TALKING ABOUT FREE SPEECH ON CAMPUS: LEGAL STANDARDS AND BEYOND

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Abstract

Colleges and universities continue to wrestle with often vexing challenges involving free speech. We contend in this article that rather than solely focusing on legal and campus rules related to free speech, institutional leaders need to look beyond the "rules"and help lead holistic approaches for multiple stakeholders to wrestle with free speech issues on campus. While arguing for an approach not singularly focused on legal standards, given the importance of legal rules, especially the First Amendment in the context of public higher education, the article reviews some of the basic legal standards that govern free speech at colleges and universities. This overview may be especially useful for non-attorneys working in a range of positions at colleges and universities. Shifting from a focus on legal standards, the article also offers suggestions for ways colleges and universities can better prepare members of the campus community and other stakeholders to engage with and better understand issues connected to free speech. An overarching goal of the article is to help institutional leaders design their own blueprint for making issues surrounding free speech an institutional priority that is holistically tackled across the campus community and in various contexts, including curricular and co-curricular settings for students.

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INTRODUCTION

Colleges and universities continue to wrestle with often vexing challenges involving free speech, including incidents of campus protest and unrest. Events arose at multiple campuses across the nation in fall 2023 and through spring 2024 following attacks on Israel and its subsequent military response.[1] These protests instigated a new chapter in ongoing debate and discourse over how colleges and universities should uphold free speech rights alongside other compelling institutional values and legal obligations, like nondiscrimination protections under federal civil rights laws. Controversy over institutional responses to free speech incidents arising from the events of fall 2023 and after even contributed to the downfall of several university presidents.[2]

The stakes remain high for college and university officials to craft policies and implement strategies that uphold free speech rights while also fostering campus environments actively welcoming of all campus members. Rather than limit themselves to solely focusing on speech requirements, for instance those mandated by the First Amendment, institutional leaders need to look beyond the "rules" and help lead holistic approaches for multiple stakeholders—including faculty and staff members and students.[3] For students, initiatives need to encompass the curricular and co-curricular realms. Efforts also need to consider other constituents, including alumni and parents of students. This article considers ways to integrate and deepen educational efforts around campus rules dealing with free speech alongside broader institutional endeavors to foster educational spaces dealing with free speech and related topics, such as civic discourse or building skills to more productively engage in disagreement.

We argue for an approach that goes beyond a singular focus on legal standards, but legal rules are relevant for free speech rights in higher education, especially for public institutions in relation to their First Amendment responsibilities. For this

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1 *See* David Swanson & Rich McKay, *Pro-Palestinian Protestors at UCLA Tussle with Israel Supporters*, Reuters (Apr. 29, 2024), https://www.reuters.com/world/us/pro-palestinian-protests-keep-roiling-us-college-campuses-2024-04-28/; and Anna Betts, *A Timeline of How the Israel-Hamas War Has Roiled College Campuses*, N.Y. Times (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/us/campus-unrest-israel-gaza-antisemitism.html. NPR has a collection of its coverage of campus protests in fall 2023 and spring 2024. *Special Series: Campus Protests over the Gaza War*, NPR, https://www.npr.org/series/1248184956/campus-protests-over-the-gaza-war.

2 Mandy Taheri, *Full List of College Presidents Who Have Resigned Amid Campus Protests*, Newsweek (Aug. 15, 2024), https://www.newsweek.com/full-list-college-presidents-who-have-resigned-amid-campus-protests-1939822; Associated Press, *A look at College Presidents Who Have Resigned Under Pressure over Their Handling of Gaza Protests* (Aug. 15, 2024), https://apnews.com/article/college-president-resign-shafik-magill-gay-59fe4e1ea31c92f6f180a33a02b336e3.

3 The article expands on a project undertaken by us to develop a learning resource dealing with social media and free speech that was sponsored by the University of California National Center for Free Speech and Civic Engagement. Neal H. Hutchens & Brandi Hephner LaBanc, Social Media: The Real Campus Speech Zone (2023), https://freespeechcenter.universityofcalifornia.edu/fellows-22-23/social-media-the-real-campus-speech-zone/.

reason, Part I of the article reviews some of the basic legal standards that govern free speech at colleges and universities. This overview may be especially useful for non-attorneys working in a range of positions at colleges and universities, like faculty roles or ones in student affairs, that intersect with free speech issues. Attorneys new to working in higher education may also find the section beneficial. We have purposely tried to avoid too much "legalese" or overly nuanced or technical discussion to lay out basic legal standards relevant to free speech on campus. Along with legal standards related to free speech under the First Amendment, this part of the article considers how the intersections of other legal standards, Title VI or Title IX for instance, can come into play when colleges and universities respond to free speech issues on campus.

Among the legal standards covered in Part I, we provide an overview of speech rights for college and university employees, particularly those afforded under the First Amendment. Special attention is given to the speech rights of faculty members in their teaching and research capacities. As covered in this part of the article, it is important, both from the perspective of crafting sound institutional policies and in terms of educational and outreach efforts, for institutional actors and other stakeholders, such as trustees, to hold clear understandings of the speech rights afforded to institutional employees. For college and university faculty and staff members, an understanding of their speech rights, or lack of rights in particular instances, helps empower them to make better informed decisions regarding their work-related speech and when speaking as a private citizen.

Shifting from a focus on legal standards and speech rights, Part II offers suggestions for ways colleges and universities can better prepare members of the campus community and other stakeholders to engage with and better understand issues of speech and expression. The overarching goal of this part of the article is to help institutional leaders design their own blueprint for making issues surrounding free speech an institutional priority that is holistically tackled across the campus community and in various contexts, including curricular and co-curricular settings for students.

An underlying rationale for the approach taken in the article is that free speech issues should not exist in legal or professional vacuums that are siloed away in the general counsel's office or in specific units in the student affairs division. While legal standards are often an essential part of considerations of free speech, legal rules are only one part of a nuanced campus system when it comes to matters of free expression and open inquiry. This is precisely why universities across the country have been investigated by the U.S. Department of Education and have received public scrutiny in recent months.[4] Free speech and closely related topics, like issues connected to civic engagement, are deeply tied to multiple facets of campus life and go far beyond an understanding of legal rules surrounding free speech. This part of the article is constructed on the premise that campus communities, and, ultimately, society benefit from a campus-wide investment in and engagement with free speech and related topics, in particular issues of access and belonging.

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4 *See, e.g.*, Zach Montague, *Campus Protest Investigations Hang over Schools as New Academic Year Begins*, N.Y. Times (Oct. 5, 2024), https://www.nytimes.com/2024/10/05/us/politics/college-campus-protests-investigations.html.

I. THE LAW OF CAMPUS SPEECH: THE FIRST AMENDMENT, OTHER LEGAL STANDARDS

This part of the article gives an overview of some key legal standards related to free speech in public colleges and universities. For public higher education, the First Amendment serves as an important source for the speech and expressive rights of members of the campus community—students, staff members, and faculty members—and those external to the institution seeking to engage in speech in either physical campus locations or virtual ones, notably social media sites.[5] Unlike their public peers, private colleges and universities are not subject to First Amendment standards in regulating speech on campus. Under what is called the "state action" doctrine, the First Amendment only applies to governmental actors, which includes public colleges and universities, but not private ones.[6] Only in very specific circumstances—when they are considered acting for or under the direction of the government—is it possible for First Amendment speech rules to apply to private (nongovernmental) actors specifically a private college or university.[7] As legal standards besides the First Amendment can impact speech rights on campus, we start out with an overview of some of the other legal sources that potentially implicate speech rights.

A. Legal Standards Besides the First Amendment

While the First Amendment is often paramount in considering speech rights in public higher education, other important legal standards, for instance, state campus speech laws,[8] speech rights grounded in contract,[9] or laws dealing with employee collective bargaining rights,[10] potentially affect the authority of both public and private colleges and universities to regulate speech on campus, including that of students, faculty members, and staff members.

A growing list of states have passed laws that deal with free speech at public colleges and universities and complement the First Amendment rights of individuals affiliated with institutions, such as students.[11] States are not able to enact legislation

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5 William A. Kaplin et al., The Law of Higher Education: Essentials for Legal and Administrative Practice 338–39, 702–03 (7th ed. 2024).

6 *Id*. at 28.

7 *Id.*

8 John R. Vile, *Campus Free Speech Protection Laws* (Oct. 21, 2024, and updated Oct. 31, 2024), Free Speech Center at Middle Tennessee State University, https://firstamendment.mtsu.edu/article/campus-free-speech-protection-laws/ (reporting at least twenty-three have adopted some form of campus speech laws).

9 *See generally* Philip Lee, *A Contract Theory of Academic Freedom*, 59 St. Louis U. L.J. 461 (2015).

10 *See generally* Kate Andrias, *Speaking Collectively: The First Amendment, the Public Sector, and the Right to Bargain and Strike*, Knight First Amendment Inst. at Columbia Univ. (Oct. 11, 2024), https://knightcolumbia.org/content/speaking-collectively-the-first-amendment-the-public-sector-and-the-right-to-bargain-and-strike; Charlotte Garden, *Was It Something I Said? Legal Protections for Employee Speech*, Econ. Pol'y Inst. (May 5, 2022), https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/.

11 *See generally* Vile, *supra* note 8. For an example of a specific state law, see, for example,

that overrides the free speech requirements of the First Amendment, but they are permitted to pass laws granting protections that are coextensive with or greater than those granted under the First Amendment.[12] For instance, many of the states that have enacted campus speech laws mandate that, at least to students, open campus areas constitute a type of open forum for speech and protest.[13] As covered in Part I.B.1, courts routinely look to forum analysis in determining the extent of speech rights on a campus. These state laws have focused on public colleges and universities, but at least one state, California, has a law that applies to students at nonreligiously focused private colleges and universities.[14] Under this law, referred to as the Leonard Law, students at secular private colleges and universities are afforded the same free speech rights as possessed by their student counterparts at public institutions through the First Amendment.[15]

Civil rights laws provide another important statutory domain where colleges and universities may regulate speech that falls outside the purview of First Amendment protection. Laws prohibiting discrimination, including Title VI (prohibits discrimination based on race),[16] Title VII (prohibits discrimination in employment),[17] or Title IX (prohibits discrimination based on sex),[18] apply to both public and private colleges and universities. In the case of public institutions, these laws provide an important basis, one permitted under the First Amendment, to take action against speech that meets legal definitions of harassment or discrimination. As an example of how these standards may intersect with speech, Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. Conduct that violates Title VII standards could implicate speech, for instance, when harassing jokes or comments about an individual's religion or sex cross over into discriminatory actions that violate the law by creating a hostile work environment.[19] The exact legal line as to when speech becomes harassing conduct under applicable civil rights laws can be subject to legal controversy, but courts have interpreted the authority of higher education employers, including public ones in relation to the First Amendment, to take action against speech that violates civil rights law such as Title VII or Title IX.[20]

Jeremy Bauer-Wolf, *Georgia Passes Law Banishing Free Speech Zones*, Higher Ed Dive (Apr. 5, 2022, and updated May 4, 2022), https://www.highereddive.com/news/georgia-legislature-passes-bill-banishing-free-speech-zones/621605/.

12 KAPLIN ET AL., *supra* note 5, at 702–03.

13 *See generally* Vile, *supra* note 8.

14 CAL. EDUC. CODE § 94367 (West, Westlaw through 2024 Reg. Legis. Sess.).

15 For more on the Leonard Law, see generally Taylor J. Barker, *Expressive Association Claims for Private Universities*, 76 STAN. L. REV. 1787 (2024).

16 Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

17 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17.

18 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

19 For an illustrative case, see *Okonowsky v. Garland*, 109 F.4th 1166, 1181 (9th Cir. 2024), where a federal appeals court decided that a coworker's social media posts could be considered as part of the totality of circumstances in assessing an employee's Title VII hostile work environment claim.

20 For a recent work examining tensions between discrimination law and free speech in higher education, see Brian Soucek, *Speech First, Equality Last*, 55 Ariz. St. L.J. 681, 681 (2023).

Part of a holistic approach to free speech issues on campus, one in which college and university attorneys have a key role to play, is to help multiple constituencies—including students, employees, and governing board members—understand the distinctions between speech that is protected and when speech may become harassing or discriminatory in nature so as to violate applicable civil rights laws or other legal standards. In carrying out this role, it is vital for institutional counsel to be able to partner with other campus offices and groups in efforts to respond to new or evolving challenges. For instance, a touchpoint of controversy following the fall 2023 and spring 2024 unrest at many institutions dealt with when speech or expressive activity crossed over into violating Title VI by engaging in the harassment of Jewish students or Muslim students.[21] Well-publicized incidents and controversies led the Biden administration to direct multiple federal agencies to issue guidance clarifying that civil rights laws, specifically Title VI, apply to antisemitic and Islamophobic discrimination.[22]

The 2024/25 academic year, at least so far, has proven quieter in terms of campus unrest than the previous one, but the events in fall 2023 and into 2024 show that tensions involving speech and campus unrest can unexpectedly arise and quickly escalate.[23] As such, higher education institutions need to be nimble in terms of existing campus communication and working group systems to address speech issues when they arise. Ongoing assessment of policy and practice is also warranted in terms of legal soundness and institutional fidelity to free speech commitments and other campus values, particularly ones related to belonging and inclusivity. Such reviews of policy and practice also pertain to newly established standards. For instance, even as many colleges and universities have put new rules in place in response to events from fall 2023 and after, critiques have arisen that some of these standards are too heavy-handed in terms of restricting free speech.[24] These criticisms highlight the need for ongoing and dynamic institutional engagement with issues and legal requirements that implicate campus free speech, including the status of campus speech policies and standards.

Besides civil rights legal standards, another example of laws potentially impacting speech are ones dealing with collective bargaining rights. Private colleges and universities fall under the purview of the National Labor Relations Act (NLRA).[25] Under the NLRA, speech activities related to collective bargaining

21 *See* Montague, *supra* note 4.

22 Statements and Releases, White House, *Fact Sheet: Biden-Harris Administration Takes Landmark Step to Counter Antisemitism* (Sept. 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/28/fact-sheet-biden-harris-administration-takes-landmark-step-to-counter-antisemitism/.

23 Amy Rock, *Which Colleges Have Had Protests This Fall?*, Campus Safety Mag. (Oct. 24, 2024), https://www.campussafetymagazine.com/insights/which-colleges-have-had-pro-palestine-protests-this-fall/163158/.

24 *See, e.g.*, Isabelle Taft, *How Universities Cracked Down on Pro-Palestinian Activism*, N.Y. Times (Nov. 25, 2024, https://www.nytimes.com/2024/11/25/us/university-crackdowns-protests-israel-hamas-war.html.

25 Kaplin et al., *supra* note 5, at 148. For more on collective bargaining in higher education, see Andrea Clemons, *Analyzing the Upward Trend in Academic Unionization: Drivers and Influences*, 15 J. Collective Bargaining Acad. 1 (Mar. 2024), https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=

are eligible for legal protection as a protected labor activity.[26] For public colleges and universities, issues of collective bargaining are subject to state law standards.[27] These laws may also provide legal protection to speech connected to collective bargaining activities.[28] As unionizing efforts have been an area of growing activity at multiple colleges and universities, collective bargaining laws represent another area where legal counsel can help educate the campus community and partner with other campus units about how these laws may have important connections to speech. In the campus unrest that occurred at multiple institutions in the 2023/24 academic year, an area of legal contention centered on whether certain protest actions were protected under collective bargaining agreements, indicative of how intersections between free speech and other laws besides the First Amendment can arise, including in unexpected ways.[29]

Laws connected to partisan political activity may also implicate the exercise of speech rights on campus. For instance, multiple states have laws in place that prohibit the use of governmental resources at public agencies, including public colleges and universities, from use in partisan political activities, like elections.[30] As covered in Part I.B.3, faculty and staff members possess substantial First Amendment rights to support political causes and advocate for candidates or positions in their private citizen capacities. However, the First Amendment does not prohibit public institutions or states from disallowing employees from using institutional resources, for example employee email accounts or list-servs, to engage in partisan activity.

Whistleblower laws provide another example of how a legal standard outside the First Amendment may implicate speech rights in higher education. Under

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1922&context=jcba.

26 *See* Employee Rights, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights (last visited Dec. 23, 2024).

27 KAPLIN ET AL., *supra* note 5, at 148.

28 Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2338 (2021). *See also* Michael Mauer, *Protecting Academic Freedom through Collective Bargaining: An AAUP Perspective*, 14 J. COLLECTIVE BARGAINING ACAD. 1 (Mar. 2023), https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1884&context=jcba.

29 Jonathan Wolfe, *University of California Workers Authorize Union to Call for Strike Over Protest Crackdowns*, N.Y. TIMES (May 15, 2024), https://www.nytimes.com/2024/05/15/us/university-of-california-strike-authorization-palestinian-protest.html; Josh Eidelson, *Harvard Gaza Protest Response Violated Labor Law, UAW Claims*, BLOOMBERG L. (May 15, 2024), https://news.bloomberglaw.com/daily-labor-report/harvard-gaza-protest-response-violated-us-labor-law-uaw-claims; Ethan Schenker, *Student Unions Say Pro-Palestine protests Are Protected Under Labor Law. Brown Isn't So Sure*, BROWN DAILY HERALD (Oct. 17, 2024), https://www.browndailyherald.com/article/2024/10/student-unions-say-pro-palestine-protests-are-protected-under-labor-law-brown-isnt-so-sure.

30 For examples of state laws that prohibit such partisan activity, see N.C. GEN. STAT. ANN. § 126-13 (West, Westlaw through 2024 Reg. Legis. Session); OR. REV. STAT. ANN. § 260.432 (West, Westlaw through 2024 Reg. Legis. Session); Wis. Stat. Ann. § 11.1207 (West, Westlaw through 2023 Act 272, published Apr. 10, 2024). A federal law, known as the Hatch Act, places limits on political activity by many federal employees and also applies to some state and local employees working in programs financed primarily through the federal government, though it does not apply to individuals employed in educational or research institutions. For more on the Hatch Act, see Whitney K. Novak, *The Hatch Act: A Primer*, CON. RSCH. SERV. (Apr. 20, 202), https://sgp.fas.org/crs/misc/IF11512.pdf.

federal and state laws providing whistleblower protections, employees or others, such as students, engaged in whistleblower activities are legally protected from retaliation for the good faith reporting of potential wrongdoing or misconduct.[31] For example, individuals with a "reasonable belief" who report fraud or misconduct in connection to federal grants or contracts are eligible for whistleblower protection.[32] To give another example, Title IX protects individuals who have reported a potential violation of the law from retaliation.[33] Distinct from whistleblower protections but connected to instances that may uncover legal wrongdoing, the U.S. Supreme Court has held that public employees may be protected from retaliation by their employer for giving testimony in a legal proceeding.[34] As covered in Part I.B.3, public employees often lack First Amendment protection for their job-related speech, but in *Lane v. Franks*, the Supreme Court ruled that a public college administrator could not be retaliated against for providing lawful testimony in a court proceeding for compelled testimony.[35]

The examples covered in this section highlight how legal standards beyond the First Amendment should be considered by colleges and universities when crafting policies related to free speech and in educational efforts. College and university legal counsel are key actors in ensuring that institutional policy and practice are attuned to the requirements of these other legal standards that may affect legal protections for speech in addition to First Amendment considerations.

B. The First Amendment and Campus Speech

While other legal rules can play a legally meaningful role in terms of impacting speech rights in higher education and encompass both public and private higher education, the First Amendment serves as the legal lodestar for speech rights at public colleges and universities. We now turn to free speech and the First Amendment. The U.S. Supreme Court has firmly established the role of the First Amendment in upholding speech rights in public higher education.[36] As noted, private colleges and universities are not subject to First Amendment standards when it comes to

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31 *See generally* Melissa Scheeren & Keri B. Stophel, *Compilation of Federal Whistleblower Protection Statutes*, Con. Rsch. Serv (updated Apr. 25, 2024), https://crsreports.congress.gov/product/pdf/R/R46979; Jonathan P. West & James S. Bowman, *Whistleblowing Policies in American States: A Nationwide Analysis*, 50 Am. Rev. Pub. Admin. 119 (2020), https://doi.org/10.1177/0275074019885629.

32 *See, e.g., Whistleblower Rights and Protections*, U.S. Dept. Just. Off. Inspector Gen., https://oig.justice.gov/hotline/whistleblower-protection (last visited Dec. 20, 2024).

33 *See, e.g., Civil Rights Protections Against Retaliation: A Resource for School Communities*, U.S. Dep't Educ. Off. Civ. Rts., https://www.ed.gov/media/document/ocr-retaliation-resource-2024 (last visited Dec. 20, 2024).

34 Lane v. Franks, 573 U.S. 228 (2014) (holding that a public employee was protected by the First Amendment for providing truthful testimony in a legal proceeding in response to a court subpoena).

35 *Id*. at 242.

36 *See, e.g*., Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661 (2010); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973) (per curium); Healy v. James, 408 U.S. 169 (1972).

regulating speech and expressive activities on campus.[37] In contrast, their public college and university counterparts must be closely attuned to First Amendment legal standards. This section covers some of the key First Amendment areas impacting speech rights at public colleges and universities, including the importance of forum analysis, First Amendment exceptions to free speech rights, and the speech rights available to faculty and staff members.

1. Forum Analysis and Campus Free Speech

In analyzing free speech issues arising on public college and university campuses, courts often turn to what is known as forum analysis.[38] The kind or type of "forum" —either physical or virtual—in which speech occurs is often important in how courts analyze the speech rights available and the extent to which a public college or university can regulate speech and expression in a specific setting.[39] The distinctions between the various types of forums that are recognized by courts as existing on campus can be muddled at times,[40] but, in general, courts have recognized forum categories that include the traditional public forum, the designated public forum, and the limited public forum.[41] Some spaces on campus, like a classroom during instructional time, office spaces for employees, or a theater space during a performance, do not constitute a type of open speech forum for members of the campus community or the public and highlight instances where institutional authority to regulate speech is typically at its highest.[42] Multiple types of forums exist on campus, including in relation to open campus areas outside buildings or other facilities.

With speech forums, it is important to distinguish between individuals or groups speaking in their own, private capacities versus when institutions, through designated individuals, are considered by courts to be the speaker. Institutional speech is a form of what is known as governmental speech, where courts view the speech as that of the institution and not of an individual or group in a private capacity.[43] In contrast, courts often turn to forum analysis when the speech is attributed to the individuals engaged in speech, for instance students, and not to the governmental entity, including a public college or university. Calls for a public higher education institution to censor or silence a speaker often conflate the concept of when the institution speaks versus when private speech occurs in a forum associated with a public college or university

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37 *See supra* text accompanying notes 6–7.

38 For more on the use by courts of forum analysis in higher education, see generally Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005); Patricia A. Brady & Tomas L. Stafford, *Some Funny Things Happened When We Got to the Forum: Student Fees and Student Organizations After Southworth*, 35 J.C. & U.L. 99 (2008).

39 KAPLIN ET AL., *supra* note 5, at 705–07. For an illustrative forum case in higher education, see *Gerlich v. Leath*, 861 F.3d 697, 700 (8th Cir. 2017), where a federal appeals court ruled that a university created a limited public forum through a program that allowed officially recognized student groups to use the university's trademarks on merchandise.

40 *See* KAPLIN ET AL., *supra* note 5, at 707, 712–13.

41 *Id*. at 706.

42 *Id*. at 726.

43 Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

and is, in fact, the speech of private citizens and not the institution. A recent issue considered by colleges and universities, including public ones, is when to use the institutional voice to weigh in on specific issues.[44] Institutional leaders and governing boards need to determine under what circumstances the institutional voice should be used, with recent calls advanced that colleges and universities should remain silent on many or most issues subject to controversy or disagreement.[45]

The type of forum at issue has important relevance for the available speech rights. Some places, public parks and sidewalks as examples, have been designated by courts as traditional public forums and as locations that by long-standing tradition are recognized as spaces for free speech and expression.[46] The government may also take action to create open forums that, for First Amendment purposes, are the same as a traditional public forum, resulting in what is called a designated public forum.[47] In a traditional or designated public forum, a speech-based regulation is allowed under the First Amendment only if the government can show that it is "narrowly tailored to serve a compelling governmental interest."[48] As pointed out, some state laws direct public higher education institutions to treat open campus areas as a designated forum generally available for speech, at least for students.[49]

For a traditional or designated public forum, distinct from regulations focused on the content of the speech, the government may put in place content-neutral rules related to time, place, and manner that are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication.[50] Under these standards, a public college or university, for instance, may put in place rules that prohibit the use of sound amplification devices, except when approved, to prevent disruptions to the learning environment or other institutional functions.[51] As another example, institutional regulations may prohibit the blocking of sidewalks or other walkways or throughways to ensure

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44 See, for example, the University of Michigan's Board of Regents approval of a new policy on institutional neutrality that "adopt[s] a heavy presumption against institutional statements on political and social issues that are not directly connected to internal university functions." University of Michigan, *Regents Vote to Approve Institutional Neutrality*, Univ. Rec. (Oct. 17, 2024), https://record.umich.edu/articles/regents-vote-to-approve-institutional-neutrality/.

45 Ryan Quinn, *What's Behind the Push for 'Institutional Neutrality'?*, Inside Higher Ed (Oct. 10, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/10/10/whats-behind-push-institutional-neutrality; Lilah Burke, *Why Colleges Are Turning to Institutional Neutrality*, Higher Ed Dive (Dec. 3, 2024), https://www.highereddive.com/news/why-colleges-adopt-institutional-neutrality/734284/.

46 *Pleasant Grove City, Utah*, 555 U.S. at 469 ("This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'.") (citations omitted)).

47 *Id.* at 470.

48 *Id.* at 469.

49 *See generally* Vile, *supra* note 8.

50 Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).

51 *Id*. at. 798–99.

that individuals are not impeded in traveling on campus.[52] Or, activities may be limited to certain hours, for instance not allowing speech or protest in campus areas after a certain time in the evening or before a certain time in the morning.[53] Of late, largely in a response to campus protests and unrest following events of fall 2023 and after, a number of institutions have updated campus speech rules to prohibit encampments or the wearing of facial coverings during protests.[54]

Courts, as noted, have also recognized the existence of what is often called the limited public forum.[55] In this type of forum, which may be reserved for certain individuals, like students, or to particular topics, a public college or university is able to impose rules that are reasonable in relation to the purposes of the forum and that are not based on discriminating on the views of particular speakers.[56] For instance, many public colleges and universities make various resources available to officially registered or recognized student organizations as a way to support students in their interests and activities.[57] In doing so, a public college or university may exclude nonstudent groups or student groups without official institutional recognition from participation in a forum that is only open to recognized student organizations.[58] However, regulations imposed on eligible student organizations as part of participation in the forum must be reasonable in relation to the purposes of the forum.[59] Institutional officials also may not engage in viewpoint discrimination in the treatment of student groups.[60] For example, a college or university could not favor campus Democrats over campus Republicans, or vice versa, based on the views of the respective organizations, as this would result in viewpoint discrimination. To give another example, some campuses have large rocks that students paint or expression walls that have been decorated with words or images. An institution may choose to apply a reservation process to these activities—like a posting policy that defines who can post, where posting can occur, and when a posting must be removed. It cannot, however, approve only messages that institutional officials view favorably.

With campus forums, it is relevant to note that spaces may exist as multiple types of forums depending on their use. For example, a classroom space during instructional time is not a type of open forum.[61] If that same classroom is made available for a meeting space for registered student organizations during noninstructional

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52 Langhauser, *supra* note 38, at 502.

53 *Id*. at 501.

54 *See* Taft, *supra* note 24.

55 *See generally* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

56 Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

57 Kaplin et al., *supra* note 5, at 749.

58 *Id*. at 743.

59 *See Id*.

60 *See Id*. at 744. *See generally Bd. of Regents of Univ. of Wis. Sys.*, 529 U.S. 217.

61 *See*, *e.g.*, Smith v. Tarrant Cnty. Coll. Dist., 694 F. Supp. 2d 610, 615 (N.D. Tex. 2010); Pompeo v. Bd. of Regents of Univ. of N.M., 58 F. Supp. 3d 1187, 1189 (D.N.M. 2014) (citing Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004)).

times, then it constitutes a type of forum in terms of availability for student use, and access to the space must comport with First Amendment standards. Additionally, as noted, a forum can exist in both physical and virtual forms. In terms of a virtual forum, for example, public colleges and universities can create forums using social media pages that are open for public comments. In creating such forums, an institution may opt to focus on a specific topic (a type of limited public forum) and is able to delete off-topic comments, but it could violate First Amendment standards for deleting or blocking comments based only on the views expressed on topic.

An understanding of forum types is often key to charting the speech protections available to individuals and groups formally affiliated with the institution and to unaffiliated individuals and groups seeking access to campus spaces, both physical and virtual, for speech or protest activities. Especially in forums designated or traditionally recognized as open for speech and expression, courts may recognize substantial First Amendment protections for speakers. While First Amendment speech protections are often expansive, there are important limits to freedom of speech, and the next section considers several categories of speech that courts have concluded are ineligible for First Amendment protection.

2. First Amendment Speech Exceptions. And What About "Hate Speech"?

The First Amendment provides broad protections for free speech, but these are not absolute. As covered, speech that rises to conduct that violates civil rights laws, for instance Title IX or Title VI, is not protected free speech under the First Amendment.[62] The U.S. Supreme Court has also recognized several types of speech that are not protected under the First Amendment, including speech that constitutes incitement to imminent lawless action,[63] is categorized as a true threat,[64] rises to the level of what are known as fighting words,[65] meets legal definitions of obscenity,[66] is defamatory in nature,[67] is made to further a criminal act,[68] or constitutes the giving of false testimony in a court proceeding (perjury).[69] Intellectual property standards may also allow institutions to regulate speech, with a common example controlling institutional trademarks or copyrighted material.[70] Overviews of incitement, true threats, fighting words, and defamation are covered in this section, as they are categories of speech

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62 *See supra* Part I.A.

63 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942); Virginia v. Black, 538 U.S. 343, 359 (2003).

64 Watts v. United States, 394 U.S. 705, 707–08 (1969).

65 Cohen v. California, 403 U.S. 15, 20 (1971).

66 United States v. Williams, 553 U.S. 285, 288 (2008). For standards to determine when material is considered obscene, see, for example, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *Miller v. California*, 413 U.S. 15, 24 (1973).

67 Gertz v. Robert Welch, Inc., 419 U.S. 323, 340–42 (1974).

68 *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 13 (2010); Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).

69 United States v. Alvarez, 567 U.S. 709, 720 (2012) (discussing that perjury not protected by the First Amendment).

70 *See generally* Jacob Rooksby, The Branding of the American Mind: How Universities Capture, Manage, and Monetize Intellectual Property and Why It Matters (2016).

falling outside First Amendment protection often salient in institutional regulation of speech on campus.

Incitement to imminent lawless action is a category of speech the U.S. Supreme Court has recognized as unprotected by the First Amendment,[71] but speech that meets this exception is very narrow. Speech qualifying under this exception is aimed at actually producing immediate unlawful action and is likely to incite or to produce such unlawful activity.[72] Advocacy of unlawful action at some unspecified point in the future is likely to be protected under the First Amendment. In *Hess v. Indiana*, for example, the U.S. Supreme Court ruled that speech by a professor during a protest stating "We'll take the fucking street later" or "We'll take the fucking street again" was protected speech.[73] The incitement to imminent lawless action category of unprotected speech is, thus, restricted to very specific circumstances. Public colleges and universities should be careful to recognize the narrow standards under which the incitement exception is available. Speech or protest that looks to future activity or events, cannot be established as intending to induce imminent lawless action, or is not likely to result in unlawful activity could likely qualify for First Amendment protection in an open forum for speech.

True threats represent another category of speech not protected under the First Amendment.[74] In *Counterman v. Colorado*, the U.S. Supreme Court held that establishing a true threat requires that an individual actually intended harm with their speech or spoke recklessly without regard to whether the speech could be viewed as threatening.[75] That is, the Court put in place a subjective test as part of a true threat assessment, which requires that an individual intended to make a threat or that the individual showed recklessness or "consciously disregarded a substantial risk that his communications would be viewed as threatening violence."[76] With this standard, the Supreme Court rejected using only an objective test—that is, whether an ordinary, reasonable person familiar with the context of the speech would conclude that it was intended as a threat—for establishing a true threat. It is important to keep in mind that when a potential threat is present, even if later established not to exist, public colleges and universities are permitted to take appropriate action to protect the safety of individuals, such as temporarily prohibiting someone from campus, to determine whether an actionable threat exists.

The fighting words doctrine refers to speech directed at individuals that is likely to result in violence from those against whom the speech is directed. In *Chaplinsky v. New Hampshire*, the U.S. Supreme Court upheld the conviction of an individual who was reported to have stated to a government official, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents

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71 *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

72 *Brandenburg*, 396 U.S. at 447.

73 414 U.S. 105, 107 (1973).

74 *See* Watts v. United States, 394 U.S. 705 (1969); Virginia v. Black, 538 U.S. 343, 360 (2003).

75 600 U.S. 66 (2023).

76 *Id*. at 69.

of Fascists.'"[77] Since *Chaplinsky* was decided, the Supreme Court has narrowed the concept of fighting words that can be excluded from First Amendment protection. In *Texas v. Johnson*, where the Court held that the burning of the U.S. flag as a form of protest was protected expression, described fighting words as a "direct personal insult or an invitation to exchange fisticuffs."[78] While *Chaplinsky* and the fighting words doctrine have not been explicitly overruled, decisions like *Texas v. Johnson* cast doubt over the continued applicability of the fighting words doctrine as a basis to restrict speech.[79] Additionally, even in the context of fighting words, the Supreme Court—in striking down a city ordinance that made it illegal to place a burning cross or swastikas in locations intended to provoke "anger, alarm, or resentment" —declared that the government could not engage in viewpoint discrimination even when regulating a speech category generally unprotected by the First Amendment.[80] At a minimum, the fighting words doctrine represents a very narrow exclusion as to First Amendment speech protections.

In considering legally permissible reasons to limit speech, it is also important to point out that the potential negative or disruptive reaction of an audience to a speaker is not a sufficient basis to censor speech. The idea of the "Heckler's Veto" refers to the notion of government imposing restrictions on a speaker because of concerns over how the speech will be received by listeners.[81] Courts have held that such a heckler's veto is not a permissible reason to prohibit or stop speech and certainly that a heckler's veto is at odds with the aims of the First Amendment to protect free speech and expression.[82]

Defamation represents another type of speech that falls outside First Amendment protection. As a civil wrong, defamation standards are subject to the specific requirements of the state law under which the defamation claims are brought.[83] Defamatory speech occurs when someone writes or says something to others that is presented as fact when the individual knows or should have known the information is untrue.[84] The target of these statements may then establish through legal action that the false statements have resulted in harm, for example damage to one's reputation.[85]

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77 315 U.S. 568, 569 (1942).

78 491 U.S. 397, 409 (1989).

79 For more on the status of fighting words, see, for example, Mark P. Strasser, *Those Are Fighting Words, Aren't They? On Adding Injury to Insult*, 71 Case W. Res. L. Rev. 249 (2020).

80 R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

81 Kaplin et al., *supra* note 5, at 715.

82 *See*, *e.g.*, Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 554 (4th Cir. 2010) ("In the abstract, at least, the impermissibility of a heckler's veto is clearly established by First Amendment jurisprudence.").

83 For more on defamation claims in higher education, see generally Adam Jacob Wolkoff, *A Privilege to Speak Without Fear: Defamation Claims in Higher Education*, 46 J.C. & U.L. 121 (2022).

84 For an example of a defamation case arising in higher education and how libel and slander are defined under state law, see *Stiner v. University of Delaware*, 243 F. Supp. 2d 106, 115 (D. Del. 2003) ("Defamation in Delaware consists of the twin torts of libel and slander; in the shortest terms, libel is written defamation, and slander is oral defamation."). *See* Kaplin et al., *supra* note 5, at 127–28.

85 *See*, *e.g.*, *Stiner*, 243 F. Supp. 2d at 115.

The U.S. Supreme Court has placed important limits on when defamation standards should be blunted by the First Amendment, namely, when the defamatory speech at issue is directed at what is termed a public figure,[86] which encompasses elected officials, celebrities, or someone well-known to the public, an individual suing for defamation must establish that the statements were made with "actual malice."[87] At a college or university, some positions, such as institutional leaders or coaches in high-profile sports, may likely qualify as public figures, and professors and other administrators could as well.[88] Another limitation on defamation is that sometimes speech may be viewed as a form of privileged communication, comments made during legislative proceedings as an example, so as not to be subject to a defamation claim unless meeting a higher standard like actual malice.[89] Among the defenses to a defamation claim is the response that the statements are true.[90]

The term "hate speech" is routinely used to identify speech that is negatively directed at individuals or groups, often based on characteristics like race or ethnicity, religion, or sexual orientation.[91] While a term often used in higher education, it is important to note that courts have not recognized "hate speech" as a general category of speech excluded from First Amendment protection.[92] We in no way seek to dismiss or downplay the real emotional and psychological harm that vile or hateful speech may cause to individuals, but it is important for college and university officials to recognize that hate speech, as an umbrella term, does not constitute a category of speech excluded from First Amendment protection.

Even if derogatory or hateful speech is legally protected, we do not suggest that institutions are without options to address the harmful effects of such speech. The emphasis on education and engagement taken up in Part II are important areas where institutions can help foster thoughtfulness and empathy in speech by

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86 Wolkoff, *supra* note 83, at 133.

87 New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

88 Wolkoff, *supra* note 83, at 133 ("Courts have considered a variety of university officials and community members to be 'public officials' or 'public figures' who cannot recover without showing 'actual malice' in the making of the statement regarding that plaintiff's official conduct.").

89 *Id*. at 142 ("While courts have generally declined to grant postsecondary institutions and members of the college and university community absolute privilege from defamation claims, they more often afford a 'qualified,' 'conditional,' or 'common interest' privilege to communications among people who have some interest or duty in sharing that information amongst themselves.").

90 *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) ("It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense."). *See also* Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) (considering the importance of truth as a defense to a defamation claim).

91 KAPLIN ET AL., *supra* note 5, at 727–28.

92 *Id*. at 729–37. *See also* Richard Delgado & Jean Stefancic, *Retheorizing Actions for Targeted Hate Speech: A Comment on Professor Brown*, 9 Ala. C.R. & C.L. L. Rev. 169, 178 (2018) (noting how courts have almost uniformly struck down college speech codes to such an extent that "the judicial system and campus administrators [seemingly] operated in different universes").

individuals on campus. Additionally, while there have been calls for institutional neutrality on controversial matters, college and university officials can express an institutional voice to counter hateful speech that merits more than silence or neutrality. Public higher education officials should adhere to First Amendment requirements for protecting speech, even for speech they find objectionable, but educational and engagement initiatives provide opportunities for individuals and groups within the institution to make more informed and thoughtful choices about what they say and how they speak, including how speech can negatively impact others on campus and beyond.

3. The First Amendment and Speech by Staff Members, Faculty Members

Speech and expression by faculty or staff members may raise questions about the speech rights of employees in their professional or private citizen capacities and of institutional authority to regulate employee speech in either of these contexts. In the case of faculty members in public higher education, as covered more later in this section, alongside general free speech protections available to all public employees, their speech may implicate questions related to possible First Amendment protection for academic freedom, specifically in the areas of teaching and research.[93] For employees at private colleges and universities, which are nongovernmental actors, their speech rights are not protected by the First Amendment.[94] Apart from the First Amendment, other legal sources already mentioned, collective bargaining laws or union contracts for example, may provide legal protection for employee speech that extends to private colleges and universities.[95] Legal standards may also encompass employees in both private and public higher education, like barring retaliation against individuals for reporting potential discrimination under civil rights laws that include Title VI and Title IX.[96] While the First Amendment provides the dominant legal framework for establishing employee speech rights at public colleges and universities, other legal standards should not be overlooked for employees in public higher education in addition to those at private colleges and universities.

For public higher education employees, an issue often of First Amendment significance is whether an individual is speaking in their employee capacity or as a private citizen.[97] If a public employee engages in speech as a private citizen and not as part of carrying out their job duties, then their speech is potentially eligible for First Amendment protection relative to their employer's authority to regulate the speech.[98] When a public employee speaks as a private citizen, courts conduct an inquiry to determine if the speech deals with what is known as a matter of public

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93 For an overview of the general First Amendment issues at stake, see KAPLIN ET AL., *supra* note 5, at 365–404.

94 *Id*. at 342.

95 *See supra* Part I.A

96 *See supra* Part I.A.

97 Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.").

98 *Id*.

concern.[99] If the speech meets this threshold, courts then engage in a balancing test to determine if the public employer can offer a sufficient justification, such as the need to ensure efficient business operations, to override First Amendment protection for the speech and make it subject to the employer's authority.[100]

Unlike speaking as a private citizen, when a public employee speaks as part of carrying out their official employment duties, the U.S. Supreme Court has greatly restricted public employee speech rights in such circumstances. In *Garcetti v. Ceballos*, the Court ruled that when public employees speak as part of carrying out their official employment duties, then they are not entitled to First Amendment protection for such job-related speech.[101] This standard means, for instance, that a staff member at a public higher education institution does not receive First Amendment protection for speech made in carrying out their official job duties.[102] They may have other legal protections available for such speech, like whistleblower laws, but are not protected by the First Amendment.[103] Part of educational efforts for college and universities potentially entails helping employees distinguish between their private citizen speech and their speech made in an employee capacity.

For faculty members at public colleges and universities, there is legal uncertainty over whether the *Garcetti* standard applies to their speech made in carrying out official job duties, specifically in the classroom and in research.[104] Some federal courts have recognized an exception for faculty speech to the general *Garcetti* standard that public employees do not receive First Amendment protection for speech made in carrying out employment duties.[105] In *Garcetti*, the justices joining in the majority acknowledged a point made in a dissenting opinion by Justice David Souter that the decision could potentially impinge First Amendment protection for academic freedom that had seemingly received acceptance in prior Supreme Court decisions.[106] While recognizing that Justice Souter raised a potentially salient issue, the majority

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99 *Id*.

100 *Id*. at 418.

101 *Id.* at 42 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

102 See, e.g., Alves v. Bd. of Regents of the Univ. Sys. of Ga., 804 F.3d 1149, 1165 (11th Cir. 2015) (holding that a memorandum raising concerns about a supervisor written by staff members at a university counseling center constituted speech made pursuant to official duties and did not qualify for First Amendment protection).

103 *See generally* Scheeren & Stophel, *supra* note 31; West & Bowman, *supra* note 31.

104 KAPLIN ET AL., *supra* note 5, at 349–50.

105 Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021) (noting how, along with the U.S. Court of Appeals for the Sixth Circuit, that three other federal circuits (the Fourth, Fifth, and Ninth) had recognized faculty speech related to teaching and scholarship eligible for First Amendment protection despite *Garcetti*).

106 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

stated that questions over First Amendment protection for faculty speech were not at issue in the case.[107]

After *Garcetti* was decided and questions arose over if its application to faculty speech in public higher education, legal decisions over First Amendment protection for faculty speech in public higher education have lacked uniformity.[108] Yet, a trend in federal courts of appeals decisions is judicial support for First Amendment speech protection for the professionally based speech by faculty members at public colleges and universities, at least when connected to teaching or research.[109] Some courts and commentators have referred to this as an "academic freedom exception" to the *Garcetti* standard.[110] In identifying the exception, courts have turned to the concept of public concern to ground protection for some types of faculty speech in relation to academic freedom considerations.[111] In *Meriwether v. Hartop*, for example, a federal appeals court ruled that a professor's decision to refrain from using a student's identified pronouns constituted protected speech.[112] The professor had a practice of using formal titles for students in class discussions but argued that using a student's identified pronouns conflicted with the professor's religious beliefs.[113] The court, along with backing the professor's decision as grounded in pedagogical practice, stated that the issue of pronouns and gender identity constituted topics of public concern.[114]

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107 *Id*.

108 *See* KAPLIN ET AL., *supra* note 5, at 365–68, 381–88, 401–04.

109 *See Meriwether*, 992 F.3d at 505 ("In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth. In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment. It concluded that the rule announced in *Garcetti* does not apply 'in the academic context of a public university.' The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that 'academic freedom is a special concern of the First Amendment.' Likewise, the Ninth Circuit [in *Demers v. Austin*] has recognized that 'if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.' Thus, it held that '*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor.'") (citations omitted)).

110 *Id*. at 507 (6th Cir. 2021) (stating "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not").

111 *See, e.g.*, Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (concluding that pamphlet authored by professor on ideas for how to structure a college of communication addressed a matter of public concern).

112 992 F.3d at 509 ("Because Meriwether was speaking on a matter of public concern, we apply *Pickering* balancing to determine whether the university violated his First Amendment rights. This test requires us 'to arrive at a balance between the interests of the [professor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' Here, that balance favors Meriwether.") (citations omitted)).

113 *Id*. at 499.

114 *Id*. at 509 ("In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.").

In a later decision coming from the same federal circuit that issued the M*eriwether v. Hartop* opinion, the court ruled that a professor's speech, centered on opposition to evolving standards of care for transgender individuals, received First Amendment protection.[115] In the case, Allan Josephson, a psychiatrist and faculty member at the University of Louisville's School of Medicine, claimed that he was demoted and later had his employment contract ended based on comments critical of emerging care standards for children identified as having gender dysphoria delivered as part of a panel hosted by the Heritage Foundation, a conservative thinktank.[116] The appeals court noted that the thinktank paid all the faculty member's trip expenses and that organizers made it clear that panelists spoke in their individual capacities and not on behalf of their institutions.[117] As a result of the negative reaction from work colleagues and others to Josephson's views, he was asked to resign from an administrative position at the school of medicine, which he agreed to do.[118] Eventually, the school also moved not to renew Josephson's employment contract.[119] In the ensuing lawsuit, Josephson claimed institutional officials retaliated against him for protected speech through these employment actions.[120]

In upholding a lower court ruling in favor of Josephson, the appeals court, looking to principles of *Garcetti*, stated that he spoke in a private citizen capacity and not as part of carrying out his official duties.[121] The court further concluded that Josephson had addressed a topic of public concern in relation to the comments shared as part of the Heritage Foundation panel.[122] Additionally, the appeals court rejected arguments that Josephson's comments had unduly interfered with the operations of the medical school as a justifiable reason for the university to take employment action against him.[123] While classifying Josephson's speech as made in a private citizen capacity and not as part of carrying out official employment duties, the court emphasized as well the academic freedom considerations present in the case for teaching and scholarship.[124] The court noted that the comments made as part of the Heritage Foundation panel directly dealt with the areas in which Josephson "taught and wrote about as a child-psychiatry expert. Put differently, Josephson's speech stemmed from his scholarship and thus related to scholarship or teaching. As such, Josephson engaged in protected speech because it related to core academic functions"[125] The court stated that even if the speech at issue were viewed as part of Josephson's official employment duties, "that would not alter

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115 Josephson v. Ganzel, 115 F.4th 771, 785–86 (6th Cir. 2024).

116 *Id*. at 777.

117 *Id*. at 778.

118 *Id*. at 780.

119 *Id*. at 781.

120 *Id*. at 782.

121 *Id*. at 784.

122 *Id*.

123 *Id*. at 784–85.

124 *Id*. at 786.

125 *Id*.

our conclusion that he engaged in protected speech at that event."[126]

In the *Josephson* case and in *Meriwether v. Hartop*, some individuals may conclude that the faculty speech at issue is objectionable and should not have received First Amendment protection. For this article, rather than weighing whether the institutional justifications should have overridden First Amendment speech protections in these specific instances, our focus is on the courts' overarching legal determination that faculty speech, at least when tied to teaching or research, is potentially entitled to First Amendment protection on academic freedom grounds, *Garcetti* notwithstanding.

First Amendment protection for faculty speech has also come into play in litigation in Florida in challenges brought by faculty members and students to a state law that, among its provisions, forbids teaching about topics related to critical race theory or related lines of critical scholarship and other topics related to diversity.[127] In legal action against the state law, a lower federal court described the law as "positively dystopian" and ruled that the challengers to the law had established strong First Amendment arguments to challenge the speech restrictions in the legislation.[128]

Notably, the lower federal court hearing the challenge to Florida's law falls under the jurisdiction of a federal appeals court—the U.S. Court of Appeals for the Eleventh Circuit—that has not yet decided if an academic freedom exception exists under *Garcetti*.[129] Given this situation, in considering Florida's law, the court turned to a prior decision from the Eleventh Circuit dealing with institutional authority over curricular-related speech that was decided before *Garcetti*.[130] In deciding that case, which dealt with whether a faculty member impermissibly incorporated his religious beliefs into class discussions and when holding voluntary class meetings,[131] the Eleventh Circuit looked to the U.S. Supreme Court's decision in *Hazelwood School District v. Kuhlmeier.*[132] In the *Hazelwood* case, the Court ruled that a principal could censor articles appearing in a school newspaper on the basis that the articles fell under the domain of school-sponsored speech.[133]

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126 *Id.*

127 For more on this litigation and the Florida law at issue, see Neal Hutchens & Vanessa Miller, *Florida's Stop Woke Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J.C. & U.L. 35 (2023).

128 Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d at 1230 (N.D. Fla. 2022). The litigation was still on appeal at the time of publication of this article. The U.S. Court of Appeals for the Eleventh Circuit did deny a motion to stay the preliminary injunction during the appeal. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

129 *Pernell*, 641 F. Supp. 3d at 1243 (stating "the Eleventh Circuit has not yet reversed itself, en banc, and the Supreme Court explicitly declined to extend its employee-speech analysis in *Garcetti* to 'speech related to scholarship or teaching.' In short, two things are clear: (1) the First Amendment protects university professors' in-class speech and (2) *Bishop* [*v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991)] remains the binding authority guiding this Court's analysis of Plaintiffs' speech claims.").

130 Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

131 *Id*. at 1068.

132 484 U.S. 260 (1988).

133 *Id*. at 273 (1988) (holding "that educators do not offend the First Amendment by exercising

Looking to the prior decision from the Eleventh Circuit and to *Hazelwood*, the district court hearing the legal challenge to Florida's law stated that the restrictions imposed on curricular-related speech in the law had to reflect a legitimate rationale by state officials.[134] Applying this standard, the court granted a preliminary injunction to halt enforcement of Florida's law in the classroom.[135] While basing limits on Florida's authority over restricting classroom speech on *Hazelwood* and the prior decision from the Eleventh Circuit, the court looked to academic freedom principles as providing an important justification for recognizing First Amendment speech rights for professors in the classroom.[136] At the time of the publication of this article, the litigation is pending before the U.S. Court of Appeals for the Eleventh Circuit, which did refuse to stay the preliminary injunction while the appeal is pending.[137]

The litigation in Florida highlights the unsettled nature of what legal basis or framework courts should follow in evaluating potential First Amendment protections for faculty speech in public higher education related to teaching and research and possibly other duties, notably participation in shared governance or administrative tasks. Besides the public employee speech cases or precedent like *Hazelwood School District*, multiple commentators have urged courts to delineate First Amendment protections for academic freedom based on previous U.S. Supreme Court decisions that indicated academic freedom constituted a "special concern" of the First Amendment.[138]

This earlier line of academic freedom cases arose as part of the judiciary responding to governmental overreach in efforts to crack down on perceived communist threats during the period often referred to as the McCarthy era and

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editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

134 *Pernell*, 641 F. Supp. 3d at 1243 (stating how "the Eleventh Circuit struck a "somewhat amorphous" balancing test, drawing from the Supreme Court's analysis in *Hazelwood*. Ultimately, the balance involves "a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech.") (citations omitted)).

135 *Id.* at 1287.

136 *Id.* at 1277.

137 Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659 (11th Cir. Mar. 16, 2023).

138 The literature on constitutional protections for academic freedom is voluminous. Here are some sample works: Robert Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State (2012); David M. Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024); Henry Reichman, The Future of Academic Freedom (2019); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law & Contemp. Probs. 79 (1990); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 Yale L.J. 251 (1989); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Geo. L.J. 945 (2008); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*. 31 J.C. & U.L. 79 (2004); Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*. 36 J.C. & U.L. 145 (2009); Lawrence Wright, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2010).

also known as the Red Scare.[139] First in dissenting opinions,[140] next in concurring opinions,[141] and finally in a majority opinion,[142] the Supreme Court would endorse the idea that the First Amendment has a role in protecting free inquiry and academic freedom in educational environments. In *Keyishian v. Board of Regents of the University of the State of New York*, the Court offered seemingly strong support of the constitutional need to protect academic freedom.[143] Despite rousing rhetoric in cases such as *Keyishian* and *Sweezy v. New Hampshire*,[144] the Supreme Court has not developed a clear line of precedent building on its academic freedom cases to define how academic freedom rights should operate under the First Amendment, for individual faculty members and in terms of any institutional rights.[145]

The lack of a specific legal framework from the Supreme Court to define First Amendment protection for faculty members' academic freedom rights in public higher education is one reason that courts routinely turned to other lines of precedent, particularly the public employee speech cases.[146] These standards provided workable, if often imperfect, standards for courts to decide legal disputes dealing with faculty speech in public higher education and claims involving academic freedom. The *Garcetti* decision opened a new legal chapter, one still in the drafting stage, in debates over the extent of legal protections for faculty members in public higher education for their speech related to teaching and research and potentially other job-based speech. Until the Supreme Court decides to provide clarity, ambiguity and debate over First Amendment protections for faculty speech in public higher education will persist.

Even as First Amendment legal debates over the First Amendment and faculty speech and academic freedom continue, there are other important legal standards that potentially provide legal protection for faculty speech, especially in the context of academic freedom. For instance, one area of potential legal protection for employee speech, including that connected to academic freedom, is from collective bargaining

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139 *See generally* Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (1986).

140 Adler v. Bd. of Educ. of City of New York, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting) (arguing that the law threatened to turn schools into a system of surveillance and inhibit the educational process, including so as "to raise havoc with academic freedom").

141 Wieman v. Updegraff, 344 U.S. 183, 196 (1952) Frankfurter, J., concurring ("To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion."). Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring). Looking to a statement by South African scholars, Justice Frankfurter wrote of the four essential freedoms that a university should possess to determine "'on academic grounds who may teach, what may be taught, what may be taught, how it shall be taught, and who may be admitted to study."

142 Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967). (declaring academic freedom a "special concern" of the First Amendment").

143 *Id*.

144 354 U.S. at 263 (Frankfurter, J., concurring).

145 *See generally supra* note 138.

146 Hutchens, *supra* note 138, at 154.

agreements.[147] Or, decades before courts took up First Amendment protection for faculty speech, colleges and universities, both public and private, looked to academic freedom as a professional employment condition, one safeguarded through tenure.[148]

The development of academic freedom as a professional norm in higher education was led by the American Association of University Professors (AAUP).[149] Building on statements issued in 1915 and 1925, the AAUP, joined by other higher education associations, issued the 1940 Statement of Principles on Academic Freedom and Tenure, which remains an important expression of academic freedom standards.[150] Higher education institutions throughout the nation have adopted the 1940 statement or some variation of it.[151] Tenure, representing a special type of contract, was envisioned as a key mechanism to protect the economic security of faculty members, and by extension, their exercise of academic freedom.[152] While tenure faces constant scrutiny—including questions over its usefulness in actually upholding academic freedom—and now applies to only a minority of faculty members in higher education,[153] the vast majority of colleges and universities attest that they continue to adhere to principles of academic freedom as a cornerstone of institutional mission and operations, even if often imperfectly realized in action.[154]

A relevant engagement question for college and university communities is to consider to what extent meaningful academic freedom protections are present at their institutions. Along with tenure-stream faculty members, scrutiny is warranted if faculty members in nontenure-stream positions are effectively able to exercise their academic freedom. In the contemporary college or university, there are also often employees not classified in a faculty position but who may teach courses or engage in research. In carrying out roles that are inherently connected to the academic mission, for instance teaching, and that should fall under the academic freedom umbrella, an important topic for institutions is the adequacy of academic freedom or open inquiry protections for these employees. Take, for instance, a student affairs professional who may also teach courses as part of their job duties. Student affairs professionals often work as at-will employees, which results in limited employment protections compared to faculty members in tenure-stream positions. Given the latitude or discretion that college and university employers possess

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147 *See generally* Karen Halverson Cross, *Faculty Handbook as Contract*, 45 Cardozo L. Rev. 789 (2024).

148 Neal H. Hutchens & Frank Fernandez, *Academic Freedom as a Professional, Constitutional, and Human Right*, *in* Handbook of Theory and Research. Higher Education: Handbook of Theory and Research (Volume 38) 5–19 (Laura W. Perna ed., 2023), https://doi.org/10.1007/978-3-031-06696-2_2.

149 *Id*. at 10–17.

150 *Id*.

151 *Id*. at 13–17.

152 *Id*. at 12–17.

153 *Id*. at 19–22.

154 Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 Hous. L. Rev. (2022), https://houstonlawreview.org/article/35603-academic-freedom-and-the-mission-of-the-university ("Academic freedom has been widely accepted as the ideal that ought to govern the operation of American universities, but it has not always been realized in practice. Like the related principle of free speech, academic freedom is much easier to endorse in the abstract than to implement on the ground.").

over the continuing employment status of many employees, whether in faculty or staff positions, institutions have an opportunity and a responsibility to craft appropriate speech protections for employees in carrying out their professional duties. In doing so, a challenge for college and university leaders is to operationalize academic freedom protections or safeguards for professional speech by all members of the campus community as more than simply a dash of rhetorical flourish in institutional mission statements.

As addressed in Part II, just as colleges and universities need to engage in learning opportunities around student speech, including the freedom of inquiry that students should possess in the classroom with their learning, there exists a need for continual assessment and learning around the ways in which open inquiry and academic freedom are made a part of institutional practice and culture. To that end, what exactly are the academic freedom standards, policies, and guiding principles recognized by a college or university? What kind of faculty speech do these standards apply to, particularly in teaching, research, and service? And what about staff members and needed levels of professional autonomy, including through speech protections, for them to carry out their vital roles professional? Moving beyond legal rules, in the part that follows, we take up issues of education and engagement around issues of free speech in connection to these questions and alongside more general considerations of free speech on campus.

II: EDUCATIONAL ENGAGEMENT AND FREE SPEECH

Legal standards form an important piece of informing how colleges and universities respond to issues involving speech, but legal compliance is only part of what should go into how colleges and universities engage free speech issues. Increasingly, higher education actors have recognized the need for educational and training efforts that go beyond legal standards and view issues of free speech and related concepts, civil discourse as an example, as foundational parts of institutional educational and outreach efforts.[155] Additionally, such outreach endeavors need to involve more than students and should also encompass faculty members, staff members, senior leadership, governing board members, and other stakeholders, like alumni and parents of students. In this second part of the article, we offer suggestions, including in specific operational areas, of where higher education institutions can integrate issues related to free speech that go beyond rules or legal standards and push for broader and deeper engagement on issues connected to free speech. Rather than intended as prescriptive, our suggestions offer themes or points for institutional actors to consider in seeking to build holistic and institution-wide efforts related to free speech.

While rules are far from the only relevant point for the type of broader engagement around free speech we endorse, an important starting point in these efforts relates to educating members of the campus community as to institutional standards and policies connected to free speech. The kind of overview of legal standards provided in the earlier part of this article may prove useful in these

155 Anemona Hartocollis, *To Dial Down Campus Tensions, Colleges Teach the Art of Conversation*, N.Y. Times (Dec. 14, 2024, and updated Dec. 16, 2024), https://www.nytimes.com/2024/12/14/us/college-campuses-gaza-conversations.html.

endeavors, especially in connection to employee engagement. In terms of campus speech rules, we also recommend that campus speech policies are easily accessible to members of the campus community and to external groups and individuals. Campus leaders may choose to have online sites specifically focused on free speech, or that use an overarching term, for example civil discourse or engagement, that provides easy access to rules and other resources and that also make clear how issues of free speech constitute a key point of institutional emphasis. No matter the form, educational and engagement initiatives can also emphasize how other compelling campus values, particularly ones related to access and belonging or diversity and inclusion, are supported and prioritized alongside ones connected to free speech. At a minimum, it is important to make clear how the free speech "rules of the road" operate on campus, but we suggest that many colleges and universities can and should do much more in their educational and engagement efforts connected to free speech.

A. Education and Engagement with Employees

Campus leaders who aim to elevate issues related to free speech should, alongside students, prioritize education and engagement opportunities for staff and faculty members. Alongside value for institutional employees, such an approach can also help foster holistic campus responses to student educational and training initiatives. As an initial point, campuses should take stock of existing educational and outreach efforts with faculty and staff members regarding relevant institutional standards and practices connected to free speech. Beyond one-way trainings, engagement efforts can provide venues for deeper reflection on free speech topics and how support of free speech intersects with other institutional values and standards, like connections to nondiscrimination principles and belonging and inclusion.

Some of the employee constituencies and points at which trainings or educational opportunities exist include the following:

- new employee onboarding
- programing for senior leadership, deans, directors, department chairs that is both for individuals new to roles and continued professional development
- employees responsible for conduct / behavioral review and / or adjudication (e.g., human resource intervention, professional standard reviews, etc.)
- employees responsible for campus-based social media accounts
- employees responsible for admissions or hiring
- employees responsible for event space or planning programmatic efforts
- employees who serve on response or resource teams (e.g., threat assessment, bias incident response, etc.)

Along with reviewing the legal basics of free speech and relevant institutional standards, these learning opportunities provide a chance for deeper engagement on free speech and connected topics, such as civic engagement and issues of access and belonging. For instance, programming could provide the opportunity to examine the intersections and potential conflicts between free speech and

impacts on inclusion and belonging on campus, specifically the effects of what is commonly termed hate speech or challenges related to chilling speech. These kinds of sessions present the opportunity to also examine how conflicts can be navigated in ways that still allow discourse and free speech to proceed. Among the topics for coverage, educational offerings can help employees envision and be better prepared to navigate incidents in the early moments and know how to effectively communicate possible incidents to appropriate campus leadership or support offices. Sessions can offer exercises or scenarios for faculty and staff members to work through in determining best institutional responses to challenges involving free speech incidents. Such programming can also provide a space to think about connections between curricular and co-curricular spaces. It additionally can foster the building of teams or partnerships that cut across different institutional units.

Along with seeking expert advice and materials external to the institution, college and university leaders should not neglect to draw on the expertise of staff and faculty members on campus, a strategy that may also boost overall engagement and help tailor sessions to events and needs that have specifically arisen at that particular institution. Engagement and educational programming for faculty and staff members related to free speech should aim to avoid only providing a cursory examination of legal standards or institutional rules without opportunities for more in-depth considerations across campus of free speech and connected themes.

Free speech and related topics are often complicated—*very complicated*. Much of the complication is not necessarily tied to legal analysis of free speech standards but, instead, how to effectively communicate campus polices and rules and accompanying rationales for "why" the standards are in place. Dialogue and learning opportunities provide intellectual spaces for faculty and staff members to pose questions about what policies and practices the institution should have in place, which recognizes the dynamic and evolving nature of free speech issues. Besides providing venues to prioritize free speech, discourse can also wrestle with the difficult challenges that often arise from free speech. If college and university leaders desire their institutions to exist as vibrant places for free speech and connected themes, such as ones related to civic dialogue and access and belonging, then careful attention needs to be given to faculty and staff members and their learning and reflection on these issues.

B. Education and Engagement with Students

As part of outreach and educational planning focused on the campus workforce, one component could focus on asking faculty and staff members to work together on how to situate free speech educational opportunities for students and others within their daily work. Campuses too often are in a position of reacting to free speech incidents versus building a culture that understands free speech and how it intersects with multiple campus values, like access and belonging or issues connected to social justice. An ideal way to get "upstream" on this state of affairs is to pursue explicit dialogue about how a campus culture can be defined, built, and continually reinforced as a place where individual perspectives are welcomed and differing perspectives are anticipated and respectfully negotiated. This approach will come with tension, and campus constituents will have to understand that it is a key part of the intersectionality and integration of free speech and other campus values.

It is important to think about the work of building campus competence and culture as everyone's job. Many campuses have relied on specific units—often student affairs—to lead the education and response efforts related to free speech. By compartmentalizing these responsibilities and work, campuses are at risk of placing these endeavors primarily on staff members that often work without tenure or other labor protections. The work of building institution-wide approaches and understandings around free speech for the student community requires contributions from faculty and staff members throughout campus and includes both curricular and co-curricular units. Suggestions about the need to educate students on free speech may often point toward new-student orientation or first-year experience as the avenue of sharing information. The challenge with this approach lies in its effectiveness if not conceived of as an initial start to ongoing educational and engagement offerings throughout a student's academic career at the institution. Additionally, the sheer amount of information shared during orientation (often occurring before students have experienced life on campus) can be overwhelming and almost always needs to be reexplained or redistributed to students and families alike at other points.

Sharing information at orientation is important and a key element in the continuum of educational opportunities available to students. But, learning about an institution's commitment to free speech and open inquiry on an admissions tour and again at orientation is just the beginning. Students need to more fully understand how this information applies to them, how it will challenge them, and how they can balance their sense of self and convictions with expectations of respect and inclusion situated within the campus community. To do this deeper work, campuses and their students can benefit from reengaging this conversation in the various contexts in which students exist on campus, in both curricular and co-curricular settings.

In sum, it is vital for university leadership and the campus community to think more broadly when it comes to educational outreach to students. There are several potential touchpoints that institutions could look to for targeted engagement on free speech issues with students and/or their families:

- Consider providing a widely available and shared position statement on free speech and efforts to promote civic dialogue and access and belonging, along with making pertinent policies and standards easily accessible for members of the campus community and beyond. Clearly stating and widely sharing institutional standards around free speech and access and belonging provides an opportunity to convey institutional values and expectation even before students are enrolled. It also provides parents of students the opportunity to become acclimated to institutional free speech standards, which are likely to differ markedly from those followed at their child's secondary education institution.
- Weave issues of free speech along simultaneous campus commitments to access and belonging into campus tours.
- Maintain a visible university website on free speech that includes a university statement on free speech and academic freedom, expectations related to balancing free speech and access and belonging, educational materials for department use, and information on campus resources.

- Launch specific communication campaigns about speech on campus.
- Provide educational opportunities for undergraduate and graduate student government leaders and members.
- Offer educational opportunities for all members of student organizations.
- Provide educational opportunities for student-athletes.
- Include educational and engagement points for campus tour guides, orientation leaders, and university ambassadors related to issues of free speech and institutional commitments to access and belonging.
- Integrate and emphasize free speech issues in curricular programs, which can include highlighting existing opportunities along with the creation of new ones.
- Explore ways to capitalize on the expertise of librarians in curricular or co-curricular educational opportunities, included on topics related to free speech like mis- and dis-information.
- Integrate and emphasize free speech issues in co-curricular programing and opportunities, including in residence life.

As institutions consider ways to integrate educational and engagement opportunities for their student communities, they may benefit from learning about efforts at other colleges and universities. To give one example, American University has launched its "Civic Life" initiative, which is described by the institution as "[r]ooted in the ethos of inquiry and a commitment to free expression and civil discourse, … [and] offers more than an opportunity to learn facts. It allows you to practice the character traits needed for dialogue and deliberation."[156] The initiative offers a component to engage in dialogue across differences and also incorporates existing university efforts in the area of civic dialogue.[157]

There are also national-level groups and initiatives, some housed in higher education institutions, that may be useful to institutions seeking to prioritize free speech, including in the context of connections to other overarching themes such as civic dialogue and access and belonging. For instance, the Campus Free Expression Project, which had been launched and housed since 2019 in the Bipartisan Policy Center, is now a part of the Council of Independent Colleges.[158] The University of California National Center on Free Speech and Civic Engagement has supports scholarship and projects related to free speech in higher education.[159] Georgetown University has "The Free Speech Project," which tracks free speech incidents and also makes learning modules available.[160] As another example, NASPA: Student Affairs

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156 *The Civic Life: An American University Experience*, Am. Univ., https://www.american.edu/the-civic-life/ (last visited Dec. 20, 2024).

157 *Id*.

158 *CIC Welcomes the Campus Free Expression Project*, Council Indep. Colls., https://cic.edu/news/cic-welcomes-the-campus-free-expression-project/ ((last visited Dec. 20, 2024).

159 Univ. Cal Nat'l Ctr for Free Speech & Civ. Engagement, https://freespeechcenter.universityofcalifornia.edu (last visited Dec. 20, 2024).

160 *The Free Speech Project*, Geo. Univ., http://freespeechproject.georgetown.edu (last visited

Administrators in Higher Education has also produced resources dealing with free speech.[161] Other groups, like PEN America,[162] the Foundation for Individual Rights and Expression,[163] the American Civil Liberties Union,[164] and the American Association of University Professors,[165] are also potential sources of information. The #ListenFirst Coalition is a multiorganizational effort that seeks to promote increased community and to challenge polarization.[166] And BridgeUSA[167] or Toastmasters[168] are examples of organizations that can help student students build their dialogue and debate skills.

The initiatives and organizations mentioned here are not meant to be exhaustive but illustrative of the variety of resources and points of contact to support campus efforts connected to free speech alongside expertise already existing on campus. Importantly, individuals or their institutions do not have to endorse or support particular views of these groups on free speech matters, but these examples show that an array of resources is available to colleges and universities in designing holistic campus blueprints related to free speech.

C. Other Stakeholders and Deciding When to Use the Institutional Voice

Alongside core educational and engagement opportunities with students and employees, outreach to other stakeholders—board members, alumni, parents of students, and elected officials—should not be overlooked. When a controversial speech incident occurs, institutional leaders will likely hear from their extended campus constituents. These moments may be more easily navigated if colleges and universities have previously developed and widely disseminated information about the ways the institution manages free speech on campus in terms of policies and practices. Proactive outreach also provides an educational opportunity for a college or university to articulate to external audiences along with internal ones the value and importance that the institution places on free speech and its commitment to other values, for instance commitments to an inclusive campus environment.

In these outreach efforts, which may help colleges and universities shape the narrative surrounding free speech at their institution, it is important to ensure that actions match with rhetoric. Institutions need to demonstrate fidelity in the day-to-day ways in which policies and practices are carried out and ensure that all

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Dec. 20, 2024).

161 *See, e.g.*, *Free Speech and the Inclusive Campus: How Do We Foster the Campus Community We Want?*, NASPA (May 22, 2020), https://naspa.org/report/free-speech-and-the-inclusive-campus-how-do-we-foster-the-campus-community-we-want.

162 PEN America, https://pen.org (last visited Dec. 20, 2024).

163 FIRE, https://www.thefire.org (last visited Dec. 20, 2024).

164 ACLU, https://www.aclu.org (last visited Dec. 20, 2024).

165 AAUP, https://www.aaup.org (last visited Dec. 20, 2024).

166 #ListenFirst Coalition, https://www.listenfirstproject.org/listen-first-coalition (last visited Dec. 20, 2024).

167 BridgeUSA, https://www.bridgeusa.org (last visited Dec. 20, 2024).

168 Toastmasters Int'l, https://www.toastmasters.org (last visited Dec. 20, 2024).

speakers are afforded treatment that is not tied to whether specific institutional actors favor or disfavor their messages or based on pressure from external groups and individuals to act in ways not in alignment with legal standards or institutional rules and values.

Distinct from even-handed treatment of individuals and groups under relevant free speech policies and standards, college and university officials should establish standards for when institutional leaders will weigh in on specific speech issues that have arisen on campus or elsewhere. Even as institutions evaluate a situation in terms of using institutional voice and avoid a rush to judgment in specific situations, it is important to have preemptively considered the individuals or offices that should be brought into conversations to help guide responses and communication on campus and beyond. Offices involved in response and communication efforts can vary depending on the circumstances, but units that often need to be included are communications; the general counsel's office; academic affairs; student affairs; diversity and inclusion; and, possibly, police/public safety. These units are also often found at the incident response team table, so integrating communications into such teams can be an efficient model.

Calls exist for institutions to take a neutral stance on "controversial" matters,[169] with adherents of this position often looking to the Kalven Report that was issued in 1967 by the University of Chicago.[170] Critiques of institutional neutrality have also been offered.[171] An important decision for college and university leaders is to determine under what circumstances the institution will use its institutional voice to take a position on specific issues. In recent years, some campuses have developed statement protocols to provide clarity regarding when their leaders will and will not issue institutional statements.[172]

In using the institutional voice, leaders should be mindful of the consequences of the messages intended for communication, including the attention that could be brought to individuals associated with the institution like faculty members, staff members, and students. While it is often important to provide updates to the campus community and external audiences when negative or controversial incidents take place, it is imperative that institutions adhere to their own campus

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169 *See*, *e.g.*, Quinn, *supra* note 45; Daniel Diermeier, *The Need for Institutional Neutrality at Universities,* Forbes (Dec. 20, 2023), https://www.forbes.com/sites/danieldiermeier/2023/12/20/the-need-for-institutional-neutrality-at-universities/.

170 *Kalven Committee: Report on the University's Role in Political and Social Action*, Univ. Chi. (Nov. 1, 1967), https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action.

171 John Warner, *About That 'Institutional Neutrality,'* Inside Higher Ed (Nov. 15, 2024), https://www.insidehighered.com/opinion/blogs/just-visiting/2024/11/15/institutional-neutrality-isnt-what-i-thought-it-was; Jennifer Ruth, *The Uses and Abuses of the Kalven Report*, Chron. Higher Educ. (Oct. 14, 2023), https://www.chronicle.com/article/the-uses-and-abuses-of-the-kalven-report; Michael T. Nietzel, *The Kalven Report and the Limits of University Neutrality*, Forbes (Dec. 26, 2023, and updated Dec.14, 2024), https://www.forbes.com/sites/michaeltnietzel/2023/12/26/the-kalven-report-and-the-limits-of-university-neutrality/.

172 *See* Jessica Blake, *Debating the 'Art' of Institutional Statements*, Inside Higher Ed (Nov. 22, 2023), https://www.insidehighered.com/news/governance/executive-leadership/2023/11/22/college-presidents-discuss-art-institutional.

policies and relevant legal standards in how they respond to high-profile events.

Education and engagement activities that include constituencies in addition to core campus groups can play a meaningful part in how colleges and universities establish expectations for the ways an institution manages and responds to free speech issues. Such engagement also provides a way for colleges and universities to share broadly how they are endeavoring to model commitments to free speech and civic dialogue while also promoting access and belonging as institutional values. These efforts can also help stakeholders, alumni for example, to serve as important voices and allies when a free speech challenge arises on campus. As part of engagement with external stakeholders, colleges and universities should also establish the circumstances for when the institution will use or not use the institutional voice to respond to issues occurring on campus or elsewhere.

III. CONCLUSION

Colleges and universities need to have well-designed speech policies and practices in place, but rules are only one part of a holistic campus plan for issues connected to free speech. In a time of increasing societal polarization, colleges and universities can serve as exemplars for how to deal with the promise and challenges of free speech. Along with curricular and co-curricular opportunities for students, faculty and staff members are key actors in establishing a vibrant campus free speech ecosystem. Rather than a single unit, such as student affairs, free speech and related issues merit attention and engagement across campus. Besides the immediate members of the campus community, education and engagement should extend to additional stakeholders, with governing board members, alumni, and parents of students often notable stakeholders. Importantly, rather than assuming that free speech exists in a static state, education and engagement must reflect a willingness to navigate the dynamic and often contested nature of free speech on campus.