2019

Attacking the Marketplace of Ideas: The Wisconsin Campus Free Speech Act

Patrick McAvaddy

Attacking the Marketplace of Ideas: The Wisconsin Campus Free Speech Act

Patrick R. McAvaddy*

INTRODUCTION

On November 16, 2016, conservative public speaker Ben Shapiro appeared on the campus of the University of Wisconsin.[1] The conservative organization Young Americans for Freedom invited Shapiro to speak at an event entitled "Dismantling Safe Spaces: Facts Don't Care About Your Feelings."[2] Most audience members came to hear the speech, but a vocal minority came to prevent Shapiro from speaking.[3] These protestors repeatedly interrupted the speech with shouts of "shame" and "safety."[4] They even managed to silence Shapiro for a brief time.[5] Meanwhile, audience members supporting Shapiro countered with chants of "free speech matters."[6] After several minutes the protestors left on their own accord.[7] After the protestors left, Shapiro finished his lecture without further interruption.[8]

The incident at the University of Wisconsin ended relatively peacefully and the speaker successfully delivered his speech. However, other protests of conservative speakers at college campuses have turned violent. One of the worst escalations occurred at UC Berkeley, the birthplace of the 1964 Free Speech Movement.[9] On February 1, 2017, student protestors

---

*J.D. Candidate, 2019, Seton Hall University of Law; B.A., 2016, The College of New Jersey.

[1] Katie Cooney, *Conservative Pundit Ben Shapiro Lectures to Turbulent Crowd on Safe Spaces, Freedom of Speech*, THE BADGER HERALD (Nov. 17, 2016), https://badgerherald.com/news/2016/11/17/conservative-pundit-ben-shapiro-lectures-to-turbulent-crowd-on-safe-spaces-freedom-of-speech.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Cooney, *supra* note 1.

[7] *Id.*

[8] *Id.*

[9] The Free Speech Movement erupted at UC Berkeley after university officials forbade Civil Rights activists from setting up information tables. The movement involved massive sit-ins and protests over university policies including restrictions on political activity. After several confrontations between activists and police, and in light of the growing attention the movement was receiving, university faculty voted to end all restrictions on political activity.

gathered in anticipation of a speech by right-wing commentator Milo Yiannopoulos.[10] Initially, the protests remained peaceful.[11] Unfortunately, roughly "150 masked agitators" arrived and began throwing rocks at police.[12] The police sought to monitor the protests and maintain order.[13] The violence escalated, as agitators hurled Molotov cocktails and smashed windows.[14] These masked agitators also harassed several students, and injured six.[15] Eventually, campus officials cancelled the event, citing "violence and destruction of property" and "a concern for public safety."[16] Afterwards, UC Berkeley issued a statement "condemn[ing] in the strongest possible terms the violence and unlawful behavior that was on display and deeply regret[ting] that those tactics will now overshadow the efforts to engage in legitimate and lawful protest."[17] The statement further declared that "while Yiannopoulos' views, tactics and rhetoric are profoundly contrary to our own, we are bound by the Constitution … to enable free expression across the full spectrum of opinion and perspective."[18]

UC Berkeley condemned the few violent protestors and stressed the importance of free speech and tolerance for free expression across the political spectrum. Despite this condemnation, conservative news outlets, pundits, and politicians all seized on this incident. They cited it as evidence of an increasing intolerance by liberal student protestors towards

---

See Richard Gonzales, *Berkeley's Fight for Free Speech Fired Up Student Protest Movement*, NPR (Oct. 5, 2014, 7:57 AM), https://www.npr.org/2014/10/05/353849567/when-political-speech-was-banned-at-berkeley.
[10] Madison Park and Kyung Lah, *Berkeley Protests of Yiannopoulos Caused $100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 PM), http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Park and Lah, *supra* note 10.
[17] *Id.*
[18] *Id.*

dissenting conservative viewpoints.[19] Yiannopoulos responded to the incident via Twitter.[20] He suggested that "one thing we do know for sure: the Left is absolutely terrified of free speech and will do literally anything to shut it down."[21] Secretary of Education Betsy DeVos also weighed in.[22] DeVos called on state legislators and those in charge of funding public universities to threaten universities with negative consequences if they are unable to prevent further incidents.[23] Even President Donald Trump expressed frustration.[24] He tweeted "if U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view – NO FEDERAL FUNDS?."[25]

But the fallout was not limited to newspaper opinion columns, talk radio, or Twitter. State lawmakers across the country have proposed, and in some cases ratified, campus free speech bills.[26] The scope of such legislation varies by state. Some merely reaffirm First Amendment protections.[27] Some create policies that "push[] schools to more aggressively police those who disrupt campus events."[28] Of all the bills, however, the most ambitious and controversial comes from Wisconsin.

---

[19] *See, e.g.*, *Goldberg: UC-Berkeley Should be Ashamed of Itself*, FOX NEWS (Feb. 2, 2017), http://video.foxnews.com/v/5307940667001/?#sp=show-clips ("the way the left operates is they just try to shout down anybody who disagrees with them. These campuses are basically these little soft-totalitarian states where disagreement is actually a heresy"); Rush Limbaugh, *Stupid Leftist Protests Have No Impact*, THE RUSH LIMBAUGH SHOW (Feb. 2, 2017), https://www.rushlimbaugh.com/daily/2017/02/02/stupid-leftist-protests-have-no-impact (declaring that "students at these universities, Berkeley being the most recent, they are just so scared, so frightened of anybody showing up that is going to say anything that they don't agree with … they start burning down buildings and destroying property and trying to injure people in order to show their dissatisfaction over this guy coming to campus to make a speech").
[20] Park and Lah, *supra* note 10.
[21] *Id.*
[22] Lauren Camera, *Campus Free Speech Laws Ignite the Country*, US NEWS (July 31, 2017, 5:40 PM), https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country
[23] *Id.*
[24] Park and Lah, *supra* note 10.
[25] *Id.*
[26] Camera, *supra* note 22 (citing states that have passed such laws including North Carolina, Colorado, Tennessee, Utah, and Virginia, as well as states that have proposed such laws including California, Illinois, Michigan, Texas, and Wisconsin).
[27] *Id.*
[28] *Id.*

The Wisconsin Campus Free Speech Act establishes a disciplinary system to be enacted by Wisconsin public colleges and universities. The system purports to "make the state university's campuses more civil for people of all political orientations."[29] Under the Act, students may "face a disciplinary hearing if they receive two or more complaints about disruptive conduct during a speech or presentation."[30] The administration must then determine if that student has "interfer[ed] with the expressive rights of others."[31] If they have, the administration must suspend the student for a minimum of one semester.[32] A third violation would necessitate expulsion.[33] The proposed bill also contains provisions requiring schools to (1) "strive to remain neutral, as an institution, on the public policy controversies of the day," (2) annually report disciplinary matters related to free expression disruptions, and (3) explain their free speech rules and policies at freshman orientations.[34]

In June, the bill passed the Wisconsin State Assembly in a 61-36 vote strictly along party lines.[35] The bill proceeded to the Republican-majority Wisconsin Senate where it currently resides.[36] If it passes the Senate, the bill will go to Republican Governor Scott Walker. Walker expressed support for the spirit of the bill in April, stating "to me, a university should be precisely the spot where you have an open and free dialogue about all different positions … but

---

[29] Derek Hawkins, *Wisconsin Lawmakers Advance Bill to Suspend or Expel Students Who Disrupt Campus Speakers*, WASHINGTON POST (June 22, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/22/wisconsin-assembly-advances-bill-to-suspend-or-expel-students-who-disrupt-campus-speakers/?utm_term=.fd724c1cb359.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* (declining to define, or provide examples of, the public policy controversies that universities should strive to remain neutral on).
[35] Hawkins, *supra* note 29.
[36] Nico Savidge, *Senate Unlikely to Take Up Republican Campus Speech Bill Before Fall*, WISCONSIN'S STATE JOURNAL (June 27, 2017), http://host.madison.com/wsj/news/local/education/university/senate-unlikely-to-take-up-republican-campus-speech-bill-before/article_36252e7a-e13a-5dc0-b92e-21c07869a4f9.html.

the minute you shut down a speaker, no matter whether they are liberal or conservative or somewhere in between, I just think that's wrong."[37]

If it becomes law, the Wisconsin Campus Free Speech Act will be one of the most comprehensive and severe responses to disruptive campus protest. As such, the bill warrants closer inspection and consideration about its potential impact.

The bill's sponsors claim it will protect free speech on college campuses.[38] On the other hand, the bill's detractors warn that it will chill such speech.[39] This Note examines these arguments, and concludes that legislative responses like the Wisconsin Campus Free Speech Act, which create speech disciplinary panels based on vague, undefined violations and aggressively promote university neutrality, are not the solution. Such solutions place an emphasis on punishing protest speech, rather than promoting the importance of allowing controversial speech. They also empower legislatures to intrude into the administration of universities, and hamstring professors' academic freedom.

Part I provides background on students' free speech rights in recent decades across the United States, and the current state of free speech on college campuses. Part II looks closely at the text of the Wisconsin Campus Free Speech Act. It examines the arguments from both sides, and then Part III analyzes why this Act crosses the line. Finally, Part IV concludes by suggesting that rather than look for a legislative solution, campuses should learn from the examples of schools like Gettysburg College, which was able to host a controversial speaker without incident by promoting more speech and constructive dissent as a response.

---

[37] Hawkins, *supra* note 29.
[38] *Id.*
[39] *Id.* ("Our colleges and universities should be a place to vigorously debate ideas and ultimately learn from one another. Instead this campus gag rule creates an atmosphere of fear where free expression and dissent are discouraged").

I. BACKGROUND

The Wisconsin Campus Free Speech Act is the latest chapter in a larger battle between students, higher educational institutions, and the government over free speech. The focus of this Note will be on public colleges and universities. Private colleges and universities enjoy a far-reaching independence from governmental interference in their decision-making.[40] Additionally, the Bill of Rights does not apply to actions taken by private institutions, even if the school receives federal funding.[41] Thus any First Amendment discussion regarding private campuses would be philosophical only, rather than legal. Whether public institutions enjoy similar independence from governmental interference, and the scope of First Amendment speech protections, are less clear and more heavily debated.

A. The Development of "Academic Freedom"

The relationship between the government and public colleges and universities has changed dramatically over much of the twentieth century. The concept of "academic freedom," which generally describes a range of [add], for public colleges and universities emerged in the early 1900s with the American Association of University Professors' ("AAUP") 1915 General Declaration of Principles.[42] In this landmark document, a committee of professors argued for the importance and necessity of freedom from political control for faculty at research universities.[43]

---

[40] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 650 (1819) (holding that a charter establishing Dartmouth College as a private college was essentially a contract between the King and the trustees that was still valid because the Constitution prohibits a state from passing laws to impair a contract).

[41] Jimin He, *First Amendment on Private Campuses: Amicus, Education & Youth, Freedom of Expression, Racial Justice*, HARVARD CIVIL RIGHTS – CIVIL LIBERTIES LAW REVIEW (Dec. 1, 2015), http://harvardcrcl.org/first-amendment-on-private-campuses/#_ftn15.

[42] *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1915), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

[43] *Id.* at 292 (explaining that academic freedom "comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action").

The document also highlighted the dangers to state universities.[44] According to the document, "where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations; and … the menace to academic freedom may consist in the repression of opinions …."[45] In light of this menace, the document stressed the importance of academic freedom from governmental interference.[46]

This initial statement of academic freedom proved successful and influential. By 1940 all major organizations of higher education in the United States joined the AAUP in crafting a "Statement of Principles on Academic Freedom and Tenure."[47] This Statement solidified a united front concerning academic freedom of faculty.[48] The Statement declared that "teachers are entitled to full freedom in research" and "teachers are entitled to freedom in the classroom in discussing their subject."[49]

Both of these documents helped establish the parameters of academic freedom, which in these early years existed mainly as an idealistic goal for universities. In 1940, however, the concept of "academic freedom" took on a new legal dimension, appearing for the first time in a judicial opinion. In *Kay v. Bd. of Higher Ed.*, a New York judge ruled against City College, setting aside the college's appointment of Bertrand Russell, a noted philosopher and liberal [activist?], to chair their philosophy department, and removing him as a professor entirely.[50] The

---

[44] *Id.* at 297.
[45] *Id.*
[46] *Id.* ("an inviolable refuge from such tyranny should be found in the university. It should be an intellectual experiment station, where new ideas may germinate.").
[47] *1940 Statement of Principles on Academic Freedom and Tenure*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1940), https://www.aaup.org/file/1940%20Statement.pdf
[48] *Id.*
[49] *Id.* at 14.
[50] J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 86 (2004) (citing Kay v. Bd. of Higher Ed., 18 N.Y.S.2d 821 (N.Y. Sup. Ct. 1940)).

court found that Russell's hiring was against public policy because he taught doctrines including a permissive view of adultery that the Court deemed immoral and in direct conflict with criminal laws.[51] City College argued that the Board of Higher Education had sole power to select the faculty free from review or curtailment by the courts or other agencies.[52] However, the judge disagreed, determining that such power "cannot be used to aid, abet, or encourage any course of conduct tending to a violation of the Penal Law.[53] The judge then spoke more generally about the relationship between the courts and "academic freedom," determining that the court would not "interfere with any action of the board in so far as a pure question of 'valid' academic freedom is concerned," but that "it will not tolerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal Law."[54] The judge concluded by stating "academic freedom does not mean academic license … there are norms and criteria of truth which have been recognized by the founding fathers."[55] Thus, in the first instance where the judiciary acknowledged the academic freedom of universities to make their own decisions, they also stressed that this right could be superseded by public policy concerns.

In 1957, the Supreme Court first upheld the idea of academic freedom.[56] Notably, the phrase "academic freedom" appears nowhere in the Constitution. Nonetheless, the Court has found constitutional protections based on this principle, while discussing other First Amendment principles. In *Sweezy v. New Hampshire*, the Court overturned the conviction of a man who had spoken at a state university, and later refused to discuss his knowledge of the Progressive Party

[51] Kay, 18 N.Y.S. at 822, 827 (citing to several examples of doctrines taught by Russell including that abduction was lawful and adultery was attractive and good to the community).
[52] *Id.* at 829.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Sweezy v. New Hampshire, 354 U.S. 234, 238-45 (1957)

in New Hampshire with the state Attorney General.[57] Most of the opinion focused on the infringement of due process rights.[58] However, the Court also admonished the state for summoning a witness and compelling him, against his will, to "disclose the nature of his past expressions and associations."[59] The Court stressed this action violated rights safeguarded by the Bill of Rights and the Fourteenth Amendment, and invaded the areas of academic freedom and political expression.[60] In a crucial passage, Chief Justice Warren elaborated by providing the first look into the Supreme Court's view of academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation … Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[61]

Justice Frankfurter concurred, writing that academic freedom rested in the institution itself, which required "the exclusion of governmental intervention in the intellectual life of a university."[62] Thus, without citing to a specific section of the Constitution, the Court suggested that the First Amendment protects academic freedom by freeing teaching and scholarship from political control.[63] Following this decision, the Supreme Court continued to find protections [for what] based upon the idea that academic freedom prohibits political interference on campuses.[64]

---

[57] *Id.* (The state attorney general had been given broad powers by the legislature to root out Communism by interrogating suspected members).
[58] *Id.*
[59] *Id.* at 250.
[60] *Id.*
[61] *Id.*
[62] Sweezy, 354 U.S. at 262 (Frankfurter, J., concurring).
[63] He, *supra* note 41.
[64] *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 591, 603 (1967) (invalidating New York requirement that forced faculty at public universities to sign certificates stating that they were not communists or members of subversive organizations because "our Nation is deeply committed to safeguarding academic freedom … which does not tolerate laws that cast a pall of orthodoxy over the classroom").

B. Development of Student Rights at Public Colleges and Universities

The opinion in *Sweezy*, however, said nothing about extending academic freedom to the words and expressions of students.[65] Yet, the courts have not been silent on this issue. Indeed, a separate line of cases has explored the relationship between students and their universities to determine how much control the institutions may exert. The first major case to tackle this question arose in Kentucky.[66] In *Gott v. Berea College,* a local restaurant owner sued Berea College after the college prohibited its students from eating at restaurants that the college did not control.[67] The college insisted that they were the students' caretakers.[68] As such, they had to occasionally pass rules to prevent students from wasting their time and money.[69] The court agreed, and decided that the doctrine of *in loco parentis* applied.[70] In other contexts, courts, citing this doctrine granted higher education institutions significant power over their students, including with respect to [add].[71]

In 1928, a New York appellate court furthered colleges' and universities' power over student freedom under the *in loco parentis* principle.[72] The case challenged Syracuse University's dismissal of a student because she was not being "a typical Syracuse" girl in that the University vaguely claimed she had been causing problems in her sorority house.[73] The student alleged that the dismissal, though not malicious, was arbitrary and unjust.[74] Further, she argued

---

[65] He, *supra* note 41.
[66] Gott v. Berea College, 156 Ky. 376 (Ky. Ct. App. 1913).
[67] *Id.*
[68] *Id.* at 378.
[69] *Id.*
[70] *Id.*
[71] *In loco parentis* literally translates to "in the place of the parents" and represented a belief that colleges and universities could make any rule for students that parents could make for their children without courts interfering with those decisions.
[72] Anthony v. Syracuse University, 224 A.D. 487, 488-89 (N.Y. App. Div. 1928)
[73] *Id.* (noting that defendant university had not proffered specific reasons for dismissing plaintiff beyond vague rumors they had heard about her causing trouble in her sorority house).
[74] *Id.* at 489.

that a contract existed between her and the University barring the dismissal.[75] The court acknowledged that "under ordinary circumstances and conditions a person matriculating at a university establishes a contractual relationship under which … he is entitled to pursue his selected course to completion."[76] However, the court held for Syracuse University and reversed the lower court.[77] They reasoned that the University had wide discretion in determining their "ideals of scholarship" and "moral standards."[78] Therefore, they cautioned, courts should take care in disturbing any decision of the University authorities in this respect.[79] Thus, another early twentieth century court underscored the broad power Universities had to regulate and control their students acting *in loco parentis*.

Moving forward, the 1950s and 1960s saw dramatic changes in the relationship between administrations and their students. Civil rights and anti-establishment movements dominated this period. Among them was a student-led movement for more rights, which fermented on public campuses. Activists sought the opportunity to be treated as adults. The movement won a huge victory with the landmark federal court decision *Dixon v. Alabama*.[80] This decision effectively ended the idea that colleges and universities could act *in loco parentis* to discipline and expel their students.[81] In *Dixon*, Alabama State College, acting *in loco parentis*, expelled six students without a hearing, and for unspecified reasons.[82] Statements by members of the State Board of Education regarding the incident suggest the students were expelled because of their

[75] *Id.*
[76] *Id.* at 489-91.
[77] *Id.*
[78] *Anthony*, 224 A.D. at 491.
[79] *Id.*
[80] 294 F.2d 150 (5th Cir. 1961).
[81] *Id.*
[82] *Id.* at 152. (occurring after students' participation in a sit-in demonstration at a segregated lunch grill located in the basement of the county courthouse in Montgomery, Alabama).

participation in the Civil Rights Movement.[83] Initially, the district court found for the College.[84] On appeal, the Fifth Circuit agreed that there are no statutes or rules requiring formal charges or a hearing.[85]

However, the Court of Appeals noted that the usual practice at Alabama State College had been to give students the opportunity for a hearing to present defenses before they could be expelled.[86] The Court of Appeals further declared that "it is not enough to say … the right to attend a public college or university is not in and of itself a constitutional right," and that "it is necessary to consider the nature both of the private interest which has been impaired and the governmental power which has been exercised."[87] Indeed, while attendance at public university is voluntary and universities retain the power to expel students, students do not waive the fundamental right to notice and a hearing.[88] The Court of Appeals continued by noting that the governmental power to expel students is not unlimited and cannot be arbitrarily exercised.[89] Rather, "there must be some reasonable and constitutional ground for expulsion."[90]

Finally, the Court of Appeals set forth notice and hearing requirements for colleges and universities to follow prior to expulsion in order to comply with due process.[91] These standards included providing students with a statement of the specific charges and grounds, if proven, for expulsion.[92] In finding these fundamental rights of notice and hearing in public university

[83] *Id.* (noting one board member based his decision solely on plaintiffs violating a law of Alabama promoting separation of the races in public places, while another based the decision on the plaintiffs demonstrating without permission of the institution).
[84] *Id.* at 155. (concluding that no statute or rule imposed a notice or hearing requirement before expelling the students).
[85] *Id.*
[86] *Dixon*, 294 F.2d at 155.
[87] *Id.* at 156.
[88] *Id.* at 156-57.
[89] *Id.* at 157
[90] *Id.*
[91] *Id.* at 158.
[92] *Dixon*, 294 F.2d at 158.

expulsion procedures, the Court's decision in *Dixon* was instrumental. It marked a shift away from deference of universities acting *in loco parentis*, and towards a system that recognized university students were adults with full rights under the Bill of Rights.

As part of this shift, the Supreme Court and lower courts began explicitly finding and emphasizing student free speech rights on campus. First though, the Supreme Court decided the landmark case *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*.[93] This decision involved whether a public high school's suspension of students for wearing armbands to protest the Vietnam War violated those students' First Amendment right to freedom of speech.[94] In a 7-2 decision, the majority found that the suspension violated the high school students' free speech rights.[95] While the case involved high school students, the majority opinion proved to be a harbinger for similar holdings involving university and college campuses.[96] Famously, the Court declared that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[97]

Additionally, the Court highlighted the extensive breadth of First Amendment protection for free speech and expression, stating that under the Constitution, "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact."[98] The Court recognized that the free speech provision of the First Amendment permits "reasonable regulation of speech-connected activities in carefully restricted circumstances."[99] However, the exercise of

[93] 393 U.S. 503 (1969)
[94] *Id.*
[95] *Id.* at 514
[96] *Id.*
[97] *Id.* at 506.
[98] *Id.* at 513. ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").
[99] *Tinker*, 393 U.S. at 513.

these rights is not limited to "a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."[100]

Finally, the Court stressed that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools … [t]he classroom is peculiarly the marketplace of ideas."[101] Indeed, the Court recognized that the future depends upon "leaders trained through wide exposure to that robust exchange of ideas … [rather] than through any kind of authoritative selection."[102] The cases that followed regarding public college and university students related more closely to the spirit of this holding.

In *Healy v. James,* the Court ruled that Central Connecticut State College violated students' First Amendment rights when it denied official recognition to a student group because of its viewpoint, thus preventing the group from enjoying certain privileges.[103] The school denied recognition because the group's leftist philosophy was allegedly "antithetical to the school's policies."[104] The Court explained that the denial of official recognition to the organization, without sufficient justification, violated the students' First Amendment right of association implicitly found in the freedoms of speech, assembly, and petition.[105]

Additionally, these First Amendment rights for public university and college students were not vulnerable to the same restrictions later applied to high school students.[106] Rather, the

---

[100] *Id*.
[101] *Id*. at 512.
[102] *Id.* at 512.
[103] 408 U.S. 169 (1972) (The student group, Students for a Democratic Society, cited three reasons for existing: (1) providing a forum of discussion for students analyzing American society; (2) bringing about constructive changes; and (3) relating the problems of leftist students with other interested groups on campus. The group sought recognition against the backdrop of the Vietnam War's polarizing influence on campuses.).
[104] *Id.* at 175.
[105] *Id.* at 181.
[106] *See, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that high school officials have discretion to curtail obscene, vulgar, lewd, indecent, or plainly offensive speech in addition to disruptive speech laid out in *Tinker*); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding school's decision to censor certain articles in school newspaper because a school does not offend First Amendment by exercising editorial control over style and content of student speech in school-sponsored activity as long as actions are reasonably related to

Court reasoned that university students' First Amendment speech rights are nearly akin to adults in broader society.[107] They held 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. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.[108]

The Court acknowledged that reasonable time, place, and manner regulations on speech would have to be respected.[109] However, the Court asserted that colleges and universities had a heavy burden to overcome in restraining student group associational activities.[110] Additionally, the Court rejected the college's argument that such groups required their "administrative seal of official college respectability."[111]

After *Healy*, the Supreme Court continued to enforce First Amendment rights for university students that resembled the rights afforded to society at large.[112] However, these decisions were divided. Several Justices, in concurring and dissenting opinions, expressed the view that First Amendment principles enjoyed by society at large did not, and should not, apply

---

legitimate concerns and even though the government could not censor similar speech outside the school); Morse v. Frederick, 551 U.S. 393 (2007) (determining that principal may restrict student speech at school event when that speech is reasonably viewed as promoting illegal drug use).

[107] *Healy*, 408 U.S. at 180

[108] *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[109] *Id.* at 182.

[110] *Id.* at 183

[111] *Id.* at 184.

[112] *See, e.g.*, Papish v. Bd. of Curators, 410 U.S. 667, 670-71 (1973) (holding that school could not punish student for the mere dissemination of ideas that were offensive to good taste when the speech could not be labeled as constitutionally obscene); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that universities cannot treat students and student groups differently based on their viewpoints even if exclusion allegedly consistent with school's mission); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) (explaining how dangerous suppression of student speech on basis of viewpoint is in university setting because "to cast disapproval on particular viewpoints … risks the suppression of free speech and creative inquiry in one of vital centers for the Nation's intellectual life, its college and university campuses").

completely to higher educational institutions. Rather, they believed that unique circumstances on campuses may influence whether First Amendment principles applied fully.[113]

These varied views about the scope of university and college students' First Amendment free speech rights culminated in *Christian Legal Soc'y Chapter of the U. of Cal. v. Martinez*, where the Court held that a public law school could, without violating the First Amendment, stipulate conditions on the granting of school funds to a student group.[114] There, a law student group at Hastings Law School challenged a requirement from the Law School that any group seeking official recognition, access to school amenities, and funds had to follow a very inclusive nondiscrimination policy.[115] The Law School adopted the policy to further their reasonable educational purposes.[116] While analyzing the reasonableness of the Law School's policy, the Court suggested a more deferential approach than previously followed.[117] It declared that "[o]ur inquiry is shaped by the educational context in which it arises, given the 'special characteristics of the school environment.'"[118] As such, the Court declined to substitute its own judgment for the "on-the-ground expertise and experience of school administrators."[119] Rather, despite any misgivings about the wisdom of the policy, the Court deferred to the law school.[120] However, the 5-4 decision was deeply divided.[121] The dissent complained that this deference was inconsistent with *Healy* and other precedential student speech cases.[122]

---

[113] *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 239 (2000) (concluding that "protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees") (Souter, J., concurring).
[114] 561 U.S. 661 (2010).
[115] *Id.* at 661.
[116] *Id.* at 668.
[117] *Id.* at 685-86
[118] *Id.* (quoting Widmar v. Vincent, 454 U.S. 265, 268 n.5 (1981)).
[119] *Id.* at 686.
[120] *Martinez,* 561 U.S. at 689
[121] *Id.* at 720-21.
[122] *Id.* (Alito, J., dissenting) ("The *Healy* Court would have none of this. Unlike the Court today, the *Healy* Court emphatically rejected the proposition that First Amendment protections should apply with less force on college campuses than in the community at large.").

To date, the Supreme Court has afforded university and college students more First Amendment protections than lower public school students. However, they have also found that colleges and universities are entitled to some deference in determining which speech to permit based on their educational missions. Thus, a level of uncertainty remains as to whose First Amendment rights should receive more consideration.

C. The Current Debate Over Free Speech Rights on Public Campuses

In recent years, universities have struggled with trying to balance their obligations under the First Amendment, and their desire to create an inclusive atmosphere. This balancing act has been especially difficult in the context of perceived offensive speech.[123] Specifically, while offensive speech can be controversial in society beyond college campuses, the Supreme Court and lower courts have previously protected it, stressing that a law directed against speech found offensive to some can be turned against dissenting views to the detriment of all.[124] Additionally, organizations such as the American Civil Liberties Union have defended the constitutionality of offensive speech, arguing that "[t]he First Amendment really was designed to protect a debate at the fringes … You need a First Amendment to protect speech that people regard as intolerable or outrageous or offensive – because that is when the majority will wield its power to censor or suppress…."[125]

---

[123] *See, e.g.*, Susan Svrluga, *Slurs, Blackface, and Gorilla Masks: The Academic Year Opened with Racial Ugliness*, THE WASHINGTON POST (Oct. 7, 2016) (examining instances of racial incidents on several college campuses and contrasting the responses that schools must "create an environment on campus that is open and inclusive and that inspires a sense of belonging for all members of our community" with responses that "even this kind of contemptible racist speech is protected by the First Amendment").

[124] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the government cannot punish inflammatory speech unless the speech meets the very high bar of intentionally and effectively provoking a crowd to immediately carry out violent and unlawful action); Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (arguing that "speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate'") (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[125] Suzanne Ito, *Protecting Outrageous, Offensive Speech*, ACLU SPEAK FREELY BLOG (Oct. 6, 2010, 4:15 PM), https://www.aclu.org/blog/free-speech/protecting-outrageous-offensive-speech.

Despite the importance placed on protecting offensive speech, however, the current trend involves college students demanding more censorship of speech they regard as antithetical to the goal of inclusivity on campuses. This approach by student activists has garnered both support and criticism. Defenders contend that students "are continuing 'the American tradition of using free expression and civil disobedience to advance social change.'"[126] They see the activists protecting "the vital imperatives of racial and gender justice that are important not just on colleges campuses but in society at large."[127] Additionally, defenders of these activists argue that "political life and discourse is at the boiling point with the election of President Trump" and as a result, "[some people] may see 'free speech' as a cover for attacks on marginalized people."[128]

Conversely, critics depict the activists as "coddled students" who have no tolerance for "dissent and offense."[129] Some critics suggest that the students' intolerance stems from younger people growing up less independently than previously.[130] As a result, "college has become a time of an 'extended period of adolescence' rather than a time when students transition to full adulthood."[131] Critics also explain this trend towards censorship as the result of "liberal intolerance" of conservative ideas.[132] These critics highlight studies suggesting that

---

[126] Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 Minn. L. Rev. 1801, 1811 (2017) (quoting PEN Am., *And Campus for All: Diversity, Inclusion, and Freedom of Speech at U.S. Universities*, 4, 5 (2016), https://pen.org/sites/default/files/PEN_campus_report_final_online_2.pdf).
[127] *Id.*
[128] *Id.* (alteration in original) (referencing Allison Stanger, *Understanding the Angry Mob at Middlebury that Gave Me a Concussion*, NEW YORK TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html).
[129] *Id.* at 1812.
[130] *Id.* (For example, "in many places around the country, kids are no longer allowed to play outside unsupervised … sheltered by their helicopter parents").
[131] *Id.* (quoting A. Douglas Stone & Mary Schwab-Stone, *The Sheltering Campus: Why College is Not Home*, NEW YORK TIMES (Feb. 5, 2016), https://www.nytimes.com/2016/02/07/education/edlife/adolescent-development-college-students.html) (arguing that "higher education students still want their parents, teachers, and administrators to set rules about what is permitted – and not permitted – in civil discourse").
[132] Papandrea, *supra* note 126 (citing Nicholas Kristof, *A Confession of Liberal Intolerance*, NEW YORK TIMES (May 7, 2016), https://www.nytimes.com/2016/05/08/opinion/sunday/a-confession-of-liberal-intolerance.html).

conservatives are less prevalent in campus faculties and administrations.[133] Finally, critics charge that universities censor offensive speech on their campuses out of fear that such speech may turn away those looking for a more inclusive environment.[134] Observers point to "a worrying trend in higher education where students 'have come to act as customers – the ones who set the terms, the ones who are always right – and the degree to which they are treated that way.'"[135]

Additionally, actual empirical evidence captures university students' growing view of offensive speech as unconstitutional and susceptible to censorship. John Villasenor, a Brookings Institution senior fellow and University of California at Los Angeles professor, recently conducted a nationwide survey of 1,500 undergraduate students at four-year colleges.[136] The survey tested students' understanding of the First Amendment.[137] One of the more notable areas of the survey involved how students think offensive speech should be handled.[138]

Villasenor first asked general questions regarding what the First Amendment protects. He asked whether the First Amendment protects "hate speech."[139] 40% incorrectly said no.[140] Villasenor then asked whether the First Amendment requires that "an offensive speaker at a public university be matched with one with an opposing view."[141] 60% incorrectly answered

---

[133] *Id.* at 1812. ("We're fine with people who don't look like us, as long as they think like us").
[134] *Id.* at 1813.
[135] *Id.* (quoting Frank Bruni, *In College Turmoil, Signs of a Changed Relationship with Students*, NEW YORK TIMES (June 22, 2016), https://www.nytimes.com/2016/06/23/education/in-college-turmoil-signs-of-a-changed-relationship-with-students.html).
[136] Catherine Rampell, *A Chilling Study Shows How Hostile College Students are Toward Free Speech*, THE WASHINGTON POST OPINIONS (Sept. 18, 2017), https://www.washingtonpost.com/opinions/a-chilling-study-shows-how-hostile-college-students-are-toward-free-speech/2017/09/18/cbb1a234-9ca8-11e7-9083-fbfddf6804c2_story.html?utm_term=.e71c760db949.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

yes.[142] Villasenor then asked more general, philosophical questions regarding what students believe would be an appropriate way to handle speech they did not agree with. He offered a hypothetical where a public university planned to host a very controversial speaker, known for making offensive and hurtful statements.[143] He asked, "would it be acceptable for a student group to disrupt the speech by loudly and repeatedly shouting so that the audience cannot hear the speaker?" 51% of respondents answered affirmatively.[144] Next, Villasenor inquired whether it would be acceptable for a student group to use violence to prevent such a controversial speaker from talking.[145] 19% believed that such violence would be justified to prevent the controversial speech.[146]

Empirical findings such as Villasenor's study paint a chilling portrait of the attitude toward disagreeable speech, and the state of free speech on college and university campuses. Offensive speech may be abhorrent and worthy of denouncement but that does not mean that such speech is unconstitutional. And it is vitally important that this distinction remain uncompromised. Indeed, as Justice Kennedy wrote, "a law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence."[147]

The question is what steps could, and should, be taken to promote free speech, even if it may be controversial. One common solution across the country involves legislatively mandating that public colleges and universities protect these rights and punish those who infringe upon

[142] Rampell, *supra* note 136.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] Matal v. Tam, 137 S. Ct. 1744, 1769 (2017) (Kennedy, J., concurring).

them. In this vein, the Wisconsin Campus Free Speech Act may be the most sweeping in its scope and in its potential impact.

II. The Wisconsin Campus Free Speech Act

A. Textual Components

The Wisconsin Campus Free Speech Act would require the Board of Regents of the University of Wisconsin System to discard any previous policies on free expression at four-year and two-year institutions in Wisconsin.[148] Instead, the Board would replace the old policies with the policies that stress campus and faculty neutrality towards speech, and establish disciplinary procedures addressing speech violations set forth in the bill.[149] The first section of the bill discusses why the drafters and sponsors believe that such a bill is necessary.[150] They view the bill as essential to uphold the fundamental importance of free speech.[151] The first section also establishes several precedential reports discussing the importance of free expression on campuses.[152] After defining several terms in sections two and three, the fourth section contains the elements of the new free expression policy.[153] The section stipulates that the Board of Regents shall develop and adopt a policy on free expression, no later than 120 days after the enactment of the bill.[154] This policy must contain at least seven enumerated stipulations.[155]

---

[148] Wis. Assemb. 299, 2017 Leg., 103rd Reg. Sess. (Wis. 2017).
[149] *Id.*
[150] *Id.* at 3.
[151] *Id.* ("In recent years, institutions have abdicated their responsibility to uphold free speech principles and these failures make it appropriate for the system to restate and confirm its commitment in this regard … the legislature views freedom of expression as being of critical importance ….").
[152] *Id.* (mentioning (1) Yale's Committee on Free Expression 1974 Woodward Report; (2) the University of Chicago's Committee on Freedom of Expression 2015 report; and (3) the University of Chicago's 1967 Kalven Committee Report).
[153] *Id.* at 4.
[154] Wis. Assemb. 299 at 4.
[155] *Id.*

Specifically, the policy adopted must reflect that (1) the primary function of a college or university is "the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate" and "an institution must strive to ensure the fullest degree of intellectual freedom and free expression"; (2) colleges and universities are not meant to shield students from speech protected by the First Amendment, "including ideas and opinions they find unwelcome, disagreeable, or even deeply offensive"; (3) "students and faculty have the freedom to discuss any problem that presents itself … as long they do not break the law or 'materially and substantially disrupt the functioning of [the] institution'"; (4) anyone legally on campus grounds may protest or demonstrate there, provided that such demonstrations do not "interfere with the rights of others to engage in or listen to expressive activity"; (5) Wisconsin public college and university campuses "are open to any speaker whom students, student groups, or members of the faculty have invited"; (6) public areas of campus "are public forums and open on the same terms to any speaker"; and (7) each college or university "shall strive to remain neutral, as an institution, on the public policy controversies of the day."[156]

Section four also contains a requirement that colleges and universities must enforce a range of disciplinary sanctions for anyone "who engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud, or other disorderly conduct that interferes with the free expression of others."[157] Examples of permissible sanctions are largely left unspecified. Still, the bill requires that any student who has twice interfered with the expressive rights of others be suspended for a minimum of one semester or expelled.[158]

[156] *Id.* at 4-5.
[157] *Id.* at 6.
[158] *Id.*

Finally, section four states that "in all disciplinary cases involving expressive conduct, students are entitled to a hearing."[159] The bill provides a non-exhaustive list of hearing rights, including the right to (1) receive advanced written notice of the charges; (2) review the evidence in support of the charges; (3) confront witnesses; (4) present a defense; (5) call witnesses; (6) receive assistance of counsel if penalties could include suspension for longer than nine days or expulsion; and (7) appeal.[160]

Section five requires the Board of Regents to create a "council on free expression consisting of no less than 15 members," tasked with overseeing the implementation and enforcement of the new policy.[161] Thirteen members shall each represent one of the universities encompassing the Wisconsin system.[162] Two of the members "shall be the chairpersons of the assembly and senate standing committees having jurisdiction over universities as determined by the speaker of the assembly and the president of the Senate."[163] The provision establishes an element of direct legislative control over the workings of Wisconsin campuses.

Section five additionally stipulates that the council must annually submit a report to the Board of Regents, Governor, and chief clerk of each legislature house.[164] This report must include (1) a description of any disruptions of free expression during that year; (2) a description of the administrative handling and discipline relating to those disruptions; (3) a description of any difficulties, controversies, or successes in maintaining institutional neutrality regarding political or social issues; and (4) any assessments, criticisms, or recommendations the council chooses to make.[165]

---

[159] *Id.*
[160] Wis. Assemb. 299 at 6.
[161] *Id.* at 7.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

Section six addresses freshman orientations.[166] Specifically, the section stipulates that "each institution shall include in freshman orientation programs a section describing to all students the policies and rules regarding free expression" pursuant to this bill.[167] Section nine of the Act permits institutions to restrict student expression in cases where the expressive activity is not protected by the First Amendment.[168] Such cases include (1) violations of state or federal law; (2) defamation; (3) peer-on-peer harassment; (4) sexual harassment; (5) true threats; (6) unjustifiable invasions of privacy; (7) an action that unlawfully disrupts the function of the institution; and (8) a violation of a reasonable time, place, and manner restriction.[169]

B. Reactions to the Wisconsin Campus Free Speech Act

While the Wisconsin Campus Free Speech Act is not the first act of its kind, it is one of the most far-reaching in that [describe why].[170] As such, the bill immediately drew strong reactions from both proponents and opponents. The bill's sponsors promoted it as an answer to the string of disruptive protests on college campuses.[171] According to lead sponsor Representative Jesse Kramer, he did not intend the bill to "micromanage our university system," but instead to "provid[e] a basic framework that protects the constitutional rights of everyone on the campus."[172] According to Kramer, the bill provides "penalties for people who are found guilty of stomping on someone's First Amendment rights."[173]

---

[166] Wis. Assemb. 299 at 7.
[167] *Id.*
[168] *Id.* at 8.
[169] *Id.*
[170] *See generally* Camera, *supra* note 22 (discussing similar bills across the country).
[171] Jessie Opoien, *Goal of Campus Speech Legislation is to Allow "More Speech," Vos Says*, THE CAPITAL TIMES (Apr. 28, 2017), http://host.madison.com/ct/news/local/govt-and-politics/election-matters/goal-of-campus-speech-legislation-is-to-allow-more-speech/article_2bac6ddf-ab7d-5ec5-be24-73505fae0d15.html.
[172] *Wisconsin Pushes University Free Speech Bill*, NPR (June 25, 2017), https://www.npr.org/2017/06/25/534332895/wisconsin-pushes-university-free-speech-bill.
[173] *Id.*

The bills co-sponsor, Representative Robin Vos, sought to alleviate the concerns of some skeptics. She assured that the bill would provide Wisconsin with some of the strongest measures to prevent free speech infringements, and would not affect classroom discussions.[174] Vos stressed that "college campuses should be the one place where the most honest … open debate happens," and that his bill would help realize this goal.[175]

However, the bill sparked criticism from many who feared that the scope of the bill could sweep up [what], and [add]. Wisconsin Representative Lisa Subeck (D-Madison) characterized colleges and universities as "place[s] to vigorously debate ideas and ultimately learn from one another."[176] She worried that this bill represents a "campus gag rule creat[ing] an atmosphere of fear where free expression and dissent are discouraged."[177] Additionally, Wisconsin Representative Cory Mason (D-Racine) charged that this bill and its sponsors "hop[e] to neuter the university from having any stance on things."[178] As evidence of this, he pointed to the vague prohibition on disruptive speech and the requirement of classroom and administration neutrality on issues of the day.[179] One Wisconsin Representative, Fred Kessler (D-Milwaukee), even accused the bill of "returning … to the witch hunt era of Joe McCarthy."[180] Kessler worried that the rigid and harsh system of punishment based on complaints would incentivize partisan

[174] Lillian Price and Jason Stein, *Wisconsin Assembly Passes Campus Free Speech Bill*, USA TODAY (June 23, 2017, 9:25 AM), https://www.usatoday.com/story/news/2017/06/21/wisconsin-assembly-taking-up-campus-free-speech-bill/403267001/.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] Scott Bauer and Todd Richmond, *Wisconsin Assembly Passes College Free Speech Bill that Would Punish Hecklers*, CHICAGO TRIBUNE (June 22, 2017, 6:15 AM), http://www.chicagotribune.com/news/nationworld/midwest/ct-wisconsin-college-free-speech-bill-20170622-story.html.
[179] *Id.*
[180] *Id.*

operatives to attend speeches and file complaints against students with the intention of getting them thrown out of school.[181]

The vast majority of criticism came from Democratic representatives. However, some Republican members also expressed reservations about the vague scope of the bill. Representative Bob Gannon (R-West Bend) expressed concerns that the bill could be used to silence conservative students.[182] He feared the bill may "intimidate students into silence – conservative students into silence."[183] Representative Gannon worried, for example, about the effects on conservative students who might want to protest abortion, gun control, or other government policies.[184]

III. The Danger of the Wisconsin Campus Free Speech Act

The main criticisms of the Wisconsin Campus Free Speech Act focus on its potentials to (1) chill students' free speech; (2) create McCarthyism-style witch hunts; and (3) infringe upon some of the independence afforded to professors in the classroom and administrators running the schools. These concerns are valid. Indeed, they would result in a bill at odds with precedent concerning the relationship between university and college campuses, students, and the government.

A. The Act Infringes Upon the Idea of Academic Freedom

The requirement in section four that each college or university "shall strive to remain neutral, as an institution, on the public policy controversies of the day" should concern

[181] *Id.*
[182] Price and Stein, *supra* note 174.
[183] *Id.*
[184] *Id.*

professors. It is at odds with educational institution's traditional relationship with government that allows for a large degree of independence in the classroom.[185] Indeed, mandating neutrality in a vague manner such as this effectively places the "straight jacket upon intellectual leaders in our colleges and universities" that the Court warned against as a threat to academic freedom in *Sweezy*.[186] Chief Justice Warren clearly expressed his belief in *Sweezy* that professorial independence is vital to the working of higher education.[187] Justice Frankfurter in his concurrence went a step further, and denounced any attempts by the government to interfere in this classroom autonomy.[188]

Furthermore, the Supreme Court stressed in *Widmar v. Vincent* that its decision would not undermine the right of universities, "to determine for [themselves] on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[189] Considering the strong deference afforded universities and professors in deciding what to teach and how to teach it, provisions like section four's neutrality requirement are unjustified and unprecedented. Indeed, they inhibit professors from fully teaching their fields of expertise and challenging students to think outside ideas they're comfortable with if they have any relation to current events and debates.

For example, during debate on the bill, one representative sought to explore the possible scope of the bill. The representative asked whether a professor would be allowed to challenge a student under the bill if, hypothetically, "the student in a geology class argued the Biblical theory

---

[185] Wis. Assemb. 299 at 5.
[186] *Sweezy*, 354 U.S. at 250 ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").
[187] *Id.*
[188] *Id.* at 262 (Frankfurter, J., concurring) (discussing the importance of "the exclusion of governmental intervention in the intellectual life of a university").
[189] *Widmar*, 454 U.S. at 276.

that the Earth is only 6,000 years old."[190] In response, Representative Kramer asserted that "students who felt intimidated from expressing their opinions in class could bring their complaints to the Council on Free Expression," implying that the bill would extend to material covered in classrooms.[191] This assertion followed Representative Kramer's declaration that Earth was, in fact, 6,000 years old.[192] Therefore, not only would the bill infringe on the traditional autonomy of professors in their classrooms, but it could also force professors to remain quiet when students express beliefs that are not held by professionals in those fields. All for the sake of enforcing aggressive neutrality.

This rigidity would be devastatingly counterproductive for institutions regarded in the past as "the marketplace of ideas."[193] As Dave Vanness, associate professor at the University of Wisconsin, pondered during the bill's hearing, "how are we to be taken seriously as an institution of higher learning and research if our professors can be called before a 'Council on Free Expression' to defend their teaching of geology?"[194] It is true that students at universities are entitled to their own beliefs regarding issues of today. However, such beliefs should ideally be formed from critical reasoning, and professors should be afforded the opportunity to counter incorrect beliefs pertaining to their field of expertise. Because section four's neutrality requirement is unnecessarily rigid and infringes upon academic freedom it should be removed.

B. The Act Could Result in a Chilling Effect on Campus Free Speech

---

[190] Pat Schneider, *Gagging the UW: Critics Worry Campus Speech Bill is Another Attack on Academic Freedom*, THE CAPITAL TIMES (June 7, 2017), http://host.madison.com/ct/news/local/education/university/gagging-the-uw-critics-worry-campus-speech-bill-is-another/article_cc7e994b-e6f2-5d16-8ff2-11513bc03033.html.
[191] *Id.*
[192] *Id.*
[193] *Tinker*, 393 U.S. at 512.
[194] Schneider, *supra* note 190.

In addition to the neutrality provision, section four of the Act discusses disciplinary action.[195] The section requires disciplinary action be taken against anyone "who engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud, or other disorderly conduct that interferes with the free expression of others."[196]

While this may seem like a comprehensive accounting of the type of punishable disruption, each term is vague and undefined elsewhere in the bill. The bill foregoes specificity in favor of deferring to fact-specific findings by the Council on Free Expression.[197] This approach, however, is problematic. It could result in opportunistic witch hunts, and the silencing of otherwise legitimate speech out of fear. Some proponents of the bill counter that free speech would be bolstered because students afraid of being shouted down for their views will feel more comfortable speaking. For example, the Goldwater Institute, a libertarian think tank, supports the bill because "it's so important for universities to be bastions of free speech because the university is a place where you can think the unthinkable," and "if we put artificial guard rails on that discussion, we're all the poorer for it."[198] However, this quote could just as easily be used as a caution against government oversight of campus speech.

Wisconsin's bill sets out to promote free speech. However, by vaguely threatening punishment based on undefined conduct, it is counterproductive. It places "artificial guard rails" on campus discussions, and threatens to prevent counter-protestors from exercising their rights to free speech."[199] As stated by Representative Dianne Hesselbein (D-Middleton), "the bill puts [the University of Wisconsin] regents in the position of determining things like 'how loud is too

---

[195] Wis. Assemb. 299 at 6.
[196] *Id.*
[197] *Id.* at 7.
[198] Katie Reilly, *Republicans Want to Punish Students Who Shut Down Controversial Speakers on Campus*, TIME (May 1, 2017), http://time.com/4759770/student-protests-republican-bill-expel/.
[199] *Id.*

loud' and could result in one student's free speech rights being protected at the expense of another's."[200] Similarly, while the ACLU generally supports efforts to bolster free speech, the organization has cautioned against the unintended consequences of [. The group argued that "restricting the speech of one group or individual jeopardizes everyone's rights because the same laws or regulations used to silence bigots [or in this case agitators] can be used to silence you."[201] Thus, while the bill's sponsors' intentions may be valid, the vagueness and strictness of the bill threaten to infringe upon valid expressions of free speech.

From a precedential standpoint, the bill also runs counter to the trend toward more free speech rights and autonomy for university students. The Court in *Dixon* began the shift away from allowing universities to act *in loco parentis* towards their students. As this shift continues, the government should not assume that role.[202] Indeed, the *Dixon* Court held that the governmental power to expel students is not unlimited and cannot be arbitrarily exercised.[203] As such, it is reasonable to extend this holding to a vague law threatening expulsion for undefined actions.

Looking back at *Tinker*, the idea that "[t]he classroom is peculiarly the marketplace of ideas" and requires "leaders trained through wide exposure to that robust exchange of ideas … [rather] than through any kind of authoritative selection," is especially relevant.[204] Regardless of what virtues the sponsors espouse, this bill represents a "kind of authoritative selection" of what exchanges of ideas will be acceptable on campuses.[205] Furthermore, even if some authoritative body should have the power to regulate disruptive speech, that body should not be an outside

---

[200] Opoien, *supra* note 171.
[201] *Speech on Campus*, ACLU (2017), https://www.aclu.org/other/speech-campus.
[202] *Dixon*, 294 F.2d at 14.
[203] *Id.*
[204] *Tinker*, 393 U.S. at 512.
[205] *Id.*

force. Rather, precedent suggests that the most capable body would be the campus administration itself.

For example, in *Southworth*, Justice Souter's concurrence espoused the belief that "protecting a university's discretion to shape its educational mission" represented an important First Amendment consideration.[206] *Martinez* went further, advocating for a deferential approach where the Court's judgment would not substitute for the "on-the-ground expertise and experience of school administrators."[207] Rather, the Court elected to defer to the university and its determinations about the most efficient way to encourage "tolerance, cooperation, and learning amount students."[208] The Court made this decision despite having some possible misgivings regarding the wisdom of the policy.[209]

The United States Supreme Court decided university administrations were more qualified to determine First Amendment issues on campus. In doing so, they stressed the importance of the insider perspective. While state assemblies may be closer to the universities in their states than the Supreme Court, they still represent an outsider perspective. While it is important to safeguard every student's First Amendment right to free speech, university officials with an acute understanding of their campuses should craft the policies.

Overall, if campuses are to continue operating as the "marketplace for ideas," then state legislatures must allow those ideas to continue flowing freely, without intimidation or interference.[210] Circumstances may arise where some students' free speech rights are being negatively affected. In these cases, these legislators should defer to the "on-the-ground expertise

[206] *Southworth*, 529 U.S. at 239.
[207] *Martinez*, 561 U.S. at 661.
[208] *Id.* at 689.
[209] *Id.*
[210] *Tinker*, 393 U.S. at 512.

and experience of school administrators" to deal with the problem as they see fit, consistent with higher constitutional principles.[211]

IV. Conclusion

There is a real problem in this country with suppression of opposing viewpoints on college campuses. While the beliefs and arguments of provocateurs like Milo Yiannopoulos may be crude and controversial, the students who invite such commentators to public campuses still have a right to hear these viewpoints. As the ACLU succinctly says, "speech that deeply offends our morality or is hostile to our way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible."[212] To address this problem, campuses should work towards crafting and promoting policies based on the idea that the answer to controversial speech is more speech. Universities can find ways to bring more speakers to campus to counter and challenge controversial viewpoints. The real answer to controversial speech should be more speech to defend against it.

Recently, Gettysburg College demonstrated the potential for such policies to accommodate both controversial speech and those opposed to it without having campuses descend into violence or censorship. On May 3, 2017, the Gettysburg chapter of the Young Americans for Freedom invited Robert Spencer to speak on campus.[213] Spencer, an author and blogger, co-founded the American Freedom Defense Initiative, which organized the "Defeat Jihad" poster campaign.[214] Spencer has drawn criticism and accusations of Islamophobia, and

---

[211] *Martinez*, 561 U.S. at 661.
[212] *Speech on Campus*, ACLU (2017), https://www.aclu.org/other/speech-campus.
[213] Benjamin Pontz, *Robert Spencer's speech at Gettysburg College engages students in civil discouse*, THE GETTYSBURGIAN (May 3, 2017), https://gettysburgian.com/2017/05/robert-spencers-speech-at-gettysburg-college-engages-students-in-civil-discourse/.
[214] Joshua Wagner, *Todd Green accuses Robert Spencer of "professional Islamophobia" in speech to campus community*, THE GETTYSBURGIAN (May 1, 2017), https://gettysburgian.com/2017/05/todd-green-accuses-robert-spencer-of-professional-islamophobia-in-speech-to-campus-community/.

the week before visiting Gettysburg College he was shouted down by students at the University of Buffalo.[215] Understandably, the days leading up to his Gettysburg visit were tense, and some called upon President Janet Morgan Riggs to disinvite Spencer. Instead, the college invited another speaker the week before Spencer's visit.[216] Dr. Todd Green, Associate Professor of Religion at Luther College, spoke about professional Islamophobia, and proceeded to debunk several common themes espoused by professional Islamophobes.[217] Dr. Green concluded by suggesting three ideas to avoid Islamophobia.[218] As part of a question and answer period, a student asked President Riggs, who was in attendance, about the decision not to disinvite Spencer.[219] President Riggs responded that

> I do want to remind you that this is part of the deal this week. It's not to have one speaker here, but to have someone here that I hope will provide all of you with the toolbox to respond to what's coming next. That was the point of having this lecture tonight. I am not interested in cultivating a community of fear … That is a way to come together. It's not protesting the speaker, but it's demonstrating solidarity with the Muslim members of this community … I think that's what we can do to counter the fear that a speaker like this can bring to this community.[220]

Additionally, the college planned a Muslim Solidarity Rally to take place simultaneously to Spencer's event as a constructive channel for protestors to express their opposition to Spencer and support for Muslim members of their community.[221]

The decisions to invite Dr. Green to offer a preemptive rebuttal of Spencer's views, and organize a protest event students could participate in paid off. Spencer's appearance came and went without disruption, violence, or censorship.[222] Rather, those that chose to attend seemed

---

[215] Pontz, *supra* note 213.
[216] Wagner, *supra* note 214.
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] Pontz, *supra* note 213.
[222] *Id.*

willing to allow him to speak, even if they still did not agree with him. "I'm interested in hearing what he has to say," reported sophomore Luca Menicali beforehand, "Going in, I know what my viewpoints are, and I will critically analyze what he has to say."[223] Speaking for the organization that invited Spencer, YAF President Scott Moore declared, "[i]t surpassed expectations really. There were no violent disruptions, no protests. I think everything went as well as it could have."[224] Using this as a blueprint, other colleges and universities can learn from the example set forth by Gettysburg College. By providing speech that debunks controversial speech, administrations can lessen the animosity that professional provocateurs seek to stir on their lecture circuits. Additionally, by organizing university-sanctioned means to express protest, administrations can lessen the chance for the type of sporadic violence seen at Berkeley. Done right, policies like these can successfully walk the line between allowing controversial speech and showing support and solidarity for students feeling attacked.

However, the answer is not the Wisconsin Campus Free Speech Act. Between its academic neutrality requirement, rigid disciplinary system, and vague descriptions of what constitutes prohibited, disruptive speech, the Act will only foster an atmosphere of fear and paranoia. It could result in using the disciplinary board as a means to silence the other side. Furthermore, the Act runs counter to the long judicial trend of affording administrations and students more autonomy with First Amendment free speech. To allow such an Act to exist suggests that the Wisconsin Assembly is better suited than university administrators to decide matters of constitutional speech. Going forward, the best course may be to stress and promote

[223] *Id.*
[224] *Id.*

the importance of free speech for all students and viewpoints, trusting that university officials, professors, and students will find a way to protect these important constitutional interests.