Student Protests And Academic Freedom In An Age Of #Blacklivesmatter

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STUDENT PROTESTS AND ACADEMIC FREEDOM IN AN AGE OF #BLACKLIVESMATTER

Philip Lee*

INTRODUCTION

Student activism1 has been part of the fabric of American higher education since the eighteenth century.2 Indeed, some scholars have called it “as American as apple pie.”3 From Harvard’s “Great Butter Rebellion” in 1766 when students pushed for better food4 to the multicultural movement of today when students have demanded increased diversity in student, staff, faculty and curriculum,5 students have long pressed to have their voices heard. Continuing in this tradition, we now live in an age of student

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1 For this Article, I use the definition of “student activism” from Tony Chambers and Christine Phelps, who observe, “We recognize that there are acts of social and political engagement whose primary purpose is nonproductive destruction and disruption. But our discussion speaks to activist behaviors whose purpose is to create change in order to address perceived or real inequities between and among individuals, groups, and/or systems.” Tony Chambers & Christine E. Phelps, Student Activism as a Form of Leadership and Student Development, 31 NASPA J. 19, 20 (1993).


activists, who by organizing through social media, are getting more people involved in political conversations and causes than would otherwise be possible. On reflecting upon the relationship between social media and political activism, John G. Palfrey noted, “Twitter and Facebook have played a crucial role in almost any mass protest in the last few years.” A recent example is #BlackLivesMatter.

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6 I refer to social media broadly as applications and websites that allow their users to generate and share content with each other.

7 Twitter, for example is known for its hashtag campaigns that bring attention to an issue and mobilize large groups of people. A hashtag is a word or phrase preceded by the hash or pound sign (#) that social media users can use to identify messages on specific topics. See TWITTER.COM, https://support.twitter.com/articles/49309-using-hashtags-on-twitter#. Hashtags were created organically by Twitter users as a means to search tweets based on message content. Id. When social media users tweet and retweet messages with the same hashtags, these hashtags start to trend and the issues that these messages are connected to become more visible to the public. Id. College activists around the country have used Twitter to communicate and organize. See e.g., Being Black on Campus—Frustrations Spread Across US, BBC NEWS, Nov. 12, 2015, available at http://www.bbc.com/news/blogs-trending-34799061 (describing how student activists are communicating and organizing through #BlackOnCampus across the country).

8 Caroline M. McKay, Facebook at Center of Egypt Protests, HARVARD CRIMSON, Feb. 3, 2011, available at http://www.thecrimson.com/article/2011/2/3/facebook-twitter-government-internet/. Indeed, protesters all over the world are using social media to communicate their goals and organize their tactics. See e.g., WAEL GHONIM, REVOLUTION 2.0: THE POWER OF THE PEOPLE IS GREATER THAN THE PEOPLE IN POWER: A MEMOIR (2012) (chronicling the role of social media in fomenting and supporting the protests behind Arab Spring); PHILIP N. HOWARD & MUZAMMIL M. HUSSAIN, DEMOCRACY’S FOURTH WAVE? DIGITAL MEDIA AND THE ARAB SPRING (2013) (exploring the creative digital activism during Arab Spring); Pablo Barberá & Megan Metzger, How Ukrainian Protesters are Using Twitter and Facebook, WASHINGTON POST, Dec. 4, 2013, available at http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/04/strategic-use-of-facebook-and-twitter-in-ukrainian-protests/ (discussing how people are interacting with Ukrainian protestor’s Facebook page—“The 2000 updates posted on the page since it was created have garnered close to 50,000 comments and over a million likes; and their content has been shared over 230,000 times.”); Bezdomny, Firechat Enables Activist Mesh Network in Hong Kong, Shareable.net, Oct. 20, 2014, http://www.shareable.net/blog/firechat-enables-activist-mesh-network-in-hong-kong (detailing how protesters in Hong Kong are using the social media platform Firechat to create a peer-to-peer “meshnet” that makes government surveillance difficult because it is independent of mobile and Internet networks). And governments are trying to thwart them by banning or controlling access to social media. See e.g., Tania Branigan, China Intensifies Crackdown on Social Media with Curb on Instant Messaging, THE GUARDIAN, Aug. 7, 2014, available at http://www.theguardian.com/world/2014/aug/07/china-intensifies-social-media-crackdown-curb-instant-messaging (“China has issued tough new rules for mobile instant messaging services such as WeChat, expanding an internet crackdown that has already muzzled microblogs and websites in what it called a bid to promote ‘true freedom of speech,’”); Melissa Etehad, Why are Twitter and Facebook Still Blocked in Iran?, ALJAZEERA AMERICA, April 19, 2014, available at
After George Zimmerman was acquitted of murder in July 2013 for the killing of Trayvon Martin, an unarmed African American teenager, Alicia Garza, a special projects director for the National Domestic Workers alliance and her friend, Patrisse Cullors, a community organizer working on prison reform, along with Opal Tomei, an activist for immigrant rights, developed the hashtag “#BlackLivesMatter.” Garza explains the purpose

http://america.aljazeera.com/opinions/2014/4/iran-twitter-rouhaniinternetcensorship.html (“Officially, access to social networks such as Twitter and Facebook is banned — leaving Iranians unable to legally access these sites. Iranians still find ways to access them by illegally downloading virtual private networks to bypass the state’s Internet filtering system. According to Iran’s Ministry of Sciences, 60 percent of Iranian university students use Viber and WeChat, and in a survey of 2,300 people, 58 percent reported using Facebook regularly, and 37 percent said they used Google+.”); Sebnem Arsu, Turkey Threatens to Block Social Media Over Released Documents, NY TIMES, Jan. 16, 2015, available at http://www.nytimes.com/2015/01/17/world/europe/turkey-threatens-to-block-social-media-over-released-documents.html (“Turkish officials threatened to shut down Twitter in the country unless the social-media company blocked the account of a left-wing newspaper that had circulated documents about a military police raid on Turkish Intelligence Agency trucks that were traveling to Syria last January.”).

9 Dani McClain, The Black Lives Matter Movement is Most Visible on Twitter. Its True Home is Elsewhere, NATION, April 19, 2016, available at https://www.thenation.com/article/black-lives-matter-was-born-on-twitter-will-it-die-there/ (“Today’s racial-justice movement demands an end to the disproportionate killing of black people by law-enforcement officials and vigilantes, and seeks to root out white supremacy wherever it lives. Social media has allowed its members to share documentary evidence of police abuse, spread activist messages, and forge a collective meaning out of heartrending news. At certain key moments, Twitter in particular has reflected and reinforced the power of this movement.”). Note that Twitter is just one tool, out of many, that activists can employ to communicate with others. Bijan Stephen explains:

If you’re a civil rights activist in 2015 and you need to get some news out, your first move is to choose a platform. If you want to post a video of a protest or a violent arrest, you put it up on Vine, Instagram, or Periscope. If you want to avoid trolls or snooping authorities and you need to coordinate some kind of action, you might chat privately with other activists on GroupMe. If you want to rapidly mobilize a bunch of people you know and you don’t want the whole world clued in, you use SMS or WhatsApp. If you want to mobilize a ton of people you might not know and you do want the whole world to talk about it: Twitter.


of her social media campaign as, “A call to action. To make sure we are creating a world where black lives actually do matter.” She also states, “We understand organizing not to happen online but to be built through face-to-face connections and relationships were we build the trust necessary to move as a collective and exercise our collective power in order to win changes in our lives.” Yet, social media has helped this effort by facilitating these face-to-face connections.

Recently, #BlackLivesMatter facilitated communication with activists around the country, helping to mobilize a new wave of nation-wide activism with the police killings of Michael Brown, Eric Garner, and many others. Protestors all over the country have connected with each by posting and searching for this hashtag. James Taylor observes that “[#]Black Lives Matter” may be the most potent slogan since “Black Power,” which Kwame Touro (formerly Stokely Carmichael) introduced to a crowd of civil rights activists almost fifty years ago.

#BlackLivesMatter has had real-world influence. For example, in the aftermath of highly publicized deaths of two African Americans at the hands of police officers—Michael Brown and Freddie Gray—it has pressured the Department of Justice to investigate the policing practices of Ferguson, Missouri and Baltimore, Maryland. It has pushed states to remove the Confederate flag and other Confederate symbols from


12 Day, supra note ___.
13 Guynn, supra note _.
14 Day, supra note __ (“The new movement is powerful yet diffuse, linked not by physical closeness or even necessarily by political consensus, but by the mobilising force of social media. A hashtag on Twitter can link the disparate fates of unarmed black men shot down by white police in a way that transcends geographical boundaries and time zones. A shared post on Facebook can organise a protest in a matter of minutes. Documentary photos and videos can be distributed on Tumblr pages and Periscope feeds, through Instagrams and Vines. Power lies in a single image. Previously unseen events become unignorable.”).
16 Guynn, supra note __.
government buildings and public spaces. It has forced politicians to address issues of racial justice and criminal justice reform.

#BlackLivesMatter has also influenced student activism for racial justice on university campuses. For example, in 2015, Harvard University students mobilized through #BlackLivesMatter and organized marches, panel discussions, teach-ins, and die-ins. During the same time, on the opposite coast, at the University of California, Berkeley, students and community members also held protests against racism as part of the #BlackLivesMatter movement. Similar protests arose on college campuses all over the country.

Social media has made it much easier for college students to voice their opinions and engage in campus protest. But what right do students have to engage in campus activism? How should colleges and universities balance the multiple interests at stake when students engage in protest? In this Article, moving away from the First Amendment principles that would apply only to public institutions, I explore contractual student academic freedom as a broader protection for students to engage in their protest activities at both public and private universities by advocating that higher education institutions codify a balancing test into free speech policies that takes into account this freedom among other competing interests.

This Article proceeds in four parts. Part I analyzes the historical context of racial exclusion in American higher education and connects it to modern

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efforts to promote racial justice to illustrate a continuum of students pressing for this type of change. Part II outlines the inadequacies of student academic freedom as articulated by courts defining this freedom in relation to the First Amendment. Part III proposes a new mechanism to protect student academic freedom that merges major higher education policy statements with contract law to create binding obligations between universities and their students. Finally, Part IV explores the tensions between free speech and student demands for racial justice and proposes a solution that reconciles the tension by using a balancing test that takes both “the marketplace of ideas” and student academic freedom into account.

I. THE HISTORICAL CONTEXT OF RACIAL EXCLUSION ON AMERICAN COLLEGE CAMPUSES

To make sense of contemporary student activism for racial equity and inclusion, it should be viewed in a historical context in which racial minorities were excluded from equal educational opportunities through state segregation laws.23 These laws were upheld in *Plessy v. Ferguson* as constitutional under the Separate-But-Equal doctrine.24

23 See e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Separate-But-Equal law in Louisiana railroad car segregation law); *Lum v. Rice*, 275 U.S. 78 (1927) (applying *Plessy* to uphold the exclusion of Chinese American children from an elementary school designated for whites based on a Mississippi segregation law). See also Richard Kluger, *Simple Justice* 28 (1975) (“Among the more insistently enforced sections of the black codes was the prohibition against teaching a slave to read or write or giving him or her pamphlets, not excluding the Bible or religious tracts. So apprehensive were members of the slavocracy about the great mischief that literacy might stir that in many states it was illegal to teach free as well as enslaved Negroes. And slave schools, of course, were unknown.”). Note that educational exclusion was not the only tool of racial oppression. For Native American peoples, schools have historically been used as a white supremacist tool to eradicate indigenous cultures. See David Wallace Adams, *Education for Extinction: Native Americans and the Boarding School Experience, 1875-1928* 336-337 (1995) (“In the final analysis, the boarding school story constitutes yet another deplorable episode in the long and tragic history of Indian-white relations. For tribal elders who had witnessed the catastrophic developments of the nineteenth century—the bloody warfare, the near-extinction of the bison, the scourge of disease and starvation, the shrinking of the tribal land base, the indignities of reservation life, the invasion of missionaries and white settlers—there seemed to be no end to the cruelties perpetuated by whites. And after all this, the schools. And after all this, the white man had concluded that the only way to save the Indian was to destroy them, that the last great Indian war should be waged against children.”).

24 *Plessy*, 163 U.S. at 540 (upholding a statute that provided “that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races . . .”).
A number of challenges to the exclusion of racial minorities in higher education, brought by NAACP lawyers, started gaining traction in the 1930s to 1950s—the facts of these cases illustrate the degree of historical racial exclusion in American higher education. They also illustrate that students were willing to fight for inclusion. For example, in Missouri ex rel. Gaines v. Canada, African American applicant Lloyd Gaines was refused admission to the University of Missouri Law School because of state segregation laws. When he applied to the law school, he was rejected based on his race and referred to a funding program that enabled African American state residents to attend law schools outside of the state. Gaines brought a successful challenge to the state’s refusal to provide African Americans in-state legal education.

In McLaurin v. Oklahoma State Regents, George McLaurin was first denied admissions to the University of Oklahoma to pursue a doctorate in education because of his race, but subsequently admitted to the university “upon a segregated basis.” McLaurin challenged the state-imposed conditions as constitutional violations. These segregated conditions were described by the Court:

[H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.

As the litigation was pending, the university altered the conditions in an attempt to comply with Separate-But-Equal in the following manner:

For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, ‘Reserved For Colored,’ but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.

Although McLaurin was permitted to be physically present on campus, in order to comply with state law, he was not allowed to interact with
any of his classmates in common academic or social spaces. The Supreme Court held that these conditions were constitutionally invalid.

In *Sweatt v. Painter*, African American student Heman Sweatt was refused admission to the University of Texas Law School because of state laws that banned racial integration in higher education. Instead, the state established a separate law school for African American students where Sweatt refused to enroll. Sweatt brought a successful equal protection challenge based on the egregious educational disparities between the two schools and was ordered admitted to the University of Texas Law School. The plaintiffs in *Gaines, McLaurin*, and *Sweatt* achieved their legal victories in the framework of Separate-But-Equal—they won because the states were unable to show equal facilities. Separate-But-Equal would not be overturned until 1954 in *Brown v. Board of Education*.

Even after *Brown*, however, a number of federal district courts continued to hear challenges to the categorical exclusion of African Americans at American colleges and universities. These cases are telling. In *Lucy v. Adams*, the University of Alabama refused to admit Atherine Lucy and Polly Anne Myers because they were African American. The district

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33 *Id.* at 641 (“These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”).

34 *Id.* at 642.


36 *Id.* at 632.

37 *Id.* at 633-634 (“Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.”).

38 Note that none of these cases overruled *Plessy*.

39 *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

court enjoined the University from refusing their admissions.\textsuperscript{41} Despite the Fifth Circuit’s affirming the district court ruling, the University of Alabama, claiming that it could not ensure Lucy’s safety, suspended her after a mob prevented her from attending classes.\textsuperscript{42} This pattern repeated itself throughout the 1950s and early 1960s, with some universities manufacturing arbitrary administrative hurdles for African American students that precluded their enrollment.\textsuperscript{43} Nonetheless, the excluded students continued to fight for fairness and inclusion.

Seven years after Brown, James Meredith, an African American student applied to the University of Mississippi in January 1961.\textsuperscript{44} The university registrar rejected James Meredith’s application claiming, among other things, that Meredith did not seek admission in good faith because he did not submit the required certificates of good character from university alumni.\textsuperscript{45} Meredith, not able to obtain such certificates from alumni, whom were all white at the time,\textsuperscript{46} submitted character affidavits from people he knew. He repeatedly wrote the registrar seeking admission to the university.\textsuperscript{47} After ignoring his numerous letters, the registrar responded that Meredith’s application was insufficient.\textsuperscript{48} Similar to the University of Georgia’s treatment of Holmes and Hunter, the Fifth Circuit concluded that “from the moment the [University of Mississippi] discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity.”\textsuperscript{49}

In the wake of the Civil Rights Movement, these exclusionary tactics began to wane. Indeed, the late 1960s and 1970s ushered in unprecedented levels of racial minority enrollment at American colleges and universities.\textsuperscript{50} John R. Thelin observes:

\textsuperscript{41} Id. at 239.
\textsuperscript{43} See, e.g., Holmes v. Danner, 191 F. Supp. 394, 401-402 (M.D. Ga. 1961) (“After a careful consideration of all of the evidence admitted at the trial, the court finds that, had plaintiffs been white applicants for admission to the University of Georgia, both plaintiffs would have been admitted to the University not later than the beginning of the Fall Quarter, 1960.”).
\textsuperscript{44} Meredith v. Fair, 305 F.2d 343, 346 (5th Cir. 1962).
\textsuperscript{45} Id. at 346-348.
\textsuperscript{46} Id. at 402 (“No Negroes have ever been enrolled at the University of Georgia, and, prior to September 29, 1950, no Negro had ever applied for admission. At the time of the trial only four Negroes, including plaintiffs, had made application for admission to the University, all on or since September 29, 1950, none of whom has yet been admitted.”).
\textsuperscript{47} Id. at 346-347.
\textsuperscript{48} Id. at 347-348.
\textsuperscript{49} Id. at 344.
\textsuperscript{50} See e.g., CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 262 (2006) (“Black enrollment as a percentage of total students attending colleges and universities
After the civil unrest associated with the assassination of Martin Luther King, Jr., and other incidents that brought racial tensions to the fore, numerous colleges and universities initiated measures to promote racial access and diversity. And enrollment patterns for African Americans and other minority groups indicated substantial change.51

This change in admissions practices was significantly due to increasing student activism for racial equity.52 This student-led pressure for inclusion also created curricular changes. As minority enrollments increased and students continued to push for inclusion, colleges and universities began instituting ethnic studies programs to institutionalize the study of minority communities and perspectives.53 This was a turbulent process. Cornel West observes, “The inclusion of African Americans, Latino/a Americans, Asian Americans, Native Americans and American women into the culture of critical discourse yielded intense intellectual polemics and inescapable ideological polarization that focused principally on the exclusions, silences and blindesses of male, WASP cultural homogeneity.”54 And it is in this historical context that students today are continuing to fight for racial equity and inclusion.

A recent example of student activism for racial justice occurred at the University of Missouri, which took inspiration in the #BlackLivesMatter protests in Ferguson.55 In the 2014-2015 academic year, a series of student

nationwide mounted steadily after the mid-sixties. By 1971, the figure stood at 8.4; by 1977 it had risen to 10.8 percent of the total college enrollment. Between 1967 and 1974, for example, black enrollment in white institutions increased fully 160 percent, compared to a 34% increase in the black enrollment of traditionally black colleges and a 33 percent increase in total enrollment. The greatest numerical growth in black enrollment occurred in northern white colleges and universities.”).

52 See generally RHOADS, supra note __ (tracing the evolution of student activists on American campuses seeking racial equity and inclusion).
53 See generally DAVID YAMANE, STUDENT MOVEMENTS FOR MULTICULTURALISM: CHALLENGING THE CURRICULAR COLOR LINE IN HIGHER EDUCATION 2002 (analyzing how student activism led to multicultural studies at University of California at Berkeley and University of Wisconsin at Madison); FABIO ROJAS, FROM BLACK POWER TO BLACK STUDIES: HOW A RADICAL SOCIAL MOVEMENT BECAME AND ACADEMIC DISCIPLINE (2007) (analyzing the interplay of student activism and the emergence of Black Studies); Mikaila Mariel Lemonik Arthur, Student Activism and Curricular Change in Higher Education (2011) (analyzing how student activism helped bring about Women's Studies, Asian American Studies, and Queer/LGBT Studies).
protests at the University of Missouri resulted in the resignations of the president of the University of Missouri System and the chancellor of the University of Missouri Columbia campus. The protests were primarily led by a student group named Concerned Student 1950. Concerned Student 1950 is a reference to the first year that the University of Missouri admitted African American students.

Much of the protests focused on issues of racial justice on campus and in society. For example, after being subject to racial slurs by people in the back of a passing pickup truck, student body president Payton Head wrote a Facebook post in which he stated, “For those of you who wonder why I’m always talking about the importance of inclusion and respect, it’s because I’ve experienced moments like this multiple times at THIS university, making me not feel included here.” This post went viral and led to a series of student rallies that the students called “Racism Lives Here.” The students found the university president’s response to their grievances insufficient.

Concerned Student 1950 issued a number of demands, including an apology and resignation from the university president and a number of steps to increase racial diversity and understanding on campus. After more racial turmoil, including an unknown vandal smearing feces in the shape of demonstrations had also been inspired by the protest movement sparked last year in Ferguson, a suburb of St. Louis, after a white police officer there killed Michael Brown, an unarmed black man, and they were experienced at using social media in organizing. They saw themselves as part of a continuum of activism linking Ferguson, other deaths at the hands of police, protests on campuses around the country and the Black Lives Matter movement.


57 See Pearson, supra note __.

58 Id.

59 Id.

60 Id. See also Before Protests, University of Missouri Saw Decades of Racial Tension, CHICAGO TRIBUNE, (“Head's social media accounts of having racial slurs shouted at him from a passing pickup truck helped spark a renewed protest movement at Missouri that culminated Monday with the resignation of university system President Tim Wolfe. Hours later, the top administrator of the Columbia campus, Chancellor R. Bowen Loftin, was forced out.”)

61 Pearson, supra note __.

a swastika on a wall in a dorm bathroom, an African American graduate student named Jonathan Butler launched a hunger strike. He vowed not to eat until the university president resigned. Adding additional pressure to the university president, African American football players at the university subsequently announced that they would neither practice nor play until the president resigned. These collective protests led to the resignations of both the university president and chancellor of the Columbia campus. Concerned Student 1950 used Twitter to get its message out.

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63 See Pearson, supra note __.
64 Id.
66 See Svrluga, supra note __. Some professors also supported the protests. A prominent example is communications professor Melissa Click, who was fired for blocking a journalist from accessing a protest. Richard Pérez-Peña, University of Missouri Fires Melissa Click, Who Tried to Block Journalist at Protest, NY TIMES, Feb. 25, 2016, available at http://www.nytimes.com/2016/02/26/us/university-of-missouri-fires-melissa-click-who-tried-to-block-journalist-at-protest.html. The American Association of University Professors subsequently issued an investigatory report finding that Professor Click’s academic freedom rights were violated by the university for firing her without a faculty review. See Colleen Flaherty, A Firing with Consequences, INSIDE HIGHER ED, May 19, 2016, available at https://www.insidehighered.com/news/2016/05/19/aaup-finds-mizzou-compromised-academic-freedom-terminating-melissa-click (“The Board of Curators of the University of Missouri System violated academic freedom in dismissing Melissa Click, a former assistant professor of communication studies at the Columbia campus, according to a new investigatory report by the American Association of University Professors. As a result, AAUP could vote to censure Mizzou’s administration at the association’s upcoming meeting.”). After its investigation, the AAUP placed the University of Missouri on its censure list. See Colleen Flaherty, Censures for Mizzou, Saint Rose, INSIDE HIGHER ED, June 20, 2016, available at https://www.insidehighered.com/news/2016/06/20/aaup-votes-censure-two-institutions-alleged-violations-academic-freedom-and-calls.
67 See #ConcernedStudent1950, https://twitter.com/cs_1950?lang=en. Cf. Scott Jaschik, Ultimatum on King Day, INSIDE HIGHER ED, Jan. 21, 2014, available at https://www.insidehighered.com/news/2014/01/21/racial-tensions-grow-university-michigan (“Last semester’s #BBUM Twitter protest attracted nationwide attention, as students used the hashtag to describe their frustrations with ‘being black at the University of Michigan.’ Students described hostile or ignorant comments as everyday events in their
#ConcernedStudent1950 connected college students around the country to push for racial equity and inclusion. Given this context of increasing student activism for racial justice, what rights to students have to engage in such protests? In the next part, I outline the constitutional contours of student academic freedom to highlight the inadequacy of such freedom when based on the First Amendment.

II. THE CONSTITUTIONAL STANDARD OF STUDENT ACADEMIC FREEDOM

Prior to 1961, courts refused to recognize students’ rights because universities were viewed as acting in loco parentis (in the place of a parent) in relation to their students. Universities and their professors were seen akin to parents who were given vast discretion in building the morals of their students.

Writing about in loco parentis, William Blackstone observed that a parent “may delegate part of his parental authority, during his life, to the
tutor or schoolmaster of his child; who is then in loco parentis, and had such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.” 70 This concept was subsequently applied to American higher education. For example, in his inaugural address as the first President of Johns Hopkins University, Daniel Coit Gilman observed, “The college theoretically stands in loco parentis; it does not afford a very wide scope; it gives a liberal and substantial foundation on which the university instruction may be wisely built.”71 If a legal dispute arose, many courts gave deference to the colleges and universities in maintaining order and discipline among students—whom were viewed as mere children.

One expression of the in loco parentis doctrine in court was Gott v. Berea College (1913), in which the Kentucky Supreme Court upheld a rule forbidding students from entering “eating houses and places of amusement in Berea, not controlled by the College.”72 Berea College, a private institution in Kentucky, expelled some students for violating this rule because the students ate at a private restaurant not controlled by the college.73 The restaurant owner challenged the rule as unlawfully harming his business.74 The Court upheld the rule, reasoning:

College authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities, or parents as the case may be, and in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful, or against public policy.75

In another case, Stetson University v. Hunt, the Florida Supreme Court upheld Stetson University’s summary suspension of a female student for “offensive habits that interfere with the comforts of others.”76 The university claimed that the student was guilty of ringing cow bells, parading the halls of the dormitory at forbidden hours, and turning off

70 William Blackstone, Commentaries on the Laws of England 441 (1765).
71 Daniel Coit Gilman. Inaugural address as First President of the Johns Hopkins University, February 22, 1876, available at http://webapps.jhu.edu/jhuniverse/information_about_hopkins/about_jhu/daniel_coit_gilman/.
72 Gott v. Berea Coll., 156 Ky. 376, 377 (Ky. 1913).
73 Id.
74 Id.
75 Id. at 379.
76 Stetson Univ. v. Hunt, 88 Fla. 510, 516 (Fla. 1924).
the lights without permission. The Court, in upholding the suspension, reasoned:

As to mental training, moral and physical discipline and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.

In a similar case at a state institution, Syracuse University expelled a student based on rumors that she was a troublemaker and that she was not “a typical Syracuse girl.” This student was dismissed without any notification of the charges against her or opportunity for a hearing. The New York Appellate Division, consistent with the in loco parentis doctrine, observed:

The university may only dismiss a student for reasons failing within two classes [set forth in the registration card that a student would have to sign before enrolling], one, in connection with safeguarding the university’s ideals of scholarship, and the other in connection with safeguarding the university’s moral atmosphere. When dismissing a student, no reason for dismissing need be given.

Note that if this type of case occurred in New York today, two additional state-specific legal wrinkles would need to be addressed. First, the distinction between state and private universities may be murky due to a statute that authorizes private colleges and universities to contract with the state to provide educational services on behalf of the state. See NYS Educ. Law § 350(3). This threshold inquiry is important because depending on whether the entity is deemed public or private, different legal standards would be applicable. For example, the First Amendment only restricts state action. Second, a statutory mechanism called Article 78 exists in New York that allows challenged to “arbitrary and capricious” decision-making. See N.Y. C.P.L.R. §§ 7801–06 (McKinney 2008). Article 78 challenges apply to private colleges and universities. See e.g., Gertler v. Goodgold, 487 N.Y.S.2d 565, 569-570 (N.Y. App. Div. 1985) (“[H]aving accepted a State charter and being subject to the broad policy-making jurisdiction of the Regents of the University of the State of New York, a single corporate entity of which they are deemed a part, private colleges and universities are accountable in a CPLR Article 78 proceeding, with its well-defined standards of judicial review, for the proper discharge of their self-imposed as well as statutory obligations.”).

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77 Id. at 515.
78 Id. at 516.
80 Id. at 488.
81 Id. at 491.
In sum, during the heyday of *in loco parentis*, courts gave great deference to colleges and universities—both public and private—to shape the morals of their students.

The *in loco parentis* relationship at American colleges and universities changed after *Dixon v. Alabama*. The Fifth Circuit held in *Dixon* that students who were expelled from a state college for engaging in protests against racial segregation at the local courthouse were entitled to due process protection. This case was to be the beginning of the end for *in loco parentis*.

Courts from the early 1960s began to recognize the constitutional rights of students at public universities. Even though students’ rights have been protected since *Dixon*, legal scholars disagree as to whether student academic freedom based on constitutional law exists. On the one hand, J. Peter Byrne argues that “no recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning.” Byrne assumes that academic freedom is about scholarship and learning and that students do not contribute to either. He contends that “while the Constitution affords students at public institutions extensive civil rights, it affords them no rights

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82 Dixon v. Alabama, 294 F.2d 150 (5th Cir. 1961),
83 Id. at 158-159.
84 See Peter F. Lake, *The Rise of Duty and the Fall of in Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 Mo. L. Rev. 1, 9 (1999) (“The 1961 decision of the Fifth Circuit in Dixon v. Alabama marked the beginning of the end for in loco parentis as an immunity insularizing the public (and later, indirectly, the private) college.”).
86 Note that *Dixon* only applied to students at public universities. In this regard, Brian Jackson observes:

Dixon v. Alabama often is hailed as a pivotal rejection of the *in loco parentis* doctrine. But despite the Dixon decision, thousands of students at private universities remain outside the scope of constitutional protection. . . . As a result, actions by these schools cannot be attributed to the state for constitutional purposes. The Dixon decision thus left untouched thousands of students attending private colleges and universities. These students have no substantive or procedural constitutional safeguards.

of academic freedom at all.\footnote{Id. at 263.} On the other hand, Walter Metzger has a broader view of academic freedom and explores the symbiotic interplay between faculty freedom and student freedom.\footnote{Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 TEX. L. REV. 1265, 1305 (1988).} He argues that “if the student bid for freedom were excluded, a major part of the constitutional story of academic freedom would go untold.”\footnote{Id.} Metzger continues:

> Even if they did not stand as full equals before the law, teachers and students did enter into complex relationships, adversarial and symbiotic, that affected the kinds of freedom they could wrest from one another and from common opponents in a court of law. . . . In the end, it seems best to conclude that, in the academic freedom club, students qualify as special members. They form a kind of odd group in—“odd” because they are neither fish nor fowl, neither full-fledged citizens of the prime state nor contractual employees of the agent state; “in” because to keep them out would be anomalous and impoverishing.\footnote{Id.}

Consistent with Metzger’s more nuanced view of student academic freedom, a number of court cases suggest, and even explicitly reference, academic freedom protection for students at public colleges and universities.

The U.S. Supreme Court has acknowledged that students at public colleges and universities have certain rights based both on their status as higher education students in conjunction with First Amendment principles. For example, in 1957, the Court held in \textit{Sweezy v. New Hampshire} that a state investigation of a visiting lecturer at the University of New Hampshire, who was claimed to be a “subversive person” for his classroom speech and political associations, was a violation of his due process and free association rights.\footnote{Sweezy v. New Hampshire, 354 U.S. 234, 246-47 (1957).} The Court noted, “We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which government should be extremely reticent to tread.”\footnote{Id. at 250.} The Court further observed, “[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.”\footnote{Id (emphasis added).}

In 1964, the Court decided \textit{Baggett v. Bullitt}, a case in which professors, staff members, and students from the University of Washington challenged
a state-mandated loyalty oath on First Amendment grounds. In a footnote, the Court recognized the students’ interest in academic freedom in this case by noting:

Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.

Eight years later, in Healy v. James, the Court held that Central Connecticut State College's refusal to recognize a campus chapter of Students for a Democratic Society as an official student organization was a violation of the students’ First Amendment rights. The Court, in ruling for the students, reasoned, “The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom. It noted:

The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

In 1995, the Court in Rosenberger v. Rector & Visitors of the University of Virginia held that the University of Virginia’s denial of funding to a student-run Christian magazine, while secular student-run magazines received funding, amounted to unconstitutional viewpoint discrimination. In so holding, it noted that student academic freedom rights are related to, but distinct from, the First Amendment right of free expression. The Court observed:

The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and

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96 Id. at 369-372.
97 Id. at 366 n.5 (emphasis added).
99 Id. at 181-82.
100 Id. at 181 (citations omitted).
creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.\(^{102}\) In other words, the Court was recognizing the special context of higher education, which called for heightened speech protections. However, when applying legal protections to students’ expression, a number of tensions have arisen between students and both their institutions and their professors.

\[\text{A. Tension between Academic Freedom of Students and Institutions}\]

The elements of institutional academic freedom were first set forth by Justice Felix Frankfurter’s concurring opinion in *Sweezy*.\(^{103}\) In that opinion, Justice Frankfurter defined the four essential freedoms of a university “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”\(^{104}\) These four freedoms would become foundational pillars in later cases discussing an institution’s academic freedom rights vis-à-vis students’ rights.

Many of these disputes have arisen out of conflicts between students and university administrators or faculty members who are acting on behalf of the institution. For example, in *Regents of the University of Michigan v. Ewing*, the Court upheld a medical school’s academic dismissal of a student. The medical school refused to allow the student to re-take a test after that student failed it.\(^{105}\) Citing Justice Frankfurter’s concurring opinion in *Sweezy*, the Court deferred to the educational judgment of the medical school to determine whether a student should be dismissed for academic reasons.\(^{106}\) The student’s rights in this situation were not part of the academic freedom analysis.

In 2000, the Court decided *Board of Regents of University of Wisconsin System v. Southworth*.\(^{107}\) In *Southworth*, a group of students challenged the mandatory student activity fee that funded the operation of student organizations.\(^{108}\) The students argued that the fee violated their First

\[\text{\textsuperscript{102} Id. at 836.}\]
\[\text{\textsuperscript{103} Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).}\]
\[\text{\textsuperscript{104} Id.}\]
\[\text{\textsuperscript{105} Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 216 (1985).}\]
\[\text{\textsuperscript{106} Id. at 225-26. In a footnote, the Court acknowledged the potential conflict between institutional and professorial freedoms, noting: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision[-]making by the academy itself . . . .” Id. at 226 n.12. This tension is highlighted in cases where professorial and institutional interests diverge. See generally PHILIP LEE, A CONTRACT THEORY OF ACADEMIC FREEDOM (2015).}\]
\[\text{\textsuperscript{107} Board of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217 (2000).}\]
\[\text{\textsuperscript{108} Id. at 226-227.}\]
Amendment rights because they should have the choice not to fund student organizations that engage in political expression that is offensive to their personal beliefs. The Court upheld the mandatory fee because it was administered in a viewpoint-neutral manner. Of particular significance, in a concurring opinion written by Justice Souter and joined by Justices Stevens and Bryer, the judges cited to the law of academic freedom as a relevant source of law in adjudicating this dispute. However, Souter’s concurrence focused exclusively on the university’s right to decide how it “discharge[s] . . . its educational mission.” Justice Souter further noted: 

Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.

Similarly, in a case before a federal district court, Yacovelli v. Moeser, a number of University of North Carolina at Chapel Hill (UNC) students brought a Free Exercise Clause claim against the university to prevent it from assigning a book during freshman orientation that contained a positive portrayal of Islam. The district court gave deference to the university’s educational judgment and dismissed the students’ claim. The court observed, “UNC, instead of endorsing a particular religious viewpoint, merely undertook to engage students in a scholarly debate about the Islamic religion. Students were free to share their opinions on the topic whether their opinions be positive, negative, or neutral.” Once again, the focus of the academic freedom analysis was on the institution’s right to select readings for the students with no attention as to what rights that students have in such situations.

Other higher education cases have applied a First Amendment case that arose in a public school (K-12) context—Hazelwood v. Kuhlmeier. For
example, in a case decided by the Ninth Circuit, *Brown v. Li*, a student at the University of California at Santa Barbara challenged the university’s refusal to allow the student to include a “disacknowledgements” section in his master’s thesis as a violation of his First Amendment rights. This section stated, “I would like to offer special *Fuck You’s* to the following degenerates for being an ever-present hindrance in my graduate career . . .” and identified a number of university administrators and others that supposedly thwarted his academic progress. The Ninth Circuit, citing *Hazelwood*, found for the university, noting that the “decision was reasonably related to a legitimate pedagogical objective: teaching the Plaintiff the proper format for a scientific paper.” In addressing why *Hazelwood* was the relevant standard, the Ninth Circuit explained:

> In view of a university's strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from curricular speech. That standard balances a university's interest in academic freedom and a student's First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them.

*Hazelwood* involved a high school student’s First Amendment challenge to the removal of two articles in the school’s newspaper. One of the articles dealt with teen pregnancy and the other reported on the impact of divorce on some of the students. The principal decided to remove the articles based he was worried about the appropriateness of the subject matter to this high school student audience and the confidentiality of the people mentioned in the articles. The Court, in upholding the school’s actions, held “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions were reasonably related to legitimate pedagogical concerns.” The Court recognized the relevance of the age of the young students in a K-12 setting by observing that “a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an

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118 Brown v. Li, 308 F.3d 939 (9th Cir. 2002).
119 Id. at 943.
120 Id. at 952.
121 Id. at 951-952.
122 *Hazelwood*, at 273.
elementary school setting to the particulars of teenage sexual activity in a high school setting.”

However, the Ninth Circuit’s reliance on *Hazelwood*’s “legitimate pedagogical concerns” standard is misplaced. Specifically, First Amendment principles arising from K-12 settings have been ill suited to protect student academic freedom at American colleges and universities because they fail to take into account the special context of American higher education. Rather than effectively balance all of the competing interests—between institutions, students, and professors—*Hazelwood* only asks what pedagogical interests—i.e., teaching-related interests—are at stake. This downplaying of students’ interests will be further apparent in conflicts between students and their professors.

B. Tension between Academic Freedom of Students and Professors

In many situations, academic freedom for both students and professors has been aligned. For example, in *Crue v. Aiken*, the plaintiffs were “a loose group of faculty members and a graduate teaching assistant,” whose interests were aligned against the institution, the University of Illinois. Pursuant to athletic regulations, the university did not allow faculty or students to communicate with prospective student-athletes. The plaintiffs wanted to inform these prospective students about their views on a current controversy regarding the university's mascot named “Chief Illiniwek.” The Seventh Circuit ruled in favor of the plaintiffs on First Amendment grounds. In another case, *Southern Christian Leadership Conference v. Louisiana Supreme Court*, law students and student organizations along with professors challenged a state supreme court rule that restricted the types community groups that may be represented and solicited by law school clinics. Although the plaintiffs lost their case, their academic freedom rights were aligned in their fight against the state.

However, sometimes tension exists between students’ and professors’ academic freedom rights. Curricular decisions are a recent example. Courts have recognized that professors’ rights to decide the content of a class generally supersede students’ rights to do the same. For example, in

123 Id. at 272.
124 *Crue v. Aiken*, 370 F.3d 668, 674 (7th Cir. 2004).
125 Id. at 674-676.
126 Id. at 674.
127 Id. at 679-680.
128 *Southern Christian Leadership Conference v. Louisiana Supreme Court*, 252 F.3d 781, 787-788 (5th Cir. 2001).
129 A similar principle applies in the K-12 setting. *Settle v. Dickson County School Board*, 53 F.3d 152, 156 (6th Cir. 1995) (“So long as the teacher limits speech or
Axson-Flynn v. Johnson, a student at the University of Utah’s Actor Training Program, who based on her religious beliefs, refused to take God’s name in vain or use particular offensive words during classroom exercises. The faculty members told her to “get over” her language issues and required her to read the words on the scripts. She eventually left the acting program because she believed that she would have been dismissed. The student challenged the university’s attempt to force her to use certain words as a violation of her First Amendment rights. The Tenth Circuit noted that this was “school-sponsored speech,” and as such, the university’s decision to compel that speech would be upheld as long as its decision was “reasonably related to legitimate pedagogical concerns.” The court remanded the case to determine whether the professors’ treatment of the student was based on pedagogical grounds or a pretext for religious discrimination.

Similarly, in Head v. Board of Trustees of California State University, a student in San Jose State University’s teaching program, who disagreed with multiculturalism, challenged the professors’ incorporation of multiculturalism in their classes as a violation of his First Amendment rights. The court found for the professors and held:

Public university instructors are not required by the First Amendment to provide class time for students to voice views that contradict the material being taught or to interfere with instruction or the educational mission. Although the First Amendment may require an instructor to allow students to express opposing views and values to some extent where the instructor invites expression of students’ personal opinions and ideas, nothing in the First Amendment prevents an instructor from refocusing classroom discussions and limiting students’ expression to effectively teach.

grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.”

130 Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004).
131 Id.
132 Id. at 1283.
133 Id.
134 Id. at 1290 (citation omitted).
135 Id. at 1301.
137 Id. at *36. The court also recognized the academic freedom of the institution to incorporate multiculturalism into its curriculum: “We discern nothing in First Amendment jurisprudence that precludes a public university from adopting, in its exercise of its academic freedom, academic standards that must be satisfied by a student seeking a professional teaching credential even where those standards reflect a certain philosophy of
This court’s First Amendment analysis centered on a professor’s freedom to teach. Student freedom was tangential to this interest.

Both Axon-Flynn and Head employed Hazelwood’s “legitimate pedagogical concerns” standard in higher education contexts. However, this approach applied to higher education is problematic in that it ignores any interest the students may have in academic freedom. Specifically, Hazelwood asks whether or not the institution or professor acted with a “legitimate pedagogical concern” and stops there. What is missing is a multi-sided balancing of interests. Taking into account the difference between K-12 and higher education students, a number of questions arise regarding the Hazelwood test. What about university and college students’ interests—do they have any worth considering? How can a legal standard take into account the unique context of American higher education in balancing the competing interests? How can this standard be made applicable to both public and private institutions?

Given the differences between K-12 and higher education based on the varying ages of the students and correspondingly different purposes, at least one court has refused to apply Hazelwood to a university context. In Kincaid v. Gibson, Kentucky State University confiscated and banned the distribution of a student-edited yearbook because university administrators felt the publication to be of poor quality and inappropriate. The district court relied, in part, on Hazelwood in holding for the university. On appeal, the Sixth Circuit, in reversing the district court, declined to follow Hazelwood, a case it described as “a case that deals exclusively with the First Amendment rights of students in a high school setting.”

education or academic viewpoints with which a student vehemently disagrees.” Id. at *44-45.

138 Axon-Flynn, at 1289 (“[W]e hold that the Hazelwood framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.”); Head, at 35 (“Student speech in school-sponsored expressive activities may be restricted so long as the restrictions reasonably relate to legitimate pedagogical concerns.”). Cf. Bishop v. Aronov, 926 F.2d 1066, 1074-77 (11th Cir. 1991) (applying Hazelwood to faculty speech).

139 Compare Bethel School Dist. v. Fraser, 478 U.S. 675, 691 (1986) (identifying “the objectives of public education as the ‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.’”) (citations omitted) with Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (“The [university] classroom is peculiarly the ‘marketplace of ideas.’ 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.’”) (citations omitted)

140 Kincaid v. Gibson, 236 F.3d 342, 345 (6th Cir. 2001) (en banc).

141 Id. at 346.

142 Id.
‘marketplace of ideas,’ which merits full, or indeed heightened First Amendment protection.” The Court, thus, held for the students.

The Sixth Circuit was correct because it took into account the differences between K-12 students and higher education students—which are differences that have been acknowledged by the U.S. Supreme Court in prior cases. In college and university settings, therefore, an alternative standard than Hazelwood’s “legitimate pedagogical concerns” test should apply. One possible approach is suggested by Kincaid, in which the Sixth Circuit applied a traditional First Amendment doctrine—forum analysis—but did so in the special context of higher education. Forum analysis affords different levels of First Amendment protection depending on what type of forum was created by the state actor. The Supreme Court has recognized three types of public fora: 1) the traditional public forum; 2) the limited or designated public forum; and 3) the nonpublic forum. First, the traditional public forum is a place “which by long tradition or by government fiat has been devoted to assembly and debate,” such as a street, sidewalk, or park.

In a traditional public forum, “the rights of the state to limit expressive activity are sharply circumscribed.” The Supreme Court has held, in these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are

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143 Id. at 352.

144 Compare Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683-84 (1986) (“By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.”) with Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (“University students, are of course, young adults. They are less impressionable than younger students . . . .”).

145 Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (“At one end of the spectrum are streets and parks which ‘have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”) (citation omitted). Note that in Perry, forum analysis was applied to a school mail system, which is not a physical location, but a metaphysical one. Id. at 46-47. See also Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 830 (1995) (“The [Student Activities Fund is a forum more in a metaphysical sense than in a spatial or geographic sense, but the same principles are applicable.”).

146 Id.
narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.\footnote{Id. (citations omitted).}

Second, the limited or designated public forum is a location that “the state has opened for use by the public as a place for expressive activity.”\footnote{Id.} If a state has designated such a place, “it is bound by the same standards as apply in a traditional public forum.”\footnote{Id. at 46.} Third, the nonpublic forum is “[p]ublic property which is not by tradition or designation a forum for public communication.”\footnote{Id.} It is a place in which the government can and does close to the public for speech. In a nonpublic forum, “[i]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”\footnote{Id.}

Out of these three categories, the Sixth Circuit found that the student yearbook was a limited public forum because the university “intended to open the forum at issue.”\footnote{Kincaid, 236 F.3d at 349.} The court found that the special context of higher education informed its decision on why the university intended the yearbook to be a forum for public communication. The Court observed:

> The university is a special place for purposes of First Amendment jurisprudence. The danger of “chilling ... individual thought and expression ... is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”\footnote{Id. at 352.}

However, this contextual inquiry of what type of forum the university intended focused entirely on the characteristics of the university, as an institution. Student academic freedom, on the other hand, was not mentioned.

The Supreme Court has also applied forum analysis to other types of student expression cases within colleges and universities. For example, in \textit{Widmar v. Vincent}, the Court struck down the University of Missouri at Kansas City’s regulation that prohibited the use of campus facilities by religious student groups as a violation of the students’ First Amendment rights.\footnote{Widmar v. Vincent, 454 U.S. 263, 277 (1981).} In finding a limited public forum, the court noted, “Through its policy of accommodating their meetings, the University has created a forum
generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Court found the University of Missouri’s regulation unconstitutional. Even though the university regulation was struck down, the Court acknowledged institutional academic freedom rights in observing:

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Finally, we affirm the continuing validity of cases . . . that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The Court was making it clear that even though certain student interests were protected against the university’s policies in this case, institutional academic freedom was not affected by this holding. As in Kincaid, no mention was made of student academic freedom.

Decisions like Widmar and Kincaid are a better approach than Hazelwood, because at least the former cases take into account the special context of higher education. However, Widmar and Kincaid do not go far enough in recognizing the role of students’ rights in applying that context to the constitutional standards. Instead these cases narrow their contextual analysis to the rights of institutions and faculty members, with little to no consideration of students’ rights. This makes student academic freedom based on First Amendment principles insufficient.

An additional limitation of First Amendment doctrines in protecting student academic freedom is that this protection only applies to students at public universities. Thus, constitutional protections are not available at private institutions.

What remains after these limitations is that the constitutional standard for student academic freedom is incomplete protection for students at public

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155 Id. at 267.
156 Id. at 277.
157 Id. at 276-277 (citations and footnotes omitted).
158 The text of the First Amendment includes a state action requirement: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. Amd. 1.
universities and no protection for students at private institutions. In the next section, I turn to contract law for an alternative mechanism for protecting student academic freedom at both public and private universities.

III. TOWARD A NEW CONTRACT STANDARD OF STUDENT ACADEMIC FREEDOM

A. Contract Law as an Alternative Foundation

Many colleges and universities explain the rights and obligations of their students as part of their college catalogs, student handbooks, institutional rules, and other sources. Some courts will interpret such documents as creating contractual obligations. For example, in *Stahis v. University of Kentucky*, a case involving a student who challenged his

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159 See e.g. *Buescher v. Baldwin Wallace Univ.*, 86 F. Supp. 3d 789, 797-98 (N.D. Ohio 2015) (“[T]he long-standing principle that when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature. The terms of such contract are found in the college catalog and handbook supplied to students.”) (citations omitted); *Wagner v. Holtzapple*, 101 F. Supp. 3d 462, 487 (M.D. Pa. 2015) (“Pennsylvania law has clarified that “the relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a student can bring a cause of action against said institution for breach of contract where the institution ignores or violates portions of the written contract. This contract is embodied by the written guidelines, policies, and procedures as contained in the written materials distributed to the student over the course of their enrollment in the institution, including the student handbook.”) (citations omitted); *Doe v. Brown Univ.*, No. CV 15-144 S, 2016 WL 715794, at *11 (D.R.I. Feb. 22, 2016) (“Under Rhode Island law, [a] student's relationship to his university is based in contract. The relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook. Rhode Island courts “interpret such contractual terms in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them.”) (citations omitted); *Nungesser v. Columbia Univ.*, No. 1:15-CV-3216-GHW, 2016 WL 1049024, at *9 (S.D.N.Y. Mar. 11, 2016) (“When a student is admitted to a university, an implied contract arises between the parties which states that if the student complies with the terms prescribed by the university, he will obtain the degree he seeks. The rights and obligations of the parties as contained in the university's bulletins, circulars and regulations made available to the student, become a part of this contract.”) (citations omitted); *Barnes v. Bd. of Regents of the Univ. of Georgia*, No. 2012CV212942, at 2 (Ga. Super. Ct. July 23, 2012) (“The Court finds the [student code of conduct] demonstrates an intent to enter into a binding agreement.”). *But see Lucero v. Curators of Univ. of Missouri*, 400 S.W.3d 1, 4-5 (Mo. Ct. App. 2013) (“While other jurisdictions have found a contractual relationship exists between a student and a university . . . the parties have not cited, nor has our research uncovered, any case law in Missouri that expressly finds the existence of a contractual relationship between a student and a university.”) (citations omitted).
expulsion from a state medical school on breach of contract grounds, a Kentucky appellate court noted:
   Our Supreme Court has noted that the relationship between a private college and its students can be characterized as contractual in nature. We can discern no reason why the same rule cannot be applied to public universities, and are of the opinion that indeed an implied contract existed between [the student] and the University and/or College of Medicine in this case.160
As to the source of the implied contract, the Court recognized:
   The rights and obligations of the parties as contained in the University's bulletins, circulars and regulations made available to the student become a part of the implied contract.161
Similarly, in Corso v. Creighton University, an expelled medical school student, Salvatore Corso, sued the school for breach of contract for failure to follow the procedure set forth in the student handbook.162 The Eighth Circuit observed:
   The relationship between a university and a student is contractual in nature. In order to establish his claim, Corso must prove that the University breached a contractual right. For our purposes, the Creighton University Handbook for Students 1981–82 [Student Handbook] is the primary source of the terms governing the parties’ contractual relationship.163
   In Ross v. Creighton University, a case involving a breach of contract claim by a college basketball player who alleged that he was denied any meaningful access to the academic curriculum, the Seventh Circuit noted that “the ‘basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.”164

161 Id. (citation omitted).
162 Corso v. Creighton Univ., 731 F.2d 529, 530 (8th Cir. 1984).
163 Id. at 531 (citations and footnotes omitted).
164 Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992). Courts have also held that faculty handbooks and other documents could similarly be deemed as contracts between professors and their institutions. See e.g., Brady v. Bd. of Trustees 196 Neb. 226, 230-231 (Neb. 1976) (holding that faculty employment letter and institutional bylaws were contractual); Sola v. Lafayette College, 804 F.2d 40, 45 (3d Cir. 1986) (holding that language in faculty handbook had contractual status); Arneson v. Board of Trustees, 210 Ill. App. 3d 844, 850-851 (Ill. App. Ct. 1991) (holding that language in faculty handbook was legally binding).
In a Texas case involving a student’s dispute with a public nursing school, the student claimed that the school breached its contract by forcing her to withdraw from the program based on different requirements than were contained in the university catalog at the time of her enrollment. The Texas appellate court wrote, “We hold that a school's catalog constitutes a written contract between the educational institution and the patron, where entrance is had under its terms.” The Court of Appeals of Texas later distinguished this case from a dispute involving a student who was expelled for failing a required course. The Court held that “[i]n light of the express disclaimer in the [school catalog], no enforceable contract existed in the present case.” This holding suggests that all a college or university needs to do to avoid contractual obligations is insert disclaimers into its written materials. Indeed, some commentators advocate that schools follow this practice to avoid contractual liability.

However, some courts will interpret these documents in accordance with the unique context of higher education. For example, in a case involving professors claiming breach of contract, five non-tenured faculty members were summarily terminated for their involvement in campus protests. The faculty members argued “that the University failed in its obligation, incident to their contracts, to give the appropriate advance notice of their non-renewal.” The university argued that a disclaimer in the handbook negated any contractual obligations arising from this document. The D.C. Circuit rejected the disclaimer, observing:

Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.

166 Id. at 506.
168 Id. at 211.
169 See e.g., Sara Kupferer, Walter Parrish & Dennis Gregory, Student Handbooks: Are they Legally Binding, CAMPUS SAFETY & STUDENT DEV., Fall 2011, at 11 (“Good practice tips when writing an institution’s student handbook encourage the inclusion of a disclaimer stating that the handbook is not a legally binding contract between the student and the institution.”).
171 Id. at 1132.
172 Id. at 1135.
The D.C. Circuit found in favor of the professors noting that the faculty handbook gave the professors a contractual right to reasonable notice and an opportunity to be heard.173 

Other courts, in disputes regarding students’ rights, have nullified disclaimers contained in college catalogs based on unconscionability. For example, in *Gamble v. University System of New Hampshire*, a student brought a breach of contract claim against a public university for arbitrarily raising tuition after the registration deadline.174 The Supreme Court of New Hampshire found that the disclaimer contained in the catalog was unconscionable.175 The Court observed, “It is inconceivable that the University could retain carte blanche authority to raise the tuition at any time during the semester for any amount it deems appropriate.”176 Finally, some courts will refuse to find explicit contracts based on disclaimers, but nonetheless, find obligations based on implicit agreements. For example, in *Southwell v. University of the Incarnate Word*, a nursing school student brought a breach of contract action against the school after she failed a required course and was not able to receive her degree as she planned.177 A Texas appellate court found that while a disclaimer in the university bulletin was effective in negating an express contract, an implied contract nonetheless existed.178 The Court observed, “The specific terms of such a contract must logically be defined by the college or university’s policies and requirements.”179 As these cases suggest, some courts will find ways to find binding obligations between students and their institutions, even when disclaimers are in place. This approach is better than finding that a college or university is bound by no contractual obligations at all.

In the next section, I turn to the ways in which the American Association of University Professors (AAUP) has articulated student academic freedom to elucidate how colleges and universities should conceptualize student academic freedom in their contracts with their students.

### B. American Association of University Professors’ Standard of Academic Freedom

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173 Id.
175 Id. 14-15.
176 Id. at 15.
178 Id. at 356.
179 Id.
When the terms of a higher education agreement are ambiguous, some courts turn to policy statements issued by the AAUP to determine the reasonable expectation of the parties. For example, in Browzin v. Catholic University of America, a professor of engineering was terminated due to the university claiming conditions of “financial exigency.” The parties agreed that the 1968 AAUP regulations were incorporated by the employment contract between the professor and university. In resolving this dispute in favor of the university, the D.C. Circuit relied on a number of AAUP materials outside the 1968 regulations to interpret the agreement, observing:

Those materials include statements widely circulated and widely accepted by a large number of organizations involved in higher education (such as the 1925 Conference Statement and the 1940 Statement of Principles on Academic Freedom and Tenure), as well as guidelines and reports issued by the AAUP as a result of its investigations into incidents where principles of academic freedom or tenure have allegedly been violated. As to the former documents—the widely accepted statements—the propriety of our considering them in interpreting the contract here could hardly be questioned. They form a kind of legislative history for the 1968 Regulations, and they do represent widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards.

As such, these documents can inform the ways in which the courts interpret contractual obligations between students and their colleges. Instead of waiting for legal disputes over vague terms, however, I propose that contracting parties explicitly codify AAUP policies in student handbooks, college handbooks, and institutional rules. In what follows, I briefly outline some of the major policy statements that the AAUP has formulated that relate to academic freedom.

In 1915, the AAUP set forth its first policy statement on academic freedom titled the Declaration on Academic Freedom and Academic
Tenure. The 1915 declaration recognized two traditional applications of academic freedom arising from the German model of higher education: “to the freedom of the teacher and to that of the student, lehrfreiheit [to teach] and lernfreiheit [to learn].” However, the declaration’s focus was almost exclusively on the teacher. While remaining mostly silent on the student’s freedom, it provided that professorial freedom entailed freedom of scholarly research and inquiry, classroom teaching, and speech and conduct outside the classroom. There were limits to this freedom in relation to the students’ right to learn in certain ways. For example, when teaching about “controversial matters,” the professor was required to:

[B]e a person of fair and judicial mind…he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.

This limitation on professorial freedom evinced the AAUP’s view that higher education, at its best, was the enabling of students to think critically and not forcing students to blindly accept dogmatic conclusions set forth by professors.

The AAUP further defined the contours of academic freedom in 1940, in a statement drafted together with the American Association of Colleges, titled the Statement of Principles on Academic Freedom and Tenure. The 1940 statement explained the purposes of tenure and explicated the details of professorial freedom set forth in the 1915 declaration. It also defined some limits on professorial academic freedom, once again in relation to the

184 Id. at 20.
185 Id. (“It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher.”).
186 Id.
187 Id. at 33.
188 See id. at 35 (“The teacher ought also to be especially on his guard against taking unfair advantage of the student’s immaturity by indoctrinating him with the teacher’s own opinions before the student has had an opportunity fairly to examine other opinions upon the matters in question, and before he has sufficient knowledge and ripeness of judgment to be entitled to form any definitive opinion of his own.”).
190 Id. at 40–41.
students’ right to learn. For example, the statement noted that “teachers are entitled to freedom in the classroom discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject.”\textsuperscript{191} American higher education historian, Christopher J. Lucas, writes about the 1940 statement: “In time, most colleges and universities accepted its broad outlines, and were reluctant to be found in noncompliance with its strictures.”\textsuperscript{192} Similar to the 1915 declaration, the 1940 statement remained mostly silent as to student freedom.

It was not until 1967 that the AAUP, in collaboration with several other higher education organizations, set forth a policy statement that specifically focused on student academic freedom titled the “Joint Statement on Rights and Freedoms of Students.”\textsuperscript{193} The 1967 statement was written in a time of student revolt and activism on college and university campuses across the country. It was in the wake of the civil rights movement,\textsuperscript{194} and the beginning of the Black Power movement.\textsuperscript{195} It was around the same time as the Free Speech Movement at the University of California at Berkeley.\textsuperscript{196}

\textsuperscript{191} Id. at 41. An interpretive comment clarifying this language was issued in 1970 that provided: The intent of this statement is not to discourage what is “controversial.” Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject. See American Association of University Professors & Association of American Colleges, Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments, 56 AAUP BULL. 323, 325 (1970).

\textsuperscript{192} Christopher J. Lucas, American Higher Education 208 (2006). While most higher education institutions formally or informally adopted the 1940 statement, I argue that colleges and universities should also adopt AAUP policies that specifically outline student academic freedom.


and the inception of the student-led movement against the Vietnam War.\textsuperscript{197} This was the time where student activists, en masse, were protesting on and off campuses in order to push for social change.

The purpose of the 1967 statement was “to enumerate the essential provisions for student freedom to learn.”\textsuperscript{198} Specifically, it outlined the academic freedom rights of students both inside and outside the classroom. Inside the classroom, the statement urged that “[t]he professor in the classroom should encourage free discussion, inquiry, and expression,” and that “[s]tudent performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.”\textsuperscript{199} The statement acknowledged, “Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.”\textsuperscript{200}

The 1967 statement also provided guidance outside the classroom, particularly as it related to students’ freedom of association. It declared, “Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. They should be free to organize and join associations to promote their common interests.”\textsuperscript{201} Moreover, the statement noted, “Students and student organizations should be free to examine and discuss all questions of interest to them, and to express opinions publicly and privately. They should be free to support causes by orderly means which do not disrupt the regular and essential operation of the institution.”\textsuperscript{202}

The statement further recognized the academic freedom right of students to participate in institutional governance. It provided, “As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs.”\textsuperscript{203}

\begin{thebibliography}{99}
\bibitem{197} \textit{See generally} \textsc{Kirpatrick Sale, SDS (Students for a Democratic Society)} (1974); \textsc{Tom Hayden, The Port Huron Statement: The Vision Call of the 1960s Revolution} (2005); \textsc{Simon Hall, Peace and Freedom: The Civil Rights and Antiwar Movements in the 1960s} (2006).
\bibitem{198} 1967 joint statement, \textit{supra} note \textsc{197}, at 366.
\bibitem{199} \textit{Id.}
\bibitem{200} \textit{Id.}
\bibitem{201} \textit{Id.}
\bibitem{202} \textit{Id.} at 366-367.
\bibitem{203} \textit{Id.} at 367.
\end{thebibliography}
Finally, the statement addressed students’ rights, in general, both on and off campus. It observed that “students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy” and warned that “[f]aculty members and administrative officials should insure that institutional powers are not employed to inhibit such intellectual and personal developments of students as is often promoted by their exercise of the rights of citizenship both on and off campus.”\(^{204}\)

In sum, based on the 1967 statement, academic freedom for students at American colleges and universities is freedom to actively engage in the learning process in the classroom, associate and organize with others on campus, express their ideas on and off campus, and meaningfully participate in institutional governance. These elements of student freedom are connected by one fundamental principal—the student’s freedom to learn.

These elements should be incorporated into student handbooks, university catalogs, institutional rules and other written materials to create contractual obligations for both universities and their students. In the next Part, I will explore the tensions between “the marketplace of ideas” and demands for racial equity and inclusion and suggest a balancing-test approach that incorporates students’ rights in resolving this tension. I will argue that the AAUP framework contained in the 1967 statement, codified as contractual obligations, can provide the proper framework.

IV. TENSION BETWEEN “THE MARKETPLACE OF IDEAS” AND STUDENT DEMANDS FOR RACIAL EQUITY AND INCLUSION

In Keyishian v. Board of Regents of the University of New York, the Supreme Court described the higher education classroom as “the marketplace of ideas.”\(^ {205}\) Keyishian involved a challenge to a state-imposed loyalty oath for all state employees. The case was brought by four university professors and a university librarian who also served as a part-time lecturer.\(^ {206}\) The Court struck down the loyalty oath requirement (i.e., the Feinberg Law) as a violation of the First Amendment.\(^ {207}\) The Court recognized, “The classroom is peculiarly the ‘marketplace of ideas.’ The

\(^{204}\) Id. The 1967 joint statement also outlines procedural standards in disciplinary proceedings. Id. at 367-368.


\(^{206}\) Id. at 592.

\(^{207}\) Id. at 609. This case was the first to link academic freedom with the First Amendment (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”). Id. at 603.
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.”

Tension potentially exists between higher education as “the marketplace of ideas” and student demands for racial equity and inclusion. The hope is that all ideas will be expressed and debated and the best ones will prevail. However, one student’s speech disparaging racial minorities in the marketplace can impede another student’s sense of inclusion and belonging on that campus and prevent that student from even participating in the dialogue. And one student’s demands for inclusion and belonging can come at the expense of another student having to reflect on how his or her speech negatively affects others before speaking and chill speech in that way. In sum, there are a number of competing interests at stake when analyzing free speech issues. In order to provide concrete examples, I will detail two recent attempts to codify free speech on campus.

A. Two Universities’ Recent Attempts to Codify Free Expression on Campus

1. University of Chicago’s Policy

In July 2014, the president and provost of the University of Chicago asked free speech scholar, Geoffrey R. Stone, to lead a faculty committee on freedom of expression. The committee was charged “in light of recent events nationwide that have tested institutional commitments to free and open disclosure” to draft a statement “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”

The committee’s statement was released in January 2015. Since the University of Chicago is a private institution, it is not restricted by the First
Amendment. As such, the Report does not mention this amendment as a foundation for its principles. Instead, the authors focus on policy considerations relevant to higher education. If this document is legally binding, it will be based on state contract law.\footnote{See e.g., Holert v. Univ. of Chicago, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (noting that the relationship between a student plaintiff and the University of Chicago is “strictly contractual in nature.”); Raethz v. Aurora Univ., 346 Ill. App. 3d 728, 732, 805 N.E.2d 696, 699 (2004) (“[I]n the student-university context, a student may have a remedy for breach of contract when it is alleged that an adverse academic decision has been made concerning the student but only if that decision was made arbitrarily, capriciously, or in bad faith.”) (emphasis in original and citation omitted).}

After briefly recounting the institution’s historical dedication to free speech, it begins:

Because the University of Chicago is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community “to discuss any problem that presents itself.”\footnote{Id.}

The statement acknowledges that ideas “will often and quite naturally conflict.”\footnote{Id.} It continues:

But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.\footnote{Id.}

The statement is focusing particular attention to the obligations of the university in not fettering speech. The statement then turns to the proper limits of speech by noting:

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades

\footnote{Id.}

\footnote{Id.}

\footnote{Id.}
substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.\(^{217}\)

The statement notes that these limits “are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.”\(^{218}\) The statement then summarizes its main point, “In a word, the 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.”\(^{219}\)

Again, the statement focuses on the university’s commitment to open dialogue. The statement emphasizes that “fostering the ability of members of the University committee to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University’s educational mission.”\(^{220}\) Finally, it stresses:

> 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. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.\(^{221}\)

Here, for the first time in the statement, obligations are imposed on the university committee as a whole. While prior sections of the statement focused on the university’s obligations and commitments, in this paragraph it imposes a duty on members of the university community in which the university will enforce when breached. It prohibits members of the university community from any obstruction of or interference with on-campus speech.\(^{222}\)

\(^{217}\) Id.
\(^{218}\) Id.
\(^{219}\) Id.
\(^{220}\) Id.
\(^{221}\) Id.
\(^{222}\) Note that the University of Chicago has a protest policy in place that provides, in part:

> The right of freedom of expression at the University includes peaceful protests and orderly demonstrations. At the same time, the University has long recognized that
The popularity of the Chicago statement is growing. Portions of it have already been adopted by Princeton University, a private institution, along with Purdue University, a public entity, and other colleges and universities. Further, the Foundation for Individual Rights in Education has endorsed the statement and has been involved in a campaign to urge higher education institutions across the country to adopt it.

2. University of Minnesota’s Policy

On March 10, 2016, a faculty committee at the University of Minnesota, in a 7-2 vote, provisionally approved and invited comment on a policy statement regarding free speech that has been hailed as “the strongest such affirmation seen on any campus.” This statement comes in the wake of several campus controversies—including incidents of protestors shouting down invited speakers and the university’s investigation into an event...
poster that reproduced a controversial illustration of the prophet Mohammed from the French satire magazine Charlie Hebdo. The proposed statement begins, “Ideas are the lifeblood of a free society and universities are its beating heart. If freedom of speech is undermined on a university campus, it is not safe anywhere. The University of Minnesota resolves that the freedom of speech is, and will always be, safe at this institution.”

The statement then enumerates four core principles. First, “A public university must be absolutely committed to protecting free speech, both for constitutional and academic reasons.” The statement explains:

As a public institution, the University of Minnesota has a constitutional obligation under the First Amendment to safeguard the freedom of speech. As an academic institution, the University must cultivate a community-wide norm of respect for free speech that goes beyond ensuring mere First Amendment compliance. . . . Every member of the University community—including administrators, faculty, offices, staff, and students—must respect both the right of others to speak and the right of listeners to hear that speech. No member of the University community has the right to prevent or disrupt expression.

Of particular note in this section, the University of Minnesota is a state institution so its statement incorporates First Amendment principles in defining the contours of free speech. At the same time, this public institution also promulgates additional principles based on community-wide norms of being an academic institution. This part also focuses on the obligations of both the institution and its individual members to ensure free speech. It proposes an absolute prohibition on speech disruption.

Second, the statement provides, “Free speech includes protection for speech that some find offensive, uncivil, or even hateful.” The statement elaborates:

226 Dale Carpenter, Israeli Academic Shouted Down in Lecture at University of Minnesota, WASH. POST, Nov. 4, 2015, available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/04/israeli-academic-shouted-down-in-lecture-at-university-of-minnesota/. The author of this article, Dale Carpenter, is also a faculty member on the committee that subsequently developed the free speech statement. In the article, Carpenter states that “there is no right to shout down a speaker at an academic lecture on the grounds of a public university.” Id.

227 Minnesota Faculty Consultative Committee, Free Speech at the University of Minnesota: Four Core Principles, March 10, 2016, at 1, http://usenate.umn.edu/usenate/docs/160505free_speech_core_principles.pdf [hereinafter “Minnesota principles”].

228 Id. at 1.
229 Id.
230 Id. at 2.
The shock, hurt, and anger experienced by the targets of malevolent speech may undermine the maintenance of a campus climate that welcomes all and fosters equity and diversity. But at a public university, no word is so blasphemous or offensive it cannot be uttered; no belief is so sacred or widely held it cannot be criticized; no idea is so intolerant it cannot be tolerated. So long as the speech is constitutionally protected, and neither harasses nor threatens another person, it cannot be prohibited.231

Third, the statement provides, “Free speech cannot be regulated on the ground that some speakers are thought to have more power or more access to the mediums of speech than others.”232 The statement clarifies, “The University may use its resources to ensure that community members have space and access to present different viewpoints. But University officials . . . cannot assume the authority to pick and choose who may speak or how much they may speak based on the perception that some speakers have ‘too much’ or ‘too little’ power in public debate.”233

Finally, the statement emphasizes, “Even when protecting free speech conflicts with other important University values, free speech must be paramount.”234 The statement explains, “The University does not condone speech that is uncivil or hateful, and University officials should make this clear. Nevertheless, on those rare occasions when protecting expression conflicts with other values, like maintaining a climate of mutual respect on campus, the right to speak must prevail.”235

The faculty committee later unanimously approved for further consideration a list of five recommendations to protect free speech on campus.236 First, the recommendations propose that the university take steps to “[f]oster understanding of the meaning and value of free speech” by including the statement on free speech “in all orientation materials, all University catalogues, and all employee handbooks.”237 If this

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231 Id.
232 Id.
233 Id.
234 Id.
235 Id.
237 Minnesota Faculty Consultative Committee, Free Speech at the University of Minnesota: Recommendations, April 21, 2016, at 1, available at http://usenate.umn.edu/usenate/docs/160505free_speech_recommendations.pdf [hereinafter “Minnesota recommendations”].
recommendation is implemented, these written materials may later be deemed contractual in Minnesota. Second, the recommendations urge that the university “[e]ncourage a climate of respectful debate about controversial topics,” including “efforts to sponsor structured debates about controversial topics.” Third, the recommendations outline procedures to “[v]igorously protect free speech when serious disruption is anticipated or actually occurs.” Fourth, the recommendations advocate for the appointment of “a free speech-advocate whose role is to ensure that freedom of expression is respected and protected during any investigation in which the investigative office determines that all or part of the basis for the complaint is expression.” This recommendation is made in the aftermath of an investigation by the University of Minnesota’s Office of Equal Opportunity and Affirmative Action (EOAA) based on complaint lodged by Muslim students. It is a recommendation in which the idea that free speech is a paramount value—superseding all others—is most evident. The recommendation elaborates:

Investigations by various University offices—including but not limited to EOAA and Human Resources—sometimes implicate free speech values. Yet despite the potential threat to free speech posed by such investigations, it is not clear that University investigatory offices see it as their duty to consider the effect of their investigations on the climate for free speech. They do not necessarily internalize the value of free speech at a public university. Their focus is on cleansing public discussion so that it is inoffensive. Otherwise, they fear, the University will be unwelcoming to some in the community. The effect is to create an imbalance by which protected speech is subordinated to other values. But speech may not be curtailed simply because it is offensive. And it is the duty of every member of the University community—including those with investigatory power—to respect and protect speech.

This language frames the work of “investigatory offices”—such as the diversity office and human resources—as pitted against free speech values

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238 *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 113 (Minn. 1977) (“Elements of the law of contracts have been applied to the student-university relationship, but rigid importation of contractual doctrine has been rejected.”)

239 Minnesota recommendations, *supra* note __ at 1.

240 *Id.* at 1-2.

241 *Id.* at 3.


and argues that such work compromises free speech because its purpose is to “cleanse” public discussion. Thus, the recommendation urges the need of a free speech advocate to fight back against this perceived threat. Finally, the recommendations call for “minimum procedural protections for faculty, students, and others subject to investigation [that involve speech].

B. A Glaring Omission in the Universities’ Policies

Insofar as the free speech statements from University of Chicago and University of Minnesota are based on policy considerations that are unique to higher education, there is an essential consideration that is absent from both reports. Specifically, they both fail to consider the academic freedom of the student protestors, in favor of an overarching institutional commitment to free expression on campus. The reports do this in a number of ways.

First, the reports assume that students’ interests are necessarily aligned with an absolute commitment to free speech and “the marketplace of ideas”—even when specific instances of that freedom allows speech that makes students of color feel degraded or unwelcome. This is not always the case. Based on the historical backdrop of racial exclusion in American education, placing such a premium on free speech, without any understanding of the context of why the students are protesting for racial justice, is misplaced. Historically, free speech principles have not shielded people of color from racism. For example, the First Amendment cozily existed with slavery and Jim Crow. It did nothing to protect the speech of slaves or the expression of racial minorities who were refused entry into the classrooms to speak. In sum, people of color have been silenced in that free speech has historically not applied to them. They have been excluded from “the marketplace of ideas.” One of the ways this exclusion occurred is that judges have not historically recognized the free speech rights, or any other, of people of African descent. Another legal mechanism that enabled

244 Id.
245 Id. at 4.
246 See e.g., Dred Scott v. Sanford, 60 U.S. 393, 404-408 (1856) (“The question before us is, whether [people of African descent] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subdued by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them . . . They had for more than a century before
Based on this history, many students who are pushing for racial justice today are not comforted by appeals to embrace the First Amendment as the supreme guiding principle that will protect their interests. Many student activists have expressed this sentiment. For example, in an open letter to the Wesleyan community in the fall of 2015, a number of students of color, commenting on racial tensions on campus, wrote:

When students of color speak our lives into existence, our speech comes under attack. When we defend our lives, we are harassing you. When we demand safety, we are attacking you. Our unapologetic voices are deranged screams; our open hands are clenched fists; our cellphones, weapons, our pigment, targets. Centering this conversation on free speech, without the context of the voices historically censored and misrepresented, is the very manifestation of systemic and structural racism that continues to silence and murder people of color.

These student activists understand that a blind embrace of free speech principles is not an adequate solution to address their grievances. Indeed, they recognize that this has been a tactic of “systemic and structural racism” that has been used against them in their fight for racial justice.

Second, the policy statements create a bright-line rule restricting any disruption as an illegitimate form of protest without considering that sometimes, at least limited disruption is a type of legitimate expression that has been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

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247 See Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1715-1724 (1993) (analyzing how whiteness is a form of property that enabled its possessors to acquire and secure other forms of property while those who lacked it—specifically African Americans and Native Americans—have been denied such acquisition and security); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27-77 (2006) (discussing how whiteness and non-whiteness—in particular, Asian-ness—were legally constructed to exclude non-white people from naturalization); Bethany R. Berger, Red: Racism and the American Indian, 56 UCLA L. REV. 591, 628-639 (2009) (detailing the unique ways in which racism excluded Native Americans from public institutions, even though the policies at the time—between 1871 to 1928—were touting assimilation); Philip Lee, Identity Property: Protecting the New IP in a Race-Relevant World, 117 W. VA. L. REV. 1183, 1185-1196 (2015) (discussing the interplay between whiteness and non-whiteness in which whiteness has been protected by law, while non-whiteness has been degraded).


249 Id.
conveys strong dissent. The bright-line rule does not allow the flexibility to take into account the protestor’s right to use this form of expression. Writing when he was president of the AAUP, Cary Nelson noted that "an interruption that signals extreme objection to a speaker's views is part of the acceptable intellectual life of a campus, but you have to let the speech go on." Nelson later wrote, “Though briefly interrupting an invited speaker may be compatible with academic freedom, actually preventing a talk or a performance from continuing is not.” This is an effective balancing of interests, in that it allows the speaker to continue and finish, it allows the protestors to voice their strong objections—even to the point of briefly disrupting a speaker, and it allows the audience to hear all of these messages. A prohibition against any and all disruption fails to take into account the multiple interests involved in campus speech disputes.

Third, the statements assume that student dissent is something to be merely tolerated by the university community. This is problematic in that it ignores the ways in which student activism can be beneficial. In the alternative, I propose that student activism should be framed as a form of student learning and civic engagement and embraced as something that the community can learn from.

Student activism has a number of benefits for numerous stakeholders. For example, for students, activism is associated with a stronger sense of student leadership, democratic citizenship, civic engagement, and higher levels of political involvement later in life. Also, campus cultures conducive to student activism positively affect the student’s development of critical thinking skills. Further, even non-participating engaged observers of student activism—"individuals who are attentive to movement writings

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252 See Chambers & Phelps, supra note __, at 27.
256 See e.g., Lisa Tsui, Effects of Campus Culture on Students’ Critical Thinking, 23 R. OF HIGHER EDUC. 421, 432 (2000). A professor at one of the studied institutions observed, “The campus culture here has to do with environmental concerns, social activism, and social justice . . . As a result [the students] have to be able to examine issues.” Id.
and activities, and express moral and even financial support for them, but who take no other action257—have increased political participation later in life.258 Finally, student activism can also have benefits for the institution by highlighting issues and grievances that would otherwise be unknown or misunderstood.259 The causes that student activists choose to champion are reflections of how they are experiencing their institutions and their home communities. Therefore, student activism can serve to create spaces of learning where the university community—students, faculty, and staff—can be exposed to the issues underlying the students’ grievances.

This is the context of modern student activism for racial justice. Although seen as nuisances by some administrators and faculty,260 it actually benefits both the student activists, student observers, and the institution itself. Thus, since the “marketplace of ideas”—as framed as a mechanism to protect people who say things offensive to racial and other minorities—is just one of many competing values, there should be some mechanism to acknowledge and consider the other values. In the next section, I propose a balancing test that takes into account the students’ right to engage in such activism in two particular contexts—students interrupting invited speakers and students occupying buildings.

C. Reconciliation: A Balancing Test

Given its benefits to the students and the university community as a whole, student activism should be viewed as a developmental component of student learning. This is entirely consistent with the AAUP’s 1967 statement’s focus on lernfreiheit—the students’ freedom to learn. Further, email and social media platforms have provided innovative methods for student activists to express themselves, connect with others, and organize

258 Id. at 80.
259 See Hamrick, supra note __ at 257 (“Dissenting students offer alternate opinions, conclusions, and judgments, allowing a broader range of perspectives and enriching subsequent dialogue. In terms of democratic political theory, the challenges to extant assumptions represented by this broader range of perspectives increases the potential that a campus can make considered, conscious decisions on what multiculturalism will mean on the campus.”).
Perhaps because of this enabling technology, today’s college freshman class is more likely to participate in student-led protests than in each of the nearly five decades that preceded it, including the freshmen of the 1960s and 1970s—two decades known for their campus activism. University policies should take students’ protest rights into account in crafting their free speech policies. I propose a balancing test for this purpose. This test could be applied to many tactics of student activists—from interrupting classes to painting political messages on campus buildings to staging die-ins on campus sidewalks. However, to illustrate my proposal, I present two specific tactics that have spurred targeted university policy responses—speaker interruption and building occupation.

1. Speaker Interruption

In recent years, student activists for racial justice have occasionally interrupted speakers to show their strong dissent, sometimes even shutting down the events through their disruption. I believe that the invited speakers at these events should be allowed to finish their presentations; however, instead of advocating for a bright-line rule that bans all interruption, I wish to propose a balancing test when formulating campus policies that takes into account the student protestors’ academic freedom along with the rights of invited speakers and audience members. To be clear, I am not arguing for a university-imposed prohibition on speech that students find objectionable. Further, I am not arguing that students have the right to terminate events that feature speakers that the students strongly disagree with. Instead, I am arguing for a balancing test in campus speech disputes that takes into account multiple competing interests. Two

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institutions have attempted such a balance in their policies—Harvard Law School and University of Michigan.

a. Harvard Law School’s Policy

Harvard Law School’s protest and dissent policy is an attempted balance of multiple interests.\textsuperscript{264} In addressing the balancing of rights at events featuring invited speakers, the policy begins:

The right to dissent is the complement of the right to speak, but these rights need not occupy the same forum at the same time. The speaker is entitled to communicate her or his message to the audience during her or his allotted time, and the audience is entitled to hear the message and see the speaker during that time. A dissenter must not substantially interfere with a speaker’s ability to communicate or an audience’s ability to see and hear the speaker.\textsuperscript{265}

In addressing noise and the audience’s responsibility, the policy continues:

Responding vocally to the speaker, spontaneously and temporarily, is generally acceptable, especially if reaction against the speaker is similar in kind and degree to reaction in his or her favor. Chanting or making other sustained or repeated noise in a manner which substantially interferes with the speaker’s communication is not permitted, whether inside or outside the meeting.

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The audience, like the host and the speaker, must respect the right to dissent. A member of the audience or the host organization who substantially interferes with acceptable dissent is violating these guidelines in the same way as a dissenter who violates the rights of the speaker or audience.\textsuperscript{266}

Harvard Law School’s policy is an attempt to balance the interests of: 1) the invited speaker; 2) the protestor; and 3) the audience member. Under the policy, a protestor will not be allowed to substantially interfere with a speaker, but his or her right to dissent is taken into consideration in the balance. Thus, a spontaneous and temporary outburst is an acceptable form of expression, while sustained and repeated chanting is not. Also, the

\textsuperscript{264} Allan R. Gold, \textit{Education; At Harvard, Guidelines on Speech and Dissent}, NY TIMES, Oct. 12, 1998, available at http://www.nytimes.com/1988/10/12/us/education-at-harvard-guidelines-on-speech-and-dissent.html ("Sarah Wald, the law school’s dean of students, said the new guidelines were "an attempt to balance the rights of speakers with the rights of people to protest and dissent.").


\textsuperscript{266} Id.
audience is not allowed to violate the rights of the protestor to express dissent. This explicit protection of protestors’ rights is crucial because it acknowledges that this form of expression is worthy of protection. The First Amendment does not apply to Harvard Law School because it is not a state actor. Therefore, if this policy creates any binding obligations, then they may be enforceable in contract law.267

b. University of Michigan’s Policy

The University of Michigan, in a free speech policy that applies to events with invited speakers or artists, also attempts to balance a number of competing interests that includes the freedom of the protestors.268 The policy provides:

Within the confines of a hall or physical facility, or in the vicinity of the place in which a member of the University community, invited speaker, or invited artist is addressing an assembled audience, protesters must not interfere unduly with communication between a speaker or artist and members of the audience. This prohibition against undue interference does not include suppression of the usual range of human reactions commonly displayed by an audience during heated discussions of controversial topics. Nor does this prohibition include various expressions of protest, including heckling and the display of signs (without sticks or poles), so long as such activities are consistent with the continuation of a speech or performance and the communication of its content to the audience.269

The policy then explicitly recognizes the rights of protestors:

Protesters have rights, just as do speakers and artists. The standard of “undue interference” must not be invoked lightly, merely to avoid brief interruptions, or to remove distractions or embarrassment. The University has an obligation to provide members of the community, and invited speakers and artists, with personal security and with reasonable platforms for expression; moreover, it has an obligation to insure audience access to public events. The University does not, however, have the obligation to insure audience passivity. The

267 See e.g., Walker v. President & Fellows of Harvard Coll., 82 F. Supp. 3d 524, 528 (D. Mass. 2014) (“[A]n entering student forms a contractual relationship with her university’ . . . ‘Contracts between students and universities are interpreted “in accordance with the parties’ reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them.’”) (citations omitted).


269 Id.
University cannot accept stipulations by invited speakers or artists of terms of appearance that are inconsistent with allowing full freedom of expression to the University community.270

The University of Michigan’s policy, like Harvard Law School’s, acknowledges and attempts to balance a number of potentially conflicting interests. It goes further than Harvard’s in protecting protestor rights because it explicitly allows “heckling” as long the speech is allowed to continue. It also permits brief interruptions and even outbursts that can cause distraction or embarrassment. The University of Michigan, as a public entity, is a state actor; thus, the First Amendment applies to its policies. However, Michigan courts have been reluctant to frame the university-student relationship as contractual.271

While HLS and the University of Michigan are going in the right direction, I would urge that such statements should also incorporate the 1967 joint statement to their policies in order to provide a theoretical foundation for the student protestor’s right to dissent. In particular, the policies should include the statement’s focus on the students’ freedom to learn.272

2. Building Occupation

Another tactic that student activists for racial justice have used is occupying buildings, specific offices, and other non-common spaces on campus without official permission in order to draw attention to their demands. For example, in February 2015, thirteen students were arrested at the University of Minnesota after staging a seven-hour sit-in at the university president’s office.273 The students had a list of eight demands related to racial and gender equity and inclusion: 1) “More faculty for the Department of Chicano and Latino Studies;” 2) “The removal of racial descriptors from campus police crime alerts;” 3) “The reversal of the

270 Id.
271 See e.g., Amaya v. Mott Cmty. Coll., No. 186755, 1997 WL 33353479, at *1 (Mich. Ct. App. Mar. 7, 1997) (“Indeed, both state and federal courts have stated that under Michigan law contract and promissory estoppel claims brought by a student against a college or university fail.”). In states that refuse to recognize contractual obligations between students and their universities, one would expect that universities would follow their own policies and rules. At least one state permits challenges to universities, both private and public, through a statutory mechanism that protects people from arbitrary and capricious decisions made by such institutions. See N.Y. C.P.L.R. §§ 7801–06 (McKinney 2008).
272 See infra, Part III.B.
Similar occupations of campus buildings were frequent in the 2015-2016 academic year.275

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274 Id.

275 See e.g. Susan Svrluga, Princeton Protestors Occupy President’s Office, Demand “Racist” Woodrow Wilson’s Name be Removed, WASH. POST, Nov. 18, 2015, available at https://www.washingtonpost.com/news/grade-point/wp/2015/11/18/princeton-protestors-occupy-presidents-office-demand-racist-woodrow-wilsons-name-be-removed/ (“Student protesters filled Princeton’s historic Nassau Hall Wednesday afternoon, sitting in the university president’s office and refusing to leave until their demands to improve the social and academic experiences of black students on campus are met — starting with an acknowledgement of famous alumnus Woodrow Wilson’s “racist legacy” and the removal of his name from all buildings.”); Jason Song & Teresa Watanabe, After Days of Protest, Students Occupy Building at Occidental College, LOS ANGELES TIMES, Nov. 16, 2015, available at http://www.latimes.com/local/education/la-me-college-race-20151117-story.html (“After several days of protesting Occidental College's handling of diversity issues, students occupied an administrative building Monday, demanding that the school president step down if officials don't take such steps as creating a black studies major and hiring more minority faculty.”); Alisha A. Pina, Providence College Students Occupy President’s Office, PROVIDENCE J., Feb. 16, 2016, available at http://www.providencejournal.com/article/20160216/NEWS/160219449 (“More than 50 students of many ethnic backgrounds occupied the reception room of Providence College President Rev. Brian J. Shanley’s office Tuesday to demand improvements to what they characterize as ‘anti-blackness and racism on campus.’”); Claire E. Parker, Law School Activists Occupy Student Center, HARV. CRIMSON, Feb. 17, 2016, available at http://www.thecrimson.com/article/2016/2/17/activists-occupy-wasserstein/ (“Student activists began to occupy a portion of Harvard Law School's Caspersen Student Center Monday evening in an effort to create a space on campus they say has been denied to minorities at the school. Calling the lounge ‘Belinda Hall’ after a former slave of prominent Law School benefactors, the group of activists led by Reclaim Harvard Law said they plan to remain there indefinitely.”); Josh Logue, Protest and Power at Duke, INSIDE HIGHER ED, April 7, 2016, available at https://www.insidehighered.com/news/2016/04/07/duke-tries-end-protest-has-occupied-administration-building-days (detailing student protestors at Duke occupying the central administrative building after a parking attendant accused the university’s executive vice president of hitting her with his car and using a racial slur.); Pat Schneider, Student Protesters Occupy UW-Madison's College Library, Demand End to Graffiti Case, CAPITAL TIMES, April 21, 2016, available at http://host.madison.com/ct/news/local/education/university/student-protesters-occupy-uw-madison-s-college-library-demand-end/article_503ab154-39ee-59f7-a3b6-7db55b90333.html (detailing student protestors at University of Wisconsin-Madison occupying a campus library after a student was arrested in class for spray painting anti-racist messages across campus);
Most free speech policies simply prohibit any unauthorized building or office occupancy. However, in crafting speech policies or disciplining students who violate building occupancy rules through their protests, I again argue that the student’s academic freedom rights of dissent should be taken into account. This balancing should recognize the protestor’s rights, other student’s rights, and safety considerations. One possible application of this balancing test would treat students who occupy buildings as an act of protest with leniency when neither physical harm is committed nor property damage inflicted. If the students interfere with university operations—either administrative activities or teaching—then their rights to protest should be balanced with those affected by the occupation. Perhaps minor interference would be permitted determined on a case-by-case basis. However, serious and prolonged interference would not. As part of my framework, this balancing of interests would necessarily consider the student activists’ freedom to engage in public expressions of dissent.

My proposed balancing test is not limited to seizures of physical space. It would also apply to seizures in cyberspace. Specifically, a balancing of interests would be used in situations where student activists temporarily interrupt the operation of websites or seize different types of electronic data such as emails or cause other types of disruption in cyberspace. Although this has not been a prominent form of protest activity, I think it is reasonable to anticipate that student activists will use evolving technology along with their increased technical savvy in this way sometime in the near future. Students would not be shielded from institutional discipline in every situation, but they will be in some. And at the very least, their academic freedom right to dissent will be part of the balancing.

This balancing of multiple interests and rights shifts the discourse in a way that recognizes students as more than just passive receptacles of information who merely consume information provided by the institution. It acknowledges that students’ experiences and perspectives contribute to learning and that their voices are worth listening to. Indeed, some higher education administrators are taking note of the students’ demands and pursuing institutional reforms. More should follow.

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276 For example, a recently proposed free speech policy at the City University of New York gives the following examples of prohibited activities during a demonstration: 1) “overnight camping on university property;” and 2) “occupying or remaining on any property or facility owned or operated by the university after receiving due notice to depart.” See Maxine Joselow, Safeguarding Free Speech, INSIDE HIGHER ED, June 20, 2016, available at https://www.insidehighered.com/news/2016/06/20/cuny-considers-free-speech-policy.

In sum, student activism is all about learning. Students who engage in protest learn from it as do students who observe it. Professors and institutions should also take such activism as an opportunity to learn. Henry Reichman, AAUP Vice President and chair of the association’s Committee on Academic Freedom and Tenure, in language that is worth quoting at length, writes about student activists:

They will offend others even as they respond to deeper offenses against their own dignity. They may demonstrate indifference to the rights of others, as protesters everywhere always have. But, in doing so, they will learn. And that, it seems to me, is the essential point. Student academic freedom, in the final analysis, is about the freedom to learn. And learning is impossible without error. What is therefore most remarkable about today’s student movements is not their alleged intolerance or immaturity. It is not their intemperance or supposed oversensitivity to insult and indifference. It is that they have begun to grapple with issues that their elders have resisted tackling for far too long . . . But the university, and especially its faculty, must also be willing to learn from students. Faculty members should welcome the challenges the protesting students have posed. Student movements offer countless opportunities for students -- as well as their teachers -- to learn. To approach them in this way, in the spirit of the student academic freedom proclaimed and defined by the AAUP and its collaborators back in 1967, is therefore simply to fulfill our responsibility as educators. 278

In order to embrace activism as a learning opportunity for the university community, free speech policies should consider students’ rights to protest, as articulated in the 1967 statement,279 in addition to the rights of others. Otherwise, colleges and universities will be ignoring an essential part of academic freedom—that of the students.

CONCLUSION

Student activism for racial equity and inclusion is on a historic rise on college and university campuses across the country. Students are reminding

college campuses are leading to some swift responses and pledges of reform by college administrators.”); Sarah Brown, How 3 College Presidents are Trying to Move Their Campuses Past Racial Tensions, CHON. OF HIGHER EDUC., Aug. 17, 2016 (discussing administrative collaboration with students demanding racial equity and inclusion at Towson University, Oberlin College, and Washington University).


279 See infra, Part III.B.
us that Black lives matter. They are bringing attention to the ways in which the normal operation of the legal system creates racial and other inequalities. They are critiquing the ways in which their experiences and perspectives are pushed to the margins in classrooms, on campuses, and in society.

In attempting to formulate university policies that allow for such activism to be moments of teaching and learning for all involved, I argue in this Article that student academic freedom to protest should be taken into account in any free speech policy. Otherwise, student voices will be deemed irrelevant and protests will be unfairly reduced to unjustifiable outbursts by young people craving attention—something to be either tolerated as mere annoyances or extinguished as threats to order. But if administrators and professors take the time to listen to what students are saying and explore the issues underlying their grievances, much can be gained. I urge that colleges and universities move away from the question, “how do we stop our student activists,” toward the question, “what can we learn from our student activists.”

As I have argued in this Article, one way to start the process of learning from what student activists have to say is to include students’ rights in a balancing test when speech is disputed—e.g., in student protests involving invited speaker interruption, unauthorized building and office occupation, and even various forms of disruption in cyberspace. Such a test should be articulated in university policies and made binding through contract law. While student protestors may not always win in the balancing, at least their academic freedom right to engage in dissent will be part of the conversation. My hope is that recognition that student protest has positive value to the university community and is an essential part of academic freedom will begin to shift attention to the substantial issues underlying student grievances. In this way, student activism will truly be an opportunity for all to learn.