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## When Legislatures Become the Ally of Academic Freedom: The First State Intellectual Diversity Statute and Its Effect on Academic Freedom

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**WHEN LEGISLATURES BECOME THE ALLY OF ACADEMIC FREEDOM:  
THE FIRST STATE INTELLECTUAL DIVERSITY STATUTE AND ITS  
EFFECT ON ACADEMIC FREEDOM**

Patrick M. Garry\*

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## I. INTRODUCTION: THE INTELLECTUAL DIVERSITY ACT

In 2019, South Dakota became the first state to pass an intellectual diversity statute aimed at public universities in the state.<sup>1</sup> Titled “An Act to Promote Intellectual Diversity at Certain Institutions of Higher Education,” the bill had been brewing in the legislature since 2006, but finally became law after certain highly-publicized incidents involving suspected censorship and restrictions on free speech occurred at the University of South Dakota (USD).<sup>2</sup> Although the issue of intellectual imbalance had been simmering for more than a decade, several events occurred to reignite legislative interest in the subject.<sup>3</sup> In 2017, the Foundation for Individual Rights in Education found that the University of South Dakota was violating speech rights through the campus’ restrictive speech codes and USD’s “Guidelines for the Awareness and Prevention of Acts of Cultural Insensitivity and Bullying.”<sup>4</sup> These events, along with others, prompted the introduction of House Bill 1073, which included nine sections addressing free speech matters at state universities.<sup>5</sup> But the Bill was opposed by the Board of Regents, teachers unions, and the Democratic Party, and it failed to pass committee votes in both the house and senate.<sup>6</sup>

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1. H.B. 1087, 94th Sess. Legis. Assemb. (S.D. 2019).

2. The 2006 South Dakota legislative session witnessed the introduction of HB 1222, 81st Session, SD Legislative Assembly, 2006, which required state higher education institutions to make annual reports to the Legislature regarding intellectual diversity. H.B. 1222, 81st Sess. Legis. Assemb. (S.D. 2006).

3. For a comprehensive discussion of the legislative and political history of HB 1087, see Jon K. Lauck, “A Long and Winding Road”: *The South Dakota Intellectual Diversity Bill of 2019*, 98 NEB. L. REV. (forthcoming 2020) (manuscript at 7) (on file with author).

4. Faith Bottum, *South Dakota to Consider Free Speech Bill After College Under Fire for Restrictive Codes*, WASH. FREE BEACON (Jan. 29, 2018, 9:31 AM), <https://freebeacon.com/culture/south-dakota-consider-free-speech-bill-college-fire-restrictive-codes/> [https://perma.cc/2KQ2-6H8T]. The Foundation for Individual Rights in Education (FIRE), released a 2018 report on speech codes which found that, across the country, thirty-two percent of schools received a “red light” rating, meaning that the institution had at least one policy that both clearly and substantially restricts free speech. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2018: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES 4 (2018). More than fifty percent of all private universities had a “red light” rating. *Id.* at 7. And approximately two-thirds of all institutions received an overall “yellow light” rating, which meant that those institutions had maintained policies that could be interpreted to suppress speech or had policies that, while clearly restricting speech, nonetheless restricted relatively narrow categories of speech. *Id.* at 4.

5. Jonathan Ellis, *USD Incident Looms Large in Campus Free Speech Debate*, ARGUS LEADER, Feb. 2, 2018, at A1.

6. Dana Ferguson, *Lawmakers Table Campus Free Speech Bill; Its Twin Lives on in State Legislature*, ARGUS LEADER, Feb. 3, 2018, at A2.

Despite these defeats, legislators kept the issue alive and pressed the Board of Regents, which oversees the state's six public universities, to revise its free speech policies.<sup>7</sup> The state's largest newspaper added its voice to the controversy with an article on faculty ideological makeup, citing studies showing that higher education faculty often skewed overwhelmingly to the left in their political ideology.<sup>8</sup> A new version of a free speech and intellectual diversity bill was then introduced in January of 2019 as House Bill 1087.<sup>9</sup> The new Bill continued to be opposed by university presidents and the Board of Regents, but it was strongly supported by the Governor, who had stated earlier that "conservative [and] Christian voices" are often censored in higher education.<sup>10</sup> But just as the Bill stalled once again, a free speech incident occurred at the University of South Dakota School of Law that attracted national attention and spurred legislators to support a revised version of the Bill.<sup>11</sup>

In the wake of the USD Law School incident, the Bill passed the legislature and was signed by Governor Noem on March 20, 2019.<sup>12</sup> This final version of HB 1087 contained four substantive sections: Section Two requires a "commitment to the principles of free expression . . . in an environment that is intellectually and ideologically diverse;"<sup>13</sup> Section Three addresses the existence of "speech zones" that limited speech rights on South Dakota campuses and designates campuses as "public forums" where speech rights are more protected; Section Four prohibits ideological discrimination against

7. See Lauck, *supra* note 3 (manuscript at 7) (on file with author).

8. Jonathan Ellis, *Regents Policy Promotes Free Speech, Intellectual Diversity*, ARGUS LEADER, Dec. 13, 2018, at A1.

9. H.B. 1087, 94th Sess. Legis. Assemb. (S.D. 2019).

10. Press Release, Kristi Noem, Representative, S.D. Legislature, Noem: Free Speech is Not Optional on College Campuses, It's a Right (Jan. 16, 2018); see also Lauck, *supra* note 3 (manuscript at 13).

11. See Jonathan Ellis, *Hawaiian Party Theme Nixed by Officials at USD, Deemed 'Insensitive'*, ARGUS LEADER, Mar. 2, 2019, at A2; Jonathan Ellis, *USD 'Hawaiian Day' Dispute Revives Free Speech Bill*, ARGUS LEADER, Mar. 5, 2019, at A1. The revival of legislative interest in the bill coincided with news that President Trump intended to sign an executive order cutting off federal funding to universities that did not protect free speech. Michael D. Shear, *Trump Vows to Issue Order on Free Speech at Colleges*, N.Y. TIMES, Mar. 3, 2019, at A18.

12. Jonathan Ellis, *Noem and GOP Target University 'Political Correctness'*, ARGUS LEADER, Mar. 22, 2019, at A1; Christopher Vondracek, *First-of-Its-Kind 'Campus Intellectual Diversity' Law Passed to Bolster Conservative Thought*, WASH. TIMES (Mar. 21, 2019) <https://www.washingtontimes.com/news/2019/mar/21/south-dakota-enacts-law-to-bolster-conservative-in/> [https://perma.cc/S98K-EZJ6]. On March 21, the day after Governor Noem signed the South Dakota law, President Trump signed an executive order demanding free speech protections at universities that received federal funds. Susan Svrluga, *Trump Signs Executive Order About Free Speech on College Campuses*, WASH. POST, Mar. 22, 2019, at A4.

13. H.B. 1087 § 2.

student organizations; and Section Five requires the Board of Regents to submit annual reports to the Legislature on actions taken by the subject universities to “promote and ensure intellectual diversity and the free exchange of ideas.”<sup>14</sup>

This new intellectual diversity act (hereinafter “IDA”) was inspired by a legislative perception of the need to create ideological balance on campus, as well as a deepening acquaintance with free speech problems and ideological homogeneity on college campuses across the country.<sup>15</sup> Legislative impatience also played a role in passing the IDA, since the Board of Regents and university presidents were reluctant to act.<sup>16</sup> Under the IDA, the South Dakota legislature recommitted the state’s institutions of higher education to the creation of “learning environment that exposes students to and encourages exploration of a variety of ideological and political perspectives.”<sup>17</sup>

Once passed, the law became the nation’s first campus intellectual diversity law.<sup>18</sup> Existing diversity policies on campuses throughout the country focus on racial, ethnic, national origin, and sexual identity factors; but with the IDA, South Dakota has now introduced ideology as a diversity factor. As Governor Noem said about the new law, “[o]ur university campuses should be places where students . . . learn about competing ideas and perspectives.”<sup>19</sup>

The South Dakota law may be the first of its kind, but an array of related legislative proposals have been under consideration in several states.<sup>20</sup> Moreover, President Trump’s executive order on campus free speech policies may set off another round of legislative proposals.<sup>21</sup> According to Stanley

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14. H.B. 1087 §§ 3–5.

15. See Lauck, *supra* note 3 (manuscript at 8).

16. See *id.* (manuscript at 9).

17. H.B. 1087 § 1(2).

18. Vondracek, *supra* note 12; Frederick Hess, *South Dakota’s Efforts to Protect Speech on Campus Could Be a Model for the Nation*, NAT’L REV. (June 24, 2019), <https://www.nationalreview.com/2019/06/south-dakota-campus-free-speech-protections/> [https://perma.cc/3D4L-X5VD] (“South Dakota enacted a new law intended to counter the stifling orthodoxy that weighs so heavily on the nation’s colleges and universities”). According to Hess, “lots of evidence in recent years has suggested that there is a problem on South Dakota campuses,” and the IDA presents a great opportunity “to encourage principled academics to defend their own core values against the efforts of an ideological vanguard of administrators, faculty and students.” *Id.*

19. Vondracek, *supra* note 12.

20. Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 88, 139 (2018).

21. The majority of colleges and universities that receive federal research funds “maintain speech codes and other restrictive policies that are unconstitutionally overbroad, hopelessly vague, enable viewpoint discrimination, or otherwise threaten academic freedom and First

Kurtz, because of this executive order, universities “will now have to take loss of federal funding into account when creating speech codes, so-called free speech zones, or bias-reporting systems, or handling visiting speakers.”<sup>22</sup>

Some have argued that the IDA infringes on universities’ First Amendment right of academic freedom.<sup>23</sup> However, a law that requires state institutions to respect free speech and commit to intellectual diversity seems, on its very face, to be one that enhances academic freedom. Nonetheless, in addressing this claim, this Article will examine the nature, purpose, and development of the First Amendment right of academic freedom. But before examining academic freedom, the Article will briefly discuss the state of free speech and intellectual diversity in the nation’s institutions of higher education.

## II. FREE SPEECH AND INTELLECTUAL DIVERSITY IN AMERICAN HIGHER EDUCATION

### A. *The Undermining of Free Speech*

Lately, free speech conflicts have littered the higher education landscape. College campuses have become increasingly averse to speech expressing perspectives not in line with the prevailing ideology of those campuses. Primarily, that unwanted speech involves opinions counter to the leftist ideology within those academies.

Universities have tolerated and even encouraged the shaming of faculty and students who voice unacceptable views; administrators have carved out “safe spaces” where only acceptable opinions can be expressed; some universities, such as Yale, have adopted systems of surveillance and anonymous reporting aimed at punishing speech and behavior that departs

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Amendment principles.” See J. Grant Addison, Opinion, *Perspective: Winning the Campus Free Speech War*, GAZETTE (Apr. 21, 2019), <https://gazette.com/opinion/columnists/perspective-winning-the-campus-free-speech-war/article62fa7574-5d6b-11e9-ad55-37209d6fba6c.html> [https://perma.cc/58C4-PAVH].

22. Stanley Kurtz, *The Politics and Policy of Trump’s Campus Free-Speech Order*, NAT’L REV. (Mar. 22, 2019), <https://www.nationalreview.com/corner/the-politics-and-policy-of-trumps-campus-free-speech-order/> [https://perma.cc/S48W-YRHK] (“[I]t’s tough to overestimate how concerned conservatives have become in the past few years over political bias, shout-downs, intimidation, bogus accusations of bigotry, and pervasive self-censorship in the academy.”).

23. See, e.g., Jennifer Kabbany, *Nationwide Faculty Group Comes Out Against New Campus Free Speech Laws*, COLLEGE FIX (July 29, 2019), <https://www.thecollegefix.com/nationwide-faculty-group-comes-out-against-new-campus-free-speech-laws/> [https://perma.cc/Q7BS-WCJL].

from campus orthodoxies.<sup>24</sup> At some universities, these surveillance policies have “started to adopt the tactics of the real police—to fight speech, not to fight crime. For instance, on some campuses, ‘Bias Response Teams’ investigate professors’ online comments and editorial choices of student groups.”<sup>25</sup>

Conservative speakers have faced hostile threats and even physical violence at campuses at which they have spoken.<sup>26</sup> Charles Murray and Heather Mac Donald saw their invited lectures shut down by angry mobs.<sup>27</sup> Brett Weinstein was forced off campus by a leftist group he had previously criticized.<sup>28</sup> Laura Kipnis has faced numerous Title IX charges and complaints for her writings criticizing the “sexual paranoia” on college campuses.<sup>29</sup> Harvard University removed Ronald Sullivan as a faculty dean because

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24. José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL’Y REV. 345, 346 (2017).

25. *Id.* at 358.

26. Robby Soave, *Free Speech isn’t Dead on College Campuses but It Might Be Ailing*, REALCLEAR EDUC. (Apr. 10, 2019), [https://www.realcleareducation.com/articles/2019/04/10/free\\_speech\\_isnt\\_dead\\_on\\_college\\_campuses\\_but\\_it\\_might\\_be\\_ailing\\_110321.html](https://www.realcleareducation.com/articles/2019/04/10/free_speech_isnt_dead_on_college_campuses_but_it_might_be_ailing_110321.html) [<https://perma.cc/RMR4-G7BS>].

27. At Middlebury College, Charles Murray, the author of a book about the white working class, was physically attacked by a mob of protestors. Robby Soave, *A Professor Who Attended Charles Murray’s Middlebury Talk Is Now Wearing a Neck Brace. Protestors Attacked Her.*, REASON (Mar. 3, 2017, 5:31 PM), <http://reason.com/blog/2017/03/03/a-professor-who-attended-charles-murrays/> [<https://perma.cc/G2ET-8BHN>]. Although Murray was decried as a bigot, a sample of seventy scholars who later reviewed his comments found them to be “middle of the road.” Wendy M. Williams & Stephen J. Ceci, Opinion, *Charles Murray’s ‘Provocative’ Talk*, N.Y. TIMES, Apr. 16, 2017, at 9. For an account of another academic conservative whose lecture was cancelled by Middlebury College, see Ryszard Legutko, *The Demon in Middlebury*, FIRST THINGS (Aug. 2019), <https://www.firstthings.com/article/2019/08/the-demon-in-middlebury> [<https://perma.cc/DV5T-4G54>]. Professor Legutko, who wrote a book arguing that in many respects liberal democracy increasingly resembles communism, was called a homophobe, a racist, a misogynist, a sexist and a bigot by protestors of his scheduled lecture about his book, *THE DEMON IN DEMOCRACY*. *Id.* And as a result of the protests, his lectures were cancelled without even providing him advance notice of the cancellation. *Id.*

28. Brett Weinstein, Opinion, *The Campus Mob Came for Me—and You, Professor, Could Be Next*, WALL ST. J., Mar. 31, 2017, at A17; see Bari Weiss, Opinion, *When the Left Turns on Its Own*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/when-the-left-turns-on-its-own.html?SearchResultPosition=1> [<https://perma.cc/9BRQ-KDCV>].

29. See Jeannie Suk Gersen, *Laura Kipnis’s Endless Trial by Title IX*, THE NEW YORKER (Sept. 20, 2017), <https://www.newyorker.com/news/news-desk/laura-kipnis-endless-trial-by-title-ix> [<https://perma.cc/6FJQ-J3HJ>]. Professor Kipnis’ case, administrators “spent weeks investigating [her] for speech [critical of Title IX] that clearly should have been protected by academic freedom.” *Id.* Robby Soave, Opinion, *Social Justice Warriors Are Just Getting Started*, WASH. EXAMINER May 21, 2019, at 22. A student at another university attracted investigation by a campus Title IX coordinator after he objected to the school’s annual drag show. *Id.*

Sullivan, a lawyer and law professor, had agreed to join the criminal defense team of Harvey Weinstein.<sup>30</sup> Michael Knowles was physically attacked for giving a lecture titled “Men Are Not Women” at the University of Missouri-Kansas City.<sup>31</sup> Chancellor C. Mauli Agrawal praised the protestors and condemned Knowles as someone whose “professed opinions do not align with our commitment to diversity and inclusion and our goal of providing a welcoming environment to all people.”<sup>32</sup>

Bruce Gilley, a respected scholar at Portland State University, but a frequent critic of academe’s leftward leanings, faced a storm of criticism over his article outlining certain positive aspects of colonialism.<sup>33</sup> The journal in which the article was to be published was petitioned by thousands, demanding that the article be stricken.<sup>34</sup> Fifteen board members of the journal resigned in protest over the article, which was finally withdrawn after the journal’s editor received death threats.<sup>35</sup> Even Gilley’s own diversity office investigated him.<sup>36</sup>

Despite frequently hosting liberal speakers, the University of Minnesota placed significant restrictions on a guest lecture by conservative author Ben Shapiro.<sup>37</sup> University administrators refused to allow Shapiro to speak at the main campus in Minneapolis and limited student attendance to 500 persons.<sup>38</sup> Young America’s Foundation won a \$70,000 judgment over the University of

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30. David French, *Harvard Launches Attack on the Culture of Liberty*, NAT’L REV. (May 13, 2019, 5:13 PM), <https://www.nationalreview.com/2019/05/harvard-launches-an-attack-on-the-culture-of-liberty/> [https://perma.cc/GZB5-XL9Z].

31. Jessica Chasmar, *Daily Wire Columnist Assaulted Giving ‘Men Are Not Women’ Speech; College Student Charged*, WASH. TIMES (Apr. 12, 2019), <https://www.washingtontimes.com/news/2019/apr/12/michael-knowles-daily-wire-columnist-assaulted-umk/> [https://perma.cc/6XXF-NVU2].

32. Victor Garcia, *Conservative Speaker Who Was Assaulted by Protestor: ‘This Was a Warning Shot to Conservatives’*, FOX NEWS (Apr. 13, 2019), <https://www.foxnews.com/politics/conservative-speaker-who-was-assaulted-by-protester-this-was-a-warning-shot-to-conservatives> [https://perma.cc/P7VK-TQKK].

33. See Vimal Patel, *Last Fall This Scholar Defended Colonialism. Now He’s Defending Himself*, CHRON. OF HIGHER EDUC. (Mar. 21, 2018), <https://www.chronicle.com/article/Last-Fall-This-Scholar/242880> [https://perma.cc/7NFA-RJ5S].

34. *Id.*

35. *Id.*

36. *Id.*

37. See Spencer Brown, *Young America’s Foundation Sues University of Minnesota for Suppressing Student Speech*, YOUNG AM.’S FOUND. (July 3, 2018), <https://www.yaf.org/news/young-americas-foundation-sues-university-of-minnesota-for-suppressing-student-speech/> [https://perma.cc/YYL6-BFTZ].

38. *Id.*



California-Berkeley for discriminatory treatment of conservative speakers on campus.<sup>39</sup>

Professor Samuel Abrams of Sarah Lawrence College incurred a barrage of university and professional attacks after publishing an op-ed piece discussing the ideological imbalance of higher education and the need for viewpoint diversity.<sup>40</sup> John McAdams, a Marquette University political science professor, was fired because of his views on gay marriage.<sup>41</sup>

Disrupting and disinviting conservative speakers has become a recurring phenomenon on college campuses. In 2014, the Foundation for Individual Rights in Education documented this trend, with disruptions often preventing the speaker from even speaking.<sup>42</sup>

In *Adams v. Trustees of the U. of N.C.-Wilmington*, a conservative Christian professor and blogger who was denied a promotion, despite having previously won teaching awards and receiving positive reviews of his scholarship, sued his employer university, alleging that its denial of promotion was in retaliation for his conservative speech.<sup>43</sup> Although unsuccessful at the district court, Adams prevailed on appeal to the Fourth Circuit, which found that his speech rights had been violated.<sup>44</sup>

These are but a small fraction of campus incidents demonstrating the intolerance for and recriminations against opposing viewpoints. In one survey, two-thirds of conservative professors admitted to refraining from sharing their

39. Hank Berrien, *YAF Wins Major Victory for Free Speech Against UC Berkeley*, DAILY WIRE (Dec. 3, 2018), <https://www.dailywire.com/news/38988/yaf-wins-major-victory-free-speech-against-uc-hank-berrien> [https://perma.cc/PDF9-GEK8].

40. Samuel J. Abrams, *The Looming Danger for Dissident Professors*, MINDING THE CAMPUS (Apr. 3, 2019) [hereinafter Abrams, *The Looming Danger*], <https://www.mindingthecampus.org/2019/04/03/the-looming-danger-for-dissident-professors/> [https://perma.cc/6M3V-UHPV]. Professor Abrams describes how the questioning of prevailing orthodoxies on campus can be professionally dangerous and marginalizing. *Id.* See also Samuel J. Abrams, *The Bullying and Silencing of Students*, MINDING THE CAMPUS (Mar. 28, 2019), <https://www.mindingthecampus.org/2019/03/28/the-bullying-and-silencing-of-students/?mk> [https://perma.cc/8UG9-LCBD]. In this essay, Professor Abrams also discusses how, in reaction to a *New York Times* editorial essay in which he argued that more ideological balance was needed in higher education, Abrams was defamed, his family's safety threatened, and his personal property destroyed.

41. J. Grant Addison, *Opinion, Tough Choice Faces the Heterodox Academy*, WASH. EXAMINER, July 16, 2019, at 26.

42. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *DISINVITATION REPORT 2014: A DISTURBING 15-YEAR TREND* (2014), <https://www.thefire.org/disinvitation-season-report-2014/> [https://perma.cc/G2QH-KQQR].

43. 640 F.3d 550, 552–53 (4th Cir. 2011). The professor had written a book titled *Welcome to the Ivory Tower of Babel: Confessions of a Conservative College Professor*. *Id.* at 553. He had also been previously granted tenure but was now denied promotion to full professor. *Id.* at 555.

44. *Id.* at 566.

opinions due to a fear of negative repercussions.<sup>45</sup> In a survey of college undergraduates in the United States, half of all students reported feeling intimidated by professors when expressing differing opinions in class.<sup>46</sup> A survey of Yale University undergraduates revealed that seventy percent have experienced political bias in the classroom, and that eighty-eight percent believe their professors on the whole are liberal, while just one percent label their professors as conservative.<sup>47</sup>

Such intolerance toward opposing viewpoints mark, to some critics, a reversion to the campus environment of more than a century ago.<sup>48</sup> Before the development of free speech protections and academic freedom principles, “American higher education was an entirely close-minded arena for indoctrination into accepted opinion, rather than a place where all ideas could be put to the test and where it was acceptable, even desirable to challenge prevailing wisdom.”<sup>49</sup> Although it “took a long time for the idea of academic freedom to gain a foothold,” the spirit of academic freedom now seems to be coming under an intense assault.<sup>50</sup>

There are generally two sources from which threats to free speech within the academe emanate.<sup>51</sup> One source comes from outside the academy, from regulatory laws and legislative investigations.<sup>52</sup> This source was the cause of

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45. Abrams, *The Looming Danger*, *supra* note 40.

46. This survey was conducted by the Buckley Program at Yale University. *The William F. Buckley, Jr. Program at Yale: Almost Half (49%) of U.S. College Students “Intimidated” by Professors When Sharing Differing Beliefs: Survey*, MCLAUGHLIN & ASSOCS. (Oct. 26, 2015), <http://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey/> [<https://perma.cc/87GC-ZHN8>]. A FIRE survey of students found that fifty-four percent said they “have stopped themselves from sharing an opinion in class.” Addison, *supra* note 41 (demonstrating further evidence that the “monoculture and censorious speech codes in place at hundreds of colleges and universities are chilling open discussion”).

47. Jennifer Harper, *Inside the Beltway: Yale Students Report That Just 1% of Their Professors Are Conservative*, WASH. TIMES (May 4, 2017), <https://www.washingtontimes.com/news/2017/may/4/inside-the-beltway-yale-students-say-1-of-professo/> [<https://perma.cc/9RDW-WF9E>]; see also *Survey: 70% of Yale Students Often Experience Political Bias in the Classroom*, WILLIAM F. BUCKLEY, JR. PROGRAM AT YALE (May 3, 2017), <https://www.buckleyprogram.com/post/survey-70-of-yale-students-often-experience-political-bias-in-the-classroom> [<https://perma.cc/UDJ6-SK8S>].

48. See Howard Gillman & Erwin Chemerinsky, *Opinion, Professors Are Losing Their Freedom of Expression*, WASH. POST (Nov. 15, 2017), [https://www.washingtonpost.com/opinions/professors-are-losing-their-freedom-of-expression/2017/11/14/c4c7805a-c594-11e7-afe9-4f60b5a6c4a0\\_story.html](https://www.washingtonpost.com/opinions/professors-are-losing-their-freedom-of-expression/2017/11/14/c4c7805a-c594-11e7-afe9-4f60b5a6c4a0_story.html) [<https://perma.cc/EN9V-QL6N>].

49. *Id.*

50. *Id.*

51. Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 683 (2014).

52. *Id.*

the constitutional development of a right of academic freedom, as will be discussed in section III.B below. The second source of attacks on free speech comes from inside the academy, from administrators conducting workplace investigations and disciplinary proceedings concerning unpopular speech.<sup>53</sup> Traditionally, the primary focus of faculty members was on the former source.<sup>54</sup> However, as can be seen from the discussion above, the threat to academic freedom seems to arise increasingly from within the university setting.

### *B. Abandoning the Marketplace of Ideas*

For more than a century, Justice Holmes' marketplace of ideas metaphor has broadly defined the scope and nature of the First Amendment speech protections.<sup>55</sup> Such a metaphor envisions a free and robust expression of all opinions, competing for acceptance in a social marketplace of ideas.<sup>56</sup> In this marketplace, the strength of opinions being expressed mirror the degree to which those opinions are held in the broader public. But higher education today does not reflect such a marketplace. Instead, academe appears highly skewed toward one ideological viewpoint.<sup>57</sup>

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53. See Bauries, *supra* note 51 at 683. As an example of the university community's intolerance of conservative speech, a prominent University of Pennsylvania law professor, Amy Wax, was targeted with slurs and demands of firing after suggesting that "the U.S. should reduce immigration from non-Western countries," because such immigrants face a more difficult task of assimilating into American society. Mark Bauerlein, *Where Amy Wax and Her Critics Agree*, WALL ST. J., July 29, 2019, p. A17 (reporting that Professor Wax argued that there was too much cultural incompatibility" between the U.S. and the developing world). Even though many developing countries do not share the Western enlightenment ideas of individual rights, free markets, fair elections and the rule of law, and hence, immigrants from those countries, have no experience in values and practices that define American society, Professor Wax's remarks were branded "an outright argument for white supremacy," with Professor Wax's own dean calling them "repugnant." *Id.* A petition demanding Professor Wax's firing attracted more than 30,000 signatures. *Id.*

54. See J. Peter Byrne, *The Social Value of Academic Freedom Defended*, 91 IND. L.J. 5, 6 (2016) ("The threat to academic work comes from interference by non-academics, whether trustees or government officials."); see Robert Post, *Why Bother with Academic Freedom?*, 9 FLA. INT'L U. L. REV. 9, 12 (2013) ("Scholars rarely need to defend this autonomy [of the scholarly enterprise] from each other. They routinely need to defend it from the predations of those who are not scholars.").

55. For a discussion on Justice Holmes' marketplace metaphor, see Patrick Garry, *Oliver Wendell Holmes and the Democratic Foundations of the First Amendment*, in GREAT JUSTICES OF THE U.S. SUPREME COURT 125, 126 (William D. Pederson & Norman W. Provizer eds., 1993).

56. *Id.*

57. For excellent works on the ideological one-sidedness of American higher education, see generally GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND*:

According to a study published in *Inside Higher Ed*, only 9.2% of full-time faculty members identify as conservative.<sup>58</sup> Another study published in *Econ Journal Watch* in September of 2016 found that Democrats outnumber Republicans by 11.5 to 1 on higher education faculties.<sup>59</sup> But in some departments where politics may be more relevant, such as history, Democrats outnumber Republicans by a ratio of 33.5 to 1.<sup>60</sup> When broken down by age, the data show that the imbalance will grow over time. While there is a 10 to 1 ratio of Democrats to Republicans for professors over the age of sixty-five, the ratio increases to 22.7 to 1 for professors under the age of thirty-six.<sup>61</sup> Moreover, the disparity increases the more prestigious the university. While Penn State has a faculty ratio of 6.0 to 1, Columbia and Princeton have ratios of 29.8 to 1 and 29.7 to 1, respectively.<sup>62</sup> And the faculties of Wellesley, Williams, and Swarthmore have ratios at or above 120 to 1.<sup>63</sup> Although ratios differed by age and department, the study found no field in which Republicans outnumbered Democrats, and not one of the colleges had more Republicans than Democrats.<sup>64</sup> More than a third of the fifty-one colleges surveyed (fifty-one of the sixty-six liberal-arts colleges ranked highest by U.S. News in 2017) had no Republicans at all.<sup>65</sup> A later study found that forty percent of colleges had no Republicans on faculty.<sup>66</sup>

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HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018) (explaining how a culture of safety and the idea that speech is violence is not preparing students for the real world); HEATHER MAC DONALD, *THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE* (2018) (arguing that empathy and curiosity are being replaced with self-engrossed complaining); KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* (2018) (arguing that free speech is necessary for the mission of a modern university); FRANK FUREDI, *WHAT'S HAPPENED TO THE UNIVERSITY?* (2017) (detailing how universities became a climate for moral regulation and conformism).

58. Scott Jaschik, *Professors and Politics: What the Research Says*, *INSIDE HIGHER ED* (Feb. 27, 2017), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> [https://perma.cc/EVB6-KDPD].

59. Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law and Psychology*, 13 *ECON. J. WATCH* 422, 425 fig.2 (2016). For another study showing how college faculties are overwhelmingly one-sided ideologically, especially in the value-laden fields of the humanities and social sciences, see AM. COUNCIL OF TR. & ALUMNI, *INTELLECTUAL DIVERSITY: TIME FOR ACTION* (2005).

60. Langbert et al., *supra* note 59.

61. *Id.* at 439 fig.5.

62. *Id.* at 436 tbl.3.

63. Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty*, 31 *ACAD. QUESTIONS* 186, 192–93 tbl.2 (2018).

64. Langbert et al., *supra* note 59, at 436–37 tbl.3.

65. Langbert, *supra* note 59, at 186–88.

66. *Id.* at 186.

In connection with this imbalanced faculty, higher education has witnessed an escalating partisan focus that sees opposing viewpoints as wrongs to be rejected.<sup>67</sup> As academe has become increasingly dominated by a single viewpoint, “institutions of higher learning have been busy since the later 1980s circumscribing and restricting the freedom of speech and due process rights in the name of promoting a variety of causes.”<sup>68</sup> In recent years, speech restrictions have escalated within higher education. Speech codes restrict speech deemed harmful to selected groups of people; universities police and punish speech categorized as “micro-aggressions” and classroom “trigger warnings;” institutions set up “safe spaces” from speech causing offense; outside speakers are either disinvited or disrupted to the point of canceling their speeches.<sup>69</sup> As Donald Downs states:

Given their moral charters to promote open discourse and the pursuit of truth, universities should be the last institutions in American society to surrender to a homogeneity of opinion. Yet that is what has happened too often in the drive for diversity, which is one of the motivating forces behind the speech and harassment policies

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67. As Lawrence Alexander describes the situation, there is a “striking political imbalance in the academy.” *Fish on Academic Freedom: A Merited Assault on Nonsense, but Perhaps a Bridge Too Far*, 9 FLA. INT’L U. L. REV. 1, 4 (2013).

68. DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS 10–11 (2005) (arguing that in the name of promoting civility and diversity of race, gender, sex, and culture, too many institutions of higher learning have fostered a rigid orthodoxy of belief). More than a decade earlier, Jonathan Rauch had noted the emerging right in higher education for certain groups of people not to be offended and, hence, to censor unwanted speech. See JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 24 (1993). For a discussion of the rise of political correctness and its restrictive effects on speech in academe, see generally PATRICK M. GARRY, AN AMERICAN PARADOX: CENSORSHIP IN A NATION OF FREE SPEECH (1993).

69. See generally SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (2017) (arguing that students should be protected from dignitary harm, but not from intellectual challenge); ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017) (discussing the tension between protecting the learning experience for all students and safeguarding the freedom of expression); Conor Friedersdorf, *The Rise of Victimhood Culture*, ATLANTIC (Sept. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-rise-of-victimhood-culture/404794/> [<https://perma.cc/9JDC-3VTZ>] (detailing an alleged microaggression that occurred on a college campus); Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC, Sept. 2015, at 42, 42–43 (arguing that protection from disliked ideas and words negatively impacts education and mental health); Jonathan Haidt & Greg Lukianoff, *Why It’s a Bad Idea to Tell Students Words Are Violence*, ATLANTIC (July 18, 2017), <https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/> [<https://perma.cc/G5UX-5JC9>] (arguing that the idea of speech as violence will increase anxiety and justify physical harm).

that have come to play such prominent roles in higher education in America.<sup>70</sup>

According to Allan Bloom, in an observation especially poignant today, “[f]reedom of mind requires not only . . . the absence of legal constraints but the presence of alternative thoughts. The most successful tyranny is not the one that uses force to assure uniformity, but the one that removes the awareness of other possibilities.”<sup>71</sup>

Perhaps a necessary result of the ideological imbalance in faculty make-up and the downgrading of free speech concerns has been the politicization of higher education faculty departments, especially in the humanities and social sciences. Faculty members have been investigated, ostracized, penalized, and defamed for expressing viewpoints that challenge the prevailing political orthodoxies of academe.<sup>72</sup> Such politicization has even intruded into the methodology of the classroom. At Villanova University, for instance, students in their teaching evaluations must address such politicized questions as whether the teacher has demonstrated cultural awareness in her classroom teaching, or whether the teacher has built “an ‘environment free of bias based on individual differences or social identities.’”<sup>73</sup> This requirement poses problems for history or literature professors who intend on teaching the political thought of John C. Calhoun or the novels of Mark Twain.

Not surprisingly, the growing politicization and viewpoint intolerance of the academe has resulted in a decline of public trust and confidence in higher education.<sup>74</sup> A 2010 survey showed that sixty percent of Americans believe that colleges care less about students today.<sup>75</sup> Moreover, this decline in public trust may well have corrosive effects on the future strength and acceptance of notions of academic freedom.

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70. DOWNS, *supra* note 68, at 20.

71. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* 249 (1987).

72. Examples abound, but for a detailed account of one such occurrence, see Charlotte Allen, *In the Academic Sandbox*, FIRST THINGS (June 2019), <https://www.firstthings.com/article/2019/06/in-the-academic-sandbox> [<https://perma.cc/7E3R-26HN>].

73. Colleen A. Sheehan & James Matthew Wilson, *A Mole Hunt for Diversity ‘Bias’ at Villanova*, WALL ST. J., Mar. 20, 2019, at A15.

74. See Amy Gajda, *Academic Duty and Academic Freedom*, 91 IND. L.J. 17, 21–22 (2016). The rising costs of college, as well as the recent college-bribery scandal, further erode public trust in higher education.

75. JOHN IMMERWAHR ET AL., NAT’L CTR. FOR PUB. POL’Y & HIGHER EDUC. & PUB. AGENDA, *SQUEEZE PLAY 2010: CONTINUED PUBLIC ANXIETY ON COST, HARSHER JUDGMENTS ON HOW COLLEGES ARE RUN* 2 (2010).

## III. INTELLECTUAL DIVERSITY AND ACADEMIC FREEDOM

A. *Constitutional Issues*

A statute, like the South Dakota law, that attempts to regulate the speech or ideological agendas of public universities could implicate several First Amendment rights. One issue might involve an infringement of student speech rights.<sup>76</sup> Without delving into a detailed discussion of the nature of student speech rights at public universities, the South Dakota law does not appear on its face to have any restrictive effect on such speech. To the contrary, the law seems to provide additional protections for student speech and expressive activities.<sup>77</sup>

Another possible First Amendment issue could involve a public forum analysis. Since public universities are state entities, portions of the campus might qualify as a public forum. Speech restrictions in a public forum receive strict scrutiny from the courts.<sup>78</sup> On the other hand, speech regulation in non-public forums receive more lenient treatment from the courts. Although viewpoint-discriminatory laws still receive strict scrutiny in non-public forums, both subject-matter regulations and content-neutral regulations can survive if they simply pass a reasonableness test.<sup>79</sup> Because of the relative ease with which government can control speech in non-public forums, governmental entities like public universities often try to designate as much of their campus as possible as non-public forums. But the South Dakota law does just the opposite: it mandates that the referenced campus space be treated as public forums, where the maximum speech protections are given.<sup>80</sup> Thus,

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76. Students in higher education certainly have speech rights, as generally defined by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988), and its progeny. Most of the circuit courts of appeals have found that, at least under certain circumstances, *Hazelwood* applies to the regulation of school-sponsored student speech at state universities. See *Jane Doe I v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211 (11th Cir. 2016); *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011); *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 950 (9th Cir. 2002). However, other courts have also declined to apply *Hazelwood* to students at universities. See, e.g., *Kincaid v. Gibson*, 236 F.3d 341, 341 (6th Cir. 2001).

77. For a further discussion of student speech rights, see Philip Lee, *Student Protests and Academic Freedom in an Age of #blacklivesmatter*, 79 OHIO ST. L.J. 223 (2018).

78. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44–45 (1983). While content regulations receive strict scrutiny, content-neutral regulations receive intermediate scrutiny. See *id.* at 45.

79. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998). Reasonableness is a much more lenient standard of review.

80. Use of outdoor areas as public forum—Reasonable restrictions—Expressive activity in other areas not limited, S.D. CODIFIED LAWS § 13-53-51 (2019).

there is little chance that a court would find any constitutional infirmity with the IDA on a public forum basis.

A third free speech area on which a statute like South Dakota's IDA might be challenged involves the matter of faculty speech. As public employees, faculty members at state universities have their speech governed by *Garcetti v. Ceballos*, which outlines the speech rights of public employees and the circumstances under which those employees may be disciplined for their speech.<sup>81</sup> Since *Garcetti* applies to the speech of public employees, and faculty members at state universities are public employees, it arguably governs the constitutional speech rights of those faculty members concerning their on-job speech.<sup>82</sup> Consequently, *Garcetti* is often equated with academic freedom. However, as will be discussed in section III.B below, the right of academic freedom, as recognized by the Court, involves considerations other than individual faculty speech.

To the extent that commentators equate faculty speech freedoms with academic freedom, dicta in *Garcetti* "suggests that First Amendment protections of academic freedom either may not exist or may be less robust than previously thought."<sup>83</sup> Although a prosecuting attorney was the employee in *Garcetti*, the Court acknowledged that its ruling could have implications for the speech freedoms of higher education faculty: "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."<sup>84</sup>

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81. 547 U.S. 410, 421 (2006) (stating that as long as "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," regardless of whether those statements touch on matters of public concern). The Court, however, declined to state whether its holding would apply to "speech related to scholarship or teaching." *Id.* at 425. Moreover, a faculty member's off-campus speech unrelated to his functions as an employed faculty member still remains fully protected by the First Amendment. *Id.* at 417. The question is whether a professor has a right of speech or academic freedom over and above the general right to free speech enjoyed by all citizens. As revealed in the dismissal of Ward Churchill, who gained notoriety by comparing the victims of the 9/11 attack on the World Trade Center to Nazi war criminal Adolph Eichman, a faculty member's speech outside their scholarship and teaching realm is probably more protected by the general right of free speech than is speech concerning the faculty member's scholarly work, which can be held to standards of honesty and scholarship, as judged by the faculty member's professional peers. See *Churchill v. Univ. of Colo.*, 2012 CO 54, ¶¶ 3–5.

82. Mark P. Strasser, *The Onslaught on Academic Freedom*, 81 UMKC L. REV. 657, 657 (2013) ("*Garcetti v. Ceballos* cast into doubt the degree to which the Constitution protects academic freedom.").

83. *Id.* at 658 ("The degree to which academic freedom is protected by the First Amendment has been a matter of some dispute for over half a century.").

84. 547 U.S. at 425.



But then, while acknowledging these implications, the Court sidestepped the issue: “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.”<sup>85</sup>

For their off-the-job speech not related to their official duties, faculty members are protected by the First Amendment just as any citizen would be protected. But *Garcetti* limits the constitutional protection given to public employees for speech related to their official duties. The reasons *Garcetti* raises questions about the rights of faculty members are two-fold: first, are faculty members to be treated as public employees under the speech rules of *Garcetti*; and second, is the speech of faculty members concerning all aspects of their teaching, scholarship, and other service activities the kind of official speech related to their employment that does not receive protection under *Garcetti*? According to one commentator, as a result of *Garcetti* and its legacy, “the academic speech of public university professors is among the least protected forms of speech.”<sup>86</sup>

Nonetheless, despite all the uncertainty surrounding *Garcetti*’s implications for academic freedom, it seems clear that it does not pose a problem for the South Dakota IDA. *Garcetti* comes into play primarily in cases involving disciplinary actions between a faculty member and her employing university.<sup>87</sup> However, nothing in the IDA authorizes or even suggests any disciplinary action against individual faculty members. The IDA does not censor or penalize faculty speech, but rather attempts to protect unpopular or minority viewpoint speech within higher education. Thus, even though the post-*Garcetti* framework outlining when a faculty member can be punished for speech is complicated, involving several hard-to-determine and yet-to-be-decided factors, the provisions of the IDA seem to render unnecessary any consideration of *Garcetti*, since on the face of the law there is no restriction or penalties placed on faculty speech.<sup>88</sup> Although the IDA

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85. *Id.* Following *Garcetti*, there has been “much disagreement . . . about the extent to which the First Amendment protects academic freedom. Courts disagree about the extent to which professors are protected in the classroom, in their research, in matters related to other duties, and even about whether academic freedom applies to individuals at all.” Strasser *supra* note 82, at 670.

86. Bauries, *supra* note 51, at 715.

87. For a survey of cases showing that most academic freedom cases involve dismissals of individual faculty members, see Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1, 4, 14 (2016) (“Speech rights for professors [have] merged with the Court’s growing regulation of speech for public employees.”).

88. See Mark Strasser, *Pickering, Garcetti & Academic Freedom*, 83 BROOK. L. REV. 579, 595 (2018) (“Analyses of when teachers can be punished for their speech are quite complicated.”). The *Garcetti* factors include: whether the teacher’s speech was made as a citizen or employee, with First Amendment protections triggered in the former case. *Id.* But protections

appears not to invade any area of protected individual speech, a remaining question is whether it intrudes on the First Amendment right of academic freedom, as that freedom has been recognized by the Court.

### *B. Academic Freedom and the First Amendment*

The issue is whether the South Dakota law, by making demands on state universities to protect diversity of speech, infringes on the academic freedom of those institutions. The argument could be made that the legislature is trying to dictate how state universities conduct their academic missions. To address this claim, the nature and purpose of the right of academic freedom must be examined.

The protection of academic freedom began in the U.S. in 1915, when the American Association of University Professors published its Declaration of Principles of Academic Freedom.<sup>89</sup> The Declaration stressed such principles as “unfettered discussion” and “freedom of speech” and freedom from the “prescribed inculcation of a particular opinion upon a controverted question.”<sup>90</sup> The authors of the 1915 Declaration strove to foster such scholarly traits as disinterestedness and impartiality, arguing that the university “should be an ‘intellectual experiment station’ and an ‘inviolable refuge’ against the equally dangerous tyrannies of public opinion and political autocracy.”<sup>91</sup> The authors never wavered in their belief in “the desirability of teachers having ‘minds untrammelled by [partisan] loyalties, unexcited by [partisan] enthusiasms, and unbiased by personal political ambitions.’”<sup>92</sup> The goal of the 1915 Declaration “was to ensure that politics and other influences deemed extrinsic to intellectual work would not be the sole, the primary, or even the major determinants of scholarly expressions.”<sup>93</sup> In addressing situations in which instructors present “controversial matter” in the classroom,

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may be triggered if the speech was made in the context of teaching. *Id.* at 596. Moreover, even if First Amendment protections are triggered, the degree of protection might be affected if the speech causes workplace disruption. *Id.*

89. Edwin R. A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 BULL. AM. ASS'N U. PROFESSORS 15, 20 (1915); see also Gajda, *supra* note 74, at 17 (relating the original language of the declaration to today's threat on academic freedom).

90. Seligman et al., *supra* note 89, at 22; see also Gajda, *supra* note 74, at 18 (“Academic freedom has come to mean . . . the freedom to research and write without significant restrictions from administrators or outside influences.”).

91. Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of “Power/Knowledge,”* in THE FUTURE OF ACADEMIC FREEDOM 43, 57 (Louis Menand ed., 1996).

92. *Id.* at 58.

93. *Id.* at 80.

the 1915 Declaration required those professors to present all “the divergent opinions of other investigators” and keeping in mind that the professor’s job “is not to provide students with ready-made conclusions.”<sup>94</sup>

In 1940, the AAUP released a Statement of Principles of Academic Freedom and Tenure, which was an extension of the 1915 Declaration and which dedicated institutions of higher education to “the free search for truth and its free exposition.”<sup>95</sup> As a legal concept, academic freedom encompasses the “marketplace of ideas” metaphor that serves as a foundation of First Amendment law and that Justice Holmes articulated as the necessary means for pursuing social truth.<sup>96</sup>

The U.S. Supreme Court recognized academic freedom as one of the rights protected by the First Amendment in *Sweezy v. New Hampshire*.<sup>97</sup> According to the Court, “[t]eachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>98</sup> The Court also stated that “[m]ere unorthodoxy or dissent from the prevailing mores is not to be condemned . . . [because] the absence of such voices would be a symptom of grave illness in our society.”<sup>99</sup>

Ten years later, the Court further entrenched academic freedom within the coverage of the First Amendment. In *Keyishian v. Board of Regents*, the Court overturned the firing of faculty members who refused to sign a pledge that they had never been Communists.<sup>100</sup> Stating that academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom,” the Court described the university, in First Amendment terms, as a “marketplace of ideas.”<sup>101</sup> As the Court pronounced, the “Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”<sup>102</sup>

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94. AM. ASS’N OF UNIV. PROFESSORS, *supra* note 92, at 298.

95. AM. ASS’N OF UNIV. PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 14 (1970).

96. See Jill Gordon, *John Stuart Mill and the “Marketplace of Ideas,”* 23 SOC. THEORY & PRAC. 235, 235 (1997).

97. 354 U.S. 234, 249–50 (1957) (overturning a contempt citation of a university professor who had refused to answer questions about his political beliefs pursuant to an investigation into groups like the Communist Party).

98. *Id.* at 250.

99. *Id.* at 251.

100. 385 U.S. 589, 591–92, 609–10 (1967).

101. *Id.* at 603.

102. *Id.* (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

The 1975 *Woodward Report on Freedom of Expression at Yale* states that “[t]he primary function of a university is to discover and disseminate knowledge,” and that the overriding obligation of the university community is to protect free expression.<sup>103</sup> And nearly two decades after *Keyishian*, Justice Stevens wrote in *Regents of the University of Michigan v. Ewing* that academic freedom thrives “on the independent and uninhibited exchange of ideas among teachers and students.”<sup>104</sup>

The judicial recognition and protection of academic freedom took root during the Cold War period, and even more specifically during the McCarthy era. As Philip Lee notes, “[s]tarting in the 1950s, courts started to grapple with defining academic freedom—using the concept to protect universities from the excesses of government authority during the McCarthy period.”<sup>105</sup> According to Lee, “[t]he constitutional foundation for academic freedom arose from a number of cases that originated as challenges to unfettered government intrusion in relation to public universities during the McCarthy era.”<sup>106</sup> In its early stage, academic freedom as recognized by the courts marked a judicial attempt to protect the marketplace of ideas within the university from outside political forces. This judicial endeavor occurred largely because, during the McCarthy period, “inquiry into unpopular subjects and theories was severely chilled and academic freedom suffered.”<sup>107</sup>

Although the *Keyishian* Court recognized academic freedom as a special concern of the First Amendment, the parameters of that freedom are still debated and far from certain. As First Amendment scholar Rodney Smolla observes:

‘Academic freedom’ may or may not be a freestanding constitutional right. To the extent that it has independent force as a constitutional value, it appears to render that force in several directions, some of which may be in tension. Formal legal doctrine

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103. See STEVEN A. BENNER ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1974), reprinted in CAMPUS SPEECH IN CRISIS: WHAT THE YALE EXPERIENCE CAN TEACH AMERICA 30, 35 (Zelinsky et al. eds., 2016).

104. 474 U.S. 214, 226 n.12 (1985) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

105. Philip Lee, *A Contract Theory of Academic Freedom*, 59 ST. LOUIS U. L.J. 461, 463 (2015). “The McCarthy era was a time of anti-Communist hysteria that used congressional hearings and other mechanisms to purge people thought to have Communist affiliation from American life,” and professors and universities often became the target of these probes. *Id.*

106. *Id.*

107. See also Haskell, *supra* note 91, at 47 (discussing how the loyalty controversies of the McCarthy period served as a capstone for academic freedom); Bauries, *supra* note 51, at 684 (noting that encroachments on academic freedom that began during the McCarthy era eventually “found their way to the Supreme Court”).

appears to place the center of gravity with institutions, meaning that universities as entities, rather than professors or students, are the more compelling claimants to academic freedom as a constitutional right. But that picture is also not entirely clean.<sup>108</sup>

As Professor Smolla notes, and as other scholars have observed, the “unsettled state of academic freedom, particularly as it ties to the First Amendment, is widely recognized.<sup>109</sup> One of these unsettled aspects relates to the question of whether academic freedom belongs to the individual faculty member or the institution of higher education.<sup>110</sup> The Seventh Circuit asserts that the freedom may belong to either individual or institution, while the First Circuit has located the freedom within institutions.<sup>111</sup>

The weight of caselaw seems to locate the right of academic freedom in the institutions of higher education, rather than in the individual educators themselves.<sup>112</sup> In *Urofsky v. Gilmore*, the Fourth Circuit stated that to the degree “the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.”<sup>113</sup> Thus, to the *Urofsky* court, academic freedom is an institutional protection benefitting the university, not individual faculty members. But this assertion as to the focus of academic freedom remains highly debated, particularly among legal

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108. Rodney A. Smolla, *Academic Freedom and Political Correctness in Uncivil Times*, 14 FIRST AMEND. L. REV. 267, 286 (2016).

109. See Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN’S L. REV. 611, 621 (2017) (citing an array of scholars with various views and interpretations of the state of academic freedom).

110. See Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 145 (2009) (“Academic freedom is often promoted as a personal right, but substantial authority suggests that courts view it primarily as an institutional right. In fact, some circuits have indicated that constitutional academic freedom is an institutional right, not necessarily an individual right.”).

111. See *Piarowski v. Ill. Cmty. Coll. Dist.*, 515, 759 F.2d 625, 629 (7th Cir. 1985); *Asociación de Educación Privada de P.R., Inc. v. García-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007) (citing *Cuesnongle v. Ramos*, 713 F.2d 881, 884 (1st Cir. 1983)). However, the Supreme Court has never expressly addressed this question. Strasser, *supra* note 82, at 681–82.

112. See, e.g., Bauries, *supra* note 51, at 679, 682–83 (concluding that the Court, despite opportunities to do so, has never carved out academic freedom as an “individual right,” and that throughout precedent there is no “principle of binding precedential law that” casts academic freedom as an individual right unique to professors).

113. 216 F.3d 401, 410 (4th Cir. 2000) (upholding a law, challenged by six professors who claimed it violated their academic freedom to conduct research, restricting state employees from accessing sexually explicit online material on state-owned computers).

scholars.<sup>114</sup> Nonetheless, regardless of the focus and placement of the right of academic freedom, “[t]o the extent that both the Supreme Court and commentators have considered the idea of academic freedom, it has often been through the lens of the First Amendment’s commitment to open and robust debate.”<sup>115</sup>

### C. *Academic Freedom Is a Form of Deference*

Instead of viewing academic freedom as a neatly defined right, some have suggested that perhaps academic freedom should be viewed as a form of judicial deference given to academic institutions. Under this view, courts are commanded to give deference to the decisions of academic institutions regarding the academic mission and operation of those institutions. But this is a generalized command for deference, rather than the enforcement of a strictly-defined right.

Paul Horwitz discusses the relationship between courts and academe in terms of judicial deference. He casts the Court’s decision in *Grutter v. Bollinger* as akin to the high point of deference.<sup>116</sup> In *Grutter*, the Court deferred to the University of Michigan’s race-based admissions policy, based on the school’s judgments about the need and value of a diverse student body, even though such a race-based system demanded strict scrutiny under the Fourteenth Amendment.<sup>117</sup> As the Court in *Grutter* stated, it was following a long tradition of judicial deference to complex educational judgments that lie “primarily within the expertise of the university.”<sup>118</sup> But a question, obviously, is what constitutes complex educational judgments that warrant

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114. For arguments stating that academic freedom protects the rights and independence of the institution, rather than the rights of individual faculty members, see J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 312 (1989); Paul Horowitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1502 (2007). For opposing arguments asserting that academic freedom protects individuals, see Matthew W. Finken, *On ‘Institutional’ Academic Freedom*, 61 TEX. L. REV. 817, 852–53 (1983). And for an argument that academic freedom protects both institutional autonomy and individual rights, see David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 230 (1990).

115. Douglas B. McKechnie & Eric Merriam, *Academic Freedom in the “Guarded” Institution*, 14 FIRST AMEND. L. REV. 313, 326 (2016). Judge Higginbotham stated that “diversity of views and perspectives” is “paramount to a university’s educational mission.” *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 236–37 (5th Cir. 2011), *vacated*, 570 U.S. 297 (2013).

116. 539 U.S. 306 (2003); see Paul Horwitz, *Fisher, Academic Freedom, and Distrust*, 59 LOY. L. REV. 489, 496 (2013).

117. 539 U.S. at 328–29.

118. *Id.* at 328.

deference. Robert Post writes that the constitutional value of academic freedom demands judicial deference to “professional scholarly standards.”<sup>119</sup>

Courts have deferred to universities in such areas as student activity fees, academic dismissals, and student evaluations and supervision.<sup>120</sup> *Grutter*, of course, reflected high judicial deference to universities’ admissions policies and practices.<sup>121</sup> The decision gave rise to a “strong principle of institutional autonomy for academic institutions,” according to Horwitz.<sup>122</sup> Justice Kennedy echoed *Grutter*’s emphasis on deference in *Fisher v. University of Texas*: “Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”<sup>123</sup> But then . . . despite Justice Kennedy’s recognition of the tradition of deference, the Court in *Fisher* did not defer to the university’s race-conscious admissions program.<sup>124</sup> And this pass at deference, according to Professor Horwitz, reflects a growing judicial distrust of academe.<sup>125</sup>

According to Horwitz, the Court’s decision in *Fisher* and other cases “suggest a growing judicial mistrust of universities altogether: an increasing unwillingness to defer to them on core questions of academic functioning.”<sup>126</sup> This mistrust may result from many forces, including skyrocketing tuition costs and bribery scandals and bloated bureaucracies, but it may also arise from the notorious incidents of speech biases at universities.<sup>127</sup> However, no matter what its source, the distrust can only lead to an erosion of deference, since universities will be seen as less deserving of such deference. As Horwitz points out, judicial confidence in university faculty and administrators has decreased, as has the general public confidence.<sup>128</sup>

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119. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 78 (2012).

120. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227–28 (1985); *Brown v. Li*, 308 F.3d 939, 955 (9th Cir. 2002); *Yacovelli v. Moeser*, 324 F. Supp. 2d 760, 763 (M.D.N.C. 2004).

121. But Justice Thomas, in his *Grutter* dissent, referred to the Court’s deference to the University of Michigan as “unprecedented.” 539 U.S. at 350 (Thomas, J., dissenting).

122. Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 467 (2005).

123. 136 S. Ct. 2198, 2214 (2016).

124. *Id.* at 2214–15.

125. Horwitz, *supra* note 116, at 493–94.

126. *Id.*

127. For instance, in his dissent in *Christian Legal Society v. Martinez*, Justice Alito suggested that universities governing themselves by the “standards of political correctness” prevailing “in our country’s institutions of higher learning” are entitled to little if any deference, since they have departed from traditional academic values. 561 U.S. 661, 706 (2010) (Alito, J., dissenting).

128. Horwitz, *supra* note 116, at 527.

The recent defamation verdict against Oberlin College showcases the level of mistrust felt toward institutions of higher learning. An Ohio jury awarded a family bakery a \$44 million judgment (\$11 million in compensatory damages; \$33 million in punitive damages) against Oberlin College for defaming them with false statements of racism and racial profiling.<sup>129</sup> The Gibson family, who owned and operated a fifth-generation family store, charged Oberlin College with using its administrators to guide a student protest of the store after store workers accused a black student of shoplifting.<sup>130</sup> Oberlin's dean of students even handed out a flyer (printed by the college) accusing the Gibsons of having a "long account of racial profiling and discrimination."<sup>131</sup> In spreading these accusations, the college ignored the findings of the police investigation that found no evidence of racism, as well as the fact that the accused students confessed to committing the crime and admitted that no store employees had racist motivations.<sup>132</sup>

Therefore, even if academic freedom is cast not in terms of hard constitutional rights, but in the softer language of judicial deference to academic institutions, the South Dakota IDA would probably not be struck down because of such deference. First, the strength and intensity of judicial deference are declining, just as judicial distrust of academe is increasing. Second, the subject matter of the IDA is not a subject matter that would command deference. The IDA does not deal with academic policies like admissions standards or curriculum design. It does not deal with university administration, like student fees or course grading. In short, the IDA deals with nothing concerning any special expertise of university officials. Instead, it deals with a matter very much within judicial expertise and authority: the functioning and maintenance of an open marketplace of free speech. As demonstrated above, this marketplace principle is a defining element of higher education and academic freedom. University administrators should not be given deference on the very foundational principles that define the basic qualifications for academic freedom.

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129. Talal Ansari, *Bakery Awarded \$44 Million in Oberlin College Libel Suit*, WALL ST. J., June 15, 2019, at A3.

130. *Id.*

131. William A. Jacobson, Opinion, *Oberlin Pays for Smearing the Town Grocer*, WALL ST. J., June 12, 2019, at A19.

132. Hans von Spakovsky & Greg Walsh, *A Hub of Political Correctness Gets Hit with a Big Judgment*, DAILY SIGNAL (June 13, 2019), <https://www.dailysignal.com/2019/06/13/a-hub-of-political-correctness-gets-hit-with-a-big-judgment/> [https://perma.cc/YW44-SC72]. Oberlin's faculty and administrators not only orchestrated and attended protests of the bakery, but even gave students academic credit for participating in a boycott of the bakery. *Id.* See also Star Parker, *A Win for the Rule of Law Over Fake Racist Narratives*, DAILY SIGNAL (June 12, 2019), <https://www.dailysignal.com/2019/06/12/a-win-for-the-rule-of-law-over-fake-racist-narratives/> [https://perma.cc/4Z2N-XKFS] (discussing whether Oberlin College's actions following the incident inspired intolerance or encouraged free speech).



## IV. ACADEMIC FREEDOM IS NOT INFRINGED BY THE IDA

*A. IDA Furthers Academic Freedom*

Since its very beginnings in the 1915 Declaration, academic freedom has been closely linked and identified with the free and robust debate of opposing opinions. The First Amendment foundations of academic freedom envision the university as a true marketplace of ideas. The right of academic freedom is given to ensure that the university remains free to function as such a marketplace, but the right also presumes that it will be conferred only upon institutions committed to serving such a role.

Robust debate, the freedom to question orthodoxy, and the absence of any penalties for expressing unpopular opinion form the pillars of academic freedom in the university. However, as the South Dakota legislature found within its state public universities, these pillars had decayed or been deconstructed.<sup>133</sup> The IDA seeks to reconstruct those pillars by providing a protective umbrella for speech that an increasingly ideologically monolithic academy tries to eliminate. Indeed, the only restrictive effect of the IDA involves restraining higher education administrators from suffocating a marketplace of ideas and creating an ideologically monolithic university.

As the university has developed and evolved over at least the past thirty years, it has steadily moved away from the marketplace of ideas metaphor that undergirded the foundations of academic freedom.<sup>134</sup> The university has become the restrainer of academic freedom. During the McCarthy era of the 1950s—an era in which the Supreme Court saw it necessary to give constitutional recognition to the right of academic freedom—it was the legislative arm of government that tried to shut down the marketplace of ideas within academe, pushing out those opinions that challenged contemporary political orthodoxy. Today, those within the halls of university administration offices are more likely to endanger academic freedom than those within the hearing rooms of legislative committees. Indeed, in the South Dakota case, it was the legislature that came to the aid of academic freedom by compelling the state's universities to respect all opinions in the marketplace of ideas and to reject compelled orthodoxy of thought.

*B. Politicized Institutions Have No Claim to Academic Freedom*

Higher education has become so politicized that it may no longer qualify in all its speech activities, under the principles of the 1915 Declaration, as

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133. See H.B. 1087 §§ 2–5, 94th Sess. Legis. Assemb. (S.D. 2019); Lauck, *supra* note 3.

134. For a discussion of the censoring effects of political correctness in the 1980s and early 1990s, see GARRY, *supra* note 68.

institutions of learning and scholarship. And if not all the speech activities of these institutions qualify as academic, then they cannot claim to possess rights and freedoms that attach only to academic functions of academic institutions.

In discussing the basis of academic identity and authority, the 1915 Declaration distinguished “real” universities, engaged in the pursuit of truth, and other schools “designed for the propagation of specific doctrines” and dedicated to “a propagandist duty.”<sup>135</sup> The Report then places in the latter category “any university which lays restrictions upon the intellectual freedom of its professors.”<sup>136</sup> Thus, according to the foundational report on academic freedom in America, any university that sacrifices the integrity of an open marketplace of ideas to a propagandistic function cannot claim the authority of a true university and hence cannot deserve the protections of academic freedom.<sup>137</sup>

The primacy of the political is “deeply inimical to academic freedom.”<sup>138</sup> When politics become too engrained in an academic institution, it renders the goals of impartiality and objectivity unattainable; those within that institution cannot imagine anything standing outside of the struggle for political power.<sup>139</sup> Stanley Fish makes this argument, asserting that if “academics are functioning not as academics, but as political advocates, then they do not merit academic freedom.”<sup>140</sup> Academics, according to Fish, should receive academic freedom with respect to their teaching, researching and publishing conducted within the standards of their academic disciplines.<sup>141</sup> Too often, academic freedom has been asserted as a shield to defend behaviors unrelated to genuine academic inquiry.<sup>142</sup> As Fish argues, academia serves to produce scholarship conducted and evaluated according to academic norms; in this function, and in this function only, should academics be given a freedom not

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135. AM. ASS’N OF UNIV. PROFESSORS, *supra* note 92, at 292–93.

136. *Id.* at 293.

137. Haskell, *supra* note 91, at 58.

138. *Id.* at 80.

139. *Id.* at 81.

140. STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* 19 (2014) (arguing that many academic freedom claims are undeserving of academic freedom protection). Fish referred to an article by Graeme Moodie, who wrote that the “special freedom(s) of academics is/are conditional on the fulfillment of their academic obligations.” *Id.* at 5 (quoting Graeme C. Moodie, *On Justifying the Different Claims to Academic Freedom*, 34 MINERVA 129, 134 (1996)). Fish also relies on the AAUP Declaration regarding its assertion that academic freedom should not be used as a shelter for “uncritical and intemperate partisanship” and instead should “help make public opinion more self-critical and more circumspect, to check the more hasty and unconsidered impulses of popular feeling.” *Id.* at 10–11 (quoting AM. ASS’N OF UNIV. PROFESSORS, *supra* note 92, at 297).

141. *See Post*, *supra* note 54, at 11–12.

142. Peter Bowal, *Stanley Fish, the Meaning of Academic Freedom and Social Responsibility*, 9 FLA. INT’L U. L. REV. 39, 40 (2013).

enjoyed by the general public. They should not be given an additional freedom that is not possessed by the general public to pursue a political agenda.<sup>143</sup>

As Fish further explains, whenever a teacher “tries to promote a political or social agenda . . . he or she has stepped away from the immanent rationality of the [academic] enterprise and performed an action in relation to which there is no academic freedom.”<sup>144</sup> Political indoctrination is not a legitimate academic function and hence is undeserving of special constitutional protection.<sup>145</sup> Fish distinguishes between academic activity and political indoctrination by revealing ways in which the latter abandons academic content. Two such ways are through instructional bias and classroom imbalance, when teachers fail to allow the presentation of contrary views.<sup>146</sup> Instructional bias, which occurs when faculty create a classroom environment “objectively offensive to some students based upon their intellectual point of view,” not only causes political indoctrination but also violate AAUP’s code of professorial conduct.<sup>147</sup>

As discussed above in Part II, strong evidence exists that American higher education institutions are being driven increasingly by a certain political ideology and agenda. Consequently, a higher education institution cannot claim academic freedom protection from an intellectual diversity law such as the IDA, if that law is attempting to transform the institution from a single-minded political advocacy institution to an institution committed to the pursuit of truth through an open and free marketplace of ideas.

As higher education has itself become more single-minded in its ideology, it has also become more aggressive in its incorporation of partisan agendas. It has become more of a political arm of a defined ideology than an impartial forum dedicated to the pursuit of truth. Political activism has infused the

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143. To grant a certain group of the population a freedom not enjoyed by the rest of the population—e.g., academic freedom—a strong rationale must be given for that freedom. Byrne, *supra* note 54, at 12–13. “Academic freedom has had to be established and protected by providing reasons why [the public] should respect it.” *Id.* at 14. And the only basis on which academic freedom can be justified is to protect the academic endeavor, as governed by established academic norms. Academics have no special ability or right to engage in political activity. Moreover, “scholarship cannot flourish in an atmosphere of suspicion and distrust.” *Id.* at 15. Such an atmosphere is the kind that is increasingly prevailing in higher education—an atmosphere sought to be remedied by the IDA.

144. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 81 (2008).

145. Kenneth L. Marcus, *Academic Freedom and Political Indoctrination*, 39 J. C. & U. L. 725, 730 (2013).

146. *Id.* at 732. Classroom imbalance tends “to have an indoctrinating effect, because the students are taught to think only in the preferred manner, and contested opinions are given the appearance of universally accepted truths.” *Id.* at 738.

147. *Id.* at 740. The AAUP requires professors to “foster an atmosphere respectful of and welcoming to all persons.” AM. ASS’N OF UNIV. PROFESSORS, ON FREEDOM OF EXPRESSION AND CAMPUS SPEECH CODES (1994), <https://www.aaup.org/report/freedom-expression-and-campus-speech-codes> [<https://perma.cc/K6P5-NUHN>].

mission and functioning of the university. And while universities are certainly free to adopt such a mission, they are not entitled under the 1915 Declaration or the rulings of the U.S. Supreme Court to claim the protections of academic freedom for such a mission.

## V. CONCLUSION

The IDA marks the first attempt by a state legislature to achieve intellectual diversity in state universities that have grown steadily hostile towards respect for free speech and debate, especially involving ideas that question the prevailing political orientation of academe. In a great irony, it is the legislature that is coming to the rescue of open debate and the university that is trying to stifle that debate. This marks a reversal of the 1950s and 1960s, when the constitutional foundations of a right of academic freedom were established.

Under the IDA, the South Dakota Legislature has committed itself to a more scrutinizing supervisory role over higher education. By requiring annual intellectual diversity reports from the Board of Regents, the Legislature has essentially put state universities on a kind of watch-list or probationary status. After years of steadily rejecting intellectual diversity, universities may have lost credibility regarding their commitment to free speech and academic freedom. They have, in a way, become like the southern states under the Voting Rights Act. Those states were put under judicial supervision to make sure that voting rights were respected in those states. Perhaps, as the South Dakota Legislature has recognized, universities may now have to be put under a kind of formalized public review process regarding their actions concerning free speech and academic freedom.

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