

NOTES

THE FAILURE TO PROTECT FREE SPEECH IN HIGHER EDUCATION: A NONPARTISAN RIGHT WITH BIPARTISAN CONSEQUENCES

ALYCE HAMMER*

I. INTRODUCTION

Free speech has been a cornerstone of American democracy—and a subject of great debate—since before the thirteen colonies even declared independence. In fact, the journey toward free speech in the United States began forty years before the commencement of the Revolutionary War with the case known as *Crown v. John Peter Zenger*.¹ Zenger, an American printer and journalist, truthfully criticized a colonial governor in the well-known *New York Weekly Journal*. Consequentially, Zenger was sued for seditious libel, leading to his imprisonment.² In English common law, speaking the truth was not a defense to libel; despite this, Zenger’s attorney was able to persuade the jury with this argument, thereby securing Zenger’s release. One of the delegates at the Constitutional Convention of 1787 described the groundbreaking *Zenger* decision as “the germ of American freedom, the morning star of that liberty which subsequently revolutionized America.”³ *Zenger* gave the colonists their first taste of free speech and democracy; once they had such freedom within their grasp, there was no going back.

In light of this, when the United States was finally independent from the British Empire in 1783, its founders sought to create a nation rooted in freedom, liberty, and democracy.⁴ Therefore, a group of revolutionaries came together to draft a constitution with the hopes of codifying these democratic concepts into law. Despite this, many Americans were still not content with the protections provided by the new nation’s constitution, believing the Framers

* J.D. Candidate, Notre Dame Law School, Class of 2024. Thank you to Professor Roger Alford for planting the seed to write this Note and for helping my ideas to grow and flourish these past several months. I would also like to thank my peers on the Journal of Law, Ethics and Public Policy for their support and for giving me a platform to share my voice with the legal field.

1. John R. Vile, *John Peter Zenger*, MIDDLE TENN. ST. UNIV.: FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1235/john-peter-zenger>.

2. *Id.*

3. *Id.*

4. U.S. CONST. pmbl.

failed to safeguard a concept vital to democracy’s survival: the people’s rights.⁵ “Ought not a government,” mused one of the famous Anti-Federalist papers, “vested with such extensive and indefinite authority to have been restricted by a declaration of rights?”⁶

From this concern arose the Bill of Rights, which included the right to freedom of speech and expression.⁷ However, this addition to the U.S. Constitution was not enough to settle the debate over the right to free speech; since the dawn of the nation three-hundred years ago, the right to free speech has found itself embroiled in numerous controversies.⁸ From *Rosen v. United States* in 1896 to *303 Creative LLC v. Elenis* in 2023, the role and nature of freedom of speech in the United States has remained unsettled for centuries.⁹ Lingering questions exist regarding free speech: what type of speech should be protected, and what type should be censored? When does protected speech cross the line into prohibited hate speech? What institutions and positions are required to abide by the First Amendment’s protection of free speech? These types of inquiries have puzzled the nation, leading to numerous legislative and judicial decisions trying to clarify the meaning and importance of the right to free speech.¹⁰

Although the dispute over free speech has existed in the United States for generations, the heart of this debate now finds itself on a different battleground: the classroom. From grade school to higher education, the entirety of the American education system has fallen under heavy scrutiny over what should—and should not—be said by students and to students. The 2020s have seen no shortage of controversial legislative and policy decisions regarding the role of free speech in education. In the past several years, various famous (or

5. James H. Read, *James Madison*, MIDDLE TENN. ST. UNIV.: FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1220/james-madison>.

6. *Brutus II Letter (Nov. 1, 1787)*, TEACHING AM. HIST. (last visited Jan. 13, 2023), <https://teachingamericanhistory.org/document/brutus-ii/>. To protest the U.S. Constitution and the actions taken by Federalists, Anti-Federalists published a series of essays for the public to read. At times, these letters were published using the pseudonym “Brutus.”

7. See *Bill of Rights*, CENTER FOR LEGIS. ARCHIVES (last visited Jan. 12, 2023), <https://www.archives.gov/legislative/features/bor>; see also U.S. CONST. amend. I–X.

8. U.S. CONST. amend. I.

9. See *Rosen v. United States*, 161 U.S. 29 (1896) (deciding that convicting Rosen for sending lewd and obscene material through the United States Postal Service did not violate his First Amendment right). See also *303 Creative LLC v. Elenis*, No. 21–476 (U.S. filed Sept. 28, 2021) (questioning whether Colorado’s law prohibiting public businesses from discriminating against LGBTQ+ individuals violates the Free Speech Clause of the First Amendment). *Elenis* was heard by the Supreme Court in 2022 and will be decided in 2023. *Id.*

10. The Supreme Court of the United States has ruled on over a dozen cases dealing specifically with freedom of speech since the start of this decade. *All Cases*, MIDDLE TENN. ST. UNIV.: FIRST AMENDMENT ENCYCLOPEDIA (last updated Jun. 2022), <https://www.mtsu.edu/first-amendment/encyclopedia/case-all/newest>. The upcoming 2022–23 Supreme Court docket will also discuss the issue of free speech, as mentioned in the above footnote. Robert Barnes & Ann E. Marimow, *FAQ: What Cases are Before the Supreme Court This Term?*, WASH. POST (Oct. 4, 2022, 3:05 PM), <https://www.washingtonpost.com/politics/2022/10/01/supreme-court-cases-decisions-2022-2023/>.

perhaps, infamous) bills and cases regarding academic freedom have been passed and decided, such as the “Parental Rights in Education” bill regarding what cannot be taught to elementary school students in Florida,¹¹ *Mahanoy Area School District v. B.L.* regarding what high school students are permitted to say off campus,¹² and *Kennedy v. Bremerton School District* regarding whether a public school football coach can pray on the field after a game.¹³

Colleges and universities are far from exempt from the multitude of free speech debates and controversies happening today. In the twenty-first century, hundreds of incidents have been reported at universities both public and private, large and small, secular and religious. As stories about free speech in higher education light up national headlines, students, faculty, and staff are left to wonder what should and should not be voiced in post-secondary settings. By way of these heated incidents, policies, and discussions, universities are trending in the alarming direction of strictly monitoring speech by limiting what, how, and where words can be relayed. Every year, the Foundation for Individual Rights and Expression (“FIRE”)—a nonpartisan, nonprofit organization dedicated to promoting free speech and free thought—releases a report assessing and categorizing universities’ speech codes.¹⁴ FIRE awards colleges and universities either a “green light” rating (the school has no policies endangering free speech), a “yellow light” rating (the school has at least one restriction of a narrowed range of expression), or a “red light” rating (the school has at least one severely restrictive speech policy).¹⁵ In 2022, after surveying 481 higher education institutions, FIRE found that 73% of these public universities fall under the “yellow light” category and 41.1% of private universities fall under the “red light” category, meaning that a majority of post-secondary schools have policies that are concerningly restrictive in nature.¹⁶ Based on this data alone, it is apparent that an alarming number of higher

11. Parental Rights in Education, H.R. 1557, 2022 Leg., (Fla. 2022). This piece of Florida legislation is infamously known as the “Don’t Say Gay” bill. See Casey R. Johnson, *2022 Brings A Flood of Anti-LGBT Legislation Across the Country*, 64 ORANGE CO. L. 28, 29–30 (June 2022).

12. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021). *Mahanoy Area School District* is a Supreme Court case regarding a high schooler posting an expletive Snapchat photo about not making the varsity cheerleading squad. This Snapchat was uploaded off campus. She was suspended from school as punishment. The Court held that this violated her First Amendment right to free speech, stating that schools are allowed to have an interest in what their students post when not on school grounds. However, the Court left it to future litigation to determine when such interest can lead to permissible regulation of student speech. *Id.*

13. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

14. *Just Released: The 2022–2023 College Free Speech Rankings*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Sept. 7, 2022), <https://www.thefire.org/just-released-the-2022-2023-college-free-speech-rankings/>.

15. FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, SPOTLIGHT ON SPEECH CODES 2022: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES 4, 7–8 (2022).

16. *Id.* It is important for the purpose of this Note to discuss that public universities are held to a legally higher standard than private universities regarding free speech. This difference in how free speech is treated is explained in Part III of this Note.

education institutions are failing to protect the free speech and expression of their students, professors, faculty, and more.

The centuries-old free speech debate is causing modern-day problems in the American higher education sphere. But why should Americans outside of the educational sphere care that free speech is being threatened in such settings? As explained by Darrell West, Vice President of the Brookings Institute, freedom of speech, specifically at colleges and universities, is intrinsically tied to and necessary for the health of our democratic system:

[O]ne of the overlooked ingredients of democracy is a vibrant civil society with a knowledge sector that is free of political interference and the ability to train students in independent analysis and critical thinking Democratic systems require the free flow of information, mechanisms to hold leaders accountable, and healthy civil discourse. Many of these features are under attack right now in the knowledge sector, with ominous consequences for universities¹⁷

The privilege young people in higher education have to freely shape and express their opinions is vital to the health of the American democratic system. Yet, colleges, universities, and the government are not providing the safeguards or support needed to protect this right. This Note will discuss several of the free speech incidents occurring at all types of higher education institutions, how schools and the government are failing to create solutions, and why parties from both sides of the political aisle should be concerned about the legacy that is being created. In Part II of this Note, I will examine how free speech has been treated in the world of higher education in the past several decades, and how history has led Americans to not protect free speech in these spaces. In Part III, I will analyze the restrictive speech policies and concerning speech incidents which have recently transpired at universities of all types, and how these thereby weaken the foothold of free speech and democracy. In Part IV, I will delve into the concerning rise of governmental controls and policy over free speech in higher education, and how political and personal agendas are causing a backslide. Finally, in Part V, this Note will look to what progress is being made to protect free speech in the post-secondary sphere, and how much more Americans must do in order to safeguard student speech and preserve American democracy.

Altogether, this Note will hopefully alert those of the growing need to protect free speech at colleges and universities as it affects not only those affiliated with such institutions, but the greater system of American democracy.

17. Darrell M. West, *Why Academic Freedom Challenges are Dangerous for Democracy*, BROOKINGS INST. (Sept. 8, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/08/why-academic-freedom-challenges-are-dangerous-for-democracy/>. See also *Free Speech on College and University Campuses*, FIRST AMEND. WATCH (2021), <https://firstamendmentwatch.org/deep-dive/classes-are-over-but-the-campus-free-speech-debate-still-rages/> (quoting Greg Lukianoff, the president of FIRE: “Colleges have promulgated speech codes that are . . . detrimental to the ideals of free inquiry. Students can’t learn how to navigate democracy and engage with their fellow citizens if they are forced to think twice before they speak their mind.”).

Free speech has been heralded as a necessary cornerstone of freedom and democracy since the United States of America was founded. Therefore, it is in the interest of Americans on both sides of the political aisle and from all backgrounds to protect free speech wherever it is being threatened, especially when that threat is directed towards the youth charged with shaping America's future.

II. LOOKING BACK: THE HISTORY OF FREE SPEECH IN HIGHER EDUCATION

While free speech has been a concept which has worried Americans since the nation got its start, specific concerns over free speech in regard to American colleges and universities came into focus during the age of McCarthyism.¹⁸ McCarthyism, emerging in the late 1940s after World War II ended, was a time in the U.S. marred with fear, paranoia, and anxiety as threats of Communism and the Cold War loomed overhead.¹⁹ Named after one of the movement's leading voices, McCarthyism was the suspicion that Communist influence was going to overtake American democracy.²⁰ As this fear swept the United States, an author named William F. Buckley capitalized on it by publishing a book called *God and Man at Yale: The Superstitions of 'Academic Freedom.'*²¹ In this text, Buckley states that "academic freedom" is a Communist influence, and that Yale alumni should control the university's education policy. In particular, Buckley wanted to rid the school of any professor who expressed views that were neither Christian nor capitalist.²² Buckley was not the only one; across the country, there were calls to remove college professors who said or did anything which could be tied to Communist ideology.²³ In essence, Americans were so bent on safeguarding American democracy from external influence that they

18. John K. Wilson, *Conservatives Have Turned Against Academic Freedom Again. Here's Why.*, WASH. POST (Sept. 26, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/09/26/conservatives-repress-free-speech-campus/>.

19. See Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1400 (2005).

20. *McCarthyism and the Red Scare*, UNIV. OF VA. MILLER CTR. (last visited Jan. 12, 2023), <https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mcarthyism-red-scare>.

21. Wilson, *supra* note 18. In addition, one author writes that "[Buckley's book] represented nothing less than a total attack on academic freedom, for Buckley recommended that alumni withhold financial support from the institution for the faculty's promotion of values and beliefs" John J. Laukaitis, *The Academy on the Firing Line: William F. Buckley, Jr.'s God and Man at Yale and the Modern Conservative Critique of Higher Education*, 40 AM. EDUC. HIST. J. 129, 130 (2013).

22. McGeorge Bundy, *The Attack on Yale*, THE ATLANTIC (Nov. 1951), <https://www.theatlantic.com/magazine/archive/1951/11/the-attack-on-yale/306724/>; see also Wilson, *supra* note 18.

23. In his opening statement for the Senate hearing on free speech in higher education, Senator Lamar Alexander recounted that when he "was a student in the 1960s at Vanderbilt University, the John Birch Society wanted D. F. Fleming, my political science professor, fired. They said he was a communist because he thought World War I was a mistake." *Examining Free Speech on College Campuses: Hearing before the Committee on Health, Education, Labor, and Pensions*, S. Hrg. 115-660 (2017) (Opening Statement of Senator Alexander).

were willing to sacrifice democratic values like freedom of speech. By way of Buckley's McCarthyistic book and similar perspectives, the American people began to pay more attention to what was being taught and said in schools as they feared undue—and Communist—influence on the education system.

In the 1960s, the concern over “academic freedom” continued on as Americans feared college students’ growing cries surrounding politics, civil rights, and the Vietnam War.²⁴ In response to limitations on “academic freedom,” students began to fight back in favor of free speech by staging protests on their college campuses. As explained by CNN, “[c]olleges and universities have long been hubs of free speech—and hotbeds of protest,” of which the protests of the 1960s and 1970s are prime examples.²⁵ Perhaps the most famous free speech student protests occurred at the University of California at Berkeley.²⁶ Berkeley students started up the “Free Speech Movement,” seeking to challenge and overturn the university’s strict speech policies.²⁷ In particular, the school had several alarming policies, which had been adopted during the age of McCarthyism, such as banning the organization of political student groups and prohibiting student discussions regarding politics on campus.²⁸ Ronald Reagan, who was the Republican candidate for California Governor at the time, made free speech matters worse during this time period by helping to incite anger towards “academic freedom” as a way to garner support from Republican voters.²⁹ During his election campaign, Reagan heavily chastised the free speech protests occurring at Berkeley’s campus.³⁰ “It

24. See Max Bloom, *The Nature of Power: Why Free Speech is Non-Partisan*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Jul. 22, 2015), <https://www.thefire.org/the-nature-of-power-why-free-speech-is-non-partisan/>.

25. *A History of Free Speech on Campus*, CNN (Apr. 18, 2017, 8:58 PM), <https://edition.cnn.com/2017/04/18/us/gallery/college-campus-protests/index.html>. See also William Harris, *From Berkeley to Haverford: Have We Forgotten the Progressive History of Free Speech on College Campuses?*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Jun. 17, 2022), <https://www.thefire.org/news/berkeley-haverford-have-we-forgotten-progressive-history-free-speech-college-campuses>.

26. University of California at Berkeley is credited as being the “birthplace” of free speech on college campuses. *Free Speech on College and University Campuses*, *supra* note 17.

27. Karen Aichinger, *Berkeley Free Speech Movement*, MIDDLE TENN. ST. UNIV.: FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1042/berkeley-free-speech-movement>; *A History of Free Speech on Campus*, *supra* note 25. The student protests at Berkeley were so influential that the movement spread to other colleges and universities across the country. *Id.*

28. Aichinger, *supra* note 27.

29. See Tyler Holmes, *On-Campus Protests: Free Speech, Discrimination, History, and Power*, ABA, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/higher-education-law/on-campus-protests-free-speech-discrimination-history-and-power/ (last visited Jan. 12, 2023) (quoting Ronald Reagan: “Will we allow a great university to be brought to its knees by a noisy dissident minority? Will we meet their neurotic vulgarities with vacillation and weakness?”).

30. Ronald Reagan, *Denouncing the Morality Gap at Berkeley, 1966*, W. VALLEY COLL. (May 1966), http://instruct.westvalley.edu/kelly/History20_on_campus/Online%20Readings/reagan.htm. The California election of 1966 had Ronald Reagan, a first-time politician and actor, face off against

began [with] so-called ‘free-speech advocates,’” fired Reagan, “[i]t continued through the filthy speech movement ... and all this has been allowed to go on in the name of academic freedom.”³¹ The crowds took favorably to this critique of academic free speech, which helped carry Reagan to victory later on in the year.³² Reagan later admitted that “his tirades against student unrest consistently drew applause, and ... he took a strong position on the issue primarily because he felt the voters demanded it.”³³ Despite the public’s response in favor of limiting campus free speech, students did not give up fighting for the right to free speech; the University of California at Berkeley eventually relented and allowed its students to perform political advocacy at a “free speech zone” on campus.³⁴

For several more years, university leaders and conservative voters worked to set limits on academic speech, while students and liberal voters loudly spoke in favor of striking down restrictive speech codes.³⁵ Then, as the nation entered into the 1980s and 1990s, this dialogue transformed, causing the pendulum to swing in the other direction.³⁶ Instead of the right arguing that left-leaning speech was disrupting campus life and students’ ability to learn, conservatives began arguing that liberals were censoring right-leaning speech in higher education.³⁷ In addition, students’ attitudes toward free speech turned fearful as “political correctness,” “hate speech,” and racial tensions entered the national conversation.³⁸ The 1980s and 1990s saw a surge of free speech zones being implemented on college campuses which—dangerously and perhaps unconstitutionally—limit free speech to small, controlled areas of campus.³⁹ In the early 1990s, the number of university codes restricting “hate speech”

gubernatorial Democratic candidate Pat Brown. Pat Brown’s popularity began waning after he publicly supported Berkeley student’s “Free Speech Movement.” As a result, Brown lost the election to Reagan at a margin of 57.5% to 42.3%. See Totton J. Anderson & Eugene C. Lee, *The 1966 Election in California*, 20 W. POL. Q. 535, 536 (1967).

31. Reagan, *supra* note 30; Anderson & Lee, *supra* note 30, at 543.

32. Anderson & Lee, *supra* note 30, at 543.

33. ELLEN SCHRECKER, *THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON AMERICAN FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY* 93 (2010).

34. Holmes, *supra* note 29. Free speech zones are “areas on college campuses ... specifically designated for protesters and demonstrators to exercise their right to freedom of speech.” Emilie Kraft, *Free Speech Zones*, MIDDLE TENN. ST. UNIV.: FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/960/free-speech-zones>. Organizations, such as FIRE and the ACLU, fight against the establishment of free speech zones, arguing that their existence on college campuses is unconstitutional as it relegates free speech only to a small area, lawn, pavilion, etc. on the property. *Id.* Free speech zones will be discussed again in Part V of this Note.

35. Wilson, *supra* note 18.

36. *Examining Free Speech on College Campuses: Hearing before the Committee on Health, Education, Labor, and Pensions*, S. Hrg. 115–660 (2017) (Opening Statement of Senator Alexander).

37. *Id.*

38. Peter Beinart, *Political Correctness Is Back*, THE ATLANTIC (Oct. 31, 2014), <https://www.theatlantic.com/politics/archive/2014/10/the-campus-free-speech-debates-of-the-1990s-are-back-unfortunately/382173/>.

39. Kraft, *supra* note 34.

jumped from just seventy-five policies to over three hundred policies.⁴⁰ Instead of looking to get rid of policies limiting speech, liberals, and the students themselves, began leading the movement for restricting academic freedom on college campuses. When interviewed by *The New York Times* about free speech in higher education, Canetta Ivy, a student government leader at Stanford University, said:

We don't put as many restrictions on freedom of speech as we should.... What we are proposing is not completely in line with the First Amendment ... I'm not sure it should be. We at Stanford are trying to set a standard different from what society at large is trying to accomplish.⁴¹

The end of the twentieth century set the tone for the twenty-first century's attitude toward free speech in higher education: instead of dealing with the underlying problems fueling hateful speech, universities and their students chose to repress it instead.⁴² By way of this, the free speech movement appears to be backsliding as there is a "growing intolerance for the exchange of ideas at American colleges and universities."⁴³ Whereas students in the 1960s and 1970s fought heavily for the right to express their opinions, students of the twenty-first century are in favor of waiving that right; in 2016, a Gallup poll found that sixty-nine percent of students were for limiting campus free speech if that speech upset students or was perceived as hateful by some students.⁴⁴ As stated by journalist Thom Nickels, such a mindset against protecting free speech "would have been inconceivable to students in the 1960s and 1970s."⁴⁵

Unfortunately, the permissibility of free speech in higher education has been subjected to a tumultuous history. For the last several decades, conservatives and liberals have argued back and forth that each group was limiting the other's speech in the education sphere. In addition, the right to free speech at colleges and universities has been steadily plagued with both political and personal agendas. While the 1960s and 1970s offered a glimmer of hope for free speech and academic freedom, the past forty years have shown a steady—and rather concerning—decline in the protection of free speech. This turbulent history sets the stage for a modern discussion on free speech in higher education, and helps to shed light on why voters, students, government leaders, and university administrators need to set aside the past and come together to safeguard free speech in these environments once and for all.

40. Beinart, *supra* note 38.

41. Felicity Barringer, *Campus Battle Pits Freedom of Speech Against Racial Slurs*, N.Y. TIMES (Apr. 25, 1989), <https://www.nytimes.com/1989/04/25/us/campus-battle-pits-freedom-of-speech-against-racial-slurs.html>.

42. *Id.*

43. Elliott C. McLaughlin, *War on Campus*, CNN, <https://edition.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html> (May 1, 2017, 12:04 PM).

44. Thom Nickels, *Free Speech on Campus, Then and Now*, PHILA. MAG. (May 4, 2017, 2:49 PM), <https://www.phillymag.com/news/2017/05/04/campus-free-speech-1960s/>.

45. *Id.*

III. Public and Private Universities' Failure to Safeguard Free Speech

A. Understanding Free Speech in Public Versus Private Schools

Before continuing with how free speech is being threatened in higher education in recent news, it is important to discuss the different expectations that must be met by public and private universities.

In the realm of free speech, public universities are held to a legally higher standard than private universities. Public school officials are considered state actors and accept government funding for their educational institutions. Therefore, “state colleges and universities are not enclaves immune from the sweep of the First Amendment” and are afforded all the constitutionally granted rights related to freedom of expression.⁴⁶ However, schools are allowed some leeway in regulating speech that substantially disrupts the classroom or is deemed especially lewd.⁴⁷ In addition, they may implement “time, place, and manner restrictions” regarding when, where, and how exactly one’s free speech may be expressed.⁴⁸ Otherwise, all are entitled to the right to freedom of speech as granted in the Bill of Rights; public universities are not even allowed to discriminate against speakers on the basis of their ideology.⁴⁹

Private schools, however, are not affiliated with the state or federal government and are not held to the same First Amendment standard.⁵⁰ Therefore, these schools can create and enforce stricter limitations on free speech without consequence.⁵¹ This means that private universities are allowed to draft policy that prioritizes other values over the right to freedom of speech if they so choose. For example, a religious university could choose to censor speech that would harm or offend the beliefs attached to the school’s official religion. While such an action would otherwise be unconstitutional under the First Amendment, private colleges are not constrained in this manner and can punish these forms of speech.⁵² However, states reserve the right to statutorily

46. See *Healy v. James*, 408 U.S. 169, 180 (1972) (discussing the role of the First Amendment on a public college campus).

47. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509–14 (1969) (prohibiting students from wearing black armbands is unconstitutional barring a showing of substantial disruption and material interference).

48. *The Basics*, PEN AM.: CAMPUS FREE SPEECH GUIDE, <https://campusfreespeechguide.pen.org/the-law/the-basics/> (last visited May 1, 2023).

49. *Free Speech on College and University Campuses*, *supra* note 17.

50. *The Basics*, *supra* note 48.

51. One caveat to this principle is that private schools given federal funding must comply with federal anti-discrimination laws. *Id.*

52. FIRE gives private universities who clearly prioritize another set of values over the right to free speech a “Warning” rating. SPOTLIGHT ON SPEECH CODES 2022: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES, *supra* note 15, at 4. FIRE’s 2022 Spotlight of Speech Codes gives seven private universities this ranking: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, the United States Military Academy, the United States Naval Academy, and Yeshiva University. *Id.*

change this; in California, the state passed a law stating that both public and private universities must adhere to the First Amendment.⁵³

Therefore, public universities and private universities are evaluated in different lights when it comes to incidents involving free speech; what constitutes a free speech violation at a public university may not legally amount to a violation at a private university. For this reason, FIRE views “yellow light” ratings as a major cause for concern at public universities and “red light” ratings as a major cause for concern at private universities.⁵⁴ Rating levels aside, in FIRE’s 2022 study on speech codes, dozens of both public and private universities affiliated with numerous different regions, religions, and political beliefs were found to be operating in a way that wrongfully limits free speech.⁵⁵ Despite varying thresholds, limitations on free speech continue to be a problem at both types of institutions.

The following subsections will discuss an increasing selection of recent free speech incidents that have occurred on both public and private university campuses.⁵⁶ These incidents come from public and private schools across the nation that are both small and large, religious and secular, and liberal and conservative. Altogether, these serve to demonstrate that the attacks on free speech in higher education cover numerous topics, affect liberals and conservatives, and have consequences that weaken American democracy as a whole.

B. Public Colleges and Universities

Despite having to adhere to the standards set by the First Amendment, public colleges and universities still fall short in providing students, faculty, and staff equal and unburdened access to free speech. In fact, the twenty-first century has seen a rise of restrictive speech codes as state schools have increasingly become governed by bureaucrats with homogenous political goals—whether those be right-leaning or left-leaning in nature—which supersede schools’ interest in protecting free speech.⁵⁷

Several incidents have transpired at public universities in recent years which highlight how free speech is losing its foothold in higher education. When a University of California at Berkeley organization invited Ann Coulter—a controversial, conservative media personality—to speak on campus grounds in 2019, the school feared what consequences would arise. In fact, the

53. *The Basics*, *supra* note 48.

54. See SPOTLIGHT ON SPEECH CODES 2022: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES, *supra* note 15, at 4. According to FIRE, a “yellow light” rating for a public university amounts to a violation of the First Amendment, thereby making that university’s speech code unconstitutional. *Id.*

55. *Id.* at 2.

56. See Wilson, *supra* note 18; see also *Free Speech and Academic Freedom*, COLUM. L. SCH. (Mar. 7, 2016), <https://www.law.columbia.edu/news/archive/free-speech-and-academic-freedom>.

57. Nina Burleigh, *Is Campus Free Speech Really Dead?*, NEW REPUBLIC (Jan. 10, 2023), <https://newrepublic.com/article/169618/campus-free-speech-really-dead>.

university wanted to reschedule Ann Coulter’s talk to when fewer students would be present on campus, fearing any backlash which would occur.⁵⁸ On the day of the event, over a thousand university students joined together to prevent people from entering the event space. The demonstration turned aggressive; protestors hurled phrases such as “[g]o home Nazis!” at eventgoers and were yelling at Coulter anytime she attempted to speak inside the event space.⁵⁹ This demonstration against the conservative speaker led to several student arrests, police arriving in riot gear, and at least one injury.⁶⁰ Ann Coulter later tweeted about the disrupted event, stating that “[i]t’s sickening when a radical thuggish institution like Berkeley can so easily snuff out the cherished American right to free speech.”⁶¹ Overall, this incident highlights how much universities fear their own free speech policies, and are willing to bend them to avoid conflict.

In 2021, another free speech incident occurred on the other side of the United States at the University of Florida. Chris Busey, an associate professor at the institution, had proposed offering a concentration labelled “Critical Study of Race, Ethnicity, and Culture in Education” at Florida’s College of Education.⁶² The school saw this specialization as a reference to the phrase “critical race theory” and wanted the proposal to be rejected;⁶³ Busey alleged that he was “threatened with discipline” if he used the phrase in his curriculum.⁶⁴ Specifically, the reason for such request was “fear on the part of top UF administrators that the words ‘critical’ and ‘race’ in proximity might offend the Florida Legislature.”⁶⁵ “University leaders expressed that the College of Education was viewed favorably by the state,” stated a Gainesville news source, “and they wanted to avoid anything that would jeopardize the relationship with the state.”⁶⁶ Eventually, the university relented and allowed

58. *Exploring Free Speech on College Campuses: Hearing of the Comm. on Health, Educ., Lab., & Pensions*, 115th Cong. 3 (2017) (opening statement of Sen. Alexander, Chairman, S. Comm. on Health, Educ., Lab., & Pensions).

59. Lois Beckett, *Arrests Made After More Than a Thousand Protest Ann Coulter Speech*, *GUARDIAN* (Nov. 21, 2019, 9:15 AM), <https://www.theguardian.com/us-news/2019/nov/21/ann-coulter-berkeley-protesters-arrests>.

60. Matthew Green et al., *Controversial Ann Coulter Speech at UC Berkeley Draws Protestors, Six Arrested*, *KQED* (Nov. 20, 2019), <https://www.kqed.org/news/11787618/uc-berkeley-braces-for-tonights-controversial-ann-coulter-speaking-event>.

61. *Id.*

62. Erin Brady, *Univ. of Florida Accused of Renaming ‘Critical Race’ Study Over Fear of Offending Lawmakers*, *NEWSWEEK* (Dec. 2, 2021, 5:23 PM), <https://www.newsweek.com/univ-florida-accused-renaming-critical-race-study-over-fear-offending-lawmakers-1655565>.

63. Divya Kumar, *At UF, Someone Used ‘Critical’ and ‘Race’ in a Sentence. Trouble Ensued.*, *TAMPA BAY TIMES*, <https://www.tampabay.com/news/education/2021/11/30/at-uf-someone-used-critical-and-race-in-a-sentence-trouble-ensued/> (Dec. 1, 2021).

64. *Id.*

65. *Id.*

66. WCJB Staff, *University of Florida Professor Files Academic Freedom Grievance After Critical Race Curriculum was Barred*, *WCJB* (Dec. 2, 2021, 12:21 AM),

Busey to use the words “critical” and “race” to describe the specialization he teaches.⁶⁷ However, damage was already done, as the university showed it was willing to sacrifice free speech in favor of pursuing political agendas.

A final glimpse into the censorship of free speech at public universities can be seen through the recent trend of prohibiting the use of the social media app TikTok on university devices and wireless networks. Citing security concerns, dozens of public universities such as the University of Texas, Auburn University, and the University of Oklahoma have taken measures to ban one of students’ most popular forms of communication.⁶⁸ Meanwhile, students are worried that these prohibitive measures will limit their ability to share and spread information with others on campus and across the globe; if public universities are willing to ban TikTok, what other forms of campus communication could be banned next? A spokesperson for the social media platform said the following about the ongoing situation: “We’re especially sorry to see the unintended consequences of these rushed policies beginning to impact universities’ ability to share information, recruit students and build communities around athletic teams, student groups, campus publications and more.”⁶⁹ As the situation develops, one thing is clear: that public universities are not prioritizing the right to free speech on their campuses.

Altogether, these situations display the willingness of universities and their students to discard the right to free speech in favor of avoiding contested situations, potentially offense verbiage, and potentially harmful situations. However, the consequences of discarding free speech at such schools are great because they extend beyond campus grounds; when this right is diminished in higher education, the values underpinning American democracy are diminished as well.

C. Private Colleges and Universities

Private colleges and universities also have their share of incidents and policies which have weakened the hold free speech has in higher education settings. Although this type of institution has more leniency when it comes to free speech, universities are still acting in direct violation of this right. East or west coast, religious or secular, left-leaning or right-leaning: private universities of all kinds are jeopardizing freedom of speech and thereby harming American democracy as a whole.

<https://www.wcjb.com/2021/12/02/university-florida-professor-files-academic-freedom-grievance-after-critical-race-curriculum-was-barred/>.

67. Christopher Busey, UNIV. OF FLA. COLL. OF EDUC., <https://education.ufl.edu/faculty/busey-christopher/> (last visited Jan. 12, 2023).

68. N’dea Yancey-Bragg, *Why Are Universities Banning TikTok? Campuses Are Limiting Use on School Devices and Wi-Fi*, USA TODAY (Jan. 19, 2023, 2:46 PM), <https://www.usatoday.com/story/news/education/2023/01/19/college-campuses-ban-tiktok/11067304002/>. Two-thirds of American teenagers are TikTok users according to Pew Research Center. Sapna Maheshwari, *Auburn Banned TikTok, and Students Can’t Stop Talking About It*, N.Y. TIMES, <https://www.nytimes.com/2023/01/15/business/auburn-tiktok-ban-students.html> (last updated Jan. 21, 2023).

69. Maheshwari, *supra* note 68.

In 2016, the University of Chicago sent a letter to incoming freshmen welcoming them to the institution and explaining the foundational principles of the university.⁷⁰ John Ellison, the school's dean of students, chose to address free speech in his letter by asserting:

Our commitment to academic freedom means that we do not support so-called trigger warnings, we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual “safe spaces” where individuals can retreat from ideas and perspectives at odds with their own.⁷¹

Ellison's letter was met with fierce backlash, with 152 University of Chicago faculty members signing a public letter criticizing the dean's statement on academic freedom.⁷² Those against Ellison's statement believed his commitment to academic freedom was too harsh and that some parameters should be set. Professor Geoffrey R. Stone, a University of Chicago law professor, verbalized his concern over the backlash by stating that the dean's letter was not “in any way radical or different It is clear that some colleges are retreating from the same free speech values . . . but my guess, if you asked most of these institutions [ten] or [twenty] years ago, they would have said more or less what we said in our statement.”⁷³ Although the dean stood by his statement, the notion of numerous faculty and students fighting against a once commonplace academic freedom statement demonstrates how much the free speech movement in higher education has backslid in recent decades.

In March of 2022, Yale Law School found itself the subject of a free speech controversy in the aftermath of a contested panel discussion on civil liberties. Kristen Waggoner, representing the right-leaning Alliance Defending Freedom, had been invited by an on-campus organization to speak at a panel on free speech alongside a left-leaning panelist. Waggoner's upcoming speaking engagement garnered attention by Yale law students, many who did not agree with her views.⁷⁴ Therefore, when introduced to the audience at the commencement of the panel, Waggoner was immediately greeted by a group of hecklers. Waggoner was prevented from speaking as students were reportedly shouting obscenities at her and giving her the middle finger.⁷⁵ After being scolded by a professor moderating the debate, the heckling students left, but allegedly lingered outside the room, yelling in the hallway and pounding their fists on the exterior walls of the space.⁷⁶ *Yale Daily News* rehashed the incident, stating that these students were “muffling, if not all but drowning out, the sounds

70. ERWIN CHEREMINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 7–8 (2017).

71. Richard Pérez-Peña et al., *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. TIMES (Aug. 26, 2016), <https://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html>.

72. CHEREMINSKY, *supra* note 70, at 8.

73. Pérez-Peña, *supra* note 71.

74. Marc A. Thiessen, *Free Speech Gets Tossed at Yale Law School*, WASH. POST (Mar. 24, 2022, 5:01 PM), <https://www.washingtonpost.com/opinions/2022/03/24/yale-law-school-silberman-protest/>.

75. *Id.*

76. *Id.*

of the speakers. At times, . . . the speakers ceased talking or listening due to the disruption.⁷⁷ While Waggoner and her fellow left-leaning panelist agree that this disruption amounted to a violation of free speech, Yale University held that the incident, while inappropriate, did not violate the school's speech code.⁷⁸ This event proves concerning for how free speech is treated at private colleges and universities, especially as Yale did not recognize that a free speech violation occurred on its campus.

Toward the end of 2022, Stanford University came under scrutiny for creating a "harmful language" list of terms that it sought to remove from its university websites.⁷⁹ According to the Stanford Information Technology department, the Elimination of Harmful Language Initiative wanted to eradicate any language deemed biased or offensive in some manner as a way to help people be more cognizant of their language choices.⁸⁰ The published list was extensive; among the words deemed offensive were "American," "immigrant," "mailman," and "grandfather."⁸¹ After facing national backlash, Stanford University responded by making the website accessible only to those with a username and password, before deciding to take the webpage down altogether.⁸² The university published a statement explaining that the list of terms was meant to be a guide, not university policy; however, the school's Chief Information Officer conceded that "[Stanford] missed the mark."⁸³ While Stanford has sought to remedy its mistake and reaffirm its commitment to "academic freedom," this push to censor and limit relatively non-offensive, everyday terms was no doubt a concerning free speech policy legitimately considered by the university. In addition, it is important to note that Stanford University has not been the only higher education institution who has made a move to address "harmful language" at the expense of academic freedom.⁸⁴

77. Philip Mousavizadeh, *Moderator Denounces Law School Protesters in Faculty-Wide Memo*, YALE DAILY NEWS (Apr. 4, 2022, 2:41 AM), <https://yaledailynews.com/blog/2022/04/04/moderator-denounces-law-school-protesters-in-faculty-wide-memo/>.

78. *Id.*

79. Susan D'Agostino, *Amid Backlash, Stanford Pulls 'Harmful Language' List*, INSIDE HIGHER ED (Jan. 11, 2023), <https://www.insidehighered.com/news/2023/01/11/amid-backlash-stanford-removes-harmful-language-list>.

80. Komi Frey & Aaron Corpora, *Rethinking Stanford's Approach to Eliminating 'Harmful' Language*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Dec. 29, 2022), <https://www.thefire.org/news/rethinking-stanfords-approach-eliminating-harmful-language>.

81. *See id.* *See also* D'Agostino, *supra* note 79. Some examples of substitutions suggested by the initiative were "U.S. citizen" in place of "American" and "person who has immigrated" instead of "immigrant." Editorial Board, *The Stanford Guide to Acceptable Words*, WALL ST. J. (Dec. 19, 2022, 6:26 PM), <https://www.wsj.com/articles/the-stanford-guide-to-acceptable-words-elimination-of-harmful-language-initiative-11671489552>.

82. Frey & Corpora, *supra* note 80; D'Agostino, *supra* note 79.

83. *Update on Elimination of Harmful Language Initiative in Stanford's IT Community*, STANFORD UNIV. (Dec. 20, 2022), <https://itcommunity.stanford.edu/news/update-elimination-harmful-language-initiative-stanfords-it-community>.

84. D'Agostino, *supra* note 79.

In the beginning of 2023, the Methodist-affiliated Hamline University too found itself in the national conversation regarding the threat towards free speech in higher education. During the fall semester, art history professor Erika López Prater showed her students art of the prophet Muhammad during a lecture.⁸⁵ Muslim students complained that doing so disrespected the Islamic faith, allegedly leading to López Prater's contract not being renewed as promised for the spring semester.⁸⁶ Although not under the protection of the First Amendment, López Prater has filed suit against the university stating that her rights to academic freedom have nonetheless been violated.⁸⁷ In addition, supporters of López Prater argue that to punish the professor for showing artwork of Muhammad would be a great affront to academic liberty.⁸⁸ Hamline University publicly announced the incident as "Islamophobic," but then chose to retract the statement after receiving backlash that such words prioritized religious interests over academic freedom.⁸⁹ According to the heads of the university, "the language they previously used did not reflect their sentiments on academic freedom."⁹⁰ As stated by the *New York Times*, small, private universities like Hamline are "especially fraught" with academic freedom issues as they seek to attract interested applicants.⁹¹

Therefore, private universities of all shapes and sizes are also facing an increasing number of concerning free speech incidents and university policies. Altogether, public and private universities have proven that they are willing to diminish the right to free speech for their students and faculty. When schools and their students are not committed to protecting the nonpartisan right to free speech, they set a dangerous precedent for all Americans.

IV. THE GOVERNMENT'S FAILURE TO SAFEGUARD FREE SPEECH

Universities are not alone in failing to prioritize the protection of free speech on their campuses. Rather, the nation's leaders and legislators are also sacrificing the nonpartisan right in favor of pursuing their partisan and personal agendas. This can be seen all over the country and from both sides of the political aisle. Government officials who push restrictions on free speech in higher education have major, negative implications for all Americans; the more politicians weaponize free speech as a political tool, the more the right is jeopardized. In the twenty-first century, there are numerous examples of how

85. Kim Bellware & Maham Javaid, *How Art of the Prophet Muhammad Threw a College into the National Spotlight*, WASH. POST (Jan. 18, 2023, 9:12 PM), <https://www.washingtonpost.com/nation/2023/01/18/images-prophet-muhammad-university-lecture/>.

86. *Id.*

87. *Id.*

88. Vimal Patel, *After Lecturer Sues, Hamline University Walks Back Its 'Islamophobic' Comments*, N.Y. TIMES (Jan. 17, 2023), <https://www.nytimes.com/2023/01/17/us/hamline-lawsuit-prophet-muhammad-religion.html>.

89. *Id.*

90. Bellware & Javaid, *supra* note 85.

91. Patel, *supra* note 88.

government leaders from all states and political parties are weakening the right to free speech in higher education. In fact, such decisions from legislators censoring free speech in higher education are only increasing; in 2022, 137 education gag order bills were introduced by state legislators, thirty-nine percent of those targeting higher education in some way.⁹² This section will discuss a few of these examples to demonstrate how intent lawmakers are to weaken the right to free speech and the dire consequences this presents.

In 2014, the government of South Carolina decided to decrease state funding for two universities who defied the state's political agenda. Namely, the College of Charleston and the University of South Carolina Upstate lost funding for reading assignments discussing LGBTQ+ topics.⁹³ Conservative lawmakers in the state were displeased with required reading about South Carolina's first gay and lesbian radio show and wanted there to be an alternative reading option for students who did not want to read about such topics. Therefore, the state passed budget cuts for these two universities which directly correlated to how much each school had spent implementing the reading program.⁹⁴ The vote was passed twenty-to-one by the South Carolina House Ways and Means Committee.⁹⁵ The lone nay vote was cast by South Carolina Representative Gilda Cobb-Hunter, who was appalled by the government's willingness to pursue conservative political agendas over its students' academic freedom. After the bill was passed, Cobb-Hunter resigned that "[w]e are now in a posture where individual moral compasses and beliefs are being pushed down on our institutions of higher education."⁹⁶ This incident sheds light on how even schools who try to be committed to free speech face threats and financial consequences for their actions, thereby jeopardizing the right despite efforts to protect it.

Eight years later, the state of Florida passed the "Individual Freedom Act"—known more colloquially as the "Stop W.O.K.E. Act"—which targets the speech of state educators.⁹⁷ The content of the bill discusses that any

92. Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/americas-censored-classrooms/>. The number of bills focusing on higher education is up from the year 2021, where thirty percent of bills targeted universities in some sense. *Id.* Educational gag order bills are those which show "a disregard for academic freedom, liberal education, and the values of free speech and open inquiry that are enshrined in the First Amendment and that anchor a democratic society." *Id.*

93. Will Creeley, *Ignoring Academic Freedom, South Carolina Legislators Aim to Punish Public Colleges for Choice of Books*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Feb. 21, 2014), <https://www.thefire.org/ignoring-academic-freedom-south-carolina-legislators-aim-to-punish-public-colleges-for-choice-of-books/>.

94. Shadee Ashtari, *South Carolina Legislators Use Budget Cuts to Punish Colleges Assigning LGBT Books*, HUFFPOST (Feb. 20, 2014, 4:07 PM), https://www.huffingtonpost.co.uk/entry/south-carolina-colleges-lgbt-books_n_4825489.

95. *Id.*

96. *Id.*

97. John R. Vile, *Stop W.O.K.E. Act (Florida) (2022)*, MIDDLE TENN. ST. UNIV.: THE FIRST AMENDMENT ENCYCLOPEDIA (Nov. 21, 2022), <https://www.mtsu.edu/first->

teaching that “espouses, promotes, advances, inculcates, or compels” students or other faculty to agree or believe certain types of speech relating to race, sex, or discrimination is not allowed.⁹⁸ In particular, this legislation has a direct impact on Florida colleges and universities as it prohibits them from hiring critical race theory consultants and allows the government to audit any funding towards diversity, equity, and inclusion programs.⁹⁹ Concerned about the implications of limiting what can and cannot be taught in a higher education classroom, the U.S. Chief District Judge issued an injunction blocking the bill from becoming law.¹⁰⁰ However, this was overturned in January of 2023, thereby allowing the Stop W.O.K.E. Act to survive and permitting academic freedom to be increasingly suppressed in the state of Florida.¹⁰¹

Looking to 2023, numerous other bills with limitations on free speech in higher education will be discussed in legislative sessions. For example, one bill set to be voted on is Texas House Bill 1006, which similarly looks to prohibit “any office of diversity, equity, and inclusion” associated with any of the state’s public universities.¹⁰² Such a measure would directly target academic freedom and the ability of academic departments to discuss or research any topic involving diversity. While the bill also purports to bolster a diversity of opinions in higher education, this is overshadowed and contradicted by what could potentially be a severe restriction on the right to freedom of speech.¹⁰³ Despite its glaring shortcomings, HB 1006 has a legitimate chance of being passed into law, which would cement a commitment to limit academic free speech in the state of Texas.¹⁰⁴

Altogether, these three incidents from the past decade shed light on a concerning trend for government leaders to push partisan political agendas onto

amendment/article/2167/stop-w-o-k-e-act. “W.O.K.E.” stands for “Wrong to our Kids and Employees.” *Id.*

98. *Id.*

99. *Stop W.O.K.E. Act*, FL GOV. RON DESANTIS, <https://www.flgov.com/wp-content/uploads/2021/12/Stop-Woke-Handout.pdf> (last visited Jan. 12, 2023); Sam Sachs, *In Win for DeSantis Admin., Judge Rules Florida Didn’t Violate ‘Stop WOKE’ Order*, WFLA NEWS CHANNEL 8, <https://www.wfla.com/news/politics/in-win-for-desantis-admin-judge-rules-florida-didnt-violate-stop-woke-order/> (Jan. 16, 2023, 3:36 PM).

100. Ben Brasch, *Judge Nixes Higher Education Portions of Florida’s Stop WOKE Act*, WASH. POST (Nov. 17, 2022, 11:38 PM), <https://www.washingtonpost.com/nation/2022/11/17/judge-nixes-higher-education-portions-floridas-stop-woke-act/>.

101. Sachs, *supra* note 99.

102. Tyler Coward, *Texas Bill Targeting ‘Diversity, Equity, and Inclusion’ Restricts Student Speech and Is Unconstitutional*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Dec. 20, 2022), <https://www.thefire.org/news/texas-bill-targeting-diversity-equity-and-inclusion-restricts-student-speech-and>.

103. *Id.*

104. Dan Solomon, *A Texas GOP Lawmaker Wants to Increase “Viewpoint Diversity” by Banning Diversity, Equity, and Inclusion in Higher Ed*, TEX. MONTHLY (Dec. 21, 2022), <https://www.texasmonthly.com/news-politics/texas-dei-schools-bill/>. The Texas House has passed legislation similar in nature to HB 1006, in addition to it currently having a conservative majority, thereby giving the bill a favorable chance of being successful. *Id.*

free speech in the educational sphere. These types of laws and restrictions are only increasing in number with no sign of slowing down in the near future. By way of politicians politicizing the right to free speech on all sides, free speech starts to take on the appearance of a non-guaranteed privilege rather than a foundational American right, which is detrimental to all Americans.

V. LOOKING FORWARD: THE FUTURE OF FREE SPEECH IN HIGHER EDUCATION

The right to freedom of speech is a cornerstone of democracy, heavily dependent on colleges and universities for its survival.¹⁰⁵ If free speech is not protected in American higher education, this right—and the entirety of the United States’ democratic system—is subject to failure. “An open society depends on liberal education,” emphasizes the American Civil Liberties Union, “and the whole enterprise of liberal education is founded on the principle of free speech.”¹⁰⁶ College students are the future of the nation and the leaders of tomorrow; if they cannot think and speak freely in their formative years, their growth will be stunted, which will create a lasting domino effect for future generations.

Yet, free speech is being threatened in all sorts of educational settings: in the classroom, at school events, on campus property, via social media, and more. In the past few decades, the people’s fear toward “academic freedom” has seen a resurgence, triggering a regression of free speech that is reminiscent of the McCarthyistic speech policies imposed in the 1950s. Several states have passed fearmongering laws, as evidenced by the ever-growing number of post-secondary educational gag bills in circulation.¹⁰⁷

Hope is not lost. Despite the backsliding in instilling safeguards for free speech in higher education, Americans are fighting back; from university offices to America’s highest courts, attention is being drawn toward the weakened state of free speech in secondary education. First, legislators are looking to make a change and are making a concerted effort to protect free speech in higher education. As of 2018, states such as Arizona, Colorado, Kentucky, Missouri, Virginia, and Utah have passed legislation banning

105. Matt Naham & Aaron Keller, *Justice Alito Takes Direct Aim at Law Schools for ‘Abysmal’ and ‘Dangerous’ Free Speech Climate as Conservative Judges Boycott His Alma Mater*, L. & CRIME (Oct. 26, 2022, 9:04 AM), <https://lawandcrime.com/supreme-court/justice-alito-takes-direct-aim-at-law-schools-for-abysmal-and-dangerous-free-speech-climate-as-conservative-judges-boycott-his-alma-mater/> (quoting Justice Samuel Alito: “We depend on freedom of speech. . . . Colleges and universities should be setting the example . . .”).

106. *Speech on Campus*, ACLU, <https://www.aclu.org/other/speech-campus> (last visited Jan. 12, 2023).

107. See Young & Friedman, *supra* note 92. While there have been several bills passed limiting free speech in higher education, one to note is Wisconsin Assembly Bill 229. This bill required public universities and colleges to punish students who disrupt campus speaking engagements. Neal H. Hutchens, *New Legislation May Make Free Speech on Campus Less Free*, CONVERSATION (Jun. 27, 2017, 9:42 AM), <https://theconversation.com/new-legislation-may-make-free-speech-on-campus-less-free-77609>. While a bill like Assembly Bill 229 touts itself as a free speech bill, it has the opposite effect. As stated by Neal H. Hutchens, “the punitive legislation proposed in Wisconsin, does more to impede free speech than protect it.” *Id.*

universities' free speech zones, thereby making entire campuses open to free speech.¹⁰⁸ In 2017, the Senate had a hearing called "Examining Free Speech on College Campuses," discussing how the country's legislative leaders could take actions to safeguard free speech.¹⁰⁹ In 2021, Representative Greg Murphy introduced the Campus Free Speech Restoration Act to the House of Representatives, which seeks to "eschew policies that improperly constrain the expressive rights of students, and to ensure that private institutions of higher education are transparent about, and responsible for, their chosen speech policies."¹¹⁰ This bill was then co-sponsored by eleven Senators and introduced to the Senate in October of the same year.¹¹¹

In addition, the judicial and executive branches are also making a stand. Former President Barack Obama, when asked to speak at Howard University's graduation ceremony, heeded the following to the class of 2016: "[t]here's been a trend around the country of trying to get colleges to disinvite speakers with a different point of view, or disrupt a politician's rally. Don't do that — no matter how ridiculous or offensive you might find the things that come out of their mouths."¹¹²

In addition, despite sitting on opposite sides of the political spectrum, both Justice Alito and Justice Kagan in 2022 agreed that free speech in higher education must be safeguarded because it is not an issue of politics, but rather one of protecting a foundational right of American democracy.¹¹³ "[The state of free speech on university campuses is] pretty abysmal, and it's disgraceful," warned Alito, "It's dangerous for our future as a united democratic country. We depend on freedom of speech. Freedom of speech is essential."¹¹⁴ Similarly, Kagan advised that "[i]t is really important for people to feel free to express their views" and that universities should promote "robust debate and [an] exchange of views."¹¹⁵ Kagan and Alito are not the only ones; across the country, Republicans and Democrats are starting to see that the attack on free speech in higher education is a nonpartisan issue with bipartisan consequences. Both conservative and liberal speech are being attacked and censored on college

108. Tyler Coward, *Bill to Prohibit Campus 'Free Speech Zones' Introduced in U.S. Senate*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Feb. 9, 2018), <https://www.thefire.org/bill-to-prohibit-campus-free-speech-zones-introduced-in-u-s-senate/>. North Carolina and Tennessee have also passed legislation protecting free speech in higher education. *Id.* See also Hutchens, *supra* note 107.

109. See generally *Examining Free Speech on College Campuses: Hearing Before the Comm. on Health, Educ., Labor, and Pensions*, S. Hrg. 115-660 (2017).

110. Campus Free Speech Restoration Act, H.R. 4007, 117th Cong. (2021).

111. Campus Free Speech Restoration Act, S. 3026, 117th Cong. (2021). This bill deals specifically with campus speech policies at both public and private universities. *Id.*

112. Pérez-Peña et al., *supra* note 71.

113. Nate Raymond, *U.S. Supreme Court's Alito Calls Law School Free Speech 'Abysmal'*, REUTERS (Oct. 27, 2022, 10:01 AM), <https://www.reuters.com/legal/government/us-supreme-courts-alito-calls-law-school-free-speech-abysmal-2022-10-26/>.

114. *Id.*

115. *Id.*

and university campuses, as evidenced by Parts II and III of this Note.¹¹⁶ However, these are far from the only free speech incidents showing how speech is being impacted across the political spectrum.

Finally, universities and their faculty and administrators are also speaking out about the need for free speech protection on their campuses. Specifically, many American colleges and universities are willing to hear free speech concerns and are looking to make a change. This willingness to adapt is reflected in recent data; as noted in FIRE's 2022 study on university free speech policies, the percentage of universities with a "red light" rating has declined from 21.3% to 18.5% in 2022; this is the fourteenth year in a row that the percentage has decreased.¹¹⁷

This willingness on the part of colleges and universities to change can also be seen through the statements and actions taken by university leaders across the nation. Dean Marcus Cole of Notre Dame Law School stated his support of free expression in the classroom during an interview from the spring of 2020: "[o]ur students are here to make a difference in the world, which means that they have to hear ideas from all angles, from everyone."¹¹⁸ President Christopher Eisgruber of Princeton University echoes similar thoughts. "You cannot discipline people on the basis of their speech," says President Eisgruber, "even when that speech is speech people profoundly disagree with, even when the speech is offensive."¹¹⁹ Lori White, President of DePauw University, recently gave this warning to students: "[t]hese are not easy times to be a strong advocate for freedom of expression However, freedom of expression is not a one-way street. It is too important for all of us not to be all in."¹²⁰ These words are just a sample of the many university leaders who are making a public stance for freedom of speech in higher education, which altogether contribute to the turning tide of protecting speech.

Another important university measure has been the creation and adoption of the Chicago Principles of free speech. Started by the University of Chicago in 2014, the Chicago Principles are a university pledge to preserve freedom of

116. Mousavizadeh, *supra* note 77; Brady, *supra* note 62.

117. SPOTLIGHT ON SPEECH CODES 2022: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *supra* note 15, at 1.

118. Margaret Fosmoe, *Having Coffee with G. Marcus Cole*, NOTRE DAME MAG. (Spring 2020), <https://magazine.nd.edu/stories/having-coffee-with-g-marcus-cole/>. Dean Cole also addressed free speech in his 2020 State of the Law School Address. "You have every right to be offended by what someone says. You do not have a right to not be offended ... lawyers have to be trained to deal with all ideas, all thoughts that are current in the world." *Id.*

119. Hope Perry, *Eisgruber Defends Free Speech Policy, Discusses Mental Health Crisis in Annual Alumni Address*, DAILY PRINCETONIAN (May 22, 2022, 12:53 PM), <https://www.dailyprincetonian.com/article/2022/05/princeton-university-christopher-eisgruber-alumni-address-reunions-joshua-katz-free-speech-divestment-financial-aid-covid-19>.

120. Lori White, *President Speaks: Why Free Speech and Diversity and Inclusion Go Hand in Hand on Campus*, HIGHER ED DIVE (May 2, 2022), <https://www.highereddive.com/news/president-speaks-why-free-speech-and-diversity-and-inclusion-go-hand-in-ha/621229/>.

speech to the greatest extent possible, which has fostered a better environment for speech on college campuses. One section of the pledge reads:

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.¹²¹

Since then, over ninety public and private institutions have adopted or endorsed these principles, such as Purdue University, Georgetown University, and Columbia University.¹²² In the year 2022, twelve university systems made the decision to affirm the statement in some capacity.¹²³

There is still much to be done before free speech becomes an ensured and protected right in higher education. Despite the positive measures described above, policies repressing speech continue to be passed and incidents repressing speech continue to transpire. All can continue to improve upon existing free speech policy; even universities who champion the Chicago Principles and have strong free speech ratings have room to bolster their speech protections. For example, even the University of Chicago—creator of the Chicago Principles and FIRE's top-rated university for the 2022-2023 College Free Speech Rankings—had one of its professors recently feel the need to delay her seminar labeled “The Problem of Whiteness” after receiving public backlash and over eighty emails on the subject which contained death threats, racist language, and anti-Semitic remarks.¹²⁴

121. REPORT OF THE COMMITTEE ON THE FREEDOM OF EXPRESSION, UNIV. CHI. 2 (2014). The pledge goes on to say that “without a vibrant commitment to free and open inquiry, a university ceases to be a university.” *Id.* at 3.

122. *Chicago Statement: University and Faculty Body Support*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (last updated Dec. 2022), <https://www.thefire.org/research-learn/chicago-statement-university-and-faculty-body-support>.

123. Those schools affirming the Chicago Principles are King University, the University of Massachusetts Boston, DePauw University, Wright State University, Youngstown State University, the University of Cincinnati, Shawnee State University, the Ohio State University, Wheaton College, the University of Texas system, the University of Oklahoma, and Massachusetts Institute of Technology. *Id.*

124. 2022-2023 College Free Speech Rankings, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (last visited Jan. 13, 2023), <https://rankings.thefire.org/rank>; Haley Gluhanich, *Amid Death Threats and Harassment, University of Chicago Professor Reschedules ‘The Problem of Whiteness’ Course*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Nov. 10, 2022), <https://www.thefire.org/news/amid-death-threats-and-harassment-university-chicago-professor-reschedules-problem-whiteness>.

Although policymakers, judicators, and educators are starting to realize the dangers of censoring free speech in higher education, a right of this caliber and level of importance requires immediate support from Americans of all backgrounds and views for change to take hold. The right to freedom of speech has been a foundational piece of American democracy for over 240 years.¹²⁵ Therefore, it is time for free speech to be rightfully viewed as a nonpartisan issue, and for Americans to accept that gagging free speech in higher education has anti-democratic and bipartisan consequences. Conservatives and liberals from all sectors need to work together to safeguard academic speech, as everyone's voice deserves to be heard. If Americans cannot band together to protect free speech at universities both public and private, large and small, left-leaning and right-leaning, the consequences could be catastrophic as the college students of today are the American leaders of tomorrow.

As stated by Darrell West of the Brookings Institution, "the risks are readily apparent and everyone should fear the possibility that the U.S. may follow the path of other nations that have limited academic autonomy, weakened freedom of expression, and harmed democracy itself."¹²⁶ Therefore, it is time for the United States to leave behind the tumultuous past in which free speech in higher education has lived the past century and instead look back on the wishes on America's founders: to have a nation built on democratic and liberal values which allows voices of all ages, races, genders, religions, and backgrounds to be heard.

125. *Bill of Rights*, *supra* note 7.

126. West, *supra* note 17.

