

## Background Brief: Free Speech

A number of high-profile incidents involving controversial speakers on college campuses in recent years has focused the attention of lawmakers on the idea of a crisis of free speech in higher education. The fact that public institutions of higher education are considered government actors held to the strictures of the First Amendment complicates matters, though there are many threads to the conversations around threads to speech on college campuses and not all of them apply to constitutional rights. This brief will review some of those threads and provide examples from some of the most common legislation introduced or considered in the last few years relating to campus speech.

Generally, legislation – either at the state or federal level – to regulate institutional actions related to speech on campus in the name of protecting free speech risks creating a chilling effect on speech. Today’s young adults are the product both of anti-bullying campaigns – designed to counter the negative effects of ridicule and speech among children by speaking out and speaking up – and of our post-9/11 security culture – where they were taught to speak up if they saw something suspicious.<sup>1</sup> They are intimately aware of the intricacies of engaging in conversation and speech on controversial issues, perhaps more so than those adults they are looking to for guidance in how to do so successfully. Recent portrayals of the so-called crisis of free speech on college campuses are often framed as pitting free speech in opposition to equity and diversity when, as our students will tell you, the truth is far more nuanced. Rather than impose external conditions and restrictions on institutions and students as we work to establish both meaningful protections for those who have experienced past trauma and create spaces for open and honest discourse on fraught topics, our institutions of higher education should be allowed the freedom to establish guidelines and rules for deliberation appropriate for their communities within our already established free speech case law. Oversight by external actors to ensure that rights are not infringed is appropriate, however interference by those actors without understanding of the nuance of campus culture risks doing more harm than good.

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<sup>1</sup> Shapiro, S. (June 18, 2018). Snowflakes and Free Speech on Campuses. Inside Higher Ed: <https://www.insidehighered.com/views/2018/06/18/middlebury-professor-surveys-student-attitudes-about-free-speech-opinion>

## Is There A “Crisis of Free Speech” on Campus?

Secretary of Education Betsy DeVos<sup>2</sup> and Attorney General Jeff Sessions<sup>3</sup> remarked on Constitution Day, September 17, 2018, about a so-called crisis of free speech on college campuses<sup>4</sup>. In scripted remarks given that day, both decried that students are demanding to silence speakers they find hateful or offensive, even going so far as to accuse higher education institutions of “abandon[ing] principle and truth altogether”<sup>5</sup> and accusing today’s students of being “sanctimonious, sensitive snowflakes”<sup>6</sup>. Colleges and university administrators are increasingly in the crosshairs in these conversations, accused of squelching conservative voices<sup>7</sup> and refusing to invite or welcome conservative speakers<sup>8</sup>. The unfortunately ever-present offensive Halloween costume controversy is even starting to enter the free speech fray with students claiming that memos from university officials cautioning against culturally inappropriate costumes are “dangerously close to violating” their First Amendment rights<sup>9</sup>. On the other hand, college athletes who choose to kneel during the national anthem in protest over structural racism and police brutality are disciplined and risk removal from their teams.<sup>10</sup> Our political representation has steadily become more partisan, though it’s unclear if that is a cause or an effect of increasing polarization in the broader population. Following the 2018

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<sup>2</sup> Anapol, A. (September 17, 2018). DeVos decries lack of free speech on campuses, says US has ‘abandoned truth’. The Hill: <https://thehill.com/homenews/administration/407059-devos-decries-lack-of-free-speech-on-campus-says-us-has-abandoned>

<sup>3</sup> Keller, M. (September 18, 2018). Sessions: DOJ concerned about suppression of free speech on college campuses. The Hill: <https://thehill.com/homenews/administration/407338-sessions-doj-concerned-about-suppression-of-free-speech-on-college>

<sup>4</sup> Balingit, M. (September 17, 2018). DeVos, Sessions warn of deepening free-speech crisis on college campuses. The Washington Post: [https://www.washingtonpost.com/local/education/devos-sessions-warn-of-deepening-free-speech-crisis-on-college-campus/2018/09/17/21c5f8c6-ba9b-11e8-a8aa-860695e7f3fc\\_story.html](https://www.washingtonpost.com/local/education/devos-sessions-warn-of-deepening-free-speech-crisis-on-college-campus/2018/09/17/21c5f8c6-ba9b-11e8-a8aa-860695e7f3fc_story.html)

<sup>5</sup> U.S. Department of Justice. (September 17, 2018). Attorney General Sessions Delivers Remarks on the Administration’s Continued Commitment to Protecting First Amendment Freedoms at the Justice Department’s Forum on Free Speech in Higher Education. <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-continued-commitment>

<sup>6</sup> Tillett, E. (July 24, 2018). Sessions slams liberal colleges for fostering “sanctimonious, sensitive snowflakes”. CBS News: <https://www.cbsnews.com/news/sessions-slams-liberal-colleges-for-fostering-sanctimonious-sensitive-snowflakes/>

<sup>7</sup> Pringle, B. (October 22, 2018). Blame administrators for lack of conservative speakers on campus. Washington Examiner: <https://www.washingtonexaminer.com/red-alert-politics/blame-administrators-for-lack-of-conservative-speakers-on-campus>

<sup>8</sup> Dirks, N. (October 28, 2018). How Colleges Make Themselves Easy Targets. The Chronicle of Higher Education (subscription required): <https://www.chronicle.com/article/How-Colleges-Make-Themselves/244921>

<sup>9</sup> Zheng, L. (October 30, 2018). Student group claims OU memo on costumes is “dangerously close to violating” First Amendment. KFOR (OK): <https://kfor.com/2018/10/30/student-group-claims-ou-memo-on-costumes-is-dangerously-close-to-violating-first-amendment/>

<sup>10</sup> Bauer-Wolf, J. (February 19, 2019). Still Taking a Knee Against Racism. Inside Higher Ed: <https://www.insidehighered.com/news/2019/02/19/college-students-are-still-taking-knee-against-racism>

midterm elections, which saw record voter turnout and the most diverse class of new federal legislators we've ever seen, 48 states with bicameral legislatures were controlled by a single party in both chambers<sup>11</sup>. Nearly two-thirds of states are governed entirely by a single party, holding both chambers of the legislature as well as the governor's mansion<sup>12</sup>. For those with views aligning with the minority party in most states, whether Republican in blue states or Democrats in red states, their views are unlikely to be represented by their elected officials. The Pew Research Center has conducted a poll that includes questions related to "ideological consistency" for at least the past 25 years<sup>13</sup>. In 1994 and 2004, most Americans held a mix of views with the majority falling somewhere in the middle between consistently liberal and consistently conservative. By 2017, however, that middle ground has clearly been divided, with 92% of Republicans identifying with positions that are more conservative than the median Democrat and 94% of Democrats identifying with positions that are more liberal than the median Republican. In 1994, 64% of Republicans and 70% of Democrats held positions more extreme than the median member of the opposing party.

While there are voices of reason arguing that this so-called crisis is manufactured<sup>14</sup>, they are all too often drowned out by the cacophony. As recently reported in Inside Higher Ed<sup>15</sup>, however, instead of looking to hide from new ideas, today's students seem to be looking for ways to engage with them directly in ways that engender respect for all participants, if not all opinions. The Chronicle of Higher Education 2019 Trends Report includes a call from David Scobey, director of Bringing Theory to Practice, a national initiative that supports civic engagement and other core purposes of undergraduate education, for institutions of higher education to lead the nation along a path to heal this political divide<sup>16</sup>. Programs designed to promote deliberative dialogue across areas of difference have long existed on campuses but many are seeing increased focus as providing the path forward Mr. Scobey recommends as our society

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<sup>11</sup> Minnesota is the only state with a bicameral legislature that was split between parties. Nebraska has a unicameral legislature that is considered non-partisan. Source: National Council of State Legislatures. (n.d.) NCSL StateVote: <http://www.ncsl.org/research/elections-and-campaigns/statevote-2018-state-legislative-races-and-ballot-measures.aspx>

<sup>12</sup> Ibid.

<sup>13</sup> Pew Research Center. (June 12, 2014). Political Polarization in the American Public. <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>

<sup>14</sup> Binder, A. and Kidder, J. (October 30, 2018). If you think campus speech is all angry confrontation, you're looking in the wrong places. The Washington Post: <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/30/if-you-think-campus-speech-is-all-angry-confrontation-youre-looking-in-the-wrong-places/>

<sup>15</sup> Shapiro, S. (June 18, 2018). Snowflakes and Free Speech on Campuses. Inside Higher Ed: <https://www.insidehighered.com/views/2018/06/18/middlebury-professor-surveys-student-attitudes-about-free-speech-opinion>

<sup>16</sup> Scobey, D. (2019). The Path Across America's Divide Starts at Its Colleges. The Chronicle of Higher Education: <https://www.chronicle.com/interactives/Trend19-Intrusion-Opinion>

grapples with the increasing polarization. NASPA's Lead Initiative for Civic Learning and Democratic Engagement provides resources for campuses on a variety of civic engagement topics, including resources to train campus practitioners to facilitate deliberative dialogues on campus.

Essential to understanding how colleges and universities can lead the nation forward, it's necessary to first understand the history and current context of free speech regulation on college campuses. Existing case law discussed in the next section have long established and affirmed boundaries on educational institutions' ability to regulate expressive activity on campus without impeding constitutionally protected speech. Generally, legislation – either at the state or federal level – to regulate institutional actions related to speech on campus in the name of protecting free speech runs the risk of creating a chilling effect on speech. It is NASPA's position that protections provided under existing case law remain sufficient to foster free trade in the marketplace of ideas so lauded by Justice Oliver Wendell Holmes, Jr. in 1919<sup>17</sup> and Justice William O. Douglas in 1953<sup>18</sup>.

### Time, Place, and Manner<sup>19</sup>

The U.S. Supreme Court allows educational institutions, including colleges and universities, to apply “time, place, and manner” limitations on speech, including on campus speakers and demonstrators (*Cox v. New Hampshire*, 1941<sup>20</sup>; *McCullen v. Coakley*, 2014<sup>21</sup>; *Perry Education Association v. Perry Local Educators' Association*, 1983<sup>22</sup>; *Ward v. Rock Against Racism*, 1989<sup>23</sup>). The purpose of time, place, and manner restrictions is to regulate speech without impeding constitutionally protected speech. The U.S. Supreme Court requires that these limitations not be favorable to one perspective or another (content-neutral), serve a significant government interest, be narrowly tailored to achieve that interest, and offer alternative options for speech. Public institutions, which are funded by taxpayer dollars, are considered government entities

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<sup>17</sup> *Abrams v. United States*, 250 U.S. 616 (1919): <https://www.law.cornell.edu/supremecourt/text/250/616>

<sup>18</sup> *United States v. Rumely*, 345 U.S. 41 (1953): <https://www.law.cornell.edu/supremecourt/text/345/41>

<sup>19</sup> This Time, Place, and Manner section was originally written by Andrew Q. Morse and published in *The First Amendment and the Inclusive Campus: Effective Strategies for Leaders in Student Affairs*, Issue 3 of the NASPA Policy and Practice Series, May 2018; the full brief is available here: <https://www.naspa.org/rpi/reports/the-first-amendment-and-the-inclusive-campus-effective-strategies-for-leade>

<sup>20</sup> *Cox v. New Hampshire*, 312 U.S. 569 (1941): <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-cox-v-new-hampshire>

<sup>21</sup> *McCullen v. Coakley*, 573 U.S. (2014): <https://www.law.cornell.edu/supremecourt/text/12-1168>

<sup>22</sup> *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983): <https://caselaw.findlaw.com/us-supreme-court/460/37.html>

<sup>23</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989): <https://www.law.cornell.edu/supremecourt/text/408/104>

and, as such, are restricted from impeding speech beyond the narrow contours of time, place, and manner (*Perry Education Association v. Perry Local Educators' Association*, 1983).

Restrictions on time may include designations on the length, frequency, or time(s) [of day] that such activities can occur. However, the courts have affirmed that time restrictions placed on speech must be reasonable. Public colleges and universities that restrict speakers or demonstrators from hosting events on campus during the daytime, for example, face the risk of violating reasonable time restrictions on campus. However, colleges and universities have used the time restriction to articulate that campus demonstrations cannot take place after midnight.

Limitations on place might include specifications regarding the areas of a campus that can be used for free speech, including areas of a campus that require a reservation. Public institutions must ensure that any restrictions on access to certain campus property ensure content neutrality, serve a significant government interest, be narrowly tailored to achieve that interest, and provide ample alternatives.

Manner restrictions do not limit content, but instead relate to the form of communication used to express certain views, such as control of volume so as to not affect the ability for a regularly scheduled class to convene.

## Free Speech on Campus: Recent Congressional Action

While most of the legislation concerning speech on campus has been introduced at the state level, Congressional legislators have shown increased concern about campus speech holding multiple hearings on the topic in the 115<sup>th</sup> Congress<sup>24, 25, 26, 27</sup>. On May 22, 2018, the House Oversight Committee Subcommittees on Healthcare, Benefits, and Administrative Rules and on Intergovernmental Affairs held a joint hearing addressing the topic. The witnesses included several higher education faculty members involved in some of the more publicized campus speech incidents and a number of scholars in the field. There was disagreement both among

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<sup>24</sup> U.S. House of Representatives. Joint Hearing Committee on Oversight and Government Reform Subcommittees on Healthcare, Benefits and Administrative Rules and Intergovernmental Affairs. (July 27, 2017). "Challenges to the Freedom of Speech on College Campuses." <https://www.govinfo.gov/content/pkg/CHRG-115hhrg26855/html/CHRG-115hhrg26855.htm>

<sup>25</sup> U.S. House of Representatives. Joint Hearing Committee on Oversight and Government Reform Subcommittees on Healthcare, Benefits and Administrative Rules and Intergovernmental Affairs. (May 22, 2018). "Challenges to the Freedom of Speech on College Campuses: Part II." <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108337>

<sup>26</sup> U.S. Senate. Health, Education, Labor & Pensions Committee Hearing. (October 26, 2017) "Free Speech on College Campuses." <https://www.c-span.org/video/?436331-1/hearing-focuses-college-campus-free-speech>

<sup>27</sup> Leonor, M. (September 26, 2018). Debate over campus free speech back before House. Politico: <https://www.politico.com/newsletters/morning-education/2018/09/26/debate-over-campus-free-speech-back-before-house-351824>

the witnesses and the Committee members as to whether the challenges to speech on college campuses presents a crisis or are simply a matter of a few extreme and highly publicized incidents that are not representative of the typical campus experience. Notably, most of the witnesses seemed to agree that the best remedy to the concerns was not to legislate additional requirements for college campuses, but rather to continue conspicuous oversight so that campuses remain vigilant in protecting the rights of all their students. Witnesses in hearings held by the Senate Health, Education, Labor, and Pensions Committee and the House Committee on Education and the Workforce largely agreed with this conclusion.

While Senator Orrin Hatch (R-UT) introduced the Free Right to Expression in Education (FREE) Act (US S 2394)<sup>28</sup>, the bill had no co-sponsors and was not taken up by Senate leadership. Companion legislation was not introduced in the House, though Representative Virginia Foxx included a statement regarding free speech in the Promoting Real Opportunity, Success and Prosperity Through Education Reform (PROSPER) Act<sup>29</sup> stating that free speech zones are “inherently at odds” with the Constitution. Senator Hatch retired from the Senate in 2018 and leadership in the House changed to Democrat control following the 2018 election, so it is unlikely either measure will successfully reappear in the 116<sup>th</sup> Congress.

## Department of Justice Interest in Campus Free Speech Court Cases

Under Attorney General Jeff Sessions, the Department of Justice filed statements of interest in at least four court cases pertaining to freedom of speech. In all four cases, the Department sided against institutions arguing that policies ranging from the University of Michigan’s Statement of Student Rights and Responsibilities (*Speech First, Inc., v. Schlissel* (E.D. Mi.)<sup>30</sup>) to the University of California, Berkeley’s High-Profile Speaker Policy and Major Events Policy (*Young America’s Foundation v. Napolitano* (N.D. Cal.)<sup>31</sup>) represented unconstitutional violations of student’s right to free expression. In the remaining two cases, the Department argued that institutional free speech policies regarding free speech zones were unconstitutional and could not be used to restrict students at Georgia Gwinnett College from proselytizing

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<sup>28</sup> Free Right to Expression in Education Act. (S 2394 115; 2018). <https://www.congress.gov/bill/115th-congress/senate-bill/2394>

<sup>29</sup> PROSPER Act. (HR 4508 115; 2017). <https://www.congress.gov/bill/115th-congress/house-bill/4508>

<sup>30</sup> U.S. Department of Justice. (June 11, 2018). Justice Department Files Statement of Interest in Michigan Free Speech Case. <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-michigan-free-speech-case>

<sup>31</sup> U.S. Department of Justice. (January 25, 2018). Justice Department Files Statement of Interest in California College Free Speech Case. <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-california-college-free-speech-case>

(*Uzuegbunam v. Preczewski* (N.D. Ga)<sup>32</sup>) or at Los Angeles Pierce College from distributing copies of the U.S. Constitution (*Shaw v. Burke* (C.D. Cal.)<sup>33</sup>). All four of the cases were either dismissed after the institution changed the policy under question in the case or were settled out of court. Jeff Sessions resigned as Attorney General in late 2018, and it remains to be seen if the Department of Justice under Attorney General William Barr will continue interest in campus free speech cases, though it is certain that cases will continue to appear in courts across the country.

## State Legislation Regarding Campus Speech

State lawmakers across the country have begun recently to propose legislation with the intent of reaffirming the First Amendment guarantee of freedom of speech on college campuses. Legislation introduced in several states would restrict the ability of campuses to designate specific free speech zones or limit disciplinary action against students who engage in lawful expression no matter how offensive or immoral. Much of this legislation requires campuses within the state to create or update policies adhering to principles of intellectual diversity, the free exchange of ideas, and other ideals while also restricting the ability of campuses to designate specific free speech zones. Some bills include provisions that would prevent a campus from disinviting a speaker invited by any member of the campus community along with requirements for campuses to enact sanctions against students who “disrupt” speakers or events.

### *The Goldwater Proposal: Heckler’s Vetoes and Sanctions for Disruptions*

Provocateurs - speakers some accuse of speaking only to incite a reaction rather than to consider or discuss ideas in a free and open dialogue - seem to seek out colleges and universities specifically because they are noted defenders of free speech. These speakers may use institutional concerns about student safety as weapons to attack campus leaders, claiming their efforts to keep the peace equate to unconstitutional stifling of speech. Advocates seeking to defend the humanity of individuals of historically marginalized populations on the basis of their race, gender identity or expression, sexual orientation, or religion are targeted by these provocateurs. Model legislation proposed by the libertarian think-tank The Goldwater Institute

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<sup>32</sup> U.S. Department of Justice. (September 26, 2017). *Uzuegbunam v. Preczewski* Statement of Interest. <https://www.justice.gov/crt/case-document/uzuegbunam-v-preczewski-statement-interest>

<sup>33</sup> U.S. Department of Justice. (October 24, 2017). Justice Department Files Statement of Interest in California Campus Speech Case. <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-california-campus-speech-case>

in January 2017 (the Goldwater Proposal)<sup>34</sup> represents the most concerning response to campuses seeking to ensure both free speech and student and campus safety. In addition to prohibiting campuses from disinviting speakers, the Goldwater Proposal legislatively mandates specific sanctions of suspension or expulsion for students who are found to have “infringed expressive activity” twice. Given that many of those protesting conservative provocateurs are students representing historically marginalized populations, many of which continue to face increased barriers to accessing and completing higher education, this level of proscribed sanctions is especially concerning. Such sanctions may constitute violations of protesting students’ rights to free speech<sup>35</sup>, and have been removed or softened from the final versions of most passed legislation.

### *Free Speech Zones and the CAFE Act*

As the court cases noted above demonstrate, the practice of designating free speech zones, first used on college campuses during the protests against the US involvement in the Vietnam War<sup>36</sup>, has grown increasingly controversial. Proponents argue that free speech zones are a constitutionally valid application of the time, place, and manner allowance provided in *Ward v. Rock Against Racism* and that they ensure that those representing minority or marginalized views on controversial topics will have dedicated and protected space from which to make their voices heard. Opponents, however, assert that policies requiring registration and advance notification create unconstitutional barriers<sup>37</sup> to the exercise of free speech. Recent court cases<sup>38,39</sup> raised hopes that the US Supreme Court will make a definitive ruling as to their constitutionality, however the cases settled before reaching that level. As noted above, under then-Attorney General Jeff Sessions, the Department of Justice took interest in at least two campus speech cases concerning campuses use of free speech zones.

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<sup>34</sup> Goldwater Institute. (January 30, 2017). Campus Free Speech: A Legislative Proposal.

<https://goldwaterinstitute.org/article/campus-free-speech-a-legislative-proposal/>

<sup>35</sup> <https://theconversation.com/new-legislation-may-make-free-speech-on-campus-less-free-77609>

<sup>36</sup> Hutchens, N. (June 27, 2017). New legislation may make free speech on campus less free. The Conversation:

<https://apnews.com/3f7b372306c8403497d48e33dd3f530b/campus-free-speech-zones-face-new-round-scrutiny>

<sup>37</sup> Foundation for Individual Rights in Education. (September 13, 2013). [INFOGRAPHIC] Free Speech Zones on

America’s Campuses. <https://www.thefire.org/infographic-free-speech-zones-on-americas-campuses-2/>

<sup>38</sup> Watanabe, T. (March 28, 2017). Pierce College student files ‘free speech zone’ lawsuit. Los Angeles Times:

<http://www.latimes.com/local/education/la-essential-education-updates-southern-pierce-college-student-files-lawsuit-1490737382-htmistory.html>

<sup>39</sup> Kramer, S. (December 20, 2016). When Free Speech Becomes “Disorderly Conduct”: ADF Sues GA Gwinnett

College. Alliance Defending Freedom: <http://adflegal.org/detailspages/blog->

[details/allianceedge/2016/12/20/when-free-speech-becomes-disorderly-conduct-adf-sues-ga-gwinnett-college?\\_ga=2.183456678.1616524979.1527885421-912704326.1527885421](http://adflegal.org/detailspages/blog-details/allianceedge/2016/12/20/when-free-speech-becomes-disorderly-conduct-adf-sues-ga-gwinnett-college?_ga=2.183456678.1616524979.1527885421-912704326.1527885421)

Most state legislation to ban campus use of free speech zones includes some or all of the language in model legislation supported by the Foundation for Individual Rights in Education called the Campus Free Expression (CAFE) Act<sup>40</sup>. Some of the bills combine restrictions on use of free speech zones with language from the Forming Open and Robust University Minds (FORUM) Act<sup>41</sup>, discussed in more detail below, to require institutional policies, communication, and annual reporting.

### *Legislative Oversight & the FORUM Act*

Model state legislation proposed by the controversial conservative organization American Legislative Executive Council (ALEC)<sup>42</sup> entitled the Forming Open and Robust University Minds (FORUM) Act provides a means for states to do just as the witnesses at recent Congressional hearings recommend. The FORUM Act requires campuses to establish and communicate appropriate policies and procedures around campus speech incidents and creates an accountability process for institutions to report on free speech issues to their state legislatures or Governors.

Concerns related to intellectual diversity, sometimes predicated on a belief that colleges and college faculty intentionally or inadvertently cause conservative voices to self-censor, have prompted legislation designed to prohibit institutions and individual faculty from expressing opinions or taking stands on some issues. An optional clause in the FORUM Act prohibits campus leaders from speaking out or taking action as an institution on “the public policy controversies of the day” and several states considered legislation in 2018 that either requires or recommends that faculty “should be cautious in expressing personal views in the classroom”. Legislation in this vein also frequently prohibits free speech zones on campus and removes the ability of college administrators to disallow speakers invited to campus by any student, faculty, or officially recognized group.

It should be noted that while self-censorship may indicate a chilled environment that is unwelcoming to some ideas, it does not necessarily constitute an unlawful restriction on speech. Self-censorship should be as much of a concern when historically marginalized or oppressed populations feel unable to speak as it seems to be when conservative students self-

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<sup>40</sup> Foundation for Individual Rights in Education. (December 17, 2015). Frequently Asked Questions: The Campus Free Expression (CAFÉ) Act. <https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/>

<sup>41</sup> American Legislative Exchange Council. (May 5, 2017). Forming Open and Robust University Minds (FORUM) Act. <https://www.alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/>

<sup>42</sup> Scola, N. (April 14, 2012). Exposing ALEC: How Conservative-Backed State Laws Are All Connected. The Atlantic: <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/>

ensor, but an individual choosing not to speak for fear of social repercussions is not necessarily the same as a government actor actively prohibiting speech. The use of safe spaces and trigger warnings have become part of the controversy, prompting accusations of coddling students<sup>43</sup> or shielding them from facing opposing viewpoints<sup>44</sup>.

## Safe Spaces, Hate Speech, and Structural Inequality

It is within the context of canceled speakers and events— and the ensuing free speech debate—that administrative leaders have begun to view safe spaces as a threat to intellectual growth. But while these incidents may coincide with a conversation on building safe spaces, the practice of safe space-making is not the true cause of the conflict. Contrary to claims by critics, both safe spaces and trigger warnings are pedagogical tools<sup>45</sup> designed to encourage students to engage with potentially offensive or traumatizing content.

NASPA's Policy and Practice brief *Safe Spaces and Brave Spaces: Historical Context and Recommendations for Student Affairs Professionals*<sup>46</sup> provides a historical perspective on the use of safe spaces and brave spaces. The brief outlines the ways that these spaces provide both opportunities for historically marginalized or oppressed populations space in which they can freely be themselves and opportunities for students from different backgrounds to engage in critical conversation and discussion on topics on which they disagree:

In fall 2016, University of Chicago Dean of Students John Ellison chose to address what he and many others in higher education felt was a disconcerting trend toward intellectual isolationism on college campuses. He published a letter to incoming students, stating that the university would no longer tolerate the use of trigger warnings or safe spaces: "We [at the University of Chicago] do not condone the creation of intellectual 'safe spaces' where individuals can retreat from ideas and perspectives at odds with their own" (Grieve, 2016)<sup>47</sup>. In contrast, commentary made earlier in the year

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<sup>43</sup> Herbst, J. (April 25, 2017). Addressing the Real Crisis of Free Expression on Campus. Newseum: [http://www.newseuminstitute.org/wp-content/uploads/2017/04/WhitePaper\\_Herbst\\_FreeExpressionOnCampus.pdf](http://www.newseuminstitute.org/wp-content/uploads/2017/04/WhitePaper_Herbst_FreeExpressionOnCampus.pdf)

<sup>44</sup> Bhagwat, A. and Inazu, J. (March 21, 2017). Searching for Safe Spaces. Inside Higher Ed: <https://www.insidehighered.com/views/2017/03/21/easily-caricatured-safe-spaces-can-help-students-learn-essay>

<sup>45</sup> Abel, J. (n.d.). Cultivating Safe Spaces by Utilizing Trigger Warnings. JP Higher Ed: <http://www.jpighered.com/cultivating-safe-spaces-by-utilizing-trigger-warnings/>

<sup>46</sup> Ali, D. (October 2017) Safe Spaces and Brave Spaces: Historical Context and Recommendations for Student Affairs Professionals. NASPA: [https://www.naspa.org/images/uploads/main/Policy\\_and\\_Practice\\_No\\_2\\_Safe\\_Brave\\_Spaces.pdf](https://www.naspa.org/images/uploads/main/Policy_and_Practice_No_2_Safe_Brave_Spaces.pdf)

<sup>47</sup> Grieve, P. (August 24, 2016). University to freshmen: Don't expect safe spaces or trigger warnings. The Chicago Maroon: <https://www.chicagomaroon.com/article/2016/8/24/university-to-freshmen-dont-expect-safe-spaces-or-trigger-warnings/>

by Morton Schapiro (2016)<sup>48</sup>, president of Northwestern University, resurfaced affirming the value of safe spaces, stating, “I’m an economist, not a sociologist or psychologist, but those experts tell me that students don’t fully embrace uncomfortable learning unless they are themselves comfortable. Safe spaces provide that comfort” (para. 10).

Both Ellison and Schapiro used the term safe space as a pivotal part of their messaging; however, a closer look at how each of them used the term reveals key differences. Ellison defined a safe space as a place where students with different ideas can isolate themselves from those who would disagree with them (Grieve, 2016). This kind of space, he claimed, coddles students, meeting them exactly where they are comfortable, without pressing them further (Grieve, 2016). Schapiro (2016) defined a safe space similarly as a space where students of diverse backgrounds can find comfort, but instead he believes that comfort leads to a valuable outcome for students by also creating opportunities for honest dialogue and learning. Both administrative leaders exemplify how a safe space is presented within varying contexts. Ellison identified the kind of safe space, utilized within student support or activist spaces, where historically marginalized students require specific support and attention (Grieve, 2016); Schapiro (2016) identified the kinds of safe spaces fostered in a classroom atmosphere. Both university representatives operate under an assumption that they are referring to the same learning environment, and the debate takes off from here. Both kinds of safe spaces appear on today’s college campuses— the kind of safe space allowing marginalized individuals opportunities to retreat from the very real threats and demands they face by their very existence and the kind of space to allow students to process new and uncomfortable ideas productively. This paper explores the various contexts of safe spaces within the higher education community and posits that a fuller understanding of safe spaces, brave spaces, and the differentiation between the two may clarify some of the more resounding misconceptions within the safe space debate.

The role of structural racism<sup>49</sup> in the creation of laws and policies around whose speech and which types of speech are protected on college campuses is largely absent from many conversations around campus free speech. Advocates for historically marginalized

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<sup>48</sup> Schapiro, M. (January 15, 2016). I’m Northwestern’s president. Here’s why safe spaces for students are important. The Washington Post: [https://www.washingtonpost.com/opinions/how-to-create-inclusive-campus-communities-first-createsafe-places/2016/01/15/069f3a66-bb94-11e5-829c26ffb874a18d\\_story.html?utm\\_term=.11e5e2bdbaf3](https://www.washingtonpost.com/opinions/how-to-create-inclusive-campus-communities-first-createsafe-places/2016/01/15/069f3a66-bb94-11e5-829c26ffb874a18d_story.html?utm_term=.11e5e2bdbaf3)

<sup>49</sup> Lawrence III, C. (1990). If He Hollers Let Him Go: Regulating Racist Speech on Campus. Duke Law Journal, Vol. 1990:431: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3115&context=dj>

communities, however, point out the often-unseen racist underpinnings<sup>50</sup> that influences public policy, from the framing of the Bill of Rights through to today. Challenges to the status quo and the pervasive white privilege embedded in US culture were during the 1960s Civil Rights Movement, and still today, are frequently met with violence<sup>51</sup> by both civilian and official police representatives<sup>52</sup>. In light of this, there is room to question whether the doctrines of free speech are in actuality applied equally to all persons, or whether underlying structural racism has resulted in unequal protection.

## The Cost of Controversy

Campuses have long been valued in our communities for fostering curiosity and learning, creating space to engage in uncomfortable conversations or wrestle with new ideas. Indeed, it is this very trait of open access and willingness to explore across the political spectrum that has resulted in campuses today becoming the stage - as they were during the Civil Rights Era - upon which our national conversations about race, inequality, and justice play out. Far from squelching free speech and intellectual diversity, campuses across the country host speakers and events on a wide variety of topics and who hold a diversity of views and opinions, challenging attendees to broaden their perspectives and engage in deliberative discourse. The vast majority of this activity occurs without issue or protest. Those few instances where speakers are met with protests, who may themselves be met with counter-protesters, including some who may not be students, make for sensational and memorable headlines. But these are far from the norm on most college campuses.

Unfortunately, those few sensational incidents place incredible demands on campuses. When large protests and counter-protests are expected to occur, college and university leaders spend countless hours planning and organizing both campus and community resources to ensure, above all, the safety of their students. In a recent article from the Chronicle of Higher Education<sup>53</sup>, the financial impact of recent incidents at the University of California Berkeley,

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<sup>50</sup> Shih, D. (May 3, 2017). Hate Speech and the Misnomer of 'The Marketplace of Ideas'. NPR: <http://www.npr.org/sections/codeswitch/2017/05/03/483264173/hate-speech-and-the-misnomer-of-the-marketplace-of-ideas>

<sup>51</sup> Taylor, A. (May 28, 2014). 1964: Civil Rights Battles. The Atlantic: <https://www.theatlantic.com/photo/2014/05/1964-civil-rights-battles/100744/>

<sup>52</sup> Sebastian, S. (October 1, 2015). Don't Criticize Black Lives Matters for Provoking Violence. The Civil Rights Movement Did, Too. The Washington Post: [https://www.washingtonpost.com/posteverything/wp/2015/10/01/dont-criticize-black-lives-matter-for-provoking-violence-the-civil-rights-movement-did-too/?utm\\_term=.b862b111543f](https://www.washingtonpost.com/posteverything/wp/2015/10/01/dont-criticize-black-lives-matter-for-provoking-violence-the-civil-rights-movement-did-too/?utm_term=.b862b111543f)

<sup>53</sup> Hussain, S. (July 3, 2017). The Costs of the Campus Speech Wars Are Piling Up for the Police. The Chronicle of Higher Education (subscription required): <https://www.chronicle.com/article/The-Costs-of-the-Campus-Speech/240527>

Evergreen State College, and Middlebury College have been detailed, including the need for significant preparation and training in addition to officer overtime costs and, in the case of Evergreen, the need to reimburse costs for municipal officers needed to ensure safety during the campus-based event.

Indeed, at the NASPA Annual Meeting in March 2018, campus leaders from around the country cited similar experiences. These costs place a material demand on our campus law enforcement agencies, requiring them to add not only additional person-hours to aid with the immediate event, but also expectations for training and equipment beyond what may normally be required. At a time when our college campuses are increasingly asked to cut costs not seen to be directly related to educating students, these unexpected and sometimes sudden events force college and university leaders to expend resources - in the case of Evergreen, as much as a quarter of a million dollars in unbudgeted expenses - to keep the peace instead of investing in students' educations.

Institutions have begun to explore more nuanced policies that allow them to restrict certain events likely to provoke unrest while remaining content neutral<sup>54</sup>. A policy introduced by the University of California, Berkeley in 2018 to limit institutional costs for outside speaker security to \$100,000 per academic year bears promise as a way for institutions to manage their financial liability for controversial speakers. According to an Inside Higher Ed article on the policy, legal experts who reviewed the policy said it was “carefully crafted to balance the First Amendment obligations of a public institution with the potentially high costs of hosting controversial speakers”.<sup>55</sup> The Foundation for Individual Rights in Education, a watchdog group that is usually critical of institutional attempts to control costs or regulate student or faculty speech, agreed that the caveats in the policy allow it to skirt potential free speech issues. The policy states that security costs for speakers invited by student groups who follow certain procedures that allow the institution to prepare for the event will be covered in full and that outside speakers are not prohibited from speaking in outdoor spaces, as any member of the public would be allowed.

## What Do Student Affairs Professionals Need to Know?

Providing evidence that campus policies and procedures support fair and equitable practices in inviting speakers and appropriate considerations for student and participant safety are

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<sup>54</sup> Bauer-Wolf, J. (March 21, 2018). Reclaiming Their Campuses. Inside Higher Ed: <https://www.insidehighered.com/news/2018/03/21/colleges-changing-their-policies-after-visits-controversial-speakers>

<sup>55</sup> Bauer-Wolf, J. (May 24, 2018). A Limit on Paying for Controversial Speakers. Inside Higher Ed: <https://www.insidehighered.com/news/2018/05/24/ucla-will-limit-how-much-it-will-pay-security-outside-speakers>

essential to re-establishing the public trust in our college campuses as crucial spaces for civil exploration of controversial topics. Campuses may be able to provide evidence about the policies and practices they are already using to ensure intellectual diversity and freedom of expression as well as student safety and respect for all individuals. Even limited evidence may help to quell the overwhelming – and largely anecdotal – concerns raised against our campuses.

Knowing the policy conversations around campus speech is only part of the responsibility of student affairs professionals. Nimble and knowledgeable responses to emerging incidents have long been part of student affairs, though the many tangled threads of the campus speech conversation, as highlighted above, require careful consideration and planning. In November 2017, the NASPA Public Policy Division held a virtual Town Hall discussion on free speech on college campuses<sup>56</sup> featuring Bobby Woodard, Vice President of Student Affairs at Auburn University, and Allen W. Groves, University Dean of Students at the University of Virginia. Both speakers provided detailed descriptions of recent events on their campuses involving controversial speakers, including their preparations and lessons learned. NASPA is committed to providing the latest information and analysis to our members and in June 2018 released a Policy and Practice brief on *The First Amendment and the Inclusive Campus: Effective Strategies for Leaders in Student Affairs*<sup>57</sup>. This brief offers strategies to address key aspects of managing controversial speakers and demonstrations on college and university campuses. Further, it provides ideas and examples for challenging divisive speech when appropriate; that is, engaging such speech as an opportunity for reflection and action in order to uphold the values and promote the intellectual vitality of our campus communities.

## About NASPA

NASPA – Student Affairs Administrators in Higher Education is the leading association for the advancement, health, and sustainability of the student affairs profession. Student affairs is a critical component of the higher education experience, collaborating with colleagues across institutions of higher education to offer students valuable learning opportunities, meaningful social engagements, and safe and inclusive environments. NASPA’s Public Policy Agenda is grounded in a commitment to ensuring opportunity for all institutional members’ students and a belief that higher education is a great benefit to both individuals and society.

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<sup>56</sup> NASPA Public Policy Division. (February 12, 2018). PPD Virtual Town Hall: Free Speech on Campus. Recording available: <http://www.youtube.com/watch?v=LgowCcMvK4Y&feature=youtu.be>

<sup>57</sup> Morse, A. (May 2018). The First Amendment and the Inclusive Campus: Effective Strategies for Leaders in Student Affairs. NASPA: <https://www.naspa.org/rpi/reports/the-first-amendment-and-the-inclusive-campus-effective-strategies-for-leade>