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# Campus Free-Speech Legislation: History, Progress, and Problems

(APRIL 2018)

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Claiming that free speech is dying on American campuses, a conservative think tank has led an effort to push states to adopt a model bill that, in the name of defending campus free speech, risks undermining it. This report seeks to understand the context and content of the “campus free-speech” movement, to track its influence within state legislatures, and to draw some conclusions concerning the best ways to respond to it.

## I. The Context

A sense of alarm about recent developments on college campuses, particularly among conservatives, has driven the efforts to adopt free-speech bills. Proponents often lump these developments together under the general heading of “political correctness.” Those most often referred to are

- *protests against campus speakers*, some of which received extensive media attention and many of which targeted conservative journalists, scholars, and political figures;<sup>1</sup>

- *free-speech zones*, or areas of a campus to which protests and other contentious political activity are confined;
- *speech codes* designed to prohibit discriminatory language and hate speech;
- *safe spaces* designed to provide protection for historically marginalized groups; and
- *trigger-warning policies* intended to alert students to course material that could trigger preexisting mental conditions.

## II. The Goldwater Institute

One of the main forces driving the current round of free-speech legislation in the United States is the Goldwater Institute. The Goldwater Institute is a conservative and libertarian think tank founded in 1988. Based in Phoenix, Arizona, it is named after Barry Goldwater, Arizona's famous Republican senator. It has been involved in promoting “school choice,” among other issues, in Arizona. In 2011, for instance, the Goldwater Institute persuaded the legislature to adopt Empowerment Scholarship Accounts. This education savings account program seeks to distribute much of

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1. A series of free-speech incidents from early 2017 illustrates the trend. On February 1, 2017, a speech by Milo Yiannopoulos at the University of California, Berkeley, was disrupted with violent protest. On March 2, student protesters interrupted a speech at Middlebury College by Charles Murray, who had been invited by a student group affiliated with the American Enterprise Institute. On April 5, protesters associated with the Black Lives Matter movement repeatedly interrupted a speech at the University of California, Los Angeles, by Heather MacDonald, a Manhattan Institute scholar who had been invited by campus Republicans. On April 6, after Black Lives Matter protesters blocked entry into

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the building at Claremont McKenna University where a speech by Heather MacDonald was scheduled to occur, university officials opted not to force entry and arranged for the speech to be streamed live on the internet. And on April 19, administrators at the University of California, Berkeley, informed College Republicans that they were cancelling a scheduled speech by Ann Coulter, explaining that the university had been “unable to find a safe and suitable venue for [their] planned April 27 event.”

the state's education budget to individual students, whose allotments go to the school they choose to attend.

The Goldwater Institute is a member of the State Policy Network (SPN), an alliance of several dozen conservative think tanks across the country. In 2013, the Center for Media and Democracy released a report showing that the SPN works actively to promote a right-wing agenda. It is also a stealth ally, at the state level, of the American Legislative Exchange Council (ALEC), which works with state legislators to promote aggressively conservative policies. A report by the Center for Media and Democracy and Arizona Working Families claims that the shared agenda of the Goldwater Institute and ALEC includes legislation that would block implementation of the Affordable Care Act, “redirect funds from Arizona’s public schools via private school vouchers to other private or for-profit businesses,” “attack Arizona workers’ collective bargaining rights,” “reform” tort law to shield corporations, disregard climate-change science, and promote “measures that would undermine the power of federal or local governments to regulate water and air pollution.”<sup>2</sup> The report notes that while the Goldwater Institute does not publicly list its donors, a review of IRS records reveals contributions by the Koch-connected Donors Capital Fund, the Charles G. Koch Charitable Foundation, and the Walton Family Foundation.

On January 30, 2017, the Goldwater Institute issued a report, *Campus Free Speech: A Legislative Proposal*, written by Stanley Kurtz, James Manley, and Jonathan Butcher.<sup>3</sup> Before examining its contents, it is worth considering the careers of its authors, all of whom are active in various conservative think tanks and causes.

Stanley Kurtz received a PhD in social anthropology from Harvard University. In addition to his scholarly work, he has worked for several right-wing think tanks, including the Hudson Institute and the Ethics and Public Policy Center (which describes itself, according to its website, as “D.C.’s premier institute dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy”). In 2010, he

published *Radical-in-Chief: Barack Obama and the Untold Story of American Socialism*, featuring blurbs by Rush Limbaugh and David Horowitz. The book argued that President Obama embodied a “stealth socialism” that was overtaking the Democratic Party, and it warned that Obama could transform the United States into a Scandinavian-style welfare state. While researching the book, Kurtz plowed through the archives of small socialist organizations to prove that Obama attended a conference on Marx in 1983, which, Kurtz asserted, had “immense” influence on the future president. “Public ignorance of this socialist world,” he explained, “is ultimately the most significant barrier to public appreciation of Obama’s background.”<sup>4</sup> In 2012, Kurtz published *Spreading the Wealth: How Obama Is Robbing the Suburbs to Pay for the Cities*. The book accused Obama of seeking to “abolish the suburbs” (the title of chapter 1) and of “Manhattanizing America” (chapter 2).

In 2015, Kurtz coauthored an article for the Hudson Institute in which he criticized the College Board’s “revisionist, left-leaning curriculum” for Advanced Placement US History. He specifically objected to the way the College Board taught immigration: rather than emphasizing the importance of assimilation, the board, Kurtz maintained, had adopted a “multiculturalist” perspective emphasizing efforts to preserve group identity. Kurtz and his coauthor wrote: “America has been the most successful immigration country in the history of the world precisely because newcomers and their children have assimilated. They have, in the vernacular, become ‘Americanized.’”<sup>5</sup> The College Board had projected a modern multiculturalist perspective back onto a much longer history in which, they contended, assimilationism had prevailed.

The second author, James (Jim) Manley, graduated from Arizona State University before earning a law degree at the University of Colorado Law School. He is currently a senior fellow at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation, the think tank’s litigating branch. He has been active in promoting the “right to self-defense”—that is, the right to bear arms—on college campuses. As an attorney for Mountain States Legal Foundation, he

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2. Arizona Working Families and the Center for Media and Democracy, *A Reporter’s Guide to the Goldwater Institute: What Citizens, Policymakers, and Reporters Should Know*, March 2013, 1, [https://www.prwatch.org/files/Report\\_on\\_the\\_Goldwater\\_Institute\\_final.pdf](https://www.prwatch.org/files/Report_on_the_Goldwater_Institute_final.pdf).

3. Stanley Kurtz, James Manley, and Jonathan Butcher, *Campus Free Speech: A Legislative Proposal* (Phoenix: Goldwater Institute, 2017).

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4. Stanley Kurtz, *Radical-in-Chief: Barack Obama and the Untold Story of American Socialism* (New York: Threshold Editions, 2010), 30.

5. John Fonte and Stanley Kurtz, “AP U.S. History Bias Still Runs Deep,” Hudson Institute, September 22, 2015, <https://www.hudson.org/research/11687-ap-u-s-history-bias-still-runs-deep>.

sued the University of Colorado after it sought to ban guns from campus. In 2012, the Colorado Supreme Court overturned the ban. Manley praised the decision as a “victory for gun rights as well as civil rights.”<sup>6</sup> As a speaker for the Federalist Society, the conservative lawyers’ association, he has participated in panels on gun rights (“More Guns, Less Crime,” 2011), state policies that ban political contributions from businesses but not unions (2015), and campus free speech (2018). He has taken a lead in criticizing the so-called “union loophole,” which in six states (notably Massachusetts) gives unions the rights to make larger political donations than businesses. Manley sees this as a restriction of free speech.

The third author, Jonathan Butcher, holds a BA from Furman University and an MA in economics from the University of Arkansas. He is currently a senior fellow at the Goldwater Institute, a senior policy analyst in the Center for Education Policy at the Heritage Foundation, and a senior fellow on education reform at the Beacon Center of Tennessee. He has notably worked on “education reform.” Previously, he worked as director of accountability for the South Carolina Public Charter School District, which authorizes charter schools in South Carolina. In Arizona, he served on the Arizona Department of Education’s Steering Committee for Empowerment Scholarship Accounts.

### **III. The Goldwater Institute’s Model Bill**

*Campus Free Speech: A Legislative Proposal* argues that free speech is under attack on American campuses. “Freedom of speech,” it declares, “is dying on our college campuses and is increasingly imperiled in society at large.” As evidence, the report cites speaker bans, “shout-downs” that interrupt speakers or prevent them from speaking altogether, safe spaces, and restrictive speech policies. It states that young people must be “confronted with new ideas, especially ideas with which they disagree.”<sup>7</sup>

The report also expresses concern at university administrators’ lack of neutrality on major political issues of the day. Administrators should, the report contends, strive for neutrality. It cites, for example,

administrations that have yielded to divestment campaigns: “We see this issue at work today in the campaigns to press universities to divest their endowments of holdings in oil companies or companies based in the state of Israel. At any university, such divestment would tend to inhibit intellectual freedom.”<sup>8</sup> In general, the report sees administrators as undermining free speech through their willingness to turn a blind eye to student activism and their tendency to capitulate to student demands.

Consistent with the Goldwater Institute’s and ALEC’s *modus operandi*, the think tank proposed a model bill. The bill is straightforwardly political: it seeks to support what it sees as the embattled minority of conservatives on campus against the “politically correct” majority. Specifically, the bill aims to “change the balance of forces contributing to the current baleful national climate for campus free speech.”<sup>9</sup>

The model bill’s specific provisions are as follows:

- It creates an official university policy that strongly affirms the importance of free expression, nullifying any existing restrictive speech codes in the process.
- It prevents administrators from disinviting speakers, no matter how controversial, whom members of the campus community wish to hear from.
- It establishes a system of disciplinary sanctions for students and anyone else who interferes with the free-speech rights of others.
- It allows persons whose free-speech rights have been improperly infringed by the university to recover court costs and attorney’s fees.
- It reaffirms the principle that universities, at the official institutional level, ought to remain neutral on issues of public controversy to encourage the widest possible range of opinion and dialogue within the university itself.
- It ensures that students will be informed of the official policy on free expression.
- It authorizes a special subcommittee of the university board of trustees to issue a yearly report to the public, the trustees, the governor, and the legislature on the administrative handling of free-speech issues.<sup>10</sup>

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6. Keith Coffman, “Colorado Court Says Students Can Carry Guns on Campus,” *Reuters*, March 5, 2012, <https://www.reuters.com/article/us-guns-colorado-university/colorado-court-says-students-can-carry-guns-on-campus-idUSTRE82504920120306>.

7. Kurtz, Manley, and Butcher, *Campus Free Speech*, 2.

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8. Kurtz, Manley, and Butcher, *Campus Free Speech*, 5.

9. Kurtz, Manley, and Butcher, *Campus Free Speech*, 4.

10. Quoted from Kurtz, Manley, and Butcher, *Campus Free Speech*, 2.

#### IV. Precedents

The Goldwater Institute cites three precedents upon which its own model bill is based: Yale University's 1974 Woodward Report, the University of Chicago's 1967 Kalven Report, and the University of Chicago's 2015 Stone Report.<sup>11</sup>

The Woodward Report or *Report of the Committee on Freedom of Expression at Yale* was an effort to restore free speech on campus at a time when some felt that it had been undermined by the upheaval of the 1960s. The committee's chair was C. Vann Woodward, the prominent historian whose book *The Strange Career of Jim Crow* (1955) helped to shape the civil rights movement. Subsequently, however, Woodward became increasingly disenchanted with the New Left, Black Power, feminism, and, later, political correctness. One incident the report cites as evidence of the university's waning free-speech culture concerns a decision to invite Alabama governor and presidential contender George Wallace to campus in 1963. Between the time Wallace was invited and the scheduled event, the Birmingham church bombings occurred. When Wallace failed to denounce the attacks as vigorously as some would have liked, Yale rescinded the invitation, expressing concern about "the damage which Governor Wallace's appearance would do to the confidence of the New Haven community in Yale and the feelings of the New Haven Negro population."

The Woodward report made a number of recommendations that have inspired the Goldwater proposal:

- First, it called for a "program of reeducation": free-speech statements would be included in university documents, and campus discussions of free speech would be organized.
- Second, it sought to define the "limits of protest in a community committed to the principles of free speech" for those objecting to a particular speaker. Thus it would be "punishable" for "objectors to coerce others physically or to threaten violence"; protest in university build-

ings would be forbidden if it led to disruption of university events; audience members at a talk by an invited speaker would be "under an obligation to comply with a general standard of civility"; and "the content of the speech, even parts deemed defamatory or insulting, [would not] entitle any member of the audience to engage in disruption."

- Third, it called upon the university to "be more effective in discharging its obligation to use all reasonable effort to protect free expression on campus." Specifically, it stated, "The administration . . . must act firmly when a speech is disrupted or when disruption is attempted." "It is plain," it continued, "that if sanctions are to work as a deterrent to subsequent disruption, they must be imposed whenever disruption occurs. They must be imposed and not suspended. They must stick." "Disruption of a speech" was declared "a very serious offense against the entire University" that could "appropriately result in suspension or expulsion."

The Kalven Committee's *Report on the University's Role in Political and Social Action* was also shaped by the events of the 1960s. The University of Chicago's decision to share some student records with the Selective Service program had triggered protests. Students for a Democratic Society was demanding that the university divest from South Africa. In response, the Kalven report defended the idea that universities as institutions should remain neutral on the dominant political issues of the day. It argued that because individuals on a university campus must be free to express themselves, institutions themselves must remain neutral. The report stated: "The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the critic." It followed that the university is "a community which cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness." This neutrality, the report maintained, arises not from lack of courage or conviction but from respect for free inquiry and diversity of viewpoints.

In January 2015, the University of Chicago issued another report, titled *Report of the Committee on Freedom of Expression*. The committee was chaired by law professor Geoffrey R. Stone. President Robert J. Zimmer and Provost Eric D. Isaacs charged

11. Committee on Freedom of Expression, *Report of the Committee on Freedom of Expression at Yale*, 1974, <https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>; Kalven Committee, *Report on the University's Role in Political and Social Action*, 1967, <http://www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf>; Committee on Freedom of Expression, *Report of the Committee on Freedom of Expression*, 2015, <https://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf>.

the committee with articulating a defense of free expression in light of “recent events nationwide that have tested institutional commitments to free and open discourse.” The report defended the principles of unrestricted debate and institutional neutrality. It declared: “[T]he University’s fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.” It also drew a line at obstructing the free speech of others: “Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe.”

A number of universities subsequently adopted Chicago’s 2015 statement or versions thereof. In April 2015, Princeton University adopted a free-speech policy that was significantly inspired by the Chicago report. That May, Purdue University became the first public university to make its own what were now being called the “Chicago principles.” In September, the faculty at the Winston-Salem State University (a University of North Carolina institution) also adopted the Chicago principles. Around the same time, similar statements were adopted by Johns Hopkins University and American University’s faculty senate. The same month, the Foundation for Individual Rights in Education (FIRE) launched a campaign in support of the Chicago principles, suggesting that they were supported by President Obama. As the Goldwater Institute would two years later, FIRE’s president, Greg Lukianoff, connected the Chicago principles to the Woodward and Kalven reports—as well as to the AAUP’s foundational documents. He commented that the Stone report “deserves to take a place alongside the American Association of University Professors’ famous 1915 ‘Declaration of Principles,’ its 1940 ‘Statement of Principles on Academic Freedom and Tenure,’ Yale University’s Woodward Report, and the University of Chicago’s own Kalven Report as inspiring statements

on the unique importance of free speech to any university community.”<sup>12</sup>

## **V. Action by the States**

States have begun to act on the politically charged issue of campus free speech. Some legislatures have proposed bills that are explicitly based on the Goldwater Institute’s model bill. Others have adopted different and typically milder measures. As of March 2018, bills had passed or had been introduced in the following states.

### **Missouri (passed July 2015)**

In July 2015, Missouri governor Jay Nixon, a Republican, signed into law the Campus Free Expression Act (SB 93). The main purpose of this law is to ban free-speech zones. The bill was supported by FIRE but was passed prior to the Goldwater proposal’s release.

### **Arizona (passed May 2016)**

In May 2016, Arizona adopted HB 2548, which seeks to prevent universities from unlawfully limiting students’ right to speak, and HB 2615, which prohibits community colleges and universities from establishing free-speech zones. HB 2548 also imposes “six-month jail terms on protesters who stop traffic headed to political rallies” and on “those who, after ignoring a warning, block anyone on their way to government meetings or hearings.”<sup>13</sup> The latter provisions were a reaction to a protest that, the previous March, had stopped traffic to prevent Donald Trump from attending a campaign rally. HB 2615 was related in part to an incident at Paradise Valley Community College in Phoenix in which a student was prevented from distributing copies of the US Constitution on behalf of a chapter of Young Americans for Liberty because of a rule requiring forty-eight hours’ advance warning and limiting such activities to a “free-speech zone.” Though the legislation was adopted before its January 2017 report was published, the Goldwater Institute was active in supporting this legislation.

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12. Foundation for Individual Rights in Education, “FIRE Launches Campaign in Support of University of Chicago Free Speech Statement,” press release, September 28, 2015, <https://www.thefire.org/fire-launches-campaign-in-support-of-university-of-chicago-free-speech-statement-pr/>.

13. Howard Fischer, “New Arizona Law Protects Campus Speech, Ups Jail Time for Those Who Block Rallies,” *Tucson.com*, May 16, 2016, [http://tucson.com/news/local/new-arizona-law-protects-campus-speech-ups-jail-time-for/article\\_ef5030a5-69cd-59a4-882c-bc0f5b07c0a3.html](http://tucson.com/news/local/new-arizona-law-protects-campus-speech-ups-jail-time-for/article_ef5030a5-69cd-59a4-882c-bc0f5b07c0a3.html).

### Illinois (introduced February 2017)

In February 2017, the Goldwater-inspired Campus Free Speech Act (HB 2939) was introduced to the Illinois legislature. The bill's synopsis reads as follows: "Requires the governing board of each public university and community college to develop and adopt a policy on free expression; sets forth what the policy must contain. Requires the Board of Higher Education to create a Committee on Free Expression to issue an annual report. Requires public institutions of higher education to include in their freshman orientation programs a section describing to all students the policies and rules regarding free expression that are consistent with the Act." The bill seems not to have moved beyond committee.

### Virginia (passed March 2017)

On February 22, 2017, the Virginia House passed HR 431, a Goldwater-inspired campus free-speech resolution. The following month, the state's Democratic governor, Terry McAuliffe, signed into law HB 1401, a campus free-speech bill. The law states: "Except as otherwise permitted by the First Amendment to the United States Constitution, no public institution of higher education shall abridge the constitutional freedom of any individual, including enrolled students, faculty and other employees and invited guests, to speak on campus." FIRE actively supported the bill.

### Utah (passed March 2017)

On March 28, 2017, Gary Herbert, Republican governor of Utah, signed into law HB 54, a campus free-speech bill. The law is mainly designed to end free-speech zones and is not Goldwater-inspired.

### Colorado (passed April 2017)

In April 2017, Colorado governor John Hickenlooper, a Democrat, signed into law SB 21, a bill "[c]oncerning the right to free speech on campuses of public institutions of higher education." It received considerable bipartisan support. The bill seems mainly aimed at banning free-speech zones. It is not a Goldwater-type bill.

### California (introduced May 2017)

In May 2017, California assemblywoman Melissa A. Melendez introduced the Goldwater-inspired California Campus Free Speech Act. As Stanley Kurtz explained in article for the *National Review*, the California proposal differs from the model bill in several

ways.<sup>14</sup> It would apply to public but also to private universities. The latter would be achieved by making state funding for private institutions contingent on compliance. The bill is also an amendment to the state constitution: to be approved, two-thirds of the legislature or a petition would be required to place it on the ballot. While this bill seems to have made little progress, the California legislature successfully passed a resolution in August 2017 that defended free speech on campuses. In addition to referring to the Chicago principles, it quoted University of California president Janet Napolitano, UC Irvine president Howard Gillman, and President Barack Obama in defense of free speech.

### Tennessee (passed May 2017)

Tennessee's legislature approved SB 723, the Campus Free Speech Protection Act, in May 2017. According to FIRE, in addition to measures found in similar bills, such as prohibiting free-speech zones, preventing administrators from rescinding invited speakers, and endorsing the Chicago principles, the Tennessee bill contains some original provisions:

- It would define "student-on-student harassment in a way that is consistent with the definition provided by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*."
- It would prohibit "viewpoint discrimination in the allocation of student fees to student organizations."
- It would "protect faculty from being punished for speech in the classroom, unless the speech is both 'not reasonably germane to the subject matter of the class as broadly construed, and comprises a substantial portion of classroom instruction.'" <sup>15</sup>

FIRE supported the Tennessee bill.

### Louisiana (vetoed June 2017)

On June 27, 2017, Louisiana governor John Bel Edwards, a Democrat, vetoed a Goldwater-inspired

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14. Stanley Kurtz, "Melissa Melendez's California Campus Free Speech Act," *National Review*, May 2, 2017, <https://www.nationalreview.com/corner/melissa-melendezs-california-campus-free-speech-act-goldwater-proposal/>.

15. Foundation for Individual Rights in Education, "Comprehensive Campus Free Speech Bill Becomes Law in Tennessee," press release, May 10, 2017, <https://www.thefire.org/comprehensive-campus-free-speech-bill-becomes-law-in-tennessee/>.

campus free-speech bill, HB 269. He called the bill “a solution in search of a problem” and described it as “unnecessary and overly burdensome.”<sup>16</sup>

#### **North Carolina (passed July–December 2017)**

On July 31, 2017, the North Carolina Restore Campus Free Speech Act (SL 2017-96), which had previously been approved by the North Carolina General Assembly, became law (without the governor’s signature). The law was nearly a direct transcription of the Goldwater Institute’s model bill. Among other provisions, the law imposes strict disciplinary measures on individuals accused of violating the free-speech rights of others, says that universities ought to be neutral on public issues, and empowers the University of North Carolina’s board of governors to issue annual reports on campus free speech. The law assigned the board of governors the task of drawing up a policy to implement the law. On October 30, the board published on its website a draft of its “free speech policy.” Titled “Free Speech and Free Expression within the University of North Carolina,” the policy prohibited expression that “substantially interferes with the protected free speech rights of others,” including “protests and demonstrations that materially infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity (1) has been scheduled pursuant to this policy or other relevant institutional policy, and (2) is located in a nonpublic forum.”<sup>17</sup> The state AAUP conference objected to the policy. It was, however, approved by the board at its December 2017 meeting and went into effect.

#### **Michigan (introduced July 2017)**

A Goldwater-inspired campus free-speech bill that would apply to Michigan’s fifteen public universities and twenty-eight community colleges was introduced in the Michigan legislature in July 2017. According to one news account, “[i]nstitutions would be required to suspend for one year or expel students who have ‘twice been found responsible for infringing upon the expressive rights of others.’” The law would also

“eliminate ‘free speech zones’” that designate where students can engage in expressive activity on campus.<sup>18</sup> As of this writing, the bill has yet to be passed by either house of the legislature.

#### **Wisconsin (approved October 2017)**

In November 2016, student protesters interrupted *Breitbart* journalist Ben Shapiro as he gave a talk at the University of Wisconsin–Madison titled “Dismantling Safe Spaces: Facts Don’t Care about Your Feelings.” On June 21, 2017, the Wisconsin Assembly passed the Campus Free Speech Act, AB 299. This Goldwater-inspired bill seems to have stalled in the senate. However, in October 2017, the Board of Regents of the University of Wisconsin approved a free-speech policy that is similar to the bill, circumventing the need for legislative action. The policy states that “students found to have twice engaged in violence or other disorderly conduct that disrupts others’ free speech would be suspended. Students found to have disrupted others’ free expression three times would be expelled.” Sixteen of the eighteen regents were appointed by Governor Scott Walker, a Republican. The lone dissenting vote was cast by state public schools superintendent Tony Evers (a Democrat and a regent ex officio). Evers claimed that the regents had sacrificed free speech to win the approval of Republican legislators, declaring, “This policy will chill and suppress free speech on this campus and all campuses.”

#### **Nebraska (introduced January 2018)**

In January 2018, the Higher Education Free Speech Accountability Act (LB 718) was introduced to the Nebraska state legislature. According to the bill’s leading sponsor, Senator Steve Halloran, the legislation requires University of Nebraska, the Nebraska State College system, and state community colleges to “set free speech policies on their campuses and make annual reports to the Legislature.” The Goldwater Institute claims that the bill was inspired by its model legislation. Legislators also received assistance from FIRE in rewriting an earlier version of the bill. Faculty opponents note that Halloran and two other sponsors, Senators Tom Brewer and Steve Erdman, had criticized a University of Nebraska–Lincoln graduate student, Courtney Lawton, who lost her right to teach in the wake of an August 25 incident. Lawton had protested

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16. Julia O’Donoghue, “College ‘Free Speech’ Bill Vetoed by Louisiana Gov. John Bel Edwards,” *Times-Picayune*, June 27, 2017, [http://www.nola.com/politics/index.ssf/2017/06/louisiana\\_campus\\_speech\\_vetoed.html](http://www.nola.com/politics/index.ssf/2017/06/louisiana_campus_speech_vetoed.html).

17. Board of Governors, “Free Speech and Free Expression within the University of North Carolina,” 2017, <http://employeeforum.unc.edu/files/2017/10/20171025-Draft-Policy-on-Free-Speech-and-Free-Expression-at-UNC.pdf>.

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18. Candice Williams, “Campus Free Speech Bills: Restrict or Protect Rights?,” *Detroit News*, July 17, 2017, <https://www.detroitnews.com/story/news/politics/2017/07/17/campus-free-speech/103787730/>.

a recruiting event for Turning Point USA, a right-wing organization that publishes on its Professor Watchlist website the names of faculty members it accuses of “advanc[ing] leftist propaganda in the classroom” (both FIRE and the AAUP contested Lawton’s dismissal, and the AAUP subsequently conducted an investigation of the case).

#### **Texas (under consideration January 2018)**

In May 2017, SB 1151, a campus free-speech bill, was introduced in the Texas senate. It required universities to adopt policies ensuring students’ rights to “expressive activity.” It was approved by the senate but died in the house. A bill introduced in the house, HB 2527, which outlined recourse for students who believed their free-speech rights had been infringed, died in committee. In October 2017, Republican lieutenant governor Dan Patrick asked the senate to consider whether campus free speech was being violated. This suggestion came several weeks after administrators at Texas Southern University (a historically black institution) canceled a speech by Representative Briscoe Cain (a Republican who had introduced HB 2527 in the spring), claiming the event was “unapproved.” (In May, a speech by US senator John Cornyn had been similarly canceled on the same campus.) Cain specifically blamed the cancellation on the Black Lives Matter movement. Charged by Lieutenant Governor Patrick, the senate Committee on State Affairs met at Texas University in San Marcos on January 31, 2018, to hear testimony on the issue of campus free speech.

#### **Georgia (introduced February 2018)**

SB 339, a Goldwater-inspired bill introduced in February 2018, levels penalties against any student “who materially and substantially interferes with the free expression of others,” including a minimum suspension of one year for second-time offenders. Expulsion may also result.

#### **Minnesota (introduced February 2018)**

Minnesota Republicans introduced a free-speech bill, the Campus Free Expression Act, in February 2018. It is particularly restrictive toward what professors can say in the classroom. It states, for example, that

although faculty are free in the classroom to discuss subjects within areas of their competence, faculty shall be cautious in expressing personal views in the classroom and shall be careful not to introduce controversial matters that have no relationship

to the subject taught, especially matters in which they have no special competence or training and in which, therefore, faculty’s views cannot claim the authority accorded statements they make about subjects within areas of their competence, provided that no faculty will face adverse employment action for classroom speech, unless it is not reasonably germane to the subject matter of the class as broadly construed, and comprises a substantial portion of classroom instruction.

One source quoted an expert who observed, “If you’re teaching nuclear physics, that would mean you can’t talk about anything other than nuclear physics.”<sup>19</sup>

#### **Wyoming (introduced February 2018)**

In February 2018, HB 137, the Wyoming Higher Education Free Speech Protection Act, was introduced into the Wyoming house. It seems to be Goldwater-inspired. The legislation comes in the wake of a 2017 incident in which students at the University of Wyoming protested a visit to campus by the conservative radio talk-show host Dennis Prager, who had been invited by Turning Point USA. Prager delivered his talk (“Socialism Makes People Selfish”), but the local chapter of Turning Point USA had its campus funding suspended as a result of its failure to follow university protocols. Some University of Wyoming faculty noted that administrators did try to cancel a speech by Bill Ayers in 2010 (but were later told by a court that they could not do so).

#### **US Senate (introduced February 2018)**

On February 7, 2018, Utah senator Orrin Hatch, a Republican, introduced the Free Right to Expression in Education (FREE) Act, which would “amend the Higher Education Act of 1965 to ensure that public institutions of higher education protect expressive activities in the outdoor areas on campus.” He defended the bill in an editorial for the *National Review*, calling attention to universities that rarely invite conservative speakers and efforts to block such speakers when they are invited.<sup>20</sup>

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19. Jacob Steinberg, “Republican ‘Free Speech’ Bill Would Save Students from Professors’ ‘Crazy Ideas,’” *City Pages*, February 13, 2018, <http://www.citypages.com/news/republican-free-speech-bill-would-save-students-from-professors-crazy-ideas/473908273>.

20. Orrin Hatch, “Protecting Freedom of Speech Where It Matters Most, on the College Campus,” *National Review*, February 7, 2018, <https://www.nationalreview.com/2018/02/free-speech-college-campus-legislation-ensure-it/>.



The following table summarizes the status of campus free-speech legislation as of March 2018.

<b>Status of State-Level Campus Free-Speech Bills</b>		
<b>States That Have Approved Campus Free-Speech Bills</b>	<b>States That Have Approved Campus Free-Speech Measures without Legislation</b>	<b>States Where Campus Free-Speech Bills Have Been Introduced as of March 2018</b>
Arizona* California Colorado Missouri North Carolina* Tennessee Virginia Utah	Wisconsin*	Georgia* Illinois* Michigan* Minnesota Nebraska* Texas Wyoming*

*Note:* Asterisks indicate legislation inspired by the Goldwater Institute’s model bill.

## VI. Conclusions

The committee reached the following conclusions about problems posed by the campus free-speech movement.

### 1. Campus free-speech laws and academic freedom are “false friends.”

One of the greatest problems posed by the Goldwater model bill is that it bases bad policy on some sound principles—principles, moreover, that are important to the AAUP.

Like the Goldwater Institute, the AAUP has opposed the practice of disinviting campus speakers. *Academic Freedom and Outside Speakers*, a 2007 statement by the AAUP’s Committee A on Academic Freedom and Tenure, quotes the statement issued at the AAUP’s Fifty-third Annual Meeting in 1967, which affirmed the Association’s “belief that the freedom to hear is an essential condition of the university community and an inseparable part of academic freedom” and that “the right to examine issues and seek truth is prejudiced to the extent that the university is open to some but not to others whom members of the university also judge desirable to hear.” Noting that administrators have invoked security concerns as a justification for disinviting speakers, Committee A observed in its 2007 statement *Academic Freedom and Outside Speakers* that these reasons are “subject to abuse, and that their proper application should be limited to very narrow

circumstances that only rarely obtain.” Committee A views cancellations justified on the grounds of “lack of balance” or risk of losing an institution’s 501(c)(3) status with similar apprehension, stating, “The university is no place for a heckler’s veto.”

The AAUP has also opposed speech codes. Committee A’s 1992 statement *On Freedom of Expression and Campus Speech Codes* acknowledges the importance of diverse and inclusive campuses and “the need to foster an atmosphere respectful of and welcoming to all persons.” Even so, it concludes that “rules that ban or punish speech based upon its content cannot be justified.” “An institution of higher learning fails to fulfill its mission,” the statement continues, “if it asserts the power to proscribe ideas”—and slurs and hate speech do contain ideas, “however repugnant.”

Ultimately, however, the AAUP and the campus free-speech movement are false friends: superficial similarity masks a fundamental difference in aims. The challenge of resisting this legislation consists in finding ways to reaffirm the principles it would seem to share with the AAUP, while emphasizing how, in practice, the legislation would undermine these principles.

### 2. A political agenda is masquerading behind “free speech.”

Perhaps the key line in the Goldwater Institute’s *Campus Free Speech: A Legislative Proposal* is its declara-

tion that the ultimate goal is to “change the balance of forces contributing to the current baleful national climate for campus free speech.”

The essence of rights such as freedom of speech is their procedural character. Freedom of speech obtains when institutions and procedures exist that afford people a reasonable opportunity to exercise this right. The existence or nonexistence of free speech cannot be gauged by the specific content of the views that people choose to express. The aim of the campus free-speech movement is, to the contrary, not process but outcome: its intention, as the Goldwater report makes clear, is to bring about a new “balance of forces” on college campuses.

What makes the Goldwater Institute’s model bill difficult to refute is its apparent reliance on procedural mechanisms (such as defining acceptable forms of protest). But these measures are tailored specifically to respond to the kinds of incidents that have affected conservative speakers. The legislation rarely addresses other constraints on campus free speech, such as the recording of professors in classrooms or professor watch lists. That they fail to do so does not, by itself, mean their own proposals are invalid. But the highly specific measures advanced by Goldwater-inspired legislation suggest that its primary goal is not to enhance campus free speech but to protect conservative voices. It is ironic that, in insisting on outcome rather than process, so-called champions of campus free speech mirror the forms of political correctness they purport to denounce.

### **3. Model bills exhibit a preference for punishment.**

The Goldwater model bill and related legislation show a preference for punishment as a means for ending protests and disruptions that obstruct free speech. The policy adopted at the University of Wisconsin would expel students who are found to have interfered with free expression on three occasions. The Michigan proposal would suspend for one year or expel students who have twice infringed the right to expression of others. The North Carolina law also calls for strict disciplinary measures against student protesters deemed to have violated free-speech rights.

The danger of such policies is that they interfere with individual institutions’ disciplinary policies and allow the threat of disciplinary action to hover over events in which frank exchanges of opinion are likely to occur. This punitive approach risks having a chilling effect on campus free speech—or could have the opposite effect of heating up already tense situations.

### **4. Who gets to teach about “free speech” matters.**

The Goldwater-inspired bills make education about free-speech policies part of first-year student orientation and require administrators regularly to inform their campuses of these policies. The North Carolina law requires such instruction, as does the Illinois bill. Others have similar measures. Because the activities of the faculty (teaching and research) are central to ensuring that free speech thrives on campus, faculty should be involved in the development and delivery of any free-speech-related instruction.

### **5. Faculty members must dispel myths and challenge facile solutions.**

Faculty need to challenge the premise upon which campus free-speech legislation is based—namely, that “freedom of speech is dying on our college campuses.” Even if the current political environment poses significant problems for free speech, the view that the free exchange of ideas no longer occurs on campuses is grossly exaggerated. Many of the most difficult issues surrounding free speech at present are about balancing unobstructed dialogue with the need to make all constituencies on campus feel included. This can, at times, be a tricky undertaking. But punitive and simplistic measures advocated by proponents of many campus free-speech bills make finding an adequate solution more difficult, not less. ■