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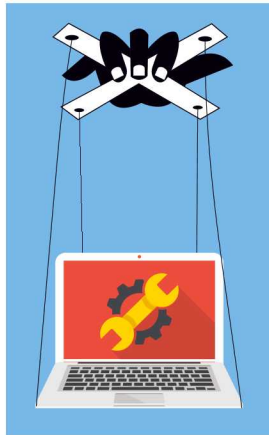
A LEGAL NEWSPAPER FOR KIDS

When You Can't Believe Your Eyes

by Michael Barbella

There is a saying that “seeing is believing” and another that says the “camera doesn’t lie.” New technology is challenging both notions.

In April 2019, former President Barack Obama issued a public warning about phony digital content and reality distortion. In the minute-long broadcast alert, the



former president is seated before the Stars and Stripes, wearing his trademark navy blue suit and American flag lapel pin. He speaks directly to the viewer, addressing the threat posed by online misinformation. But something seems...off.

About halfway into the segment, the video reveals who is really behind the audio being heard—actor/director Jordan Peele. The entertainer teamed with BuzzFeed.com to alert the public to the dangers of falsified web content. Forged videos such as Peele’s are better known as deepfakes, named for their use of deep machine learning, which uses **algorithms** to create realistic, digitally-altered material. The technology

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Balancing the Right to Protest with the Right to Be Heard

by Hanna Krueger

Free speech is one of the most sacred rights guaranteed by the U.S. Constitution and nowhere has it been more revered than on college campuses, with sit-ins and student activists arrested fighting for the right to free speech and political action on campus.

The Free Speech Movement was born on the campus of the University of California—Berkeley in the 1960s. A journalist covering the protests at the time remarked, “It wasn’t exactly that



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Courts to Decide the Fate of Two National Monuments

by Maria Wood

For more than a century, U.S. presidents have declared national monuments, which preserve land that protect endangered species, ecosystems or historical artifacts. Now, lawsuits waiting to be heard in Washington, DC federal court may ultimately decide whether a president has the authority to shrink a previously established national monument.

The issue came up in December 2017 when

President Donald Trump announced the reduction of two national monuments in Utah. The reductions went into effect on February 2, 2018. The president’s proclamation downsized the Grand Staircase-Escalante National Monument by half from 1.9 million acres to 997,490 acres. Similarly, Bears Ears National Monument was shrunk from 1.35 million acres to 201,876 acres, an 85 percent reduction in size.

President Trump’s reductions of these sites, reportedly the largest ever ordered by a president, were



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Two National Monuments **CONTINUED FROM PAGE 1**

immediately met with lawsuits from environmental and conservation groups, as well as Native American tribes. The **plaintiffs** in the cases contend shrinking the national monuments opens up once-protected land to mining, gas drilling and other commercial uses that could diminish the monuments' natural beauty and disturb the fragile environment surrounding them. Native American tribes add that shrinking the national monuments would threaten culturally significant tribal lands. In fact, it was a coalition of five tribes that requested former President Barack Obama to designate Bears Ears as a national monument in 2016.

Advocates of the reductions argue local and state officials, as well as residents of Utah, should have a say in how land within their

borders is used instead of the federal government. Freeing monument land for economic development will provide more jobs and revenue in the towns surrounding the monuments, advocates say.

Digging for dinosaurs

The lawsuits also contend that reducing the size of Bears Ears puts current archeological digs in jeopardy. In February 2018, paleontologists working in Bears Ears discovered the remains of three intact phytosaurs, a crocodile-like species that also have blowholes. This species dates back more than 250 million years to the Triassic Period, which predates the Jurassic Period. The fossils were discovered on the land that is no longer protected.

Robert Gay, the paleontologist leading researchers at the dig site, told news reporters that without national monument designation, "anyone can come and collect plant fossils and shells, legally. It's not prohibited. Whereas in a monument, that activity is restricted to permitted scientists."

As for the Grand Staircase-Escalante monument, David Polly, president of the Society of Vertebrate Paleontology, told *The Washington Post* that it ranks as one of the "most important examples of the Mesozoic Era and has yielded 27 new species never known to science before."

Grand Staircase-Escalante also contains commercially viable shale gas deposits that could be developed by gas companies. Bears Ears is rich in uranium, which can be used as fuel in nuclear reactors.

The Antiquities Act of 1906

In challenging the reductions, the plaintiffs base their argument on a century-old law, the Antiquities Act of 1906, which was enacted to stop



the theft of ancient artifacts from archeological sites in the Southwest. The Act enables the president to quickly set aside portions of federally owned land that contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."

President Theodore Roosevelt was the first president to establish a national monument under the Antiquities Act—Devils Tower in Wyoming. Over the years, 17 presidents have designated a total of 158 national monuments.

In declaring a national monument, a president isn't taking land away from private owners. The land has to be owned by the federal government. Approximately 60 percent of the land in Utah is federally owned. By declaring an area of land as a national monument, the federal government can, however, dictate how the land can be used. Along with the designation, national monument proclamations may restrict or ban specific commercial or recreational uses, such as mining or cattle grazing.

While presidents may declare a national monument, only Congress has the authority to create a national park. Several national monuments have been converted to national parks. The Grand Canyon, for example, was declared a national monument in 1908 (also by Theodore Roosevelt) before being named a national park in 1919.



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The Antiquities Act doesn't expressly give presidents the authority to reduce or revoke a monument, yet several have trimmed the size of national monuments. Compared to the reductions President Trump made, previous changes were mostly small in scale and, most importantly, never challenged in court.

In one example, Washington State's Olympia Peninsula National Monument was reduced three times since it was designated in 1909. President Woodrow Wilson downsized the monument during World War I because the nation needed lumber. The boundaries were later restored in 1938 when Congress declared the monument a national park.

The Antiquities Act also states the president must confine the monument to "the smallest area compatible with the proper care and management of the objects to be protected." On that point, supporters of the reductions in Utah argue that the monuments were too big and, therefore, due for a re-sizing.

On the other hand, Kathryn Kovacs, an environmental law professor at Rutgers Law School, says courts have not restricted presidential power to mandate the

size of a national monument. Professor Kovacs, who previously worked in the Department of Justice's Environment and Natural Resources Division, points to the 2003 case of *Tulare County v. Bush* where the U.S. Court of Appeals in DC ruled the president wasn't obligated to justify the size of a national monument. The case involved the Giant Sequoia National Monument in California, established by President Bill Clinton in April 2000.

"Essentially, the courts won't second guess the size of the monument," Professor Kovacs says. "So the claim the monuments were bigger than they needed to be may be an uphill climb."

Why the shrinkage?

The reductions by President Trump followed a review by then-Interior Department Secretary Ryan Zinke of 27 national monuments designated in the past 20 years. His report recommended cutting the size of Bears Ears and Grand Staircase-Escalante, which were established by Presidents Barack Obama and Bill Clinton, respectively.

The power to declare a national monument isn't the president's authority alone. Congress can also

establish a national monument. For instance, President Clinton declared Grand Staircase-Escalante a national monument in 1996 and it was later approved by Congress.

Congress has also limited a president's authority to designate or enlarge national monuments in Wyoming and Alaska. In fact, any national monument in Wyoming requires congressional approval, as does any monument in Alaska more than 5,000 acres in size. Congress also has the authority to abolish or reduce a national monument, according to Professor Kovacs.

"That's the point the monument defenders are making in this case," Professor Kovacs says. "The Antiquities Act gives the president the authority to create a monument, but the authority to reduce or eliminate a monument is left to Congress under its Property Clause authority."

Under the Property Clause of the Constitution, Congress "shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States..." The Property Clause doesn't conflict with a president's authority to declare national monuments, Professor Kovacs explains.

"The purpose of the Antiquities Act was to allow rapid protection of land," Professor Kovacs says. "There is no

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Coming Soon.....

Beyond the Bill of Right is a newsletter containing 10 articles on the 17 amendments added to the U.S. Constitution after the Bill of Rights was ratified in 1791.

All articles include Discussion Questions providing a ready-made lesson plan.

Printed copies of *Beyond the Bill of Rights* will be available for order via our website. A pdf of the publication will be available for download as well.

All articles contained in the newsletter may also be found as individual posts on our civics blog, The Informed Citizen, which may be accessed from the homepage of our website (click on "Blogs" from the navigation bar)

Questions on the publication or how to order may be directed to Jodi Miller (jmiller@njsbf.org).



Berkeley was the first place where this mechanism [political protest] kicked in, but it was the place where it went critical.”

Fast forward a half a century later and it seems to be a different story on the Berkeley campus. In February 2017, the Berkeley College Republicans invited right-wing commentator Milo Yiannopoulos to speak on campus. More than 1,500 students gathered on the campus to protest Yiannopoulos, who promotes white supremacy and neo-Nazi ideals. The gathering turned violent when an **anarchist** group joined the protest throwing fireworks and rocks at police officers. The university condemned the violence and ultimately canceled the Yiannopoulos speech.

Suing over viewpoint

The free speech issue resurfaced months later when the Berkeley College Republicans invited conservative authors Ann Coulter and David Horowitz to speak on campus. Administrators originally rescinded the invitations, citing concerns about violence similar to the Yiannopoulos protests.

Amid national criticism that the university was suppressing free speech, administrators reversed course and invited them back to speak but at an alternative venue. Coulter and Horowitz rejected the renewed invitation because they were moved to a building on the outskirts of campus and the event had been changed to daytime hours, not the evening as originally planned. As a result, Young America’s Foundation, a conservative youth organization, filed a federal lawsuit against the university.

“Berkeley promises its students an environment that promotes free debate and the free exchange of ideas,” the lawsuit said, but that promise was broken

by “the repressive actions of university administrators and campus police.”

In April 2018, a U.S. district court judge dismissed the **plaintiff’s** claim of viewpoint discrimination against UC Berkeley, but allowed them to move forward with charges of bias in the relocation of speakers. In December 2018, the university settled the lawsuit, agreeing to pay \$70,000 in attorneys’ fees, along with the promise that it would not charge any group a fee for increased security or relocate speeches based on a speaker’s viewpoint.

Teachable moments

Similar free speech battles are playing out at universities across the nation. On more than one occasion in the past few years, student protests against political speakers have spiraled into violence and chaos.

“If there is any place in the world that an individual’s right to free speech and thought should be protected, it is on a college campus where young adults can pursue their passions and figure out how they think and who they want to be,” argues Zach Greenberg, a program officer at the Foundation for Individual Rights in Education (FIRE).

Administrators must also maintain an environment of civility and dignity, which has become increasingly more difficult since the polarization of politics, says Svetlana Mintcheva, free speech activist and

program director with the National Coalition Against Censorship (NCAC).

A month after the protest at Berkeley, student protesters at Middlebury College shut down a speech by Charles Murray, a conservative social scientist who wrote *The Bell Curve*, a book which concluded that intelligence and race are connected. Students at his speech pulled fire alarms and chanted until Murray stopped speaking. He was then harassed by protesters in the parking lot on the way to his car. Murray had previously spoken on campus in 2007 without incident.

“There is a fine line between protected speech and punishable conduct,” says Greenberg. “You have the right to protest, but not the right to throw bottles at someone you disagree with or shout them down and drown them out.”

In an opinion piece for *The Guardian*, Zachary Wood, a graduate of Williams College and president of its “Uncomfortable Learning” program, recalled his brush with Charles Murray. Wood, an African American, received pushback from his peers after inviting Murray to speak on the Williams campus.

“I wanted to use the education I received at Williams to create positive change in the world one day,” Wood wrote. “How would I do that if I shut out the voices I disagreed with instead of engaging with them?”

On behalf of his colleagues on the Free Speech Movement Archive Board of Directors at Berkeley, Robert Cohen, now a social studies professor at New York University, wrote an opinion piece for *The Daily Californian* about the Yiannopoulos protest.

“If even a 10th of the 100 or so faculty who signed those pro-ban open letters showed up to ask this **bigot** tough questions or held a teach-in about what’s wrong and unethical in his **vitriol** (and in



the rest of the so-called 'alt right'), they could puncture his PR bubble instantly, avoid casting him in the role of free speech martyr and prove that the best cure for ignorant and hateful speech is speech that unmasks its illogic, cruelty and stupidity," Professor Cohen wrote.

What's protected?

Some experts believe that current college students have a skewed view about what type of behavior is protected and acceptable under the First Amendment. For example, a Cornell University student told *Time Magazine*, "Free speech is speech that

is not aimed to hurt. Free speech that dehumanizes is not free."

A survey conducted by the Brookings Institution, an educational research group, reveals that 20 percent of college respondents think it is acceptable to use violence to shut down a speaker known for making offensive and hurtful statements. The same survey asked college students if the First Amendment protects "hate speech." Nearly half said it did not. Legal experts say that is incorrect.

"The Supreme Court has never created a category of speech that is defined by its hateful conduct,

labeled it hate speech, and said that that is categorically excluded by the First Amendment," former American Civil Liberties Union president Nadine Strossen told National Public Radio (NPR). "Speech cannot be punished just because of its hateful content."

Indeed, in a dissenting opinion, Justice Oliver Wendell Holmes once wrote, "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought, not free thought for those who agree with us but freedom for the thought that we hate."

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Executive Order Takes on Free Speech on College Campuses

In March 2019, President Donald Trump issued an Executive Order addressing free speech on college campuses. An incident where a conservative activist was assaulted on the University of California's Berkeley Campus provided the motivation for the President to announce plans for the Executive Order before it was actually finalized. It should be noted that neither the victim in the Berkeley incident, nor the assailant in the attack were students at the university.

Weeks after the incident, President Trump signed the Executive Order, which directs 12 government agencies to link grants and other federal higher education funds to how educational institutions enforce the right to free speech. The order states these agencies should "take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive federal research or education grants promote free inquiry through compliance with all applicable federal laws, regulations and policies."

Leaders in higher education questioned the need for an executive order, noting that research universities and public colleges already promote free speech and academic freedom. In addition, they pointed out that Congress, not the president or the executive branch of government, controls the money provided to these institutions.

"Public universities are already bound by the First Amendment and work each day to defend and honor it," Peter McPherson, president of the Association of Public and Land-Grant Universities, told *Inside Higher Ed*. "As institutions of higher learning, public universities are constantly working to identify new ways to educate students on the importance of free expression, provide venues for free speech and advance our world through free academic inquiry. No executive order will change that."

The agencies affected by the President's order include the Departments of Education, Defense, Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, and Energy, as well as the Environmental Protection Agency, the National Science Foundation and NASA.

Supporters and critics of the executive order say it is too early to say what effect the directive will have, especially because it is unclear how it will be enforced.

"We haven't seen what the agencies plan to do," Joe Cohn, legislative and policy director at the Foundation for Individual Rights in Education (FIRE) told *Inside Higher Ed*. "We have seen throughout our history at FIRE how censorship has victims on every part of the political spectrum. How the agencies take their next steps will be important in determining whether or not the public can trust the federal government to protect the rights of all speakers, and not just speakers with whom they politically agree."

Legal scholars maintain that the enforcement of any order would need to be neutral so it doesn't favor or discriminate based on viewpoint.

—Jodi L. Miller

allows for the manipulation of images and video footage to create new videos of people doing or saying things they never said or did.

Quickly developing technology

Deepfakes first surfaced in late 2017 after an anonymous Reddit user named “deepfakes” began posting phony videos of celebrities in “compromising positions.” By early 2018, the technology was being shared through a free app (FakeApp) that uses artificial intelligence (AI) to swap out faces and change voice recordings. Peele used FakeApp to create the deceiving Obama video, which reportedly took a total of 56 hours to produce.

Since its debut, FakeApp and other copycat programs have generated a flood of phony online videos of famous people. Celebrities or public figures are most susceptible to the technology because of the amount of footage out there for deepfake creators to use.

Deepfake technology has also been used to create silly and/or prank videos—actor Nicolas Cage, for example, has suddenly appeared in films with which he was never previously associated, and Leonardo da Vinci’s famous Mona Lisa painting has been spotted talking (and smiling). A museum in Florida used deepfake technology to create an interactive experience with the famous painter Salvadore Dali.

Deepfake technology has come a long way in a short time, moving past the celebrity realm and into the business and political arenas, where it has been used to rip off companies and discredit lawmakers. Cybersecurity software provider Symantec reports that scammers used phony audio of three different CEOs in recent months to trick senior financial executives into transferring cash.

Politicians, including President George W. Bush, President Donald Trump and Democratic House Speaker Nancy Pelosi, have also been deepfake targets. A three-minute video of Speaker Pelosi showed her slurring her words. Technically, the Pelosi video isn’t considered a deepfake since it was created not by image manipulation but by slowing down the video speed. However, it demonstrated how quickly a deepfake could go viral before it can be discredited. The video was

quickly exposed as a fake, but not before it had racked up 2.5 million Facebook views.

Real world consequences

So far, deepfakes have not had major consequences, but U.S. intelligence agencies warn about their potential influence during the 2020 election.

In a hearing before the House of Representatives Intelligence Committee, Danielle Citron, a law professor at the University of Maryland and an expert on deepfakes, urged lawmakers to take the dangers seriously, testifying, “A deepfake could cause a riot; it could tip an election; it could crash an IPO [initial public offering].”

The Pentagon is taking the dangers of the technology seriously and is currently researching how to best detect

deepfakes. The technology raises serious concerns about the potentially damaging impact of phony online content on personal reputations, truth and overall trust in what we see online. Many are concerned that deepfakes could call into question legitimate videos; spreading more doubt about what is to be believed. In addition, even if a deepfake is identified, the damage may already have been done.

Those concerns have intensified in the last year as improvements in deepfake technology have outpaced detection methods. Deep learning computer applications are now so readily accessible that it has become virtually impossible to prevent the creation of deepfakes or their spread on social media, technology experts claim.

“Technologically speaking, there is nothing we can do,” Ali Farhadi, senior

research manager for the computer vision group at the Allen Institute for Artificial Intelligence in Seattle, told *Business Insider*. “The technology is out there, [and] people can start using it in whatever way they can.”

A narrow focus

Any effective solution to address the potentially damaging consequences of deepfakes must address the way in which the technology is used rather than the AI technology itself, authorities note. Lawmakers throughout the country have proposed deepfake-targeted legislation that attempts to penalize those who misuse the technology.

In Virginia, for example, it is now illegal to share real or fake nude photos or videos of someone without his or her permission. The law, which took effect July 1, 2019,



also covers photoshopped images or any other kind of fake footage.

Two bills pending in the California State Assembly would prohibit the creation of bogus digital imagery and sexually explicit audio-visual works without proper consent, and the distribution of phony political audio or visual media within 60 days of an election. Federal lawmakers are targeting manipulated media content through proposals like the Malicious Deep Fake Prohibition Act, which was introduced in December 2018 and is currently before the U.S. Senate Judiciary Committee; and the DEEPFAKES Accountability Act, introduced in June 2019 and referred to the House subcommittee on Crime, Terrorism and Homeland Security.

These proposed laws, however, could potentially violate the U.S. Constitution's right to free speech, including the creation of parody videos, which are protected. Proposals to address deepfakes must be narrowly tailored and clearly define the potential harms involved, according to Ellen P. Goodman, a professor at Rutgers Law School—Camden who specializes in information policy law.

"If it's not narrowly tailored and the harms are not defined, it will be unconstitutional," Professor Goodman notes. "To avoid First Amendment issues, the law has to be very narrowly tailored to the kind of content you're targeting. It also has to be content neutral and it cannot address any kind of editing or alteration."

Some legal experts believe legislation is pointless because existing laws give deepfake victims appropriate options for legal challenges. Deepfakes used for criminal or harassment purposes, for example, are subject to criminal laws, according to the Electronic Frontier Foundation, an international nonprofit digital rights group. Likewise, bogus content used in blackmail attempts are subject to **extortion** laws.

Copyright infringement claims offer some protections against deepfakes, but that approach will not stop their spread because the videos (and images) may fall under the "fair use" exemption. The fair use rule in copyright law allows for some unlicensed use of material that otherwise would be copyright protected.

Defamation laws are another potential weapon against the harms of deepfakes, but victims must prove the content portrays them in an embarrassing or offensive manner.

"Defamation is one approach—if the deepfake is about an actual person, and it's false, and the content is damaging to that person's reputation, then defamation laws would apply," Professor Goodman says.

As with any new technology, deepfakes may ultimately force a change in law or legal precedent. Brett R. Harris, a Woodbridge attorney who specializes in technology law, says that existing law already offers protection for victims of deepfakes.

"AI is often surrounded by a 'wow' factor, where the novelty often distracts from the underlying legal issues," Harris says. "In these situations, new laws may be developed to make clear that [basic legal] principles should be applied."

Professor Goodman points out, "We are entering a world where public figures—Congress members, U.S. senators, presidents—can be depicted saying things that they never said, and there doesn't seem to be anything under current law to prevent that. I do think there is an opportunity for new laws to prevent that from happening, but they will have to be very narrowly focused." 🗡️

DEEP FAKES

DISCUSSION QUESTIONS

1. What potential harms can you think of related to the use of deepfakes?
2. What potential benefits can you think of related to the use of deepfakes?
3. Do you think the government should put more regulations on technology or less? Explain your answer.
4. Right now, social media platforms are policing themselves with regard to deepfakes. What are potential problems with the current oversight? Who should bear the responsibility of flushing out deepfakes and overseeing their abuse? Explain your reasoning.



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Two National Monuments CONTINUED FROM PAGE 3

need for rapid unprotection of land. So, it can be left to Congress to unprotect land without causing any danger, and without contradicting the purpose of the Antiquities Act.”


What’s the status?

The latest development on the lawsuits came in September 2018 when a U.S. district court judge ruled the cases would be heard in Washington, DC. The Department of Justice had requested the lawsuits be heard in Utah state court. The judge also consolidated the three cases dealing with Bears Ears into one case and the two dealing with Grand Staircase-Escalante into another case. In addition, the judge also ruled the government must inform the plaintiffs if any proposals are submitted

to explore mining on the land. At press time, a trial date had not been set.

Professor Kovacs predicts the court will ultimately rule in the plaintiffs’ favor, though she admits it may be a close call. Courts typically grant presidents authority that may not be spelled out in a statute but is implied. In other words, although a statute doesn’t state a president has the authority to

do something, it may imply he or she has the right to take certain actions.

“On the one hand the language is quite clear. The president is given the authority to designate, but not expressly the authority to revoke,” Professor Kovacs says. “But there are a lot of situations where the courts have held that the president has implied authority. It wouldn’t be crazy for a court to go that route.” 

DISCUSSION QUESTIONS

1. Should a sitting president have the right to reduce monuments that previous presidents have designated? Why or why not?
2. Should public lands be preserved even if there are natural resources that could be developed from them, such as coal, gas or oil?
3. What are the benefits of studying 250 million year old fossils? Does the government have an obligation to protect them?




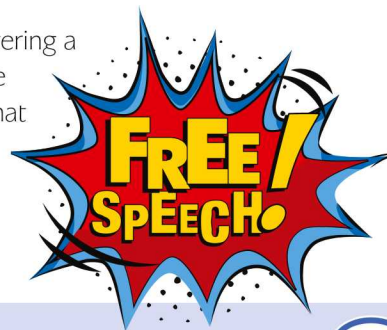
Right to Be Heard CONTINUED FROM PAGE 5

Just as student protesters are grappling with how to protest without inciting violence, universities face the question of whether they should curtail First Amendment rights or give a platform to hateful speech. Some universities and colleges are instituting free speech codes and policies that allow them to address First Amendment issues before they become headlines.

According to Mintcheva, that means answering a significant question: “How do you balance the rights of protesters without silencing those that are being protested?”

What these universities decide will likely have far-reaching effects.

“What is happening on campuses has a ripple effect into society,” says Greenberg. “When an institution makes the decision to silence a group on a college campus, they are sending the message to the rest of the educational community and society at large that certain voices do not need to be heard.” 



DISCUSSION QUESTIONS

1. What do you think the consequences are of silencing certain viewpoints?
2. If certain viewpoints are silenced do you think people that hold those views stop having them? Why or why not?
3. How would you feel if your opinion was disregarded? What would you do to be heard?
4. What steps do you currently take so that you are exposed to opinions or ideas that conflict with your beliefs? Is it enough? Why or why not?

GLOSSARY

algorithm – a set of rules to be followed in calculations.

anarchist – someone who tries to bring about disorder by not recognizing authority.

bigot – a person who is intolerant of those of different races or religions.

extortion — the act of obtaining property or money by the use of violence, threats or intimidation.

plaintiff — person or persons bringing a civil lawsuit against another person or entity.

vitriol – cruel and bitter criticism.