners and managers for failing to do so.¹⁵ A state legislator recently introduced a bill that would entitle fans to a refund in the event they had to witness such an offensive form of

11. See Timothy Zick, *Protests in Peril*, U.S. NEWS & WORLD REP. (Nov. 20, 2017, 1:00 PM), <https://www.usnews.com/opinion/civil-wars/articles/2017-11-20/prosecuting-inauguration-day-protesters-puts-free-speech-in-peril>.

12. See generally ZICK, *SPEECH OUT OF DOORS*, *supra* note 3, ch.8 (discussing spatial and other limits on campus expression).

13. See GREG LUKIANOFF, *FREEDOM FROM SPEECH* 29–36 (2014) (discussing “disinvitation season” on university campuses).

14. Todd Richmond, *University of Wisconsin Approves Policy That Punishes Student Protesters*, CHICAGO TRIBUNE (Oct. 6, 2017), <https://perma.cc/QQW6-QK8X>.

15. Associated Press, *Trump Says NFL Players Should be Fired for Anthem Protests*, N.Y. TIMES (Sept. 23, 2017), <https://www.nytimes.com/2017/09/23/sports/trump-nfl-colin-kaepernick-.html>.

dissent.¹⁶ Some fans have also sued for refunds, alleging that the anthem dissents nullify their season ticket purchases.¹⁷ The First Amendment may not be formally implicated in this controversy, since (thus far, at least) no government official has taken any direct action against the players or coerced management to discipline or fire them. However, the fact that a silent, peaceful protest has generated such public controversy—even outrage in some quarters—is telling. Apparently, many Americans view the peaceful expression of dissent on a matter of critical public concern as an act of disrespect to the nation.

Managed dissent is rooted in our First Amendment history and jurisprudence. It is manifested in recent proposals for further narrowing or punishing the exercise of public dissent. It is evident on many of our public and private campuses. And it is threatening to drive out public professions of dissent by casting them as disrespectful, disruptive, and even unpatriotic.

Professor Magarian proposes a different approach, which he calls “dynamic diversity.”¹⁸ Dynamic diversity seeks to facilitate the communication of diverse ideas and participation by diverse speakers. It pushes back against the managerial power that the Court has permitted officials, administrators, and private institutions to exercise. However, to change this situation, to rise above and perhaps escape managed speech, will take more than a few decisions by the current or future Supreme Court. As my examples show, to achieve something like dynamic diversity in our free expression culture will require more than a change in judicial attitude or doctrine. It will require a concerted effort by a diversity of managers—lawmakers, college administrators, and private employers—to facilitate those goals. More broadly, achieving the goals of dynamic diversity will require broad-scale attitudinal changes among our citizens regarding the purposes and values of public protest and dissent.¹⁹

Part I of the Article discusses Professor Magarian’s conception of “managed speech.” It argues that the management of public protest and dissent is deeply rooted in First Amendment precedents, concepts, and principles. Our First Amendment jurisprudence has structured public protest by favoring non-disruptive speakers, delegating control of public properties to public managers, and limiting contacts with “outsiders.” The Roberts Court’s First Amendment decisions have followed this jurisprudential tradition by generally supporting public speech rights only insofar as they do not pose any serious threats to public order and stability.

16. Cindy Boren, *Indiana Legislator Pushes Bill Requiring Colts to Refund Money to Fans Offended by National Anthem Protests*, WASH. POST (Dec. 28, 2017), <https://perma.cc/4QXN-D7YT>.

17. *Id.*

18. See MAGARIAN, *supra* note 1, at xvi–xx.

19. *Id.* at xvii.

Part II looks outside and beyond the Supreme Court to current examples of managed dissent within the body politic. It focuses on the three contexts mentioned earlier—public demonstrations, campus dissent, and professional athlete protests. In each of these contexts, there has been a significant backlash against public protest and dissent. Public and private actors have moved to curb or quash public contention. Working from something similar to the template of managed speech, they have proposed or enforced limits on public rallies, restrictions on campus dissent, and public displays of protest. In these and other quarters, dissent is not viewed as a patriotic exercise or civic duty. Instead, it is increasingly perceived as a threat to public unity and an act of disrespect.

Part III assesses the prospects for resisting the management of dissent and adopting something like the “dynamic diversity” approach supported by Professor Magarian. The Supreme Court can and should play a role in encouraging a diversity of ideas and a diversity of participants. However, as my examples will show, whether dynamic diversity stands a fighting chance will depend more on the managers, political leaders, and public audiences that can create the conditions for its adoption. If free speech is to be “an engine of political and social change,” as Professor Magarian advocates, we will need more than a Supreme Court dedicated to this goal.²⁰ We will need to draw on another First Amendment tradition: a commitment to public protest and dissent not just as civil *liberties* but as civic *duties*.²¹

I. “MANAGED SPEECH”

A. *Dissent and Public Protest in the Roberts Court Era*

As Professor Magarian observes, judged by the results of many of its First Amendment decisions, the Roberts Court might be characterized as a champion of freedom of expression. In a number of cases, the Court has ruled in favor of First Amendment claimants. In the process, it has extended protection to some unsavory and offensive speakers.

In his study of Roberts Court First Amendment decisions, Professor Magarian takes a more critical view of the Court’s free expression jurisprudence. He argues that the Roberts Court has generally adopted a “managed speech” approach to First Amendment issues. By this he means that the Court has generally authorized public and private actors “to exercise a strong measure of managerial control over public discussions.”²²

20. *Id.*

21. *See generally* STEPHEN D. SOLOMON, *REVOLUTIONARY DISSENT: HOW THE FOUNDING GENERATION CREATED THE FREEDOM OF SPEECH* (2016).

22. MAGARIAN, *supra* note 1, at xv.

Professor Magarian claims that the Court has “disregarded the expressive interests and First Amendment claims of *outsider speakers*” and shown “a consistent preference for modes of public discussion that promote social and political stability, while disfavoring modes of public discussion that threaten to destabilize existing arrangements of social and political power.”²³

I do not agree with the manner in which Professor Magarian characterizes all of the Roberts Court’s free expression decisions. However, particularly with regard to decisions concerning dissent and public protest, I agree with his thesis that the Roberts Court has embraced a “managed speech” approach. The Roberts Court has not been a strong champion of contentious displays, disruptive modes of speech, or potentially destabilizing demonstrations of political dissent. Even in decisions upholding free speech and other expressive claims, the Court has demonstrated a preference for methods of protest and dissent that do not threaten the social and political status quo.

Thus, as Professor Magarian shows, in public fora and other “government preserves” the Roberts Court has authorized public officials, within broad parameters, to manage and control expression.²⁴ As property owners, officials exercise broad discretion to control the when, where, and how of public discourse. To take an example from the Roberts Court era, in *McCullen v. Coakley*, the Court reviewed a Massachusetts law that narrowly constrained “sidewalk counseling” near abortion clinics.²⁵ Although it ultimately invalidated the law, the Court refused to treat it as aimed at suppressing dissent near abortion clinics (although it only applied near such facilities and exempted clinic employees from its restrictions).²⁶

As Professor Magarian notes, although the speakers won the case, *McCullen* only appears to reflect support for contentious speech in the public forum. As the Court emphasized, the “sidewalk counselors” were not actually engaged in “protest” at all.²⁷ According to the Court, they sought only to engage in a peaceful, orderly, and reserved conversation with their intended audience—women seeking access to health care facilities.²⁸ *McCullen* is thus not a “protest” case. It does not signal any retreat from the recognition of managerial authority with regard to protests in public fora. It does not address, much less bid to challenge, the authority to maintain social stability on the public streets and sidewalks. Rather, *McCullen*

23. *Id.* (emphasis in original).

24. *Id.*

25. 134 S. Ct. 2518 (2014).

26. *See id.* at 2530–34.

27. *Id.* at 2536.

28. *Id.*

recognizes a relatively narrow right to engage in a quiet and orderly form of face-to-face *conversation* on public sidewalks. So long as this kind of speech does not disrupt, interrupt, or otherwise threaten public order, government power to restrict or ban the speech is limited.

As Professor Magarian claims, governments have other means of managing speech in the “preserves” they own and operate. For example, they frequently condition the receipt of government funds or benefits on forms of expression the government-as-subsidizer favors. Thus, in *Christian Legal Society v. Martinez*, the Roberts Court held that a public law school could condition its official recognition of student groups on their obligation to accept “all comers.”²⁹ This meant that the Christian Legal Society (CLS) could not reject potential members—even if they did not ascribe to the group’s specified commitments regarding sexual activity and homosexual conduct in particular. Under this rule, the campus Democrats could not turn away committed Republicans who wanted to join their group. Notably, the Roberts Court decided the case under the rubric of the “public forum,” holding that the law school’s student recognition program was a form of subsidy—a “limited public forum”—as to which it could apply any reasonable and viewpoint-neutral restrictions.³⁰ *Martinez* concluded that CLS’s dissenting view with regard to matters of sexuality, as well as its claim of associational freedom, had to yield to the law school’s preferred position that “all comers” be eligible for group membership.

McCullen and *Martinez* are examples of how Roberts Court decisions have empowered governmental owners and funders to control expression through the powers of management and subsidy. These decisions allow government officials to shape public discourse by controlling rights to speak and associate in government preserves.

As Professor Magarian shows, Roberts Court decisions with respect to *private* speech—speech that exists separate and apart from any governmental support for it—have also recognized the broad authorities of public and private managers. In *Snyder v. Phelps*, the Court invalidated a sizeable civil verdict, based on an intentional infliction of emotional distress claim, against a group that protested near a funeral for a military veteran.³¹ The group, the Westboro Baptist Church, infamously used the occasion of military funerals to protest the U.S. military, policies relating to LGBT rights, and the Catholic Church.³² They chanted and held up signs saying things like “God Hates Fags” and “Thank God for IEDs.”³³

29. 561 U.S. 661, 696–97 (2010).

30. *Id.* at 679–83.

31. 562 U.S. 443 (2011).

32. *Id.* at 448, 454.

33. *Id.* at 448–49.

On its face, *Snyder* seems like a decision that embraces a deeply offensive and disruptive form of political protest. However, as it did in *McCullen*, the Court took pains to note that the protesters were in a place they had a right to be and were otherwise in compliance with all local laws concerning time, place, and manner regulations.³⁴ As the Court observed, the protesters “did not yell or use profanity, and there was no violence associated with the picketing.”³⁵ As the Court also noted, the plaintiff *did not actually see or hear the protesters* on the day of the funeral.³⁶

Snyder seems like a significant victory for public protesters. However, although *Snyder* prohibits government from imposing civil liability for “outrageous” political dissent, it does not prevent government from enacting laws that effectively displace protesters—even, perhaps, to the extent that they cannot be seen or heard. Indeed, both before and after *Snyder*, states, localities, and the federal government have imposed strict limits on funeral protests.³⁷ As Professor Magarian correctly observes, *Snyder* does not affect those efforts. Indeed, by mentioning the alternative of zoning out the speech of funeral protesters, the decision tacitly approves of them.

The Roberts Court also held that the federal government can restrict private political speech that crosses international borders. In *Holder v. Humanitarian Law Project* (HLP), the Court upheld a federal law that prohibits any person from providing “material support” to designated “foreign terrorist organizations.”³⁸ A group of Americans filed a pre-enforcement challenge to the law. They wanted to assist designated foreign terrorist organizations with lawful educational and legal activities. Specifically, they wanted to help the organizations file petitions at the United Nations and provide them with instruction concerning principles of international law.³⁹

The Roberts Court held that the law was valid as applied to these activities and any other form of expression that is “coordinated with, or controlled by foreign terrorist groups.”⁴⁰ It concluded that the government had compelling national security and foreign relations interests, and that the law furthered those interests by narrowly proscribing forms of

34. *Id.* at 448, 457, 460.

35. *Id.* at 449.

36. *Id.*

37. See ZICK, SPEECH OUT OF DOORS, *supra* note 3, at 124–28 (discussing funeral protest zoning cases).

38. 561 U.S. 1, 7–8 (2010); see 18 U.S.C. § 2339(b)(a)(1) (prohibiting provision of “material support” to foreign terrorist organizations).

39. *Id.* at 36–38.

40. *Id.* at 36.

“coordinated” expression and association that might indirectly facilitate the violent ends of the foreign terrorist organizations.⁴¹

Consider, finally, a decision that was handed down after Professor Magarian’s book was published, but which also fits the managerial model. In *Packingham v. North Carolina*, the Roberts Court unanimously invalidated a state law that effectively barred released sex offenders from visiting a wide variety of internet websites, including the most popular social network sites.⁴² The decision contains soaring dicta about the importance of cyber speech and cyber places.⁴³ However, the Court’s actual holding does nothing to challenge or upset the broad public and private regulatory authority that service providers and others exercise over cyber speech. As it had in *Snyder*, the *Packingham* Court emphasized that a narrower law targeting certain online activities would likely survive First Amendment scrutiny.⁴⁴ More generally, the Court did not question the underlying public-private distinction that permits private owners to restrict speech in ways that would otherwise violate the First Amendment. In other words, for all its lofty dicta, *Packingham* does not announce a public forum doctrine for cyber places. The decision accepts and applies the existing managerial framework for speech in those places.

In sum, with regard to both expression in “government preserves” and private expression, the Roberts Court has applied a managerial approach that allows officials and private actors to continue to exercise significant control over public protest and private expression. It has recognized this authority with respect to public sidewalks, public campuses, international borders, and cyberspaces. First Amendment decisions like *McCullen*, *Snyder*, and *Packingham*, which on the surface appear to embrace broad First Amendment rights, actually do relatively little to protect public or private expression. As Professor Magarian observes, these and other decisions grant public and private authorities broad power to manage speech in a variety of contexts and fora.

B. Our Managed Speech Tradition

As noted, the “managed speech” approach Professor Magarian identifies did not spring forth anew from the Roberts Court. As Professor Magarian observes, on at least a few occasions, in many instances the Roberts Court was applying longstanding First Amendment managerial attitudes,

41. *Id.* at 33–37.

42. 137 S. Ct. 1730 (2017).

43. *See id.* at 1735 (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general”) (citations omitted).

44. *See id.* at 1737 (discussing narrower laws).

principles, and doctrines. With respect to dissent and public protest in particular, the Roberts Court thus far has mostly ratified and applied a managed speech tradition that is deeply rooted in First Amendment jurisprudence. Thus, while its decisions may have exacerbated some of the problems associated with the managerial model, the Roberts Court was hardly working from a blank slate.

1. Robust, Uninhibited, Wide Open: Provoking, Inducing Unrest, and Stirring to Anger

The lore of our First Amendment, in particular the Free Speech Clause, is that it protects vocal, offensive, and disruptive forms of public dissent. Americans boast that the right to offend and disturb is part of the freedom the First Amendment protects, indeed part of an exceptional American speech culture.

This attitude has sometimes been reflected in Supreme Court decisions. In *Terminiello v. City of Chicago*, for example, the Court wrote that speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁴⁵ The Court went on to note that “[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”⁴⁶ In *New York Times Co. v. Sullivan*, which altered the nation’s libel laws to create breathing space for criticism of government officials, the Supreme Court wrote that debate on public matters should be “uninhibited, robust, and wide-open.”⁴⁷

However, insofar as the First Amendment is concerned, a far more conservative attitude with regard to public expression has typically prevailed. Dissent that induces unrest, stirs to anger, or creates dissatisfaction with the status quo has not received the favored or celebrated status suggested by the rhetoric in cases like *Terminiello* and *Sullivan*. Indeed, First Amendment jurisprudence has long preferred “safer” forms of dissent. Thus, despite the obvious importance of protecting dissent in times of war and conflict, the Supreme Court’s World War I-era free speech cases consistently upheld lengthy prison terms for speakers who distributed political pamphlets or made political speeches. Justice Holmes’s now-famous dissents, which objected to the application of the “clear and [present] danger” standard, did so in part because the speakers were “puny

45. 337 U.S. 1, 4 (1949).

46. *Id.*

47. 376 U.S. 254, 270 (1964).

anonymities” who conveyed “silly” ideas.⁴⁸ Holmes’s characterizations suggested that the speech and speakers most worthy of First Amendment coverage and protection were those that posed the least threat to social stability and political order.

Of course, as scholars have noted, officials have tended to give less protection to freedom of speech and other expressive rights during times of war.⁴⁹ However, even in its earliest cases upholding public speech rights, the Hughes Court was willing to protect public dissent only if it was carefully managed, didn’t stir anyone to anger, and did not threaten any serious disruption. For instance, the Court overturned a breach of peace conviction against a Jehovah’s Witness in part because he was “upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others.”⁵⁰ There was no evidence, observed the Court, that the speaker’s “deportment was noisy, truculent, overbearing or offensive.”⁵¹ He demonstrated no “intentional discourtesy.”⁵² The Witness did not intend to “insult or affront” his public audience.⁵³ In another early case, the Court observed that epithets and swear words (also known as “fighting words”) directed at a person “without a disarming smile” were not entitled to coverage under the Free Speech Clause.⁵⁴ In that case, the speaker, another Jehovah’s Witness, had the audacity to call a public official a “damn Fascist” and “a God damned racketeer.”⁵⁵

To be sure, some of these early decisions were critically important victories for public speech and assembly rights. They established, for example, that speakers had a right to use the public sidewalks and streets to communicate with public audiences. However, they also clearly and consistently indicated that public forms of dissent and protest were more likely to receive coverage and protection under the Free Speech Clause insofar as they did not pose any serious challenge to social order, cause any actual disruption, or threaten the status quo. Thus, a speaker who peacefully and non-truculently communicated on the streets was assured of some First Amendment protection (if not protection from angry mobs). But a speaker who communicated with the intent to offend a public audience, without a “disarming smile,” or with the wrong bearing, was not so assured.

48. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting); *id.* at 627.

49. *See generally* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1870 TO THE WAR ON TERRORISM* (2004); THOMAS R. REED, *AMERICA’S TWO CONSTITUTIONS: A STUDY OF THE TREATMENT OF DISSENTERS IN TIMES OF WAR* (2017).

50. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

51. *Id.*

52. *Id.* at 310.

53. *Id.* at 309.

54. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

55. *Id.* at 569.

Later, the Court sanctioned measures designed to protect speakers from hostile crowds who might be offended by their speech or moved to violence because of it. In *Feiner v. New York*,⁵⁶ the Court upheld the disorderly conduct conviction of a speaker who called political figures, including President Truman, “bums” and suggested that African-Americans should “rise up” and fight for their equality rights.⁵⁷ *Feiner* was arrested owing to the reaction of onlookers, some of whom were offended or agitated by his speech. His remarks had apparently “stirred up a little excitement.”⁵⁸ One of the onlookers told police officers on the scene: “If you don’t get that son of a bitch off, I will go over and get him off there myself.”⁵⁹ Instead of arresting the onlooker, the police arrested *Feiner*—for his refusal to stop speaking when ordered to do so. The Court upheld the conviction, citing the city’s overriding interest in “peace and order on its streets.”⁶⁰

This pattern, again particularly with regard to public protest and dissent, generally held even during what many view as the heyday of freedom of expression—during the Warren Court and civil rights eras. To be sure, civil rights protesters won important First Amendment victories relating to public dissent. But the movement itself was committed to peaceful methods of protest; the violence and disruption typically came from officials and private parties opposed to the movement. Although in some post-*Feiner* civil rights cases the Court invalidated breach of peace convictions on what seemed like very similar facts, it again emphasized that those assembled were engaged in passive demonstrations and peaceful marches.⁶¹ Although these were significant victories for the protesters and more generally for the civil rights movement, note that they rested on the notion that public dissent and protest was worthy of protection so long as it did not pose any actual risk to public order.

Other cases from the civil rights era adopted a similar perspective concerning the scope of public dissent. The Court upheld the free speech right to engage in a *silent* civil rights protest in a public library reading room.⁶² It held that public elementary and junior high school students could wear black armbands in *silent* protest of the Vietnam War—that is, so long as their speech did not “materially disrupt or invade the rights of others.”⁶³

56. 340 U.S. 315 (1951).

57. *Id.* at 330 (Douglas, J., dissenting).

58. *Id.* at 317.

59. *Id.* at 330.

60. *Id.* at 320.

61. See *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (invalidating breach of peace convictions of civil rights protesters); *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (also invalidating breach of peace convictions of civil rights protesters).

62. See *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (overturning convictions of group that refused to leave public library reading room when asked).

63. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969).

But when civil rights protesters got too close for comfort to government buildings such as schools and jailhouses, the Court did not hesitate to uphold their breach of peace and disorderly conduct convictions.⁶⁴ And the Court saw no merit in First Amendment challenges to segregation in public accommodations like lunch counters.⁶⁵

I do not mean to suggest that the Warren Court and Burger Court failed to recognize, and even expand upon, First Amendment rights to communicate public dissent and to criticize government. After all, the Court refashioned tort law to permit speakers to engage in robust and sometimes caustic criticism of government.⁶⁶ The Court also articulated strong defenses of what might be considered offensive forms of dissent. In *Cohen v. California*, the Court overturned the conviction of a man who wore a jacket emblazoned with the words “Fuck the Draft” into the corridor of a public courthouse—in part, though, because no one in the corridor was apparently stirred to anger or even much disturbed by the jacket.⁶⁷

However, despite the liberalization of public speech and dissent rights, First Amendment precedents have not eagerly embraced speech that “created conditions of unrest” or “stirred people to anger.”⁶⁸ Indeed, our free speech narrative of “uninhibited and wide-open discourse” has actually been more myth than reality—an aspirational story we tell ourselves about robust expressive rights. In fact, the First Amendment has mostly protected speakers who towed a certain line in terms of accepted social and political behavior. Silent protests and expressive activities that did not upset sensibilities have generally been treated as protected speech—but not burning a draft card as part of an otherwise peaceful public protest, protesting near a jail where political prisoners were being held, uttering “dirty words” on the radio as part of a political commentary about language repression, or sleeping overnight in a park near the U.S. capitol.⁶⁹ These forms of expression were all considered too “robust,” “uninhibited,” or “wide-open” to merit full First Amendment protection.

Even *Brandenburg v. Ohio*,⁷⁰ which narrowed the standard for “incitement” and created breathing space for political dissent, involved the

64. See, e.g., *Adderly v. Florida*, 405 U.S. 39, 46 (1966) (upholding trespass convictions of civil rights protesters situated in curtilage of jailhouse).

65. See, e.g., *Garner v. Louisiana*, 368 U.S. 157, 163 (1961) (invalidating breach of peace convictions in sit-in case on procedural due process grounds).

66. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (invalidating state libel laws).

67. See *Cohen v. California*, 403 U.S. 15, 25 (1971).

68. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

69. See *United States v. O'Brien*, 391 U.S. 367, 371 (1968) (upholding conviction for public burning of draft card); *FCC v. Pacifica*, 438 U.S. 726 (1978) (upholding order limiting time of day when indecent speech could be broadcast on the radio); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding restrictions on overnight camping in national parks).

70. 395 U.S. 444 (1969).

sort of “anonymities” Justice Holmes was referring to in his early dissent. A group of KKK members one could only describe as clownishly non-threatening had burned some crosses in a rural Ohio field.⁷¹ They talked of taking “revengeance” against the government and marching on Washington, D.C. and perhaps other places.⁷² Like other public speakers who prevailed in First Amendment challenges, this group was an orderly, non-disruptive, and decidedly non-threatening group.

2. *The Public Order Management System*

The roots of our managed speech tradition go much deeper than this preference for non-threatening and non-disruptive speakers. First Amendment doctrines relating to speech on public properties and regulation of the time, place, and manner of expression have long reflected this attitude. In general, these doctrines have imposed a public order management system on dissent and protest. They have made it more difficult, and more costly, to engage in public protests and demonstrations.

Public properties and other “government preserves” (as Professor Magarian refers to them) are managed under a regime that combines official control over access to public places with power to enforce content-neutral limits on the “time, place, and manner” of expression in those places.⁷³ As I have explained at length elsewhere, this “public order management system,” which has been in place since the 1970s, has significantly narrowed the scope and contours of our “expressive topography”—the places where expressive activity is allowed to occur—and restricted the ability of speakers to reach intended audiences.⁷⁴ Those wishing to engage in disruptive forms of public protest must now run a daunting gauntlet of permit requirements, free speech zones and other physical barricades, aggressive law enforcement tactics, and public order laws.

Although some of these measures have been successfully challenged, courts generally defer to governmental managers’ interests in order, safety, and even aesthetics.⁷⁵ Under the managerial regime, public contention that disturbs the peace, interferes with residential or personal tranquility, or

71. *Id.* at 445.

72. *Id.* at 446.

73. For a discussion of the challenges this regime poses for public protests, demonstrations, and other events, see generally ZICK, *SPEECH OUT OF DOORS*, *supra* note 3.

74. See generally *id.* at ch.2 (explaining the management system that affects public expression and the concept of the “expressive topography”); see also John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States*, in *THE SOCIAL MOVEMENT SOCIETY* 83 (David S. Meyer & Sydney Tarrow eds. 1998).

75. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

proffers speech to unwilling audiences may be restricted or suppressed.⁷⁶ This is the regime that governs cases like *McCullen* which, as noted, upheld the sidewalk counselor's free speech claim but left undisturbed the core of the managerial framework.

Constitutional doctrine has been even less protective of dissent and protest in *non-governmental* preserves. In this context, the managerial approach is deeply rooted in principles of state action and private property rights. *Marsh v. Alabama* held that a Jehovah's Witness distributing leaflets on the streets of a "company town" could raise a First Amendment defense to his arrest.⁷⁷ However, *Marsh* is an outlier insofar as private properties are concerned. For example, the Court has held that privately owned and operated shopping malls are not part of the First Amendment's expressive topography. Even though these places often operate as the functional equivalent of public streets and plazas, speakers have no access to them for purposes of the First Amendment.⁷⁸ The spaces that are meaningfully open for purposes of public dissent and protest are generally limited to the public streets, parks, and most sidewalks.

Despite its dicta concerning the Internet-as-public forum, cases like *Packingham* are governed by this aspect of the managed speech framework. Access to Facebook and Twitter are determined by the private owners and managers of those spaces, as dictated by their terms and conditions. Dissent and protest are obviously allowed in cyberplaces, and at least in some quarters this expression is wide open and robust. But as of this moment, this is a function of the grace of private intermediaries, who are not required to comply with the First Amendment. Profits and public relations, not constitutional principles, determine both how much and what kind of dissent can occur there.

3. *Managing Transborder Speech and Association*

Professor Magarian is rightly critical of the Roberts Court's treatment of transborder speech and association rights in *HLP*. However, fear and rejection of "foreign" political expression is yet another basic hallmark of our managed speech tradition.⁷⁹ That tradition includes a stunning lack of recognition of the many values relating to cross-border and beyond-border expression.

76. See, e.g., *Frisby v. Shultz*, 487 U.S. 474, 484 (1984) (recognizing residential privacy and tranquility as substantial interests); *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (recognizing right of "privacy" in some "confrontational settings").

77. 326 U.S. 501, 509 (1946).

78. See *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

79. See generally TIMOTHY ZICK, *THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS RIGHTS* (2014).

At and beyond U.S. borders, First Amendment rights have long been treated as quasi-constitutional rights.⁸⁰ The judicial “quasi-recognition” of transborder First Amendment rights has entailed a reluctance to fully recognize and justify these rights; articulation of unique limitations on transborder rights; demotion or devaluation of certain transborder activities, such as the right to travel; substantial reliance on federal immigration and foreign affairs powers; and reflexive deference to national security concerns.⁸¹

In this particular context, which has long gone nearly unnoticed by First Amendment scholars, courts have provided only the meekest coverage and protection for free speech and associational rights. As I explain elsewhere, the provincial or parochial perspective regarding transborder First Amendment rights extends at least as far back as the founders’ own fear of foreign influence.⁸² Thus, *HLP* is rooted in a longstanding parochial tradition that treats transborder speech and association as inherently dangerous and generally outside the domain of ordinary First Amendment rules and principles.

In one important respect, in *HLP*, the Roberts Court expanded the government’s traditional degree of control with regard to cross-border speech and association. The Court retreated from Cold War precedents that had recognized the right to join associations that conducted peaceful political activities.⁸³ Thus, the Roberts Court authorized the government to use the “material support” law to prosecute political collaboration even where the government had not proven any intent to further the violent and criminal activities of the organization. In this sense, *HLP* exacerbated the difficulties Americans face when they seek to communicate or associate with persons and institutions located beyond U.S. borders.

Professor Magarian ably chronicles the Roberts Court’s embrace of “managed speech.” As he shows, the Court has not been a full-throated champion of outsiders, disruptive protesters, and other dissidents. Even decisions that have enforced the First Amendment rights of such individuals have done so only insofar as they act in ways that do not challenge or upset social order and stability. However, in most instances, particularly with regard to public dissent and protest, the Roberts Court was working within a longstanding managed speech framework.

80. *See id.* at 70–74.

81. *Id.* at 71.

82. *Id.* at 62–66.

83. *See, e.g.*, *Scales v. United States*, 367 U.S. 203, 229 (1961) (holding that mere association with a group that uses unlawful means to achieve its ends does not forfeit First Amendment associational rights).

II. MANAGED DISSENT BEYOND THE ROBERTS COURT

Managed speech principles are deeply ingrained not just in First Amendment jurisprudence but in American free speech culture more generally. This Part examines some recent examples of efforts to control public dissent and protest in the managed speech tradition. Recent proposals for limiting or suppressing public protests and demonstrations, campus dissent, and professional athletes' symbolic expressions of dissent, show the extent to which the managed speech approach has penetrated American free speech culture. In each of these examples, dissent and protest are being actively managed by public and private actors who wish to impose order and stability. Although constitutional doctrines and principles provide the framework under which protest and dissent are managed in these contexts, courts have played only a small role. The examples highlight both the extent to which our speech is managed speech and the challenges for Professor Magarian's conception of "dynamic diversity."

A. *Curbing Public Protests*

I have already mentioned the managerial controls that are authorized under the First Amendment's public forum and time, place, and manner doctrines. In response to some recent public protests, state officials have proposed even tighter and more restrictive measures, all designed to tame and curb public protest. Many of these measures have not yet become law. However, the mere fact of their introduction is indicative of a shift toward imposing greater control over public dissent and protest. Whether they become law today, future public protests will likely provide an impetus for revisiting these and similar proposals.

In general, the measures, which have been proposed in eighteen states thus far, would make public protest more difficult, more expensive, or even physically dangerous. They include the following:

- Making it a felony to block a highway;
- Significantly increasing the amount of civil fines for obstructing traffic or trespassing;
- Authorizing police to shut down public protests, including by "any means necessary;"
- Making it a crime to leave an "unlawful assembly;"
- Allowing businesses to sue individuals who target them with protests;
- Increasing fines for "mass picketing" behavior;
- Prohibiting the wearing of masks, robes, or other disguises during public protests and demonstrations;

- Permitting localities to charge protesters for the costs of policing events;
- Exempting drivers from liability if they strike protesters under certain circumstances;
- Pursuing protesters under anti-racketeering laws, including asset forfeiture provisions;
- Making it a crime to threaten, intimidate, or retaliate against current or former state officials; and
- Requiring public community colleges and universities to expel any student convicted of participating in a violent riot.⁸⁴

The national clamp down on protest and dissent has generated both domestic and international criticism. In the U.S., civil libertarians have objected that public officials are seeking to deter public dissent by criminalizing acts of public protest. In the international arena, the United Nations published a report suggesting that lawmakers in the U.S. were placing basic human rights relating to freedom of speech and assembly in jeopardy.⁸⁵

Some of the measures would likely violate the First Amendment, which may partly explain why they have not become law. Measures aimed directly at suppressing particular protests, that apply racketeering laws to even peaceful protests, that require protesters to cover the full cost of policing lawful demonstrations, and that release drivers from liability for running down protesters so long as they did so only negligently, have the purpose or likely effect of criminalizing or otherwise punishing lawful expressive activities. At least in most applications, such laws would likely violate the First Amendment.

However, under the managerial framework discussed earlier, some of the proposals might well survive First Amendment scrutiny. Many measures already on the books, including permitting requirements and financial indemnification provisions, significantly burden public protests and demonstrations. Some of the proposed additional burdens, including increased fines and criminal penalties for seemingly minor offenses, would make it more difficult to mount effective public protests. This burden would be measured against the state's interests in maintaining public order and

84. These examples are reported in Christopher Ingraham, *Republic Lawmakers Introduce Bills to Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017), <https://perma.cc/HTG5-NRVW> and Traci Yoder, *New Anti-Protesting Legislation: A Deeper Look*, NAT'L LAW. GUILD (Mar. 2, 2017), <https://perma.cc/P5UT-6MMV>.

85. See Harriet Agerholm, *More Than 20 US States Have Cracked Down on Protests Since Donald Trump's Election*, INDEPENDENT (May 9, 2017, 1:23 PM), <https://perma.cc/MKU4-6RK8> (quoting UN report).

safety. When such balancing occurs, courts often defer to officials charged with keeping peace and order.

My point is not to litigate the constitutionality of these proposals. Whether or not they would survive First Amendment scrutiny, the bills express an unambiguous desire to crack down on and curb public dissent. As noted earlier, many of the measures were introduced in direct response to particular protests, including minimum wage demonstrations, indigenous protests of the Standing Rock pipeline, Black Lives Matter protests in Ferguson, Missouri, and protests relating to Donald Trump's election as the nation's forty-fifth president.⁸⁶ The Ferguson protests were marked by violence and looting, which of course can be proscribed. But it is telling that, in each instance, the reaction to protest events was to find ways to punish or deter even peaceful but sometimes disruptive forms of dissent and protest.

Of course, in times of public turmoil, it is not unusual to see some degree of backlash against dissenters and protesters. Jehovah's Witnesses, labor picketers, and others who challenged the status quo have faced measures designed to curb their public dissent and protect activities.⁸⁷ During the civil rights era, various measures were adopted or enforced, particularly in southern states, to prohibit civil rights organizations from organizing, forming, protesting, and criticizing government.⁸⁸ In general, public unrest and division tend to give rise to anti-protest measures. These recent examples show that the managerial impulse runs deep and is especially likely to be triggered during eras of sharp public contention.

86. See Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sep 9, 2016, 6:16 PM), <https://perma.cc/RBU2-SESY> (examining the events that led to the pipeline protests); Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> (explaining events that led to the Ferguson protests); Gregory Krieg, *Police Injured, More Than 200 Arrested at Trump Inauguration Protests in DC*, CNN (Jan. 21, 2017, 4:06 AM), <https://perma.cc/5AZA-445S> (examining events surrounding arrests of protesters at Trump inauguration).

87. For descriptions of early cases involving restrictions on the expressive rights of Jehovah's Witnesses, see Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 443–51 (2006). Daniel Hildebrand, *Free Speech and Constitutional Transformation*, 10 CONST. COMMENT. 133, 150–59 (1993); see also *Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938) (invalidating ordinance prohibiting distribution of literature on public streets). For a discussion of early limits on labor picketing, see DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 1870–1920* (1999).

88. See *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (invalidating the conviction of a leader of civil rights group seeking to protest racial segregation); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (invalidating state libel laws); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (invalidating breach of peace convictions against civil rights protesters); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (invalidating Virginia law that restricted solicitation of clients for purposes of challenging racial segregation in public schools); *Garner v. Louisiana*, 368 U.S. 157, 163 (1961) (invalidating breach of peace convictions in sit-in case on procedural due process grounds).

We appear to have entered another such era. To the extent cultural and political attitudes concerning dissent emanate from the top, President Trump's actions and rhetoric have contributed to the backlash. As President, Trump has signed executive orders authorizing significant funding for militarizing local police forces.⁸⁹ The Justice Department has aggressively investigated and prosecuted anti-Trump inaugural protesters under "conspiracy to riot" laws that carry substantial prison terms.⁹⁰ President Trump has also blocked dissenting voices from his Twitter account, precipitating a First Amendment lawsuit.⁹¹ Further, as discussed below, President Trump has weighed in multiple times against NFL players who silently protested during pre-game renditions of the national anthem.⁹² The president has suggested that the players be fired or suspended for their acts of dissent.⁹³

Public rhetoric matches these actions. Candidate Trump invited attendees at his campaign rallies to literally "rough up" protesters.⁹⁴ Throughout the 2016 presidential campaign, Trump fashioned himself the "law and order" candidate.⁹⁵ The Trump Administration has refused to condemn violence against certain protesters.⁹⁶ In the wake of Black Lives Matter protests across the nation, the Federal Bureau of Investigation has listed "black identity extremism" as a domestic terrorism threat.⁹⁷ The Administration has steadfastly supported law enforcement officers in their policing of public protests—including, as noted, by providing federal funds for military equipment for use at public demonstrations.

These bills, actions, and anti-dissent rhetoric are all part of the broader managed speech framework. The proposed laws are rooted in the jurisprudence of managed speech, which grants officials broad authority to

89. Adam Goldman, *Trump Reverses Restrictions on Military Hardware for Police*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/us/politics/trump-police-military-surplus-equipment.html>.

90. Zick, *Protests in Peril*, *supra* note 11.

91. Carlos Ballesteros, *Trump Violates First Amendment by Blocking Critics on Twitter*, *Legal Experts Say*, NEWSWEEK (Nov. 16, 2017, 1:21 PM), <https://perma.cc/NZ3N-DAAD>.

92. *See infra* Section II.C.

93. Associated Press, *Trump Says NFL Players Should be Fired for Anthem Protests*, N.Y. TIMES (Sept. 23, 2017), <https://www.nytimes.com/2017/09/23/sports/trump-nfl-colin-kaepernick-.html>.

94. Jenna Johnson & Mary Jordan, *Trump on Rally Protester: "Maybe He Should Have Been Roughed Up,"* WASH. POST (Nov. 22, 2015), <https://perma.cc/9632-GM49>.

95. David A. Graham, *The Shaky Basis for Trump's "Law and Order" Campaign*, ATLANTIC (July 12, 2016), <https://perma.cc/DQ7N-NQ4H>.

96. For instance, President Trump was slow to object after Turkish President Recep Tayyip Erdogan's security detail beat American protesters in Washington, D.C. *See* Laurel Raymond, *Trump Still Silent Two Days After Protesters in DC Were Brutally Assaulted by Turkish Security*, THINKPROGRESS (May 18, 2017, 3:59 PM), <https://perma.cc/8Y5Y-PS34>.

97. Khaled A. Beydoun & Justin Hansford, *The F.B.I.'s Dangerous Crackdown on 'Black Identity Extremists'*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html>.

control public dissent and protest. The Administration's acts and anti-protest rhetoric are also redolent of the traditional preference for silent, non-disruptive, and non-threatening forms of dissent. The unmistakable message is that even minor acts of civil disobedience will be met with severe punishment. These acts and attitudes chill dissent by suggesting the possibility of harsh penalties or even bodily injury for those who step out of line. They blur the space between peaceful protest and racketeering, and between lawful dissent and terrorism.

Public opinion polling suggests that Americans, while supportive of free speech generally, are somewhat ambivalent about certain forms of dissent. For example, in a recent poll, a majority responded that a person who burns the U.S. flag should lose their citizenship and that controversial speakers should be banned from campus if students are likely to engage in violent protests in response to the speaker's presence.⁹⁸ Polling also suggests that Americans are ambivalent about protest movements. As one organization that tracks public opinion regarding protest movements has observed, "the public's overall attitude regarding mass demonstrations seems to range from skepticism to outright condemnation."⁹⁹ This is true regardless of the movement's agenda. Thus, civil rights, anti-war, and economic justice mass protests have all received similarly low levels of support from the American public. In sum, at least according to opinion polls, Americans prefer managed dissent to protest that upsets, stirs to anger, or unsettles.¹⁰⁰

These examples and findings show that the Supreme Court is not the only institution that has adopted and enforced a managed speech framework. Backed by the public order management system and a measure of public opinion, legislators have proposed increasingly speech- and assembly-suppressive laws. Executive officials have aggressively pursued anti-government protesters. The prevailing attitude concerning public contention and dissent seems to be this: public protest and dissent should be allowed, so long as it does not block intersections, keep individuals from attending scheduled events, take up too much space, get too close to intended audiences, make too much noise, or cost too much to police.

98. See Emily Ekins, *The State of Free Speech and Tolerance in America*, CATO INST. (Oct. 31, 2017), <https://perma.cc/FK4D-PZCR> (reporting findings of Recent Cato Institute survey of public attitudes concerning free speech).

99. Roper Center for Public Opinion Research, *Going Too Far: The American Public's Attitudes Toward Protest Movements*, CORNELL UNIV., <https://perma.cc/2A7M-759Z>. (last visited Apr. 5, 2018).

100. *Id.*

B. Managing Campus Dissent

In the United States, there is a long tradition of dissent and protest on public university campuses.¹⁰¹ As has been true outside the campus gates, there have been efforts to crack down on dissident expression and protest—in particular, during the civil rights and Vietnam eras.¹⁰² Contrary to suggestions that colleges were once open forums for expression, and have only recently become less supportive of free expression, campuses have actually experienced significant bouts of repression. As many have observed, public universities are facing new challenges in terms of student dissent and protest. The subject has received considerable attention in various media, and I will not attempt to examine campus free speech controversies in detail. I will focus instead on some of the most salient aspects of the management of campus dissent.

1. The Campus Order Management System

Public universities are unique places. Unlike other public properties, such as streets and parks, they exist primarily to ensure that students receive proper instruction and education in various disciplines. That said, as public institutions, universities are presumably subject to at least some of the constraints imposed by the First Amendment. Thus, students enjoy some free speech, association, press, and petition rights on campuses.¹⁰³ Those rights may of course be tempered or even restricted by the institution's interests in order, safety, and academic freedom.

During the 1960s, university campuses experienced significant disruption as a result of civil rights protests.¹⁰⁴ The Free Speech Movement at the University of California at Berkeley originated as a result of students' clashes with administrators, who had prohibited public protests except in certain areas on campus.¹⁰⁵ In particular, the students objected to the designation of small free speech areas that could be used for student protests. The Free Speech Movement ultimately prevailed against these

101. For an overview of student activism from the American Revolution to the 1950s, see SEYMOUR MARTIN LIPSET, *REBELLION IN THE UNIVERSITY* chs.4–5 (1976). I will focus on *public* institutions, which are formally governed at least to some extent by the First Amendment. However, my criticisms of managed speech on campus apply also to private colleges and universities, which generally express their commitment to First Amendment principles and values.

102. See generally KENNETH J. HEINEMAN, *PUT YOUR BODIES UPON THE WHEEL: STUDENT REVOLT IN THE 1960S* (2001).

103. See generally Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017).

104. See HEINEMAN, *supra* note 102.

105. For an account of the Berkeley Free Speech Movement, see ROBERT COHEN & REGINALD E. ZELNIK, EDs., *THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S* (2002).

strict limitations on public expression. Across the nation, students thereafter participated in sit-ins, pickets, demonstrations, and strikes.

Episodes such as the Free Speech Movement show that campuses are subject to the same kinds of convulsions and conditions that affect public dissent in other contexts. One disturbing recent trend, thoroughly documented by organizations like the American Civil Liberties Union and the Foundation for Individual Rights in Education (FIRE), is an institutional crackdown on student dissent. What I have referred to as the “public order management system”—essentially, the bureaucracy that curbs and limits public protest and dissent in public places—has largely been imported onto university campuses.

Under the “campus order management system,” many universities apply something like public forum and time, place, and manner principles to the open spaces of campus—quads, plazas, and other spaces that students could use for public protests.¹⁰⁶ This managed speech regime includes the full panoply of managed speech mechanisms that are used in public places—free speech zoning, permitting requirements, time limits, size limits, noise regulations, etc. University policies typically contain, at a minimum, a “Public Forum Policy,” an “Advertising, Distribution and Solicitation Policy,” and a “Policy on Speakers and Facilities Usage.”¹⁰⁷ These policies are enforced to manage and control public contention on university campuses. Penalties for failure to comply with such policies range from the denial of a permit application to student expulsion. These and other regulations affect expressive activities ranging from pamphleteering to sizeable protests.

Free speech zoning has been a prevalent managerial tactic on campuses.¹⁰⁸ FIRE and the ACLU have been instrumental in challenging efforts to “zone” campus dissent. Yet, on many university campuses, free speech zoning persists. Campuses comprising tens of thousands of acres have sought to limit student speech to just a few small areas. For example, at one point Texas Tech University had designated a “free speech area” on its campus of 28,000 students and 2,000 acres that comprised approximately 400 square feet.¹⁰⁹ This was the only space on campus where students were permitted to speak without advance permission. University administrators often defend these measures on the ground that they prevent “disruption.”

106. See ZICK, SPEECH OUT OF DOORS, *supra* note 3, at 273–76.

107. *Id.*

108. See *id.* at 277–81.

109. See *id.* at 278 (establishing Texas Tech University’s student body size and acreage); Roberts v. Haragan, 346 F. Supp. 2d 853, 866 (N.D. Tex. 2004) (stating that the “free speech area” was approximately 400 square feet).

Campus officials have also sought to manage student dissent through “speech codes.”¹¹⁰ Although campus “speech codes” were invalidated by several federal courts in the 1990s, there is some evidence that officials retained or even continued to adopt them. One study from the early 2000s suggested that many universities retained portions of their speech codes even after similar provisions had been invalidated by federal courts.¹¹¹ More remarkably, some universities *initially* adopted their speech codes after these court decisions.¹¹² Today, the regulation of offensive speech is accomplished through “codes of conduct,” sexual harassment policies, and other disciplinary rules. According to a 2006 FIRE study, ninety-three percent of universities surveyed still prohibited speech that is protected under the First Amendment.¹¹³

Universities have also used a variety of other means, including standardless licensing schemes, fees, notice and registration requirements, and restrictions on “outsider” speech, to contain and manage dissent on campus.¹¹⁴ Some university regulations require advance presentation of any materials to be displayed. Protest organizations may also be required to meet with administrators prior to events, in order to discuss the nature of the proposed event and negotiate its logistical terms.¹¹⁵ Advance notice requirements can range from twenty-four hours to up to two weeks. Further, specific code provisions may grant officials the authority to deny permits for any expression that does not serve or benefit the entire university community.¹¹⁶ In all of these and in other respects, places of higher learning exhibit the same suppressive tendencies that influence regulation of expression in other public places.

2. *Managing Outside Voices*

With specific regard to the diversity of voices that can be heard on university campuses, universities vary widely in their approaches to outside speakers or what some call “non-university entities.”¹¹⁷ Many permit members of the public and other “non-university entities” to use at least some campus spaces. Others restrict outsiders’ access to those invited or

110. See ZICK, *SPEECH OUT OF DOORS*, *supra* note 3, at 271–73.

111. See Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 *LAW & SOC'Y REV.* 345, 345–46 (2001).

112. *Id.* at 345.

113. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *SPOTLIGHT ON SPEECH CODES IN 2006: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES* 1–3 (2006).

114. See ZICK, *SPEECH OUT OF DOORS*, *supra* note 3, at 274–76 (discussing restrictions).

115. *Id.* at 274.

116. See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 865 (N.D. Tex. 2004); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 577 (S.D. Tex. 2003).

117. See ZICK, *SPEECH OUT OF DOORS*, *supra* note 3, at 276.

affiliated with student organizations. Still other universities impose broader restrictions, effectively denying outsider access.¹¹⁸

American universities are once again roiling with free speech conflicts.¹¹⁹ Some of those conflicts relate to outside speakers. Many universities have rescinded invitations to outside speakers, some of whom had been invited to campus by students.¹²⁰ Controversial speakers, including the avowed white supremacist Richard Spencer and provocateurs like Milo Yiannapolous, have planned events on campuses, some of which have been canceled.¹²¹

Universities fear the potential disruption, including the threat of violence, controversial speakers may bring in their wake. They worry about their ability to provide adequate security and the considerable expense of doing so (which can run to millions of dollars in some cases). Not surprisingly, they have turned to managerial tools to try to resolve conflicts relating to outside speakers.

Students concerned about the harms associated with offensive and denigrating speech have also taken certain steps to manage outside speakers on their campuses. Polling shows relatively strong support among the current generation of college students for silencing speech that offends minorities or makes students uncomfortable.¹²² One poll suggests that a majority of college students think it is acceptable to take action—including shouting down the speaker—in order to prevent someone from communicating opinions or ideas with which they disagree.¹²³ These polling results are consistent with some recent incidents on college campuses. In some cases, students have physically blocked controversial speakers' access to venues or attempted to assault them.¹²⁴ Students have also interrupted or yelled over speakers in an effort to prevent them from

118. *Id.*

119. See GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF THE AMERICAN DEBATE* (2014); ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017).

120. See LUKIANOFF, *supra* note 13, at 29–36 (2014) (discussing “disinvitation season” on university campuses).

121. Susan Svrluga, *UC-Berkeley Says “Free Speech Week” is Canceled. Milo Yiannopolous Says He’s Coming Anyway*, WASH. POST (Sept. 23, 2017), <https://perma.cc/T69E-MJB5>.

122. See CHERMERINSKY & GILLMAN, *supra* note 119, at 12 (“We can confirm what the Pew Research Center reported in November 2015: this generation of college students is much more supportive of censoring offensive statements about minorities and much less supportive of protecting speech that makes some students uncomfortable.”).

123. See Johnathan Villasenor, *Views Among College Students Regarding the First Amendment: Results From A New Survey*, BROOKINGS (Sep. 18, 2017), <https://perma.cc/QZ33-SGR7>.

124. See, e.g., Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), <https://perma.cc/5J7U-H5F9>.

communicating with audiences.¹²⁵ Indeed, owing to the sheer number of such incidents on college campuses, one commentator dubbed the 2016–17 academic year “the year of the shout-down.”¹²⁶

In response to shout-down and other disruptive actions by students, some universities have adopted policies that restrict the kinds of expressive disruption students may engage in at campus events.¹²⁷ Thus, administrators have responded to student efforts to manage outside speech by adopting policies that manage student management of speech. These policies are the latest additions to the campus order management system discussed earlier.

The outside speaker controversies are part of a broader debate on university campuses over freedom *from* speech.¹²⁸ These controversies raise difficult First Amendment questions relating to university officials’ authority to exclude outside speakers. They also raise unresolved questions about whether there is a First Amendment right to heckle a speaker, which includes a right to drown out controversial speech altogether. First Amendment scholars have noted the surprising dearth of authorities relating to the rights of counter-protesters and hecklers.¹²⁹

Students using disruptive counter-protests to interfere with controversial speech may or may not be within their First Amendment rights when doing so. However, their speech serves the same purpose as other measures intended to exclude controversial speech and speakers from campus. What is more, the shout-down tactic evinces the same sort of lack of tolerance that many university policies communicate regarding student dissent. In other words, students exhibiting managerial intolerance may simply be imitating their local administrators, who have in many cases responded to controversial dissent with repression.

Whatever the ultimate answers to these First Amendment questions may be, there is no question that administrators and students alike are invoking measures that are intended to manage and curb controversial speech on campuses. The campus order management system, which is rooted in public forum and time, place, and manner doctrines, serves as the backdrop for administrators’ responses. Students, as physical and expressive disruptors, sometimes also seek to manage access and communication by outsiders.

125. See Jeremy Bauer-Wolf, *ACLU Speaker Shouted Down at William & Mary*, INSIDE HIGHER ED Oct. 5, 2017), <https://perma.cc/4UBZ-UHA2> (reporting an incident in which Black Lives Matter protesters shouted down an ACLU representative).

126. Stanley Kurtz, *Year of the Shout-Down: It Was Worse Than You Think*, NAT’L REV. (May 31, 2017, 1:48 PM), <https://perma.cc/GPZ8-WJUE>.

127. Todd Richmond, *University of Wisconsin Approves Free Speech Policy That Punishes Student Protesters*, CHI. TRIB. (Oct. 6, 2017, 8:19 PM), <http://perma.cc/UC34-HPH9>.

128. See LUKIANOFF, *supra* note 13, at 1.

129. See, e.g., FREDERICK SCHAUER, *THE HOSTILE AUDIENCE REVISITED* (2017), <https://perma.cc/K6VK-JU6N>.

They attempt to control or silence voices they dislike or find offensive. Administrators, in response, are moving to limit or punish students' disruptive actions.

C. *Managing Political Orthodoxy*

The lessons university students learn regarding free expression and the value of dissent will undoubtedly carry forward into their post-university lives.¹³⁰ Insofar as students are learning that dissent need not be tolerated, or that the appropriate response to ideas one does not like is to drown them out or otherwise suppress them, American society will continue to confront issues relating to the proper response to public expressions of dissent and protest.

One recent example is the conflict over whether NFL athletes must or ought to stand at respectful attention during the pre-game playing of the national anthem and flag ceremonies. Colin Kaepernick and other players took a knee or made other non-disruptive gestures of dissent during pre-game ceremonies.¹³¹ As the athletes explained, they were not protesting the flag, the nation, or the U.S. military but rather what they considered examples of police brutality—specifically, what they believed to be unjustified shootings of African-Americans in several high-profile cases.¹³²

The NFL protests received increased national attention after President Trump weighed in via Twitter. President Trump has tweeted frequently about the issue, urging that any dissenting player—whom he described in one tweet as a “son of a bitch”—be suspended or fired for showing “disrespect” for the national anthem, the flag, and the nation’s military.¹³³ Depending on which opinion poll one consults and how it is constructed, a majority of the American public may actually support President Trump’s general position that kneeling is disrespectful and unpatriotic.¹³⁴

Note that in this particular instance, the rationale for objecting to dissent cannot be that the protests are disruptive—for example, in the way that mass social movement demonstrations can be. Taking a knee does not disrupt the playing of the anthem, the saluting of the flag, or the actual game itself. Rather, the principal objection seems to be the audience’s view that

130. See Lukianoff, *supra* note 119, at 7 (“What happens on campus doesn’t stay on campus.”).

131. Vann R. Newkirk II, *No Country for Colin Kaepernick*, ATLANTIC (Aug. 11, 2017), <https://perma.cc/T5GE-X5QP>.

132. Eric Reid, *Why Colin Kaepernick and I Decided to Take a Knee*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/colin-kaepernick-football-protests.html>.

133. Jeremy Gottlieb & Mark Maske, *Roger Goodell Responds to Trump’s Call to ‘Fire’ NFL Players Protesting During National Anthem*, WASH. POST (Sept. 23, 2017), <https://perma.cc/QUP4-ES7R>.

134. Kathryn Casteel, *How Do Americans Feel About the NFL Protests? It Depends on How You Ask*, FIVETHIRTYEIGHT (Oct. 9, 2017, 5:58 AM), <https://perma.cc/TE5J-KYEK>.

even silent forms of public dissent and protest during the national anthem are inappropriate, disrespectful, or unpatriotic.

The NFL is a private organization, and for that reason the controversy does not formally or technically involve the First Amendment. However, as some have observed, President Trump has crept closer and closer to the constitutional line in encouraging that kneeling players be benched or terminated.¹³⁵ Whether or not the First Amendment formally applies, the official and public reactions to these acts of dissent implicate core free speech principles and values. In *West Virginia State Board of Education v. Barnette*,¹³⁶ the Supreme Court invalidated state laws mandating that school children salute the United States flag. *Barnette* is part of the First Amendment canon. It is an iconic affirmation of a core right to dissent with respect to and resist majoritarian ideas regarding politics, patriotism, and nationalism. That affirmation is worth highlighting in the context of the NFL protests.

In response to the state's argument that its interest in national unity overrode the students' right to object on religious and other grounds to the mandatory flag salute, *Barnette* said that "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men."¹³⁷ As Justice Jackson wrote for the Court: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."¹³⁸ In one of the best known passages in our First Amendment jurisprudence, *Barnette* concluded: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹³⁹

Judging by the reaction to the NFL protests, the sitting president and many Americans do not share or indeed may have rejected *Barnette*'s anti-orthodoxy principle. President Trump and others insist that individuals stand at attention while the national anthem is performed. Some adamantly insist that Americans think of the sacrifices of military personnel while the anthem plays. Some undoubtedly do so. But as *Barnette* concludes, a central point of that sacrifice was to preserve the right to decide for ourselves how we will react to our government and its symbols. As the

135. See Robert Post, *Do Trump's NFL Attacks Violate the First Amendment?*, POLITICO (Sept. 27, 2017), <https://perma.cc/3WMV-522K>.

136. 319 U.S. 624 (1943).

137. *Id.* at 640.

138. *Id.* at 641.

139. *Id.* at 642.

Court stated in *Barnette*, insisting (as President Trump and others have) on a particular response “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”¹⁴⁰

III. THE PROSPECTS FOR “DYNAMIC DIVERSITY”

As the discussion thus far suggests, Americans have a complicated relationship with public dissent. We celebrate the virtues and victories of American dissenters, including our revolutionary ancestors. We are justly proud of our First Amendment *right* to dissent. We point to that right as evidence that we are a free people—freer, in fact, than citizens of other nations.

However, if we Americans were to be honest with ourselves, we would acknowledge that our right to dissent is in some respects severely challenged. It is undermined by a managed speech regime that is deeply rooted in precedents, attitudes, laws, bureaucracies, and cultural norms concerning free expression. In just the three contexts I have examined, Americans have imposed increasingly restrictive controls on public contention, reserved the greatest protection for non-disruptive forms of expression, excluded controversial outside speakers, and supported a national political orthodoxy. In the opening lines of his book, Professor Magarian writes: “If a democracy doesn’t make noise, it dies.”¹⁴¹ In many respects, Americans are noisy and boisterous folk. But when it comes to public dissent, it seems many support making noise so long as it is not too loud, too raucous, or too disruptive.

This Article highlights the challenges for Professor Magarian’s proposed alternative to managed speech, which he calls “dynamic diversity.”¹⁴² The approach calls for facilitating a diversity of ideas and a diversity of participation in public discussions.¹⁴³ Dynamic diversity envisions a free speech jurisprudence that facilitates public debate in ways that “spur political change.”¹⁴⁴ Professor Magarian argues that “we need First Amendment law to protect marginal, dissident, outsider voices.”¹⁴⁵ He advocates a free speech framework that does not “merely bar government from restricting speech but requires, or at least presses, the government to promote speech.”¹⁴⁶ Among other things, this approach would entail

140. *Id.*

141. MAGARIAN, *supra* note 1, at xi.

142. *Id.* at 227.

143. *Id.* at 239.

144. *Id.* at 240.

145. *Id.*

146. *Id.* at 241.

facilitating greater access to government preserves such as public streets and parks.

As is fitting for a book about the Roberts Court, Professor Magarian's "dynamic diversity" model focuses primarily on what the Supreme Court might do to further the goals of dynamic diversity.¹⁴⁷ Thus, Professor Magarian advocates a shift in the Court's "center of gravity" from well-heeled speakers "to dissenters and outsider speakers."¹⁴⁸ He wants the Court to "prioritize strong First Amendment protection for dissenters and outsider speakers," including "[s]treet protesters" and "campus agitators."¹⁴⁹ As he observes, Court decisions following the dynamic diversity approach would not "treat[] speech that challenges the status quo as a threat to social order," but rather as a powerful means of effecting social change."¹⁵⁰ Among other things, Professor Magarian urges the future Court to "restore expressive rights in public places" by "treat[ing] free expression not as an inconvenient encroachment on public spaces but as a primary purpose of those spaces."¹⁵¹

This will be an uphill climb. As I have noted, the Roberts Court did not pioneer the managed speech approach. Some of its decisions may have exacerbated its effects, but managed speech is part of a deep and stubbornly attached root system.¹⁵² Particularly as it relates to public protest and public contention, managed speech is now deeply entrenched in our First Amendment jurisprudence. However, even if future Courts fail to adopt the doctrines and principles of dynamic diversity, the approach merits consideration.

Indeed, the most useful venues for contemplating and perhaps adopting the principles of dynamic diversity may be located outside and beyond the Supreme Court. Judicial decisions that facilitate a diversity of ideas and participants would likely effect some degree of change on the ground. But in our streets, on our campuses, and in the context of national social and political conflicts, it will take more than a handful of Supreme Court decisions to facilitate a path to something like dynamic diversity. It will take much larger-scale institutional and attitudinal transformations.

The fundamental principles of dynamic diversity could help to bring the necessary changes about. As a society literally built on protest and dissent, we do need to focus attention on speakers who are outsiders, who challenge

147. *Id.* at 243.

148. *Id.*

149. *Id.* at 243–44.

150. *Id.* at 244.

151. *Id.* at 250.

152. I have encountered this problem in my work on the public forum doctrine and the treatment of cross-border expression. See ZICK, SPEECH OUT OF DOORS, *supra* note 3; ZICK, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 79.

the status quo, and who bring disruption to our streets, campuses, and athletic stadiums. We need not give them free reign; but we ought to provide the space necessary to bring a diversity of views and a diversity of participants to public places.

Speech managers, including legislators who write laws designed to curb public protest, significantly constrain public discussion and diminish public participation. As Professor Magarian suggests, “only the organization and hierarchy necessary for a vigorous exchange of ideas should structure public debate.”¹⁵³ Public forums are already difficult places to engage in effective protest and dissent. Imposing additional onerous requirements and enhancing the penalties for engaging in what are often minor acts of civil disobedience will further chill these activities.

Legislators ought to resist the urge to impose draconian penalties for acts of civil and political disobedience. Disruption has limits, and officials can enforce existing public order and safety laws. But the bills and proposals discussed earlier seem designed not simply to maintain order, but to chill public dissent and expression. Applying racketeering laws and immunizing drivers who plow into protesters is not really about maintaining order. These measures penalize dissent and make protest more onerous or even physically perilous. They are part of a dangerous trend that threatens to chill a valuable means of effectuating social change. Civil rights and other activists need to pressure legislators to reject this approach as antithetical to the First Amendment and dangerous to constitutional liberty.

Managing public protest and dissent on college campuses has not taken on the same draconian overtones. However, as discussed earlier, administrators have adopted many of the managerial techniques that are used outside the campus gates to control dissent within them. Speech-friendly rules and procedures, which need not follow court decisions mandating adoption, could allow for robust exchanges in the open expanses of campus properties.

Again, this does not mean that student speakers are entitled to protest whenever, wherever, and however they wish. Officials are obligated to maintain a level of order and decorum consistent with their educational goals. But insisting on detailed permits, excluding certain speech and speakers, and erecting tiny free speech zones for campuses that cover thousands of acres are not measures designed for that purpose. Rather, they are vestiges of a managed speech framework that impose order at the expense of diverse and robust public debate.

153. MAGARIAN, *supra* note 1, at xix.

As Professor Magarian observes, “[m]anaged speech treats outsider speakers as useless at best and dangerous at worst.”¹⁵⁴ Too often this has seemed to be the attitude of campus administrators and students alike. Dynamic diversity “rejects the managed speech tendency to scorn outside speakers.”¹⁵⁵ Both administrators and students should recognize that speakers from outside the community can enhance the diversity of participants and ideas on campus. That does not mean anyone necessarily has a right to speak on campus, or that students must remain silent in the presence of speakers who do come to campus. But institutions of higher learning ought not to fear outsiders who come to “challenge existing institutions and power arrangements.”¹⁵⁶

Without embracing the substance of every speaker’s message, university communities could broadly welcome outside entities and participants. Students should of course have some latitude to dissent, perhaps including through disruptive expression. But they should not be permitted to silence outside speakers through violent acts or physical access barriers. At the same time, administrators ought to resist the urge to punish students who are not as welcoming as they ought to be by enacting punitive policies. Controversies regarding outside speakers can be effective “teaching moments.” Students, faculty, and administrators can all learn something about tolerance, freedom of expression, and equality from these controversies.

Last, and perhaps most importantly, there must be a transformation in the way Americans process and interpret public dissent. During periods of contention, legislators reflexively seek to impose greater limits on public protests. This bespeaks a public attitude of intolerance toward civil disobedience and dissent. University administrators likewise turn to the campus order management system to control dissent on campus. According to some recent opinion polling, many university students share this same sort of intolerance for dissent.¹⁵⁷ The polling suggests the rather urgent need for universities and others to expend resources and energy to educate students concerning the values of freedom of speech.

As the conflict concerning NFL protests demonstrates, the cultural preference for polite and orthodox displays is deeply entrenched in American society. The urge to suppress public dissent emanates from all walks of life and all points on the political spectrum. In order to foster societal and political change, dissent must have adequate breathing space.

154. *Id.*

155. *Id.*

156. *Id.*

157. See Catherine Rampell, *A Chilling Study Shows How Hostile College Students Are Toward Free Speech*, WASH. POST (Sept. 18, 2017), <https://perma.cc/4UYS-GJ52>.

As Professor Magarian observes: “For dynamic diversity, disruption defines much of expressive freedom’s value.”¹⁵⁸ Disruption need not be physical. It can operate at the level of mental processes and reactions. We need to ask why taking a knee during the national anthem so deeply affronts, and why this act of dissent cannot at least be tolerated even if people cannot fully support it. If there really is no room in our society for peaceful, symbolic gestures of this sort, then dynamic diversity is going to be a real moonshot.

As trivial as it may seem, the NFL protest example encapsulates perhaps the biggest challenge for dynamic diversity. Scholars have shown that Supreme Court decisions generally tend to follow public opinion rather than shape it.¹⁵⁹ If this is correct, and if the body politic is not open to a diversity of ideas and participants, there is little chance the Supreme Court will alter its course. Dynamic diversity must first take root with the participants and institutions whose actions are broadly framed by constitutional rules and values, but whose laws and policies give those things actual force. And it must follow significant changes in the way the American public views, reacts to, and tolerates public dissent.

CONCLUSION

As Professor Magarian’s study demonstrates, the dissenting speaker has not been the primary focus of First Amendment jurisprudence during the first decade or so of the Roberts Court. During prior eras, the Supreme Court did sometimes wax rhetorical on the importance of maintaining robust dissenters’ rights. It put Jehovah’s Witnesses, civil rights protesters, and others who challenged the status quo front and center. But in truth, even these revered dissenters were tolerated only insofar as they did not pose any threat of *actual* disruption or otherwise upset the social order in the course of expressing dissent. In general, the First Amendment protected the Witnesses’ and civil rights protesters’ non-truculent expression, so long as it was conveyed in a place the speakers had a right to be and without any aggressive intentions.

Later, with the Court’s blessing, officials constructed a public order management system that neutralized and significantly stymied public dissent. Order became the order of the day. Disruption could not be tolerated. It had to be maintained, controlled, and managed. Today, this system is pervasive on our streets, on our campuses, and in our stadiums. We see it in the raft of legislative proposals for burdening and further

158. MAGARIAN, *supra* note 1, at xx.

159. *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

marginalizing public dissent. We see it in law enforcement tactics, which continue to use militarized methods to police and manage public dissent. We see it on our campuses, which have largely adopted a bureaucracy of management that applies to student speech from the quad to the classroom. Even some students have asserted a form of managerial authority, in blocking our ousting controversial speakers or speech. Finally, peaceful and non-disruptive athlete protests have been met with outrage, derision, and threats of adverse employment actions.

Professor Magarian rightly decries the Roberts Court's embrace, perpetuation, and in some cases exacerbation, of managed speech doctrines and principles. His "dynamic diversity" proposal encompasses the basic prerequisites for meaningful constitutional discourse and change. We do need more diverse messages and participants. Were a future Court to chart a course by the lights of "dynamic diversity," we could experience some marginal change in the status and rights of dissenters. However, real change in this regard must come not from courts but from legislators, executive officials, campus administrators, students, and the public at large—all of whom will need to provide more breathing space for dissent in their respective communities.

My prognosis has admittedly been mostly negative. But there may yet be hope for public dissent and dynamic diversity. Most of the bills to curb and punish public protesters have failed to garner majority support in state legislatures. Activists continue to risk arrest and detention to exercise rights to protest and dissent. Although a vocal and disruptive minority of college students have stolen the recent headlines, not all in that community agree that controversial speech is something to be avoided or exiled. Efforts to teach and educate students, without condescension or judgment, about the values of dissent and dynamic diversity must be part of a program to preserve and protect dissent. Americans like to disagree with one another. Now more than ever, they need to be reminded of the importance of preserving the right to express opinions at variance with those commonly or officially held.