

**PUBLIC UNIVERSITIES AND THE FIRST AMENDMENT:  
CONTROVERSIAL SPEAKERS, PROTESTS, AND FREE SPEECH  
POLICIES**

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I. INTRODUCTION

In recent years, several high-profile cases of controversial speakers at public colleges and universities<sup>1</sup> have resulted in protests of those speakers. For example, at the University of Wisconsin-Madison, student protestors in November 2016 took to the front of a classroom and began chanting, temporarily halting a scheduled speech by *Daily Wire* founder, and former *Breitbart News* editor, Ben Shapiro.<sup>2</sup> Similar disruptions occurred in 2018 at multiple events where speakers were invited to campuses by student chapters of the Federalist Society, including speeches by John Blackman at the City University of New York and Christina Hoff Sommers at Lewis and Clark College.<sup>3</sup> In some cases, the protests have turned violent, such as the now famous case of protestors at the University of California-Berkeley lighting fires, tossing Molotov cocktails, and throwing fireworks at police officers in response to a speech planned by former *Breitbart News* editor Milo Yiannopoulos in February 2017.<sup>4</sup> Similarly, some

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<sup>1</sup> Hereafter, this article will frequently refer to “public universities,” but those remarks will generally apply to any public institutions of higher education, including public community colleges.

<sup>2</sup> Pat Schneider, *Fighting Words: The Campus Free Speech Battle at UW Often Focuses on Guest Speakers*, CAP. TIMES (Apr. 5, 2017), [http://host.madison.com/ct/news/local/education/university/fighting-words-the-campus-free-speech-battle-at-uw-often/article\\_31f9abea-78d3-5211-b41c-7ba535a87abf.html](http://host.madison.com/ct/news/local/education/university/fighting-words-the-campus-free-speech-battle-at-uw-often/article_31f9abea-78d3-5211-b41c-7ba535a87abf.html) [<https://perma.cc/6NH5-FWVH>].

<sup>3</sup> See Scott Jaschik, *Guest Lecture on Free Speech at CUNY Law School Heckled*, INSIDE HIGHER ED (Apr. 16, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/04/16/guest-lecture-free-speech-cuny-law-school-heckled> [<https://perma.cc/4H97-FVCB>]; Scott Jaschik, *Students Interrupt Several Portions of Speech by Christina Hoff Sommers*, INSIDE HIGHER ED (Mar. 6, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/03/06/students-interrupt-several-portions-speech-christina-hoff-sommers> [<https://perma.cc/KQ3P-T7NQ>].

<sup>4</sup> Anonymous, *Violent Protests by Visiting Mob Lead Berkeley to Cancel Speech by Milo Yiannopoulos*, INSIDE HIGHER ED (Feb. 2, 2017, 1:13 AM), <https://www.insidehighered.com/news/2017/02/02/violent-protests-by-visiting-mob-lead-berkeley-to-cancel-speech-by-milo-yiannopoulos>  
(continued)

demonstrators caused injuries when protests turned violent at the conclusion of *The Bell Curve* author Charles Murray's speech at Middlebury College in March 2017.<sup>5</sup> Although it did not involve violence, student protestors disrupted a planned talk by Blackwater security company founder Erik Prince at Beloit College in March 2019 with the use of a drumline and by piling chairs on the stage; this led to the college cancelling the lecture.<sup>6</sup> In still other cases, planned or expected protests resulted in the controversial speakers being disinvited. This includes the University of California-Davis disinviting both Yiannopoulos and former Turing Pharmaceuticals CEO Martin Shkreli in early 2017,<sup>7</sup> as well as the University of Central Oklahoma cancelling the speech of Creation Museum founder Ken Ham in February 2018.<sup>8</sup> A speech scheduled for conservative commentator and author Ann Coulter was cancelled at the University of California-Berkeley in April 2017, although it is not entirely clear if Coulter or the university cancelled the event.<sup>9</sup> Finally, some speakers have contemplated voluntarily withdrawing from their planned speeches, such as when white nationalist Richard Spencer considered ending his speaking tour of college campuses in the spring of 2018, partly in response to the significant protesting that accompanied his events.<sup>10</sup>

There is little evidence that these examples are representative of the behavior of university students generally at public speeches and similar

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ed.com/news/2017/02/02/violent-protests-visiting-mob-lead-berkeley-cancel-speech-milo-yiannopoulos [https://perma.cc/2BA6-DRLZ].

<sup>5</sup> Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html> [https://perma.cc/LP8E-MQGF].

<sup>6</sup> Jeremy Bauer-Wolf, *Another Speaker Shut Down*, INSIDE HIGHER ED (Mar. 29, 2019), <https://www.insidehighered.com/news/2019/03/29/beloit-cancels-erik-prince-talk-after-student-protests> [https://perma.cc/3XBE-ECBV].

<sup>7</sup> Jeremy Bauer-Wolf, *College Administrators: No Easy Answers for Controversial Speakers*, INSIDE HIGHER ED (Nov. 14, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/11/14/college-administrators-no-easy-answers-controversial-speakers> [https://perma.cc/BH3F-H4U7].

<sup>8</sup> Adam Kealoha Causey, *Creationist's Speech Canceled at University in Oklahoma*, FOX NEWS (Feb. 8, 2018), <http://www.foxnews.com/us/2018/02/08/creationists-speech-canceled-at-university-in-oklahoma.html> [https://perma.cc/KB8S-CE3E].

<sup>9</sup> Merrit Kennedy, *After Back-And-Forth, Ann Coulter Speech Is Off at UC Berkeley*, NPR (Apr. 26, 2017, 4:44 PM), <https://www.npr.org/sections/thetwo-way/2017/04/26/525745159/after-back-and-forth-ann-coulter-speech-is-off-at-uc-berkeley> [https://perma.cc/9GMD-C3ME].

<sup>10</sup> Ryan Lenz, *Richard Spencer Cancels Speaking Tour of College Campuses After Speech in Michigan*, S. POVERTY L. CTR. (Mar. 12, 2018), <https://www.splcenter.org/hatewatch/2018/03/12/richard-spencer-cancels-speaking-tour-college-campuses-after-speech-michigan> [https://perma.cc/ZE4T-TSXK].

events.<sup>11</sup> Nevertheless, they are instances where speakers have been prevented (or claim to have been prevented) from expressing their ideas to some degree in particular public venues. Remedies to these campus incidents have occurred in various forms. In some cases where planned speeches were disrupted, individual universities have conducted investigations or punished offending students.<sup>12</sup> At the national level, President Donald Trump issued an executive order in 2019 that directed U.S. government agencies to ensure that universities receiving federal funding are protecting “free inquiry” on their campuses.<sup>13</sup> In what may ultimately prove to be the most far-reaching response to these types of cases, in 2017 the Goldwater Institute produced model state legislation titled the “Campus Free Speech Act.”<sup>14</sup> According to the drafters of the model policy, the asserted purposes of the Campus Free Speech Act are to, among other things, promote the creation of university policies supportive of the freedom of expression, prevent campus administrators from disinviting controversial speakers, propose potential sanctions for students who harm the free speech rights of others, and ensure that students will be informed of official policy on the freedom of expression.<sup>15</sup> As will be explored below, the model legislation goes beyond the issue of controversial invited speakers to dictate governmental action as it relates to other First Amendment concerns, such as the creation of “free speech zones” and student organizational recognition.<sup>16</sup> Several states have already enacted a derivation of the Campus Free Speech Act, or a comparable law with the asserted goal of protecting the freedom of

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<sup>11</sup> See Mari Uyehara, *The Free Speech Grifters*, GQ (Mar. 19, 2018), <https://www.gq.com/story/free-speech-grifting> [<https://perma.cc/3RKH-UXQW>]; Kelly Wilz, *The Myth Of The Liberal Campus*, HUFFPOST (Feb. 27, 2017), [https://www.huffpost.com/entry/the-myth-of-the-liberal-campus\\_b\\_58b1bc0e4b02f3f81e44812](https://www.huffpost.com/entry/the-myth-of-the-liberal-campus_b_58b1bc0e4b02f3f81e44812) [<https://perma.cc/KEX3-Z3H8>].

<sup>12</sup> See Bauer-Wolf, *supra* note 6; Nell Gluckman, *Middlebury Punishes 67 Students for Charles Murray Protest*, CHRONICLE OF HIGHER EDUCATION (May 23, 2017), <https://www.chronicle.com/blogs/ticker/middlebury-punishes-67-students-for-charles-murray-protest/118607> [<https://perma.cc/SVJ6-VR95>].

<sup>13</sup> Maggie Haberman & Michael D. Shear, *Trump Signs Executive Order Protecting Free Speech on College Campuses*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/us/politics/trump-free-speech-executive-order.html> [<https://perma.cc/72XZ-5N VF>].

<sup>14</sup> See *Campus Free Speech Act*, GOLDWATER INST. (2017), <https://drive.google.com/file/d/1wUs1BV7EVS4rbG-3UBFxsM5ZSIRIFa36/view> [<https://perma.cc/ZZ3J-32JF>].

<sup>15</sup> See Stanley Kurtz et al., *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST. 3 (2017), [https://drive.google.com/file/d/1BKyHPKHS\\_xVg3hGxqjHNlpRVQqoV6Xyq/view](https://drive.google.com/file/d/1BKyHPKHS_xVg3hGxqjHNlpRVQqoV6Xyq/view) [<https://perma.cc/4UTW-NVMJ>].

<sup>16</sup> *Id.* at 3, 6, 10, 12.

expression at public institutions of higher education. Measures like this have been passed by state legislatures and signed into law in Arizona, Arkansas, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, North Carolina, South Dakota, Tennessee, Utah, and Virginia.<sup>17</sup> In other states, public universities have created campus rules based on the model legislation. For instance, in Wisconsin, the university system's Board of Regents established a free speech policy after a version of the model legislation was introduced in the state legislature,<sup>18</sup> and the University of North Carolina Board of Governors adopted a free speech policy after the state legislature passed a campus free speech act.<sup>19</sup>

Does the Campus Free Speech Act work to promote the freedom of expression at public universities? Put another way, would the adoption of the Act by a state government infringe on free speech rights in addition to protecting them? More to the point, if a state—either through its legislature or by university policy—were to enact the model legislation, would it pass muster under the First Amendment's Free Speech Clause?

This article will explore relevant U.S. Supreme Court precedents on the freedom of expression and then apply them to the model legislation to ascertain if it would violate the First Amendment. The article concludes that, if enacted by a state government, the Campus Free Speech Act would be constitutional and promote the freedom of expression in many respects,

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<sup>17</sup> See Lauren Camera, *Campus Free Speech Laws Ignite the Country*, U.S. NEWS & WORLD REP. (July 31, 2017, 5:40 PM), <https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country>; Tom Lindsay, *Educating the Educators: States Take The Lead On Restoring Free Speech On Campus*, FORBES (June 29, 2018, 11:50 AM), <https://www.forbes.com/sites/tomlindsay/2018/06/29/educating-the-educators-states-take-the-lead-on-restoring-free-speech-on-campus/#565290c81241> [<https://perma.cc/5KUP-T5VY>]; Neal H. Hutchens, *Campus Free Speech Laws Being Enacted in Many States, But Some May Do More Harm than Good*, THE COURIER (April 10, 2019), <https://codcourier.org/11294/opinion/campus-free-speech-laws-being-enacted-in-many-states-but-some-may-do-more-harm-than-good/> [<https://perma.cc/HKY3-CC7B>]; Stephen Gruber-Miller & Aimee Breaux, *Kim Reynolds Signs Bill Requiring Iowa Universities to Respect "Free Speech" on Campus*, DES MOINES REGISTER (Mar. 27, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/03/27/free-speech-on-campus-governor-kim-reynolds-bill-university-iowa-business-leaders-christ-ui-isu-uni/3288307002/> [<https://perma.cc/7GBM-GHQH>].

<sup>18</sup> Karen Herzog, *Regents Approve Punishments up to Expulsion for UW Students Who Repeatedly Disrupt Speakers*, MILWAUKEE J. SENTINEL (Oct. 6, 2017, 4:09 PM), <https://www.jsonline.com/story/news/education/2017/10/06/regents-consider-punishments-uw-students-who-disrupt-speakers/738438001/> [<https://perma.cc/28LU-K5E6>].

<sup>19</sup> *Update on N.C. Free Speech Act, Policies and Campus Resources*, U. OF N.C. AT CHAPEL HILL U. GAZETTE (Apr. 26, 2018, 1:04 PM), <https://gazette.unc.edu/2018/04/26/update-on-n-c-free-speech-act-policies-and-campus-resources/> [<https://perma.cc/FGP8-73Z> A].

but some portions of it are constitutionally suspect and should be modified or eliminated to ensure compliance with the U.S. Constitution. The article then concludes with proposed alternatives to these portions of the Campus Free Speech Act to better ensure protection of First Amendment rights.

## II. FIRST PRINCIPLES

The First Amendment to the U.S. Constitution commands that “Congress shall make no law . . . abridging the freedom of speech.”<sup>20</sup> As originally interpreted by the U.S. Supreme Court, the entirety of the Bill of Rights—including the First Amendment’s Free Speech Clause—applied to the federal government only, not to the states.<sup>21</sup> However, this provision was eventually incorporated by the Fourteenth Amendment’s Due Process Clause, which requires that no state shall “deprive any person of life, liberty, or property, without due process of law . . . .”<sup>22</sup> Indeed, in *Gitlow v. New York*, the Court proclaimed that “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”<sup>23</sup> Thus, whatever the First Amendment’s freedom of speech protects against the federal government, it also protects that right against infringement from the states.<sup>24</sup> The Supreme Court has likewise long held that the First Amendment protects more than pure speech, extending that protection to the broader notion of the freedom of expression.<sup>25</sup>

For nearly a century, the Supreme Court has also ruled that the freedom of expression applies in various ways to public educational institutions. The development of this right was implicit at first and explicit later. In *Meyer v. Nebraska*, before the Court incorporated the Free Speech Clause, the justices held that the Due Process Clause of the Fourteenth Amendment protects an instructor’s right to teach a foreign language and the right of parents to secure a teacher to educate their children.<sup>26</sup> Furthermore, in *West Virginia State Board of Education v. Barnette*, the Court found that the First Amendment protects a right not to speak for children in a public school who refused to salute the U.S. flag and recite

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<sup>20</sup> U.S. CONST. amend. I.

<sup>21</sup> See *Barron ex rel. Tiernan v. Mayor of Balt.*, 32 U.S. 243, 250 (1833).

<sup>22</sup> U.S. CONST. amend. XIV, § 1.

<sup>23</sup> 268 U.S. 652, 666 (1925).

<sup>24</sup> See *id.*

<sup>25</sup> See *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>26</sup> 262 U.S. 390, 400 (1923).

the Pledge of Allegiance.<sup>27</sup> The Court's key case on First Amendment rights in educational institutions, however, was *Tinker v. Des Moines Independent Community School District*, where the justices famously held that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>28</sup> In *Tinker*, the Court found unconstitutional a suspension imposed against two public school students for wearing black armbands to protest the Vietnam War.<sup>29</sup>

Although *Tinker* was specifically a case about First Amendment rights in public K-12 schools, one could easily infer that the same or greater rights would apply to students at public universities. Indeed, *Tinker* dealt with students in a setting where they are typically under the age of majority and are compelled to attend.<sup>30</sup> Students attending public universities, on the other hand, are almost always eighteen years-of-age or older,<sup>31</sup> and these adults are not required to be in class by state law. In the rare case that a minor is taking college classes on campus, that student has chosen to enter an adult institution with a different mission than K-12 public schools.<sup>32</sup> Thus, one would expect that university students' rights would be protected to a greater degree. However, when *Tinker* was decided in 1968, no Supreme Court case was on point regarding the free speech rights of public university students.

By the time of the *Tinker* decision there had been, however, several rulings proclaiming that First Amendment rights attached to public university instructors. For instance, in *Sweezy v. New Hampshire*, the Court confirmed that a "right to lecture and [a] right to associate with others were constitutionally protected freedoms" possessed by a college professor.<sup>33</sup> Likewise, in *Keyishian v. Board of Regents*, the Court found unconstitutional a requirement that public university faculty members sign

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<sup>27</sup> 319 U.S. 624, 642 (1943).

<sup>28</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1968).

<sup>29</sup> *Id.* at 514.

<sup>30</sup> See *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT. (2017), [https://nces.ed.gov/programs/statereform/tab5\\_1.asp](https://nces.ed.gov/programs/statereform/tab5_1.asp) [<https://perma.cc/EG87-EES6>]. The students in *Tinker* were fifteen, sixteen, and thirteen years old. See *Tinker*, 393 U.S. at 504.

<sup>31</sup> See *Total Fall Enrollment in Degree-Granting Postsecondary Institutions, By Attendance Status, Sex, and Age: Selected Years, 1970 Through 2026*, NAT'L CTR. FOR EDUC. STAT. (2017), [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_303.40.asp?current=t](https://nces.ed.gov/programs/digest/d16/tables/dt16_303.40.asp?current=t) [<https://perma.cc/6WKB-58HJ>].

<sup>32</sup> See *Benefield v. Bd. of Trs. of the Univ. of Ala.*, 214 F. Supp.2d 1212, 1223 (N.D. Ala. 2002).

<sup>33</sup> 354 U.S. 234, 249–50 (1957).

certificates avowing they are not Communists; if they had previously been Communists, that fact was communicated to the university president.<sup>34</sup> Failure to sign the certificate would have resulted in dismissal.<sup>35</sup> The *Keyishian* decision became a bold defense of academic freedom, stating the following:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”<sup>36</sup>

According to the Court, with the law, “the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest . . . .”<sup>37</sup> Thus, by the late 1960s, the Court had held that First Amendment free speech and association rights applied to public school teachers and public-school students, as well as to public university instructors.<sup>38</sup> Would it rule the same way for public university students?

*Healy v. James* is the Court’s foundational case for the First Amendment rights of public university students.<sup>39</sup> It involved the President of Central Connecticut State College denying official recognition to a group of students who wished to form a campus chapter of Students for a Democratic Society.<sup>40</sup> In declaring that this action was unconstitutional, the Court proclaimed that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>41</sup> Granted, the Court recognized that it approached the case “with special

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<sup>34</sup> See 385 U.S. 589, 591–92 (1967).

<sup>35</sup> *Id.* at 592.

<sup>36</sup> *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

<sup>37</sup> *Id.* at 607.

<sup>38</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). See also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1968); *Sweezy*, 354 U.S. at 249–50; *Keyishian*, 385 U.S. at 591–92.

<sup>39</sup> See generally 408 U.S. 169 (1972).

<sup>40</sup> *Id.* at 170, 174.

<sup>41</sup> *Id.* at 180.

caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process,” and that it was “mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order.”<sup>42</sup> Nevertheless, the justices found that “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”<sup>43</sup> Thus, the Court forthrightly required the rights of public university students to be protected to the same degree as for other Americans generally.<sup>44</sup>

If there was any doubt of the Court’s intent in *Healy*, it was snuffed out the following year in *Papish v. Board of Curators of the University of Missouri*.<sup>45</sup> In *Papish*, a graduate student in the University of Missouri School of Journalism was expelled for distributing on campus a newspaper (the *Free Press Underground*) containing what was deemed by the Dean of Students to contain “indecent speech.”<sup>46</sup> The basis of the university finding the publication to be indecent was two-fold. First, on the front cover was a political cartoon portraying police officers raping the State of Liberty and the Goddess of Justice; the caption underneath the picture read, “...With Liberty and Justice for All.”<sup>47</sup> Second, the issue included an article titled “Motherfucker Acquitted,” which discussed the assault trial and acquittal of a New York City youth who was a member of an organization called “Up Against the Wall, Motherfucker.”<sup>48</sup> Like in *Healy*, the Court affirmed “a state university’s undoubted prerogative to enforce reasonable rules governing student conduct.”<sup>49</sup> Still, like *Healy*, the Court found the university’s action to be unconstitutional in *Papish*.<sup>50</sup> According to the Court, “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”<sup>51</sup> The Court then concluded by enforcing the idea that the freedom of speech is protected on public college

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<sup>42</sup> *Id.* at 171.

<sup>43</sup> *Id.* at 180.

<sup>44</sup> *See id.*

<sup>45</sup> *See generally* 410 U.S. 667 (1973).

<sup>46</sup> *Id.* at 667.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 667–68.

<sup>49</sup> *Id.* at 669–70.

<sup>50</sup> *Id.* at 671.

<sup>51</sup> *Id.* at 670.

and university campuses to the same degree as elsewhere in public: “[T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech.”<sup>52</sup> Thus, the same principles that govern First Amendment rights generally for adults also apply to public universities.<sup>53</sup> It should come as no surprise that the Court held in *Healy* and *Papish* that university students have the same constitutional rights as other adults, as these decisions came on the heels of the Twenty-Sixth Amendment, which set the voting age at eighteen in 1971, and ushered in a new understanding of the age of majority.<sup>54</sup>

### III. THE GOLDWATER INSTITUTE’S CAMPUS FREE SPEECH ACT

With the above principles in mind regarding the applicability of the Free Speech Clause to public universities, the constitutionality of the Goldwater Institute’s Campus Free Speech Act, were it adopted by a state, can be examined. The Act was drafted as a proposed set of policies related to the freedom of expression on colleges and universities as well as a model directive for state legislatures to use and require public institutions of higher education to follow certain requirements regarding the freedom of expression.<sup>55</sup> The Act’s basic structure is divided into a series of “whereas” statements justifying the Act, followed by five substantive sections.<sup>56</sup> Section 1 is the longest in the document, containing requirements that a state university’s governing board develop official policy statements protecting intellectual freedom, establish time/place/manner restrictions on student expression (with limits on the power of a university to enact such restrictions), impose disciplinary sanctions for disrupting university functions or interfering with other persons’ free speech rights, and require that universities remain neutral on public policy controversies.<sup>57</sup> Section 2 requires the creation of a Committee on Free Expression with a responsibility of issuing an annual report on the state of freedom of expression on campus.<sup>58</sup> Section 3 mandates orientation programs for incoming students to explain for

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<sup>52</sup> *Id.* at 671.

<sup>53</sup> *See id.*

<sup>54</sup> *See* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students’ First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 30–31 (2008).

<sup>55</sup> *See* Kurtz, *supra* note 15, at 3.

<sup>56</sup> *See generally* *Campus Free Speech Act*, *supra* note 14.

<sup>57</sup> *See* Kurtz, *supra* note 15, at 6, 10.

<sup>58</sup> *See id.* at 11.

students the requirements of the new free speech regulations.<sup>59</sup> Section 4 permits universities to adopt policies in furtherance of the Act and informs that institutions of higher education are permitted to regulate student speech and expressive activities that are not protected by the First Amendment.<sup>60</sup> Finally, Section 5 reiterates the limited instances whereby campuses may restrict expression in public areas before creating a right of civil action for persons whose rights have been violated by the section.<sup>61</sup> The subsections of this article below will assume that a state has adopted the Campus Free Speech Act as it stands and then assess the constitutionality of its relevant provisions.

*A. Statements Promoting the Freedom of Expression*

Sections 1(A) and 1(B) require a public institution of higher education to promulgate statements about the roles and functions of universities.<sup>62</sup> To the extent that these are merely statements and not rules with sanctions for violation, they do not raise any First Amendment questions, assuming the government is not compelling individual persons to affirm any content-based ideological messages.<sup>63</sup> In fact, the statements work to promote the principles of the Free Speech Clause in various respects.

Section 1(A) mandates that public higher educational institutions acknowledge that “the primary function of an institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate,” and that “to fulfill this function, the institution must strive to ensure the fullest degree of intellectual freedom and free expression.”<sup>64</sup> Section 1(A) promotes the freedom of expression generally, including the First Amendment value of seeking truth. As described by the Court in *Bose Corporation v. Consumers Union*, the “First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”<sup>65</sup> Furthermore, this section endorses the idea that a university campus fulfills this mission by serving as a marketplace of ideas, similar to the Court’s description of the

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<sup>59</sup> See *id.* at 12.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> *Campus Free Speech Act*, *supra* note 14, § 1(A) & (B).

<sup>63</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>64</sup> *Campus Free Speech Act*, *supra* note 14, § 1(A).

<sup>65</sup> 466 U.S. 485, 503–04 (1984).

university in *Keyishian* and *Healy*.<sup>66</sup> In this way, Section 1(A) promotes an important constitutional goal.

Similarly, Section 1(B) would have state legislatures require public higher educational institutions to promulgate a statement to the effect that “it is not the proper role of the institution to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”<sup>67</sup> As will be explored more fully below, offensive speech unquestionably receives First Amendment protection, something the Court has long held.<sup>68</sup> As the Court articulated in *Street v. New York*, “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”<sup>69</sup> This is a principle the Court has repeatedly acknowledged, most recently in 2017.<sup>70</sup> To the extent that Section 1(B) would serve as a reminder of this principle, it encourages public institutions that are subject to the First Amendment according to *Healy* and *Papish* to observe what the First Amendment requires.<sup>71</sup>

#### *B. Prohibiting Content and Viewpoint Discrimination*

Although the first two subsections of the Campus Free Speech Act are merely statements, Section 1(C) requires the development of a policy that ensures content and viewpoint neutrality on public university campuses.<sup>72</sup> The relevant language is as follows:

Students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and within the limits of reasonable viewpoint- and content-neutral restrictions on time, place, and manner of expression that are consistent with this act and that are necessary to achieve a compelling institutional interest;

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<sup>66</sup> See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>67</sup> *Campus Free Speech Act*, *supra* note 14, § 1(B).

<sup>68</sup> See *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

<sup>69</sup> 394 U.S. 576, 592 (1969).

<sup>70</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

<sup>71</sup> See *Healy v. James*, 408 U.S. 169, 187 (1972); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 669–70 (1973).

<sup>72</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(C).

provided that these restrictions are clear, published, and provide ample alternative means of expression. . . .<sup>73</sup>

There is much to unpack in this section. Clearly, the portion stating that students and faculty have the right to discuss what the First Amendment permits is, by definition, constitutional. Beyond this, the model policy permits reasonable restrictions on speech that are viewpoint and content neutral, and that serve a compelling interest. Such restrictions are typically going to be found constitutional. As the U.S. Supreme Court explained in *R.A.V. v. St. Paul*, the “First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”<sup>74</sup> However, the Court also went on to state that “[e]ven the prohibition against content discrimination that we assert the First Amendment requires is not absolute.”<sup>75</sup> For instance, “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable,” such as when the government bans obscene materials because it is patently offensive, “no significant danger of idea or viewpoint discrimination exists.”<sup>76</sup> Nevertheless, if the restrictions are aimed at protected speech, then “the danger of censorship presented by a facially content-based statute . . . requires that that weapon be employed only where it is necessary to serve the asserted [compelling] interest.”<sup>77</sup> As a general matter, the government cannot let people speak about some subjects but not others in a public forum,<sup>78</sup> subject to a compelling interest analysis that will be explored more fully below. In this way, the freedom of expression requirements that would be imposed by Section 1(C) would be constitutional.

More specifically, it appears that Section 1(C) is aimed at protecting offensive and hate speech on public institutions of higher education. As noted in *R.A.V.*, the government cannot punish a person for taking the “wrong” side of an issue on a matter of public policy.<sup>79</sup> Any restrictions in

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<sup>73</sup> *Id.*

<sup>74</sup> 505 U.S. 377, 382 (1992) (internal citations omitted).

<sup>75</sup> *Id.* at 387.

<sup>76</sup> *Id.* at 388.

<sup>77</sup> *Id.* at 395 (internal citations and quotations omitted).

<sup>78</sup> See Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 625 (1991) (discussing that generally, the government cannot prohibit some topics of speech but allow other topics of speech in a public setting).

<sup>79</sup> See *R.A.V.*, 505 U.S. at 391–92.

this regard must pass strict scrutiny,<sup>80</sup> something the policy alludes to both in Section 1(C) and in Section 5(A). Offensive speech and hate speech are no different from other expression in this regard.<sup>81</sup> The Court has long held that such expression is constitutionally protected. Concerning the use of offensive language, the Court proclaimed in *Cohen v. California* that “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us,” and that “one man’s vulgarity is another’s lyric.”<sup>82</sup> Put another way, the government cannot determine that there is a standard of language that can be used in public. This position was perhaps most eloquently expressed by the Court in *Texas v. Johnson*, where it proclaimed, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>83</sup> More recently, in *Snyder v. Phelps*, the Court reaffirmed that speech “at a public place on a matter of public concern . . . is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.”<sup>84</sup> These three cases represent instances where the Court found protection under the First Amendment for wearing a jacket with the word “fuck” written on it while walking the corridors of a courthouse,<sup>85</sup> burning the American flag as the culmination of a political march,<sup>86</sup> and expressing anti-gay slurs while protesting a military funeral.<sup>87</sup> The Court has even gone so far as to hold in *Matal v. Tam* that “[g]iving offense is a viewpoint,” and that government policy may not discriminate on the basis of such a viewpoint without surviving constitutional scrutiny.<sup>88</sup> Given *Healy* and *Papish*’s prescriptions that the First Amendment applies with equal force to public universities, the model policy’s emphasis on protecting such speech on university campuses coincides with Court rulings regarding offensive and hate speech.

It is worth noting, however, that the policy would allow for *certain* types of content discrimination in narrow circumstances, as some forms of content discrimination are necessary in limited contexts. The design of the

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<sup>80</sup> *Id.* at 395.

<sup>81</sup> *See id.* at 386.

<sup>82</sup> 403 U.S. 15, 25 (1971).

<sup>83</sup> 491 U.S. 397, 414 (1989).

<sup>84</sup> 562 U.S. 443, 458 (2011).

<sup>85</sup> *Cohen*, 403 U.S. at 16.

<sup>86</sup> *Johnson*, 491 U.S. at 406.

<sup>87</sup> *Snyder*, 562 U.S. at 454.

<sup>88</sup> 137 S. Ct. 1744, 1763 (2017).

curriculum, the grading of student work, and the evaluation of faculty teaching and scholarship must—by definition—be assessed according to content-based criteria.<sup>89</sup> The Campus Free Speech Act recognizes this need, stipulating that such content-based restrictions are permitted when “necessary to achieve a compelling institutional interest; provided that these restrictions are clear, published, and provide ample alternative means of expression.”<sup>90</sup> As long as these assessments are based on professional standards and applied to evaluate academic achievements, they are constitutional.<sup>91</sup> For instance, if a student turned in a paper that was off topic from what the assignment required, that paper could be evaluated negatively without infringing on the student’s freedom of expression. Likewise, a faculty member who authored a paper that failed to adhere to the scientific method could have the paper assessed negatively by the department during the professor’s tenure review. These types of content-based restrictions at public universities are permissible because institutionally, “academic freedom . . . ‘long has been viewed as a special concern of the First Amendment.’”<sup>92</sup> In another context, seeking a racially diverse student body in furtherance of promoting a “robust exchange of ideas” has been found by the Court to be a compelling interest in furtherance of the academic freedom of a public university.<sup>93</sup> As long as students and faculty are provided with notice of content-based restrictions on their work and are still free to engage in protected expression in other settings, the model legislation permits it, and it thus complies with the First Amendment. Nevertheless, outside of these narrow contexts, it is clear that content-neutral restrictions on speech are generally required to meet constitutional mandates.<sup>94</sup>

The model policy goes on in several other places to require specific actions that are neutral with respect to content and/or viewpoint. For instance, Section 1(F) would require that campuses “are open to any speaker whom students, student groups, or members of the faculty have invited.”<sup>95</sup> As long as this restriction is subject to the required compelling interest analysis above (*e.g.*: allowing a university to close its doors to

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<sup>89</sup> See ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 132 (2017).

<sup>90</sup> *Campus Free Speech Act*, *supra* note 14, § 1(C).

<sup>91</sup> See ERWIN CHERMERINSKY & HOWARD GILLMAN, *supra* note 89, at 132–35.

<sup>92</sup> *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents v. Bakke*, 438 U.S. 265, 312 (1978)).

<sup>93</sup> See *id.* at 324–25.

<sup>94</sup> See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>95</sup> *Campus Free Speech Act*, *supra* note 14, § 1(F).

someone engaging in expression not constitutionally protected), then a prohibition on content-based disinvitations by a university is constitutional.<sup>96</sup> Indeed, to the extent that this mandate would further viewpoint and content neutrality by the university, it promotes First Amendment principles.<sup>97</sup>

Similarly, Section 1(G) requires that a public university “shall make all reasonable efforts and make available all reasonable resources to ensure the safety of invited speakers. An institution shall not charge security fees based on the content of the inviter’s speech or the content of the speech of invited speakers.”<sup>98</sup> Again, this is a clear promotion of content neutrality, a general requirement of the Free Speech Clause. As long as the speech is constitutionally protected, it would violate the First Amendment to charge higher speaker security fees based on content,<sup>99</sup> as this could deter speakers with certain views from appearing on campus. Instead, public universities must establish neutral and objective criteria for security fees,<sup>100</sup> something the model legislation accomplishes.

Section 1(L) of the Campus Free Speech Act deals with neutrality in the treatment of student organizations.<sup>101</sup> It states in relevant part that a public university may not “deny a student organization any benefit or privilege available to any other student organization, or otherwise discriminate against a student organization, based on the content of the organization’s expression . . . .”<sup>102</sup> Like other requirements in the model legislation cited above, this requirement promotes neutrality with regard to policies that regulate student speech. Neutral treatment of university student organizations—based on their ideological messages—has been a concern of the Court since *Healy*.<sup>103</sup> The Court has held in later cases that if a university sets up a system of recognizing and funding of registered

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<sup>96</sup> See Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL OF RTS. J. 765, 771 (2009).

<sup>97</sup> See *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (Although there is some question as to the policy implications of requiring that public universities be open to any speaker invited by anyone who qualifies as a student (as opposed to speakers invited by officially recognized student groups or employees like faculty), such a requirement does not appear to violate the First Amendment).

<sup>98</sup> *Campus Free Speech Act*, *supra* note 14, § 1(G).

<sup>99</sup> See, e.g., *Forsyth City v. The Nationalist Movement*, 505 U.S. 123 (1992).

<sup>100</sup> See Erica Goldberg, *Must Universities “Subsidize” Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 396 (2011).

<sup>101</sup> *Campus Free Speech Act*, *supra* note 14, § 1(L).

<sup>102</sup> *Id.*

<sup>103</sup> See *Healy v. James*, 408 U.S. 169, 170–76 (1972).

student organizations, it must be viewpoint neutral.<sup>104</sup> According to the Court in *Rosenberger v. University of Virginia*, a public university is forbidden from “exercise[ing] viewpoint discrimination, even when the limited public forum is one of its own creation.”<sup>105</sup> However, the content of student expression *may* be something that is permissible to restrict. According to *Rosenberger*, “[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”<sup>106</sup> The justices further stated that “we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”<sup>107</sup> Nevertheless, the Court made clear in *Rosenberger* that “[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum . . . .’”<sup>108</sup> In this way, Section 1(L) goes beyond what the First Amendment requires: according to the Court, universities are forbidden in this context to discriminate on the basis of viewpoint, but they may discriminate on the basis of content if excluding subjects from a limited public forum is reasonable with regard to the objectives of the forum.<sup>109</sup> Thus, the ban on content discrimination here restricts universities more than what the First Amendment requires according to *Rosenberger* (although that decision has been criticized for allowing universities to define the content of the forum in a discriminatory way).<sup>110</sup> Thus, it would be constitutionally permissible to change the wording above to bar viewpoint discrimination, or to more tightly word the restrictions on content discrimination to mirror the language in *Rosenberger*, that such content discrimination is only

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<sup>104</sup> See *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 834 (1995).

<sup>105</sup> *Id.* at 829.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 829–30.

<sup>108</sup> *Id.* at 829 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

<sup>109</sup> See Alan Trammell, *The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle that Never Was*, 92 VA. L. REV. 1957, 2013 (2006).

<sup>110</sup> See Robert L. Waring, *Wide Awake or Half-Asleep? Revelations from Jurisprudential Tailings Found in Rosenberger v. University of Virginia*, 17 N. ILL. U. L. REV. 223, 242 (1997).

permissible if “reasonable in light of the purpose served by the forum.”<sup>111</sup> Nevertheless, protecting rights to a greater degree than the First Amendment requires is a policy decision permitted by the Constitution, and states may impose it if they wish.<sup>112</sup>

Finally, Section 1(K) of the Campus Free Speech Act requires that while “[i]ndividual students, faculty, and staff of the university shall be free to take positions on the public controversies of the day,” the university “should attempt to remain neutral, as an institution, on the public policy controversies of the day, except insofar as administrative decisions on such issues are essential to the day-to-day functioning of the university.”<sup>113</sup> This section goes on to state that the “institution may not take action, as an institution, on the public policy controversies of the day in such a way as to require students, faculty, or staff to publicly express a given view of a public controversy.”<sup>114</sup> This is another instance of the policy requiring institutional neutrality on viewpoints. Clearly, a university may not compel students or employee speech on political or social issues: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>115</sup> However, this section goes beyond that constitutional mandate. Unlike the other sections of the model legislation that deal with content and viewpoint neutrality, this one is problematic in that it restricts what a public university may do in a way that does not directly touch upon the free speech rights of students, faculty, staff, and others.<sup>116</sup> The word “controversies” is not defined in the policy, but a standard definition of the word “controversy” is something that is “disputable” or a “discussion that is marked esp[ecially] by the expression of opposing views,”<sup>117</sup> which would seem to include almost *any* public policy issue. By restricting the positions that a public university may take on issues of public policy, it limits the ability of a university to advocate for itself with regard to legislation that could touch upon various issues, including legislation that might tangentially impact admissions and curricular offerings, as it is not entirely clear what is included in “the day-

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<sup>111</sup> See *Cornelius*, 473 U.S. at 806.

<sup>112</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

<sup>113</sup> *Campus Free Speech Act*, *supra* note 14, § 1(K).

<sup>114</sup> *Id.*

<sup>115</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>116</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(K).

<sup>117</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 272 (11th ed. 2009).

to-day functioning of the university.”<sup>118</sup> Such a limit could restrict a public university’s academic freedom.<sup>119</sup> Although the prohibition on compelled speech is certainly constitutional and is welcome, the restriction on universities’ institutional expression and policy preferences goes a step too far. Thus, that provision should be removed. As an alternative, the Wisconsin Board of Regents requires that a university “shall not take action, as an institution, in such a way as to require students or employees to express a particular view on a public policy issue,” and that policy does *not* go on to limit a university from taking controversial positions.<sup>120</sup> That approach prevents compelled speech while not threatening universities’ academic freedom.

*C. Strict Scrutiny and Expression that May Be Prohibited*

As noted above, content and viewpoint neutral restrictions on speech are permitted under the model legislation if they meet certain other requirements. The first of these is that such restrictions are necessary “time, place, and manner” restrictions that also allow for “ample alternative means of expression.”<sup>121</sup> This certainly complies with current Supreme Court rules for dealing with speech in public forums. As elucidated in *McCullen v. Coakley*:

We have . . . afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”<sup>122</sup>

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<sup>118</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(K).

<sup>119</sup> See, e.g., *Regents v. Bakke*, 438 U.S. 265, 312 (1978).

<sup>120</sup> See University of Wisconsin Regent Policy Document 4-21, Commitment to Academic Freedom and Freedom of Expression, UNIV. OF WIS. SYS. (Oct. 6, 2017), available at <https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/> [<https://perma.cc/KTT4-4W9L>].

<sup>121</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(C).

<sup>122</sup> 134 S. Ct. 2518, 2529 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

Thus, if restrictions are content and viewpoint neutral, the government may be able to engage in time, place, and manner restrictions of speech, such as limiting the number of participants in a forum, placing limits on the volume of speech in some contexts, and restricting certain types of expression to particular times of day.<sup>123</sup> *McCullen* and *Ward* demand that such neutral restrictions also allow for a variety of other means of communicating messages; to the extent that Section 1(C) has language that is similar, it meets the requirements of those cases. Although Section 1(C) does not make mention of the “narrowly tailored” requirement, that issue is addressed in Section 5(A).<sup>124</sup> In addition, Section 1(C) states that these time, place, and manner restrictions must be “necessary to achieve a compelling institutional interest,”<sup>125</sup> which is a higher standard than the “significant government interest” requirement in *McCullen* and *Ward*.<sup>126</sup> In this way, the section surpasses what the First Amendment demands.

Section 5(A) of the Campus Free Speech Act would mandate that a “state institution of higher education may restrict expressive conduct in the public areas of campus only if it demonstrates that the restriction” meets all of the following criteria:

- (1) Is necessary to achieve a compelling governmental interest;
- (2) Is the least restrictive means of furthering that compelling governmental interest;
- (3) Leaves open ample other opportunities to engage in the expressive conduct; and
- (4) Provides for spontaneous assembly and distribution of literature.<sup>127</sup>

This section refers to the strict scrutiny test for the freedom of expression. It is the highest, most difficult test for government to pass when burdening the exercise of constitutional rights.<sup>128</sup> According to the Court in numerous decisions, including in *McCutcheon v. FEC*, “the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated

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<sup>123</sup> See Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 434 (1999).

<sup>124</sup> See *Campus Free Speech Act*, *supra* note 14, § 5(A).

<sup>125</sup> *Id.* § 1(C).

<sup>126</sup> See *McCullen*, 134 S. Ct. at 2529; *Ward*, 491 U.S. at 791.

<sup>127</sup> *Campus Free Speech Act*, *supra* note 14, § 5(A).

<sup>128</sup> See Kristapor Vartanian, *Equal Protection*, 10 GEO. J. GENDER & L. 227, 230 (2009).

interest.”<sup>129</sup> Section 5(A) mandates not only the use of strict scrutiny, but also the requirements explained above from *Ward* in that it provides ample opportunities for alternative expression.<sup>130</sup> The standard here also meets the requirements for traditional public forums under *Perry Education Association v. Perry Local Educators’ Association*,<sup>131</sup> which will be explored in more detail below. Thus, this portion of the model legislation bears some similarities to relevant Supreme Court decisions, but it raises one concern given the context. Although it is laudable that the policy seeks to protect expressive activity that is *spontaneous*, its wording raises some question as to the protection of expressive activity that is also *planned*. The Court has specifically referred to the protection of speech that is spontaneous<sup>132</sup> as well as planned.<sup>133</sup> Inserting into this provision that any restriction is required to provide for “both planned and spontaneous assembly and distribution of literature” would alleviate any constitutional doubts on this point.<sup>134</sup>

Section 4 provides examples of expression that are not protected by the First Amendment, and hence that public universities may restrict without conflicting with the policy.<sup>135</sup> In a sense, this section is a reminder that there is expression that falls outside the scope of the First Amendment or that can be restricted by meeting certain constitutional requirements. The first example of unprotected speech in Section 4 includes §4(A), which prohibits “[v]iolations of state or federal law.”<sup>136</sup> Unlike the examples in the subsections that follow, this is an example of a restriction that could be revised.<sup>137</sup> The prohibition here appears to be aimed at non-expressive conduct, such as property damage<sup>138</sup> or physical assault,<sup>139</sup> and in that sense, it would be constitutional as applied. However, as much as individual laws when reviewed by courts are typically presumed to be constitutional,<sup>140</sup> clearly, not all state and federal laws *are* constitutional.<sup>141</sup> The model policy focuses specifically on protecting a constitutional right,

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<sup>129</sup> 134 S. Ct. 1434, 1444 (2014).

<sup>130</sup> See *Ward*, 491 U.S. at 791.

<sup>131</sup> See 460 U.S. 37, 45 (1983).

<sup>132</sup> See *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 167 (2002).

<sup>133</sup> See generally *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).

<sup>134</sup> See *id.*

<sup>135</sup> See generally *Campus Free Speech Act*, *supra* note 14, § 4.

<sup>136</sup> *Id.* § 4(A).

<sup>137</sup> See *id.*

<sup>138</sup> See, e.g., *United States v. O’Brien*, 391 U.S. 367, 375 (1968).

<sup>139</sup> See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

<sup>140</sup> See F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1448 (2010).

<sup>141</sup> See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

and it is proposed because of claims that this right is at risk because of unconstitutional action (or inaction) by public universities.<sup>142</sup> Thus, a better approach would be to emphasize the need to adhere to the Constitution by modifying the subsection to permit universities to restrict forms of expression that are “violations of constitutional state or federal laws.” In this way, Section 4(A) could be revised, so that it has a qualifier similar to the subsections that follow.

This minor wording concern aside, other examples of speech that may be restricted in Section 4 clearly meet First Amendment standards set by the Supreme Court. Section 4(B) permits proscription of “[e]xpression that a court has deemed unprotected defamation.”<sup>143</sup> As the Court noted in *Gertz v. Robert Welch, Inc.*,

[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.<sup>144</sup>

In this way, Section 4(B) dovetails with earlier sections that protect offensive speech that expresses opinions, in that there are no false opinions under the First Amendment.<sup>145</sup> The Free Speech Clause, however, does not protect a speaker who makes false statements of fact about someone else because there is little to no constitutional value in protecting such expression.<sup>146</sup> The standard to be applied to defamation depends on the target of the falsehood. The First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>147</sup> The same standard applies to public figures.<sup>148</sup> However, the actual malice standard does not apply to private persons, meaning that states “retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”<sup>149</sup> To the extent that a public university

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<sup>142</sup> See Kurtz, *supra* note 15.

<sup>143</sup> *Campus Free Speech Act*, *supra* note 14, § 4(B).

<sup>144</sup> 418 U.S. 323, 339–40 (1974).

<sup>145</sup> See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19–20 (1990).

<sup>146</sup> See David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 76–77 (2012).

<sup>147</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>148</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 (1974).

<sup>149</sup> *Id.* at 345–46.

restricts defamatory falsehoods under these court-imposed standards, they would be in compliance with First Amendment requirements. Thus, Section 4(B) properly takes into account restrictions mandated by the Free Speech Clause.

Section 4(C) proceeds to restrict student expression if it is one of two forms of harassment. One type of harassment that may be prohibited is peer-on-peer harassment, which is defined by the model legislation as “conduct directed by a student towards another individual student, on the basis of that student’s membership or perceived membership in a protected class, that is so severe, pervasive, and objectively offensive that it effectively deprives the victim of access to the educational opportunities or benefits provided by the university.”<sup>150</sup> This language is derived from *Davis v. Monroe County Board of Education*, which states that there is no legal immunity from lawsuit for “harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>151</sup> Harassing speech that meets the *Davis* standard is outside of the protection of the First Amendment.<sup>152</sup> The model legislation also allows for the restriction of *quid pro quo* sexual harassment.<sup>153</sup> The Supreme Court has never dealt directly with the constitutionality of such a ban. However, since *quid pro quo* sexual harassment is a type of conduct in which a sexual demand is made with either positive economic consequences for compliance, or negative economic consequences for non-compliance, it is non-expressive conduct that lacks First Amendment protection.<sup>154</sup> Even if such conduct did contain protected expression, the government would have a compelling interest in promoting sex equality,<sup>155</sup> thereby providing justification to ban such expression. In this way, both portions of Section 4(C) are constitutional restrictions on speech.

Section 4(D) would restrict “true threats,” defined by the act as “statements meant by the speaker to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or

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<sup>150</sup> *Campus Free Speech Act*, *supra* note 14, § 4(C).

<sup>151</sup> 526 U.S. 629, 651 (1999).

<sup>152</sup> See Brett A. Sokolow et al., *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RTS. 19, 20 (2011).

<sup>153</sup> See *Campus Free Speech Act*, *supra* note 14, § 4(C)(2).

<sup>154</sup> See Aileen V. Kent, *First Amendment Defense to Hostile Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?*, 23 HOFSTRA L. REV. 513, 515 (1994).

<sup>155</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

group of individuals.”<sup>156</sup> This language is identical to that used by the Court in *Virginia v. Black*, where it held that the First Amendment “permits a State to ban a ‘true threat,’” with the Court describing that “‘true threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>157</sup> In this way, Section 4(D) also comports with the First Amendment.

Section 4(E) permits public universities to prohibit expression that is an “unjustifiable invasion of privacy or confidentiality not involving a matter of public concern.”<sup>158</sup> The U.S. Supreme Court has held that “speech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection,’”<sup>159</sup> but also that “restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.”<sup>160</sup> The Court has also held that invasion of privacy may fall outside of First Amendment protection unless “the information involved already appears on the public record.”<sup>161</sup> Nor are breaches of confidentiality protected generally by the First Amendment.<sup>162</sup> Similarly, the Court has found that in the absence of any “interest . . . of public importance,” there may not be First Amendment protection in disclosing illegally intercepted private communications.<sup>163</sup> Putting all of this prior case law together leads to the conclusion that Section 4(E) is in conformity with the requirements of the Free Speech Clause.

All told, although section 4(A) could have some qualifying language added, sections 4(B) through 4(E) are clearly constitutional. The remaining subsections of Section 4 touch upon either expression that disrupts the functioning of the university (discussed below), or time, place, and manner restrictions (discussed above).<sup>164</sup>

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<sup>156</sup> *Campus Free Speech Act*, *supra* note 14, § 4(D).

<sup>157</sup> 538 U.S. 343, 359 (2003).

<sup>158</sup> *Campus Free Speech Act*, *supra* note 14, § 4(E).

<sup>159</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

<sup>160</sup> *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

<sup>161</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1974).

<sup>162</sup> *See Cohen v. Cowles Media*, 501 U.S. 663, 665 (1991).

<sup>163</sup> *See Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001).

<sup>164</sup> *See generally Campus Free Speech Act*, *supra* note 14, § 4.

*D. The Freedom of Speech in Traditional Public Forums and Non-Public Facilities*

Section 1(E) of the model legislation proclaims that the “public areas of campuses of the institution are traditional public forums, open on the same terms to any speaker.”<sup>165</sup> In *Perry Education Association* and other cases, the U.S. Supreme Court has held that there are three different types of forums under the Free Speech Clause: (1) traditional public forums, (2) designated public forums, and (3) non-public forums.<sup>166</sup>

First, traditional public forums are “places which by long tradition or by government fiat have been devoted to assembly and debate,” so “the rights of the State to limit expressive activity are sharply circumscribed.”<sup>167</sup> They include “streets and parks which ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”<sup>168</sup> The Court has also held that public sidewalks are traditional public forums.<sup>169</sup> Since “[t]raditional public forum property occupies a special position in terms of First Amendment protection,” it “will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression.”<sup>170</sup> In traditional public forums, viewpoint discrimination is forbidden,<sup>171</sup> and for “the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>172</sup> Furthermore, in a traditional public forum, the government may “enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>173</sup>

Second, a limited or designated public forum “consists of public property which the State has opened for use by the public as a place for

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<sup>165</sup> *Id.*

<sup>166</sup> *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–47 (1983).

<sup>167</sup> *Id.* at 45.

<sup>168</sup> *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

<sup>169</sup> *See United States v. Grace*, 461 U.S. 171, 179 (1983).

<sup>170</sup> *Id.* at 180.

<sup>171</sup> *See Goldberg*, *supra* note 100, at 389–90. *See also generally* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 505–21 (2000).

<sup>172</sup> *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>173</sup> *Id.*

expressive activity.”<sup>174</sup> Designated public forums include classrooms and auditoriums when opened for specific purposes and events.<sup>175</sup> Although the government can place restrictions on when a designated public forum is open, as long as the government opens such a forum, “it is bound by the same standards as apply in a traditional public forum.”<sup>176</sup> In a designated public forum, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>177</sup>

Third, non-public forums include “[p]ublic property which is not by tradition or designation a forum for public communication.”<sup>178</sup> Most publicly owned property is categorized as a non-public forum.<sup>179</sup> For instance, the Court has held that there is no right to protest on the grounds of a county jail or on a military base because such places are non-public forums.<sup>180</sup> According to the Court, the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”<sup>181</sup> In a non-public forum, “[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>182</sup> In other words, in a non-public forum, much more regulation (and even prohibition) of speech is permitted and the public may be excluded altogether: content discrimination is allowed, but viewpoint discrimination is still prohibited.<sup>183</sup>

Returning to the language of Section 1(E), it identifies “public areas” of campuses as traditional public forums.<sup>184</sup> As a general matter, that is

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<sup>174</sup> *Id.*

<sup>175</sup> Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 342 (2016).

<sup>176</sup> *Perry Educ. Ass’n*, 460 U.S. at 46.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Robert A. Sedler, *The “Law of the First Amendment” Revisited*, 58 WAYNE L. REV. 1003, 1065 (2013).

<sup>180</sup> See *Adderly v. Florida*, 385 U.S. 39, 46–47 (1966); *Greer v. Spock*, 424 U.S. 828, 838–39 (1976).

<sup>181</sup> *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981).

<sup>182</sup> *Perry Educ. Ass’n*, 460 U.S. at 46.

<sup>183</sup> See Sedler, *supra* note 179, at 1065 n.322; Terry Nicole Steinberg, *Rival Union Access to Public Employees: A New First Amendment Balancing Test*, 2 GEO. MASON IND. L. REV. 361, 364 (1994).

<sup>184</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(E).

correct constitutionally, assuming that this is not referring to places like indoor auditoriums and classrooms, which are typically categorized better as designated public forums or non-public forums.<sup>185</sup> Among other things, Section 1(E) is aimed at eliminating the development of so-called “free speech zones” on some campuses,<sup>186</sup> whereby only small areas of a campus mall (also known as a “quad”) are designated as the places where full free speech rights apply.<sup>187</sup> To the extent that this is what the model legislation is doing, it is a welcome development with the object of bringing such campuses into compliance with the First Amendment. Campus malls typically combine various elements and examples of what constitute traditional public forums: they have sidewalks, they have grassy space similar to parks, and for many years they have been places where people have assembled, communicated, and discussed public issues.<sup>188</sup> The Court held in *Edwards v. South Carolina* that peaceful protests in a traditional public forum constitute “an exercise of . . . basic constitutional rights in their most pristine and classic form,” and are thus protected by the First Amendment.<sup>189</sup> As the Court proclaimed in *Healy*, the “college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’”<sup>190</sup> meaning that the rule from *Edwards* applies with full force to public universities. Put another way, in general the public areas of public universities—particularly outdoor campus mall spaces—are “free speech zones” with full First Amendment rights applying to protected expression according to the traditional public forum doctrine.<sup>191</sup> This is true even if the campus mall is adjacent to university buildings or other facilities.<sup>192</sup>

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<sup>185</sup> See Greene, *supra* note 175, at 342; Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1955 (2017).

<sup>186</sup> See Kurtz, *supra* note 15, at 3.

<sup>187</sup> See Jeremy Bauer-Wolf, *The Death of College Free-Speech Zones*, INSIDE HIGHER ED (Feb. 2, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/02/02/experts-states-likely-keep-abolishing-free-speech-zones> [<https://perma.cc/AH4L-3ZB9>].

<sup>188</sup> See GERARD J. DEGROOT, *STUDENT PROTEST: THE SIXTIES AND AFTER* 7–9 (1998); RODERICK A. FERGUSON, *WE DEMAND: THE UNIVERSITY AND STUDENT PROTESTS* 30–31 (2017).

<sup>189</sup> 372 U.S. 229, 235 (1963).

<sup>190</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>191</sup> See Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 267 (2004); Nathan W. Kellum, *If It Looks Like a Duck...: Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 1–2 (2005); Stephen Douglas Bonney, *The University Campus as Public Forum: The Legacy of Widmar v. Vincent*, 81 UMKC L. REV. 545, 545–46 (2013).

<sup>192</sup> See *United States v. Grace*, 461 U.S. 171, 180 (1983).

Section 1(G) of the Campus Free Speech Act proclaims that a higher educational institution “may restrict the use of its non-public facilities to invited individuals.”<sup>193</sup> It is certainly true that non-public forums receive very little to no protection under the First Amendment, particularly if they are locations not designed for the exchange of ideas.<sup>194</sup> As explained by the Court in *Adderly v. Florida*, a “State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>195</sup> Thus, a university appears to have the power under the First Amendment to restrict expressive activities in places where the public is not permitted generally, such as the inside of the physical plant, a scientific laboratory, or the interior of the campus police headquarters. However, there is some question as to which other indoor spaces are non-public forums, such as the area directly outside of the office of the president or chancellor of the university, the hallways directly adjacent to faculty offices, and other similar locations.<sup>196</sup>

Although a university may certainly restrict the use of non-public locations to invited speakers, it is the process of defining which areas are non-public which could ultimately work to restrict student expression beyond what is permitted by the First Amendment. If, for instance, the hallways of a student union or the common areas of a dormitory were classified as non-public areas, that would raise significant constitutional concerns (although such areas could clearly be subject to time, place, and manner restrictions).<sup>197</sup> Furthermore, the placement of this statement in the model legislation would have little effect on protecting invited speakers. Invited speakers who will generate controversy are often going to speak to a crowd of people. Such an event may be open to the general public, it may be restricted to a group such as students and/or faculty, or it may be restricted to persons who purchase a ticket. In any case, the venue for these events—an auditorium or classroom—would typically be classified as a designated public forum or possibly a non-public forum.<sup>198</sup> In other words, they are open to the public (or a portion of it) at an event designated for a certain type of expression. In this way, Section 1(G) is a correct statement of the law, but it begs more questions than it answers, particularly if it can be used as a weapon to limit the freedom of expression

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<sup>193</sup> *Campus Free Speech Act*, *supra* note 14, § 1(G).

<sup>194</sup> *See* Sedler, *supra* note 179, at 1065.

<sup>195</sup> 385 U.S. 39, 47 (1966).

<sup>196</sup> *See* Amar & Brownstein, *supra* note 185, at 1964–65.

<sup>197</sup> *See* *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>198</sup> *See* Greene, *supra* note 175, at 342.

rights of student protestors by broadly defining many campus locations as “non-public.” Additionally, the policy could be improved by clarifying not just what traditional public forums are, but also what constitutes designated public forums and non-public forums. This would help to avoid questions about vagueness, a First Amendment concept described in more detail below.

*E. Materially and Substantially Disrupting the Functioning of the Institution*

In addition to the promulgations listed above, Section 1(C) would permit students and faculty to exercise their First Amendment rights and “engage in spontaneous expressive activity as long as such activity is not unlawful and does not materially and substantially disrupt the functioning of the institution.”<sup>199</sup> Like the language from Section 5(A), it would be best to add the verbiage here that both spontaneous *and planned* expressive activity are protected.<sup>200</sup>

The protection of expression, unless it “materially and substantially disrupt[s] the functioning of the institution,” is language originally derived from Supreme Court cases on the free speech rights of students in public K-12 schools.<sup>201</sup> As noted above, in *Tinker* the Court found that the freedom of expression applies to students in public schools, including the wearing of an armband to protest U.S. involvement in the Vietnam War.<sup>202</sup> The Court also, though, noted an important limitation on this right: “conduct by the student, in class or out . . . , which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”<sup>203</sup> In other words, the Court has stated that free expression rights of students are generally protected unless they materially and substantially disrupt either the functioning of the educational institution or, as will be explored in more detail below, interfere with the rights of others. Put another way by the Court in *Tinker*:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it

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<sup>199</sup> *Campus Free Speech Act*, *supra* note 14, § 1(C).

<sup>200</sup> See *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (on the issue of planned expressive activities also receiving First Amendment protection).

<sup>201</sup> See *Tinker v. Des Moines Indep. Com. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>202</sup> *Id.* at 514.

<sup>203</sup> *Id.* at 513.

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. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.<sup>204</sup>

In the K-12 context, this materially and substantially disruptive standard has been referenced in several cases where the Court has upheld student discipline against First Amendment challenges. In *Bethel School District v. Fraser*, the Court upheld the suspension of a student whose comments included several instances of sexual innuendo during a school-wide assembly.<sup>205</sup> The student in question in that case was disciplined for making the following comments while campaigning for a classmate who was running for a student government office: “he’s firm in his pants,” “he drives hard, pushing and pushing until finally—he succeeds,” and he “is a man who will go to the very end—even the climax, for each and every one of you.”<sup>206</sup> The *Bethel* Court found that a K-12 school needs “to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process.”<sup>207</sup> In *Hazelwood School District v. Kuhlmeier*, the Court upheld a principal’s decision to excise stories about teen pregnancy and divorce in a high school newspaper.<sup>208</sup> The Court determined in the case that

a school may in its capacity as publisher of a school newspaper or producer of a school play disassociate itself, not only from speech that would substantially interfere with [its] work, . . . but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.<sup>209</sup>

In *Morse v. Frederick*, the Court upheld the suspension of a public school student who unfurled at a school event a banner stating “BONG

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<sup>204</sup> *Id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>205</sup> 478 U.S. 675, 686 (1986).

<sup>206</sup> *Id.* at 687.

<sup>207</sup> *Id.* at 686.

<sup>208</sup> 484 U.S. 260, 274–76 (1988).

<sup>209</sup> *Id.* at 271 (internal citations & quotations omitted).

HiTS 4 JESUS.”<sup>210</sup> The Court referred to the material and substantial disruption standard in *Morse*, although the Court also stated that an even more deferential standard than this may be applied to student speech in a K-12 setting.<sup>211</sup> Nevertheless, there are several cases referencing or applying this standard within educational institutions.

Looking more specifically at public universities, the Court adopted the material and substantial disruption standard in *Healy* in 1972, quoting the language from *Tinker*.<sup>212</sup> The Court went on in *Healy* to note that expression and associational activities “need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”<sup>213</sup> One should not read this to mean that “material and substantial disruption” means the same thing in a higher educational setting as it does in a public K-12 school, however. Recall that public universities are not bound to enforce compulsory attendance laws and almost all students are adults over the age of eighteen.<sup>214</sup> Recall, too, that in *Healy*, the Court strongly emphasized that the need for order does not justify applying the First Amendment with less force at a public university than elsewhere.<sup>215</sup> Many of these adult students live on campus, meaning that an overly broad notion of material and substantial disruption would unduly subject those adults to such a rule not just when in class, but also when at home in their dorm rooms.<sup>216</sup> Pedagogically, the purpose of a higher educational institution is “to create an intellectual marketplace where unpopular, controversial, and sometimes even offensive speech can be expressed.”<sup>217</sup> As observed by the Third Circuit, “the pedagogical missions of public universities and public elementary and high schools are undeniably different” because “the former encourages inquiry and challenging *a priori* assumptions whereas the latter prioritizes the inculcation of societal

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<sup>210</sup> 551 U.S. 393, 397, 409–10 (2007).

<sup>211</sup> *Id.* at 403.

<sup>212</sup> *See Healy v. James*, 408 U.S. 169, 189 (1972).

<sup>213</sup> *Id.*

<sup>214</sup> *See supra* Section II.

<sup>215</sup> *See Healy*, 408 U.S. at 180.

<sup>216</sup> *See McCauley v. U. of the V.I.*, 618 F.3d 232, 243, 247 (3d Cir. 2010).

<sup>217</sup> *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ACADEMIC FREEDOM OF STUDENTS AND PROFESSORS, AND POLITICAL DISCRIMINATION (July 29, 2018), <https://www.aup.org/academic-freedom-students-and-professors-and-political-discrimination> [https://perma.cc/TZG2-QBTL].

values.”<sup>218</sup> Due to these factors, the concept of “material and substantial disruption” must apply differently at a university than in a K-12 school.

A close inspection of the Supreme Court’s relevant K-12 speech cases reveals that 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. The Court, while applying the same standard, has allowed for greater regulation of expression in K-12 schools. For instance, the Court in *Bethel* made clear that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”<sup>219</sup> which comports with what the Court stated about the application of First Amendment rights for adult college students in *Healy*.<sup>220</sup> More to the point, the *Bethel* Court observed that “[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”<sup>221</sup> In *Hazelwood*, the Court noted that educators may exercise greater control over student expression, in part, to ensure that “readers or listeners are not exposed to material that may be inappropriate for their level of maturity”<sup>222</sup>—a concern that does not exist for an adult population in higher education. In *Morse*, the Court placed its decision in the context of “detering drug use by schoolchildren,”<sup>223</sup> and the “difficult job” that must be carried out by school principals.<sup>224</sup> These types of institutional concerns do not exist in a public university setting where there are no children or principals. On the other hand, what constitutes a “material and substantial” disruption to the functioning of a higher education institution is much narrower. In *Papish*, the Court upheld the right of a college student to distribute literature using profanity and depicting sexual assault in a political cartoon,<sup>225</sup> which is expression that is much more offensive and disruptive than the student speech held unprotected in the K-12 setting in *Bethel*, *Hazelwood*, or *Morse*.

The standard contemplated by Section 1(C)—that students and faculty may “not materially and substantially disrupt the functioning of the

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<sup>218</sup> *McCauley*, 618 F.3d at 243.

<sup>219</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>220</sup> *See Healy*, 408 U.S. at 180.

<sup>221</sup> *Bethel*, 478 U.S. at 682.

<sup>222</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

<sup>223</sup> *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

<sup>224</sup> *Id.* at 409.

<sup>225</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670–71 (1973).

institution”<sup>226</sup>—can be clearly understood in the classroom, at an invited speaker’s talk in an auditorium, and in various other contexts on campus. The word “disrupt” can be defined in three ways: “to break apart,” “to throw into disorder,” or “to interrupt the normal course or unity of.”<sup>227</sup> The word “material” in this context means “having real importance or great consequences,”<sup>228</sup> and the word substantial here is best defined as “essential” or “significantly great.”<sup>229</sup> Putting these definitions together contemplates action that would break apart, throw into disorder, or interrupt the normal course of university functions in a greatly significant way with important or great consequences. In multiple contexts, this standard is easy to grasp and places students on notice regarding what is being prohibited. How might one apply this standard to various functions on campus, and would it be constitutional to do so?

In non-public forums, it is clear that this standard would be constitutional. Take, for example, the classroom during a scheduled class, which is best understood as a non-public forum.<sup>230</sup> Given that college students are typically going to have spent years taking classes before entering higher education, they are accustomed to attending a class lecture<sup>231</sup> and what the expectations are in such a setting. It will be clear that their actions cannot break apart, throw into disorder, or interrupt a lecture in a significant way. Furthermore, such a non-public forum regulation is reasonable (to ensure that class activities can go on as planned); as long as *any* disruption of this magnitude would be punishable, it would not be a form of viewpoint discrimination, thus satisfying the *Perry Education Association* standard for non-public forums.<sup>232</sup>

Similarly, there is no question that outside of a scheduled class, there is much activity that could be constitutionally restricted with this standard. The Campus Free Speech Act clearly contemplates activity outside of the classroom, as it refers to the “material and substantial” disruption standard and then remarks that it “does not prohibit professors or other instructors

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<sup>226</sup> *Campus Free Speech Act*, *supra* note 14, § 1(C).

<sup>227</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 117, at 362.

<sup>228</sup> *Id.* at 765.

<sup>229</sup> *Id.* at 1245.

<sup>230</sup> See generally *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>231</sup> See Valerie Strauss, *It Puts Kids to Sleep—But Teachers Keep Lecturing Anyway*, WASH. POST (July 11, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/11/it-puts-kids-to-sleep-but-teachers-keep-lecturing-anyway-heres-what-to-do-about-it/?utm\\_term=.a8a7bc0813a0](https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/11/it-puts-kids-to-sleep-but-teachers-keep-lecturing-anyway-heres-what-to-do-about-it/?utm_term=.a8a7bc0813a0) [<https://perma.cc/6EB6-LXRY>].

<sup>232</sup> See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

from maintaining order in the classroom.”<sup>233</sup> Thus, the model policy would appear to apply this standard elsewhere on college campuses; in non-public forums, it would be well-defined and constitutional. For example, if students stormed into the university chancellor/president’s office and refused to leave, it is clear such activity would materially and substantially disrupt the functioning of that office; prohibiting such conduct is reasonable. Likewise, if a student protest blocked entrances to a university building, it would materially and substantially disrupt the ability of students, faculty, and staff to enter for scheduled class, work, and other events (including invited speaker events); again, prohibiting this disruption from occurring is clearly reasonable. Similarly, if students protested animal testing by entering a university research laboratory, loudly chanting, and refusing to leave, such activity would be a material and substantial disruption of the ability to conduct that research; a ban on such activity would also be reasonable, given the research function of universities.<sup>234</sup>

What about a material and substantial disruption of a speech by an invited speaker? If such an event is considered a non-public forum because it is a school sponsored event, then the same deferential analysis would be applied as for causing such a disruption during a scheduled class,<sup>235</sup> and the standard would be constitutional to apply. Assume, though, that such an event is a designated public forum, which one could consider such an event to be, particularly if the speaker is invited by a student organization, which is, itself, funded as part of a designated public forum at the university.<sup>236</sup> The compelling interest here could be the academic freedom the university has to put on a forum, or it could be the university’s role in fostering civil discourse, which it furthers by protecting the free expression rights of the invited speaker and others in attendance.<sup>237</sup> In such a scenario, even content-based prohibitions could be permissible according to *Perry Education Association*.<sup>238</sup> A material and substantial disruption of this university function could be accomplished by an

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<sup>233</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(D).

<sup>234</sup> See ELLIOTT C. KULAKOWSKI & LYNNE U. CHRONISTER, RESEARCH ADMINISTRATION AND MANAGEMENT 242–45 (2006).

<sup>235</sup> Amar & Brownstein, *supra* note 185, at 1962.

<sup>236</sup> See *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>237</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (Both of these rationales would be within the spirit of the Supreme Court’s understanding of “a compelling state interest . . . recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy . . .”).

<sup>238</sup> See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

audience member trying to take over the talk, such as by shouting for an extended period of time or deliberately discussing other subjects beyond the ones designated by the speaker for a significant length of time. Furthermore, preventing persons or groups from taking over—through the use of continued shouting, chanting, or physically occupying the speaker’s podium area—an event scheduled by another student group in a room reserved by that group, is a reasonable time, place, and manner regulation permitted by *Perry Education Association*.<sup>239</sup> Such efforts would have to be sustained to qualify as material and substantial; as Kurtz, Manley, and Butcher point out in a document explaining the Campus Free Speech Act, a standard like this “ensures that students will not be punished merely for an occasional ‘boo’ in response to a visiting lecturer.”<sup>240</sup> Indeed, boos—as well as jeers, hisses, and similar verbal reflections—communicate ideas in certain contexts;<sup>241</sup> to the extent that they communicate ideas without materially and substantially disrupting the invited speaker, they are protected by the First Amendment. Similar to the classroom setting, it is clear when students would be disruptive to this university function, as they will typically have plenty of experience sitting in lectures even before attending college.<sup>242</sup> As long as protesting students remain free to schedule their own event or protest in another place, they retain a multitude of alternative modes of communication according to *Perry Education Association*, and it is constitutional to restrict them from materially and substantially disrupting the lecture of an invited speaker.<sup>243</sup>

As much as the “material and substantial” disruption standard is clear and constitutional in the classroom, various non-public forums, and invited speaker events, applying it in a traditional public forum, particularly on an outdoor campus mall, would prove problematic. What would it mean to engage in activity on the campus mall—a place with a long history of protest activity<sup>244</sup>—that breaks apart, throws into disorder, or interrupts the normal course of university functions in a greatly significant way with important consequences? How could protesting students know that a meeting in an administration building was being disturbed by their protest a significant distance away and outside? The problem would be giving the

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<sup>239</sup> *See id.*

<sup>240</sup> Kurtz, *supra* note 15, at 6.

<sup>241</sup> Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL OF RTS. J. 367, 397 (2004).

<sup>242</sup> *See* Strauss, *supra* note 231.

<sup>243</sup> *See Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>244</sup> *See id.* *See also* DEGROOT, *supra* note 188, at 7–9; FERGUSON, *supra* note 188, at 30–31.

protesting students proper notice of what would be truly disruptive. How could they know when an outdoor protest on the campus mall would be too loud (or perhaps too embarrassing) to harm the functioning of the university?

When it is not clear what is being prohibited, the First Amendment is violated because people are not properly on notice regarding which speech is protected and which speech is not protected. As promulgated in *Winters v. New York*, “a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment.”<sup>245</sup> Put another way in *Gooding v. Wilson*, a regulation of speech “must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. ‘Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.’”<sup>246</sup> “The root of the vagueness doctrine is a rough idea of fairness,” allowing persons to know what is prohibited and what is permitted by the law.<sup>247</sup> Given the questions raised above about what exactly constitutes a material and substantial disruption of university functions as applied to expression on the campus mall, vagueness would be a serious constitutional concern in this context.

All told, the use of the material and substantial disruption standard is clear and constitutional in non-public forums generally, in the classroom during a scheduled class, and at speaking events scheduled by the university or members of the university community. Just like one does not have a right to excessively disrupt court proceedings,<sup>248</sup> or the functioning of an abortion clinic,<sup>249</sup> one has no right to materially and substantially disrupt legitimate university functions, including scheduled speeches. However, the standard lacks clarity in a traditional public forum like the campus mall, and it would therefore be unconstitutional if applied in that context. Of course, narrowly tailored time, place, and manner restrictions that are contemplated by the model legislation may still be imposed on the campus mall.<sup>250</sup> This would include specific restrictions on blocking

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<sup>245</sup> 333 U.S. 507, 509 (1948).

<sup>246</sup> 405 U.S. 518, 522 (1972) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>247</sup> See *Colton v. Kentucky*, 407 U.S. 104, 110 (1972).

<sup>248</sup> See *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970); *Codispoti v. Pennsylvania*, 418 U.S. 506, 514 (1974).

<sup>249</sup> See *Schenck v. Pro-Choice Networks of W. N.Y.*, 519 U.S. 357, 361 (1997).

<sup>250</sup> See *supra* Section III.C–D.

entrances or protesting within a small number of specified feet of entrances or classrooms,<sup>251</sup> prohibitions on persistently following unwilling listeners,<sup>252</sup> or precise restrictions on protest noise levels during certain hours of the day,<sup>253</sup> as long as students are on proper notice of what these restrictions are. However, a generalized prohibition on material and substantial disruptions on a campus mall would be unconstitutionally vague.

*F. Materially and Substantially Infringing on the Free Expression of Others*

Although the U.S. Supreme Court has applied *Tinker*'s standard on material and substantial disruption to the functioning of a higher educational institution, the Court has, in a higher education context, only briefly alluded to *Tinker*'s other restriction: limiting speech that would materially and substantially involve the "invasion of the rights of others."<sup>254</sup> Nevertheless, the model legislation modifies this standard in Section 1(D), where after affirming the right of "[a]ny person lawfully present on campus" to protest or demonstrate, it goes on to prohibit "protests and demonstrations that materially and substantially infringe upon the rights of others to engage in or listen to expressive activity."<sup>255</sup>

It appears that the intent of the prohibition in Section 1(D) is to prevent a "heckler's veto," which traditionally is understood as when the government unconstitutionally restricts a speaker's freedom of speech to prevent someone else (typically a crowd of people) from rioting or causing harm; this may involve arresting the speaker.<sup>256</sup> The Court has found such state action to violate the First Amendment since *Terminiello v. City of Chicago*, because "a function of free speech under our system of government is to invite dispute . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have

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<sup>251</sup> See *Schenck*, 519 U.S. at 381.

<sup>252</sup> See *Hill v. Colorado*, 530 U.S. 703, 734 (2000).

<sup>253</sup> See *Grayned v. City of Chicago*, 408 U.S. 104, 107–08, 119 (1972).

<sup>254</sup> See *Healy v. James*, 408 U.S. 169, 194 (1972) ("[A]lthough the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded."); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 n.6 (1973) ("[I]n the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.");

<sup>255</sup> *Campus Free Speech Act*, *supra* note 14, § 1(D).

<sup>256</sup> See R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 161–63 (2017).

profound unsettling effects as it presses for acceptance of an idea.”<sup>257</sup> Put more recently by the Court in *Forsyth County v. The Nationalist Movement*, “[s]peech cannot . . . be punished or banned, simply because it might offend a hostile mob.”<sup>258</sup> If this were the only type of heckler’s veto the model legislation prohibited, it would clearly be constitutional, and it would be promoting the protection of the freedom of speech. More broadly, though, a heckler’s veto can also refer to government failing to take proper action to protect a speaker from a dangerous mob, thereby giving a “veto” power to people who do not want to hear the speaker’s message.<sup>259</sup> For instance, this might occur if demonstrators stop a speaker from speaking, particularly by using threats of violence or actual violence.<sup>260</sup>

Cases in recent decades confirm that preventing a heckler’s veto—even in the broader sense—is a First Amendment concern. As the Court noted in *Reno v. ACLU*, the government cannot “confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech.”<sup>261</sup> Likewise, in *Hill v. Colorado*, the Court noted that “governmental grants of power to private actors [are] constitutionally problematic,” and that the First Amendment prohibits permitting “a single, private actor to unilaterally silence a speaker even as to willing listeners.”<sup>262</sup>

Certainly, a lawful speaker should not be punished for other people failing to constrain themselves. There are serious threats to the freedom of expression if a crowd may exercise a type of tyranny of the majority to silence a speaker, and the government permits this under its watch. Similarly, the Court has identified that there is a First Amendment right to listen: “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . .”<sup>263</sup> Thus, the Campus Free Speech Act aims to secure twin rights—those of the speaker to speak and those of willing listeners to listen—which are protected by the First Amendment. There is some question whether or not the Campus Free Speech Act aims at a true heckler’s veto in the narrow sense if universities do not specifically designate protestors with

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<sup>257</sup> 337 U.S. 1, 4 (1949).

<sup>258</sup> 505 U.S. 123, 134–35 (1992).

<sup>259</sup> See Cheryl A. Leanza, *Heckler’s Veto Case as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007).

<sup>260</sup> *Id.* at 1307–08.

<sup>261</sup> 521 U.S. 844, 880 (1997).

<sup>262</sup> 530 U.S. 703, 734 n.43 (2000).

<sup>263</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

government power to censor speech. If they are not state actors, then protestors who shout down speakers are being disruptive, but they are not infringing on any First Amendment rights of speakers or listeners; indeed, the U.S. Supreme Court has long held that individual, non-state actors do not infringe upon constitutional rights.<sup>264</sup> Instead, this model legislation charges universities with the duty of keeping order and enforcing policies that prevent people from engaging in activities that would stop people from speaking, thus creating a positive right for the speakers to be protected, which is the broader notion of what constitutes a heckler's veto.<sup>265</sup> Although the Supreme Court has been clear about the narrower idea of a heckler's veto being unconstitutional in cases like *Terminiello*, there is little direct case law on the constitutionality of a heckler's veto if the government "turns a blind eye" and does nothing to stop such hecklers without conveying government authority on them to do so.<sup>266</sup>

Nevertheless, there is a strong intellectual history supporting the notion that the government must restrain hecklers from vetoing another's speech if the freedom of expression is to be properly protected.<sup>267</sup> If we assume that speakers possess a broader right against a broader heckler's veto, can the government prohibit someone (including adults who are not students)<sup>268</sup> from "materially and substantially . . . infringing upon the . . . rights of others to engage in or listen to expressive activity . . . ?"<sup>269</sup> Although "expressive activity" and "expressive conduct" have been defined by the Court (and that protection has been very expansive),<sup>270</sup> it is not clear what is meant by a person (*i.e.*: not the government or a government actor) materially and substantially infringing

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<sup>264</sup> See *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

<sup>265</sup> See *Leanza*, *supra* note 259, at 1306.

<sup>266</sup> In fact, there remains some question constitutionally if the government is restricted from arresting the speaker in a "heckler's veto" situation unless *Feiner v. New York* is overruled. See *generally* 340 U.S. 315 (1951).

<sup>267</sup> See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416–18 (1986).

<sup>268</sup> The model legislation uses this standard directly after proclaiming that "[a]ny person lawfully present on campus may protest or demonstrate there," implying that it applies to any person, whether a student or not. See *Campus Free Speech Act*, *supra* note 14, § 1(D).

<sup>269</sup> *Freedom of Speech and Expression*, LSU Permanent Memorandum 79, 2 (Nov. 9, 2018), <https://www.lsuhsoc.edu/administration/pm/PM-79.pdf> [<https://perma.cc/F3CY-PD5U>].

<sup>270</sup> See *id.* See also *Gooding v. Wilson*, 405 U.S. 518, 519–20 n.1 (1972) (Prosecution for uttering "[w]hite son of a bitch, I'll kill you," and "[y]ou son of a bitch, I'll choke you to death," violated the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 415 (1989) (flag burning is a protected expressive activity); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (cross burning is protected expressive conduct).

on the free expression rights of others and the rights of others to listen. Unlike “materially and substantially disrupt[ing] the functioning of the institution,”<sup>271</sup> which as explained above has clarity in various higher educational contexts,<sup>272</sup> trying to interpret what it means to materially and substantially infringe on the free expression rights of others and the rights of others to listen is inherently problematic. Indeed, the Court has never explored what it means for a private person to *infringe* on the rights of others in a university context, or what it means more specifically for a private person to infringe upon other persons’ free speech rights or rights to listen.

As defined above, the word “material” in this context means “having real importance or great consequences,”<sup>273</sup> and the word substantial here is best defined as “essential” or “significantly great.”<sup>274</sup> To “infringe” in this context means “to encroach upon”<sup>275</sup> the rights of others to engage in or listen to expressive activity. As noted earlier, constitutional rights are infringed by the government, not other private persons,<sup>276</sup> making it difficult to know how to fully define the word “infringe” in this context. Even assuming that a private person *can* infringe on another person’s constitutional rights, what does it mean for a private person to essentially or significantly encroach upon the expressive or listening rights of others in a way that has important consequences? Does it include any action that, if done by the government, would be considered an infringement on the speaker’s free speech rights? Does it include protesting outside of a building in a traditional public forum if the speaker’s event is in an exterior room with windows, thus meaning that the speaker and listeners inside can see (and perhaps also hear) the protestors? Does it include protesting in the hallway outside the room where an event is taking place, thus meaning that the speaker and listeners in the classroom can hear the protestors’ muffled chants through a closed door? Does it include a group of attendees who silently hold up in the back of a classroom a banner denigrating the speaker or the speaker’s message, if the speaker claims that he or she cannot concentrate upon seeing the banner? Does it include someone who stands up in the middle of a lecture hall with a protest message written on his or her t-shirt, where the speaker can see the

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<sup>271</sup> *Campus Free Speech Act*, *supra* note 14, § 1(C).

<sup>272</sup> *See supra* Section III.E.

<sup>273</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 117, at 765.

<sup>274</sup> *Id.* at 1245.

<sup>275</sup> *Id.* at 642.

<sup>276</sup> *See Civil Rights Cases*, 109 U.S. 3, 17 (1883).

message and those sitting behind the protester cannot see the speaker unless they stand up or move to other seats? Does it include someone shouting a response to a speaker's question? Does it include someone engaging in a lengthy response to a speaker's question, thus not yielding the floor back to the speaker right away? How loud—and how long—must the response be before it materially and substantially infringes on the expressive rights of the speaker or listener? Is the material and substantial infringement determined by the subjective view of the invited speaker? Is it determined by the subjective views of affected listeners, or by the subjective views of the audience as a whole? Is it an objective standard determined by a university administrator at a subsequent disciplinary hearing?

The definition here is much vaguer than prohibiting material and substantial disruptions to the functioning of the university, including disruptions of scheduled speakers. It involves a lack of clarity, given that there are no Supreme Court cases on point to instruct what it means for a private actor to infringe on the free speech rights of others, and the standard itself is not defined in the model legislation. It pits the free speech rights of one speaker against those of another speaker—particularly if it were applied to a traditional public forum—effectively forcing the university into the position of moderator, deciding which expression is to be prized. If universities are to promote the “robust exchange” of ideas,<sup>277</sup> then this is an untenable position for the university to take. How should the university measure when a non-state actor is *infringing* on the free speech rights of a speaker who is a public official or a public figure, against whom the public has a right to engage in “vehement, caustic, and sometimes unpleasantly sharp attacks”?<sup>278</sup> Protecting such expression ensures that “debate on public issues [will] be uninhibited, robust, and wide-open.”<sup>279</sup> The material and substantial infringement standard, due to these defects, raises concerns regarding overbreadth and vagueness of speech regulation.

As a general matter, restrictions on expression cannot be more extensive than necessary.<sup>280</sup> As expressed by the Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, “if the governmental interest could be served as well by a more limited restriction

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<sup>277</sup> See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>278</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>279</sup> *Id.*

<sup>280</sup> See Jeffrey A. Berman, *Constitutional Realism: Legislative bans on Tobacco Advertising and the First Amendment*, 1986 U. ILL. L. REV. 1193, 1199 (1986).

on . . . speech, the excessive restrictions cannot survive.”<sup>281</sup> The Court expressed this view in a commercial speech case, with commercial speech receiving a lower level of First Amendment protection than speech on social and political issues<sup>282</sup> (which is the type of speech typically expected to be at issue under the Campus Free Speech Act). Generally, regulations on speech must be narrowly tailored.<sup>283</sup> In other words, trying to prevent violence by prohibiting all demonstrations, or trying to prevent disputes by banning any handbill distribution, would be overbroad.<sup>284</sup> For comparison, although disorderly conduct statutes can trend toward being vague and overbroad, they have a great deal of case law interpreting their meaning.<sup>285</sup> No such case law exists for what it means to materially and substantially infringe on the free expression rights of others, risking that the regulation will prohibit more speech than necessary to accomplish its goals.

According to the Court in *United States v. Williams*, “the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.”<sup>286</sup> By placing the free speech rights of two different parties in opposition to each other, the Campus Free Speech Act runs afoul of this prohibition, as it inhibits the exchange of ideas on one side. The Court has also held in *United States v. Stevens* that “a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”<sup>287</sup> If the material and substantial infringement on the rights of others standard is used, then there are a myriad of ways that protected expression could be restricted. From voicing unpopular views, to raising one’s voice, to storming out of the room, to displaying offensive messages on a sign, a banner or a t-shirt, there are many examples of speech that could be restricted. Although the Court rarely strikes down speech regulations for being overbroad—commenting in *New York v. Ferber* “that the overbreadth doctrine is ‘strong medicine’ and [the Court has] employed it with hesitation, and then

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<sup>281</sup> 447 U.S. 557, 564 (1980).

<sup>282</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1763–64 (2017).

<sup>283</sup> See Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 674–75 (2004).

<sup>284</sup> See *Jones v. Bd. of Regents*, 436 F.2d 618, 621 (8th Cir. 1970).

<sup>285</sup> See *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *Colton v. Kentucky*, 407 U.S. 104, 111 (1972); *Hess v. Indiana*, 414 U.S. 105, 109 (1973); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987); *State v. Givens*, 135 N.W.2d 780, 783–84 (Wis. 1965).

<sup>286</sup> 553 U.S. 285, 292 (2008).

<sup>287</sup> 559 U.S. 460, 473 (2010) (quoting *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

‘only as a last resort’<sup>288</sup>—the great potential here, that more speech can be banned than the Constitution permits, may require such action by the Court. This is particularly true since the material and substantial disruption standard already is “a more limited restriction on”<sup>289</sup> speech that serves the relevant governmental interests that are at stake for invited speakers.

Overbreadth is closely related to the concept of vagueness. Similar to the problem with the application of the material and substantial disruption standard to campus mall protests, vagueness is a problem for the material and substantial infringement standard in a variety of contexts. According to the Court, the law must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.”<sup>290</sup> This standard in the Campus Free Speech Act is “so vague and indefinite”<sup>291</sup> because it is unlikely to be clear to most students what the free speech rights of others are and when they would be *infringing* on them. Without further refinement and specificity, the Act does not place students on notice regarding what they can and cannot say. Unlike the application of the material and substantial disruption standard to protests of invited speaker events, the application of the material and substantial infringement standard at these events is rife with problems. Since the former standard already addresses the heckler’s veto problem and works to promote civil discourse, the use of the latter standard is also redundant.

There is no question that invited speakers, including controversial speakers, have First Amendment rights. Additionally, listeners at these talks have a right to hear what is being said. To the extent that the model policy aims to protect these rights and to prevent a heckler’s veto, it is laudable and firmly in line with promoting Free Speech Clause values; this is precisely what the material and substantial disruption of university function standard does. However, the rights of dissenters and protestors to express their own message is just as important. Their right to disagree and challenge a speaker needs to be ensured as well. Indeed, when the way the alleged disruption is occurring is through one speaking, it forces the university into a choice: does it emphasize the free speech rights of the invited speaker or the protesting students? This is a difficult balance to undertake, and the material and substantial infringement standard places a

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<sup>288</sup> 458 U.S. 747, 769 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

<sup>289</sup> *Cent. Hudson v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

<sup>290</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>291</sup> *See Winters v. New York*, 333 U.S. 507, 509 (1948).

clear emphasis on protecting the invited speaker, leaving the rights of protesting students in some doubt. Unless this language in Section 1(D) is eliminated or clarified to ensure protection of a larger class of expression, it does not fully protect First Amendment rights for dissenters and protestors.

*G. Penalties for Violations, Civil Actions, and Chilling Effects*

Sections 1(H) through 1(J) of the Campus Free Speech Act identify the procedures afforded to students accused of infringing on the free speech rights of others, and the penalties if students are found to have engaged in this behavior. According to Section 1(H), “a range of disciplinary sanctions” shall be included “for anyone under the jurisdiction of the institution who materially and substantially interferes with the free expression of others.”<sup>292</sup> Although this could include faculty and staff as well, the aim of these sections is students, as Section 1(I) spells out the due process rights for student disciplinary hearings and procedures.<sup>293</sup> This section specifically contemplates suspension.<sup>294</sup> Section 1(J) then mandates the following: “Any 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.”<sup>295</sup>

Before discussing the significance of these penalties, it is worth noting that Section 1(J) is, at a minimum, poorly drafted. Unlike the other areas of the model policy which prohibit “material and substantial” disruption or infringement,<sup>296</sup> this section requires a certain level of penalties for simply “infringing the expressive rights of others,”<sup>297</sup> whether or not such disruption is material and substantial. Although the material and substantial infringement standard is problematic in this context for the reasons outlined above, the language in Section 1(J) is even more troubling, as it is easier for a university to classify student expression as simply “infringing the free speech rights of others” than it is to classify student expression as materially and substantially infringing on the rights of others.

If we give the model policy’s drafters the benefit of the doubt and assume they meant to say that a student would have these penalties

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<sup>292</sup> *Campus Free Speech Act*, *supra* note 14, § 1(H).

<sup>293</sup> *Id.* § 1(I).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* § 1(J).

<sup>296</sup> *Id.* § 1(C) & (D).

<sup>297</sup> *Id.* § 1(J).

imposed on them in Section 1(J) *only* if they materially and substantially infringe the expressive rights of others, that does not save this section from its constitutional defects. There is already a concern that this standard is overbroad and too vague.<sup>298</sup> Putting in place mandatory penalties such as these risks creating an unconstitutional chilling effect on expression. As the Court noted in *Reno*, the “vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”<sup>299</sup> Fear of peripheral prosecutions in this context may lead speakers to place additional burdens on themselves, thus chilling expression to a significant degree.<sup>300</sup>

The heavy penalty to be imposed here, which is a mandatory one-year suspension or an expulsion from the university, is significant. As observed by First Amendment scholar Frederick Schauer, higher penalties create more of a risk of a chilling effect:

The severity of the potential punishment magnifies the danger, and hence the fear, of an erroneous judicial determination. In addition to the ‘objective’ harshness of a particular penalty—the length of a prison term or the amount of a fine—the type of punishment itself may also influence the perceived severity of an incorrect legal judgment.<sup>301</sup>

The penalties here are significant and have potential long-term implications. The most analogous prosecution that exists for the activity in question would be citations or arrests for offenses against state laws or municipal ordinances, such as disorderly conduct or breaching the peace.<sup>302</sup> In most cases, adults would be charged with this or something similar for the type of conduct in question if it is not protected by the First Amendment. In those cases, the penalty imposed for each infraction is likely to be either a minor fine or some type of short jail sentence, which may be suspended, converted to community service, or have some other

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<sup>298</sup> See *supra* Section III.F.

<sup>299</sup> *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 871–72 (1997).

<sup>300</sup> See Jennifer M. Kinsley, *Chill*, 48 LOY. U. CHI. L.J. 253, 262 (2016).

<sup>301</sup> Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 696–97 (1978).

<sup>302</sup> See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 557–58 (1997).

similar type of disposition.<sup>303</sup> This is not to minimize penalties for these offenses, as they may be significant for persons cited or arrested, particularly if they are without financial means to challenge the government's case accordingly in a non-criminal context where there is no right to a government appointed attorney.<sup>304</sup> A second offense here, however, would carry a mandatory one-year suspension or an expulsion from the university.<sup>305</sup> For a college student, this will likely be seen as a serious threat. Not only will their identity as a college student be put at risk, but without a guarantee that they could be readmitted to that (or any other) university if they are expelled, a student's entire education and future vocation could be in jeopardy. Recent studies suggest that college graduates earn approximately \$1 million more over their career compared to persons possessing just a high school diploma,<sup>306</sup> making a minor disorderly conduct fine pale in comparison to an expulsion. Such a substantial financial threat increases the likelihood that a student will choose to remain silent rather than express themselves in a way that could erroneously be deemed worthy of suspension or expulsion. This is a textbook example of a chilling effect.

Granted, this penalty is for multiple offenses only, and procedural rights apply.<sup>307</sup> Nevertheless, these procedural rights are not in court; they are in an administrative setting, where constitutional due process requirements are less protective.<sup>308</sup> Furthermore, mandatory suspensions and expulsions are substantial sanctions for engaging in protest activities, especially when most universities do not impose mandatory suspensions or expulsions on students who have committed much more serious violations, such as sexual assault.<sup>309</sup> They are odd sanctions against protestors in an educational institution in particular. If one of the goals of public

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<sup>303</sup> See Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), <https://slate.com/news-and-politics/2012/04/misdemeanors-can-have-major-consequences-for-the-people-charged.html> [<https://perma.cc/2VSG-DASA>].

<sup>304</sup> See *id.* See also *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>305</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(J).

<sup>306</sup> See Tiffany Hsu, *College Graduates Earn 84% More than High School Grads*, *Study Says*, L.A. TIMES (Aug. 5, 2011, 10:51 AM), [https://latimesblogs.latimes.com/money\\_co/2011/08/college-graduates-pay.html](https://latimesblogs.latimes.com/money_co/2011/08/college-graduates-pay.html) [<https://perma.cc/8N5H-NRFQ>].

<sup>307</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(I).

<sup>308</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

<sup>309</sup> See Jake New, *Should Expulsion be the Discipline Policy for Students Accused of Sexual Assault?*, INSIDE HIGHER ED (June 27, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/06/27/should-expulsion-be-default-discipline-policy-students-accused-sexual-assault> [<https://perma.cc/7WNX-DTQE>].

universities is to teach about citizenship,<sup>310</sup> this would certainly include teaching about the freedom of expression. Is ending students' formal education by expelling them from the university the best way to "teach" those students about the freedom of speech? The answer is clearly no. Instead, more education and dialogue on what the freedom of expression means is the key to promoting the First Amendment in these types of situations. Additionally, hamstringing public universities' methods of teaching about the freedom of expression by requiring these mandatory penalties raises concerns of institutional academic freedom. According to the Court, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."<sup>311</sup> Accordingly, there is "a constitutional dimension, grounded in the First Amendment, of educational autonomy,"<sup>312</sup> which could be infringed by these mandatory penalties if university administrators believe there are more effective ways to teach disruptive students about the freedom of expression.

Finally, Section 5 of the model legislation allows either the state attorney general or a "person whose expressive rights are violated" to bring a civil suit for both injunctive relief and monetary damages.<sup>313</sup> Although providing for civil actions against a public university for violating one's expressive rights is certainly constitutional and may be the only way to vindicate certain First Amendment violations,<sup>314</sup> it is not clear that the defendants in this section are limited to universities. If private persons—including college students—may be sued for material and substantial

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<sup>310</sup> See, e.g., WIS. STAT. § 36.01(2) (2018), regarding the mission of the University of Wisconsin System:

The mission of the system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

*Id.*

<sup>311</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>312</sup> *Id.*

<sup>313</sup> *Campus Free Speech Act*, *supra* note 14, § 5(B).

<sup>314</sup> See, e.g., *Ex parte Young*, 209 U.S. 123, 166–67 (1908).

infringements on the rights of others to engage in or listen to expressive activity, it would be another significant chill on expression. The Court has long held that civil suits may not be used to restrict expression in ways that the criminal law may not reach.<sup>315</sup> Since the model legislation allows for the seeking of actual monetary damages, while also allowing plaintiffs to recover reasonable court costs and reasonable attorney's fees,<sup>316</sup> it threatens a potentially enormous financial penalty against college students. Given the relatively low economic standing many college students maintain and the debt they tend to carry while in school,<sup>317</sup> a civil suit could become even more chilling than either a minor criminal sanction or a mandatory suspension/expulsion. For these reasons, it would be more sound constitutionally to specify that a civil action may be brought against a university in this context, not against students who have been found to violate the free speech rights of others.

#### IV. CONCLUSIONS AND SOLUTIONS

The Goldwater Institute's 2017 Campus Free Speech Act, as a form of model legislation, tries to fill a need on public university campuses by ensuring that invited speakers, student organizations, and others are not denied the ability to express their ideas. To the extent that it prevents content and viewpoint discrimination by public universities and requires strict scrutiny when universities do otherwise, it is certainly constitutional.<sup>318</sup> The model legislation works in various ways to protect the freedom of expression while also ensuring order on the campus; there is no question that protestors can—and should—be prohibited from engaging in acts of violence, property damage, disorderly behavior, and similar non-expressive conduct<sup>319</sup> if they are materially and substantially disrupting scheduled speeches. The Campus Free Speech Act aims at preventing heckler's vetoes, thus ensuring that the university fulfills its role as a marketplace of ideas and a place for civil discourse. Additionally, the model policy attempts to create a culture of promoting the freedom of expression among students on campus within the spirit of cases like *Healy*

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<sup>315</sup> See *N.Y. Times v. Sullivan*, 376 U.S. 254, 277 (1964).

<sup>316</sup> *Campus Free Speech Act*, *supra* note 14, § 5(B).

<sup>317</sup> See OHIO STATE UNIVERSITY OFFICE OF STUDENT LIFE, NATIONAL STUDENT FINANCIAL WELLNESS STUDY: NATIONAL DESCRIPTIVE REPORT (2014), <https://cssl.osu.edu/p-osts/documents/nsfws-national-descriptive-report.pdf> [<https://perma.cc/2RZC-H22J>].

<sup>318</sup> See generally Amar & Brownstein, *supra* note 185, at 1943–70.

<sup>319</sup> See *United States v. O'Brien*, 391 U.S. 365, 375 (1968); *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006).

and *Papish*, with prohibitions on policies that would restrict expression to small “free speech zones.” It prohibits public universities from compelling speech from students and employees. The policy reminds us of the importance of the rights of listeners. In all of these ways, the Campus Free Speech Act is a welcome development, and states should consider using these portions of the model legislation to protect and foster the freedom of speech at public universities.

In these ways, the Campus Free Speech Act appears to be a good faith attempt to safeguard the freedom of expression. However, some of its provisions raise significant constitutional questions. The prohibition on public universities taking positions on controversial matters of public policy has the potential to limit academic freedom, and it should not be adopted. A greater clarification of which areas of the campus are traditional, designated, and non-public forums could be undertaken. The model policy’s lack of explicit protection for planned (as compared to spontaneous) expression may create confusion for students. The material and substantial disruption standard, if applied to outdoor traditional public forums like campus malls, would be a step toward limiting the free speech rights of adults in ways the First Amendment does not allow. More significantly, the application of the material and substantial infringement standard appears well-meaning but offers too much discretion to campus officials; this standard’s lack of specificity leaves the possibility that its restrictions of student speech are both too vague and overbroad. These factors—as well as the mandatory suspensions and expulsions, and the possible civil lawsuits against student protestors—raise the specter of a chilling effect on student expression that runs afoul of the Free Speech Clause.

While the Campus Free Speech Act tries to limit the harms of overzealous student speech, some of its provisions represent an overcorrection. There is no question that student protests are a form of speech too under the First Amendment.<sup>320</sup> They should be protected just as much as invited speakers appearing on a college campus. Indeed, more than perhaps anyone else, the campus belongs to the students: they typically live on campus or nearby, they pay tuition and fees to keep the campus in operation, and they learn by exercising their constitutional right of expression, including by protesting.<sup>321</sup> These students also usually have

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<sup>320</sup> See *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 669–70 (1973).

<sup>321</sup> See Shaun R. Harper, Provost Professor of Education and Business, University of South California, Testimony provided to the U.S. House of Representatives Committee on Oversight and Government Reform (May 2018), available at <https://oversight.house.gov/w> (continued)

little exposure to media outlets that permit them to amplify their voices. On the other hand, controversial invited speakers are often accomplished public figures or public officials with some level of notoriety (that is why they are invited to speak),<sup>322</sup> so they likely have multiple available avenues to get their messages to the greater public. This fact does not excuse materially and substantially disrupting a campus speech, but it does place the relative expressive power of most students and most invited speakers in context.

Although student speech rights are certainly discussed within the model legislation,<sup>323</sup> they are understated compared to the other free speech rights that are emphasized for invited speakers.<sup>324</sup> The policy needs more clarity and stress on the free speech rights of students and other protestors. Otherwise, the model legislation risks allowing administrators to target protesting college students as nothing more than petulant children in need

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p-content/uploads/2018/05/Harper-USC-Statement-Free-Speech-II-5-22.pdf [https://perma.cc/4W2H-2Q 6B]. See also *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (which has implications for controversial speakers as they relate to students who live on campus). *Frisby* upheld a ban on picketing in front of residential homes because in the home one may be a “captive” audience to such expression: “The resident is figuratively, and perhaps literally, trapped within the home, and . . . is left with no ready means of avoiding the unwanted speech.” *Id.*

<sup>322</sup> See Richard Abel, *The 5 Most Controversial Campus Speakers of 2017*, WASH. EXAMINER (Dec. 28, 2017), <https://www.washingtonexaminer.com/the-5-most-controversial-campus-speakers-of-2017> [https://perma.cc/TX34-2DFE]; Chelsie Arnold, *6 Conservatives Sparking Free Speech Debates on Campuses*, USA TODAY (Mar. 14, 2017), <http://college.usatoday.com/2017/03/14/6-conservatives-sparking-protests-and-free-speech-debates-on-campus/> [https://perma.cc/777S-WNKZ].

<sup>323</sup> See *Campus Free Speech Act*, *supra* note 14. Section 1(C) (“Students and faculty have the freedom to discuss any problem that presents itself”); Section 1(D) (“Any person lawfully present on campus may protest or demonstrate there”); Section 1(K) (“Individual students, faculty, and staff of the university shall be free to take positions on the public controversies of the day”); Section 1(L) (emphasizing the protection of expression rights for student organizations).

<sup>324</sup> See *Campus Free Speech Act*, *supra* note 14. Section 1(C) (limiting student expression when it “materially and substantially disrupt[s] the functioning of the institution,” which includes lectures by invited speakers); Section 1(D) (limiting student “protests and demonstrations that materially and substantially infringe upon the rights of others to engage in or listen to expressive activity,” including lectures by invited speakers); Section 1(F) (emphasizing the right of speakers to be invited to campuses); Section 1(G) (requiring that universities “shall make all reasonable efforts and make available all reasonable resources to ensure the safety of invited speakers,” and requiring that universities “shall not charge security fees based on the content of the inviter’s speech or the content of the speech of invited speakers”); Section 1(J) (outlining mandatory penalties for students who have infringed on the free speech rights of others, including invited speakers); Section 4 (outlines when universities “shall be allowed to restrict student expression”).

of correction. For an example of a recent free speech policy that puts students and invited speakers on the same footing, the University of North Carolina Board of Governors prohibits disrupting lawful protests in the same way it prohibits protestors from disrupting invited speaker events.<sup>325</sup> If one has an inflammatory message he or she wants to project at a public university—a place designed for a “robust exchange of ideas”<sup>326</sup>—that speaker must be prepared for a proportionate expressive reaction. If students must tolerate a speaker on their campus who has views they find offensive and even hateful, then the speaker in that scenario has to be prepared to encounter opposition in the form of protected expression, as long as that expression does not materially and substantially disrupt the event. That expression might not always be articulate, it might be loud, and it might be offensive in its own right.<sup>327</sup> However, as noted above, the Supreme Court has long held that one function of the freedom of expression is “to invite dispute.”<sup>328</sup> In other words, freedom means people have the right to say things you do not like. This applies just as much to the invited speaker as it does to the protestors.

As it stands, some speakers possess a goal to drum up significant student opposition as a way to portray themselves as victims, raise funds, and attract new members to their causes.<sup>329</sup> In other words, they are not necessarily on campuses primarily to convince students of the validity of their claims and views; they instead want to make a spectacle that draws media attention and portrays college students in a negative light. Such speakers certainly have a First Amendment right to do this. For instance, the Supreme Court found for neo-Nazis in *National Socialist Party v.*

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<sup>325</sup> See Free Speech and Free Expression within the University of North Carolina (Dec. 15, 2017), available at <http://www.northcarolina.edu/apps/policy/index.php?pg=dl&id=19766&format=pdf&inline=1> (“Anyone who substantially interferes with acceptable forms of dissent is also considered in violation of this policy in the same way as a dissenter who violates the rights of the speaker or the audience.”). This language, though, raises vagueness and overbreadth questions by focusing on interfering with others’ free speech rights instead of focusing on whether or not there was disruption of a university function.

<sup>326</sup> See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>327</sup> See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

<sup>328</sup> See *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

<sup>329</sup> See Jane Mayer, *A Conservative Nonprofit that Seeks to Transform College Campuses Faces Allegations of Racial Bias and Illegal Campaign Activity*, THE NEW YORKER (Dec. 21, 2017), <https://www.newyorker.com/news/news-desk/a-conservative-nonprofit-that-seeks-to-transform-college-campuses-faces-allegations-of-racial-bias-and-illegal-campaign-activity> [<https://perma.cc/A5W5-RCF7>]; Andrew Marantz, *How Social-Media Trolls Turned U.C. Berkeley into a Free Speech Circus*, THE NEW YORKER (July 2, 2018), <https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus> [<https://perma.cc/Y4GV-37PP>].

*Skokie*, where a prior restraint on a march in a city populated by a large number of Holocaust survivors was found to be unconstitutional.<sup>330</sup> Likewise, in *Snyder*, the Court upheld the rights of members of the Westboro Baptist Church to protest at military funerals; the protest included the use of inflammatory, anti-gay, anti-Catholic, anti-military, and anti-American messages.<sup>331</sup> In those and other cases, a coordinated strategy may be in place to try to subtly induce violence or other disruptive behaviors without resorting to unprotected speech to do so. As pointed out by Justice Samuel Alito, groups like these engage in expressive activities that are “almost certain to inflict injury,” which is central to a “well-practiced strategy for attracting public attention.”<sup>332</sup> According to Justice Alito, groups like this tend to schedule an event where highly controversial expression is expected to occur, and “their announcement [is] national news.”<sup>333</sup> Such a group can then “obtain free air time . . . in exchange for canceling its protest.”<sup>334</sup> Students who demonstrate against these speakers need to be aware of these tactics. Students should be counseled to remain peaceful and civil. Universities should permit expression by these types of speakers, regardless of the content or the viewpoint expressed. Doing this will honor the First Amendment while not falling into traps meant to falsely denigrate public universities as some sort of enclaves of totalitarianism,<sup>335</sup> or to incorrectly caricature college students as nothing more than a multitude of “snowflakes” who are constantly in need of trigger warnings and safe spaces.<sup>336</sup>

Beyond some minor tweaking of language (*e.g.*: what constitutes a non-public forum space on campus; explicitly protecting both spontaneous *and planned* expression), there are four significant ways that the Campus Free Speech Act can be improved to make it more likely to be ruled

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<sup>330</sup> *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977).

<sup>331</sup> *Snyder*, 562 U.S. at 454 (provides a description of the inflammatory and hateful messages the Court held were protected by the First Amendment in the context of the case).

<sup>332</sup> *Id.* at 466 (Alito, J., dissenting).

<sup>333</sup> *Id.* at 467 (Alito, J., dissenting).

<sup>334</sup> *Id.* at 467–68 (Alito, J., dissenting).

<sup>335</sup> See Mayer, *supra* note 329.

<sup>336</sup> See Chris Quintana, *Colleges Are Creating “A Generation of Sanctimonious, Sensitive, Supercilious Snowflakes,” Sessions Says*, THE CHRON. OF HIGHER EDUC. (July 24, 2018), <https://www.chronicle.com/article/Colleges-Are-Creating-a/243997> [<https://perma.cc/XK9M-KF5Z>]; David Brooks, *Understanding Student Mobbists*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/student-mobs.html?rref=collection%2Fsectioncollection%2Fopinion-columnists> [<https://perma.cc/CM5J-7FDQ>]; Andrew Sullivan, *We All Live on Campus Now*, N.Y. MAG. (Feb. 9, 2018), <http://nymag.com/daily/intelligencer/2018/02/we-all-live-on-campus-now.html> [<https://perma.cc/SB24-KARE>].

constitutional under the Free Speech Clause. First, remove the restrictions on student speech that would materially and substantially infringe on the free speech rights of others. Indeed, the U.S. Supreme Court has eschewed the creation of new restrictions on expression in recent years,<sup>337</sup> and these portions of the Campus Free Speech Act would do just that. As explained above,<sup>338</sup> that standard is rife with difficulties because it is vague and overbroad. It is also redundant when combined with the clearer material and substantial disruption standard, which has been successfully adopted in some states.<sup>339</sup> Thus, the best way to comply with the Constitution in this regard would be to eliminate the material and substantial infringement restrictions altogether.

Second, as much as the material and substantial disruption standard makes sense to use in the classroom, at indoor public lectures, and in a variety of non-public forums, it should *not* be the standard applied to outdoor traditional public forums like campus mall areas. Such areas are better guided by other prohibitions already in the policy and by one standard not discussed in the model legislation: incitement to imminent lawless action. The Court proclaimed in *Brandenburg v. Ohio* that advocacy of imminent lawless action is not protected by the First Amendment.<sup>340</sup> Such advocacy is defined as follows:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>341</sup>

Although a state could attempt to place an additional proscription on fighting words articulated by the Court in *Chaplinsky v. New Hampshire*,<sup>342</sup> the Court has not sustained a fighting words conviction in several

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<sup>337</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (striking down a law restricting expression that was aimed at preventing cruelty to animals); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (striking down a law restricting expression that was aimed at protecting children from access to violent video games); *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down a law restricting expression that was aimed at honoring soldiers).

<sup>338</sup> See *supra* Section III.F.

<sup>339</sup> See University of Wisconsin Regent Policy Document 4-21, *supra* note 120; Free Speech and Free Expression within the University of North Carolina, *supra* note 325.

<sup>340</sup> 395 U.S. 444, 447 (1969).

<sup>341</sup> *Id.* at 447.

<sup>342</sup> See 315 U.S. 568, 571–72 (1942).

decades.<sup>343</sup> Given changes to our discourse and the emergence of other First Amendment doctrines,<sup>344</sup> *Chaplinsky's* fighting words doctrine would be a poor choice to insert into campus free speech policies today.

*Brandenburg's* imminent lawless action standard, however, has remained good law for fifty years; it is clear, and it is narrowly drawn. It would prevent types of action on public university campus malls that campus free speech policies aim to prohibit: conspiring to block the entrance of the campus or the entrance of a building, thus preventing people from entering or exiting at will; leading a riotous mob to cause actual damage to property; etc. In this way, the imminent lawless action doctrine does not have the potential constitutional defects of the material and substantial disruption standard imposed in an outdoor traditional public forum. On the other hand, a prohibition on advocating imminent lawless action added to other prohibitions in the policy—such as bans on defamation, harassment, and true threats—is comprehensive enough to keep order but also narrow enough to protect the free speech rights of all parties who appear in traditional public forums on university campuses. Beyond this, as long as the rest of the Campus Free Speech Act adheres to time, place, and manner restrictions being narrowly tailored, so that they do not allow a university to censor speech “for mere convenience,”<sup>345</sup> the policy does not risk being too vague when applied to campus mall areas.

Third, the policy should avoid the mandatory penalties of lengthy suspension or expulsion, instead opting for shorter, discretionary penalties. This—coupled with eliminating the vaguest portions of the policy’s proscriptions on speech and clarifying that no right of civil action is created against protesting college students—would remove the largest potential chilling effect on student expression. Certainly, sanctions are appropriate for students who have materially and substantially disrupted class or a public lecture.<sup>346</sup> However, mandatory penalties on a second offense are unduly punitive. The model policy should continue to permit a smaller range of penalties for second and greater offenses as it does for first offenses.<sup>347</sup> If a student has been found in violation of a constitutional portion of such a policy, individual circumstances may not warrant lengthy

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<sup>343</sup> See ERWIN CHEMERINSKY & HOWARD GILLMAN, *supra* note 89, at 92 (“[I]n the more than seventy years since [the *Chaplinsky*] decision, the Court has never again upheld a fighting words conviction.”).

<sup>344</sup> Brett A. Sokolow et al., *supra* note 152, at 20.

<sup>345</sup> See McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014).

<sup>346</sup> See, e.g., Healy v. James, 408 U.S. 169, 184 (1972).

<sup>347</sup> See *Campus Free Speech Act*, *supra* note 14, § 1(J).

suspension or expulsion, even for a second or greater offense. The hallmark of justice is taking individual circumstances—including mitigating factors—into account when rendering sentence.<sup>348</sup> This portion of the policy does not do that and instead threatens students with a heavy-handed penalty that may chill their speech.

In addition to shorter, non-mandatory penalties, the policy should require or recommend that universities do what they do best: educate students. The model legislation starts in this direction. In Section 3, it requires that “State institutions of higher education shall include in freshman orientation programs a section describing to all students the policies and regulations regarding free expression consistent with this act.”<sup>349</sup> This is a good first step to guarantee that students are aware of the policy. However, it could do much more in this regard. It could ensure that new and continuing students are educated not just about what the policy is, but also what their rights are under the First Amendment according to the Supreme Court and *why* they have those rights. In the vein of the First Amendment, this could be done in an interactive way that promotes civil discourse, rather than as a one-way presentation of information. It could require or recommend coursework for students on the freedom of expression. It could encourage public universities to invite in speakers from different perspectives to debates and forums. It could require that students who go beyond their protected rights when protesting are provided with additional—not fewer—educational opportunities. Given that college students arrive on campus having experienced high school—where anti-bullying and speech code policies are the norm<sup>350</sup>—they may have less experience learning about or exercising the freedom of expression (although recent survey data suggest that college students are still more supportive of allowing offensive and hate speech on college campuses than adults generally).<sup>351</sup> Given the transition these students

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<sup>348</sup> See generally Karen Lutjen, *Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 389 (1996). See also Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1800 (2016).

<sup>349</sup> *Campus Free Speech Act*, *supra* note 14, § 3.

<sup>350</sup> See ERWIN CHERMERINSKY & HOWARD GILLMAN, *supra* note 89, at 14.

<sup>351</sup> See FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS, KNIGHT FOUNDATION 12–14 (2016), [https://www.knightfoundation.org/media/uploads/publication\\_pdfs/FreeSpeech\\_campus.pdf](https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf) [<https://perma.cc/N68D-GD7A>] (survey found that 78 percent of college students supported an open campus environment that allowed offensive speech, while a comparably lower sixty-six percent of adults supported such a campus environment).

undergo from high school (where fewer free speech rights apply according to *Tinker* and its progeny),<sup>352</sup> it makes great sense for universities to take this education much farther in these ways. If the model legislation took this approach to a greater degree, it would promote free speech and civil discourse more than it currently does. All of these suggestions are certainly constitutional as well, as long as they do not compel students to express ideological messages with which they disagree<sup>353</sup> or unduly infringe upon universities' academic freedom.<sup>354</sup>

Finally, if states want truly to promote the freedom of speech and civil discourse at public universities, they need to reinvest in higher education. In recent decades, many states have significantly cut back on their financial commitments to public universities.<sup>355</sup> Returning to the previous paragraph, increasing the educational opportunities regarding the freedom of expression will take additional funding to pay for materials, programming, and personnel. Further, if universities are to be places where controversial speakers appear to discuss contentious ideas, this demands that a certain law enforcement presence is in place to ensure all persons (including protestors) are able to speak and that everyone present is safe. In some recent cases, protection for events with controversial speakers has resulted in police costs in the hundreds of thousands of dollars. The University of California-Berkeley spent \$800,000 to provide security for a Milo Yiannopoulos speech, and \$600,000 for a Ben Shapiro talk,<sup>356</sup> the University of Florida spent \$600,000 on security for a Richard Spencer speech.<sup>357</sup> If public universities must bear these costs without additional state support, it requires them to do at least one of three things: raise student tuition, engage in additional fundraising, or make cuts to other university functions.<sup>358</sup> If state legislatures are truly committed to the First Amendment rights of all parties, they must recognize that protecting these rights is not free for institutions of higher education.

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<sup>352</sup> See *supra* Section III.E.

<sup>353</sup> See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>354</sup> See *Gutter v. Bollinger*, 539 U.S. 306, 324 (2003).

<sup>355</sup> See Rick Seltzer, *State Funding Cuts Matter*, INSIDE HIGHER ED (Jul. 24, 2017), <https://www.insidehighered.com/news/2017/07/24/new-study-attempts-show-how-much-state-funding-cuts-push-tuition> [<https://perma.cc/U3FX-8SQL>].

<sup>356</sup> Chris Quintana, *What Berkeley's \$800,000 Did—and Didn't—Buy During "Free Speech Week"*, THE CHRON. OF HIGHER EDUC. (Oct. 10, 2017), <https://www.chronicle.com/article/What-Berkeley-s-800000-Did/241419> [<https://perma.cc/29ZX-B8Z4>].

<sup>357</sup> Bauer-Wolf, *supra* note 187.

<sup>358</sup> See Rick Seltzer, *supra* note 355.

The freedom of speech is undoubtedly worth both protecting and promoting. It is important, certainly, because it is an enumerated constitutional right. But it is also vital for a variety of other reasons, including ensuring that we have a full democratic system of government, that we fulfill our own sense of purpose, and that we are able to continue the eternal search for truth.<sup>359</sup> These are all values that are part of a university education. The Campus Free Speech Act 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 most of these provisions, but leaving out or modifying the portions identified here, will be the best way for states to achieve what the freedom of speech requires for speakers, listeners, and protestors. Indeed, a greater emphasis on the rights of protesting students is warranted to avoid what Justice Robert Jackson warned in *Barnette*. He cautioned that educational institutions have

important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>360</sup>

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.

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<sup>359</sup> See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503–04 (1984).

<sup>360</sup> *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).