THE PROBLEMS WITH THE SOLUTIONS: EXAMINING THE RESPONSE FROM UNIVERSITIES, PRESIDENT TRUMP, AND STATE LEGISLATURES TO CAMPUS FREE SPEECH ISSUES

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INTRODUCTION

The constitutional right to free speech and expression is a protection that directly affects the progress and advancement of the American free society.[1] Concurring with this ideal, Justice Brandeis in *Whitney v. California* said, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[2] Additionally, Justice Cardozo described the freedom of thought and speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[3] Safeguarding this protection encourages citizens to voice and debate their political and social ideas without the fear of censorship, ensuring a pursuit for the truth by the people.[4] Nevertheless, the Supreme Court has established that free speech is not an absolute right in certain circumstances,[5] even on educational campuses.[6]

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1. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (describing that the First Amendment's speech protection affords people the means of voicing their desires for social or political change without inhibition from the government); 16 AM. JUR. 2D *Constitutional Law* § 467, Westlaw (database updated Nov. 2020) [hereinafter *Constitutional Law*].

2. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

3. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

4. *See Constitutional Law*, *supra* note 1.

5. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (formulating the "clear and present danger" test, where, for example, falsely yelling "fire" in a theater and causing a panic is not constitutionally protected), *abrogated by* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Roth v. United States, 354 U.S. 476, 492 (1957) (prohibiting the distribution of obscene materials from enjoying free

Despite the occurrence of several free speech controversies on university campuses in the last decade,[7] there is still ongoing debate as to whether a campus free speech crisis exists at all.[8] Some of this skepticism comes from the notion that university speech restrictions are rare.[9] Others believe that right wing activists only use the crisis narrative to push their own values.[10] However, the current efforts taken by institutions like Speech First, Foundation for Individual Rights in Education ("FIRE"), and Alliance Defending Freedom ("ADF") suggest that there is a constitutional freedom in need of advocacy.[11]

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speech protection); United States v. O'Brien, 391 U.S. 367, 376–77, 382 (1968) (holding that the symbolic act of burning draft cards in protest of the war is not afforded First Amendment protection).

6. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (allowing administrators to censor student articles in a school newspaper if it associates the school with controversial political views); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (allowing administrators to ban the use of obscene language at school-sponsored events); Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that the First Amendment protection does not protect student speech when it involves advocating for illegal drug use at school-sponsored events).

7. *See* Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 103–04 (2018) (referencing separate incidents at the University of Virginia, Middlebury College, and the University of California at Berkley where white nationalists rallied and protests against conservative speakers ensued).

8. *See, e.g.*, Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 218–20 (2019), https://legacy.virginialawreview.org/sites/virginialawreview.org/files/Franks_Book.pdf; Lee C. Bollinger, *Free Speech on Campus Is Doing Just Fine, Thank You*, THE ATLANTIC (June 12, 2019), https://www.theatlantic.com/ideas/archive/2019/06/free-speech-crisis-campus-isnt-real/591394/; Nesrine Malik, *The Myth of the Free Speech Crisis*, THE GUARDIAN (Sept. 3, 2019, 1:00 AM), https://www.theguardian.com/world/2019/sep/03/the-myth-of-the-free-speech-crisis; Zack Beauchamp, *The Myth of a Campus Free Speech Crisis*, VOX (Aug. 31, 2018, 8:20 AM), https://www.vox.com/policy-and-politics/2018/8/31/17718296/campus-free-speech-political-correctness-musa-al-gharbi; Jeffrey Adam Sachs, *The 'Campus Free Speech Crisis' Is a Myth. Here Are the Facts.*, WASH. POST (Mar. 16, 2018, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/16/the-campus-free-speech-crisis-is-a-myth-here-are-the-facts/; Chris Ladd, *There Is No Free Speech Crisis on Campus*, FORBES (Sept. 23, 2017, 3:20 PM), https://www.forbes.com/sites/chrisladd/2017/09/23/there-is-no-free-speech-crisis-on-campus/#2356de0028cb.

9. Sachs, *supra* note 8.

10. Ladd, *supra* note 8.

11. *See, e.g.*, Sarah Kramer, *Big Win for Free Speech on California State Campuses—Thanks to This Student's Lawsuit*, ALL. DEF. FREEDOM (Jan. 29, 2020), https://www.adflegal.org/blog/big-win-free-speech-california-state-campuses-thanks-students-lawsuit (describing one of the lawsuits brought by ADF in defense of free speech rights on campus); FIRE, https://www.thefire.org/ (last visited Feb. 8, 2020) (providing public and private advocacy services including issuing press releases, gaining media coverage on cases, compiling surveys and educational resources, writing universities on behalf of students, and putting clients in touch with legal counsel).

In early 2018, the legal organization Speech First was founded to specifically support aggrieved students in their First Amendment lawsuits against their universities.[12] In 2018, Speech First filed a complaint against the University of Michigan arguing that the school's policy prohibiting harassment and bullying on campus too broadly defined "harassment" and "bullying."[13] Speech First's anonymous student clients argued that the overbroad policy essentially chills their right to free speech, because they "feel that they cannot openly and vigorously debate and discuss a wide array of often-controversial topics without running afoul of the University's harassment and bullying policies."[14] The university established a Bias Response Team ("BRT") which is an online resource where students can file a report if they feel affected by "incidents of bias."[15] A bias incident involves misconduct of the kind that "stems from fear, misunderstanding, hatred, and stereotypes [that] may be intentional or unintentional."[16] If the deans reviewing the BRT complaints think the incident violates the university's Statement of Student Rights and Responsibilities, referrals may be made to the police, the Office of Student Conflict Resolution, or a school counseling service.[17]

Ultimately, the Sixth Circuit Court of Appeals found that the district court erred in holding that Speech First's challenges were moot.[18] While it did not make an ultimate determination on Speech First's likelihood of success on the merits,[19] the Sixth Circuit did conclude that the BRT's ability to make conduct referrals (though they may not result in disciplinary action) objectively chills speech.[20] The university settled thereafter, and agreed to

12. Robby Soave, *Meet Speech First, a New Combatant in the Campus Free Speech Wars*, REASON (Mar. 1, 2018, 9:30 AM), https://reason.com/2018/03/01/speech-first-campus-students/; SPEECH FIRST, https://speechfirst.org/about/ (last visited Dec. 27, 2020).

13. Speech First, Inc. v. Schlissel, 333 F. Supp. 3d 700, 702–03, 709 (E.D. Mich., 2018), *overruled by* Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019).

14. *Id.* at 707 ("chilling" controversial topics that "include, but are not limited to: (a) support for gun rights, President Trump, the border wall, and the right of 'highly unpopular speaker[s]' to lecture on campus; (b) opposition to illegal immigration, abortion, affirmative action, and having children outside of marriage; and (c) criticism of the Black Lives Matter and 'gender identity' movements, welfare, affirmative action, and Title IX.").

15. *Id.* at 705.

16. *Id.* at 705–06.

17. Speech First, Inc. v. Schlissel, 939 F.3d 756, 761–63 (6th Cir. 2019).

18. *Id.* at 770.

19. *Id.*

20. *Id.* at 765.

revise its definitional terms, abolish the BRT, and reserve the right for Speech First to sue again should the BRT replacement program chill student speech.[21]

Since then, Speech First has instituted other lawsuits against Iowa State University, the University of Texas, and the University of Illinois.[22] Those lawsuits attack the constitutionality of the universities' speech codes, campus bias response systems, and other policies that misalign with the protections of free speech.[23] Two of those lawsuits are still underway, but the suit against Iowa State settled in March 2020.[24] Their existence suggests that there are still at least unresolved questions, if not a crisis, concerning free speech on campuses today.[25]

In its 2020 Spotlight report, FIRE concluded that although the percentage of colleges with overly restrictive speech policies has declined,[26] only about 10.6% of the surveyed schools have written policies that "do not pose a serious threat to free speech."[27] The work of organizations such as FIRE and Speech First prove the reality of persistent affronts to student free speech rights on college campuses today.

The purpose of this note is not only to validate that student speech rights are still threatened, but to examine the effectiveness of policies and laws put in place to protect First Amendment rights on college campuses. Part I of this note will examine frequently cited Supreme Court decisions as a background for understanding the general allowances and limits of free speech in higher education and secondary school settings. Part II will separately discuss the effectiveness of speech code policies, President Trump's Executive order, and state enacted legislation as practical methods

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21. Agreement, Speech First, Inc. v. Schlissel, No. 4:18-cv-11451-LVP-EAS (E.D. Mich. Oct. 28, 2019), ECF No. 35-1.

22. Speech First, Inc. v. Wintersteen, No. 4:20-CV-00002 (S.D. Iowa dismissed Mar. 12, 2020); Speech First, Inc. v. Killeen, 3:19-CV-3142 (C.D. Ill. May 30, 2019); Speech First, Inc. v. Fenves, 384 F. Supp. 3d 732 (W.D. Tex. 2018), *vacated*, 979 F.3d 319 (5th Cir. 2020). *See also Court Battles*, SPEECH FIRST, https://speechfirst.org/court-battles/ (last visited Nov. 15, 2020) (providing a brief snapshot of Speech First's campus claims and their status).

23. *Court Battles*, *supra* note 22.

24. *Id.*; *Wintersteen*, No. 4:20-CV-00002.

25. *See Court Battles*, *supra* note 22.

26. *Spotlight on Speech Codes 2020*, FIRE 6, https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/12/04102305/FIRE-Spotlight-On-Speech-Codes-2020.pdf (last visited Dec. 28, 2020). This report attributes the decline of policies that are "clearly and substantially restricting [of] freedom[s] of speech" to "the tireless work of free speech advocates at FIRE and elsewhere." *Id.* at 2, 4.

27. *Id.* at 4–5.

of encouraging free student speech and inquiry. After assessing the efficacy of these methods, this note contends that the best avenue for preserving free speech on American campuses is to encourage states to enact campus free speech laws.

I. CASE LAW BACKGROUND

A. Tinker *and the General Campus Free Speech Framework*

The imposition of limitations on free speech within American public education is not a recent legal issue. In fact, the rise of student free speech controversies began surfacing in the late sixties with the landmark case, *Tinker v. Des Moines Independent Community School District*.[28] In that case, a group of high school students were inspired to protest against the political turmoil brought by the Vietnam War.[29] They publicized their opposition to the war by wearing black armbands to school, and were suspended for violating the school's policy that disallowed wearing armbands in "opposition to this Nation's part in the conflagration in Vietnam."[30] The Supreme Court ultimately found that wearing black armbands to school in protest of the Vietnam War is protected speech.[31] Subsequently, the Court prescribed a new standard which said that actions which "materially and substantially interfere"[32] with "appropriate discipline in the operation of the school" or "inva[de] . . . the rights of other[]" students are not protected speech.[33] However, symbolic expressions of protest, such as wearing black armbands, were not subject to censorship since they did not cause substantial disruption to "school activities nor sought to intrude in the school affairs or the lives of others."[34]

Although *Tinker* took place in a public secondary school, the Supreme Court still references it in college speech-related cases because it sets the

28. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
29. *Id.* at 504, 516.
30. *Id.* at 504, 510–11.
31. *Id.* at 505–06.
32. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
33. *Id.* at 513.
34. *Id.* at 514.

framework for student free speech cases.[35] *Tinker* is capable of such a broad application because of the underlying principle it stands for:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the *discomfort* and *unpleasantness* that always accompany an unpopular viewpoint.[36]

After *Tinker*, the student free speech framework grew from cases like *Bethel School District v. Fraser, Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*.[37] In *Bethel*, the Supreme Court upheld the school's policy prohibiting a student's lewd sexual innuendos at a school assembly because the language did not sufficiently relate to the "'fundamental values' of public school education."[38] This case did not strictly apply *Tinker*; rather, it gave school administrators discretion to reprimand students whose "offensively lewd and indecent speech"[39] inadvertently "disrupt[s] the school's educational mission."[40] This outcome is directly contrary to *Papish v. Board of Curators of the University of Missouri*, where the Supreme Court found that a university student's political cartoon and explicit headline story in the campus newspaper was neither constitutionally obscene, nor without constitutional protection.[41]

Hazelwood carved its own exception to *Tinker*, holding that when a school acts as a publisher, it is justified in censoring student speech in the school newspaper because it may "disassociate itself" from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[42] The

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35. Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1480 (2012).

36. *Tinker*, 393 U.S. at 509 (emphasis added).

37. Lindsay, *supra* note 35, at 1476; Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

38. *Bethel*, 478 U.S. at 685–86.

39. *Id.* at 685.

40. *Id.* at 688–89.

41. Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973) (reasoning that even if the political cartoon and headline title were "offensive to good taste," they were not "constitutionally obscene or otherwise unprotected." Furthermore, "universities are not enclaves immune from the sweep of the First Amendment.").

42. *Hazelwood*, 484 U.S. at 271, 274. This case dealt with students involved in the school newspaper publishing articles about experiences with teen pregnancy and divorce. The administrator

Supreme Court also noted that administrators may censor speech that "associate[s] the school with any position other than neutrality on matters of political controversy."[43] The Court in that case expressly distinguished itself from *Tinker*, and created an alternative holding better suited for situations where "a school may refuse to lend its name and resources to the dissemination of student expression."[44]

After *Hazelwood*, came *Morse v. Frederick*, where a school suspended a student for displaying a banner at a school event that read, "BONG HiTS 4 JESUS."[45] The Supreme Court distinguished this case from *Tinker* by reasoning that inhibiting student expression of illegal drug use goes beyond "avoid[ing] controversy."[46] Rather, it is well-settled that deterring student drug abuse is a compelling governmental interest.[47]

B. Beyond Tinker*: How Universities Create their Own Campus Speech Policies*

Although *Tinker* and its progeny produce a general framework of protections for free speech in education, application of the *Tinker* standard is limited to secondary school speech circumstances.[48] This is because issues arise when using a standard created for secondary students in the university setting due to differences between "the educational missions of secondary and post-secondary institutions."[49] On the one hand, primary and secondary schools are tasked with teaching young minors their place in society, and are given discretion to discipline.[50] On the other hand, it is recognized that universities and college campuses are "peculiarly suited to serve as *a marketplace of ideas* and a forum for the robust exchange of different viewpoints."[51]

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censored them, and the Supreme Court allowed the censorship under a new standard: educators are not in violation of the First Amendment by exercising editorial control if their restraint on school-sponsored speech is "reasonably related to legitimate pedagogical concerns." *Id.* at 273.

43. *Id.* at 272.

44. *Id.* at 272–73.

45. Morse v. Frederick, 551 U.S. 393, 397–99 (2007).

46. *Id.* at 408–09.

47. *Id.* at 407–08.

48. Lindsay, *supra* note 35, at 1480–81.

49. *Id.* at 1481–83.

50. *Id.* at 1481–82.

51. Solid Rock Found. v. Ohio State Univ., 478 F. Supp. 96, 102 (S.D. Ohio 1979) (emphasis added). *See also* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24,

In the university setting, great importance is placed on preserving First Amendment freedoms to promote "free and unfettered interplay of competing views . . . *essential* to the institution's educational mission."[52] Although the Supreme Court in *Healy v. James* applied *Tinker* in its analysis, it made clear that the need for maintaining order in the school cannot itself justify lessening First Amendment protections on university campuses.[53] To this end, the Court historically has not "linked high school- and college-speech rights."[54]

Still, other tensions exist when balancing the mission to protect speech that brings controversy, while simultaneously imposing restrictions against harassment.[55] *Davis ex rel. LaShonda D. v. Monroe County Board of Education* is instructive in this area, because the Supreme Court created a standard which stated that actions for harassment can only lie if the conduct is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity."[56] Although that case dealt with sexual harassment claims for relief under Title IX,[57] it is also applicable to student speech issues when defining what constitutes harassing speech.[58]

877–78 (2008) (explaining that Justice Holmes first popularized the "marketplace of ideas" metaphor in his dissenting opinion of *Abrams v. United States*, 250 U.S. 616 (1919), to describe the purpose of the First Amendment. Blocher later describes that Justice Brennan was the first to bridge the metaphor to universities as speech institutions, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)).

52. Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (emphasis added) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

53. Healy v. James, 408 U.S. 169, 180 (1972). *See* Eric T. Kasper, *Public Universities and the First Amendment: Controversial Speakers, Protests, and Free Speech Policies*, 47 CAP. U. L. REV. 529, 558–59 (2019) (explaining that although the Supreme Court applies the same standard from its relevant K-12 free speech cases, "the justices understand this vital difference between what it means to be materially and substantially disruptive in higher education, versus educational institutions tailored to younger students.").

54. Lindsay, *supra* note 35, at 1483.

55. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 667–68 (1999) (Kennedy, J., dissenting) (articulating support for this proposition in his dissenting opinion by stating that "[a] university's power to discipline its students for speech that may constitute sexual [or racial] harassment is also circumscribed by the First Amendment.").

56. *Id.* at 633.

57. *Id.* at 632–33.

58. *See* Kasper, *supra* note 53, at 550 (demonstrating that the *Davis* standard is applied in speech policies to define what kind of harassment may be restricted and explaining that "[h]arassing speech that meets the *Davis* standard is outside of the protection of the First Amendment."); Robert Shibley, *Why the Supreme Court's* Davis *Standard Is Necessary to Restore Free Speech to America's College Campuses: Part II*, FIRE (Oct. 24, 2019), https://www.thefire.org/why-the-supreme-courts-davis-standard-is-necessary-to-restore-free-speech-to-americas-college-campuses-part-ii/.

Consequently, terms like "offensive" and "harassment" have become more commonplace in university speech policies.[59] One commentator adds that "this generation of college students" is staunchly opposed to such speech, in part, because of their anti-bullying upbringing.[60] In these students' opinions, silencing microaggressions[61] is of paramount value which, most likely, diminishes their understanding of the "severe, pervasive, and objectively offensive" standard actually used to prohibit harassing speech.[62]

Consequently, Justice Fortas' notion of promoting unpopular speech, even if it brings "discomfort and unpleasantness," became flipped on its head. A reasoned theory to explain this shift flows from the idea that this generation of undergraduate students has "a strong and persistent urge to protect others against hateful, discriminatory, or intolerant speech, especially in educational settings."[63] Surveys suggest that a hefty percentage of college students today support university censorship of all offensive, hurtful language, and remain opposed to pro-free speech ideologies that support protecting "hateful or controversial speech."[64] FIRE finds these statistics

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59. *Spotlight on Speech Codes 2019: The State of Free Speech on Our Nation's Campuses*, FIRE 10 [hereinafter *Spotlight 2019*] https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/02/08150756/SCR_2019.pdf (last visited Aug. 6, 2020) ("Under the guise of the obligation to prohibit discriminatory harassment, unconstitutionally overbroad harassment policies banning subjectively offensive conduct proliferated.").

60. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 9–10, 12 (2018) (relying on studies conducted by the William F. Buckley Program at Yale and Pew Research Center to contend that "this generation" refers to undergraduate students in 2015 and millennials generally).

61. *Microaggression*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/microaggression (last visited Mar. 21, 2020) (defining "microaggression" as "a comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group"); *see also* CHEMERINSKY & GILLMAN, *supra* note 60, at 140 (discussing one commentator's definition of "microaggression" as "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color").

62. *See* CHEMERINSKY & GILLMAN, *supra* note 60, at 10–13 (arguing that students today are more supportive of censoring speech they find offensive rather than recognizing a need to protect hateful or controversial speech); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

63. *Id.*

64. *Id.* at 12 (citing Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RSCH. CTR. (Nov. 20, 2015), https://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/). *See* Kelsey Ann Naughton, *What Students Think About Expression, Association, and Student Fees on Campus*, FIRE 3 (Jan. 2019), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/03/05104349/Student-Attitudes-Association-Survey.pdf (reporting that nearly 89% of university students agree that university students

unnerving because they illustrate real misunderstandings of the First Amendment among today's students and higher education institutions.[65] Erwin Chemerinsky, Dean of Berkeley Law and author to several prominent constitutional law treatises and casebooks, concurs with this proposition.[66] He argues that university faculty and administrators are often unable to distinguish between the protections of academic freedom and the protections of free speech.[67]

The debate on limitations of free speech in public education is not new. However, the values facing today's generation of college students has vastly changed the way students understand the First Amendment.[68] Chemerinsky comments on this discussion by adding that:

> This historic link between free speech and the protection of dissenters and vulnerable groups is outside the direct experience of today's students, and it was too distant to affect their feelings about freedom of speech. They were not aware of how the power to punish speech has been used primarily against social outcasts, vulnerable minorities, and those protesting for positive change—the very people toward whom our students are most sympathetic.[69]

The use of speech codes as an attempt to respond to this shifted understanding of free speech is a noticeable culprit of First Amendment violations. As the next section discusses, universities that implement these codes often risk staying in alignment with the interpretive cases previously examined in Part I. As the formerly mentioned Speech First lawsuits reveal, sometimes unconstitutional speech codes induce retaliation from students which results in litigation. Overall, suspect speech codes and university discipline against student expression have induced backlash from President

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should encourage students to express their views openly, yet 57% of those students contradictorily believe that seemingly hurtful or offensive expressions of political views should be restricted.); *see also* College Pulse, *Free Expression on College Campuses*, KNIGHT FOUND. (May 13, 2019), https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/351/original/Knight-CP-Report-FINAL.pdf.

65. Naughton, *supra* note 64, at 3–4. Naughton suggests that there is "only a surface-level understanding of free expression . . . protections that underlie the First Amendment and an unwillingness to see them applied to the protection of expression most often censored on campus." *Id.* at 4.

66. *See* CHEMERINSKY & GILLMAN, *supra* note 60, at 155.

67. *Id.*

68. *Id.* at 10–12.

69. *Id.* at 11.

Trump and state legislatures.[70] These governmental bodies, and educational institutions themselves, have each taken steps to mitigate the risk of unconstitutional speech regulation by universities.

II. THE EFFECTS OF CURRENT CAMPUS FREE SPEECH POLICIES AND LAWS

The response to the debate on campus free speech restriction has taken form in the creation of laws and policies. University officials, President Trump, and state legislators have separately enacted their own rules and bylaws in an effort to promote First Amendment protection in higher education. As this section will discuss, these methods meet varying levels of success, usually depending on how closely they mirror the intention behind Supreme Court case law.

A. University Speech Codes

Speech codes are a relatively recent development in the university free speech arena. These codes are university-made policies and regulations that "limit the kind of speech in which students and teachers may engage."[71] Generally, they limit speech that is discriminatory based on race, gender, sexual orientation, and religion.[72]

FIRE's research dates the earliest conceptualization of speech codes to the mid-1980s through the 1990s as a widespread response to comply with

70. President Donald Trump, Remarks at Signing of Executive Order, "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities" (Mar. 21, 2019) [hereinafter Remarks by President Trump] ("Under the guise of 'speech codes' and 'safe spaces' and 'trigger warnings,' these universities have tried to restrict free thought, impose total conformity, and shut down the voices of great young Americans like those here today.") *See* Katherine Mangan, *More States Are Passing Campus Free-Speech Laws. Are They Needed, or Is the Crisis Talk Overblown?*, THE CHRONICLE (July 23, 2019) (quoting remarks by Gov. Greg Abbott of Texas supporting the need for Texas' free speech bill, and observing "more than a dozen" other states following suit), https://www.chronicle.com/article/more-states-are-passing-campus-free-speech-laws-are-they-needed-or-is-the-crisis-talk-overblown/.

71. Jeanne M. Craddock, Comment, *Constitutional Law–"Words That Injure; Laws That Silence:" Campus Hate Speech Codes and the Threat to American Education*, 22 FLA. ST. U. L. REV. 1047, 1048 (1995).

72. S. Douglas Murray, *The Demise of Campus Speech Codes*, 24 W. ST. U. L. REV. 247, 250 (1997).

newly enacted Title IX laws.[73] Other commentators alternatively theorize that this time period brought "increased enrollment and access to education for minority groups."[74] With greater female and racial minority enrollment in universities came expressions of intolerance and discrimination from many students.[75] To mitigate these prejudices, several federally funded institutions began implementing these speech codes as their means of compliance with Title IX.[76] FIRE openly argues that speech codes operate merely "under the guise of the obligation to prohibit discriminatory harassment," and such policies are often times "unconstitutionally overbroad."[77]

Other commentators suggest that speech codes emerged from the "political correctness trend."[78] This trend stems from the ideology that "speech or behavior that is offensive to various groups' sensibilities should be eliminated, by means of regulations or penalties if necessary."[79] Generally, universities advance speech codes—sometimes known as *hate speech codes*[80]—to protect university students from offensive or harassing speech specifically targeting their sensibilities.[81]

1. The Tension between Speech Codes and Free Speech

Speech codes inherently create tension because there is a struggle between mitigating hostility on campuses without undercutting a constitutional right to free speech.[82] One commentator aptly suggests that, "[t]here is a fundamental dissonance between controlling words and the very

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73. *Spotlight 2019*, *supra* note 59, at 10. *See* 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

74. Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 486 (2009). *E.g.*, Lee Ann Rabe, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205, 205 (2003).

75. Majeed, *supra* note 74, at 486–87. *See also* Doe v. Univ. of Mich., 721 F. Supp. 852, 854 (E.D. Mich. 1989) (noting that incidents of racial harassment became "increasingly frequent" within the last three years of the lawsuit).

76. *Spotlight 2019*, *supra* note 59, at 10.

77. *Id.*

78. Majeed, *supra* note 74, at 487. *See* Murray, *supra* note 72, at 249.

79. Anne Reynolds, *Political Correctness*, THE FIRST AMENDMENT ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/1138/political-correctness.

80. *See, e.g.*, Craddock, *supra* note 71.

81. Reynolds, *supra* note 79.

82. Murray, *supra* note 72, at 250.

nature of a university as a place of free inquiry."[83] In other words, taking efforts to stifle speech that may be unpleasant or offensive to some—but nevertheless protected under the First Amendment—undermines the university's mission of promoting "academic discourse" through "reason and persuasion."[84]

Another issue with speech code implementation is the concern that university officials are currently the arbiters placed in charge of regulating student communications.[85] Whether such officials are best equipped to articulate what speech should be protected at the expense of opposing dialogue is a major concern.[86] The language used in several drafted speech codes exposes a failed understanding by many university administrations to properly distinguish between expressions that are protected and those that are not. Overbroad codes, impermissibly vague language, and other unconstitutional prohibitions are only some of the grounds which courts use to override university speech codes.[87]

Nevertheless, proponents of hate speech codes are committed to the theory that adopting such codes is necessary to support "equality and . . . individual freedom and autonomy."[88] For example, using racist or homophobic terms can "remind the target that his or her group has always been and remains unequal in status to the majority group."[89] The effects of using such terms may go beyond seeming offensive by calling upon words that were originally created to incite grave hostility and repression.[90]

However, the use of those terms on college campuses may be protected unless they are connected to some "extreme and blatant forms of discriminatory conduct."[91] This is because the First Amendment offers

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83. ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY (1997), *reprinted in* SHOULD THERE BE LIMITS TO FREE SPEECH? 44, 53 (Laura K. Egendorf ed., 2003).

84. *See id.*

85. *Id.*

86. *See id.* This concern is echoed by Harvard University's former president, Derek Bok, who is quoted saying, "Whom will we trust to censor communications and decide which ones are 'too offensive' or 'too inflammatory' or too devoid of intellectual content?" *Id.*

87. *Spotlight 2019*, *supra* note 59 at 16.

88. RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND HATE NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997), *reprinted in* SHOULD THERE BE LIMITS TO FREE SPEECH? 34, 43 (Laura K. Egendorf ed., 2003).

89. *Id.* at 42 (arguing that such terms "evoke and reinforce entire cultural histories of oppression and subordination").

90. *See id.*

91. Doe v. Univ. of Mich., 721 F. Supp. 852, 861 (E.D. Mich. 1989).

varied protections based on whether the action can be categorized as "pure speech" or "mere conduct."[92] Pure speech is protected from regulation even if it is considered "offensive, even gravely so, by large numbers of people."[93] Likewise, universities may not restrict conduct unless it takes on an extreme form of discrimination, assault and battery, or sexual abuse.[94]

Advocates for speech codes also argue that there is no harm in filing a complaint to the university when falling victim to a speech code violation.[95] They argue that the only real harm is the offensive speech itself.[96] Unconvinced by this supposition, the court in *Doe v. University of Michigan* could not condone pressing students to attend hearings for complaints based on allegedly harassing statements, which were ultimately protected by free speech.[97]

2. Unconstitutional Speech Codes

However laudable the goal of offering all students the opportunity to learn in an environment free of discrimination and discriminatory speech may be, making way for Fourteenth Amendment protections at the expense of the First Amendment can create tension.[98] This dynamic between constitutional provisions is becoming increasingly more common where it can create issues for courts to balance "expressive rights against rights to equal treatment."[99] And, when this conflict arises, there are some instances where the balancing approach will not allow the First Amendment to limit rights guaranteed by the Fourteenth Amendment.[100]

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92. *Id.*

93. *Id.* at 863.

94. *Id.* at 861–62 ("Discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the constitution and both state and federal statutes.").

95. *See* DELGADO & STEFANCIC, *supra* note 88, at 40.

96. *Id.*

97. *Doe*, 721 F. Supp. at 865.

98. Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 825 (2017) (speculating that "exclusionary cases demonstrate that the relationship between First Amendment expressive rights and Fourteenth Amendment equality rights is not always, or necessarily, synergistic and collaborative").

99. *Id.*; *see also* CHEMERINSKY & GILLMAN, *supra* note 60, at 154 (arguing that "the effort to create inclusive learning environments cannot proceed at the expense of free speech and academic freedom.").

100. *See* Zick, *supra* note 98, at 824–26, 829–30 (pointing out the limits of the Free Speech clause in discrimination cases involving African-Americans and LGBT persons).

However, the constitutional grounds in which a court may strike down a speech policy include overbreadth, vagueness, and creation of free speech zones.

2.i. Overbroad Speech Codes

The overbreadth doctrine as it relates to free speech operates to strike down a speech regulation if it "reaches too much expression that is protected by the Constitution."[101] Furthermore, a policy is overbroad if it creates a "likelihood that the [code's] very existence will inhibit free expression" to a substantial extent.[102]

For example, in *McCauley v. University of the Virgin Islands*, the Third Circuit held that several provisions in the university's student code of conduct had "the potential to chill protected speech."[103] The unconstitutional provisions forbade "conduct which causes emotional stress," and "misbehavior at sports events, concerts, and social-cultural events, including the display of unauthorized or offensive signs."[104] Each of these separate rules failed to pass constitutional muster because they were "facially overbroad" in violation of the First Amendment.[105]

FIRE incorporates this doctrine in its analysis to rate colleges on a "red light," "yellow light," or "green light" scale, based on the extent that an institution's written policy restricts free speech expression.[106] Usually a "red" or "yellow" light will be rated against universities that have codes which are "broadly applicable" in a manner that is unconstitutional.[107] FIRE uses the example that codes banning "offensive speech" or "verbal abuse" may violate free speech rights for being written too broadly.[108] The basis for this rationale follows from *Texas v. Johnson*, where the Supreme Court explicitly stated that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[109]

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101. McCauley v. Univ. of the V.I., 618 F.3d 232, 241 (3d Cir. 2010) (quoting Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 258 (3d Cir. 2002)).

102. *Id.*

103. *Id.* at 238–39.

104. *Id.*

105. *Id.* at 247, 250, 252.

106. *Spotlight 2019*, *supra* note 59, at 4.

107. *Id.*

108. *Id.*

109. Texas v. Johnson, 491 U.S. 397, 414 (1989).

This point closely aligns with *Tinker* as well.[110] In other words, speech that is considered offensive or verbal abuse may be protected speech under the First Amendment, even though the expression of that view may be unpleasant to society.

2.ii. Speech Codes That Create "Free Speech Zones"

Another way that universities attempt to restrict speech on campus is through free speech zones. Free speech zones are "out-of-the-way" areas that students are limited to conduct their demonstrations and expressive activities.[111] Courts have frequently struck down such zone provisions on constitutional grounds. Several state legislators, including the Florida legislature, have also enacted laws that restrict speech zone policies.[112]

For example, in *University of Cincinnati Chapter of Young Americans For Liberty v. Williams*, the District Court held that the university's "Free Speech Area" policy was unconstitutional.[113] The university failed to offer a "compelling interest" in limiting expressive activities to only one area of campus,[114] and the court found it unconstitutional to require students to supply administration with notice of such demonstrations.[115]

This is due to the fact that "outdoor open areas of [a university's] campus generally accessible to students – such as plazas and sidewalks – [are] public forums for student speech."[116] Requiring students to give notice of their speech contradicts First Amendment "constitutional tradition"—guarding against the notion that "a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so"[117]—whether in a public forum or otherwise.

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110. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

111. *Spotlight 2019*, *supra* note 59, at 24.

112. S.B. 4, 121st Reg. Sess. (Fla. 2019); H.R. 498, 2019 Reg. Sess. (Ala. 2019); H.R. 2615, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016); H.R. 527, Gen. Assemb., 2017 Reg. Sess. (N.C. 2017); H.R. 1087, 94th Leg. Assemb., 2019 Reg. Sess. (S.D. 2019).

113. Univ. of Cin. Chapter of Young Am. for Liberty v. Williams, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *2, *29 (S.D. Ohio June 12, 2012).

114. *Id.* at *25.

115. *Id.* at *19–22.

116. Just. for All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005).

117. Watchtower Bible & Tract Soc'y, Inc. v. Vill. Stratton, 536 U.S. 150, 165–66 (2002).

3. A Proposed Cure to Unconstitutional Provisions in Speech Codes

In January 2015, the University of Chicago released a free speech statement by the Committee of Freedom and Expression.[118] Otherwise known as the "Chicago Statement,"[119] the statement models a policy that "articulat[es] the University's overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University's community."[120] The statement generalizes several events in the university's history where the university encountered opportunities to maintain freedom of expression on campus.[121] The pertinent section of the statement states:

> In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, *not for the University as an institution*, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.[122]

FIRE endorsed this statement and encourages other universities to adopt its language into their own campus speech policies to protect the freedom of speech.[123] As of December 17, 2020, seventy-eight university institutions have adopted the Chicago Statement or affirmed its language into its own

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118. COMM. ON FREEDOM OF EXPRESSION, UNIV. OF CHI., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015) [hereinafter CHICAGO STATEMENT] (on file with the University of Chicago) https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf (describing that the Committee on Freedom of Expression was formed in 2014 in responses to "recent events nationwide that have tested institutional commitments to free and open discourse"); *see also FIRE Launches Campaign in Support of University of Chicago Free Speech Statement*, FIRE, https://www.thefire.org/cases/fire-launches-campaign-in-support-of-university-of-chicago-free-speech-statement/ (last visited Jan. 19, 2020).

119. Mary Zoeller, *Faculty Council at University of North Carolina at Chapel Hill Adopts "Chicago Statement"*, FIRE (Apr. 16, 2018), https://www.thefire.org/faculty-council-at-university-of-north-carolina-at-chapel-hill-adopts-chicago-statement/.

120. CHICAGO STATEMENT, *supra* note 118.

121. *Id.* ("From its very founding, the University of Chicago has dedicated itself to the preservation and celebration of the freedom of expression as an essential element of the University's culture.").

122. *Id.* (emphasis added).

123. *FIRE Endorses University of Chicago's New Free Speech Statement*, FIRE (Jan. 7, 2015), https://www.thefire.org/fire-endorses-university-of-chicagos-new-free-speech-statement/.

campus policies.[124] The significance of the Chicago Statement—including policies that borrow its position—is that it does not "merely echo First Amendment principles; [it] provide[s] a roadmap for creating a campus climate that values free expression as the lifeblood of the university."[125] FIRE suggests that the continued adoption of the Statement is correlative to positive trends in awarding more schools with a "green light" rating, for having speech codes that encourage free exchange of ideas on campus.[126]

Assuming this connection exists, encouraging both public and private universities to adopt the Chicago Statement would give less room for university institutions to assert their authority "unpredictabl[y]."[127] This could effectively remedy the current issues universities face with unconstitutional speech codes by replacing those codes wrought with terms that are overbroad or vague with a statement that removes "specific and static terms to regulate issues directly."[128] However, to be fully effective as a remedial measure, all universities would have to incorporate the statement into their speech policies.[129] Without some kind of state legislation to mandate such incorporation by the university institutions of that state, the Chicago Statement is a limited remedy to campus free speech restriction.

B. Free Speech and the Executive Branch's Response

The federal government recently took its own stance on the free speech restrictions that American universities have implemented.[130] On March 21, 2019, President Trump signed an Executive order that is, in part, designed to "promote free and open debate on college and university campuses."[131] In other words, the purpose behind this order is to encourage public and private

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124. *Chicago Statement: University and Faculty Body Support*, FIRE (Dec. 17, 2020), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/.

125. *Spotlight 2019*, *supra* note 59, at 17.

126. *Id.* at 17–18.

127. Joseph W. Yockey, *Bias Response on Campus*, 48 J.L. & EDUC. 1, 37 (2019) (discussing the benefits of adopting the Chicago Statement).

128. *Id.*

129. *See Chicago Statement: University and Faculty Body Support*, FIRE (Mar. 4, 2021), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/ (reporting that *only* eighty-one institutions have incorporated and adopted the Chicago Statement into their campus speech polices).

130. Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, Exec. Order No. 13864, 84 Fed. Reg. 11401 (Mar. 21, 2019).

131. *Id.*

colleges to uphold the First Amendment by preventing universities from creating environments that "stifle competing perspectives."[132]

To execute this mission, the order essentially states that institutions which promote free inquiry will "receive Federal research or education grants."[133] Conversely, if "heads of covered agencies . . . in coordination with the Director of the Office of Management and Budget" decide a university is not in "compliance with all applicable Federal laws, regulations, and policies," federal grants will be denied to that institution.[134] Section 3(b) of the order defines "covered agencies" as "the Departments of Defense, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy, and Education;" including agencies like NASA, the Environmental Protection Agency, and the National Science Foundation.[135] The agencies' discretion must be monitored by "applicable law, including the First Amendment."[136] The federal funds that can be withheld can include "all funding" by any agency listed in the Executive order, excluding Federal student aid.[137]

1. Criticism Against the Executive Order

Before signing the order, President Trump gave a brief speech about what the order is designed to prohibit in the future.[138] To illustrate the context surrounding the order, he had three undergraduate students briefly describe incidents where they personally faced "ideological intolerance on campus."[139] One student was the President of the Students for Life organization at her college, a pro-life group, another represented Turning Point USA on her campus, a conservative group, and the third student was a Christian who handed out "Jesus loves you" Valentine's Day cards on campus.[140] In choosing to specifically include the testimonies of these three students, President Trump made it clear that this order was designed to

132. *Id.*
133. *Id.* at 11402.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. Remarks by President Trump, *supra* note 70.
139. *Id.*
140. *Id.*

address, at least, conservative ideological intolerance on campuses.[141] To some, this point alone discredits the legitimacy of the order.[142]

Whether this concern is well founded will likely depend on the patterns in which this order is given effect in the future.[143] On its face however, the order is broadly written to promote "open, intellectually engaging, and *diverse* debate."[144] Thus, it seems as if the language of the order could have potential to lend itself to nonpartisan application.[145]

However, criticism for this Executive order still flows from several other arguments. First, there is debate that the order offers a method of execution which is too vague.[146] It does not provide covered agencies with guidance on how to assess alleged First Amendment violations on campuses, nor does it specify what types of offenses would warrant withholding federal funds.[147]

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141. Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER ED (Mar. 22, 2019, 3:00 AM), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk (suggesting that some momentum for this Executive order flows from President Trump's repeated "weigh[ing] in . . . on alleged suppression of free speech on [college] campuses, especially speech by conservative students").

142. *Id.* (quoting Jonathan Friedman, the project director for campus free speech at PEN America, and his skepticism that the Executive order will effectively "apply speech protections for all points of view," not just the conservative ones).

143. *See* Alan Perez, *Trump Issues Executive Order on Free Speech, Though Impact at Northwestern Remains Unclear*, DAILY NW. (Apr. 10, 2019), https://dailynorthwestern.com/2019/04/10/campus/trump-issues-executive-order-on-free-speech-though-impact-at-northwestern-remains-unclear/ (citing the skepticism met by several university presidents and higher education groups of the vague order's future application). *See generally President Trump Issues Executive Order on Campus Free Speech*, AM. COUNCIL ON EDUC. (Mar. 22, 2019), https://www.acenet.edu/News-Room/Pages/President-Trump-Issues-Executive-Order-on-Campus-Free-Speech.aspx (citing American Council on Education ("ACE") President Ted Mitchell saying, "Executive Orders are not self-implementing. . . . What remains to be seen is the process the administration develops to flesh out these requirements and the extent to which it is willing to consult with the communities most affected—especially research universities").

144. Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, Exec. Order No. 13864, 84 Fed. Reg. 11401 (Mar. 21, 2019) (emphasis added).

145. *See FIRE Statement on Campus Free Speech Executive Order*, FIRE (Mar. 21, 2019), https://www.thefire.org/fire-statement-on-campus-free-speech-executive-order/ [hereinafter *FIRE Statement*]. The "FIRE" organization, self-proclaimed as "nonpartisan," posits that the order's objectives "should be uncontroversial" because it calls universities to uphold constitutional rights which they are already legally obligated to do. *Id*.

146. *See* Catherine J. Ross, *Trump's Latest Threat to Free Speech and the Academy*, FIRST AMENDMENT WATCH (Mar. 21, 2019), https://firstamendmentwatch.org/catherine-j-ross-trumps-latest-threat-to-free-speech-and-the-academy/#_ftnref8; Evan Gerstmann, *Trump's Executive Order on Campus Free Speech Actually Needs To Be Stronger (and Better)*, FORBES (Mar. 22, 2019, 2:07 PM), https://www.forbes.com/sites/evangerstmann/2019/03/22/trumps-executive-order-on-campus-free-speech-actually-needs-to-be-stronger-and-better/; Kreighbaum, *supra* note 141.

147. PEN America, *Legislative and Political Action on Campus Free Speech: An Analysis*, 43 SETON HALL LEGIS. J. 405, 425–26 (2019).

Furthermore, if a covered agency attempted to do so, there is no procedure in place detailing how much money can be withheld from the university or how long that reprimand could last.[148] Would the existence of "free speech zones" on campus rise to the level of triggering the order's application?[149] Or would a college that prohibits a student from handing out Christian Valentine's cards find itself stripped of all federal funding?[150] Currently, the answers regarding these procedural matters remain unclear.[151]

Second, there is real concern centered around where this order places its power.[152] Skeptics such as Ted Mitchell, the president of the American Council of Education, express that this order will cause "unwanted federal micromanagement."[153] Catherine Ross, a law professor at George Washington University Law School, echoes this sentiment by positing that courts are in the better position to interpret free speech violations, rather than "bureaucrats or political appointees."[154] Such bureaucrats may be compelled to disfavor institutions that disagree with their personal political values.[155] As Robert Zimmer, President of the University of Chicago puts it, "[a] committee in Washington passing judgment on the speech policies and activities of educational institutions, judgments that may change according to who is in power and what policies they wish to promulgate, would be a profound threat to open discourse on campus."[156]

Currently, this order only provides that covered agencies may make their determinations in compliance with applicable laws and the First Amendment itself.[157] While this may be interpreted as an adequate check and balance on

148. *See id.* at 426–27.

149. *See* A. Celia Howard, Note, *No Place for Speech Zones: How Colleges Engage in Expressive Gerrymandering*, 35 GA. ST. U. L. REV. 387, 400–01 (2019) (citing recent lawsuits in the last ten years contemplating the constitutionality of free speech zones included within college speech policies).

150. Remarks by President Trump, *supra* note 70.

151. *See* Perez, *supra* note 143; *President Trump Issues Executive Order on Campus Free Speech*, *supra* note 143; *FIRE Statement*, *supra* note 145; Gerstmann, *supra* note 146; PEN America, *supra* note 147, at 428.

152. *President Zimmer's Message on Free Expression and Federal Action*, UCHICAGO NEWS (Mar. 4, 2019), https://news.uchicago.edu/story/president-zimmers-message-free-expression-and-federal-action [hereinafter *President Zimmer's Message*]. *See* Ross, *supra* note 146; Gerstmann, *supra* note 146; Kreighbaum, *supra* note 141.

153. Kreighbaum, *supra* note 141.

154. Ross, *supra* note 146.

155. *See President Zimmer's Message*, *supra* note 152.

156. *Id.*

157. Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, Exec. Order No. 13864, 84 Fed. Reg. 11401, 11402 (Mar. 21, 2019) (stating in Section 3(a) that "[t]o advance

the agencies' discretion, there is still significant doubt that these agencies are overall best suited to make informed distinctions as to whether an act is constitutional.[158]

It is the job of the judiciary to interpret the law and make impartial judgments.[159] Not only are they equipped with a deep understanding of the standards and applications involved in constitutional law, they are also guided by case precedent and expected to uphold the law fairly and impartially.[160] As President Zimmer has stated, granting administrative agencies supervisory power over universities would inevitably create a new bureaucratic system of constitutional enforcement.[161] He warns that adopting such a model can become a problem when it depends largely on who is in charge of the agency and what their subjective values are.[162] For these reasons, covered agencies' professional experience cannot remotely resemble

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the policy described in subsection 2(a) of this order, the heads of covered agencies shall, in coordination with the Director of the Office of Management and Budget, 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, including through compliance with *all applicable Federal laws, regulations, and policies*") (emphasis added).

158. *As Promised, Trump Signs Contentious Executive Order on Campus Free Speech*, FIRST AMENDMENT WATCH (Mar. 21, 2019), https://firstamendmentwatch.org/trump-promises-executive-order-compelling-free-speech-on-campus/ (quoting University of Chicago President Robert Zimmer's concern, that the order creates an "inevitable establishment of a bureaucracy" by allowing "[a] committee in Washington passing judgment on the speech policies and activities of educational institutions"). *See also* Adam Kissel, *An Executive Order on Campus Free Speech*, NAT'L REV. (Mar. 4, 2019), https://www.nationalreview.com/2019/03/donald-trumps-executive-order-on-campus-free-speech/ (considering the possibility that the covered agencies in the order could abuse their power altogether and "bias research by having policy goals that are distinct from the search for truth").

159. *The Judicial Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/ (last visited Jan. 31, 2020) ("Federal courts enjoy the sole power to interpret the law, determine the constitutionality of the law, and apply it to individual cases."). *Cf.* Joe Cohn, *The Department of Education Must Avoid These Pitfalls When Crafting Regulations on Campus Free Speech*, FIRE (Dec. 4, 2019), https://www.thefire.org/the-department-of-education-must-avoid-these-pitfalls-when-crafting-regulations-on-campus-free-speech (positing that "the Department of Education is not a subject matter expert on the First Amendment").

160. *See* Bollinger, *supra* note 8 (arguing that "[t]he final word on First Amendment disputes in America, after all, isn't rendered on campus, . . . [w]e leave the ultimate decisions to judges who look to precedent for guidance and render new decisions about emerging topics, thus creating new precedent."). *See* 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY 5 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf; MODEL RULES OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2020).

161. *President Zimmer's Message*, *supra* note 152.

162. *Id. See* Cohn, *supra* note 159 (reasoning that the inherent political nature of the Executive branch would prevent political actors from staying neutral, as judges can, when resolving free speech disputes).

the judiciary's experience in constitutional interpretation.[163] Therefore, it is a misguided choice to grant the agencies this discretional power.[164]

Finally, the consequences of violating this vague Executive order casts serious doubts on its reasonableness.[165] Specifically, critics of the Executive order fear that revoking funds for federal research or education grants would have a disparate impact on a university's access to "cutting-edge research that is critical to our nation's continued vitality and global leadership."[166] This is a relevant concern because revoking funds for educational research would directly contradict the Trump Administration's promotion of "learning, scientific discovery, and economic prosperity" on campuses.[167] President Trump has acknowledged that "the federal government provides educational institutions with more than $35 billion in research funding [and] [a]ll of that money is now at stake."[168] Nevertheless, the President has affirmed that "[i]f a college or university doesn't allow you to speak, we will not give them money. It's very simple."[169] However, the process for effectuating this order is far from simple because it threatens the economic abilities of universities to provide students with access to advanced research environments.[170] As one commentator theorizes, if the Department of Education based the receipt of federal funds off the outcomes of free speech lawsuits against universities, then judges might be in a difficult position of making the decision that triggers a university's loss of federal funds.[171] The

163. *Cf.* Kissel, *supra* note 158 (noting that one way covered agencies can enforce their power against a university is to rely on the federal court's ascertainment of the alleged constitutional violation).

164. *See* Cohn, *supra* note 159.

165. *Id.*; Kissel, *supra* note 158 ("The best policy will expand the search for truth by *preventing* incursions on academic freedom. . . . University researchers already suffer under the administrative burdens of their own campuses, federally mandated (and unconstitutional) institutional review boards, and a variety of federal restrictions when they take on federal grants.") (emphasis added).

166. Kreighbaum, *supra* note 141 (quoting Ted Mitchell, President of the American Council on Education, and his criticism of the order's potential effect on academic flourishing on college campuses).

167. Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, Exec. Order No. 13864, 84 Fed. Reg. 11401 (Mar. 21, 2019).

168. Remarks by President Trump, *supra* note 70.

169. *Id.*

170. *See* Ross, *supra* note 146; PEN America, *supra* note 147, at 426–27 (commenting that "research dollars could be in jeopardy" and "scientific research or educational grants could be tied to prevailing political winds is anathema to the academic enterprise").

171. Cohn, *supra* note 159 ("From a legal perspective, we certainly don't want judges (particularly in close cases, or in cases that would expand free speech protections) to think that lifesaving medical research will be lost if they rule against a school. If a school is able to make the case that this would indeed be the consequence of losing a court case, we predict that at least some judges will do anything they can to avoid ruling against institutions.").

government will be challenged to address these potential economic consequences, should they come to fruition.

2. Response to the Criticism

Despite the criticism, it is argued that the threat to cut federal funding will, by itself, be enough to incentivize universities to reevaluate their free speech policies.[172] Since a significant amount of taxpayer dollars *are* on the line, university administrations may be pressured to consult with legal counsel to "remove unconstitutional policies well before regulators even act."[173] Accordingly, the ambiguity surrounding the order could pressure college administrators to amend their free speech policies before involving administrative agencies at all.[174] This kind of pressure may be useful to address universities that are teetering between either "red light" or "yellow light" ratings issued by FIRE.[175] As a proponent of the Executive order puts it, "colleges [that] face a loss of federal funds . . . just might give up on evading the First Amendment."[176] Perhaps FIRE's simple ratings may be what the government agencies rely on as a basis for withholding funds under the order. Nevertheless, for reasons stated previously in this section, only time will tell if the presidential administration will effectuate the order harshly, leniently, or at all.

Overall, however broad President Trump's Executive order may be, it does not necessarily require public universities to do anything that they are not already constitutionally obligated to do.[177] Public universities are government agencies and as such, are required to stay in compliance with the Constitution.[178] This order is not creating new law.[179] At most, it could be viewed as providing a prophylactic method of ensuring the constitutional

172. Stanley Kurtz, *The Politics and Policy of Trump's Campus Free-Speech Order*, NAT'L REV. (Mar. 22, 2019, 10:27 AM), https://www.nationalreview.com/corner/the-politics-and-policy-of-trumps-campus-free-speech-order.

173. *Id.*

174. *Id.*

175. *See Spotlight 2019*, *supra* note 59, at 17–18.

176. Kurtz, *supra* note 172.

177. *See Fire Statement*, *supra* note 145.

178. Kurtz, *supra* note 172.

179. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2020 (2019) (stating that the Department of Education will soon propose new rules for implementing the Executive order "consistent with the First Amendment to the Constitution and the requirements of federal law"). *See* Cohn, *supra* note 159.

right to free speech. Nevertheless, should colleges fail to take adequate steps to promote free inquiry on campus—at least in the eyes of the regulating agencies—serious harm may arise when those agencies are independently given control to make federal funding cuts.[180] For this reason, the order is subject to similar criticism of speech codes: granting unskilled bureaucratic systems discretionary power is problematic.[181] Since the judicial branch is "superior for resolving these [campus free speech] cases,"[182] yet unaccounted for in the order, and preserving campus speech rights would ultimately defund important academic research,[183] adhering to this Executive order might create higher risks with moderate rewards.

C. State Legislative Efforts to Offer Greater Campus Free Speech Protection

Currently, nineteen states have enacted legislation to encourage free speech on college campuses.[184] Twenty-three other states introduced bills to promote First Amendment protection for students,[185] however, only a

180. Cohn, *supra* note 159.

181. *See* O'NEIL, *supra* note 83, at 53.

182. Cohn, *supra* note 159.

183. *Id.*

184. *See Alabama*: H.R. 498, 2019 Reg. Sess. (Ala. 2019); *Arizona*: H.R. 2615, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016); H.R. 2542, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016); H.R. 2563, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018); *Arkansas*: S.B. 156, 92nd Gen. Assemb., 2019 Reg. Sess. (Ark. 2019); *California*: S.B. 1115, Ch. 1363, 1992 Reg. Sess. (Cal. 1992); S.B. 2581, 2006 Reg. Sess. (Cal. 2006); *Colorado*: S.B. 62, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017); *Florida*: S.B. 4, 121st Reg. Sess. (Fla. 2019); *Georgia*: S.B. 339, 154th Gen. Assemb., 2018 Reg. Sess. (Ga. 2018); *Iowa*: S.B. 274, 88th Gen. Assemb., 1st Reg. Sess. (Iowa 2019); *Kentucky*: S.B. 17, 2017 Reg. Sess. (Ky. 2017); H.R. 254, 2019 Reg. Sess., (Ky. 2019); *Louisiana*: S.B. 364, 2018 Reg. Sess. (La. 2018); *Missouri*: S.B. 93, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015); *North Carolina*: H.R. 527, Gen. Assemb., 2017 Reg. Sess. (N.C. 2017); *North Dakota*: S.B. 2320, 66th Leg. Assemb. (N.D. 2019); *Oklahoma*: S.B. 361, 57th Leg., 1st Reg. Sess. (Okla. 2019); *South Dakota*: H.R. 1087, 94th Leg. Assemb., 2019 Reg. Sess. (S.D. 2019); *Tennessee*: S.B. 723, 110th Gen. Assemb. (Tenn. 2017); *Texas*: S.B. 18, 86th Leg. (Tex. 2019); *Utah*: H.R. 54, 62nd Leg., Gen. Sess., (Utah 2017); *Virginia*: H.R. 258, 2014 Reg. Sess. (Va. 2014); H.R. 344, 2018 Gen. Assemb., Reg. Sess. (Va. 2018). *See generally Enacted Campus Free Speech Statutes*, FIRE, https://www.thefire.org/legislation/enacted-campus-free-speech-statutes/ (last visited Aug. 6, 2019) (providing a list of 18 states that have enacted free speech bills with links and additional information for each).

185. *See Alaska*: H.R. 295, 31st Leg., 2nd Reg. Sess. (Alaska 2020); *Connecticut*: H.R. 5113, Gen. Assemb., Jan. Sess. (Conn. 2019); *Hawaii*: H.R. 1227, 30th Leg. (Haw. 2019); *Idaho*: H.R. 422, 64th Leg., 2nd Reg. Sess. (Idaho 2018); *Illinois*: H.B. 2280, 101st Gen. Assemb. (Ill. 2019); *Indiana*: S.B. 302, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018); *Kansas*: S.B. 340, 2018 Sess. (Kan. 2018); *Maine*: H.R. 486, 129th Leg., 1st Reg. Sess. (Me. 2019); *Maryland*: H.R. 796, 441st Gen. Assemb., 2020 Reg. Sess. (Md. 2020); *Michigan*: H.R. 4581, 99th Leg., 1st Reg. Sess. (Mich. 2017); *Minnesota*: S.B. 2469, 2018

handful among those are presently up for consideration.[186] Similarities exist between the bills that have been passed, as they serve primarily to instruct the board of trustees in each public higher education institution to renovate their free speech policies.[187] For example, the laws require universities to incorporate provisions in their campus policies that include prohibitions against quarantining speech with "free speech zones,"[188] and redefining what conduct constitutes as harassment.[189]

Notably, the language used in several of these bills and laws adopt terminology from Supreme Court case law and even the Chicago Statement.[190] For example, Arkansas, Alabama, Oklahoma, and Tennessee have referenced the language from *Davis v. Monroe County Board of Education* to define "harassment."[191] Likewise, a number of states have borrowed similar language from the Chicago Statement, or endorse the

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Leg., 90th Reg. Sess. (Minn. 2018); *Mississippi*: H.R. 1200, 2020 Leg., Reg. Sess. (Miss. 2020); *Montana*: H.R. 735, 2019 Leg., 66th Reg. Sess. (Mont. 2019); *Nebraska*: L.B. 718, 105th Leg. 2nd Reg. Sess. (Neb. 2018); *New Hampshire*: H.R. 477, 2017 Leg., 165th Gen. Sess. (N.H. 2017); *New Jersey*: A.B. 5731, 218th Leg. (N.J. 2019); *New York*: S.B. 6126, 2017 Leg., 240th Leg. Sess. (N.Y. 2017); *Ohio*: H.R. 363, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017); *South Carolina*: S.B. 33, 123rd Assemb., 1st Reg. Sess. (S.C. 2019); *Washington*: H.R. 2223, 65th Leg., 2d Spec. Sess., (Wash. 2017); *West Virginia*: H.R. 4203, 83rd Leg., 2d Reg. Sess. (W.Va. 2018); *Wisconsin*: A.B. 444, 104th Leg., 2019-20 Reg. Sess. (Wis. 2019); *Wyoming*: H.R. 137, 64th Leg., 2018 Budget Sess. (Wyo. 2018).

186. *Id.* (Illinois, Maine, and South Carolina).

187. *E.g.* H.R. 498, 2019 Reg. Sess. (Ala. 2019) (instructing higher education boards to "adopt a policy on free expression that is consistent with this act").

188. *E.g.* H.R. 498, 2019 Reg. Sess. (Ala. 2019); H.R. 2615, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016); H.R. 527, Gen. Assemb., 2017 Reg. Sess. (N.C. 2017); H.R. 1087, 94th Leg. Assemb., 2019 Reg. Sess. (S.D. 2019) ("An institution may not designate any area within its boundaries as a free speech zone or otherwise restrict expressive activities to particular areas within its boundaries in a manner that is inconsistent with this section.").

189. *E.g.* H.R. 498, 2019 Reg. Sess. (Ala. 2019); S.B. 156, 92nd Gen. Assemb., 2019 Reg. Sess. (Ark. 2019).

190. *See, e.g.*, *Enacted Campus Free Speech Statutes—Tennessee*, FIRE (Dec. 18, 2019), https://www.thefire.org/enacted-campus-free-speech-statutes-tennessee/.

191. H.R. 498, 2019 Reg. Sess. (Ala. 2019) (defining harassment as an "[e]xpression that is so severe, pervasive, and objectively offensive that it effectively denies access to an educational opportunity or benefit provided by the public institution of higher education"); S.B. 156, 92nd Gen. Assemb., 2019 Reg. Sess. (Ark. 2019) (defining harassment to "mean[] expression that is so severe, pervasive, and subjectively and objectively offensive that it effectively denies access to an educational opportunity or benefit provided by the state-supported institution of higher education"); S.B. 361, 57th Leg., 1st Reg. Sess. (Okla. 2019) (defining harassment as "mean[ing] only that expression that is unwelcome, so severe, pervasive and subjectively and objectively offensive that a student is effectively denied equal access to educational opportunities or benefits provided by the public institution of higher education"); S.B. 723, 110th Gen. Assemb. (Tenn. 2017) (defining harassment as conduct "that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

Statement generally, to articulate the free speech principles behind the legislation.[192] *Texas v. Johnson* is also subtly referenced in the enacted bills by reiterating that case's holding: institutions may not restrict speech that could be perceived to others as "unwelcome, disagreeable, or even deeply offensive."[193]

Moreover, similarities exist between some of the enacted bills and the Campus Free Speech Act—a "model bill" created by libertarian think tank, the Goldwater Institute.[194] The goal of the model bill is to provide states with a template[195] to: incorporate provisions that ban free speech zones, avert university administrations from disinviting controversial speakers, and overall "encourage the widest possible range of opinion and dialogue within the university itself."[196] The provisions provided by Goldwater also borrow

192. *Compare* CHICAGO STATEMENT, *supra* note 118 ("[T]he University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. . . . But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."), *with* H.R. 498, 2019 Reg. Sess. (Ala. 2019) "[T]he 2015 report issued by the Committee on Freedom of Expression at the University of Chicago . . . articulate[s] well the essential role of free expression and the importance of neutrality at public institutions of higher education to preserve freedom of thought, speech, and expression on campus."); H.R. 2563, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018) ("It is not the proper role of an institution of higher education to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions that may be unwelcome disagreeable or deeply offensive."); S.B. 274, 88th Gen. Assemb., 1st Reg. Sess. (Iowa 2019) ("[I]t is not the proper role of an institution of higher education to shield individuals from speech protected by the first amendment to the Constitution of the United States, which may include ideas and opinions the individual finds unwelcome, disagreeable, or even offensive."); H.R. 527, Gen. Assemb., 2017 Reg. Sess. (N.C. 2017) ("[I]n 2015, the Committee on Freedom of Expression at the University of Chicago issued a similar and widely respected report. . . . The principles affirmed by [this] highly regarded report[] are inspiring articulations of the critical importance of free expression in higher education."); S.B. 723, 110th Gen. Assemb. (Tenn. 2017) ("An institution shall be committed to giving students the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue. . . .").

193. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). *E.g.*, H.R. 527, Gen. Assemb., 2017 Reg. Sess. (N.C. 2017).

194. Kasper, *supra* note 53, at 531–32. *See* PEN America, *supra* note 147, at 412; Jeremy Bauer-Wolf, *Free Speech Laws Mushroom in Wake of Campus Protests*, INSIDE HIGHER ED (Sept. 16, 2019), https://www.insidehighered.com/news/2019/09/16/states-passing-laws-protect-college-students-free-speech (suggesting that not all, but some, states that enacted free speech laws borrowed elements that originated from the Goldwater Institute's model). *See* Stanley Kurtz et al., *Campus Free Speech: A Proposal*, GOLDWATER INST. (Jan. 30, 2017), https://goldwaterinstitute.org/wpcontent/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf.

195. Kurtz et al., *supra* note 194, at 2.

196. *Id. See* Kasper, *supra* note 53, at 531; Jake New, *Conservative, Libertarian Groups Propose Campus Free Speech Bill*, INSIDE HIGHER ED (Feb. 1, 2017), https://www.insidehighered.com/

from Supreme Court decisions and highly regard the efforts taken by the University of Chicago in issuing their statement.[197]

State bills that reference preexisting laws and policies, like the model bill, are probably wise to do so.[198] Failure to borrow inspiration from established legal thought could risk creating laws that are overreaching or even unconstitutional.[199] Consequently, even the Campus Free Speech Act is not without its flaws.[200] Some provisions in the model bill are subject to criticism for imposing harsh penalties on students[201] or using terms that are too vague to pass constitutional rigor.[202]

For example, Section 1.9 of the Act states "[a]ny student who has twice been found responsible for infringing the expressive rights of others will be suspended for a minimum of one year, or expelled."[203] The issues with this section are twofold–first, the heavy penalty,[204] and second, using a standard that is "overbroad and too vague."[205] Adopting this penalty could carry long-term financial implications for students, dissuading them from voicing their opinions and objectively chilling speech.[206] Furthermore, "infringing the expressive rights of others"[207] is "troubling" language to use because it defines a standard that is too easily adaptable and subject to misuse by

quicktakes/2017/02/01/conservative-libertarian-groups-propose-campus-free-speech-bill; Kurtz et al., *supra* note 194, at 2.

197. Kurtz et al., *supra* note 194, at 2, 6, 12, 23–24.

198. *See* Robert Shibley, *Goldwater Institute Releases Model Campus Free Speech Legislation for States*, FIRE (Jan. 31, 2017), https://www.thefire.org/goldwater-institute-releases-model-campus-free-speech-legislation-for-states/ (suggesting that FIRE supports and endorses organizations that take a "constitutionally sound role" in protecting students' free speech, which Goldwater's proposed state legislation primarily does).

199. Kasper, *supra* note 53, at 532–33 (suggesting that the Campus Free Speech Act, if enacted, is constitutional on several fronts, however "suspect" on others). *See* PEN America, *supra* note 147, at 406.

200. Kasper, *supra* note 53, at 532–33.

201. *Id.* at 571–75; *see* Shibley, *supra* note 198.

202. Kasper, *supra* note 53, at 564–72 (arguing that Section 1(D) of the Act—which prohibits "protests and demonstrations that *materially and substantially* infringe upon the rights of others to engage in or listen to expressive activity"—uses a standard that does not protect the First Amendment rights of protesters or dissenters) (emphasis added).

203. Kurtz et al., *supra* note 194, at 20.

204. Kasper, *supra* note 53, at 572–75.

205. *Id.* at 572.

206. *Id.* at 572–73.

207. Kurtz et al., *supra* note 194, at 20.

college administrations.[208] One of Arizona's campus free speech bills adopts a similar provision using a different standard, stating, "if a student has repeatedly been determined to have engaged in individual conduct that materially and substantially infringes on the rights of other persons to engage in or listen to expressive activity, a punishment of suspension or expulsion from the university or community college may be appropriate."[209]

Although the troublesome vague standard used in the model bill is substituted for the "materially and substantially" standard, it remains problematic by "plac[ing] a clear emphasis on protecting the invited speaker, leaving the rights of protesting students in some doubt."[210] Despite which standard is used, the same risk of chilling speech by enforcing harsh penalties remains. However, since those penalties are not expressly mandatory, Arizona's bill may reduce the risk of "unconstitutional chilling effect[s]" unlike the model bill.[211] Arizona's bill also holds that "[a] university or community college MAY restrict a student's right to speak, including verbal speech, holding a sign or distributing fliers or other materials, in a public forum."[212] FIRE has not taken kindly to this prohibition of student rights, expressing that this language "must never become law,"[213] out of fear that it would give colleges latitude to "routinely violate[]" students' free speech rights.[214]

Though not representative of all state laws and bills on campus speech, Arizona's campus free speech bill serves as one example of state law that does not fully meet constitutional requirements.[215] While institutions like FIRE consider the efforts of the Goldwater Institute[216] and state legislatures

208. Kasper, *supra* note 53, at 571–72 (advising that this provision may incite "[f]ear of peripheral prosecutions in this context [and] may lead speakers to place additional burdens on themselves, thus chilling expression to a significant degree.").

209. H.R. 2563, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018) (adopting the standard iterated in *Tinker*).

210. Kasper, *supra* note 53, at 570–71.

211. *Id.* at 572 ("Putting in place mandatory penalties such as these risks creating an unconstitutional chilling effect on expression.").

212. H.R. 2563, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).

213. Tyler Coward, *Problematic Arizona Campus Free Speech Bill Would Allow Colleges to Restrict Students' Rights*, FIRE (Apr. 19, 2018), https://www.thefire.org/problematic-arizona-campus-free-speech-bill-would-allow-colleges-to-restrict-students-rights/.

214. *Id.*

215. *Id.*

216. Shibley, *supra* note 198 ("The Goldwater legislation . . . is a worthy proposal for consideration by members of state legislatures and the public.").

as major steps in the right direction,[217] state lawmakers should still be careful with the language they use when crafting free speech policies for colleges to adopt.[218] As one commentator explains, the failure to eliminate or revise worrisome provisions like those discussed above could detrimentally undermine the purpose of such legislation.[219]

CONCLUSION

There will always be competing tensions between preserving free speech and restricting it to protect other genuine values.[220] Nevertheless, the historic application of the First Amendment has proven that Justice Brandeis's "more speech, not enforced silence" outlook[221] is preferable to government censorship.[222] Creating speech restrictions beyond the First Amendment exceptions that already exist[223] would undermine the "social progress [that] has come about not as a result of silencing certain speakers, but by ensuring that previously silenced or marginalized groups are empowered to find their voice and have their say."[224]

Nonetheless, the stakes are high for losing free expression and diverse debate on university campuses.[225] This risk is evident from the continued proliferation of unconstitutional speech codes and campus incidents involving free speech restriction[226]—disinviting controversial speakers,

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217. *E.g.*, Robert McIntosh, *Alabama Governor Signs Bill into Law to Better Protect Student and Faculty Free Speech Rights*, FIRE (June 7, 2019), https://www.thefire.org/alabama-governor-signs-bill-into-law-to-better-protect-student-and-faculty-free-speech-rights/ (stating its encouragement "by yet another state taking seriously the role of the First Amendment on college campuses").

218. Kasper, *supra* note 53, at 584.

219. *Id.* ("In this spirit, states must be careful when designing campus free speech policies for their public universities. Otherwise, students may begin to interpret those policies as protecting merely the free expression rights of others, thus turning the phrase 'freedom of speech' in their view into nothing more than a tired cliché.").

220. CHEMERINSKY & GILLMAN, *supra* note 60, at 22–23 (noting that there could be valid reasons to restrict speech in situations involving other values such as "national security, safety, public morality, privacy, reputation, dignity, equality").

221. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

222. CHEMERINSKY & GILLMAN, *supra* note 60, at 40.

223. *Id.* at 46 (listing "narrowly drawn categories . . . that [case] law treats as unprotected [speech]" including "incitement of illegal activity, defamation, fighting words, true threats, [and] harassment").

224. *Id.* at 47. The authors consider "social progress" to include historical events spanning from John Locke's enlightenment contributions to the civil rights movement and beyond, made in part by adopting a broad free speech approach. *Id.* at 30–46.

225. *Id.* at 158–59. *See* Craddock, *supra* note 71, at 1089.

226. CHEMERINSKY & GILLMAN, *supra* note 60, at 155.

"trigger warning" requirements on potentially offensive class materials, and general prevention of students or faculty from expressing dissenting opinions.[227] What is even more troubling is that supporting these restrictions or unconstitutional speech codes can result in creating a society that is unable to express free and diverse debate.[228] This would produce a divisive, intolerant society, that possesses neither the ability "to challenge governmental authority [nor] improve the functioning of a free society."[229]

After assessing the efficacy of university-regulated speech policies and President Trump's Executive order, the best avenue for preserving free speech on American campuses is to encourage states to enact campus free speech laws. While some argue that free speech legislation is not the answer to the campus free speech problem,[230] it has the potential to be a very effective way of preserving college students' free speech rights.[231] Granted, to be effective at the highest level, these laws require careful and conscious reference to constitutionally upheld laws—nothing more, and nothing less.[232]

As previously discussed, the main issue with President Trump's Executive order is that it prescribes substantial penalties with overbroad provisions.[233] On the other hand, there are still several institutions enforcing self-made unconstitutional speech policies without the requisite expertise or education on the First Amendment.[234] Even though the Chicago Statement seems to rectify overreaching codes, the issue is that not all universities have

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227. *Id.* at 70.

228. *Id.* at 158.

229. Craddock, *supra* note 71, at 1089. *See id.*

230. *See* Bauer-Wolf, *supra* note 194 (quoting Frederick M. Hess, Director of Education Policy Studies at the American Enterprise Institute, where he stated that he does not "think these free speech bills solve anything by themselves, but they are a symptom that many people feel that something is very wrong."); Lauren Camera, *Campus Free Speech Laws Ignite the Country*, US NEWS (July 31, 2017), https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country (quoting higher education administrators that voiced their skepticism with enacting legislative remedies).

231. *See* Kasper, *supra* note 53, at 576.

232. *See generally id.* at 552–56, 576 (suggesting that although some provisions of the Campus Free Speech Act "represent an overcorrection," the model bill "appears to be a good faith attempt to safeguard the freedom of expression." Being that several states borrow language from the model bill—both the constitutional elements and the problematic ones—Kasper's suggestion can be applied state-to-state with free speech legislation generally.).

233. PEN America, *supra* note 147, at 425–26.

234. *See* Majeed, *supra* note 74, at 483–84 ("Colleges and universities across the country have enacted "speech codes . . . despite the fact that the courts have indicated that '[s]peech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech.'").

adopted it.[235] Enacting campus free speech state bills would more effectively guide institutions to create policies that preserve, not regulate, First Amendment liberties.[236]

Giving state legislatures the responsibility of regulating how universities formulate their speech policies would be proper if a balance is struck between protecting free speech without "expand[ing] government oversight."[237] Universities would still be free to administer their campuses in the best way they see fit, provided that their authoritative position remains constitutional.[238] Universities implementing policies based on state laws—specifically those that uphold the Constitution[239]—can defer the responsibility of generating such policies that firmly reflect a long-line of detailed (and nuanced) free speech case law to state legislatures.[240] Flaws in policy language that once resulted in a FIRE "red light" or "yellow light" rating could easily be solved if the university were to rely on a fully constitutional state bill for reference.[241] If state legislatures can rely on judiciary interpretation, and higher education institutions can uniformly rely

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235. *Chicago Statement: University and Faculty Body Support*, FIRE (Dec. 17, 2020), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/ (reporting that only seventy-eight institutions have adopted the Chicago Statement, as of December 17, 2020).

236. *See* Kasper, *supra* note 53, at 532–33, 537, 584 ("The Campus Free Speech Act [and derivative legislation thereof] takes us substantially in this direction by ensuring that public universities maintain their goal of being places for the free exchange of ideas. Adopting policies that include [constitutional] provisions . . . will be the best way for states to achieve what the freedom of speech requires for speakers, listeners, and protestors."). *Id.* at 584.

237. PEN America, *supra* note 147, at 406. *See generally Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire*, PEN AM. 8 (Nov. 7, 2017), https://pen.org/wp-content/uploads/2017/11/2017-Wrong-Answer.pdf. PEN America maintains a divided position that several state bills include provisions that are supportive of free speech protection, yet the bills undermine themselves for their negative elements. This suggests that if states were to amend their similar harmful provisions, state bills could be effective. *Id.*

238. *See* Kasper, *supra* note 53, at 579, 582 (adopting constitutional state legislation into campus free speech policies would prevent universities from "falling into traps meant to falsely denigrate public universities as some sort of enclaves of totalitarianism." It would also promote universities to "do what they do best: educate students.").

239. *See id.* at 532.

240. *See, e.g.*, *id.* at 539. For example, Section 1(B) of the model bill—providing that institutions cannot shield "ideas and opinions they find unwelcome, disagreeable, or even deeply offensive" . . . "would serve as a reminder of . . . principle[s]" which the Supreme Court has "repeatedly acknowledged" in cases like *Healy* and *Papish*. *Id.*

241. Daniel Burnett, *50 Universities Now Earn FIRE's Highest Rating for Free Speech*, FIRE (July 16, 2019), https://www.thefire.org/50-universities-now-earn-fires-highest-rating-for-free-speech/ (suggesting that FIRE attributes increases in "green light" speech policy ratings among universities to state legislative developments).

on state legislation, then perhaps there is an effective solution to offer universities guidance on specific ways to formulate free speech provisions that uphold constitutional liberties.[242]

242. *Contra* Hutchens & Fernandez, *supra* note 7, at 128 (proposing that a preferable solution means allowing institutions to independently resolve many speech disputes, rather than vesting this duty in legislatures). However, the authors' main quarrel with state legislative effort is when the law goes beyond its constitutional limits (i.e., demanding political neutrality on campuses and imposing minimum punishments on students). Should remedial measures be taken to rectify blemishes such as these state bills could still effectively promote free speech on campuses. Kasper, *supra* note 53, at 532–33.