PRIVATE COLLEGE STUDENTS DESERVE FREE SPEECH

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ABSTRACT

Freedom of speech is an ever-evolving legal issue facing all communities. Campus speech has been particularly prominent due to cases like Brown v. Jones County Junior College. Brown illustrates the dangers to students on campuses that lack "free speech" protections. After experiencing wrongful suppression of their speech activities, the students in Brown fortunately had a legal avenue to relief through 42 U.S.C. § 1983. However, had the same deprivation of rights occurred on a private college campus, no relief would have been available. This Note addresses the issue of suppressed speech on private school campuses and offers a proposed legislative solution for states to adopt. Using Missouri colleges as a case study, the Author demonstrates the efficacy of his proposed legislation and regulatory enforcement mechanisms. The Author provides a thorough historical background on the First Amendment, paying particular attention to its original meaning and interaction with other parts of the Constitution, like the Due Process Clause and the Fourteenth Amendment. The Author then explores the development of the academic freedom doctrine and how it has intersected with the First Amendment on college campuses. After considering various judicial and legislative options available for extending free speech rights to students attending private institutions, the Author outlines a proposal for state legislatures to enact laws which require private colleges to guarantee free speech protections for students.

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INTRODUCTION

As technology advances, college[1] enrollment rates increase,[2] and politics become more polarized,[3] the need for the open exchange of ideas and protections for free speech is more important now than ever. Given the polarized nature of American society, there is a debate as to the contours of free speech protection.[4] At the center of this debate is campus speech, including the right of a college student to express her views, a campus group to invite a speaker, and students to freely debate ideas. As colleges establish campus free speech zones,[5] disinvite speakers, and utilize bias incident response teams, a college student's right to speak freely is often unjustifiably impeded.[6] This is true even though colleges should be places where the marketplace of ideas flourishes—where any and all ideas are openly considered, debated, and reflected upon in the search for truth. In fact, college campuses are better equipped to provide a marketplace for

1. To simplify matters, I will refer to higher education institutions (two-year colleges, four-year universities, four-year colleges, etc.) collectively as "colleges" throughout this piece.

2. USA FACTS, *College Enrollment Rate*, https://usafacts.org/data/topics/people-society/education/higher-education/college-enrollment-rate/ [https://perma.cc/YC2C-2PMA] (last visited Oct. 15, 2020) (showing that the percentage of individuals enrolled in college among individuals ages 16 to 24 who graduated high school or completed a GED the past year reached 69.1% in 2019. It was 49.3% in 1980).

3. Erik Cleven et al., *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53 (2018) ("Political polarization is a fact in the United States and has been for some time.").

4. *See generally*, Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/the-ongoing-challenge-to-define-free-speech/ [https://perma.cc/N996-E3JL] (last visited August 23, 2022).

5. A campus free speech zone is a designated area of a college campus that is the only place students and faculty can protest, demonstrate, or otherwise express themselves. Foundation for Individual Rights in Education, *Free Speech Zones* (May 24, 2019), https://www.thefire.org/issues/free-speech-zones/ [https://perma.cc/ME2S-K8C7].

6. Lee Rowland, *We All Need to Defend Speech We Hate*, AM. C.L. UNION (Apr. 25, 2017, 9:00 AM), https://www.aclu.org/blog/free-speech/we-all-need-defend-speech-we-hate [https://perma.cc/3RWS-CJH5] ("We need students trained to really *listen* to ideas they hate—and respond with better ones. In that regard, recent incidents suggest that colleges are fundamentally failing their students in imparting these skills.") (emphasis in original); Robert P. George & Cornel West, *Sign the Statement: Truth Seeking, Democracy, and Freedom of Thought and Expression*, JAMES MADISON PROGRAM, PRINCETON UNIV. (Mar. 14, 2017), https://jmp.princeton.edu/statement [https://perma.cc/U74K-N53Z] ("It is all-too-common these days for people to try to immunize from criticism opinions that happen to be dominant in their particular communities. Sometimes this is done by questioning the motives and thus stigmatizing those who dissent[;] . . . disrupting their presentations; . . . or by demanding that they be excluded from campus[.]").

ideas, free from marketplace failures, than is society at large. College campuses are limited, intellectually-focused domains where students should be free to fail (*e.g.*, speak an idea they later reject as false after reflection). Free speech is necessary for the marketplace of ideas to work. But colleges have neglected to capitalize on this opportunity.

A case involving an incident in 2019 at Jones County Junior College in Mississippi illustrates this point well. In *Brown v. Jones County Junior College*, J. Michael Brown, a student at the college, and Mitch Strider, a former student, sought to engage fellow students in the campus's outdoor common space by sharing information about the Young Americans for Liberty organization and allowing fellow students to write on a free speech ball.[7] The chief of campus police instructed them to cease their expressive activities because they had not gone through the proper approval process for permission to speak on campus.[8] Additionally, the chief also threatened to arrest Strider, who was no longer a student, if he did not leave the campus.[9] The students deflated the speech ball and left campus.[10]

Several months later, Brown, his girlfriend, and a Young Americans for Liberty national organization staff member, Nathan Moore, revisited the campus to speak to students about joining the organization.[11] Again, the administration told them they could not engage in expressive activity on campus without prior approval and threatened to arrest Moore if he did not leave.[12] Brown continued to attend the college but did not engage in further expressive activity "for fear of disciplinary action, removal from campus, or arrest."[13] Jones County Junior College is a public institution and Brown brought a civil rights claim against the school under 42 U.S.C. § 1983, alleging a violation of his First Amendment right to free speech.[14] The facts of the case are worrisome because a college threatened arrest and removal for merely handing out pamphlets. The school did not allege the students created a disruption; they were retaliated against for their speech. If this disconcerting story had played out on a private school campus, Brown

7. Brown v. Jones Cnty. Junior Coll., 463 F. Supp. 3d 742, 747–48 (S.D. Miss. 2020).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 749–50.
13. *Id.*
14. *Id.* at 751.

would have no federal recourse akin to § 1983 nor any right to express himself on the campus. This creates a troubling dichotomy wherein students attending public schools are afforded constitutional protections which are denied to students attending private schools for no reason other than the institution they have chosen to attend.

This Note considers how the problem of suppressed speech on private school campuses can be solved. After analyzing a host of options, I recommend that states should adopt legislation that extends First Amendment freedom of speech rights to private college students. The new policy should be enforced by a combination of efficient and effective regulatory mechanisms. I will use several examples from Missouri colleges as a case study to demonstrate my proposal.

Part I of this Note tracks the history of the First Amendment and its application to student speech on campus. It begins by discussing the history of the First Amendment with special attention paid to its original meaning and its enduring rationales. I then discuss the incorporation of the First Amendment's protections against the states through the Due Process Clause of the Fourteenth Amendment, as well as the state action doctrine that has developed to restrict its application to government actors. Part I ends by tracing the development of the academic freedom doctrine and an exploration of how the First Amendment has played out on college campuses. Then, Part II of this note analyzes the judicial and legislative options available to extend free speech rights to private college students. Finally, Part III outlines my proposal that states should enact legislation requiring private colleges to afford free speech rights to students.

I. HISTORY

A. The Foundation of the First Amendment

Justice Scalia explained the rationale behind the First Amendment eloquently: "The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and

ultimate source."[15] And history bears that out. Ratified in 1791,[16] the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[17] What exactly the Founders meant by "the freedom of speech" in 1791 is still debated by scholars.[18]

First Amendment scholar Jud Campbell argues that discerning the original meaning starts with determining whether free speech is a natural right or positive right.[19] He believes freedom of speech is a natural right and goes on to argue that natural rights can be restricted by a representative legislature when such a restriction promotes the public good.[20] But Campbell's view leads to the question of what constitutes a public good—a question ripe for debate.

In addition to Campbell's argument, it is informative to consider the two primary restrictions on free speech the founding generation faced in England, well before the ratification of the First Amendment. The Framers' responses to these restrictions provide insight into what protections the freedom of speech was intended to encompass. There were two primary restrictions on free speech that the colonists escaped by leaving England. The first was licensing, where anyone who wanted to print something had to first obtain a license from the Crown.[21] In modern constitutional jurisprudence, there is a strong presumption against prior restraints like licensing.[22] The second restriction was seditious libel, "which made it a

15. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring).

16. *First Amendment Timeline*, THE FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/page/first-amendment-timeline [https://perma.cc/96FA-SCNR] (last visited Oct. 15, 2020).

17. U.S. CONST. amend. I (emphasis added).

18. Jud Campbell, *What Did the First Amendment Originally Mean?*, UNIV. RICHMOND SCH. L. (July 9, 2018), https://lawmagazine.richmond.edu/features/article/-/15500/what-did-the-first-amendment-originally-mean.html [https://perma.cc/RZ4R-NKPZ].

19. *Id.* ("Natural rights were all things that we could do simply as humans, without intervention of a government. . . . Expression is an innate human capacity, so it is a natural right.").

20. *Id.*

21. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 1 (2009).

22. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (citation and internal quotation marks omitted).

crime to publish anything disrespectful of the state or church or their officers."[23] Seditious libel lived a short life in America following the passage of the Sedition Act,[24] a controversial law that made it illegal for Americans to express negative views about the government.[25] The Sedition Act fueled debate about the constitutionality of seditious libel laws[26] and its history continues to raise questions for scholars about whether the Founders intended to outlaw such free speech restrictions. Despite the importance of these early debates, however, the modern understanding of the Free Speech Clause is most firmly rooted in the twentieth century cases construing the right.

Although the Supreme Court recognized the freedom of speech as a fundamental right in *Gitlow v. New York*,[27] the thrust of modern First Amendment jurisprudence is grounded in a string of dissents and concurrences by Justices Holmes and Brandeis in the early to mid-twentieth century. The cases of *Abrams v. United States* and *Whitney v. California* emphasized two key free speech principles: the marketplace of ideas and the necessity of free speech to effective self-governance.

First, in *Abrams*, the defendants were five Russian nationals convicted of violating the Espionage Act for conspiring to criticize the government and bring it into disrepute.[28] The Court upheld the convictions. But it is Justice Holmes's dissent that is most relevant. He wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our

23. LEWIS, *supra* note 21, at 2.
24. Sedition Act, ch. 74, 1 Stat. 596–97 (1798).
25. *Id.*
26. LEWIS, *supra* note 21, at 15–20.
27. 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").
28. 250 U.S. 616, 617 (1919).

> Constitution. It is an experiment, as all life is an experiment.[29]

In essence, Justice Holmes argued that when the truth battles falsehoods in the marketplace of ideas, the truth will win out. This, he states, is the theory of our Constitution.[30]

Holmes's argument was not novel when he wrote his dissent in *Abrams*. John Stuart Mill made the same argument in his seminal 1859 book, *On Liberty*. There, he wrote:

> Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil: there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth[.][31]

More recently, Professor Timothy Garton Ash has used the modern example of internet echo-chambers to eloquently contrast the marketplace of ideas against groupthink.[32] He argues: "[G]roupthink is the precise opposite of a liberal ideal of an internet-enabled public sphere, where we are constantly confronted with inconvenient facts, contrary arguments and different values[.]"[33] However, Ash's argument can just as easily be applied to echo-chambers in other contexts, such as college campuses that employ faculty consisting largely of left-leaning thinkers.

Second, in *Whitney*, the defendant was convicted under the California Criminal Syndicalism Act for taking part in the formation and organization of the California branch of the Communist Labor Party.[34] The Court affirmed the conviction, weighing the State's police power to regulate subversive speech more heavily than the individual's freedom of speech.[35] In a concurring opinion that complemented Justice Holmes's dissent in *Abrams*, Justice Brandeis recognized the importance of an individual's

29. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).
30. *Id.*
31. JOHN STUART MILL, ON LIBERTY 94 (J. W. Parker & Son 1859).
32. TIMOTHY GARTON ASH, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD 51 (2016).
33. *Id.*
34. 274 U.S. 357, 364 (1927).
35. *Id.* at 371.

ability to freely "develop their faculties[.]"[36] He then turned to a theory that has gained more traction—the idea that free speech is also essential for self-governance. He wrote,

> [F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government. . . . [I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government[.][37]

Justice Brandeis is arguing that free speech is necessary to a free society; without free speech, a free society crumbles.

Justice Brandeis's sentiments continue to be echoed by scholars such as Alexander Meiklejohn and Cass Sunstein. Meiklejohn's theory starts from the premise that the governed and the governors are the same, "rebelling from the traditional notion of government as a relationship of subject to sovereign."[38] Instead, Meiklejohn believed it necessary that a self-governing people have the absolute right of free speech "because hearing every argument that is relevant is what democracy means."[39] Importantly, Meiklejohn only advocated for such an absolute right with regards to speech that is "related to self-governance."[40] He argued that Congress can, and should, expand the freedom of speech to promote the free flow of ideas.[41]

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36. *Id.* at 375.
37. *Id.* at 375–76.
38. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:28 (2020).
39. *Id.*
40. *Id.* (emphasis omitted). Speech that is related to self-governance is essentially political speech.
41. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16 (2000); *Id.* at 17 ("And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress . . . has a heavy and basic responsibility to promote the freedom of speech.").

Sunstein, while agreeing that free speech is essential to self-governance, argues that the First Amendment has been extended too *far* as an absolute right in areas not completely related to self-government.[42] In essence, he argues that "there should be more regulation of speech in order to correct the distortions of the public voice that certain kinds of speech can produce."[43] This is in contrast to Meiklejohn's more libertarian view of government speech regulation. The two theories embodied in Justice Holmes's and Justice Brandeis's opinions—the marketplace of ideas and self-governance—combined to win the day in First Amendment jurisprudence, leading to a general rule for when government can regulate speech based on it being disruptive or harassing.

The result is commonly referred to as the clear and present danger test.[44] The most well-recognized formulation of the test came from the Court in *Brandenburg v. Ohio*, holding that the government can only proscribe advocacy of the use of force if the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[45] It remains the law today.

B. The State Action Doctrine and Incorporation

The state action doctrine and the doctrine of incorporation govern the application of these constitutional principles to private entities. Once defined by professor and constitutional law scholar Charles L. Black as a "conceptual disaster area,"[46] the state action doctrine dictates that the Fourteenth Amendment[47] restricts the actions of the government, not private

42. CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 7 (1995).

43. *Democracy and the Problem of Free Speech*, JACK MILLER CTR., https://jackmillercenter.org/cd-resources/cass-sunstein-democracy-problem-free-speech/?category=arguments-for-free-speech [https://perma.cc/3NFR-HZRS] (last accessed July 31, 2022).

44. Leslie Kendrick, *On "Clear and Present Danger"*, 94 NOTRE DAME L. REV. 1653, 1658 (2019).

45. *Id.*; 395 U.S. 444, 447 (1969).

46. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 576 (2016) (citing Charles L. Black, Jr., *The Supreme Court, 1966 Term – Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

47. The Fourteenth Amendment states, in relevant part,

individuals.[48] This principle—stemming from the clear text of the Fourteenth Amendment—was first announced by the Supreme Court in the *Civil Rights Cases*.[49] Those cases involved several challenges to prosecutions for denying Black persons accommodations in hotels and theaters.[50] The laws at issue[51] subjected those who denied anyone access to public accommodations on account of race or color to a fine and jail time.[52] In striking down the federal law, the Court opined on the operation of the Fourteenth Amendment. It held that the first section of the Fourteenth Amendment prohibits "[s]tate action of a particular character. . . . Individual invasion of individual rights is not the subject-matter of the amendment."[53] The essence of the holding is simple: The Fourteenth Amendment only restricts what states can do, not private entities.[54] The Court has continually reaffirmed this principle in cases across the century since the *Civil Rights Cases*.[55]

The Court has gone further and incorporated—piece by piece—the Bill of Rights, enforcing it against states via the Fourteenth Amendment. The Court incorporated the First Amendment in *Gitlow v. New York* in 1925.[56] In *Gitlow*, the defendant, Benjamin Gitlow, was convicted under New York State's criminal anarchy law for publishing and circulating several writings that allegedly advocated the overthrow of the government.[57] Gitlow

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

48. Schmidt, *supra* note 46, at 584.

49. The Civil Rights Cases, 109 U.S. 3 (1883).

50. *Id.* at 4.

51. Civil Rights Act, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

52. *The Civil Rights Cases*, 109 U.S. at 9.

53. *Id.* at 10–11.

54. *Id.* at 13.

55. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); *but see* Schmidt, *supra* note 46, at 585–93 (providing that the Court has recognized exceptions to the state action doctrine when the private actor serves a "public function," and when the State is so entangled with the private entity that it is a joint participant in the activity).

56. Gitlow v. New York, 268 U.S. 652, 666 (1925).

57. *Id.* at 655.

challenged his conviction on the theory that it violated his First Amendment right of free speech and, by extension, his Fourteenth Amendment due process guarantee.[58] The Court upheld Gitlow's conviction on the basis that his speech was direct incitement, but recognized that the First Amendment freedom of speech is "among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."[59] Thus, the Free Speech Clause is enforced against the states just as it is against the federal government.

In the higher education context, the state action doctrine thus affords constitutional free speech protections to public college students but not to those who attend private colleges.[60] For example, in *Bair v. Shippensburg University*, the Court issued a preliminary injunction enjoining the enforcement of parts of a public college's speech codes because they violated the First Amendment.[61] In *Bair*, the plaintiffs, a student and a recent graduate of the university, challenged the university's speech code on First Amendment grounds.[62] The challenged sections included a broad proclamation that "[t]he University will strive to protect [free speech] freedoms if they are not inflammatory or harmful towards others."[63] The plaintiffs also challenged sections which declared that "[a]cts of intolerance will not be condoned"[64] and that "[n]o person shall participate in acts of intolerance that demonstrate malicious intentions towards others."[65] Additionally, the plaintiffs challenged the university president's establishment of a "free speech zone" to which demonstrations and rallies would be limited.[66]

The plaintiffs alleged that these restrictions prevented them from openly engaging in discussions of their political and religious ideas and beliefs for

58. *Id.* at 664.
59. *Id.* at 666, 672 (internal quotation marks omitted).
60. Kelly Sarabyn, *Free Speech at Private Universities*, 39 J. L. & EDUC. 145, 145 (2010); *see also* Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J. COLL. & UNIV. L. 145 (2009) (highlighting the inconsistency the state action doctrine creates for the free speech rights of faculty at private and public colleges). A similar inconsistency issue arises when considering the tension between the freedom of the individual and the freedom of the institution. *See infra* Part II, Section c.
61. Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 361 (M.D. Pa. 2003).
62. *Id.* at 361–62.
63. *Id.* at 362.
64. *Id.*
65. *Id.* at 363.
66. *Id.* at 363–64.

fear of being sanctioned by the school.[67] In assessing whether to issue a preliminary injunction, the district court judge recognized that "it is apparent that the Code of Conduct prohibits speech that is protected by the First Amendment."[68] After reaching this conclusion, the court considered whether the restrictions were "necessary to prevent substantial disruption or interference with the work of the school or the rights of other students."[69] The court determined they were not and issued a preliminary injunction enjoining most of the challenged portions of the speech code.[70]

However, in *Furumoto v. Lyman*, former students at Stanford University, a private institution, brought an action for, *inter alia*, infringement of their First Amendment rights under 42 U.S.C. § 1983.[71] The students interrupted a scheduled quiz to challenge Professor William Shockley to a debate on his racial views related to genetics.[72] The students read a statement at the front of the room, passed out printed copies of the statement, and refused to leave until Professor Shockley agreed to debate one of the students publicly.[73] The students in the class were unable to take the scheduled quiz.[74] The protesting students, including Furumoto, were charged by the administration with violating a school policy of disrupting the carrying out of an approved university activity and were suspended indefinitely.[75]

The district court dismissed Furumoto's § 1983 claims against Professor Shockley and the Stanford University Board of Trustees for failure to state a claim upon which relief could be granted.[76] Dispositive in the court's analysis was the plaintiff's inability to show Stanford University's actions

67. *Id.* at 365.
68. *Id.* at 370.
69. *Id.* at 372 (quoting *Saxe v. State College Area School Dist.*, 240 F.3d 200, 216 (3rd Cir. 2001)).
70. *Id.* at 372–74.
71. Furumoto v. Lyman, 362 F. Supp. 1267, 1271 (N.D. Cal. 1973); 42 U.S.C. § 1983 provides a cause of action against any person acting under color of State law who has deprived one of her "rights, privileges, or immunities secured by the Constitution and laws[.]"
72. *Furumoto*, 362 F. Supp. at 1271.
73. *Id.* at 1272.
74. *Id.*
75. *Id.* at 1272–73.
76. *Id.* at 1287.

constituted state action.[77] The court found that Stanford did not exist as an arm of the state nor was the state so entangled with the University that its actions were essentially a state action. Thus, the Fourteenth Amendment did not apply to the case.[78] That was the end of Furumoto's quest to overturn the University's decision and her suspension remained in place.[79] While the state action doctrine has blocked claims like this one brought against private colleges, institutional academic freedom doctrine has grown out of the First Amendment to protect private colleges.

C. Academic Freedom

Merriam-Webster's dictionary defines academic freedom as the "freedom to teach or to learn without interference."[80] But as Neal Hutchens points out, the "Supreme Court decisions have failed to offer clear guidance on standards that courts should follow in evaluating academic freedom claims[.]"[81] The concept of academic freedom grew out of the First Amendment and was first recognized by the Supreme Court in 1957.[82] In *Sweezy v. State of New Hampshire*, Sweezy was convicted of contempt for refusing to answer questions as part of the New Hampshire Attorney General's investigation into the subversive activities of government employees.[83] The New Hampshire legislature had given the Attorney General the authority to investigate and criminally prosecute subversive

77. *Id.* at 1276; *but see* Guillory v. Adm'rs of Tulane Univ., 203 F. Supp. 855, 858–59 (E.D. La. 1962) ("Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes?"). It is important to note that, in *Guillory*, Judge J. Skelly Wright was writing in the context of a statute requiring segregation on the basis of race in private colleges.

78. *Furumoto*, 362 F. Supp. at 1276–80.

79. *Id.* at 1287. While the court dismissed the claims on state action grounds, it nevertheless indicated that the claims lacked merit. The essence of the court's merits analysis was that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 1281 (citing Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513 (1969)).

80. *Academic Freedom*, MERRIAM-WEBSTER'S DICTIONARY https://www.merriam-webster.com/dictionary/academic%20freedom [https://perma.cc/9N4F-TCH6] (last accessed Feb. 2, 2021).

81. Hutchens, *supra* note 60, at 149.

82. Sweezy v. New Hampshire, 354 U.S. 234 (1957).

83. *Id.* at 235–41.

persons found to be employed by the government.[84] He was also given the ability to ask the State Superior Court to hold witnesses in contempt for failure to cooperate.[85] The Attorney General summoned Sweezy to testify twice.[86] The second time, Sweezy refused to answer several questions about the Progressive Party, the Progressive Citizens of America, the Communist Party, and a lecture he delivered to students at the University of New Hampshire.[87] At the Attorney General's request, the Superior Court held Sweezy in contempt and ordered him to the county jail.[88] The New Hampshire Supreme Court affirmed his conviction.[89]

The Supreme Court of the United States reversed the decision.[90] In reaching its conclusion, the Court briefly discussed the freedom of the American university, stating, "The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[91] But this was mere dicta. The Court reversed the conviction on the grounds that the questions posed to Sweezy were not germane to the investigation.[92]

The concept of academic freedom was more prevalent in the concurring opinion. Justice Frankfurter argued that the freedom of inquiry, debate, and speculation in the academic setting must only be disturbed for "reasons that are exigent and obviously compelling."[93] But perhaps the most infamous part of Justice Frankfurter's concurrence came two pages later when he wrote of the "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who shall be admitted to study."[94] Nevertheless, Justice Frankfurter's analysis rested on the balancing of the "right of a citizen to

84. *Id.* at 237.
85. *Id.* at 238.
86. *Id.*
87. *Id.* at 243.
88. *Id.* at 244–45.
89. *Id.* at 245.
90. *Id.* at 255.
91. *Id.* at 250.
92. *Id.* at 254.
93. *Id.* at 262 (Frankfurter, J., concurring).
94. *Id.* at 263 (internal quotations omitted).

political privacy" with the "right of the State to self-protection."[95] Notably, the academic freedom of the institution was not dispositive.

In 1967, the concept of academic freedom made another appearance in the Supreme Court's jurisprudence. In *Keyishian v. Board of Regents of University of State of New York*, the appellants were faculty and staff members at the State University of New York who refused to sign declarations that they were not, and had never been, communists.[96] As a result, they were effectively terminated from employment with the university.[97] The same statute that permitted their termination also established a complex "administrative machinery" for identifying and eliminating so-called subversion in the state university system.[98] The Supreme Court held the statutory scheme, as applied to educational institutions, invalid because of its vagueness and ambiguity.[99] But the Court also focused on academic freedom in its analysis.

The Court quoted its previous opinion in *De Jonge v. State of Oregon*, stating that when compared to protecting against the threatened overthrow of the government, it is "more imperative [to] preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion[.]"[100] Thus, the Court stated that "safeguarding academic freedom" is a "special concern of the First Amendment."[101] The Court then, quoting *Sweezy*, invoked the familiar marketplace of ideas rationale, stating that "students must always remain free to inquire, to study and to evaluate[.]"[102]

The Court continued to emphasize the importance of free speech in schools in what is likely the most well-known case dealing with free speech on campuses, *Tinker v. Des Moines Independent Community School District*.[103] In *Tinker*, a group of public high school students were disciplined for wearing black armbands to school in protest of the Vietnam

95. *Id.* at 266–67.
96. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 592 (1967).
97. *Id.*
98. *Id.* at 601, 604.
99. *Id.* at 604.
100. *Id.* at 602 (quoting De Jonge v. State of Oregon, 299 U.S. 353, 365 (1937)).
101. *Id.* at 603.
102. *Id.* (quoting Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957)).
103. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

War.[104] The Court held that such discipline violated the First Amendment.[105] In reaching its conclusion, the Court opined that students do not "shed their constitutional right" to free speech "at the schoolhouse gate."[106] On the contrary, freedom of expression and encountering dissenting viewpoints is "an important part of the education process,"[107] so long as the expression does not cause "substantial disorder or invasion of the rights of others[.]"[108] A trio of cases—one from the Supreme Court and two from the circuit courts—between 1972 and 1980 illustrate the application of *Tinker* well.

First, in *Healy v. James*, a group of students at Central Connecticut State College challenged the public college's prohibition on the establishment of a Students for a Democratic Society chapter on the campus.[109] The Supreme Court held that the college must officially recognize the organization if it is willing to comply with "reasonable campus rules and regulations[.]"[110] In reaching its conclusion, the Court again reasoned that "[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas[.]"[111] Importantly, the Court added that protecting free speech is "nowhere more vital" than in schools.[112]

The second case was brought in the District Court of New Hampshire. There, the court applied *Tinker* and *Healy* to enjoin the University of New Hampshire from prohibiting or restricting sponsored events by the Gay Students Organization ("GSO") on campus.[113] The court began by noting that students' right to freedom of speech on campus is no longer questioned.[114] It then recognized that student-organization-sponsored events fall within the realm of constitutionally protected speech on public college

104. *Id.* at 504.
105. *Id.* at 514.
106. *Id.* at 506.
107. *Id.* at 512.
108. *Id.* at 513.
109. Healy v. James, 408 U.S. 169, 170 (1972). The college denied recognition because it was not convinced the student organization was wholly divorced from the national Students for a Democratic Society, which the college viewed as violent. *Id.* at 169.
110. *Id.* at 194. The Court emphasized that official recognition was necessary to protect the petitioner's First Amendment rights because it afforded the organization the ability to "remain a viable entity" on campus through things such as using campus bulletin boards and meeting spaces. *Id.* at 181–82.
111. *Id.* at 180–81.
112. *Id.* at 180.
113. Gay Students Org. of Univ. of N.H. v. Bonner, 367 F. Supp. 1088, 1102 (D.N.H. 1974), *aff'd in part and rev'd in part on other grounds*, 509 F.2d 652 (1st Cir. 1974).
114. *Id.* at 1094.

campuses.[115] As such, the "social" events held by the GSO were in furtherance of the organization's mission of "promot[ing] the free exchange of ideas among homosexuals and between homosexuals and heterosexuals, and to educate the public about bisexuality and homosexuality."[116] On appeal, the First Circuit held that the organization must be able to host events on campus and freely express their ideas, "for only in this way can our system of peaceful social change be maintained."[117]

In the third case, *Shamloo v. Mississippi State Board of Trustees of Institutions of Higher Learning*, the Fifth Circuit applied the same principles in striking down several regulations on student demonstrations at Jackson State University.[118] In *Shamloo*, thirty-two Iranian students participated in demonstrations on campus expressing support for the new Iranian government.[119] The university brought disciplinary actions against the students for not complying with the school's demonstration regulations, which required students to gain approval of any expressive activity from one of five administration officials at least three days in advance of the demonstration and that the demonstration be "wholesome."[120] The university sanctioned all but one student for their expressive activity.[121] The sanctioned students sued the school for infringing on their constitutional right to freedom of speech.[122]

The court first attempted to analyze the students' free speech claim under the test set forth in *Tinker*.[123] However, the court declined to make a determination as to any interference the demonstration allegedly caused with educational activities.[124] As a result, the Court bypassed the *Tinker* analysis and rested its holding, striking down the regulations, on alternative free speech grounds.[125] The Court held the regulations were unconstitutional

115. *Id.* at 1095.
116. *Bonner*, 509 F.2d at 661.
117. *Bonner*, 367 F. Supp. at 1102. *See also* Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972) (holding that the denial of use of school facilities violated the First Amendment rights of students wishing to use it for expressive activities of the Committee on Gay Education).
118. Shamloo v. Miss. State Bd. of Trs. of Insts. of Higher Learning, 620 F.2d 516 (5th Cir. 1980).
119. *Id.* at 519.
120. *Id.* at 519–20.
121. *Id.* at 520.
122. *Id.* at 518.
123. *Id.* at 521–22; *see* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513 (1969).
124. *Shamloo*, 620 F.2d at 522.
125. *Id.*

for two reasons.[126] First, the requirement that demonstrations be "wholesome" constituted a content-based restriction.[127] This made the regulation "unreasonable on its face."[128] Second, the same "wholesome" requirement made the regulation unconstitutionally vague because a "college student would have great difficulty determining whether or not his activities constitute prohibited unwholesome conduct."[129] These two rationales represent two additional First Amendment hurdles that public institution speech regulations must clear.

In addition to these cases dealing with students' freedom of speech on campus, several subsequent cases also addressed academic freedom for professors' free speech rights. In *Parate v. Isibor*, the Sixth Circuit attempted to strike a balance between the academic freedom of a university professor and the freedom of the university itself.[130] Parate, a professor at Tennessee State University, refused to change a student's grade after the student cheated on the final exam and provided fake excuses for doing so.[131] In retaliation, Parate's supervising dean gave him a critical review on his evaluation, berated him, denied authorized travel reimbursements, and failed to renew his teaching contract.[132] Parate then sued the school and the dean under 42 U.S.C. § 1983 alleging, *inter alia*, a violation of his First Amendment academic freedom rights.[133]

In assessing the claim, the Sixth Circuit first recognized that academic freedom "thrives . . . on the autonomous decision making [of] . . . the academy itself."[134] The court also invoked the four freedoms of the university written by Justice Frankfurter in *Sweezy*.[135] However, the court then noted that individual professors have substantial academic freedom

126. *Id.* at 523–24.
127. *Id.* at 523. A "[c]ontent-based law" is one "that target[s] speech based on its communicative content" and is "presumptively unconstitutional[.]" Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015).
128. *Id.*
129. *Id.* at 524.
130. Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).
131. *Id.* at 824.
132. *Id.* at 824–25.
133. *Id.* at 825.
134. *Id.* at 826 (internal quotation marks omitted) (citation omitted).
135. *Id.*

protection under the First Amendment.[136] Ultimately, the Court held that the latter prevailed, and the school compelling Parate to change the student's grade constituted an infringement of his constitutional rights.[137]

D. Speech on Campus

A review of what is happening on college campuses today reveals a culture in stark contrast with Voltaire's famous saying: "I may disagree with you, but I defend to the death your right to say it."[138] Simply put, colleges are not defending the rights of students to say things that are controversial or that might offend someone. This concern is not new. During the Supreme Court oral argument in *Cohen v. California*, counsel for the appellant made it a point to note that a "hostile audience" should not be sufficient to shut down a speaker because the audience finds the speech to be offensive.[139] Counsel went on to state, "This becomes a very current issue on college campuses today, where many members of the [g]overnment and other established people cannot go on campus because the college audiences are sufficiently hostile so that they attempt, sometimes, by violent acts, to stop the speaker."[140] He then asserted that "this is wrong; this is contrary to the First Amendment[.]"[141] Nearly fifty years later, Justice Samuel Alito echoed similar sentiments about speech on campus in an address at the annual convention of The Federalist Society. Justice Alito remarked, "It would be easy to put together a list of things you can't say if you're a professor or a student at a college or university."[142] And these warnings are not hollow; there are many examples of the attack on free speech on college campuses in present-day America.

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136. *Parate*, 868 F.2d at 827. *But see* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) ("The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.").

137. *Parate*, 868 F.2d at 830.

138. Martin Gruberg, *Voltaire*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1263/voltaire [https://perma.cc/5K5K-2RMF]; EVELYN BEATRICE HALL, THE FRIENDS OF VOLTAIRE 199 (G. P. Putnam's Sons 1907).

139. Transcript of Oral Argument at 21, Cohen v. California, 403 U.S. 15 (1971) (No. 299).

140. *Id.*

141. *Id.*

142. Samuel Alito, Associate Justice of the United States Supreme Court, Keynote Address at The Federalist Society National Lawyers Convention, at 39:05 (Nov. 12, 2020), https://www.youtube.com/watch?v=tYLZL4GZVbA&feature=emb_title [https://perma.cc/42DH-KB34].

In his article arguing for constitutional free speech rights of student journalists on college campuses, Brian J. Steffen outlines several such instances of censorship on campus.[143] A College of the Ozarks student left the school after it pressured him to shut down the newspaper he ran.[144] Jacksonville University removed and placed on disciplinary probation the school newspaper's student editor for publishing a "satirically risqué photograph of a male beauty pageant."[145] The Northwestern University student government withdrew its support of the conservative-leaning student newspaper and denied it student organization office space.[146] Clark Atlanta University withdrew funding for the student newspaper after it "reported that toxic materials were used in art classes."[147]

Censorship has not stopped at student journalists. Many institutions have established free speech zones, thereby restricting any freedom of expression to particular areas of the campus.[148] Some civil libertarian groups, such as the ACLU, have pushed back, arguing that "all public spaces in America are free-expression areas."[149] And in addition to free speech areas, colleges have found other ways to stifle free speech on campus. In 2020 alone, there were at least twenty instances of a speaker being disinvited to speak at a college because of their views.[150] These efforts have been led by both those on the political right and left, at both public and private colleges.[151] Right-leaning students and groups at Georgetown University called for the cancellation of a Zoom event that featured an

143. Brian J. Steffen, *Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139 (2002).

144. *Id.* at 140.

145. *Id.* at 141.

146. *Id.* The recognition was reinstated only after several alumni and faculty members criticized the decision.

147. *Id.*

148. Emerson Sykes & Vera Eidelman, *When Colleges Confine Free Speech to a 'Zone,' It Isn't Free*, AM. CIV. LIBERTIES UNION (Feb. 7, 2019, 2:30 PM), https://www.aclu.org/blog/free-speech/student-speech-and-privacy/when-colleges-confine-free-speech-zone-it-isnt-free [https://perma.cc/2UTF-4ENG].

149. *Id.*

150. *Disinvitation Database*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/research/disinvitation-database/#home/?view_2_sort=field_6|desc [https://perma.cc/QXL7-YPET] (last accessed Jan. 23, 2021).

151. *Id.*

Israeli-born Jew because of his views on Israel.[152] At Duke University School of Law, numerous left-leaning students signed their name to a letter calling to cancel a student group-sponsored event that included a law professor who believes marriage should only be between opposite-sex couples.[153] But non-college affiliated speakers are not the only ones being censored on campuses. Students are too.

Campus "free speech" codes provide means for colleges to censor students who present unpopular viewpoints on campus. Using Missouri as an example, at least three private institutions have speech codes that could be used in nefarious ways to undermine students' free speech rights. Lindenwood University's statement on academic freedom states that students should be free to express their views, but that "in no way implies a tolerance of disrespect [or] of bigotry. . . ."[154] But the policy does not define "disrespect" or "bigotry." Saint Louis University's student handbook prohibits "[a]ny unwelcome, unsolicited, and *offensive* conduct that injures, degrades, or shows hostility, or disrupts from the formation of an inclusive environment . . . ."[155] But the handbook does not define "offensive." Finally, Washington University in St. Louis's Rights and Responsibilities of Resident Students includes the "right to be free from *intimidation*, physical and/or *emotional harm*."[156] The document does not, however, define "intimidation" or "emotional harm." On their face, the policies prohibit a broader class of speech than the fighting words doctrine leaves unprotected. And such policies have not gone unanswered. States and the federal

152. Aaron Bandler, *Georgetown SJP to Host Speaker Who Tweeted Jews Are Known for Being 'Sleazy Thieves'*, JEWISH J. (Oct. 15, 2020), https://jewishjournal.com/news/322976/georgetown-sjp-to-host-speaker-who-tweeted-jews-are-known-for-being-sleazy-thieves/ [https://perma.cc/4EJ5-BWCD].

153. Law School Students, *A plea to disinvite Professor Alvare*, THE CHRONICLE (Oct. 20, 2020, 11:00 PM), https://www.dukechronicle.com/article/2020/10/a-plea-to-remove-professor-alvare-law-school-alvare-lgbtq [https://perma.cc/2LA6-2X94].

154. *Academic Freedom*, LINDENWOOD UNIVERSITY, https://www.lindenwood.edu/academics/support-resources/academic-freedom/ [https://perma.cc/Z2ZY-T9P7] (last accessed Jan. 24, 2021).

155. *2019–2020 Student Handbook*, ST. LOUIS UNIVERSITY, https://www.slu.edu/life-at-slu/community-standards/studenthandbook1920.pdf [https://perma.cc/2TR9-XC72] (last accessed on Jan. 24, 2021) (emphasis added).

156. *Rights and Responsibilities of Resident Students*, WASHINGTON UNIVERSITY IN ST. LOUIS https://wustl.edu/about/compliance-policies/governance/rights-responsibilities-resident-students/ [https://perma.cc/K8CW-8DHL] (last accessed on Jan. 24, 2021).

government have taken legislative and symbolic steps, albeit not enough, to recognize the importance of free speech on campus.

According to the 1915 General Report of the Committee on Academic Freedom and Academic Tenure:

> [The university] should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world.[157]

The marketplace of ideas for the college campus concept described by the committee has been embraced by states and the federal government. In 1991, Representative Joel Hefley introduced the Freedom of Speech on Campus Act of 1991 ("FSCA").[158] The FSCA provided that any institution of higher education that received federal financial assistance, with the exception of religious and military institutions, was not allowed to sanction or discriminate against a student for engaging in protected speech.[159] The bill defined "protected speech" as any "speech that is protected under the [F]irst and [F]ourteenth [A]mendments . . . or would be so protected if the institution of higher education were subject to those amendments."[160] Violations of the law would be enforced by the federal Department of Education revoking federal funding to the institution that was found to be in violation.[161]

While the FSCA was never passed by Congress, California did enact a similar law one year after the bill's failure.[162] In what is popularly known as the state's Leonard Law,[163] California private colleges are disallowed from "mak[ing] or enforc[ing] a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech . . . that, when engaged in

157. Edwin R. A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure*, American Association of University Professors, 1 BULL. AM. ASS'N U. PROFESSORS 15, 65 (1915).
158. H.R. 3451, 102d Cong. (1991).
159. *Id.* §§ 901A(a)(1)–(2), (2).
160. *Id.* § 901A(c)(2).
161. 20 U.S.C. § 1682 (1972).
162. CAL. EDUC. CODE § 94367 (West 1992).
163. *California Leonard Law (private colleges) (2009)*, STUDENT PRESS L. CTR. (Sept. 30, 1992), https://splc.org/1992/09/california-leonard-law-private-colleges/ [https://perma.cc/8J62-6T9X].

outside the campus, . . . is protected from governmental restriction by the First Amendment[.]"[164] Like the FSCA, the Leonard Law does not apply to religiously-affiliated colleges.[165] Unlike the FSCA, however, the Leonard Law allows for students to bring a civil action against the college for violating the statute.[166] A student who prevails in a lawsuit against their college can obtain an injunction, declaratory relief, and attorney's fees.[167] While the statute allows students to sue their schools for violations, it has not led to a wave of litigation. In fact, as far as the author can find, only ten California free speech cases cite to the Leonard Law.[168]

Nearly thirty years later in 2018, with the support of a Democrat governor, Louisiana enacted a law protecting free speech for students on public college campuses.[169] The law "eliminates free speech zones, designates Louisiana postsecondary institutions as traditional public forums, and implements measures that ensure institutions are held accountable for protecting free speech."[170] The enforcement structure the Louisiana law adopts is different than California's Leonard Law. The Louisiana Law requires public colleges in the state to generate annual reports that detail the institution's implementation of the law's requirements, any barriers or incidents against free expression that occur, and if the institution has been sued for a First Amendment free speech violation.[171] The law also requires colleges to make those reports publicly

164. CAL. EDUC. CODE § 94367(a).
165. *Id.* § 94367(c).
166. *Id.* § 94367(b).
167. *Id.*
168. *See* Antebi v. Occidental Coll., 47 Cal. Rptr. 277 (Cal. Ct. App. 2006); Marca v. Capella Univ., No. 05-642, 2007 WL 9705859 (C.D. Cal. Dec. 13, 2007); Amini v. S. Cal. Univ. of Health Sci., No. B191273, 2008 WL 116259 (Cal. Ct. App. 2008); Runyon v. Bd. of Tr. of Cal. State Univ., No. B195213, 2008 WL 4741061 (Cal. Ct. App. 2008); Yu v. Univ. of La Verne, 196 Cal. Rptr. 3d 763 (Cal. Ct. App. 2011); Grisham v. Notre Dame De Namur Univ., No. A135765, 2013 WL 4239157 (Cal. Ct. App. Aug. 13, 2013); Salinas v. Palo Alto Univ., No. 5:15-CV-06336-HRL, 2016 WL 3068404 (N.D. Cal. June 1, 2016); Karimi v. Golden Gate Sch. of L., No. 17-CV-05702-JCS, 2018 WL 1911804 (N.D. Cal. Apr. 23, 2018); Omicron Chapter of Kappa Alpha Theta Sorority v. Univ. of S. Cal., No. B292907, 2019 WL 1930153 (Cal. Ct. App. May 1, 2019); Massey v. Biola Univ., Inc., No. 219CV09626CJCJDE, 2020 WL 6161451 (C.D. Cal. Oct. 20, 2020).
169. Corbin Robinson and Shelby Emmett, *ALEC-Influenced Free Speech Legislation Becomes Law in Louisiana*, AM. LEGIS. EXCH. COUNCIL (June 25, 2018), https://www.alec.org/article/alec-influenced-free-speech-legislation-becomes-law-in-louisiana/ [https://perma.cc/NQ97-587W].
170. *Id.*; LA. STAT. ANN. §§ 3399.31–3399.37 (2018).
171. § 3399.36. The Louisiana law does not explicitly create a cause of action. Because it applies to public colleges, victims of free speech infringement would presumably sue the school under 28 U.S.C. § 1983.

available on their websites.[172] One glaring problem with the Louisiana law is the omission of restrictions on private colleges. In this sense, the law does not go far enough.

Since the Louisiana law was enacted, other actions by governments regarding free speech have been largely symbolic. On March 21, 2019, President Donald Trump issued Executive Order 13,864, which was aimed at improving free speech protections on college campuses—both public and private—across the nation.[173] The Order directed federal agencies to "ensure institutions that receive Federal research or education grants promote free inquiry" and to "encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate[.]"[174] However, the Order includes no consequences or enforcement mechanism for institutions that do not foster such environments.[175]

Several senators followed the President's lead three months later and introduced "[a] resolution recognizing the importance of protecting freedom of speech, thought, and expression at institutions of higher education."[176] The Resolution listed numerous instances of free speech violations on college campuses and stated that "free speech zones and restrictive speech codes are inherently at odds with the freedom of speech guaranteed by the First Amendment[.]"[177] But that is all the Resolution did; it was never voted on by the entire Senate and, even if it was, it would not have the force of law.[178]

The argument I make in this Note is influenced by the way our society has thought and continues to think about free speech. To begin, there is the First Amendment—the epitome of a society valuing the freedom of speech—and the body of academic freedom jurisprudence that has grown out of it. While academic freedom has not become a well-defined doctrine, it has nonetheless influenced the discussion about free speech on campus. And the First Amendment has been applied in the college campus context

172. *Id.*
173. Exec. Order No. 13,864, 84 C.F.R. 11401 (2019).
174. *Id.*
175. *Id.*
176. S. Res. 233, 116th Cong. (2019).
177. *Id.*
178. *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm [https://perma.cc/F9GV-PSJ7] (last accessed Jan. 24, 2021) ("Simple resolutions . . . do not have the force of law.").

many times. Beyond the First Amendment's reach, several states and the White House have introduced or implemented policies and laws aimed at protecting students' campus free speech rights. This history and the approaches taken in the past to address the issue of free speech on campus can help inform the direction future legislation should take.

II. ANALYSIS

In this section, I will analyze the difference between judicial extension and legislative extension of free speech rights to college campuses. In doing so, I will set the stage for my proposal that states should adopt laws requiring private colleges to afford students free speech rights akin to those public college students have. The enforcement of such rights should be a combination of regulatory and oversight mechanisms that ensure free speech prevails.

A. Judicial Extension and the State Action Requirement

At first, it seems most logical to rely on the federal judiciary.[179] This may seem convenient because of the difficulty of the legislative process, the judiciary's perceived responsibility of interpreting the Constitution, and the ability to avoid fifty states adopting different degrees of rights. But there are two insurmountable hurdles that make judicial extension both unattainable and undesirable. First, the state action doctrine poses a legal barrier that is unlikely to be overcome. Second, a judicially-extended right can be taken away just as easily as it is granted. These barriers are worth consideration before discussing how states should legislatively accomplish the same end.

The first barrier is straightforward. The Fourteenth Amendment incorporates the First Amendment against the states, not private actors.[180] The Supreme Court made this clear in the *Civil Rights Cases* and the state action doctrine remains the law today.[181] Further, neither of the two recognized limited exceptions to the state action requirement—private actor performing public function or private-public entanglement—are

179. *See* Steffen, *supra* note 143, at 142–43. Steffen argues that First Amendment protection should be extended by the courts to student journalists at private colleges.

180. U.S. CONST. amend. XIV, § 1 ("No *state* shall make or enforce . . . .") (emphasis added).

181. The Civil Rights Cases, 109 U.S. 3 (1883); *see also* Schmidt, *supra* note 46.

realistically applicable. A private college does not perform a public function in the Fourteenth Amendment context. While Judge J. Skelly Wright argued in 1962 that private college administrators perform a public function in the context of racial segregation,[182] this argument does not represent the law today.[183] At the same time, there is not a sufficient degree of state control to constitute substantial entanglement between the state and the private college. This makes judicial extension of free speech rights, as enforced against private colleges, almost unattainable.

The second barrier is more nuanced. In addition to it being legally incorrect to apply the First Amendment to private colleges, it would also be unwise as a matter of federal court legitimacy. If a court can extend free speech rights in this way, the same court can go back on its ruling just as easily. This would invite protracted litigation aimed at changing and developing the rule in a battle of free speech activist litigators and private colleges. These battles should happen in the halls of the state legislature, not the courtroom. Alternatively, a legislative extension would concentrate that give-and-take in the body where it should take place: the legislature. Legislative extension would invite legislators, who unquestionably represent constituents on both sides of the issue, to consider its nuances and craft a policy that can withstand the political hurdles[184] and become enacted law.

B. Legislative Extension

Legislative extension presents a better opportunity for ensuring private college students enjoy free speech rights on campus for several reasons. First, legislative extension is likely to be longer lasting, more developed, and command more legitimacy. Legislation is difficult to pass into law because of the political process necessary. The flip side of that coin is that enacted laws are difficult to repeal. This coupled with how vulnerable judicially-created rules can be, makes legislative extension likely to live longer. The political process also means a legislative solution is likely to be

182. Guillory v. Adm'rs of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962).
183. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
184. The political hurdles include legislative committee consideration, identical passage in both chambers of a state's legislature (with the exception of Nebraska), and support of the state's governor to sign it into law.

better developed than a judicial one. Whereas a judicial ruling would likely be narrow and built upon in future rulings, slowly developing the law, a legislative solution would go through the development process up-front. This is not to say a legislative solution will be perfect. But it would have been opined on by experts, debated and amended in committee hearings, and considered by both chambers of the state's legislature. A legislative solution would surely be more perfect than a judicially-crafted one.

Second, legislative extension can provide for an enforcement mechanism that is not a civil lawsuit. If the judiciary were to extend free speech rights, every student seeking vindication would have to hire a lawyer and go through the long and costly litigation process. This is undesirable. Students seeking a college degree should spend their time studying, debating, and participating in campus activities. Further, a student should not have to go to court to exercise her right to free speech. In this spirit, states could develop an enforcement mechanism that ensures free speech while minimizing the financial and time cost to students.

III. PROPOSAL

All the evidence reflects the need for state legislatures to pass laws that enable private college students to speak freely. I will begin by discussing the details of legislative extension, including what legislation should include and how the law would further free speech. Then I will address several counterarguments, the most serious of which are that the private college retains an institutional free speech right and the law would violate the original meaning of the Constitution. I will then briefly discuss the possible remedies the law could provide.

A. The Details of Legislative Extension

The essence of the legislation should be similar to that in the introduced Free Speech on Campus Act of 1991 and California's Leonard Law.[185] The legislation should prohibit a private college from punishing or retaliating

185. H.R. 3451, 102d Cong. (1991); CAL. EDUC. CODE § 94367 (West 2009). The religious and military institution exceptions included in the Leonard Law should also be included in the proposed legislation to avoid First Amendment establishment of free exercise clause hurdles. These religious freedom issues are beyond the scope of this Note.

against students who express themselves if that expression would be protected by the First Amendment to the United States Constitution and would not disrupt the education process as defined by *Tinker v. Des Moines Independent Community School District*.[186]

The enforcement of this law should be twofold. First, private colleges should be required to file an annual report with the State Attorney General's Office detailing any incidents in which the college censored, disciplined, or retaliated against a student for expressive conduct.[187] This report should also be made publicly available on the school's website. In addition, the State Attorney General's Office should intake complaints of violations, investigate them, and civilly charge institutions that violate the law. This way, the institution and the government, not students, shoulder the cost of enforcement.[188]

As discussed, at least three private colleges in Missouri have speech codes and student policies that could be used to censor student speech on campus.[189] To be clear, this proposed legislation would not change the substance of those policies. Nor would it restrict the colleges' abilities to adopt such policies in the future. What this legislation would do is prohibit any college from using those policies to infringe on a student's free speech right. For example, Lindenwood University would not be able to restrict a student's arguably "disrespectful" behavior unless it would pose a clear and present danger on campus or disrupt the educational process.[190] Washington University would be restricted in the same way with regards to speech that causes "emotional harm."[191]

This legislative proposal is necessary for several reasons. First, as discussed in the introduction to this Note, students like J. Michael Brown and Mitch Strider are being censored on campuses across the country.[192]

186. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

187. This is similar to the enforcement mechanism in the Louisiana campus speech law. LA. STAT. ANN. §§ 3399.31–3399.37 (2018).

188. Whether this would result in colleges passing the cost onto students in the form of higher tuition and fees is a complicated economics question. It is worth considering, however, other college regulations—such as Title IX—that impose an enforcement cost on the institution. The question therefore becomes whether the cost is worth the policy. In the Title IX and free speech contexts, I would argue that it is.

189. *See supra* Part I (d).

190. *Academic Freedom*, *supra* note 154; *see also* Brandenburg v. Ohio, 395 U.S. 444 (1969).

191. *Rights and Responsibilities*, *supra* note 156.

192. Brown v. Jones Cnty. Junior Coll., 463 F. Supp. 3d 742, 747–48 (S.D. Miss. 2020).

This is an undesirable outcome for a country that operates as a Constitutional Republic that relies on civic participation and open debate. This is best demonstrated by asking a simple question: Should college students be exposed to different ideas? If the answer to that question is yes, then students must be able to express their ideas freely on college campuses. Otherwise, the only method of exposure will come from institution-sanctioned alternative viewpoints that are sure to be biased and filtered. Censorship invites selectivity. An "offensive" idea may very well include a kernel of truth.

This is another reason why it is important that students at private colleges be able to speak freely on campus. They will likely not gain exposure to opposing viewpoints from the academy itself.[193] The academy leans to the left; "[E]ven in the most 'conservative' disciplines the liberals outnumber conservatives by wide margins."[194] Victor David Hanson opined that "faculty and students now know precisely which speech will endanger their careers and which will earn them rewards. The terrified campus community makes the necessary adjustments. . . . Toadies thrive; mavericks are hounded."[195] Whether a left-leaning academy is a positive thing or not is neither here nor there, but the largely homogenous academy does present the need for campuses to allow for diversity of opinion. Combined with an online world that presents an increasingly polarizing feed of news and opinions,[196] it is all the more important that college campuses be a place where opposing viewpoints can be presented and debated openly.

This legislation would enhance free speech on private college campuses. It directly advances the two primary rationales used to justify a more robust First Amendment by Justices Holmes and Brandeis. First, you cannot have a marketplace of ideas if the market is not free to entrants. If speech is censored—and kept out of the market—then the marketplace will by definition fail of its essential purpose. Justice Holmes argued against censoring opinions "we loathe and believe to be fraught with death" in the

193. *See generally* SUNSTEIN, *supra* note 42 (noting that regulation might be necessary to correct distortions in the free speech marketplace).

194. Robert Maranto & Matthew Woessner, *Diversifying the Academy: How Conservative Academics Can Thrive in Liberal Academia*, 45 POL. SCI. & POL. 469 (2012).

195. Victor Davis Hanson, *How universities lose their way – and cheat their students*, CHICAGO TRIBUNE (May 4, 2017, 9:11 AM), https://www.chicagotribune.com/opinion/commentary/ct-free-speech-liberal-colleges-campuses-20170504-story.html [https://perma.cc/G8ZF-9DLG].

196. *See generally* ASH, *supra* note 32, at 51.

general marketplace.[197] This legislation disallows the censorship of those opinions on college campuses.

In addition, the protection of private student speech is also important for self-governance. Justice Brandeis stated that "the greatest menace to freedom is an inert people; that public discussion is a political duty . . . [and] the path to safety lies in the opportunity to discuss freely supposed grievances[.]"[198] Approaching free speech on campuses through a self-governance lens is important for two reasons. First, students must be able to engage in opposing ideas once they graduate college and are active members of society. A college atmosphere that censors speech does not prepare students for this challenge. Second, approximately 36% of voting Americans have a four-year degree.[199] That is a large portion of the voting bloc. It is important that students who are going to participate in the decision-making process become exposed to various arguments and viewpoints to both broaden their perspectives and hone their ability to evaluate policy arguments.

B. Does the "Institutional Right" Pose a Barrier?

Furthermore, the proposed legislation does not infringe on any institutional right of academic freedom, if such a right exists at all. As noted, the Supreme Court has never disposed of a case purely on academic freedom grounds.[200] In fact, "[t]here has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it."[201] But the Court has, on countless occasions, held that students have free speech rights.[202] If the two were to be balanced against one another in the context of this Note's proposal, students' free speech would likely win. And even if the academic freedom doctrine were to provide the institution a shield, the proposed law does not infringe on it.

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197. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

198. Whitney v. California, 274 U.S. 375 (1927) (Brandeis, J., concurring).

199. *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines*, PEW RSCH. CTR. (June 2, 2020), https://www.pewresearch.org/politics/2020/06/02/in-changing-u-s-electorate-race-and-education-remain-stark-dividing-lines/ [https://perma.cc/7FEV-MNBA].

200. *See supra* Part I (c).

201. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L. J. 251, 253 (1989).

202. *See supra* Part I (d).

The only complete articulation of the academic freedom doctrine at the Supreme Court was by Justice Frankfurter in his concurrence in *Sweezy v. New Hampshire*.[203] He stated that academic freedom includes the "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who shall be admitted to study."[204] Enabling a student to express herself freely on campus does not necessarily infringe upon any of these rights. Similarly, a professor's methods of instruction are not always impacted by a student's non-disruptive free speech. The institutional academic freedom argument quickly fails.

Aside from academic freedom, if the institution has a free speech right broader than that espoused in *Sweezy*, the proposed law does not infringe on that right either.[205] The proposed law does not dictate what a college may include in its emails to its students, faculty, and donors. It does not require the college to endorse a particular message. It does not prohibit the college from hosting events espousing particular viewpoints or ideologies. In essence, the college would still be free to speak on whatever topic it may choose, however it pleases.

C. Other Counterarguments

Two more counterarguments are likely to be lodged against this legislative proposal. First, that academic institutions are better situated to make these choices, not the government. Second, that students should be free to choose colleges in part based on their speech policies. The first argument fails because colleges have widely neglected their responsibility to protect speech on campus. As demonstrated, speakers are continuously disinvited from college campuses,[206] students are censored when they seek to express themselves,[207] and student journalists are shut down when they

203. Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring).

204. *Id.* at 262 (Frankfurter, J., concurring).

205. The proposed law especially does not infringe on the free speech clause as it was originally understood. As noted, many at the time of the Founding believed the government had the right to expand free speech (the speech of the students by "restricting" the "speech" of the college) so long as it did not impose a prior restraint. *See generally* Campbell, *supra* note 18.

206. *Disinvitation Database*, *supra* note 150.

207. *See, e.g.*, Brown v. Jones Cnty. Junior Coll., 463 F. Supp. 3d 742 (S.D. Miss. 2020).

say the wrong thing.[208] If we accept that free speech on campus is a net positive, then we must recognize that colleges have failed to see to it that speech on campus is in fact free. Further, the proposed legislation does not necessarily make educational choices for colleges. It simply requires them to enable students to exercise their free speech rights in a way that does not interfere with the education process.[209]

In terms of educational choice, students have a plethora of different ways to choose what college to attend. If they wish to attend a college that is religiously affiliated, they have that option. If they wish to choose a college based on its curricular or extracurricular offerings, they have those options. But to enforce free speech rights unequally between public and private college students in the name of a student's choice of college is unpersuasive. The argument ignores the fact that free speech on campus is necessary to the develop of the students' faculties and ability to effectively function in a self-governing society. This is especially true considering a student on any campus is never forced to engage with or listen to another student's speech. A student who wishes to not engage certain types of speech can walk away; close the door; put in earphones; or provide counter speech.

D. Remedy

Among the possible remedies for violations of the proposed law, three options present themselves: damages, an injunction, and withholding funding. Damages would require an institution that has violated the law to pay damages to the injured student. The problem with damages, however, is quantifying them. An award of nominal damages is likely to make a mockery of the law and provide little incentive to institutions to comply. Additionally, an injunction would be effective if the process were fast enough to produce a result before the student's desired expressive activity. This is unlikely to remedy a situation in a timely manner. Finally, withholding state funding would depend on how much state funding the

208. Steffen, *supra* note 143.

209. In the author's view, speech that disrupts the educational process is speech that would substantially interfere with the delivery of formal instruction. For example, if students decided to demonstrate by chanting outside of a classroom in a way that prevents students from hearing their professor or each other.

institution receives. If it is minimal, it is unlikely to deter an institution from violating free speech rights. Additionally, a formula for determining how much funding is withheld and for how long for what type of violation would be necessary. I leave these questions and the presentation of creative remedy solutions to future scholarly work.

CONCLUSION

Each state should take it upon itself to pass legislation that ensures students on private college campuses have free speech rights parallel to those enjoyed by their public college peers. The legislation should protect a student's right to express themselves in ways the First Amendment protects, except where it interferes with the education process. To enforce these rights, the legislation should require schools to submit an annual report of their censorship practices and enable the State Attorney General's Office to field, investigate, and charge complaints.

In addition to providing an efficient and effective scheme for affording free speech rights to private college students, legislation will prove to be more durable, detailed, and legitimate than judicial extension. Legislation will be debated and withstand the rigors of the political process. It will be embedded into the state's laws and enforced by its agents. A judicial extension, on the other hand, would take time and litigation to develop. And judicial extension would not provide for any enforcement mechanism besides litigation, a process that takes a substantial amount of time and money. Ensuring speech is free on college campuses should be a burden shouldered by the institutions and the states, not students.

This legislation is necessary because students on college campuses across the country face censorship, discipline, and retaliation for simply expressing themselves. Students are prohibited from speaking on campus in a way that they could in other places with constitutional protection. But not all students. It is only private college students who face this burden because of the state action requirement of the Fourteenth Amendment. While a legal necessity, the Fourteenth Amendment creates a discrepancy in rights of college students. This discrepancy is contrary to the values of free speech and open expression.

Ultimately, "Freedom of speech is both a cause and an effect of wider freedom."[210] This principle is enshrined in the First Amendment to the United States Constitution.[211] It is a virtue in the free world. It is what enables issues to be debated, differences to be worked out, and pluralistic people to coexist in harmony. For these reasons, we should seek to extend free speech as far as possible. We should not leave private college students to suffer censorship. We should protect their speech, just as we would protect our own.

210. ASH, *supra* note 32, at 59.
211. U.S. CONST. amend. I.