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The People v. Their Universities: How Popular Discontent Is Reshaping Higher Education Law

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THE PEOPLE V. THEIR UNIVERSITIES: HOW POPULAR DISCONTENT IS RESHAPING HIGHER EDUCATION LAW

Ben Trachtenberg¹

ABSTRACT

Surveys taken since 2015 reveal that Americans exhibit stark partisan divisions in their opinions about colleges and universities, with recent shifts in attitudes driving changes to higher education law. In recent years, Democrats have become slightly more positive about higher education. Concurrently, Republicans have become extremely more negative, and a majority of Republicans now tells pollsters that colleges and universities have an overall negative effect on the country.

Particularly in legislative chambers controlled by Republicans, public and elite dissatisfaction with higher education has led to legal interventions into the governance of universities, with new laws related to faculty tenure, the treatment of undocumented immigrant students, the use of state funds for disfavored programs, the composition of university governing boards, and campus speech, among other topics. At the federal level, during the Obama Administration advocates persuaded the Department of Education to demand sweeping changes to how institutions adjudicate allegations of sexual harassment and sexual assault. At the behest of different advocates and critics, Trump Administration officials have rescinded the prior guidance and are in the process of enacting new regulations on the same campus processes.

Higher education has real problems—such as skyrocketing tuition—which inspire real anger. Right-wing media outlets amplify this discontent, and politicians respond to voter outrage with hearings and legislation, deepening the lack of confidence. These phenomena are likely to endure and even to increase in intensity. Accordingly, higher education law has entered a new era in which college and university leaders must anticipate growing legislative intervention into day-to-day campus operations. Remaining true to institutional values in a newly difficult legal environment will challenge higher education administrators across the country, both at private and at public institutions. In particular, leaders of public institutions will face increasingly daunting tasks in states with conservative electorates.

¹ Associate Professor of Law and Director of Undergraduate Studies, University of Missouri School of Law. I thank colleagues and friends who have reviewed prior drafts, as well as leaders at various institutions who have spoken frankly about their perceptions of the issues presented in this Article. In particular, I thank Anne Alexander, Buz Barclay, Larry Dessem, Gordon Gee, Buck Goldstein, Bob Jerry, Michael Horn, Holden Thorp, Francine Trachtenberg, Joanna Trachtenberg, and Stephen Trachtenberg.

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“When we see an issue that’s split by political party, any kind of issue, it usually never recovers.”²

— *Brandon Busteed, polling expert, formerly at Gallup*

“[W]e are at the beginning of a new state-legislative era, and that beginning is auspicious.”³

— *Stanley Kurtz, conservative commentator and education reform advocate*

INTRODUCTION

The law of higher education has entered a period of rapid change, driven in part by recent souring of public opinion about colleges and universities. Americans overall report increasing dissatisfaction with higher education, and Republicans in particular tell pollsters that colleges and universities have an overall negative effect on the country. Growing distrust of university administrators and trustees has inspired legislatures to intervene in university governance, with new state and federal laws affecting issues from sexual assault hearings to affirmative action to faculty tenure to campus speech to the composition of governing boards. As public perception of higher education diverges further from the self-perception within institutions, further legal intervention appears inevitable.

An example from Michigan illustrates what can happen when university leaders adopt a high-profile policy position at odds with the wishes of the electorate. In June 2003, the University of Michigan Law School won a victory in the Supreme Court, which held that the law school’s affirmative action policies did not violate the Equal Protection Clause of the Fourteenth Amendment.⁴ The University’s president, Mary Sue Coleman, cheered the result as “a tremendous victory for the University of Michigan, for all of higher education, and for the hundreds of groups and individuals who supported us.”⁵ She added, “[t]his is a resounding affirmation that will be heard across the land—from our college classrooms to our corporate boardrooms.”⁶

Three years later, Michigan voters sent a resounding message of their own. On November 7, 2006, the Michigan Civil Rights Initiative—also known as “Proposal 2”—amended the state’s constitution after winning 58 percent of the vote.⁷ The new provision, codified as Article I, Section 26 of the Michigan Constitution, states that

² Alan Greenblatt, *How Higher Ed Became a Partisan Wedge Issue*, GOVERNING (May 2018), <https://www.governing.com/topics/education/gov-college-campus-politics-states-debate-partisanship.html> [<https://perma.cc/L8A6-4F87>] (quoting Brandon Busteed, a polling expert at Gallup).

³ Stanley Kurtz, *North Carolina Campus Free-Speech Act: First Goldwater-Based Law*, NAT’L REV.: CORNER (July 31, 2017, 7:49 PM), <https://www.nationalreview.com/corner/north-carolina-campus-free-speech-act-goldwater-proposal/> [<https://perma.cc/2BGT-SLEL>].

⁴ *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

⁵ *U.S. Supreme Court Rules on University of Michigan Cases*, MICH. NEWS (June 23, 2003), <https://news.umich.edu/us-supreme-court-rules-on-university-of-michigan-cases/> [<https://perma.cc/83QD-QYLR>].

⁶ *Id.*

⁷ Samuel Weiss & Donald Kinder, *Schuette and Antibalkanization*, 26 WM. & MARY BILL RTS. J. 693, 693–97 (2018); see also *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 298–99 (2014) (plurality opinion) (upholding the ballot initiative against constitutional challenge).

no “public college or university, community college, or school district” may “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”⁸ It continues, “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”⁹

The story of the *Grutter v. Bollinger* decision upholding the law school’s affirmative action, along with a companion case finding the university’s undergraduate affirmative action program unconstitutional,¹⁰ is a complicated one¹¹—as is the process by which proponents of Proposal 2 won access to the ballot and convinced a large majority of voters to adopt it. From the perspective of university governance and higher education law, however, the story is simpler. One of the nation’s premier public universities faced a legal challenge to its admissions process, which it had adopted in an effort to achieve what university leaders deemed important policy goals.¹² University lawyers fought the challenge all the way to the Supreme Court of the United States and emerged largely victorious.¹³ While the Court struck down the undergraduate system of “predetermined point allocations,”¹⁴ the Court concurrently signaled that by adopting a system like that of the law school, the University could continue its affirmative action program.¹⁵ Then, rejecting pleas to leave university governance to universities’ trustees and administrators, Michigan voters did what the Supreme Court would not and banned affirmative action at public universities across the state.¹⁶

Michigan is not unique in banning affirmative action by popular vote.¹⁷ Indeed, Ward Connerly, a businessman who had helped to lead a similar successful campaign

⁸ MICH. CONST. art. I, § 26(1).

⁹ *Id.* art. I, § 26(2).

¹⁰ *Gratz v. Bollinger*, 539 U.S. 244, 249–51 (2003).

¹¹ See Mary Sue Coleman, *When to Take a Stand on National Policy: Perspectives from a Supreme Court Case*, in *LEADING COLLEGES AND UNIVERSITIES* 253, 253–59 (Stephen Joel Trachtenberg et al. eds., 2018), for President Coleman’s analysis of what happened.

¹² See *id.* at 253.

¹³ See *id.* at 254, 256.

¹⁴ *Gratz*, 539 U.S. at 279 (O’Connor, J., concurring).

¹⁵ See *id.* (O’Connor, J., concurring) (“This policy stands in sharp contrast to the law school’s admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class.”).

¹⁶ See *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 311 (2014) (plurality opinion) (“Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.”); *id.* at 326–27 (Scalia, J., concurring) (noting that voters chose to amend university policy by constitutional amendment rather than by “voting in a favorable board” at each state university); *id.* at 351 (Sotomayor, J., dissenting) (noting that Section 26 to the Michigan Constitution, adopted by Michigan voters, “prohibits Michigan’s public colleges and universities from ‘grant[ing] preferential treatment to any individual or group on the basis of race.’” (quoting MICH. CONST. art. I, § 26(2))).

¹⁷ See *infra* Section I.E.

in California, supported Proposal 2.¹⁸ California's Proposition 209 won approval in 1996 and amended the state constitution to add Article I, Section 31¹⁹, which provides that California "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."²⁰ The State of Washington adopted a similar provision, titled Initiative 200, in 1998.²¹

Popular interference with university governance has not been limited to direct action at the ballot box. Instead, discontent with the management of public universities has inspired legislative action across the country, with state legislatures enacting laws on topics ranging from the funding of diversity efforts,²² to faculty tenure,²³ to abortion,²⁴ to how universities should discipline students who disrupt campus events.²⁵ The list of bills not enacted provides a glimpse of what the future may hold.²⁶ In addition, litigants have urged state and federal courts to strike down various university policies under state and federal constitutions.²⁷ And anger at university policies adopted pursuant to U.S. Department of Education guidance during the Obama Administration has prompted action by President Trump's

¹⁸ Tamar Lewin, *Affirmative Action Ban in Michigan is Rejected*, N.Y. TIMES (Nov. 15, 2012), <https://www.nytimes.com/2012/11/16/education/michigans-affirmative-action-ban-is-ruled-unconstitutional.html> [<https://perma.cc/KAD6-LSDS>] ("After those decisions, Ward Connerly, a black former University of California regent who was the driving force behind California's affirmative action ban, worked with Jennifer Gratz, a white Michigan woman who was the plaintiff in one of the Supreme Court cases, to get the issue onto the Michigan ballot.")

¹⁹ Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 196–86, 201 (1997).

²⁰ CAL. CONST. art. 1, § 31(a).

²¹ Robert Holland, *Toward an Equal Society: Making Initiative 200 Work*, WASH. POL'Y CTR. (May 1, 1999), <https://www.washingtonpolicy.org/publications/detail/toward-an-equal-society-making-initiative-200-work> [<https://perma.cc/TJ2E-SAV7>] (comparing Washington law to California law).

²² E.g., Fernanda Zamudio-Suaréz, *Bill Diverting Funds from U. of Tenn. Diversity Office Becomes Law*, CHRON. HIGHER EDUC. (May 20, 2016), <https://www.chronicle.com/blogs/ticker/bill-diverting-funds-from-u-of-tenn-diversity-office-becomes-law/111517> [<https://perma.cc/Z8DB-3BUN>]; see *infra* Section I.B.

²³ E.g., Audrey Williams June, *Frustrated Faculty Struggle to Defend Tenure Before It's Too Late*, CHRON. HIGHER EDUC. (June 17, 2018), <https://www.chronicle.com/article/Frustrated-Faculty-Struggle-to/243675> [<https://perma.cc/8AFH-RW5V>] ("In recent years, lawmakers or college governing boards have altered professors' expectations of what tenure means at public institutions in places like Wisconsin, Arkansas, and Kentucky."); see *infra* Section I.C.

²⁴ See, e.g., Elise Schmelzer, *Planned Parenthood to File Claim Against MU After University Discontinues Abortion Doctor's Privileges*, MISSOURIAN (Sept. 25, 2015), https://www.columbiainmissourian.com/news/local/planned-parenthood-to-file-claim-against-mu-after-universitydiscontinues/article_40fb35f4-63c2-11e5-af30-efd6ba9689aa.html [<https://perma.cc/3SG2-23FH>] (quoting Planned Parenthood leader, Laura McQuade, who stated that "[w]e were outraged that an institution of higher learning would cower to such obvious political tactics" and quoting state senator, Kurt Schaefer, who called the move a "victory for the unborn").

²⁵ See *infra* Section I.A.ii.

²⁶ See, e.g., Andy Thomason, *Missouri Lawmaker Would Revoke Scholarships of Athletes Who Boycott*, CHRON. HIGHER EDUC. (Dec. 15, 2015), <https://www.chronicle.com/blogs/ticker/missouri-lawmaker-would-revoke-scholarships-of-athletes-who-boycott/107431> [<https://perma.cc/3SYN-59XH>] (discussing the state representative who sponsored a bill to revoke athletic scholarships for student athletes refusing to play for reasons unrelated to health); *infra* Section I.G.

²⁷ See, e.g., Tiffany Crouse, *Law School Professor Files Lawsuit over MU's Gun Ban*, MISSOURIAN (Sept. 21, 2015), https://www.columbiainmissourian.com/news/law-school-professor-files-lawsuit-over-mu-s-gunban/article_057fa9fe-6072-11e5-a07d-4b492fd8e3e9.html [<https://perma.cc/UD6A-MH3T>].

Secretary of Education, Betsy DeVos, related to Title IX of the Education Amendments Act of 1972.²⁸

In short, elite and popular discontent with American university governance has inspired important changes to higher education law and this process shows every sign of enduring and even accelerating. Politicians have discovered that running against the state university can win votes, establishing a feedback loop whereby citizens lose faith in public higher education and elect representatives with similar attitudes who then use their public influence to further degrade the reputations of state institutions among the people they serve.²⁹ Well-funded advocacy institutes provide intellectual heft and ready-to-adopt policies,³⁰ allowing busy legislators to keep the faults of state universities in the news. As the spread of anti-affirmative action provisions demonstrates, today's new law in one state can become tomorrow's proposal in another. The ease of communication—along with the network of advocacy groups—all but ensures that higher education law will continue changing in response to critics not content—or perhaps not politically able—to leave university administration to university administrators.

Indeed, as this Article documents, the impact of outside opinion on higher education law is increasing. Accordingly, while higher education observers have noticed effects of public opinion on law relevant to universities for some time now—California's vote on Proposition 209 was back in 1996, after all, and Michigan voters approved Proposal 2 in 2006—the newly-heightened importance of outside opinion is underappreciated. Public opinion data shows a marked shift against higher education among Republicans since 2015.³¹ Further, the 2016 election cycle saw candidates win races nationwide after attacking higher education institutions on the stump. These candidates won state legislative seats, governorships, and positions in Congress.³² One won the White House. They and their staffs have surely noticed how voters responded to their criticism of universities.

²⁸ Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/4YN9-CU3Q>]; see *infra* Section II.A; see also *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, U.S. DEP'T EDUC. (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all> [<https://perma.cc/93CD-7HVW>]. See generally 20 U.S.C. § 1681 (2018).

²⁹ See, e.g., Eric Kelderman, *Quarrel at a Flagship Ignites a Battle with State Legislators*, CHRON. HIGHER EDUC. (Nov. 30, 2017), <https://www.chronicle.com/article/Quarrel-at-a-Flagship-Ignites/241943> [<https://perma.cc/NC3D-V67J>] (“State Sen. Steve Erdman is one of the legislators who wrote an opinion piece questioning whether conservative students are treated fairly at [Nebraska's] flagship campus.”); see also *id.* (“Ronnie D. Green, chancellor of the [U]niversity [of Nebraska], fired back at lawmakers in a letter: . . . ‘To recklessly and falsely accuse the university as a whole of hostility toward a particular view appears to be an attempt to further a political agenda.’”).

³⁰ See *infra* Sections III.D, I.A.iii.

³¹ *Since 2015, Sharp Rise in Share of Republicans Saying Colleges have a Negative Effect on the Country*, PEW RES. CTR. (July 19, 2017), http://www.pewresearch.org/fact-tank/2017/07/20/republicans-skeptical-of-colleges-impact-on-u-s-but-most-see-benefits-for-workforce-preparation/ft_17-07-20_collegessince2015/ [<https://perma.cc/AY29-9MTZ>].

³² For documentation of this phenomenon in the 2016 election cycle in Missouri, see Ben Trachtenberg, *The 2015 University of Missouri Protests and their Lessons for Higher Education Policy*

This Article argues that higher education law has entered a new period of increased legislative intervention in the operation of colleges and universities and that this trend is inspired in part by public and elite discontent with higher education.³³ Further, it argues that recent intervention is not a temporary aberration but instead a phenomenon likely to grow. Part I reviews intervention at the state level, focusing on legislative acts and ballot initiatives. It addresses issues ranging from campus speech, to faculty tenure, to affirmative action, to the use of state budgets to close disfavored programs. Part II discusses federal intervention, including regulation by the U.S. Department of Education of how campuses respond to allegations of sexual harassment and sexual assault. It also highlights legislation enacted and debated by Congress during 2017 and 2018. Part III explores the sources of popular and elite dissatisfaction with higher education. After reviewing real problems that inspire justified anger, it explains how right-wing media create and amplify discontent, and it then uses polling data to quantify public sentiment. Part III concludes with a discussion of how advocacy institutes assist legislators in converting public discontent into legal changes. Part IV looks ahead, explaining why legislative intervention inspired by discontent with higher education is likely to remain an important part of the legal landscape and indeed may become more prominent. It also offers some thoughts on the challenges presented to colleges and universities by the new changing legal environment, as well as recommendations for how institutional leaders might respond.

I. UNIVERSITY GOVERNANCE BY STATE LEGISLATURES AND BALLOT INITIATIVES

This Part explores how state legislatures have shaped higher education law in response to popular and elite pressure. It then examines how in some states advocates have bypassed the legislature, bringing university governance directly to the people in the form of ballot initiatives and referenda. In particular, this Part tells the story of (1) how, in response to a largely imaginary campus free speech crisis, state legislatures have enacted laws regulating student conduct at public universities, (2) how legislatures have used state budgets to eliminate disfavored programs at public universities, (3) how legislatures have attacked tenure, and (4) how legislatures have reorganized university boards to ensure that trustees adopt desired policies. Moving next to initiatives and referenda presented to voters, this Part includes a discussion of how states have changed their laws concerning university admissions by prohibiting certain affirmative action policies. After reviewing state laws related to the treatment of unauthorized immigrant students, this Part concludes with a sampling of proposals that did not become law and may foreshadow future legislative enactments.

and Administration, 107 KY. L.J. 61, 106 (2018) [hereinafter *Missouri Protests*], for a discussion on Missouri candidates for state legislature, attorney general, and governor attacking state university.

³³ By “elite,” I mean members of the media, board members of advocacy institutes, government officials, and similarly placed persons.

A. *The (Greatly Exaggerated) Campus Speech Crisis and Related Legislation*

While American university campuses protect free speech better than almost any locations in the world, in recent years popular representations of campus life have increasingly depicted universities as hotbeds of censorship. The First Amendment requires that public universities permit expression commonly banned in other countries,³⁴ and American private universities commonly assert their fidelity to the free-speech principles embodied in First Amendment law.³⁵ The sort of expression that can get an American fired from most workplaces—for example, U.S. labor law generally allows employers to fire workers for voicing their political opinions³⁶—is protected on American campuses.³⁷ (Indeed, I personally have worked to protect it at my own institution.)³⁸ Despite a handful of incidents in which speakers have been shouted down and prevented from delivering campus lectures, along with an even smaller number of incidents involving violence,³⁹ campuses nationwide host events at which speakers express views of all kinds, including those about hot-button topics such as abortion, Israel, criminal justice and police brutality, and immigration. Communists, anarchists, and fascists alike enjoy campus platforms, along with more mainstream representatives of Democratic and Republican politics, not to mention

³⁴ *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997) (en banc); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993); see *Bowman v. White*, 444 F.3d 967, 974 (8th Cir. 2006) (“[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment.” (quoting *Healy v. James*, 408 U.S. 169, 180 (1972))). See generally ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017).

³⁵ See, e.g., Ben Trachtenberg, *Private Universities and the First Amendment*, 2018 J. DISP. RESOL. 71, 78 (2018) [hereinafter *Private Universities*]; Leon Botstein, *Bard President Responds to Critics of Far-Right Figure’s Talk*, CHRON. HIGHER EDUC. (Oct. 24, 2017), <https://www.chronicle.com/article/Bard-President-Responds-to/241538> [<https://perma.cc/AJ6X-X6M4>] (defending the appearance of a right-wing German politician at Bard College with an appeal to free speech); Bret Stephens, *America’s Best University President*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/opinion/robert-zimmer-chicago-speech.html> [<https://perma.cc/8DSL-KZZP>] (quoting the University of Chicago’s President, Robert Zimmer, in defense of broad free speech principles).

³⁶ See, e.g., *Schumann v. Dianon Sys., Inc.*, 43 A.3d 111, 126 (Conn. 2012) (allowing private employers to discipline employees for speech that might have been protected if uttered by public employees); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 590–91 (W. Va. 1998) (noting that absent state statutes to the contrary, which are rare, “an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee’s state constitutional right of free speech”); Alina Tugend, *Speaking Freely About Politics can Cost you your Job*, N.Y. TIMES (Feb. 20, 2015), <https://www.nytimes.com/2015/02/21/your-money/speaking-about-politics-can-cost-you-your-job.html> [<https://perma.cc/CR44-T94S>]. See generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017) (discussing the dynamic between private employers and employees).

³⁷ Frederick M. Lawrence & William K. Marimow, *3 Core Principles Emerge for Free Speech Debates on Campuses*, PHILA. INQUIRER (Oct. 9, 2017, 10:00 AM), <https://www.inquirer.com/philly/opinion/commentary/campus-free-speech-yiannopoulos-middlebury-berkeley-first-amendment-20171009.html> [<https://perma.cc/Q2WX-UDJT>] (“On our campuses—public and private—free speech is presumed to be protected.”).

³⁸ See Ben Trachtenberg, *The Complexities of Shared Governance and Freedom of Speech, in LEADING COLLEGES AND UNIVERSITIES: LESSONS FROM HIGHER EDUCATION LEADERS* 118–20 (Stephen Joel Trachtenberg et al. eds., 2018) [hereinafter *Freedom of Speech*] (discussing the steps taken at the University of Missouri to address free speech issues on campus).

³⁹ See *infra* Section III.A (discussing genuine threats to free campus speech).

promoters of all sorts of religious beliefs. Reports of hostility toward free expression among today's students are greatly exaggerated.⁴⁰

Nonetheless, scholars on the right and left have attacked what they describe as a campus climate intolerant of unpopular speech and ideas.⁴¹ Newspaper columnists have decried the phenomena of political correctness and safe spaces, alleging that robust campus expression is increasingly at risk.⁴² Television and online media have attacked universities, highlighting perceived outrages and fomenting anger at university faculty and administrators.⁴³ Media reports trumpet survey results indicating that today's students lack First Amendment values and support censorship.⁴⁴

⁴⁰ See Lois Beckett, 'Junk Science': Experts Cast Doubt on Widely Cited College Free Speech Survey, *GUARDIAN* (Sept. 22, 2017), <https://www.theguardian.com/us-news/2017/sep/22/college-free-speech-violence-survey-junk-science> [<https://perma.cc/79P2-7WNP>] (debunking a widely-cited survey of students); Scott Lemieux, *The Campus PC Panic*, *ACADEME* (2019), <https://www.aaup.org/article/campus-pc-panic#.XYaM5JKgWo> [<https://perma.cc/V646-8DBN>] (responding to common arguments about campus speech).

⁴¹ See, e.g., GREG LUKIANOFF & JONATHAN HAITT, *THE CODDLING OF THE AMERICAN MIND* 81–121 (2018); Jonathan Chait, *Not a Very P.C. Thing to Say*, *N.Y. MAG.* (Jan. 27, 2015, 8:00 AM), <http://nymag.com/intelligencer/2015/01/not-a-very-pc-thing-to-say.html?gtn=bottom> [<https://perma.cc/U3PD-C4SZ>]; John Daniel Davidson, *Sorry, College Kids, There's no such Thing as Hate Speech*, *FEDERALIST* (Apr. 20, 2017), <https://thefederalist.com/2017/04/20/sorry-college-kids-theres-no-thing-hate-speech/> [<https://perma.cc/87FP-UJQU>]; Cliff Maloney, Jr., *Colleges have no Right to Limit Students' Free Speech*, *TIME* (Oct. 13, 2016), <https://time.com/4530197/college-free-speech-zone/> [<https://perma.cc/LD7G-VERG>].

⁴² See, e.g., David Brooks, *Understanding Student Mobbists*, *N.Y. TIMES* (Mar. 8, 2018), <https://nytimes.com/2018/03/08/opinion/student-mobs.html> [<https://perma.cc/KN6U-NAYT>] ("Students across the country continue to attack and shut down speakers at a steady pace . . ."); Maloney, *supra* note 41; Bret Stephens, *Free Speech and the Necessity of Discomfort*, *N.Y. TIMES* (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/opinion/free-speech-discomfort.html> [<https://perma.cc/742J-XJCK>] (complaining, during a speech delivered at the University of Michigan, about how "the progressive left, [] are [] eager to bully or shame their opponents into shutting up because they deem their ideas morally backward or insufficiently 'woke'"); Bari Weiss, *We're all Fascists Now*, *N.Y. TIMES* (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/opinion/were-all-fascists-now.html> [<https://perma.cc/5LGM-RAFJ>] (arguing that students "don't believe in [free speech] at all"); George F. Will, *A Red Flag on Campus Free Speech*, *WASH. POST* (May 18, 2018, 7:57 PM), https://www.washingtonpost.com/opinions/a-red-flag-on-campus-free-speech/2018/05/18/e034cdd6-59f3-11e8-8836-a4a123c359ab_story.html [<https://perma.cc/M3XD-G4LF>].

⁴³ See, e.g., Bill O'Reilly: *The Rise of Fascism on American College Campuses*, *FOX NEWS* (Nov. 11, 2015), <https://www.foxnews.com/transcript/bill-oreilly-the-rise-of-fascism-on-american-college-campuses> [<https://perma.cc/7E3R-3PMZ>] ("A hallmark of fascist societies is the denial of free speech. And now that's happening on some college campuses."); Fox News, *Milo Yiannopoulos Full Interview on Tucker Carlson Tonight—Fox News*, *YOUTUBE* (Feb. 2, 2017), <https://youtu.be/XUVeHnh2hC8> [<https://perma.cc/UNF7-JNSU>] ("Isn't it Nazis who do the punching? . . . They don't tolerate dissent, but civilized people do?"); *This Madness has to Stop: Hannity says the Left is Stifling Free Speech*, *FOX NEWS INSIDER* (Apr. 27, 2017, 10:34 PM), <https://insider.foxnews.com/2017/04/27/hannity-monologue-ann-coulter-canceled-berkeley-speech-lefts-assault-free-speech> [<https://perma.cc/45Z2-3QAU>] (discussing Sean Hannity's statement that the "alt-radial left," whom Hannity also calls "out-of-control fascists," "want to silence every single conservative voice in America").

⁴⁴ Beckett, *supra* note 40 ("The way the survey results have been presented are 'malpractice' and 'junk science' and 'it should never have appeared in the press', according to Cliff Zukin, a former president of the American Association of Public Opinion Polling . . ."). See COLL. PULSE & KNIGHT FOUND., *FREE EXPRESSION ON COLLEGE CAMPUSES* 3 (May 2019), https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/351/original/Knight-CP-Report-FINAL.pdf [<https://perma.cc/RBF8-C7GZ>] ("Findings show that despite widespread news coverage of campus protests, young people are generally supportive of free speech protections and

State legislators have responded with regulation. In some states, laws impose substantive regulations on how universities must protect free expression on campus. Other states, responding to popular depictions of angry students disrupting campus events, have mandated punishments for students interfering with the free expression of others.

i. Substantive Laws Related to Campus Speech

Between 2015 and 2018, several states enacted laws concerning speech on public university campuses, and legislatures in other states have considered similar legislation.⁴⁵ States adopting new laws include Arizona, Colorado, Georgia, Missouri, North Carolina, Tennessee, Utah, and Virginia.⁴⁶ Other states considering legislation include California, Michigan, Minnesota, Louisiana, Nebraska, Texas, Wisconsin, and Wyoming.⁴⁷ Although the enacted bills are not identical, they possess similar features. This subpart reviews a sample.

Missouri. Enacted in 2015, Senate Bill 93, known as the Campus Free Expression Act,⁴⁸ states that “outdoor areas of campuses of public institutions of higher education in this state shall be deemed traditional public forums.”⁴⁹ It allows institutions to “maintain and enforce reasonable time, place, and manner restrictions in service of a significant institutional interest only when such restrictions employ clear, published, content, and viewpoint-neutral criteria, and provide for ample alternative means of expression,” and it requires that “such restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble.”⁵⁰ The statutory phrase “traditional public forums” echoes language from U.S. Supreme Court opinions interpreting the First Amendment’s “freedom of speech” clause.⁵¹ In a traditional public forum, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”⁵² The Court has defined “traditional public fora” as places “like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse.”⁵³ In effect, the Missouri legislature imported First Amendment jurisprudence into a state statute limiting how public

skeptical about actions taken to disrupt speakers from engaging the campus community.”), for more recent (and better) survey data.

⁴⁵ See AM. ASS’N UNIV. PROFESSORS, CAMPUS FREE-SPEECH LEGISLATION: HISTORY, PROGRESS, AND PROBLEMS 5–8 (Apr. 2018), https://www.aaup.org/file/Campus_Free_Speech_2018.pdf.

⁴⁶ *Id.*; see, e.g., COLO. REV. STAT. § 23-5-144(3)(a) (2017); GA. CODE ANN. § 20-3-48 (2018); VA. CODE ANN. § 23.1-401.1 (2018).

⁴⁷ COLL. PULSE & KNIGHT FOUND., *supra* note 45, at 5–8.

⁴⁸ 2015 Mo. Legis. Serv. S.B. 93 (West) (codified at MO. REV. STAT. § 173.1550 (2015)).

⁴⁹ MO. REV. STAT. § 173.1550(2) (2015).

⁵⁰ *Id.*

⁵¹ See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800–02 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983). See generally Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965) (discussing the exercise of free speech in public places).

⁵² *Perry Educ. Ass’n*, 460 U.S. at 46.

⁵³ *Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc’ns Comm’n*, 518 U.S. 727, 791 (1996) (Kennedy, J., concurring in part and dissenting in part) (citing *Perry Educ. Ass’n*, 460 U.S. at 45).

universities may restrict campus speech.⁵⁴ In addition to whatever remedies might be available to someone whose First Amendment rights were violated by a public university, the Missouri statute also provides a state cause of action.⁵⁵ Both the state attorney general and anyone “whose expressive rights were violated through the violation of” the statute may bring suit and a court may impose an injunction or award “compensatory damages, reasonable court costs, and attorney fees.”⁵⁶

Beyond adding new avenues for enforcement, the Missouri statute imposes a burden on institutions to explain why any outdoor space on campus should not be treated like a traditional public forum.⁵⁷ For example, the playing fields in most campus football stadiums are outdoors. Outdoor courtyards by university hospitals are likely covered by the phrase “outdoor areas of campuses,” and while those places probably are not “traditional public forums” under First Amendment law, the Missouri statute declares them to be so for purposes of the act.⁵⁸ Accordingly, universities cannot regulate expressive activity—such as a protest on the football field or in a hospital courtyard—without engaging in the sort of justifications for time, place, and manner restrictions normally associated with parks and sidewalks.⁵⁹ States adopting similar statutes may eventually develop their own bodies of law on how to evaluate such campus restrictions.

North Carolina. The Restore/Preserve Campus Free Speech Act,⁶⁰ which became law in 2017, required the Board of Governors of the University of North Carolina⁶¹ to “develop and adopt a policy on free expression” and further required that the policy contain several specific provisions.⁶² Mandatory provisions included a statement that each “constituent institution [of the university] must strive to ensure

⁵⁴ See MO. REV. STAT. § 173.1550 (2015). When the University of Missouri enacted new rules in 2017 governing the use of public space, free expression, and protests, it crafted them to conform with the statute. See *Free Expression at Mizzou: Policies*, U. MO., <https://freespeech.missouri.edu/policies/> [<https://perma.cc/PF5Y-4EPU>] (describing policies effective June 1, 2017); see also *Free Expression at Mizzou: Guiding Principles*, U. MO., <https://freespeech.missouri.edu/principles/> [<https://perma.cc/PC7C-A7DR>] (discussing the “legal distinction between outdoor space and indoor space” created by the statute).

⁵⁵ § 173.1550(5).

⁵⁶ *Id.* See *Freedom of Speech*, *supra* note 38, at 119–20, 125, for information on how the University of Missouri amended its policies partly to ensure compliance with the statute. See H.B. 213, 94th Gen. Assemb., Reg. Sess. (Mo. 2007), for a previous bill that passed the Missouri House but not the Senate, which would have required public higher education institutions to prepare “an annual report describing steps taken by each institution to ensure intellectual diversity, which must be posted on the institution’s web site” and would have mandated the creation of a new system for receiving student complaints.

⁵⁷ § 173.1550(2).

⁵⁸ See *id.*

⁵⁹ See *id.* (“The outdoor areas of campuses of public institutions of higher education in this state shall be deemed traditional public forums. Public institutions of higher education may maintain and enforce reasonable time, place, and manner restrictions in service of a significant institutional interest only when such restrictions employ clear, published, content, and viewpoint-neutral criteria, and provide for ample alternative means of expression.”).

⁶⁰ See 2017 N.C. Sess. Laws 196 (codified at N.C. GEN. STAT. §§ 116-300–116-304 (2017)).

⁶¹ The Board oversees the University of North Carolina (“UNC”) System, which has seventeen campuses including UNC-Chapel Hill, North Carolina State University, North Carolina Central University, and UNC Charlotte. *About the Board of Governors*, U. N.C. SYS., <https://www.northcarolina.edu/Leadership-and-Policy/Board-Governors> [<https://perma.cc/4P6Y-6JYL>]; *Our 17 Campuses*, U. N.C. SYS., <https://www.northcarolina.edu/content/our-17-campuses> [<https://perma.cc/C34G-72T9>].

⁶² N.C. GEN. STAT. § 116-300 (2017).

the fullest degree of intellectual freedom and free expression,” that in keeping with “First Amendment jurisprudence, including any reasonable time, place, and manner restrictions adopted by a constituent institution, campuses of the constituent institutions are open to any speaker whom students, student groups, or members of the faculty have invited,” and that “[i]t is not the proper role of any constituent institution to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”⁶³ The statute also required that the Board create a “Committee on Free Expression,” which must report annually to the legislature on topics such as “any barriers to or disruptions of free expression within the constituent institutions” and “the administrative handling and discipline relating to these disruptions or barriers.”⁶⁴ Further, the statute mandates that the university conduct a “freshman orientation” at each campus that includes “a section describing the policies regarding free expression consistent with” the statute.⁶⁵

Virginia. In 2017, Virginia enacted House Bill 1401,⁶⁶ which states “[e]xcept as otherwise permitted by the First Amendment to the United States Constitution, no public institution of higher education shall abridge the constitutional freedom of any individual, including enrolled students, faculty and other employees, and invited guests, to speak on campus.”⁶⁷

As the three examples above indicate, state laws concerning campus speech tend to prohibit the sort of interference with free speech that is already barred by the First Amendment. Some statutes however, go further. For example, by defining outdoor spaces on campuses as “traditional public forums,” the Missouri statute extends the principles embodied in First Amendment case law to at least some land that otherwise would not have been covered—those spaces that would not have been deemed “traditional public forums” under Supreme Court precedent but are within the scope of the statute. It also adds a state cause of action to whatever remedies might already have been available under Section 1983.⁶⁸ Further, the North Carolina statute imposes a reporting requirement, along with a freshman orientation mandate, that would not otherwise have existed.

⁶³ *Id.*

⁶⁴ *Id.* § 116-301. See UNIV. N.C. SYS.: COMM. ON UNIV. GOVERNANCE, 2017–2018 REPORT ON FREE SPEECH AND FREE EXPRESSION WITHIN THE UNIVERSITY (Sept. 12, 2018), https://www.northcarolina.edu/sites/default/files/2017-2018_report_on_free_speech_and_free_expression_within_the_university.pdf [<https://perma.cc/BD9L-U4F2>], for the first such report.

⁶⁵ N.C. GEN. STAT. § 116-302 (2017).

⁶⁶ H.B. 1401, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

⁶⁷ VA. CODE ANN. § 23.1-401.1(A) (2018).

⁶⁸ 42 U.S.C. § 1983 (2018) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

ii. Laws Requiring Discipline of Students Who Disrupt Campus Speech

Beyond supporting free speech on campus by prohibiting universities from restricting it, some states have mandated specific penalties for students who interfere with free expression. Such statutes take state legislatures deep into the weeds of university policy. At the universities covered by these statutes, institutional leaders remain free to set penalties they deem appropriate for conduct such as plagiarism, sexual assault, vandalism, substance abuse, and theft. For the disruption of campus speech, however, leaders must take direction from elected officials.

Wisconsin. In response to a legislative proposal introduced but not enacted,⁶⁹ the Board of Regents of the University of Wisconsin System adopted a “Commitment to Academic Freedom and Freedom of Expression” policy in 2017.⁷⁰ Pursuant to the policy, “[a] formal investigation and disciplinary hearing is required the second time a formal complaint alleges a student has engaged in violent or other disorderly misconduct that materially and substantially disrupted the free expression of others.”⁷¹ A student “who has twice been found responsible for misconduct that materially and substantially disrupted the free expression of others at any time during the student’s enrollment shall be suspended for a minimum of one semester,” and a student “who has thrice been found responsible . . . shall be expelled.”⁷²

Wisconsin’s policy also contains substantive provisions about campus speech similar to those described above. For example, the policy limits the restrictions that institutions may impose on free expression (invoking First Amendment principles related to “time, place, and manner” restrictions),⁷³ and it includes a broad endorsement of the value of free speech.⁷⁴

North Carolina. In addition to the provisions already discussed,⁷⁵ North Carolina’s Restore/Preserve Campus Free Speech Act, enacted in 2017, required state universities to:

[I]mplement a range of disciplinary sanctions for anyone under the jurisdiction of a constituent institution who substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others, including protests and

⁶⁹ See Assemb. B. 299, 103rd Leg. (Wis. 2017) (requiring, among other things, that “the second time that a student is found responsible for interfering with the expressive rights of others, the policy [that the Board of Regents of the University of Wisconsin System must adopt] must require the student to be suspended for a minimum of one semester or expelled”).

⁷⁰ *Board of Regents Approves Academic Freedom and Freedom of Expression Policy*, U. WIS. SYS. (Oct. 6, 2017), <https://www.wisconsin.edu/news/archive/board-of-regents-approves-academic-freedom-and-freedom-of-expression-policy/> [https://perma.cc/9NVD-42HW]; see also Board of Regents of the University of Wisconsin System, *Agenda of Meeting to Approve Proposed Regent Policy Document on Commitment to Academic Freedom and Freedom of Expression* (Oct. 6, 2017) [hereinafter *Proposed Regent Policy Document*], https://www.wisconsin.edu/regents/download/meeting_materials/2017/october/Board-of-Regents-Friday-Agenda-and-Materials--October-2017.pdf [https://perma.cc/R8AY-KW27].

⁷¹ *Proposed Regent Policy Document*, *supra* note 70, at 3.

⁷² *Id.*

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 1.

⁷⁵ See *supra* text accompanying notes 60–65.

demonstrations that infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to this policy or is located in a nonpublic forum.⁷⁶

Pursuant to the UNC Policy Manual approved after the enactment of the state statute, discipline is mandated for students who “substantially interfere[] with the protected free expression rights of others.”⁷⁷ The policy creates a presumption that specific punishments will be imposed on recidivists.⁷⁸

Georgia. In 2018, Georgia enacted Senate Bill 339, which requires that:

[T]he board of regents shall establish a range of disciplinary sanctions for anyone under the jurisdiction of the state institution of higher learning who is found by his or her conduct to have interfered with the board of regents’ regulations and policies relevant to free speech and expression on the campus of each such institution.⁷⁹

A prior version of the bill was more specific, requiring that “any student who has twice been found responsible for infringing upon the expressive rights of others shall be suspended for a minimum of one year or expelled[.]”⁸⁰

iii. The Genesis of Campus Speech Laws

It may well be appropriate for a university to expel a student twice (or thrice) found responsible for substantial interference with the free expression of others on campus. It does not necessarily follow, however, that this level of detail of university policy should be regulated by the state legislature. One might wonder how state representatives would be inspired to propose such laws. One answer is that advocacy institutes (sometimes known as think tanks) have drafted model bills that they encourage states to enact.

For example, the punishment provision contained in the version of Georgia Senate Bill 339 initially introduced—requiring that the state university enact the educational version of a mandatory minimum sentence—echoes a model bill published by the Goldwater Institute, a conservative organization headquartered in Arizona.⁸¹ The Goldwater model bill appears in a report titled “Campus Free Speech: A Legislative Proposal.”⁸² Section 1.9 of the proposed “Campus Free

⁷⁶ N.C. GEN. STAT. § 116-300(7) (2017).

⁷⁷ THE CODE AND UNC POLICY MANUAL § 1300.8(VII)(A), https://www.northcarolina.edu/apps/policy/index.php?tab=policy_manual&action=view-sections&all=1 [<https://perma.cc/6HH5-JBEW>].

⁷⁸ *Id.* § 1300.8(VII)(A)(1) (“Any third finding of a material and substantial disruption or substantial interference shall presumptively result in an expulsion of the student . . .”).

⁷⁹ GA. CODE ANN. § 20-3-48(b) (2018).

⁸⁰ S.B. 339, 154th Gen. Assemb., Reg. Sess. (Ga. 2018) (as introduced in the Senate on Jan. 19, 2018).

⁸¹ *About The Goldwater Institute*, GOLDWATER INST., <https://goldwaterinstitute.org/about/> [<https://perma.cc/Q4MF-DK LX>].

⁸² STANLEY KURTZ ET AL., GOLDWATER INST., CAMPUS FREE SPEECH: A LEGISLATIVE PROPOSAL 19–22 (2017), https://goldwaterinstitute.org/wpcontent/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf [<https://perma.cc/6FLK-XT4V>].

Speech Act” provides that “[a]ny student who has twice been found responsible for infringing the expressive rights of others will be suspended for a minimum of one year, or expelled.”⁸³ This is not a coincidence. Several portions of the initial bill text were taken from the Goldwater model text.⁸⁴ Between Senate Bill 339’s introduction and enactment, the section concerning student discipline was amended to give greater discretion to Georgia public university officials,⁸⁵ in contrast with the mandatory minimum punishments adopted by the Wisconsin regents. The Goldwater model also inspired the North Carolina law discussed above, as is explained in a *National Review* article in which a co-author of the model thanks the lieutenant governor for his support and laments various ways in which university leaders managed to “weaken” the bill before its enactment, including the removal of “the provision that would have mandated suspension for students twice found responsible for silencing others.”⁸⁶

Similarly, the Missouri statute designating outdoor university property as “traditional public forums”⁸⁷ is modeled on the “Campus Free Expression Act” promoted by the Foundation for Individual Rights in Education (FIRE).⁸⁸ Indeed, the Missouri law is named the “Campus Free Expression Act.”⁸⁹ FIRE also touts its work related to a Virginia statute,⁹⁰ which limits regulation of “student speech that [] occurs in the outdoor areas of the institution’s campus.”⁹¹ Other advocacy institutes, while not producing model statutes or participating directly in the legislative process, helped create a sense of urgency about campus speech and provided support for those seeking to enact policy changes.⁹² The role of advocacy

⁸³ *Id.* at 20.

⁸⁴ Compare S.B. 339 (stating that “in all disciplinary cases involving expressive conduct, students shall be entitled to a disciplinary hearing under published procedures, including, at minimum . . .” and listing seven specific rights), with KURTZ ET AL., *supra* note 82, at 20 (stating that “[i]n all disciplinary cases involving expressive conduct, students are entitled to a disciplinary hearing under published procedures, including, at minimum . . .” and listing the same seven rights).

⁸⁵ Compare S.B. 339, with GA. CODE ANN. § 20-3-48(b) (2018). The initial Georgia bill contained other provisions taken from the Goldwater model bill that did not end up in the enacted version of the law. Compare S.B. 339 (“The board of regents shall create a Committee on Free Expression, consisting of no fewer than 15 members.”), with KURTZ ET AL., *supra* note 82, at 21 (“The Board of Trustees of the state university system shall create a single Committee on Free expression consisting of no less than 15 members.”), and S.B. 339 (amending definitions of “peer-on-peer harassment” and “quid pro quo sexual harassment” to match Section 4(c) of the Goldwater text), and KURTZ ET AL., *supra* note 82, at 21–22.

⁸⁶ Stanley Kurtz, *North Carolina Campus Free-Speech Act: First Goldwater-Based Law*, NAT’L REV.: CORNER (July 31, 2017, 7:49 PM), <https://www.nationalreview.com/corner/north-carolina-campus-free-speech-act-goldwater-proposal/> [https://perma.cc/2E8Y-LKNE].

⁸⁷ MO. REV. STAT. § 173.1550 (2015).

⁸⁸ *Frequently Asked Questions: The Campus Free Expression (CAFE) Act*, FIRE (Dec. 17, 2015), <https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/> [https://perma.cc/Q6AQ-E4A8] (“The first CAFE Act became law in Missouri.”).

⁸⁹ § 173.1550(1).

⁹⁰ *Virginia Bans Unconstitutional Campus ‘Free Speech Zones,’* FIRE (Apr. 7, 2014), <https://www.thefire.org/virginia-bans-unconstitutional-campus-free-speech-zones/> [https://perma.cc/7VWQ-QP8T]; see also *Frequently Asked Questions*, *supra* note 88.

⁹¹ VA. CODE ANN. § 23.1-401 (2019) (codifying H.B. 258).

⁹² See, e.g., GUENTER LEWY, ACTA: AM. COUNCIL TRS. & ALUMNI, CAMPUS INTOLERANCE THEN & NOW: THE INFLUENCE OF MARCUSIAN IDEOLOGY 1, 18–19 (Feb. 2018), <https://www.goacta.org/images/download/campus-intolerance-then-and-now.pdf>

institutes in transforming public opinion into law and policy is discussed below in greater detail,⁹³ as is the formation of public opinion on this subject more generally.⁹⁴ Advocacy institutes' activity related to higher education law has much in common with their activity related to other areas of law, such as abortion bills, minimum wage legislation (either raising the minimum wage or preventing municipalities from doing so), and school vouchers.

B. State Budgets and Unpopular University Programs

Public universities receive billions of dollars annually from state budgets, and control of these appropriations provides a powerful tool for influencing university policy. For example, legislators concerned about a shortage of medical professionals in part of a state can provide a public university with extra money to train doctors and dentists in an area that administrators might otherwise ignore.⁹⁵ They can also ensure the location of campuses in places that please a broad array of stakeholders, or at least a few powerful ones.⁹⁶ They can promote teaching and research related to subjects important to the state's culture and economy.⁹⁷ Politics has always been part of state higher education funding,⁹⁸ as is only fair and reasonable. If state taxpayers are to fund the universities, their elected representatives have every right to guide how the money is spent.

Because political influence on public university spending is neither new nor necessarily objectionable, it can be difficult to discern when such influence manifests popular discontent instead of ordinary horse trading. Money spent in one legislator's

[<https://perma.cc/US9W-Q67R>] (stating that “[f]reedom of expression is threatened on today’s college campuses” and cheering laws such as the North Carolina statute discussed above while noting that “22 other states are considering similar legislation”); JOYCE LEE MALCOLM, ACTA: AM. COUNCIL TRS. & ALUMNI, *GUARDING THE FREEDOM TO SPEAK, FREEDOM TO HEAR* 1, 6, 14 (Oct. 2018), <https://www.goacta.org/images/download/Guarding-the-Freedom-to-Speak-Freedom-to-Hear.pdf> [<https://perma.cc/876F-HVCC>] (stating that “freedom [of speech] is under attack on a disturbingly large number of our nation’s campuses” and recommending that institutions adopt speech rules approved by FIRE).

⁹³ See *infra* Section III.D.

⁹⁴ See *infra* Part III.

⁹⁵ See, e.g., Rudi Keller, *Missouri House Budget Plan Offers Relief for Higher Education*, COLUM. DAILY TRIB. (Mar. 7, 2018, 6:35 PM), <https://www.columbiatribune.com/news/20180307/missouri-house-budget-plan-offers-relief-for-higher-education> [<https://perma.cc/CLN7-2NDF>].

⁹⁶ See, e.g., W. BRUCE LESLIE ET AL., *SIXTY-FOUR CAMPUSES—ONE UNIVERSITY: THE STORY OF SUNY* (2016); BRUCE M. STAVE ET AL., *RED BRICK IN THE LAND OF STEADY HABITS: CREATING THE UNIVERSITY OF CONNECTICUT, 1881–2006* 90–91 (2006) (discussing how the University of Connecticut placed its medical and dental schools in suburban Farmington instead of closer to large hospitals); Matt Carroll, *Penn State Receives Approval for Separate Law Schools at Carlisle, University Park*, CENTRE DAILY TIMES (June 18, 2014, 10:05 AM), <https://www.centredaily.com/news/local/education/penn-state/article42855297.html> (reporting the university’s plan to continue operating two fully accredited law schools at separate locations, rather than consolidating operations). Consider also Rutgers Law School, which operates one school with locations in Camden and Newark. *One Rutgers Law*, RUTGERS L. SCH., <https://law.rutgers.edu/one-rutgers-law> [<https://perma.cc/RALS-S7YC>].

⁹⁷ Common examples include agriculture and veterinary medicine.

⁹⁸ See, e.g., DEAN O. SMITH, *MANAGING THE RESEARCH UNIVERSITY* 91–94 (2011) (discussing political intervention in university spending decisions); *Missouri Protests*, *supra* note 32, at 66 (describing how a state senator delivered the University of Missouri to his constituency in Columbia).

district cannot be spent elsewhere. Support for agriculture consumes money otherwise potentially available for dentistry or music. The lack of funding for a particular program need not signal anything wrong—real or even imagined—with the unfunded program and may merely indicate that someone else had better connections. Nonetheless, recent high-profile decisions by state legislatures to cut disfavored budgets indicate something different from the usual political process.

Tennessee. A stark example arose when the Tennessee legislature passed a 2016 law reallocating about \$445,882 within the budget of the University of Tennessee-Knoxville.⁹⁹ Although not an especially large sum in the context of the University of Tennessee System’s \$1.375 billion annual budget (of which nearly \$499 million comes from state appropriations),¹⁰⁰ the reallocation represented a repudiation of the administration. House Bill 2248 provided: “All funds in the budget of the office for diversity and inclusion at the University of Tennessee, Knoxville, for fiscal year 2016–2017, shall be reallocated in the university’s budget and used by the university solely for scholarships to be awarded through a minority engineering scholarship program.”¹⁰¹ In addition, the law prohibited the use of university funds “to promote the use of gender neutral pronouns, to promote or inhibit the celebration of religious holidays, or to fund or support sex week.”¹⁰² Although the effects on the university could have been far more severe—earlier proposals would have cut millions of dollars from the budget¹⁰³—the law nonetheless caused real disruption. Rickey Hall, the University of Tennessee’s vice chancellor for diversity and inclusion, promptly departed for a job in Seattle.¹⁰⁴ Students protested, and university officials had to find creative solutions to keep programs open.¹⁰⁵

The genesis of this legislation will not surprise readers. After years of complaining about “Sex Week,” “a wide-ranging set of events, programs and discussion panels—some with salacious titles—on sexuality, preventing sexual assaults and sexually transmitted diseases and other topics, including sexual abstinence,”¹⁰⁶ legislators became enraged upon discovering a diversity office newsletter item related to gender-neutral pronouns¹⁰⁷ and a blog post on the

⁹⁹ See Richard Locker, *University of Tennessee Diversity Funding Bill Allowed to Become Law*, TENNESSEAN (May 20, 2016, 11:31 AM), <https://www.tennessean.com/story/news/politics/2016/05/20/university-tennessee-diversity-funding-bill-allowed-become-law/84650208/> [<https://perma.cc/8ATA-SULT>].

¹⁰⁰ UNIV. TENN., REVISED BUDGET DOCUMENT FY 2016–2017 B-18, B-20 (2017), http://tennessee.edu/wp-content/uploads/2017/03/FY17_Bud_Doc_Revised_2.pdf [<https://perma.cc/A4YB-EMNZ>] (showing a total budget of nearly \$650 million for the Knoxville campus alone).

¹⁰¹ H.B. 2248, 109th Gen. Assemb., 2d Sess. (Tenn. 2015).

¹⁰² *Id.*

¹⁰³ Locker, *supra* note 99 (“[I]n the fall, the discussion revolved around a much larger \$19 million figure spent throughout public higher education, including such diversity efforts as scholarships and faculty recruitment. In March, the Senate Education Committee narrowed its focus and recommended taking \$8 million only from UT diversity programs.”).

¹⁰⁴ See Victor Balta, *Rickey L. Hall Named Vice President for the Office of Minority Affairs and Diversity and Chief Diversity Officer at the UW*, UW NEWS (May 19, 2016), <https://www.washington.edu/news/2016/05/19/rickey-l-hall-named-vice-president-for-the-office-of-minority-affairs-and-diversity-and-chief-diversity-officer-at-the-uw/> [<https://perma.cc/M4G5-GTYH>].

¹⁰⁵ See Locker, *supra* note 99 (quoting the UT chancellor saying, “[t]he Pride Center will remain a gathering place for students but it will no longer be staffed by university employees”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (“It noted that some prefer pronouns such as ‘xe,’ ‘xym’ and ‘xyr.’”).

importance of inclusive holiday celebrations.¹⁰⁸ Lawmakers called on Knoxville Chancellor Jimmy Cheek to resign, and the state's entire Republican delegation to the U.S. Congress denounced the holiday guidance.¹⁰⁹ Cheek announced his retirement approximately one month after the diversity-budget bill became law.¹¹⁰ Chances are, the administrators hired to succeed Chancellor Cheek and Vice Chancellor Hall—who moved to Seattle when his office was defunded—will run a more circumspect operation.

North Carolina. A half-million-dollar 2017 budget cut at the University of North Carolina School of Law further illustrates the risks of offending the political sensibilities of legislators. The cut represented a compromise—an earlier proposal would have cut \$4 million—and arose from objections about legal clinics operated by UNC Law.¹¹¹ As the legislature considered the proposed cut, the university's board was reviewing the law school's Center for Civil Rights, which was "privately funded, represent[ed] low-income, minority clients and ha[d] sued local entities in the past."¹¹² Two years earlier the board had closed the law school's Center on Poverty, Work and Opportunity, which had been led by a former dean who clashed with Republican politicians.¹¹³ Subsequently the board voted to prohibit the Center for Civil Rights from conducting litigation on behalf of clients, leading to the firing of two staff attorneys.¹¹⁴ In other words, even though the university's governing board was already conducting a years-long attack on the school's social justice activities,¹¹⁵ the legislature cut \$500,000 from the budget of the state's flagship law school.¹¹⁶ The law school's battles with the board and the legislature have complicated fundraising efforts, as well as the provision of clinical education.¹¹⁷ UNC Law has a very strong reputation in North Carolina and nationwide, and its

¹⁰⁸ *Id.* (describing a "memo that suggested—but did not require—ways to make non-Christian university employees feel welcome at holiday office parties on campus" and warned against holding a "Christmas party in disguise").

¹⁰⁹ Scott Jaschik, *War on Christmas? On Inclusivity?*, INSIDE HIGHER ED (Dec. 7, 2015), <https://www.insidehighered.com/news/2015/12/07/furor-over-holiday-party-advice-u-tennessee-grows-there-and-spreads> [<https://perma.cc/PLZ7-LHUI>] (quoting state legislator who said that "[t]he people on the far left who claim to be tolerant seem to be tolerant of everything except traditional Christianity").

¹¹⁰ See MJ Slaby, *UT Chancellor Jimmy Cheek to Step Down, Return to Teaching*, KNOXVILLE NEWS SENTINEL (June 21, 2016, 7:18 AM), <https://www.knoxnews.com/story/news/local/2016/06/21/ut-chancellor-jimmy-cheek-to-step-down-return-to-teaching/91012286/> [<https://perma.cc/BZX5-MH9S>].

¹¹¹ Jane Stancill, *UNC Law School's Budget is Cut—But it Could have been Worse*, NEWS & OBSERVER (June 20, 2017, 11:25 AM), <https://www.newsobserver.com/news/local/education/article157121589.html>.

¹¹² *Id.*

¹¹³ *Id.* Center for Civil Rights Co-Director Mark Dorosin also involved himself in politics directly, by winning a seat on his county's Board of County Commissioners. See *Mark Dorosin*, ORANGE COUNTY: N.C., <https://www.orangecountync.gov/1001/Mark-Dorosin> [<https://perma.cc/HG6Y-ZSP6>].

¹¹⁴ See Jane Stancill, *UNC Center for Civil Rights Attorneys are out of a Job. Now What?*, NEWS & OBSERVER (Oct. 19, 2017, 8:17 AM), <https://www.newsobserver.com/news/local/education/article179665076.html>.

¹¹⁵ See *id.* ("The center's lawyers and law students have taken on cases of school desegregation, fair housing and environmental justice. Its clients have typically been poor and minority groups, such as rural neighborhoods battling for municipal water and sewer service.")

¹¹⁶ Stancill, *supra* note 111.

¹¹⁷ See Stancill, *supra* note 114.

leaders will weather this storm. That said, a vindictive budget cut during a difficult period in legal education¹¹⁸ cannot be helpful.

The UNC Law cut occurred during the unexpectedly tumultuous and unexpectedly brief tenure of UNC President Margaret Spellings. Despite being a Republican who served as Secretary of Education under President George W. Bush, Spellings struggled to establish a good working relationship with her board, which was dominated by Republicans with close ties to the state legislature.¹¹⁹ Spellings announced her departure less than three years into her five-year contract.¹²⁰ Board members and faculty worried after her 2018 retirement announcement that because of difficulties created by the legislature and board, UNC may have trouble attracting top candidates to replace Spellings.¹²¹ Since January 2019, the system has employed an interim president.¹²²

Louisiana. Even private universities are not immune from legislative pressure aimed at unpopular programs. At Tulane University, the Tulane Environmental Law Clinic has worked since 1989 to provide students with real legal experience and to offer representation to low-income clients.¹²³ In 2010, the state senate considered Senate Bill 549, which would have prohibited legal clinics at universities receiving any state funding from either suing government agencies or suing individuals or businesses for money.¹²⁴ The bill received national attention, in part because of actions by the Louisiana Chemical Association, which urged its members to impose “sanctions” on Tulane in response to work done by the clinic.¹²⁵ When the Deepwater Horizon disaster provided new evidence of how corporate irresponsibility can harm the environment, however, it became especially difficult to argue against the clinic, much less that Tulane should forfeit \$44 million in state funding “specifically dedicated to medical research and health care services” because of the clinic’s legal

¹¹⁸ See, e.g., Elizabeth Olson, *Study Cites Lower Standards in Law School Admissions*, N.Y. TIMES (Oct. 26, 2015), <https://www.nytimes.com/2015/10/27/business/dealbook/study-cites-lower-standards-in-law-school-admissions.html> [<https://perma.cc/4S4M-WAYU>] (noting that “many schools are also facing pressure from plummeting enrollments—the lowest in decades,” in addition to low bar exam passage rates for graduates).

¹¹⁹ Jane Stancill, *After Spellings Exit, UNC must try Again to Find Accord Between Board and President*, NEWS & OBSERVER (Nov. 3, 2018, 2:36 PM), <https://www.newsobserver.com/news/local/article221025920.html>.

¹²⁰ *Id.*

¹²¹ See *id.* (quoting observers who said that the new president would enter “a poisonous caldron” and “a snake pit”).

¹²² *The UNC System Interim President William L. Roper*, U. N.C. SYS., <https://www.northcarolina.edu/leadership-and-policy/president> [<https://perma.cc/2N5M-PJE8>].

¹²³ TULANE ENVTL. LAW CLINIC, TULANE ENVIRONMENTAL LAW CLINIC: ANNUAL REPORT 2017-2018 2 (Dec. 28, 2018), http://www.tulane.edu/~telc/assets/annual/2017-18_Annual_Report.pdf [<https://perma.cc/LY9V-V8WC>].

¹²⁴ S.B. 549, Reg. Sess. (La. 2010) (stating that one of the purposes of the bill was “to provide certain restrictions on actions, proceedings and activities by certain law school clinics”); see also Times-Picayune Editorial Bd., *Louisiana Legislature Should Leave University Law Clinics Alone: An Editorial*, NOLA.COM (Apr. 1, 2010, 4:11 PM), https://www.nola.com/opinions/article_309060a0-7205-5cd9-9201-95da0b6be353.html [<https://perma.cc/5FUH-TKQZ>].

¹²⁵ Karen Sloan, *Chemical Association Escalates Attack on Tulane over Law Clinic*, LAW.COM: NAT’L L.J. (May 12, 2010, 12:00 AM), <https://www.law.com/nationallawjournal/almID/1202458112680/> [<https://perma.cc/PM6L-J8HX>]. (“In a memorandum sent to its 61 corporate members, the association advocated that they stop making donations to the university, stop matching employee donations to the school and curtail recruiting there.”).

work.¹²⁶ The bill ultimately died in the state's Senate Commerce Committee.¹²⁷ Nonetheless, its introduction, along with the backing of powerful corporate interests, demonstrates the vulnerability of even private institutions to attacks by sufficiently motivated state legislators.

C. *The Ongoing Assault on Tenure*

For many university faculty members, the relative job security provided by "tenure" adds important value to their overall compensation.¹²⁸ Tenured professors are difficult to fire. While they may not have the "job for life" commonly imagined, they normally cannot be removed from their positions without adequate cause.¹²⁹ They can express unpopular opinions, both about their research and the governance of their universities. The costs and benefits of tenure have been debated for generations,¹³⁰ with occasional calls for its abolition or major reform. Concurrently, the percentage of university classes taught by tenured faculty has plummeted, with more and more university faculty holding appointments with less job security.¹³¹ The increasing proportion of faculty who are not on the tenure track is a perennial subject of concern among academics.¹³² To simplify a complicated story: Tenure is an important part of the modern American university, and despite sensible criticisms of its effects, universities across America have maintained it and consider it an essential

¹²⁶ CityBusiness Commentary, *Opinion: Law Clinic Ban Dies a Good Death*, NEW ORLEANS CITYBUSINESS (May 20, 2010), <https://neworleanscitybusiness.com/blog/2010/05/20/opinion-law-clinic-ban-dies-a-good-death/> [<https://perma.cc/2Z9Y-LKHD>].

¹²⁷ *Id.*

¹²⁸ See CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW 1-2* (1959), for definitions of "tenure"; see also Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 *LAW & CONTEMP. PROBS.* 325, 325 (1990).

¹²⁹ Brown & Kurland, *supra* note 128, at 325. The cause normally involves some sort of serious misconduct by the faculty member or serious financial exigency on the part of the institution, of the kind that leads to the closing of programs. *Id.* at 328, 342, 346-47.

¹³⁰ See generally, e.g., RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1st ed. 1955) (arguing tenure is a necessary means to academic freedom); ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1st ed. 1990); PAGE SMITH, *KILLING THE SPIRIT: HIGHER EDUCATION IN AMERICA* (1990) (arguing tenure protects professors accused of moral shortcomings more than their academic freedom); David M. Rabban, *The Regrettable Underenforcement of Incompetence as Cause to Dismiss Tenured Faculty*, 91 *IND. L.J.* 39 (2015) (arguing academic freedom is in fact compromised by reluctance to fire tenured professors).

¹³¹ See Colleen Flaherty, *A Non-Tenure-Track Profession?*, *INSIDE HIGHER ED* (Oct. 12, 2018), <https://www.insidehighered.com/news/2018/10/12/about-three-quarters-all-faculty-positions-are-tenure-track-according-new-aaup> [<https://perma.cc/9RXX-DRBA>] ("Some 73 percent of all faculty positions are off the tenure track, according to a new analysis of federal data by the American Association of University Professors.").

¹³² E.g., *Data Snapshot: Contingent Faculty in US Higher Ed*, AAUP: AM. ASS'N U. PROFESSORS, <https://www.aaup.org/sites/default/files/10112018%20Data%20Snapshot%20Tenure.pdf> [<https://perma.cc/RB2Y-BWTX>] ("As the AAUP and others have documented over the past decades, the percentage of faculty that are off the tenure track has been steadily increasing.").

tool for recruiting and retaining a portion of their faculties. At the same time, that portion with tenure is shrinking.¹³³

Wisconsin. In 2015, Governor Scott Walker signed legislation reducing the tenure protections available at public universities in Wisconsin.¹³⁴ Part of a bill that also cut \$250 million from the state's higher education budget, the tenure provision allowed the university system's regents to write a new tenure policy for the system.¹³⁵ Under the new law, the regents would have authority to dismiss any faculty member, with or without tenure, "when such an action is deemed necessary due to a budget or program decision requiring program discontinuance, curtailment, modification, or redirection."¹³⁶ Then, in March 2016, the Board of Regents adopted its new tenure policy.¹³⁷ Although financial exigency has traditionally been a justification for laying off tenured faculty members, the need to "modify" or "redirect" a program is a far lower bar.¹³⁸ Uncertainty and disappointment caused by the legislation and the new board policy created opportunities for other universities to recruit professors away from Wisconsin. Faculty had suffered a reduction in compensation—a loss of whatever their prior tenure protections were worth beyond the value of the new, lesser protections—with no corresponding pay increase. Some faculty left, and the flagship Madison campus estimated that it spent nearly \$9 million to retain faculty who received outside job offers between July and December 2015.¹³⁹

Observers of Wisconsin politics described the new tenure rules in the context of other actions taken by Walker that won praise among conservatives. Calling the tenure change the final item in a "conservative trifecta," one reporter wrote that after defeating public-sector unions and weakening private sector unions, "the Wisconsin Republican is staring down another conservative target: college professors."¹⁴⁰ The

¹³³ MARTIN J. FINKELSTEIN ET AL., *THE FACULTY FACTOR: REASSESSING THE AMERICAN ACADEMY IN A TURBULENT ERA* 58 (2016).

¹³⁴ Nico Savidge, *Uncertainty, Concern over Future of Tenure Draw National Attention to UW System*, WIS. ST. J. (July 19, 2015), https://madison.com/wsj/news/local/education/university/uncertainty-concern-over-future-of-tenure-draw-national-attention-to/article_063cb365-f8f8-5aa2-b14e-335afc4424b7.html [<https://perma.cc/8PWP-W384>] ("[L]egislators stripped tenure from state law, weakened shared governance and expanded justifications for laying off professors.").

¹³⁵ *Id.* Tenure had previously been defined and protected by state statute. *See id.*

¹³⁶ WIS. STAT. § 36.21 (2015).

¹³⁷ Peter Schmidt, *Wisconsin Regents Approve New Layoff and Tenure Policies over Faculty Objections*, CHRON. HIGHER EDUC.: TICKER (Mar. 10, 2016), <https://www.chronicle.com/blogs/ticker/wisconsin-regents-approve-new-layoff-and-tenure-policies-over-faculty-objections/109380> [<https://perma.cc/M5GR-HLK3>].

¹³⁸ *See* Colleen Flaherty, *'Fake' Tenure?*, INSIDE HIGHER ED (Mar. 11, 2016), <https://www.insidehighered.com/news/2016/03/11/u-wisconsin-board-regents-approves-new-tenure-policies-despite-faculty-concerns> [<https://perma.cc/ZPB5-VV76>] (describing various amendments, which would have strengthened tenure protections, rejected by regents when the policy was adopted).

¹³⁹ Karen Herzog, *UW-Madison Spends Nearly \$9 Million to Retain Faculty Stars*, J. SENTINEL (Mar. 7, 2016, 10:00 PM), <https://www.jsonline.com/story/news/education/2016/03/07/uwmadison-spends-nearly-9-million-to-retain-faculty-stars/84877068/> [<https://perma.cc/S34D-SREF>] ("The University of Wisconsin-Madison last semester gave out \$726,436 in raises and \$8 million in research support to retain 40 top faculty members . . .").

¹⁴⁰ Noah Bierman, *Scott Walker, Going for Conservative Trifecta, Takes on Tenured Professors*, L.A. TIMES (June 23, 2015, 3:00 AM), <https://www.latimes.com/nation/la-na-walker-wisconsin-tenure-20150623-story.html> [<https://perma.cc/2KU8-WBRY>] ("The trifecta could cement Walker's reputation among conservative Republican primary voters . . ."); *see also* Monica Davey & Tamar Lewin, *Unions Subdued, Scott Walker Turns to Tenure at Wisconsin Colleges*, N.Y. TIMES (June 4, 2015),

tenure move won Walker praise from commentators already hostile toward the professoriate. Writing in *The American Thinker*, Bruce Walker wrote:

Walker is proposing to end tenure in the state university system. Predictably, the overpaid and underworked professorial class is screeching about the loss of academic freedom. These are the same clowns who regularly intimidate conservative students in their classes, who exclude qualified conservatives from the very tenure they are defending, and who participate in keeping conservative speakers off campuses.¹⁴¹

Governor Walker also criticized Wisconsin professors, albeit in less insulting language. Speaking in favor of the tenure bill, he said, “maybe it’s time for faculty and staff to start thinking about teaching more classes and doing more work.”¹⁴²

Kentucky. In 2018, the Kentucky legislature inserted a provision into the state budget that reduced tenure protections at public universities in the state.¹⁴³ Inserted near the end of a contentious state budget process,¹⁴⁴ the provision stated that public colleges and universities:

[M]ay reduce the number of faculty, including tenured faculty, when the reduction is a result of the Board discontinuing or modifying an academic program upon determining that program changes are in the university’s or college’s best interest due to low enrollment, financial feasibility, budgetary constraints, or declaration of financial exigency.¹⁴⁵

The bill stated that affected faculty members would receive “ten days’ notice” and that “[t]he provisions of this section supersede any and all policies governing the faculty employment approved by a Board of Regents or Board of Trustees.”¹⁴⁶ Like the Wisconsin policy that received so much more media attention,¹⁴⁷ the Kentucky

<https://www.nytimes.com/2015/06/05/us/politics/unions-subdued-scott-walker-turns-to-tenure-at-wisconsin-colleges.html> [<https://perma.cc/P7A8-SABN>] (discussing the proposal in the context of the 2016 presidential primary).

¹⁴¹ Bruce Walker, *Scott Walker and Academic Tenure*, AM. THINKER (June 12, 2015), https://www.americanthinker.com/articles/2015/06/scott_walker_and_academic_tenure.html [<https://perma.cc/MN7M-PGPJ>]. See John O. McGinnis & Max Schanzbach, *College Tenure has Reached its Sell-by Date*, WALL ST. J. (Aug. 11, 2015, 7:21 PM), <https://www.wsj.com/articles/college-tenure-has-reached-its-sell-by-date-1439335262> [<https://perma.cc/2CF2-E5MP>], for more measured praise of Walker.

¹⁴² Kimberly Hefling, *Walker Erodes College Professor Tenure*, POLITICO (July 12, 2015, 6:36 PM), <https://www.politico.com/story/2015/07/scott-walker-college-professor-tenure-120009> [<https://perma.cc/R86Q-W53E>].

¹⁴³ H.B. 200, 2018 Gen. Assemb., Reg. Sess. (Ky. 2018).

¹⁴⁴ Scott Jaschik, *Tenure Under Threat in Kentucky*, INSIDE HIGHER ED (Mar. 29, 2018), <https://www.insidehighered.com/news/2018/03/29/kentucky-legislation-could-limit-tenure-protections> [<https://perma.cc/LJ7V-W5MS>].

¹⁴⁵ H.B. 200.

¹⁴⁶ *Id.*

¹⁴⁷ Perhaps the Kentucky policy received less attention because the state’s governor was not running for president. Also, the bill was enacted over his veto (for reasons unrelated to the tenure provision), and reporters were focused on provisions related to elementary and secondary school spending. See Bruce

language allows dismissal of faculty under circumstances far less grave (and far less rare) than the traditional “declaration of financial exigency” that has historically been a limitation on the protection of tenure. Decisions to “modify” programs because of “budgetary constraints” are part of the annual budget process at universities. Such decisions normally do not trigger the ability to dismiss tenured professors.¹⁴⁸

D. Reorganizing University Boards to Achieve Policy Goals

Even the most active state legislatures and governors cannot manage the day-to-day operations of public universities. Authority to govern universities is vested in boards of trustees, who then delegate much of that power to presidents, chancellors, and subordinate officers.¹⁴⁹ Trustees, volunteers who serve part time, have the power to hire and fire presidents.¹⁵⁰ Although trustees cannot oversee day-to-day decisions, their ability to fire the chief executive provides them with significant influence over any matter about which they may have special interest.

Recognizing the power of university boards, state politicians have acted occasionally to empower coalitions with political power at a particular moment to reorganize public boards of trustees. State constitutions and statutes often provide rules for the appointment of trustees.¹⁵¹ For example, a governor might appoint trustees with the consent of the state senate.¹⁵² Often, the terms of trustees are staggered, which limits the ability of any one governor or temporary legislative majority to quickly reconstitute a board with political allies. With sufficient time, however, a political faction able to consistently win elections can eventually reshape a board.¹⁵³ Sometimes, however, politicians do not wish to wait, and they amend the rules to allow more rapid change.

This section reviews recent examples of state elected officials acting to change the process by which university board members are appointed, allowing them to quickly select members ready to enact policy changes desired by the elected officials.

Schreiner & Adam Beam, *Teacher Victory: Kentucky Lawmakers Override Budget Veto*, ASSOCIATED PRESS (Apr. 13, 2018), <https://www.apnews.com/5fe98a38b7d44c3aaac36e80bd55ac6c> [<https://perma.cc/3RNZ-4TYM>] (“With the chants of hundreds of teachers ringing in their ears, Kentucky lawmakers voted Friday to override the Republican governor’s veto of a two-year state budget that increases public education spending with the help of a more than \$480 million tax increase.”).

¹⁴⁸ See Jaschik, *supra* note 144 (noting that under the new law, “public universities could dismiss tenured faculty members due to program changes or eliminations, not just the traditional reasons related to serious misconduct or failure to perform their jobs, or an institution being on the verge of financial collapse”).

¹⁴⁹ See, e.g., LA. CONST. art. VIII, § 6; MO. CONST. art. IX, § 9(a); NEB. REV. STAT. § 85-103 (2019); OKLA. STAT. tit. 70, § 3431 (2019). See generally ROBERT A. SCOTT, *HOW UNIVERSITY BOARDS WORK: A GUIDE FOR TRUSTEES, OFFICERS, AND LEADERS IN HIGHER EDUCATION* (2018) (explaining the role of trustees in higher education’s current power structure and outlining instructions on effective board membership).

¹⁵⁰ See SCOTT, *supra* note 149, at 53.

¹⁵¹ E.g., LA. CONST. art. VIII, § 6; OKLA. STAT. tit. 70, § 3431 (2019).

¹⁵² E.g., tit. 70, § 3431.

¹⁵³ Similar systems of staggered terms exist at the state and federal level for agencies and boards of various kinds. For example, the Securities and Exchange Commission has five commissioners appointed by the President with consent of the Senate. 15 U.S.C. § 78d(a) (2018). Each commissioner has a five-year term, with one term expiring each year. *Id.*

Tennessee. In 2016, Tennessee enacted the Focus on College and University Success (FOCUS) Act, which removed six public universities from the supervision of the Tennessee Board of Regents (TBR).¹⁵⁴ The TBR governs one of the state's two public university systems¹⁵⁵ and before the enactment of the FOCUS Act, it included Austin Peay State University, East Tennessee State University, University of Memphis, Middle Tennessee State University, Tennessee State University, and Tennessee Technological University.¹⁵⁶ The TBR system now includes forty community colleges and technical colleges.¹⁵⁷ Under the FOCUS Act, the six universities removed from the TBR system have their own boards, and Governor Bill Haslam appointed the overwhelming majority of their members.¹⁵⁸ Reasonable theorists of higher education governance can and do disagree about whether schools like Memphis and Austin Peay are better off independent or collected within a system that includes dozens of community and technical colleges.¹⁵⁹ It cannot be disputed, however, that the method by which the six universities left the TBR system allowed the governor to promptly pack each institution's boards with members of his choosing.

Then, in 2018, Governor Haslam signed the UT FOCUS Act, which reorganized the board of trustees of the University of Tennessee system.¹⁶⁰ The law reduced the size of the UT board from twenty-seven members to twelve, and Haslam then appointed ten members of the new board.¹⁶¹ The law also created a new advisory board for each UT campus, with most members selected by the governor.¹⁶²

¹⁵⁴ Jane Roberts, *Haslam Marks University of Memphis Independence from Board of Regents*, COM. APPEAL (June 9, 2016), <http://archive.commercialappeal.com/news/schools/haslam-marks-u-of-m-independence-from-tbr-in-event-today-34da6806-8404-606d-e053-0100007f302c-382389981.html/> [<https://perma.cc/DZF7-ZKEW>]; see also TENN. CODE ANN. § 49-8-101 (2013) (amended by H.B. 2578, 109th Gen. Assemb., Second Reg. Sess. (Tenn. 2016)).

¹⁵⁵ The other system, the University of Tennessee system, has its own board. *UT Board of Trustees*, U. TENN., <https://trustees.tennessee.edu/> [<https://perma.cc/B6PT-K529>].

¹⁵⁶ Roberts, *supra* note 154.

¹⁵⁷ *Institutions: Our Institutions*, TBR: C. SYS. TENN., <https://www.tbr.edu/institutions/our-institutions> [<https://perma.cc/HM3S-44VT>].

¹⁵⁸ *E.g.*, Roberts, *supra* note 154 (“[Memphis’s] new 10-member board will take over July 1, 2017. Haslam will appoint eight of the nine voting members. A process agreed on by the university senate and president will be used to name the ninth. The tenth member will be a nonvoting student position.”).

¹⁵⁹ See, e.g., Doug Lederman, *In Tenn., Politics or Good Policy?*, INSIDE HIGHER ED (Mar. 23, 2016), <https://www.insidehighered.com/news/2016/03/23/politics-trumps-good-policy-proposed-governance-change-tennessee> [<https://perma.cc/4C6J-XRNS>] (noting recent impressive higher education policy accomplishments in Tennessee and questioning whether the FOCUS Act could undermine them); Kellie Woodhouse, *Planned Breakup in Tennessee*, INSIDE HIGHER ED (Jan. 14, 2016), <https://www.insidehighered.com/news/2016/01/14/mixed-reviews-plan-change-tennessee-higher-education-governance> [<https://perma.cc/W6NQ-HCC6>] (quoting supporters and opponents of the proposal).

¹⁶⁰ Jordan Buic, *Gov. Bill Haslam Announces 10 Appointees to New, Smaller University of Tennessee Board of Trustees*, TENNESSEAN (Apr. 9, 2018, 12:06 PM), <https://www.tennessean.com/story/news/politics/2018/04/09/gov-bill-haslam-announces-10-appointees-new-smaller-university-tennessee-board-trustees/499269002/> [<https://perma.cc/6NSU-6QGV>].

¹⁶¹ *Id.*; see also TENN. CODE ANN. § 49-9-202 (2018).

¹⁶² TENN. CODE ANN. § 49-9-501 (2018); see also Meghan Mangrum, *UTC’s New Advisory Board Meets for the First Time, Thanks to UT Focus Act*, CHATTANOOGA TIMES FREE PRESS (Jan. 7, 2019), <https://www.timesfreepress.com/news/local/story/2019/jan/07/utcs-new-advisory-board-meets-first->

Kentucky. On June 17, 2016, Kentucky Governor Matthew Bevin issued executive orders reconstituting the board of trustees of the University of Louisville, a public university.¹⁶³ The first order abolished and then re-created the board of trustees and the second June 17 order established an interim board of trustees.¹⁶⁴ The first order stated that “the University of Louisville has recently been involved in several high-profile incidents that have cast the institution in a negative light” and concluded that “the administration of the University of Louisville and the members of its Board of Trustees have become operationally dysfunctional.”¹⁶⁵ Citing statutory authority to restructure state boards, the order then stated that the twenty-member “University of Louisville Board of Trustees . . . is abolished” with the terms of all board members ending immediately.¹⁶⁶ Next, the board was “recreated” with thirteen members, ten of whom would be appointed by the governor.¹⁶⁷

On the same day, Governor Bevin appointed an interim board of trustees with three members,¹⁶⁸ and, two weeks later, he appointed ten regular members of the board.¹⁶⁹ Around the same time, the Governor announced that James Ramsey, who had served as Louisville’s president since 2002, would step down.¹⁷⁰

The state attorney general sued, alleging that Governor Bevin exceeded his authority when he abolished and recreated the board.¹⁷¹ Attorney General Andy Beshear is a Democrat, and Governor Bevin is a Republican.¹⁷² Further, Beshear’s

time-than/486220/ [https://perma.cc/63PH-L82G] (“The seven-member board, includes five members appointed by the governor . . .”).

¹⁶³ *Timeline of Board of Trustees Reorganization*, U. LOUISVILLE, <https://louisville.edu/accreditation/uofl-sacs-monitoring-report-submitted-08-15.17/comprehensive-standard-3-2-5-footnotes/3-2-5-fn16> [https://perma.cc/PPF6-Y6ES].

¹⁶⁴ *Beshear v. Bevin*, No. 16-CI-738, 1 n.1 (Franklin Cir. Ct. Sept. 28, 2016) (final judgment granting declaratory and injunctive relief); see also *Timeline of Board of Trustees Reorganization*, *supra* note 163.

¹⁶⁵ Ky. Exec. Order No. 2016-338 (June 17, 2016). The statement about high-profile scandals was accurate. Kellie Woodhouse, *Accountable or Not?*, INSIDE HIGHER ED (Jan. 5, 2016), <https://www.insidehighered.com/news/2016/01/05/should-president-be-held-responsible-scandals-university-louisville> [https://perma.cc/2CZ3-W8HS] (“The public university has weathered several high-profile incidents in the last year, including a prostitution scandal involving the men’s basketball team, the president and his staff donning racially insensitive Halloween costumes, and, revealed most recently, the ongoing investigation of an executive vice president and other high-level staffers for possibly misusing federal funds.”).

¹⁶⁶ Ky. Exec. Order No. 2016-338 (June 17, 2016).

¹⁶⁷ *Id.*

¹⁶⁸ Ky. Exec. Order No. 2016-339 (June 17, 2016).

¹⁶⁹ Ky. Exec. Order No. 2016-391 (June 29, 2016). One appointed member declined to serve, and the governor appointed a replacement on July 12, 2016. Ky. Exec. Order No. 2016-512 (July 12, 2016).

¹⁷⁰ Rick Seltzer, *Cleaning House at Louisville*, INSIDE HIGHER ED (June 20, 2016), <https://www.insidehighered.com/news/2016/06/20/university-louisville-housecleaning-raises-questions> [https://perma.cc/B9Y4-M5A6].

¹⁷¹ See *Beshear v. Bevin*, No. 16-CI-738 (Franklin Cir. Ct. Sept. 28, 2016) (final judgment granting declaratory and injunctive relief).

¹⁷² Rick Seltzer, *Louisville Board Overhaul Blocked*, INSIDE HIGHER ED (Sept. 29, 2016), <https://www.insidehighered.com/news/2016/09/29/judge-blocks-kentucky-governor-overhauling-louisville-board> [https://perma.cc/UPY8-PLB8].

father, Steve Beshear, served as governor from 2007 to 2015.¹⁷³ Andy Beshear ran against Bevin for governor in 2019, winning a narrow victory as the only Kentucky Democrat elected that year statewide.¹⁷⁴ The fight over the governor's power to reorganize the Louisville Board is accordingly linked to the larger political battles of the state.

While the lawsuit was ongoing, the state legislature enacted a new law that "provides a specific statutory path for a governor to disband and reconstitute a university's governing board and creates a process for the removal of individual members of a university's governing board."¹⁷⁵ The Supreme Court of Kentucky then held that the new statutory authority mooted the attorney general's challenge to the governor's prior executive orders.¹⁷⁶ Both Bevin and Beshear claimed victory.¹⁷⁷ Bevin's win was more straightforward; the court dismissed the lawsuit and allowed the governor's new board to continue its service. Beshear announced more of a moral victory, stating that the Court "found that the General Assembly bailed [Bevin] out."¹⁷⁸

State Coordinating Boards. In other states, governors have sought to use state coordinating boards to achieve their higher education policy goals. Statewide boards offer a tool to influence decisions at campuses and systems that have their own boards.¹⁷⁹ In California for example, Governor Gavin Newsom promised to create an updated version of the California Postsecondary Education Commission, which his predecessor had abolished in 2011 to save money.¹⁸⁰ Jared Polis, the new governor of Colorado, proposed strengthening his state's existing Commission on Higher Education.¹⁸¹ States vary in whether they have statewide coordinating boards to supervise their public universities, and different states with such boards grant them

¹⁷³ Tara Golshan, *Kentucky's Republican Governor is Facing a Tough Race—and He Wants Trump to Save Him*, VOX (Nov. 5, 2019, 12:21 PM), <https://www.vox.com/policy-and-politics/2019/11/1/20932085/kentucky-governor-election-2019-bevin-beshear-trump> [<https://perma.cc/YX7B-KVZE>].

¹⁷⁴ Campbell Robertson, *In Kentucky, a Governor Who Picked Fights Loses a Big One*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/us/kentucky-governor-race-matt-bevin.html> [<https://perma.cc/NLB8-WRCD>]; see *Democrat Andy Beshear Declares Victory in Tight Kentucky Governor's Race*, CBS NEWS (Nov. 6, 2019), <https://www.cbsnews.com/news/kentucky-election-results-today-andy-beshear-governor-race-2019-11-05-live-updates/> [<https://perma.cc/FT45-ZSNW>].

¹⁷⁵ *Bevin v. Beshear*, 526 S.W.3d 89, 90 (Ky. 2017).

¹⁷⁶ *Id.* at 90–91 (“[W]e hold that intervening statutory law enacted by the General[] Assembly has rendered moot the legal issues decided by the circuit court.”); see also KY. REV. STAT. ANN. § 12.028 (West 2019) (concerning authority of governor to reorganize board); S.B. 12, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017) (reorganizing Louisville board in manner consistent with prior executive orders).

¹⁷⁷ Matthew Glowicki, *Bevin Claims Win After Justices Dismiss Suit on University of Louisville Board Shake-up*, COURIER J. (Sept. 28, 2017, 12:07 PM), <https://courier-journal.com/story/news/politics/2017/09/28/university-louisville-board-reorganization-bevin-beshear-kentucky-supreme-court/711929001/> [<https://perma.cc/RE6U-2NYL>].

¹⁷⁸ *Id.*

¹⁷⁹ See Greg Toppo, *'Higher Ed's Most Important Watchdog'?*, INSIDE HIGHER ED (Jan. 25, 2019), <https://www.insidehighered.com/news/2019/01/25/lawmakers-officials-split-state-coordinating-boards> [<https://perma.cc/7S7F-J4T7>] (explaining the goals of two recently elected governors who aim to empower coordinating boards to allocate state higher education funding).

¹⁸⁰ *Id.*; see also Larry Gordon, *California Higher Education Leaders have High Hopes for Newsom's Spending Plans*, MERCURY NEWS (Jan. 6, 2019, 6:00 AM), <https://www.mercurynews.com/2019/01/06/california-higher-education-leaders-have-high-hopes-for-newsoms-spending-plans/> [<https://perma.cc/SJ5E-2QEN>].

¹⁸¹ Toppo, *supra* note 179.

varying levels of authority. If a governor cannot quickly replace board members at individual universities, coordinating boards could be an attractive alternative, particularly if a governor can create a new board and thereby appoint all the members at once.

E. Banning Affirmative Action at the Ballot Box

As discussed in the Introduction, voters in multiple states have approved ballot initiatives prohibiting the consideration of race in public higher education admissions.¹⁸² Unlike some of the issues discussed above—such as the organization of university governing boards—public opinion on the question of affirmative action has been well documented for years. The polling data accord with the results of the ballot initiatives: Solid majorities tell pollsters that they oppose the consideration of race by admissions officers.¹⁸³

Although survey respondents are more likely than not to support “affirmative action for racial minorities,” with fifty-four to fifty-eight percent indicating approval,¹⁸⁴ that support evaporates when pollsters ask more specific questions. Working with *Inside Higher Ed*, Gallup conducted a poll in the wake of the Supreme Court’s 2016 decision in *Fisher v. University of Texas*.¹⁸⁵ The question asked was: “The Supreme Court recently ruled on a case that confirms that colleges can consider the race or ethnicity of students when making decisions on who to admit to the college. Overall, do you approve or disapprove of the Supreme Court’s decision?”¹⁸⁶ Participants disapproved by a vote of sixty-five to thirty-one percent.¹⁸⁷

The poll also asked respondents about a variety of factors that a university might consider when making admissions decisions, including high school grades, test scores, athletic ability, family economic circumstances, race, gender, and having a parent who is a graduate of the institution.¹⁸⁸ Consideration of race and gender both

¹⁸² See *supra* notes 4–21 and accompanying text.

¹⁸³ E.g., Nikki Graf, *Most Americans say Colleges Should not Consider Race or Ethnicity in Admissions*, PEW RES. CTR.: FACT TANK (Feb. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/> [<https://perma.cc/N3MC-NTHB>]; Frank Newport, *The Harvard Affirmative Action Case and Public Opinion*, GALLUP: POLLING MATTERS (Oct. 22, 2018), <https://news.gallup.com/opinion/polling-matters/243965/harvard-affirmative-action-case-public-opinion.aspx> [<https://perma.cc/7YJD-9WNA>] (“The most important conclusion from all of these data is that Americans do not like the idea of colleges using race and ethnicity as a factor in decisions on college admissions.”).

¹⁸⁴ Newport, *supra* note 183.

¹⁸⁵ Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP: POLITICS (July 8, 2016), <https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx> [<https://perma.cc/559M-QMWB>]. See generally *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (upholding an affirmative action program at the University of Texas despite application of strict scrutiny to consideration of race in admissions).

¹⁸⁶ Newport, *supra* note 185.

¹⁸⁷ *Id.*

¹⁸⁸ Scott Jaschik, *Poll: Public Opposes Affirmative Action*, INSIDE HIGHER ED (July 8, 2016), <https://www.insidehighered.com/news/2016/07/08/poll-finds-public-opposition-considering-race-and-ethnicity-college-admissions> [<https://perma.cc/FQS6-565A>].

had less support than preferences for athletes and legacies.¹⁸⁹ For each factor, respondents were asked if it should be a “major factor,” a “minor factor,” or considered “not at all.”¹⁹⁰ While white respondents were especially likely to oppose consideration of race, majorities of black and Hispanic respondents also opposed it.¹⁹¹

Gallup has also surveyed about consideration of race in college admissions without mentioning a Supreme Court decision. Four times between 2003 and 2016, Gallup asked the following question:

Which comes closer to your view about evaluating students for admission into a college or university—[ROTATED: applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted (or) an applicant’s racial and ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted]?¹⁹²

The “solely on merit” option is far more popular, with survey respondents choosing it at rates between sixty-seven and seventy percent during each administration of the poll.¹⁹³

Public opinion on race-conscious admissions differs markedly from the mainstream consensus of American university administrators. While the *Fisher* case was pending, the president of the University of California, along with the chancellors of the UC campuses, submitted an amicus brief in support of the University of Texas.¹⁹⁴ The UC administrators noted that because of California’s state law prohibiting race-conscious admission measures, “UC provides a compelling illustration of the broader educational context in which race-neutral and race-conscious policies must be evaluated.”¹⁹⁵ Arguing that UC’s best efforts to recruit a diverse student body without considering the race of its applicants “have proven to be ineffective alternatives,” the brief urged the Court to allow other public institutions to continue considering race.¹⁹⁶ Harvard University also submitted a brief supporting the University of Texas, noting that “Justice Powell cited with approval the ‘Harvard College Admissions Program’ in his influential opinion in *Regents of*

¹⁸⁹ *Id.* Support for preferences for athletes and legacies may suffer as a result of the recent “Varsity Blues” admissions scandal. It will be worth watching whether any legislation results—for example, prohibiting state institutions from offering admissions preferences to children of donors.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Newport, *supra* note 183.

¹⁹³ *Id.*

¹⁹⁴ Brief of the President and the Chancellors of the University of California as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981).

¹⁹⁵ *Id.* at 2–3.

¹⁹⁶ *Id.* at 3–4; cf. Ford Fessenden & Josh Keller, *How Minorities have Fared in States with Affirmative Action Bans*, N.Y. TIMES (Dec. 9, 2015), <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html> [<https://perma.cc/HX3N-G9DC>] (providing interactive graphics showing changes to state demographics and university student populations over time).

the University of California v. Bakke, 438 U.S. 265, 322 (1978).¹⁹⁷ Harvard summarized its argument as follows:

It is more apparent now than ever that maintaining a diverse student body is essential to Harvard's goals of providing its students with the most robust educational experience possible on campus and preparing its graduates to thrive in a complex and stunningly diverse nation and world. These goals, moreover, are not held by Harvard alone, but are shared by many other universities that, like Harvard, have seen through decades of experience the transformative importance of student body diversity on the educational process. This Court should therefore reaffirm its longstanding deference to universities' academic judgment that diversity serves vital educational goals.¹⁹⁸

The Court agreed, holding, “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”¹⁹⁹ Writing for the majority, Justice Kennedy noted that in striking the balance between promoting racial diversity (which might require race-conscious admissions) and promoting “equal treatment and dignity” (which might be undermined by race-conscious decisions), “public universities, like the States themselves, can serve as ‘laboratories for experimentation.’”²⁰⁰

For the time being, the Court has allowed public universities to consider race in their admissions process, at least if they are careful about how they design their selection process. They are also free to ignore race entirely.²⁰¹ So far, when boards and administrators at highly selective public universities have been empowered to decide what path is best, they have tended to select “race-conscious admissions practices.”²⁰² When voters have chosen, however, race-conscious admissions have lost nearly every time.²⁰³

¹⁹⁷ Brief for Amicus Curiae Harvard University in Support of Respondents at 1, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981).

¹⁹⁸ *Id.* at 3.

¹⁹⁹ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016).

²⁰⁰ *Id.*

²⁰¹ See *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 312–14 (2014).

²⁰² See Brief of Amicus Curiae the University of North Carolina at Chapel Hill in Support of Respondents at 10–11, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981) (noting that UNC and “numerous other universities” had crafted policies pursuant to *Bakke* with “appropriately limited race-conscious admissions practices”). See generally MICHELE S. MOSES, *LIVING WITH MORAL DISAGREEMENT: THE ENDURING CONTROVERSY ABOUT AFFIRMATIVE ACTION* (2016). Private university leaders have acted similarly. Pending litigation concerning admissions at Harvard College may reshape the law in this area. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39 (D. Mass. 2015) (suit against Harvard over its race-conscious admissions system).

²⁰³ Examples include Arizona and Nebraska. See, e.g., Proposition 107 (*Ariz.* 2010) (adding Sec. 36 to ARIZ. CONST. art. 2); Neb. Initiative 424 (*Neb.* 2008) (amending NEB. CONST. art. I). In addition, New Hampshire banned affirmative action through traditional legislation. See N.H. REV. STAT. ANN. § 21-I:52 (2012); H.B. 623, Reg. Sess. (N.H. 2011). Colorado voters, however, have rejected an affirmative action ban. Naomi Zeveloff, *Amendment 46 to Repeal Affirmative Action Loses Despite Hefty Odds*, COLO. INDEP. (Nov. 7, 2008), <https://www.coloradoindependent.com/2008/11/07/amendment-46-to-repeal-affirmative-action-loses-despite-hefty-odds/> [<https://perma.cc/Y3YJ-APUM>].

F. Restricting Access to Higher Education Based on Immigration Status

As the battle over immigration law has roiled national politics, state legislatures have moved to decide whether their public universities will grant in-state tuition benefits to resident students who are unauthorized immigrants.²⁰⁴ At least six states have laws that prohibit unauthorized immigrants from enjoying in-state tuition.²⁰⁵ At least sixteen states, in addition to the District of Columbia, have laws extending in-state tuition to unauthorized immigrants, with an additional handful of states providing such benefits through action by university systems rather than legislation.²⁰⁶ The issue remains up to the states because while the Supreme Court decided in 1982 that undocumented schoolchildren must be allowed to attend public elementary and secondary schools,²⁰⁷ it has imposed no such requirement on public institutions of higher education.²⁰⁸

State restricting access. In Alabama, Arizona, Georgia, Indiana, Missouri, and South Carolina, state law prohibits public universities from granting in-state tuition to unauthorized immigrants.²⁰⁹ The first such law was enacted by Arizona voters in 2006 after state legislators placed it on the ballot.²¹⁰ Legislatures in the other five states enacted their similar laws directly, without a ballot item. In 2008, Georgia and South Carolina enacted their statutes,²¹¹ with Alabama and Indiana following suit in

²⁰⁴ Michael A. Olivas & Kristi L. Bowman, *Plyler's Legacy: Immigration and Higher Education in the 21st Century*, 2011 MICH. ST. L. REV. 261, 261–62. The issues raised in this subpart—including hostility toward certain foreign-born students—relate to broader issues beyond the scope of this article. Further research might explore the relationship between the treatment of unauthorized immigrants and the recent decline in enrollment at American colleges by international students, a phenomenon connected to the overall reputation of the United States abroad.

²⁰⁵ *Tuition Benefits for Immigrants*, NCSL: NAT'L CONF. ST. LEGISLATURES (Sept. 26, 2019), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> [https://perma.cc/69ZN-EC7D].

²⁰⁶ *Id.*

²⁰⁷ See *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

²⁰⁸ Olivas & Bowman, *supra* note 204, at 269–70; see also Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357, 361–62 (supporting legal challenges aimed at winning such a Supreme Court ruling).

²⁰⁹ *Tuition Benefits for Immigrants, supra* note 205.

²¹⁰ Jesse McKinley, *Arizona Law Takes a Toll on Nonresident Students*, N.Y. TIMES (Jan. 27, 2008), <https://www.nytimes.com/2008/01/27/us/27tuition.html> [https://perma.cc/PD2G-GR9B]; see ARIZ. REV. STAT. ANN. § 15–1803(B) (2006) (providing that “a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student”); Proposition 300 (Ariz. 2006).

²¹¹ See GA. CODE ANN. § 20-3-66(d) (2008) (“Noncitizen students shall not be classified as in-state for tuition purposes unless the student is legally in this state and there is evidence to warrant consideration of in-state classification as determined by the board of regents.”); S.C. CODE ANN. § 59-101-430(A) (2008) (“An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State”); *id.* § 59-101-430(B) (denying eligibility for in-state tuition); see also S.B. 492, Gen. Assemb., Reg. Sess. (Ga. 2008); H.B. 4400, 117th Gen. Assemb., Reg. Sess. (S.C. 2008).

2011 and Missouri joining in 2015.²¹² Some, but not all, of these statutes provided also that unauthorized immigrants cannot attend state universities at all.²¹³

States granting access. A greater number of states have passed laws allowing at least some unauthorized immigrants to attend public universities at in-state rates.²¹⁴ For example, in 2005, New Mexico passed Senate Bill 582, which provides that “[a] public post-secondary educational institution shall not deny admission to a student on account of the student’s immigration status.”²¹⁵ Oregon enacted a similar law in 2013.²¹⁶ Washington law allows unauthorized immigrants to enjoy in-state tuition, so long as they swear that they will seek legal immigration status “at the earliest opportunity.”²¹⁷

The in-state tuition issue inspired scholarly debate, particularly among Professors Kris Kobach and Michael Olivas.²¹⁸ Kobach, who after teaching law was elected Secretary of State of Kansas, became nationally known for his opposition to granting benefits to unauthorized immigrants.²¹⁹ His legal scholarship raised similar arguments to those he would raise as a politician and litigator.²²⁰ Aiming to “drive a

²¹² See ALA. CODE § 31-13-8 (2012) (“An alien who is not lawfully present in the United States shall not be permitted to enroll in or attend any public postsecondary education institution in this state. . . . [and] shall not be eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.”); IND. CODE § 21-14-11-1 (2013) (“An individual who is not lawfully present in the United States is not eligible to pay the resident tuition rate that is determined by the state educational institution.”); H.B. 3, 98th Gen. Assemb., Reg. Sess. (Mo. 2015) (stating that “no funds shall be expended at public institutions of higher education that offer a tuition rate to any student with an unlawful immigration status in the United States that is less than the tuition rate charged to international students”); see also H.B. 56, Reg. Sess. (Ala. 2011); H.E.A. 1402, 117th Gen. Assemb., Reg. Sess. (Ind. 2011).

²¹³ E.g., ALA. CODE § 31-13-8 (2012); S.C. CODE ANN. § 59-101-430(A) (2008).

²¹⁴ See *Tuition Benefits for Immigrants*, *supra* note 205 (collecting statutes and policies).

²¹⁵ S.B. 582, 47th Leg., Reg. Sess. (N.M. 2005); see also *Information for Undocumented Students and Applicants at NMHU*, N.M. HIGHLANDS U., <https://www.nmhu.edu/information-for-undocumented-students-and-applicants-at-nmhu/> [<https://perma.cc/W2XD-J6CL>] (stating that “it makes all qualified residents of New Mexico eligible for in-state tuition and state-funded financial aid, regardless of immigration status if they meet” certain criteria).

²¹⁶ H.B. 2787, 77th Leg. Assemb., Reg. Sess. (Or. 2013); see also HIGHER EDUC. COORDINATING COMM’N, TUITION EQUITY AT PUBLIC UNIVERSITIES: REPORT TO THE LEGISLATURE ON HOUSE BILL 2787 ii (2013), [https://www.oregon.gov/highered/about/Documents/Commission/COMMISSION/2018/Nov%202018/8.4a%20ACTION%20ITEM%20Tuition%20Equity%20Report%20\(HB%202787,%202013\).pdf](https://www.oregon.gov/highered/about/Documents/Commission/COMMISSION/2018/Nov%202018/8.4a%20ACTION%20ITEM%20Tuition%20Equity%20Report%20(HB%202787,%202013).pdf) [<https://perma.cc/3BBP-6YRW>] (“HB 2787 (2013) allows non-citizens and military relocation students to pay resident tuition at Oregon’s seven public universities.”).

²¹⁷ WASH. REV. CODE § 28B.118.010(4)(b)(i) (2019) (requiring “an affidavit indicating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so”); H.B. 1488, 65th Leg., Reg. Sess. (Wash. 2018) (creating the affidavit requirement); see also H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003) (granting in-state tuition regardless of immigration status).

²¹⁸ See Elizabeth Redden, *An In-State Tuition Debate*, INSIDE HIGHER ED (Feb. 28, 2007), <https://www.insidehighered.com/news/2007/02/28/state-tuition-debate> [<https://perma.cc/8EJJ-8TLZ>] (quoting Kobach saying that the issue arises in many states because “giving this subsidized tuition to illegal aliens is just intensely unpopular” and Olivas saying that “in our society, we don’t punish kids for what their parents have committed” and that he is kept busy because the “forces of evil are afoot”).

²¹⁹ See *Republican Immigration Platform Backs ‘Self-Deportation,’* N.Y. TIMES: CAUCUS (Aug. 23, 2012, 10:46 AM), <https://thecaucus.blogs.nytimes.com/2012/08/23/republican-immigration-platform-backs-self-deportation/> [<https://perma.cc/9QWJ-6N9Y>] (quoting Kobach, who said, “[I]f you really want to create a job tomorrow, you can remove an illegal alien today”).

²²⁰ See, e.g., Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 473, 473–75 (2007).

wooden stake through the heart of . . . Kobach's proposals,²²¹ Olivas, a law professor who served as general counsel to the American Association of University Professors²²², devoted substantial scholarly attention to the in-state tuition issue.²²³ Unlike some academic arguments, the Olivas-Kobach debate has real-world consequences, with about half the states passing laws on one side or the other concerning in-state tuition for undocumented students. One cannot be sure how much the legal scholarship affected legislation. But one thing is clear—elected leaders in those states chose not to leave the decision to university administrators and trustees.

G. *A Few Proposals Not Enacted: Harbingers of Future Law?*

Beyond all the changes in higher education law chronicled above, which represent only a fraction of the examples one might collect, one must consider the stillborn legislation—proposals announced by politicians but never enacted. Knowing how easy it is for a legislator to gain media coverage for introducing a bill with low chances of becoming law, one should not give too much weight to random proposals. They may signal one member's idiosyncrasy rather than the bubbling of mass discontent. Nonetheless, today's unsuccessful bill may be tomorrow's law. This Section examines a few instances in which politicians have suggested amending higher education law in recent years, focusing on proposals that relate to successful law changes documented earlier in this Part.

i. Proposed Campus Speech Laws

In the area of campus speech, U.S. Senator Charles (“Chuck”) Grassley of Iowa, then Chairman of the Senate Committee on the Judiciary, held a hearing in June 2017 called “Free Speech 101: The Assault on the First Amendment on College Campuses.”²²⁴ In his opening statement, Grassley suggested that “private colleges that accept federal funds could be subject to individual private lawsuits when free speech rights . . . are violated.”²²⁵ In essence, he was floating the idea of a federal statute like the Campus Free Expression Act proposed by FIRE and enacted in Missouri.²²⁶ Grassley's law would have gone much further, however, than anything modelled on the FIRE or Goldwater model bills. Those bills restrict only the behavior of public universities. Grassley, by contrast, explicitly singled out private universities in his remarks, aiming his proposed right of action at “private colleges

²²¹ Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 100 (2008).

²²² *The University of Houston Law Center Faculty: Michael A. Olivas*, U. HOUSTON LAW CTR., <https://www.law.uh.edu/faculty/main.asp?PID=31> [<https://perma.cc/GRJ8-3Y9Y>].

²²³ See, e.g., *id.*; Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 2–5 (2011).

²²⁴ *Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (June 20, 2017), <https://www.judiciary.senate.gov/imo/media/doc/06-20-17%20Grassley%20Statement.pdf> [<https://perma.cc/5SSP-2YFL>] (statement of Senator Chuck Grassley, Chairman, Senate Judiciary Committee); see also *Private Universities*, *supra* note 35, at 75 (discussing this hearing).

²²⁵ *Free Speech 101: The Assault on the First Amendment on College Campuses*, *supra* note 224.

²²⁶ See *supra* Section I.A.

that accept federal funds.”²²⁷ Although Grassley’s idea never became law, the concept echoed suggestions from leaders of the conservative advocacy institute world. FIRE co-founder Harvey Silverglate,²²⁸ for example, wrote in the *Wall Street Journal* that Congress should “tie federal funds to respect for the First Amendment.”²²⁹ (Because the First Amendment binds only state actors,²³⁰ a group that does not include private universities, the proposed requirement would mandate “respect” not for the actual First Amendment but instead for some other principle.²³¹)

Ironically, Silverglate’s idea evoked the most biting criticisms leveled against the Office for Civil Rights of the U.S. Department of Education during the Obama Administration, as was noted in a cautionary response written by Preston Cooper of the American Enterprise Institute.²³² Cooper posited that “the proposed solution—using federal aid as a hammer to keep trigger warning-happy institutions in line—has a recent history of treating too many problems as nails. The Obama administration exploited the power of federal aid programs to implement its agenda on sexual assault and transgender issues.”²³³ He noted that under the wrong sort of leadership, the Department of Education might punish a “private, religious college,” deeming it to have “violate[d] free speech if its students are required to participate in prayer.”²³⁴

Neither congressional action nor Department of Education regulation has attempted to use the spending power to regulate the free expression policies of universities across America; however, President Trump issued an executive order in March 2019 directing certain federal officials to “take appropriate steps . . . to ensure institutions that receive Federal research or education grants promote free

²²⁷ *Free Speech 101: The Assault on the First Amendment on Campuses*, *supra* note 224; *Private Universities*, *supra* note 35, at 75 (recounting Grassley’s attack on the president of Northwestern University, a private institution in Illinois).

²²⁸ *History*, FIRE, <https://www.thefire.org/about-us/history/> [<https://perma.cc/NGD2-PHH8>].

²²⁹ Harvey Silverglate, *Trump and Congress Can Help Restore Campus Free Speech*, WALL ST. J.: OPINION (Apr. 30, 2017, 4:21 PM), <https://www.wsj.com/articles/trump-and-congress-can-help-restore-campus-free-speech-1493583718> [<https://perma.cc/RSR9-CR48>].

²³⁰ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (“The Free Speech Clause does not prohibit *private* abridgment of speech.”).

²³¹ The text of Silverglate’s op-ed was slightly more precise than the subhead. Instead of referring to the “First Amendment,” it instead said, “Congress should deny funding to institutions with policies that violate free-speech rights.” Silverglate, *supra* note 229. But this too misses the mark because a private university can depart from First Amendment jurisprudence without violating anyone’s “rights.” Consider, for example, a religious college prohibiting certain student speech it deems heretical. Cf. *Private Universities*, *supra* note 35, at 85 (noting religious orthodoxy imposed on students by Wheaton College).

²³² See Preston Cooper, *Don’t Use Federal Aid to Police Campus Free Speech*, FORBES (May 2, 2017, 9:48 AM), <https://www.forbes.com/sites/prestoncooper2/2017/05/02/dont-use-federal-aid-to-police-campus-free-speech/#25edecbc6c89> [<https://perma.cc/X2ZK-7BVK>].

²³³ *Id.*; see also George Leef, *Can the Feds do Something to Protect Campus Free Speech? Should They?*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (May 26, 2017), <https://www.jamesmartin.center/2017/05/can-feds-something-protect-campus-free-speech/> [<https://perma.cc/M3D4-NZS5>] (reviewing Cooper’s fears and concluding he was “not convinced that we would actually increase the Education Department’s power and the likelihood of its abuse if we conditioned eligibility for federal funds on respect for free speech on campus”).

²³⁴ Cooper, *supra* note 232.

inquiry.”²³⁵ FIRE promptly issued a statement expressing appreciation for “the executive branch’s attention to this issue” while noting the possibility of “unintended consequences that threaten free expression and academic freedom.”²³⁶ It remains to be seen what actions will be taken by the federal agencies—including the Departments of Defense, Education, Interior, and Agriculture, along with the National Science Foundation—in response to the executive order.

ii. Proposed Prohibitions on Tenure

Section C above discusses the Wisconsin and Kentucky legislation that undermined faculty tenure protections in those states’ public universities. House Bill 1474, introduced by a Missouri legislator in 2017, would have gone further. It stated that “no public institution of higher education in this state shall award tenure to any person who is hired by such institution for the first time on or after January 1, 2019.”²³⁷ The proposal earned its sponsor some media attention but did not win much support.²³⁸ Senate Bill 41, introduced by an Iowa legislator the same year, would have gone even further. It would have “[p]rohibit[ed], at each institution of higher learning governed by the state board of regents, the establishment *or continuation* of a tenure system for any employee of the institution,”²³⁹ thereby stripping tenure from faculty who already possessed it. Like the Missouri bill, the Iowa counterpart died in committee.²⁴⁰

In Kansas, a 2016 bill would have ended tenure at community colleges and technical schools.²⁴¹ Its short title was “[e]liminating due process for certain

²³⁵ Exec. Order No. 13864, 84 Fed. Reg. 11401, 11402 (Mar. 21, 2019). By issuing the order, Trump kept a promise he had made earlier that month at the Conservative Political Action Conference. David Shepardson & Katanga Johnson, *Trump Vows Executive Order Requiring ‘Free Speech’ at Colleges*, REUTERS (Mar. 2, 2019, 2:07 PM), <https://www.reuters.com/article/us-usa-trump-colleges/trump-vows-executive-order-requiring-free-speech-at-colleges-idUSKCN1QJ0JD> [<https://perma.cc/K3P5-V6UA>] (quoting President Trump saying, “[t]oday, I am proud to announce that I will be very soon signing an executive order requiring colleges and universities to support free speech if they want federal research funds”).

²³⁶ FIRE, *FIRE Statement on Campus Free Speech Executive Order* (Mar. 21, 2019), <https://www.thefire.org/fire-statement-on-campus-free-speech-executive-order/> [<https://perma.cc/MQR3-8WNP>].

²³⁷ H.B. 1474, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2017).

²³⁸ See, e.g., Stephanie Sandoval, *Lawmakers Clash over Proposals to Eliminate Tenure and Tuition Caps*, MISSOURIAN (Feb. 28, 2018), https://www.columbiainmissourian.com/news/state_news/lawmakers-clash-over-proposals-to-eliminate-tenure-and-tuition-caps/article_f23a735c-1ce3-11e8-bf59-6b9c909fd3e8.html [<https://perma.cc/7PAG-XG7D>]; Mará Rose Williams, *Legislator Wants to Hand a Pink Slip to Guaranteed Job Security at Missouri Colleges*, KAN. CITY STAR (Feb. 1, 2017, 7:00 AM), <https://www.kansascity.com/news/politics-government/article129891454.html>.

²³⁹ S.F. 41, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) (emphasis added).

²⁴⁰ Compare

HB	1474,	MO.	HOUSE,
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<https://house.mo.gov/BillContentMobile.aspx?year=2018&code=R&bill=HB1474> [<https://perma.cc/4N3Z-XA4D>], with *Bill History for Senate File 41*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=SF%2041&ga=87> [<https://perma.cc/PQA2-VS7R>].

²⁴¹ Celia Llopis-Jepsen, *Two-year College Teachers Urge Lawmakers not to Eliminate Tenure*, TOPEKA CAPITAL-JOURNAL (Feb. 9, 2016, 4:22 PM), <https://www.cjonline.com/article/20160209/NEWS/302099733> [<https://perma.cc/PCB4-UVBX>].

postsecondary teachers.”²⁴² The bill, which would have followed a successfully enacted law eliminating job protections for K-12 teachers,²⁴³ died in committee.²⁴⁴ Similar bills have been introduced in Florida²⁴⁵ and Utah.²⁴⁶

iii. Proposed Restriction of Boycotts and Strikes by Scholarship Athletes

In December 2015, one month after student protests culminated in the resignation of top administrators at the University of Missouri,²⁴⁷ two members of the state legislature introduced a bill that would have required state universities to revoke the scholarship of any college athlete who “participates in any strike or concerted refusal to play a scheduled game.”²⁴⁸ In addition, the same punishment would be mandatory for any athlete who “calls [for], incites, [or] supports” such a strike or refusal.²⁴⁹ Further, the text provided that any coaching staff member who “encourages or enables” students to engage in the prohibited conduct “shall be fined by his or her” employer-institution.²⁵⁰

The Missouri protests had involved an announcement by football players that they would “no longer participate in any football related activities until” the UM System president resigned or was removed.²⁵¹ At the time, the university received suggestions from some outside observers that the football players should be punished, perhaps with revocation of their scholarships.²⁵² The proposed bill would have required such action and by its terms, it would have applied to private and public universities alike.²⁵³ Because the bill was withdrawn soon after its introduction,²⁵⁴ lawmakers did not have to consider the First Amendment implications of mandating punishments for students who “support” a strike.

²⁴² H.B. 2531, Leg., 2016 Reg. Sess. (Kan. 2016).

²⁴³ Llopis-Jepsen, *supra* note 241.

²⁴⁴ *HB 2531*, KAN. LEGISLATURE, http://www.kslegislature.org/li_2016/b2015_16/measures/hb2531/ [<https://perma.cc/C9NM-KMVR>].

²⁴⁵ H.B. 7193, 2011 Reg. Sess. (Fla. 2011); *see also* Denise-Marie Balona, *Bill to Kill Tenure at State Colleges Passes Key Panel*, ORLANDO SENTINEL (Mar. 29, 2011), <https://www.orlandosentinel.com/news/os-xpm-2011-03-29-os-tenure-community-colleges-20110329-story.html> [<https://perma.cc/9BGD-F3U4>].

²⁴⁶ H.B. 485, 2011 Gen. Sess. (Utah 2011); *see also* Josh Loftin, *Lawmaker’s Bill Would End Tenure for Utah Profs*, DAILY HERALD (Feb. 14, 2011), https://www.heraldextra.com/news/local/govt-and-politics/lawmaker-s-bill-would-end-tenure-for-utah-profs/article_87844524-388e-11e0-af90-001cc4c03286.html [<https://perma.cc/7HBT-J784>].

²⁴⁷ *Missouri Protests*, *supra* note 32, at 74–79 (discussing the issues surrounding the administration during the protests).

²⁴⁸ H.B. 1743, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2015); Dave Helling & Tod Palmer, *Missouri Lawmakers want Scholarships Revoked if College Athletes go on Strike*, KAN. CITY STAR (Dec. 14, 2015, 1:13 PM), <https://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article49686940.html>.

²⁴⁹ H.B. 1743, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2015).

²⁵⁰ *Id.*

²⁵¹ *Missouri Protests*, *supra* note 32, at 77.

²⁵² *Id.* at 91, 91 n.195.

²⁵³ Helling & Palmer, *supra* note 248 (“The [] bill apparently would apply to all Missouri colleges, both public and private, that offer athletic scholarships.”).

²⁵⁴ Dave Helling, *Area Lawmaker Withdraws Bill to Yank Scholarships from Protesting Athletes*, KAN. CITY STAR (Dec. 16, 2015, 11:11 AM), <https://www.kansascity.com/news/politics-government/article50044460.html>.

Although seemingly in tension with the proposed campus speech laws described earlier in this Part,²⁵⁵ the proposed strike-and-game-boycott ban has one important similarity: It would punish students and institutions who anger conservative voters and elites. When UM President Tim Wolfe resigned in the wake of student protests and a football strike, *National Review*'s David French chastised the university for having "caved to the pressure" of "revolutionaries," arguing that "the revolution they seek is nothing less than the overthrow of our constitutional republic, beginning with our universities."²⁵⁶ *National Review*'s editorial board chimed in, calling the resignation "an act of extraordinary cowardice on the part of the university" and opining that "University of Missouri students desperately need to grow the hell up and start acting like adults."²⁵⁷ Then-candidate Donald Trump called the protests "disgusting," and candidate Ben Carson described the students' tactics as "infantile behavior" that would "move [us] further toward anarchy than anybody can imagine."²⁵⁸

In *The American Conservative*, Rod Dreher wrote in March 2016 about the budget shortfalls caused by reduced enrollments in the wake of the protests and resignations, saying "Good. This is all to the good. I hope it happens to every single university that caved."²⁵⁹ After concluding that further successful student protests would advance policy goals that Dreher opposes, he continued: "Hit them in the purse. That is the only thing these politically correct college administrators will listen to. . . . At some point, they must be made to pay a price, or the madness will not end."²⁶⁰

In 2018, the *Wall Street Journal* reviewed three years of budget difficulties at the university and crowed, "[i]ndulging protestors can be expensive[.]"²⁶¹ Rush Limbaugh called Mizzou "an early indicator of what happens when an organization . . . gives itself over to the protest movement and allows it to rule the roost and define what happens."²⁶² Texas radio host Michael Berry asked why Mizzou failed to tell "football players to shut their mouth and play football, else they lose their

²⁵⁵ See *supra* Section I.A.

²⁵⁶ David French, *Missouri's Lesson: the Campus Wars are about Power, Not Justice*, NAT'L REV. (Nov. 9, 2015, 11:23 PM), <https://www.nationalreview.com/2015/11/university-protests-missouri-power-not-justice/> [<https://perma.cc/Z7PL-9VMM>].

²⁵⁷ The Editors, *Abject Missouri*, NAT'L REV. (Nov. 9, 2015, 8:42 PM), <https://www.nationalreview.com/2015/11/university-missouri-racism-crisis/> [<https://perma.cc/7CRA-BDRT>].

²⁵⁸ Carrie Dann, *Donald Trump: Mizzou Protests are 'Disgusting,'* NBC NEWS (Nov. 12, 2015, 6:02 PM), <https://www.nbcnews.com/politics/2016-election/donald-trump-mizzou-protests-are-disgraceful-n462186> [<https://perma.cc/ZEB2-FKRR>].

²⁵⁹ Rod Dreher, *Mizzou Pays the Price of Appeasement*, AM. CONSERVATIVE (Mar. 10, 2016, 3:21 PM), <https://www.theamericanconservative.com/dreher/mizzou-pays-the-price-of-appeasement/> [<https://perma.cc/4MMW-VA5S>] ("Mizzou is a place where student radicals—including the football team—and their faculty and staff supporters bullied the craven administration into caving to their absurd demands.").

²⁶⁰ *Id.*

²⁶¹ Editorial Board, *More Misery in Missouri*, WALL ST. J.: OPINION (June 15, 2018, 6:59 PM), <https://www.wsj.com/articles/more-misery-in-missouri-1529103599> [<https://perma.cc/J8QS-MU8Y>].

²⁶² Rush Limbaugh, *How the Protest Movement Destroyed Mizzou* (Sept. 25, 2017), <https://www.rushlimbaugh.com/daily/2017/09/25/how-the-protest-movement-destroyed-mizzou/> [<https://perma.cc/HG5T-JUGD>].

scholarship.”²⁶³ Harvey Silverglate’s proposal—echoed by Senator Grassley—would allow the Trump Administration to defund universities deemed insufficiently welcoming of free speech, however Secretary Betsy DeVos’s Department of Education might define it. The anti-boycott bill would have forced universities to revoke the scholarships of (presumably liberal) athletes who protest the status quo, even if they merely “supported” or “incited” a boycott.²⁶⁴ While taking opposing positions on campus speech, the proposals sing from the same hymnal with respect to campus politics.

H. Other Possible Changes and Challenges

The legal subjects reviewed in this Part are not an exhaustive list of recent state legislative interventions into higher education administration, nor are they even an exhaustive list of such interventions motivated by public dissatisfaction with college and university leaders. A few additional legal topics—guns, abortion, and Confederate monuments—deserve very brief identification. Because, however, these topics have been addressed in great depth elsewhere in scholarly and popular publications—and because they are matters of intense public debate unrelated to higher education law—they will not receive the same robust attention given to other topics above.

Guns on campus. Several states have enacted laws related to the possession of firearms on campus. In 2015, for example, the Texas state legislature enacted a statute requiring public colleges and universities to permit the concealed carriage of

²⁶³ Katie Sullivan, *Right-wing Media Bemoan University of Missouri President’s Resignation: His Only Crime was “Being A White Man,”* MEDIA MATTERS FOR AM. (Nov. 9, 2015, 3:23 PM), <https://www.mediamatters.org/research/2015/11/09/right-wing-media-bemoan-university-of-missouri/206720> [<https://perma.cc/EJS5-CTVP>]. For another example of a right-wing commentator telling an athlete to focus on sports instead of politics, see Max Greenwood, *LeBron James to Produce Documentary Series ‘Shut Up and Dribble’ for Showtime*, HILL (Aug. 6, 2018, 10:33 PM), <https://thehill.com/blogs/in-the-know/in-the-know/400652-lebron-james-to-produce-doc-series-called-shut-up-and-dribble> [<https://perma.cc/ESV5-GMU9>] (“The title is a reference to a comment made earlier this year by Fox News host Laura Ingraham, who responded to political statements from James by telling him to ‘shut up and dribble.’”).

²⁶⁴ One might also note the parallels to the case of quarterback Colin Kaepernick, who protested racial injustice by kneeling as the national anthem was played before football games. Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protesters: ‘Get that son of a bitch off the field,’* GUARDIAN (Sept. 23, 2017, 6:43 PM), <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests> [<https://perma.cc/PTY2-RFPY>]. Many of the same commenters who opposed the University of Missouri protestors (and the university’s purported “caving” in response) have reveled in Kaepernick’s subsequent inability to find work playing football. See, e.g., *id.*; Douglas Ernst, *Limbaugh Unloads on Kaepernick Protest, NFL Hypocrisy on Cowboys’ Request to Honor Cops*, WASH. TIMES (Aug. 29, 2016), <https://www.washingtontimes.com/news/2016/aug/29/rush-limbaugh-unloads-on-colin-kaepernick-protest/> [<https://perma.cc/CC6D-JTEY>]. But see David French, *Conservatives Fail the N.F.L.’s Free Speech Test*, N.Y. TIMES: OPINION (May 24, 2018), <https://www.nytimes.com/2018/05/24/opinion/conservatives-fail-the-nfls-free-speech-test.html> [<https://perma.cc/BN8M-KWRW>] (“The cure for bad speech is better speech—not censorship. Take that message to the heartland, and conservatives cheer. Until, that is, Colin Kaepernick chose to kneel.”).

firearms on campus.²⁶⁵ In Utah, both open carry and concealed carry are permitted.²⁶⁶ Similar laws exist in Kansas,²⁶⁷ Idaho,²⁶⁸ and other states.²⁶⁹

Abortion. Americans hold intense opinions about abortion, and state laws reflect divergent views. In California, for example, the legislature passed a bill in 2018 that would have required public universities—which already included abortion access in students’ health insurance packages—to provide abortions on campus.²⁷⁰ The governor vetoed the bill, and proponents introduced a similar bill in 2019 that they hoped California’s new governor would sign.²⁷¹ He did.²⁷² In other states, statutes prohibit the performance of abortions on public campuses. Examples include Arizona,²⁷³ Kentucky,²⁷⁴ and Pennsylvania.²⁷⁵

Confederate monuments. In several states, political battles rage over whether to remove monuments erected to honor the Confederate cause and its soldiers, with state legislatures sometimes preempting political subdivisions from removing monuments.²⁷⁶ Some of these laws affect monuments held by public institutions of higher education and bar trustees and administrators from removing campus monuments. The most prominent example is the “Silent Sam” statue, recently removed by the University of North Carolina at Chapel Hill.²⁷⁷

²⁶⁵ S.B. 11, 84th Leg. (Tex. 2015) (codified at TEX. GOV’T CODE ANN. § 411.2031 (West 2016)); see also *Campus Carry: General Information*, TEXAS: U. TEX. AUSTIN, <https://campuscarry.utexas.edu/> [<https://perma.cc/6EEM-4QGJ>].

²⁶⁶ UTAH CODE ANN. § 53B-3-103(2)(a)(ii)(A) (West 2014).

²⁶⁷ Ellen Cagle, *Kansas Universities, Students Express Preparedness for Guns on Campus Starting Saturday*, KAN. CITY STAR (June 30, 2017, 7:56 PM), <https://www.kansascity.com/news/politics-government/article159193599.html> (noting that “[t]he law was originally passed in 2013, but universities had been exempt for four years to prepare”).

²⁶⁸ *Guns on Campus: Possession of Firearms/Weapons on University Owned or Controlled Premises*, BOISE ST. U., <https://www.boisestate.edu/publicsafety-security/guns-on-campus/> [<https://perma.cc/5865-J846>] (noting passage of an Idaho law in 2014, which “permits enhanced concealed carry license holders and qualified retired law enforcement concealed carry license holders to carry concealed firearms on some Boise State University property”).

²⁶⁹ Zach Winn, *A List of States that Allow Concealed Guns on Campus*, CAMPUS SAFETY (Aug. 30, 2017), <https://www.campusafety.com/university/list-of-states-that-allow-concealed-carry-guns-on-campus/> [<https://perma.cc/SGJ2-S8BJ>] (providing a “list of [] states that allow the permitted concealed carry of guns on public college and university campuses”).

²⁷⁰ S.B. 320, Leg., 2017–2018 Reg. Sess. (Cal. 2018).

²⁷¹ Zoe Ferrigno, *The Fight for On-Campus Abortion in California*, YR MEDIA (Feb. 12, 2019), <https://yr.media/health/the-fight-for-on-campus-abortion-in-california/> [<https://perma.cc/3RD3-A4CK>].

²⁷² *Bill Information: SB-24 Public Health*, CAL. LEGIS. INFO., https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB24 [<https://perma.cc/2XDW-LYSQ>]. The final version of the bill provides as follows: “On and after January 1, 2023, each public university student health center shall offer abortion by medication techniques onsite.” S.B. 24, Reg. Sess. (Cal. 2019).

²⁷³ ARIZ. REV. STAT. ANN. § 15-1630 (2019).

²⁷⁴ KY. REV. STAT. ANN. § 311.800 (West 2019).

²⁷⁵ 18 PA. CONS. STAT. § 3215 (2019).

²⁷⁶ See, e.g., Holly Meyer, *Why Removing Confederate Monuments in Tennessee is not an Easy Process*, TENNESSEAN (Aug. 17, 2017, 6:00 AM), <https://www.tennessean.com/story/news/2017/08/17/why-removing-confederate-monuments-tennessee-not-easy-process/573067001/> [<https://perma.cc/R82N-3BTU>] (discussing the Tennessee Heritage Protection Act of 2016).

²⁷⁷ Valerie Bauerlein, *UNC Chancellor to Step Down Amid Silent Sam Rift*, WALL ST. J. (Jan. 14, 2019, 8:04 PM), <https://www.wsj.com/articles/unc-chancellor-steps-down-amid-silent-sam-rift-11547509763> [<https://perma.cc/CJ2V-FUWH>] (describing university leader “hamstrung by a 2015 state

II. FEDERAL REGULATION OF HIGHER EDUCATION IN RESPONSE TO PUBLIC PRESSURE

This Part reviews federal lawmaking related to higher education—both by Congress and federal administrative agencies—conducted in the wake of popular pressure. First, Section A of this Part briefly reviews action by the U.S. Department of Education during the Obama and Trump administrations, discussing how both administrations reacted to complaints from their different electoral constituencies about how campus leaders respond to rape and sexual harassment. Then, Section B reviews congressional action during 2017 and 2018, a period during which Republican officials controlled a majority of both the Senate and the House of Representatives, along with the White House.

A. Title IX and Federal Regulation of Campus Sex and Student Discipline

During the presidency of Barack Obama, the Office for Civil Rights (OCR) of the U.S. Department of Education engaged in a vigorous effort to reform how American colleges and universities adjudicate claims of sexual assault and harassment.²⁷⁸ After the inauguration of Donald Trump, OCR withdrew guidance issued during the prior administration;²⁷⁹ and the Department of Education has opened for public comment proposed regulations that would require colleges and universities to abandon certain internal rules enacted in response to Obama-era guidance and enforcement.²⁸⁰ Obama-era reforms ignited intense controversy,²⁸¹

law passed by the GOP-led Legislature that blocks the removal of monuments without legislative approval”); see also Adam Harris, *Who Wants to be a College President?*, ATLANTIC (Jan. 24, 2019), <https://www.theatlantic.com/education/archive/2019/01/how-politics-are-reshaping-college-presidency/581077/> [<https://perma.cc/XX3C-N9GM>] (describing political difficulties faced by the UNC chancellor).

²⁷⁸ See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/ZK3D-DVWZ>]; see also U.S. DEP’T EDUC.: OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/G3JE-N7AW>].

²⁷⁹ Letter from Candice Jackson, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/E64Y-K4QV>].

²⁸⁰ Press Release, U.S. Dep’t of Educ., Department of Education Welcomes Public Comment on Draft Rule (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all> [<https://perma.cc/LF9U-NH8K>]; see *Background & Summary of the Education Department’s Proposed Title IX Regulations*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf> [<https://perma.cc/PN38-3PBT>].

²⁸¹ See, e.g., Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 823–24 (2017); Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2165–73 (2016); Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107, 122–23 (2017) [hereinafter *University Title IX Enforcement*].

with critics on the right and left joining to attack perceived agency overreach and derogation of due process.²⁸² Concurrently, supporters cheered the Obama OCR's unwavering focus on campus injustices long given insufficient attention.²⁸³

A thorough description of the Obama OCR's work in this area is well beyond the scope of this article, and a critical evaluation of the work (along with efforts to undo it) is even more so. For this discussion, the important point is that advocates, unhappy with the performance of university leaders, managed to change the legal environment in which higher education operates. Instead of relying solely on suasion, advocates harnessed the power of the federal government, which then threatened universities with punishments if they did not comply with new federal guidance.²⁸⁴

As a result of OCR guidance and enforcement actions, universities across the country made sweeping changes to their student discipline processes, including the standard of proof needed to impose discipline, the availability of appeals, the role of lawyers at hearings, and the substantive definitions of student conduct offenses.²⁸⁵ These legal changes did not occur by coincidence. Instead, the OCR's action resulted from a sustained campaign by advocates dissatisfied with higher education leadership.²⁸⁶ For years, whether university administrators liked it or not, they ensured that their rules conformed to the guidance that advocates had caused to issue from Washington. Indeed, universities were so fearful of federal enforcement that they adopted internal policies that exposed them to serious litigation risk.²⁸⁷

²⁸² See generally KC JOHNSON & STUART TAYLOR, JR., *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES* (2017) (describing the OCR's effect on campus policies); Nancy Gertner, *Complicated Process*, 125 YALE L.J. F. 442 (2016) (describing the reduction of procedural protections for the accused party under revised rules); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013).

²⁸³ See generally Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281 (2016) (arguing against critics' attempt to import criminal process into campus hearings); Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y, & L. 1, 5 (2015) (discussing how "the ordinary practice of universities is to undercount incidents of sexual assault"); Tyler Kingkade, *Stop Attacking the Education Department for Enforcing Title IX*, 80 *Advocacy Groups Say*, HUFFPOST: POLITICS (July 13, 2016, 7:51 PM), http://www.huffingtonpost.com/entry/education-department-title-ix_us_57869f24e4b08608d332c880 [<https://perma.cc/C4UB-HNR3>] (discussing advocates' defense of the OCR's enforcement of Title IX from "unwarranted criticism").

²⁸⁴ See, e.g., *University Title IX Enforcement*, *supra* note 281, at 133–34 (describing how OCR mandated that University of New Mexico and University of Montana amend internal rules related to sexual harassment or else potentially face federal sanctions); cf. Halley, *supra* note 282, at 107 n.8 (describing OCR as "enforcing its own policy choices" rather than "the law").

²⁸⁵ See generally *University Title IX Enforcement*, *supra* note 281, at 163, 145, 149–52 (discussing each of these kinds of policy changes).

²⁸⁶ See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2101 (2016) (describing "[a]ggressive administrative enforcement of Title IX in the sexual harassment setting by the Obama Administration's Department of Education, responding to increased activism and organizing by student survivors"); see also Cantalupo, *supra* note 283, at 282–83 ("[M]ovement leaders have wisely chosen Title IX as their lead banner and organizing point.").

²⁸⁷ See Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN. ST. L. REV. 1001, 1004–05, 1023–24 (2016) (noting that following Obama-era OCR guidance exposed universities to lawsuits alleging violation of due process rights of accused students).

Now, because the political wind has shifted, the federal government is preparing to mandate that American colleges and universities again change how they adjudicate claims of sexual harassment and misconduct by students. Whereas in 2016 Professor Catharine MacKinnon was suggesting that Congress “amend Title IX to provide a private right of action in United States district courts for equitable relief, compensatory and punitive damages, and reasonable attorneys’ fees for all failures to adhere to Title IX,”²⁸⁸ the current Department of Education has recently ended the comment period for its proposed Title IX reforms. If the proposed rule becomes law, colleges and universities subject to Title IX will need to make the following changes, among others. First, if an institution wishes to use the “preponderance of the evidence” standard (instead of the “clear and convincing evidence” standard) for sexual harassment and misconduct cases, it may do so only if it “uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”²⁸⁹ Second, institutions must allow cross-examination at hearings, and if a party (the complainant or the accused) lacks an advisor at the hearing, the institution “must provide that party an advisor aligned with that party to conduct cross-examination.”²⁹⁰ In addition, although it does not appear that institutions *must* change their definitions of sexual harassment and sexual assault, the proposed rule would allow institutions to define those offenses less broadly than was required by Obama-era guidance.²⁹¹

Advocates who supported OCR during the Obama administration now oppose the new administration’s proposed regulations, which were themselves written in response to the efforts of different advocates.²⁹² Regardless of how much further action the Trump administration takes, American universities will not be left to their own best judgment concerning how to prevent campus sexual assault and how to adjudicate allegations of student misconduct.

B. Federal Laws Proposed and Enacted During the 115th Congress

In 2017, Congress considered several potential changes to federal law affecting higher education. At least some of these ideas—including provisions passed by the House of Representatives—would have been terrible for American colleges and universities. In addition, at least one provision that became federal law, a tax on certain university endowments, appeared motivated by anger at universities.

In November 2017, House Republicans introduced H.R. 1, the “Tax Cuts and Jobs Act” (TCJA), a version of which would eventually be signed into law that

²⁸⁸ MacKinnon, *supra* note 286, at 2103.

²⁸⁹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 64,462, 61,477 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

²⁹⁰ *Id.* at 61,474–75.

²⁹¹ *See id.* at 61,496.

²⁹² *See* Andrew Kreighbaum, *Sharp Divide over Trump Administration’s Title IX Overhaul*, INSIDE HIGHER ED (Nov. 19, 2018), <https://www.insidehighered.com/news/2018/11/19/devos-sexual-misconduct-rule-criticized-survivor-advocates> [<https://perma.cc/V76G-E442>] (noting objections to cross-examination procedures, as well as the decreased breadth of offense definitions).

December.²⁹³ The version, passed on a largely party-line vote by the Republican-controlled House, inspired panic in academia.²⁹⁴ In particular, one provision would have repealed the student loan interest deduction (SLID), and another would have subjected graduate student tuition waivers to taxation as ordinary income.²⁹⁵ Repealing the SLID would have raised the tax burdens of those repaying student loans, effectively raising the price of higher education. Taxing tuition waivers would have drastically increased the tax burden on graduate students who, under current law, are not taxed on the nominal value of tuition that their institutions do not expect them to pay. One engineering graduate student at Columbia University noted that her nominal tuition was over \$40,000 and if her waiver were considered income, her “taxable income would more than double.”²⁹⁶ Others estimated that some graduate students would pay “a higher percentage in taxes than any millionaire or billionaire in America.”²⁹⁷

The American Council on Education—a membership organization that lobbies on behalf of colleges and universities—wrote in a letter that the “legislation, taken in its entirety, would discourage participation in postsecondary education, make college more expensive for those who do enroll, and undermine the financial stability of public and private, two-year and four-year colleges and universities.”²⁹⁸ The letter was also sent on behalf of groups such as the American Association of University Professors, the United Negro College Fund, the Association of Jesuit Colleges and Universities, the Association of Public and Land-grant Universities, the Association of Community College Trustees, and the Association of American Medical Colleges.²⁹⁹ The House Bill was opposed by nearly every major stakeholder group in higher education representing faculty, trustees, registrars, major research universities, public institutions, Christian colleges, dental schools, medical schools, libraries, and teachers’ colleges.³⁰⁰

²⁹³ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017); *Summary: H.R. 1—115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1> [<https://perma.cc/W94Z-ABKW>].

²⁹⁴ See, e.g., Colleen Flaherty, ‘Taxing a Coupon,’ INSIDE HIGHER ED (Nov. 7, 2017), <https://www.insidehighered.com/news/2017/11/07/grad-students-and-policy-experts-say-taxing-graduate-students-tuition-waivers-would> [<https://perma.cc/R72Q-J5MJ>] (explaining the results of the tax plan “would be devastating not only to graduate students’ day-to-day finances but to research and teaching across academe”); Ethan Siegel, *The GOP Tax Plan will Destroy Graduate Education*, FORBES (Nov. 7, 2017, 10:05 AM), <https://www.forbes.com/sites/startswithabang/2017/11/07/the-gop-tax-plan-will-destroy-graduate-education/#3c7130483d2f> [<https://perma.cc/LJZ6-77S8>] (describing the extreme hardships the new tax plan would have placed on graduate students).

²⁹⁵ Letter from Ted Mitchell, President, Am. Council on Educ., to Hon. Kevin Brady, Chairman, Ways & Means Comm., U.S. House of Representatives and Hon. Richard Neil, Ranking Member, Ways & Means Comm., U.S. House of Representatives 2 (Nov. 6, 2017), <https://www.acenet.edu/news-room/Documents/Letter-on-House-Tax-Cuts-and-Jobs-Act.pdf> [<https://perma.cc/RP7C-Q23T>].

²⁹⁶ Flaherty, *supra* note 294.

²⁹⁷ Siegel, *supra* note 294.

²⁹⁸ Letter from Ted Mitchell to Hon. Kevin Brady and Hon. Richard Neil, *supra* note 295, at 1.

²⁹⁹ *Id.* at 4–5.

³⁰⁰ See *id.*

Although the final bill did not abolish the student loan interest deduction or tax graduate tuition waivers,³⁰¹ it contained provisions perceived as mean-spirited in academia. A change in the calculation of unrelated business income tax “result[s] in disparate treatment for nonprofit organizations [including universities] by holding them to standards and rules not applicable to corporations,”³⁰² and an “excise tax on private university endowments” affects twenty-five to thirty institutions.³⁰³ The excise tax affects only a small portion of universities—among the very richest—and the final tax rate was lower than the initial House bill proposed.³⁰⁴ Nonetheless, the American Council on Education lamented the “remarkably bad idea,” which “takes money that would otherwise be used for student aid, research, and faculty salaries and sends it to the Department of the Treasury to finance corporate tax cuts.”³⁰⁵ Further, universities worried about the sentiment behind the excise tax. Senator Chuck Grassley, a leading proponent of the tax, criticized universities in 2011 for “hoarding assets at taxpayer expense.”³⁰⁶ Similarly, in 2016, the chairs of various congressional committees complained about tuition increases by institutions with “large and growing endowments.”³⁰⁷ The 2017 legislation resulted from that sentiment.

In December 2017, the House Committee on Education and the Workforce passed H.R. 4508, the Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (PROSPER).³⁰⁸ The bill would have reauthorized the Higher

³⁰¹ *Tax Reform and Higher Education: Tax Cuts and Jobs Act*, ACE: AM. COUNCIL ON EDUC., <https://www.acenet.edu/Policy-Advocacy/Pages/Tax-Reform-and-Higher-Education.aspx> [<https://perma.cc/THS7-YYEB>] (explaining the enacted version of the Act and pointing out that the final version “dropped a House proposal to repeal a number of benefits helping students and families finance a college education, including the Student Loan Interest Deduction (SLID) and Sec. 117(d) exemption from taxation for tuition waivers”).

³⁰² *Id.*

³⁰³ Ginger O’Donnell, *GOP’s Final Tax Plan Imposes Excise Tax on Some Private University Endowments*, INSIGHT INTO DIVERSITY (Dec. 18, 2017), <https://www.insightintodiversity.com/gops-final-tax-plan-proposes-excise-tax-on-some-private-university-endowments/> [<https://perma.cc/8NDK-RPRY>]. See generally Michelle Hackman, *Kentucky College gets Tax Exemption in Budget Deal*, WALL ST. J. (Feb. 8, 2018, 1:13 PM), <https://www.wsj.com/articles/kentucky-college-gets-exemption-from-endowment-tax-1518113588> [<https://perma.cc/AMX5-SDUB>] (noting that one small institution, Berea College, that would have been taxed was exempted specially at the behest of Sen. Mitch McConnell, who represents the state in which Berea is located).

³⁰⁴ See Andrew Kreighbaum, *Final GOP Deal Would Tax Large Endowments*, INSIDE HIGHER ED (Dec. 18, 2017), <https://www.insidehighered.com/news/2017/12/18/large-endowments-would-be-taxed-under-final-gop-tax-plan> [<https://perma.cc/5R5S-GJRB>].

³⁰⁵ Margaret Fosmoe, *Notre Dame to Pay Millions in Taxes on Investment Earnings under Tax Bill*, SOUTH BEND TRIBUNE (Dec. 20, 2017), https://www.southbendtribune.com/news/education/notre-dame-to-pay-millions-in-taxes-on-investment-earnings/article_645ccede-b94c-5fd5-9451-d5f28584188a.html [<https://perma.cc/8VQ3-WS3V>] (quoting Terry Hartle, the senior vice president of the American Council on Education).

³⁰⁶ Wally Hilke & Amit Jain, *Public Interests, Private Institutions? Public Policy Challenges to Tax-Free Universities*, 127 YALE L.J. F. 94, 94–95 (2017).

³⁰⁷ *Id.* at 95 (quoting language from a joint letter of the chairs).

³⁰⁸ Letter from Ted Mitchell, President, Am. Council on Educ., to Rep. Paul Ryan, Speaker, U.S. House of Representatives and Rep. Nancy Pelosi, Minority Leader, U.S. House of Representatives (Feb. 15, 2018), <https://www.acenet.edu/news-room/Documents/Letter-to-House-PROSPER-Act.pdf> [<https://perma.cc/KY5V-RHMW>].

Education Act (HEA), which was first enacted in 1965.³⁰⁹ Although it “is supposed to be renewed every five years,” the last reauthorization occurred in 2008.³¹⁰ The PROSPER bill did not become law; nonetheless, its passage by a House committee caused great concern because of a provision that would have reduced federal financial aid to needy students “by nearly \$15 billion.”³¹¹ Like the education provisions in the House TCJA bill, provisions in the PROSPER Act related to financial aid and student loans inspired near universal opposition from higher education stakeholders.³¹²

Ultimately, the 115th Congress did not hurt American universities nearly as badly as had initially been feared. The endowment tax is fairly modest and affects a small number of institutions that can afford to pay. The House’s PROSPER Act never found Senate support, and its cuts to financial aid were not enacted.³¹³ The greatest threat to higher education in the House’s initial TCJA, the taxation of graduate student tuition waivers, was removed during conference with the Senate.³¹⁴

The story of federal legislation during 2017 and 2018 is not, however, a happy one for higher education. The small endowment tax can be expanded now that the precedent for taxing university coffers has been set. Further, proposals to slash student aid and to tax tuition waivers, one supported by a House committee and the other by the majority of the entire House, indicate intense hostility toward universities among Republican representatives. Eventually, anger of this kind—shared by the House caucus of a major political party—is likely to lead to more problems.

III. THE SOURCES OF DISCONTENT: GRASS ROOTS AND ASTROTURF

To understand why politicians attack universities, and why such attacks seem increasingly common, one must understand what voters think about higher education. This Part reviews several factors that have combined to foment popular discontent with universities and their leaders, creating an environment conducive to legislative attacks. First, universities have real problems that affect voters. In particular, the cost of higher education has inflated at rates far in excess of wages, making it increasingly less affordable. Rising inequality and economic stagnation for new graduates further lowers the perceived value of degrees. Second, campuses have become primary battlegrounds in culture wars, with right-wing media outlets relentlessly publishing stories that present universities, their faculties, their students, and their administrators as out of step with American values. Together, these factors

³⁰⁹ *Renewing the Higher Education Act: HEA Reauthorization*, ACE: AM. COUNCIL ON EDUC., <https://www.acenet.edu/Pages/Renewing-the-Higher-Education-Act.aspx> [<https://perma.cc/ED7X-BARL>].

³¹⁰ *Id.*

³¹¹ Letter from Ted Mitchell to Rep. Paul Ryan and Rep. Nancy Pelosi, *supra* note 308.

³¹² *See id.* (listing organizations joining letter from the American Council on Education).

³¹³ *See* Adam Minsky, *Student Loan Outlook for 2019*, FORBES (Jan. 8, 2019, 2:10 PM), <https://www.forbes.com/sites/adamminsky/2019/01/08/student-loan-outlook-for-2019/#6653a4e52471> [<https://perma.cc/A3VT-VYUZ>] (“The PROSPER Act never passed.”).

³¹⁴ Andrew Kreighbaum, *Apparent Relief for Grad Students*, INSIDE HIGHER ED (Dec. 14, 2017), <https://www.insidehighered.com/news/2017/12/14/some-tax-bill-provisions-opposed-higher-ed-dropped-conference-negotiations> [<https://perma.cc/8UN3-XSTG>].

have caused public confidence in higher education to drop markedly in the past few years, with 2015 marking the start of a new era for hostility among Republicans in particular. Then, in states with Republican legislatures and governors, politicians can please their voters by supporting legislation aimed at real and perceived flaws in higher education, a process made easier by the availability of model legislation from advocacy institutes.

A. *Real Problems and Justified Anger*

When analyzing negative opinions about universities, scholars should begin by recognizing real problems that can inspire sensible indignation. Tempting as it may be for some academics to deride popular opposition—particularly among political conservatives—as false consciousness inspired by right-wing propaganda, supporters of higher education cannot afford to ignore genuine flaws. As is discussed below, skyrocketing tuition is not some illusion, nor are the disappointing average incomes of recent college graduates.

Campus speech. The issue of campus speech, to which so much scholarly attention has been devoted,³¹⁵ is one that prompts fair and justified criticism of universities, even if that criticism is often exaggerated. Observers wondering about public anger toward universities should not allow frustration at overblown complaints to blind them to genuine shortcomings. For example, FIRE’s annual list of the “Worst Colleges for Free Speech” offers truly embarrassing anecdotes.³¹⁶ The 2019 Hall of Shame included a private university claiming “eminent domain” as an excuse for preventing students from distributing flyers critical of the campus administration, a religious institution censoring the student newspaper and imposing non-disclosure obligations on student journalists, and a public university’s removal of an art installation that offended sensitive politicians.³¹⁷ FIRE’s website publishes a parade of stories like these, which is only possible because university and college officials provide grist for the mill.³¹⁸

In addition, in some disgraceful instances, students and others have used violence to suppress speech either on campus or at events associated with institutions of higher education. For conservatives, one of the most vivid examples of this was the March 2017 visit by Charles Murray to Middlebury College in Vermont.³¹⁹ Protestors used shouting and other tactics to prevent Murray and Allison Stanger—a Middlebury faculty member—from speaking at a pre-planned campus event.³²⁰ Murray and Stanger then attempted to move the event to a secret location from which it could be

³¹⁵ See *supra* Section I.A.

³¹⁶ *10 Worst Colleges for Free Speech: 2019*, FIRE (Feb. 12, 2019), <https://www.thefire.org/10-worst-colleges-for-free-speech-2019/> [<https://perma.cc/GF2E-N8WU>].

³¹⁷ *Id.*

³¹⁸ See LUKIANOFF & HAIDT, *supra* note 41, at 81–121, for more products of the mill. See also Lemieux, *supra* note 40, for a more thorough argument about the actual scope of the problem. Again, I think this issue, while real, is overstated. See *supra* Section I.A.

³¹⁹ Katharine Q. Seelye, *Protesters Disrupt Speech by ‘Bell Curve’ Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html> [<https://perma.cc/8PPQ-45LU>].

³²⁰ *Id.*

broadcast, and protestors pulled fire alarms.³²¹ After “the interview was completed and officials, including Ms. Stanger, escorted Mr. Murray out the back of the building,” masked protestors found them and attacked; one person grabbed Stanger’s hair and twisted her neck.³²² Stanger ended up going to a hospital for treatment.³²³ The event received widespread media coverage, and the arguably anemic discipline imposed by the college inspired fair questions about the administration’s commitment to free speech.³²⁴

Events involving even greater depraved indifference to safety and human life occurred in the wake of white nationalist protests at the University of Virginia and the University of Florida.³²⁵ During a counter-protest in Charlottesville, a white supremacist intentionally drove his car into a crowd.³²⁶ He killed Heather Heyer, who had gone with a friend to the anti-racism protest.³²⁷ In Gainesville, protestors gathered off campus to oppose the message of white nationalist Richard Spencer, who had visited the university.³²⁸ A group of three Spencer supporters began “heckling some anti-Spencer protesters with Hitler chants, Nazi salutes and threats,” and then one of the trio shot at the protesters.³²⁹ Regardless of whom one blames for such horrific actions, events like these can contribute to a growing narrative about dangers to free speech on campus.

Tuition. Perhaps more than by anything else, anger at higher education is driven by the skyrocketing cost of attending colleges and universities. Because so much has been written about tuition increases,³³⁰ a short report will suffice here. According to

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*; see also Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/> [<https://perma.cc/83S3-RW4R>].

³²⁴ See Stephanie Saul, *Dozens of Middlebury Students are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html> [<https://perma.cc/25UN-26M7>] (“The college . . . issued a statement on Tuesday describing sanctions against 67 students ‘ranging from probation to official college discipline, which places a permanent record in the student’s file.’”). But see Baishakhi Taylor, *Free Speech Conflict: What We Learned at Middlebury College*, 2018 J. DISP. RESOL. 23, 25–27 (expressing a more sympathetic view of the college’s actions).

³²⁵ *Private Universities*, *supra* note 35, at 76–77.

³²⁶ Jonah Engel Bromwich & Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/james-alex-fields-charlottesville-driver.html> [<https://perma.cc/XH5V-UHU7>]; see also Karen Zraick & Julia Jacobs, *Charlottesville Attacker Pleads Guilty to Federal Hate Crime Charges*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/us/james-alex-fields-charlottesville.html> [<https://perma.cc/CKE5-U78W>].

³²⁷ Christina Caron, *Heather Heyer, Charlottesville Victim, is Recalled as ‘a Strong Woman,’* N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html> [<https://perma.cc/V9WC-PRZT>].

³²⁸ Alex Harris, *Three Richard Spencer Supporters Arrested on Charges of Shooting at UF Protesters*, MIAMI HERALD (Oct. 20, 2017, 11:40 AM), <https://www.miamiherald.com/news/local/crime/article179941551.html>.

³²⁹ *Id.*

³³⁰ See, e.g., Steven W. Hemelt & David E. Marcotte, *The Impact of Tuition Increases on Enrollment at Public Colleges and Universities*, 33 EDUC. EVALUATION & POL’Y ANALYSIS 435, 435 (2011); David O. Lucca et al., *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, 32 REV. FIN. STUD. 423, 423 (2019); Briana Boyington & Emma Kerr, *See 20 Years of Tuition Growth at National Universities*, U.S. NEWS & WORLD REP. (Sept. 19, 2019), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years->

the National Center for Education Statistics, in 2015–2016, the average annual total cost of attendance—including “tuition and fees and room and board rates charged for full-time students”—was \$19,189 at public four-year universities.³³¹ At private universities, the total was \$39,529 during the same year.³³²

Ten years earlier, in the 2005–2006 academic year, the average total cost was \$14,499 at four-year public institutions and \$32,729 at private institutions.³³³ (All figures are presented in constant 2015–2016 dollars; that is, they are adjusted for inflation.) Ten years before that, in the 1995–1996 academic year, the average total cost was \$10,817 at four-year public institutions and \$27,161 at private institutions.³³⁴ (Again, adjusted for inflation.) And ten years before that, in the 1985–1986 academic year, the average total cost was \$8,449 at four-year public institutions and \$20,207 at private institutions.³³⁵ (Again, adjusted for inflation.) Over thirty years, the price of private higher education has increased by more than 95 percent. Over the same period, the price of four-year public higher education increased by more than 127 percent.

Has higher education doubled in quality over those three decades? Even if it has, can current students afford to pay two times what students did a generation ago? Academicians can offer a variety of explanations for the increase of higher education costs in excess of broader inflation rates.³³⁶ It is unlikely, however, that a presentation on Baumol’s cost disease will convince a skeptical public that current college and university prices are fair and reasonable.³³⁷ Rising costs bring rising expectations, which are difficult to meet. Especially in times of economic hardship, the unceasing increase in higher education prices invites growing public dissatisfaction.³³⁸

of-tuition-growth-at-national-universities [<https://perma.cc/FLD5-TSZV>]; Susan Dynarski, *New Data Gives Clearer Picture of Student Debt*, N.Y. TIMES (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/upshot/new-data-gives-clearer-picture-of-student-debt.html> [<https://perma.cc/2X49-BV3Q>].

³³¹ U.S. DEP’T EDUC., NCES 2017-094 (2018), <https://nces.ed.gov/pubs2017/2017094.pdf> (presenting data from the “Digest of Education Statistics 2016”).

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ See generally ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? (2011) (using labor market theory to argue that college costs are rising in ways similar to those of other service industries relying on highly educated professionals).

³³⁷ See Joshua Kim, *The Baumol Cost Disease Orthodoxy*, INSIDE HIGHER ED (Nov. 12, 2017), <https://www.insidehighered.com/blogs/technology-and-learning/baumol-cost-disease-orthodoxy> [<https://perma.cc/NDX5-VKLZ>] (“Baumol theorized that the costs of people-intensive services will inevitably rise with overall economic productivity, even as those industries that depend mostly on people don’t get more productive.”)

³³⁸ See Kim Parker, *The Growing Partisan Divide in Views of Higher Education*, PEW RES. CTR. (Aug. 19, 2019), <https://www.pewsocialtrends.org/essay/the-growing-partisan-divide-in-views-of-higher-education/> [<https://perma.cc/YL68-VLNS>]. For evidence that this dissatisfaction is driving education law changes, see also *An Agenda for Higher Education Reform: Remarks by Senate HELP Committee Chairman Lamar Alexander (R-TN)*, AEI: AM. ENTERPRISE INST. (Feb. 4, 2019), <http://www.aei.org/events/an-agenda-for-higher-education-reform-remarks-by-senate-help-committee-chairman-lamar-alexander-r-tn/> (quoting Senator Alexander describing proposed laws that “should help lower tuition” and that “should provide colleges with an incentive to lower tuition”); Libby A. Nelson, *‘Hoarding Assets’?*, INSIDE HIGHER ED (Dec. 9, 2011),

Economic status of graduates. Having paid higher tuition than students of prior generations, recent graduates have left college with more debt (in absolute numbers and as a percentage of household income) than their predecessors.³³⁹ Although students who had attended shady for-profit institutions represent a disproportionately high share of borrowers, as well as borrowers in default,³⁴⁰ graduates of traditional colleges and universities also carry unprecedented debt burdens.³⁴¹ A combination of high debt and a slow economy caused hardship to graduates over the past decade.³⁴² Economists have documented how the great recession caused an increase in student loan defaults,³⁴³ and one needs no special training to reach the common-sense conclusion that bad economic times will bring stress to people who have borrowed a lot of money, even if they do not end up in default. Further, in recent years, economic inequality has become an important political issue and some politicians have offered populist legislation related to student debt.³⁴⁴ Every student loan payment serves as a gentle reminder of how much alumni have borrowed to finance their educations. With some repayment plans lasting for decades, a large proportion of Americans will receive literally hundreds of monthly reminders.

B. Right-Wing Media as a Creator and Amplifier of Discontent

Although one cannot conclusively prove a causal link between right-wing media content and the changing attitudes of Republicans toward higher education, available evidence strongly indicates that the media consumed by Republicans contribute to their dislike of academia. Earlier, this Article suggested that a media drumbeat—one

<https://www.insidehighered.com/news/2011/12/09/grassley-renews-focus-endowments> [<https://perma.cc/27KW-YNG2>] (quoting Senator Grassley asking whether tax benefits for universities are “fueling [] tuition increases”).

³³⁹ Richard Fry, *Young Adults, Student Debt and Economic Well-Being*, PEW RES. CTR. (May 14, 2014), <http://www.pewsocialtrends.org/2014/05/14/young-adults-student-debt-and-economic-well-being/> [<https://perma.cc/EHN8-VKNM>].

³⁴⁰ Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse than we Thought*, 2 EVIDENCE SPEAKS REPS., no. 34, Jan. 10, 2018, <https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf> [<https://perma.cc/2GW4-H5LT>].

³⁴¹ See Richard Eskow & Sean McElwee, *Canceling Student Debt Would Stimulate the Economy—and Voter Turnout*, NATION (Oct. 5, 2018), <https://www.thenation.com/article/canceling-student-debt-would-stimulate-the-economy-and-voter-turnout/> [<https://perma.cc/Z95U-NEKK>].

³⁴² See ANTHONY P. CARNEVALE & BAN CHEAH, GEORGETOWN UNIV.: GEORGETOWN PUB. POLICY INST., *HARD TIMES: COLLEGE MAJORS, UNEMPLOYMENT AND EARNINGS* 3, 6 (May 2013), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/2014/11/HardTimes.2013.2.pdf> [<https://perma.cc/Q69P-R5E3>]; see also Kathleen Deveny, *The Lost Grads: Born into the Wrong Generation*, BUS. INSIDER (Aug. 1, 2011, 4:09 PM), <https://www.businessinsider.com/the-lost-grads-born-into-the-wrong-generation-2011-8#> [<https://perma.cc/3T8Q-UXRZ>]; Jeffrey J. Selingo, *Two-Thirds of College Grads Struggle to Launch Their Careers*, HARV. BUS. REV. (May 31, 2016), <https://hbr.org/2016/05/two-thirds-of-college-grads-struggle-to-launch-their-careers> [<https://perma.cc/6G8H-RJ7D>].

³⁴³ Holger M. Mueller & Constantine Yannelis, *Students in Distress: Labor Market Shocks, Student Loan Default, and Federal Insurance Programs* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23284, 2017), <https://www.nber.org/papers/w23284.pdf> [<https://perma.cc/F6T9-5HJL>].

³⁴⁴ E.g., H.R. 5928, 115th Cong., 2d Reg. Sess. (2018) (titled the “Students Over Special Interests Act,” this bill would have repealed the Tax Cuts and Jobs Act, increased federal Pell Grants, and forgiven all outstanding federal student loans); H.R. 4170, 112th Cong., 2d Reg. Sess. (2012) (“Student Loan Forgiveness Act of 2012”).

that highlights isolated threats to free campus speech to create the appearance of a crisis—led to the enactment of campus speech legislation in several states.³⁴⁵ Scholarship examining the “right-wing media ecosystem” more generally supports the theory that well beyond the context of campus speech, Republican attitudes toward higher education are being soured by news sources “sowing confusion and distrust.”³⁴⁶ Readers should note, however, that while this theory about right-wing media is interesting and important, it is not essential to the overall thesis of this Article. My key argument—that Republicans’ negative attitudes toward academia are driving changes to the law of higher education—does not depend on proof of how those negative attitudes come to exist. Nonetheless, for those ultimately convinced by my larger argument, evidence about how negative attitudes toward higher education develop will be useful when considering possible responses to the challenges these attitudes present.

Over the past decade, observers of right-wing media have warned of “epistemic closure” in the conservative movement.³⁴⁷ Julian Sanchez put it this way in 2010:

One of the more striking features of the contemporary conservative movement is the extent to which it has been moving toward epistemic closure. Reality is defined by a multimedia array of interconnected and cross promoting conservative blogs, radio programs, magazines, and of course, Fox News. Whatever conflicts with that reality can be dismissed out of hand because it comes from the liberal media, and is therefore ipso facto not to be trusted.³⁴⁸

David French, a conservative commentator at *National Review*, wrote in 2016 that Fox News was “killing the conservative movement,” lamenting how the network could keep a topic in the conservative conversation, regardless of whether the topic deserved attention.³⁴⁹ He wrote, “Fox has become the prime gatekeeper of

³⁴⁵ See *supra* Section I.A (analyzing how backlash against perceived campus liberal overreach affected American politics in 2016); see also Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1988–90 (2017).

³⁴⁶ YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 13 (2018); cf. DAVID NEIWERT, ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP 326 (2017).

³⁴⁷ *Frum, Cocktail Parties, and the Threat of Doubt*, JULIAN SANCHEZ (Mar. 26, 2010), <http://www.juliansanchez.com/2010/03/26/frum-cocktail-parties-and-the-threat-of-doubt/> [<https://perma.cc/4U7Z-F68M>]; see KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT 84 (2008); Mike Godwin, *The Splinters of our Discontent: A Review of Network Propaganda*, R ST. (Jan. 18, 2019), <https://www.rstreet.org/2019/01/18/the-splinters-of-our-discontent-a-review-of-network-propaganda/> [<https://perma.cc/K8PC-FV65>] (reviewing BENKLER ET AL., *supra* note 346); Jim Manzi, *Liberty and Tyranny and Epistemic Closure*, NAT’L REV.: CORNER (Apr. 21, 2010, 6:40 PM), <https://www.nationalreview.com/corner/liberty-and-tyranny-and-epistemic-closure-jim-manzi/> [<https://perma.cc/8WP6-4CC2>].

³⁴⁸ *Frum, Cocktail Parties, and the Threat of Doubt*, *supra* note 347.

³⁴⁹ David French, *The Drive to Become ‘Fox News Famous’ Hurts the Right*, NAT’L REV. (Aug. 30, 2016, 6:42 PM), <https://www.nationalreview.com/2016/08/fox-news-hurts-conservative-movement/> [<https://perma.cc/BV87-XEWC>].

conservative fame, the source of conservative book deals, and the ticket into the true pantheon of conservative influence.³⁵⁰

More recently—discussing his book, in which he analyzed data from 2015 to 2017—Yochai Benkler argued that “an insular right-wing media ecosystem (Fox News, Breitbart, the *Washington Times*, Daily Caller, and the Gateway Pundit, for example) [] has spun out of control and created a propaganda feedback loop, in which what is true or false is entirely beside the point.”³⁵¹ Benkler and his co-authors’ research, which included studying millions of online stories, led them to conclude that liberal media outlets differ in kind from their right-wing counterparts. Benkler explained the rationale for their conclusion as follows:

To contrast, the left-wing media, which includes outlets such as Daily Kos, Mother Jones, and HuffPost, is part of a single media ecosystem, in which both producers and consumers of news pay attention to a diverse media diet primarily anchored in traditional mainstream media—the *New York Times*, the *Washington Post*, CNN, and which stretches all the way to editorially conservative mainstream publications such as the *Wall Street Journal* and *Forbes*. In most cases, the left-wing outlets share the reporting and journalistic traditions of mainstream media, and even where they do not, they are constrained in how far they can stray from the truth by the fact that their audiences pay significant attention to these media. So the two wings of the media ecosystem are not operating under the same rules.³⁵²

Estimating that “somewhere between 25 and 35 percent of the population” get news from Fox News and conservative talk radio, Benkler argues that “Fox News reasserted its dominance over Breitbart after the 2016 primaries and election by becoming more extreme and more exclusively focused on reinforcing right-wing narratives.”³⁵³ Further, “politicians on the right are stuck in the same feedback loop,” meaning that more moderate Republicans are ignored, and over time Republican elected officials move to the right.³⁵⁴

Scholars have identified a “Fox News effect,” concluding that watching Fox News for a certain amount of time per week increases the odds that someone will vote for Republican candidates.³⁵⁵ This is not mere correlation. Professors Gregory Martin and Ali Yurukoglu studied the effect of cable channel positions on political opinions. They found that when Fox News happens to have a lower channel number on a particular cable system (say, “position 25 instead of channel position 65”), viewers spend more time watching Fox News, which “increases the vote share of the

³⁵⁰ *Id.*

³⁵¹ Yochai Benkler & Deborah Chasman, *Selling Outrage*, BOSTON REV. (Nov. 12, 2018), <http://bostonreview.net/politics/yochai-benkler-deborah-chasman-selling-outrage> [<https://perma.cc/Y2YL-F3DC>] (discussing the views expressed in his book BENKLER ET AL., *supra* note 346, which he co-authored with Robert Faris and Hal Roberts).

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565, 2566 (2017).

Republican presidential candidate.”³⁵⁶ The boost provided by Fox News to Republican candidates has increased over time because the station’s viewership has increased and its coverage has moved further to the right.³⁵⁷

Local television news is perhaps even more important than cable news. More Americans get their news from local stations than from either national networks or cable television.³⁵⁸ Recent analysis of television stations owned by Sinclair Broadcast Group, which has established a “conservative media empire” by buying local stations in small markets,³⁵⁹ suggests that local news has also become more right-wing in the past few years. Professors Gregory Martin and Joshua McCrain analyzed what happens to news coverage when Sinclair buys a station. They found that ownership changes led to “(1) substantial increases in coverage of national politics at the expense of local politics, (2) a significant rightward shift in the ideological slant of coverage, and (3) a small decrease in viewership, all relative to the changes at other news programs airing in the same media markets.”³⁶⁰ The authors noted that these changes have “negative implications for accountability of local elected officials and mass polarization.”³⁶¹ Further, because moving coverage to the right does not improve viewership, the authors found “a substantial supply-side role” in the changes—that is, the owners are shifting right because of their own preferences, not to satisfy viewer demand for more conservative coverage.³⁶²

By moving voters to the right, Fox News and Sinclair stations allow Republican politicians to adopt more conservative positions than they otherwise might. As one commentator put it:

It would be ridiculous, of course, to argue that absent conservative propaganda broadcasting, Republicans would never win an election. What would happen, instead, is that in order to avoid constantly losing, Republicans would need to do more to bring key aspects of their policy agenda in line with public opinion³⁶³

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 2566–68, 2597.

³⁵⁸ Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR.: FACT TANK (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/2QAS-XAQM>] (“Among the three different types of TV news asked about, local TV is the most popular—37% get news there often, compared with 30% who get cable TV news often and 25% who often watch national evening network news shows.”).

³⁵⁹ Sheelah Kolhatkar, *The Growth of Sinclair’s Conservative Media Empire*, NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/22/the-growth-of-sinclairs-conservative-media-empire> [<https://perma.cc/Y2N2-U9E8>].

³⁶⁰ Gregory J. Martin & Joshua McCrain, *Local News and National Politics*, 113 AM. POL. SCI. REV. 372, 372 (2019).

³⁶¹ *Id.*

³⁶² *Id.* at 372–73.

³⁶³ Matthew Yglesias, *Fox News’s Propaganda isn’t just Unethical—Research Shows it’s Enormously Influential*, VOX (Mar. 4, 2019, 12:30 PM), <https://www.vox.com/2019/3/4/18249847/fox-news-effect-swing-elections> [<https://perma.cc/PG8E-GCP3>].

If conservative media is shifting opinions about higher education to the right, then politicians are increasingly likely to introduce and support higher education initiatives that otherwise would have risked offending voters.

Evaluating the “epistemic closure” theory and the more recent research on television news is beyond the scope of this Article. If, however, the theories presented in recent research are accurate, it becomes easier to understand how Republican politicians across the United States would have decided around the same time to attack universities on culture war issues, particularly issues like affirmative action, immigration, campus speech, and job security for a professoriate associated with political liberalism.

C. *Measuring the Discontent with Polling Data*

To understand the extent of popular discontent with American higher education, one need not rely on anecdote. Well-established national polling operations have collected enough data to allow us to observe changes in these opinions over time. The data reveal that popular assessment of colleges and universities is growing increasingly negative, especially among Republicans.

In less than five years, public opinion about higher education, which formerly showed relatively small differences among supporters of different political parties, has become starkly split on partisan lines. In 2010, fifty-eight percent of Republican respondents told the Pew Research Center that colleges and universities have a positive “effect on the way things are going in the country,” and sixty-five percent of Democrats agreed.³⁶⁴ In 2015, the results were similar—albeit with more partisan divergence—with fifty-four percent of Republicans and about seventy percent of Democrats agreeing that colleges and universities have positive effects.³⁶⁵ By 2017, Republicans had turned sharply against higher education. That year, fifty-eight percent of Republicans said colleges and universities have a negative effect on the country, with only thirty-six percent giving a positive response.³⁶⁶ At the same time, Democrats remained mostly unchanged, with seventy-two percent of respondents rating colleges and universities positively.³⁶⁷

A 2017 Gallup poll yielded similar results. The poll asked: “Please tell me how much confidence you, yourself, have in colleges and universities—a great deal, quite a lot, some or very little?”³⁶⁸ Among Democrats and Democratic “leaners,” fifty-six percent answered either “a great deal” or “quite a lot.”³⁶⁹ Among Republicans and Republican “leaners,” only thirty-three percent answered either “a great deal” or

³⁶⁴ Hannah Fingerhut, *Republicans Skeptical of Colleges' Impact on U.S., but Most See Benefits for Workforce Preparation*, PEW RES. CTR.: FACT TANK (July 20, 2017), <http://www.pewresearch.org/fact-tank/2017/07/20/republicans-skeptical-of-colleges-impact-on-u-s-but-most-see-benefits-for-workforce-preparation/> [<https://perma.cc/N3KW-FU29>] (percentages count together those who identify as “Republican” and “Lean Republican,” and those who identify as “Democratic” and “Lean Democratic”).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Frank Newport & Brandon Busteed, *Why Are Republicans Down on Higher Ed?*, GALLUP (Aug. 16, 2017), <https://news.gallup.com/poll/216278/why-republicans-down-higher.aspx> [<https://perma.cc/3US2-2WJP>].

³⁶⁹ *Id.*

“quite a lot.”³⁷⁰ The overall result for U.S. adults was forty-four percent expressing “a great deal” or “quite a lot” of confidence and fifty-six percent reporting “some” or “very little” confidence.³⁷¹

In sum, a small majority of Americans lacks confidence in their colleges and universities. Among Republicans, a large majority lacks confidence. Confidence ratings are lower than they were just a few years ago.

D. Advocacy Institutes and the Conversion of Discontent into Law

Parts I and II described several changes to higher education law caused in part by the work of professional advocacy institutes, also known as think tanks. These groups distill the public opinion just described into legislative proposals on which politicians can act. Further, they have crafted their model legislation to sustain their own relevance and to increase their future influence.

Let us return to the Goldwater model free speech bill described in Section A of Part I. Celebrating North Carolina’s enactment of a Goldwater-inspired statute, Goldwater co-author Stanley Kurtz noted how the bill will allow outside critics to pressure universities and will ease the enactment of future legislation.³⁷² Here is how Kurtz described what will happen if universities in North Carolina do not punish student protestors sufficiently:

If the university refuses to discipline shout-downs in the wake of passage of this law, there will be consequences. For one thing, the annual report of the Board of Governors will either condemn the refusal to discipline, or the committee will itself be subject to public criticism. A negative report on the administrative handling of discipline would give the Board of Regents a reason to replace administrators, and legislators a reason to cut university funds.³⁷³

In addition, “[a] university that refuses to discipline students who silence others is also inviting a renewed campaign to pass the mandatory suspension for a second offense.”³⁷⁴

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See Kurtz, *supra* note 86. In addition to disclosing his Goldwater position, the article identifies Kurtz as a senior fellow of the Ethics and Public Policy Center. *Id.* Some readers will recall the work of EPPC president Edward Whelan during the confirmation of Justice Brett Kavanaugh. See Matt Stevens, Edward Whelan, *Conservative Strategist, Takes Leave of Absence After Kavanaugh Tweets*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/us/politics/ed-whelan-eppc.html> [<https://perma.cc/3MDU-L2XU>] (“The leader of a prominent conservative research organization who suggested that Christine Blasey Ford mistakenly accused Judge Brett M. Kavanaugh of sexually assaulting her while in high school, and who built a case against one of his classmates, will take a leave of absence from the organization . . .”).

³⁷³ Kurtz, *supra* note 86.

³⁷⁴ *Id.* (noting that Tennessee has passed a statute somewhat like North Carolina’s and predicting, “[s]hould the University of Tennessee refuse to discipline shout-downs in the coming years, the limitations of the new law will be evident and a campaign to add discipline provisions will ensue”).

Predicting too that universities will see campaigns for “provisions regarding public forums and a legal ‘cause of action,’” Kurtz exulted, “we are at the beginning of a new state-legislative era.”³⁷⁵ And illustrating how manufactured outrage can yield real changes in law, Kurtz concluded, “[i]n short, the public has awakened and is actively pushing back against the illiberal assault on speech. That is a silver lining in the current crisis.”³⁷⁶

Statements by the Goldwater Institute reveal the sort of “illiberal” behavior at universities likely to inspire future legislative activism.³⁷⁷ Goldwater materials attack not only efforts to stifle free expression, but also phenomena like “trigger warnings,” which whether helpful or not when used by faculty provide fodder for conservative characterizations of liberal academics.³⁷⁸ Further, in contrast to the common refrain that the solution to terrible speech is more speech—rather than censorship³⁷⁹—the Goldwater Institute recommends prohibiting universities from expressing themselves on controversial issues.³⁸⁰ One benefit of the North Carolina bill, according to its Goldwater proponent, is that it “will discourage the university from, say, joining the ‘fossil fuel’ divestment campaign.”³⁸¹ A university’s choice to divest from fossil fuel holdings would have no impact on free speech. It would, however, offend conservative orthodoxy. (Stanley Kurtz, for example, has opposed the divestment movement for years.³⁸²) I take no position on whether UNC should invest in ExxonMobil stock. It is nonetheless instructive that advocates for the North Carolina campus speech statute—and similar ones like it across America—likely intend to use the statute to combat political movements they already oppose.³⁸³

When the University of North Carolina System prepares its mandated annual reports on free expression, another advocacy institute exerts influence on university policy. Before the System’s board published its first report under the new law, it revealed that the “evaluation will take into consideration each institution’s grade

³⁷⁵ *Id.* (“Goldwater-based bills are under consideration in several states, with more likely to follow next year. And any state bill can be strengthened in a second legislative round if universities continue to abuse their powers.”).

³⁷⁶ *Id.*

³⁷⁷ See James Scott, *Was the Restore Campus Free Speech Act Designed to Stifle Protests?*, *PIEDMONT SUNDIAL* (Nov. 28, 2017, 2:50 AM), https://piedmontsundial.com/calendar/calendar_main_article.php?theArticle=27.

³⁷⁸ See *id.* (“The Goldwater paper frames its policy against the creation on some campuses of ‘safe zones’, and states that ‘New devices like “trigger warnings” and “safe spaces” shelter students from the give-and-take of discussion and debate.”); see also Kitrosser, *supra* note 345, at 1991, 1993, 2015–16.

³⁷⁹ See generally NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* (2018); CHEMERINSKY & GILLMAN, *supra* note 34.

³⁸⁰ Kurtz, *supra* note 86 (noting with regret that the North Carolina bill lacks Goldwater-recommended language mandating “a posture of institutional neutrality”).

³⁸¹ *Id.* (suggesting that annual reporting requirement will help promote “neutrality” despite lack of statutory mandate).

³⁸² See Stanley Kurtz, *Divestment du Jour*, *NAT’L REV.* (Sept. 26, 2013, 4:00 AM), <https://www.nationalreview.com/magazine/2013/10/14/divestment-du-jour/> [<https://perma.cc/8KG7-KT3Q>].

³⁸³ For background on the divestment movement, see generally Bill McKibben, *At Last, Divestment is Hitting the Fossil Fuel Industry Where it Hurts*, *GUARDIAN* (Dec. 16, 2018, 12:37 PM), <https://www.theguardian.com/commentisfree/2018/dec/16/divestment-fossil-fuel-industry-trillions-dollars-investments-carbon> [<https://perma.cc/K2K8-8YL2>] (“[W]e have marked the 1,000th divestment in what has become by far the largest anti-corporate campaign of its kind.”).

under FIRE, the Foundation for Individual Rights in Education.³⁸⁴ And the 2017–2018 report indeed cited FIRE’s ratings.³⁸⁵ FIRE ratings include evaluation of university policies at a granular level, including things like residence hall regulations in addition to higher-profile free speech issues such as policies on protests.³⁸⁶ The enactment of the Goldwater-inspired law has accordingly given FIRE and others a university-operated microscope with which to scrutinize the work of student affairs professionals in addition to officials like chancellors and presidents.

Scrutiny of higher education related to free expression combines good faith criticism of misguided university policy (such as FIRE’s advocacy against university decisions that plainly violate the First Amendment or the self-imposed free speech commitments of many private institutions) with plain-old conservative attacks on liberal bogeymen largely unrelated to free speech (such as the voluntary use of “trigger warnings” by individual faculty, or the decision by endowment managers or trustees to sell oil and gas stocks). Some critics are more careful than others to explain when their critiques digress from legal analysis to naked policy preferences. State legislators and other lawmakers, however, are influenced by the less careful advocates at least as much as they are by those more committed to truth in advertising. Further, fair criticism from honest observers contributes to the media drumbeat that lays the groundwork for the next round of legislation, which may well promote partisan goals under the cloak of liberty and free inquiry.

IV. LOOKING FORWARD

Political intervention in the administration of universities has occurred for centuries in the United States, with a famous early example resulting in a landmark Supreme Court case about corporate charters and the Contracts Clause.³⁸⁷ Readers should therefore be skeptical of claims that state legislators, federal regulators, and other political actors have recently discovered a new ability to affect higher education law. Nonetheless, recent political influence on higher education law differs in important ways from the background levels observed since the early days of the Republic. While public institutions in particular have always needed to work constructively with state political leaders and attend to sources of popular discontent that might motivate political action, events in the past few years suggest that a new era has arrived. Recent levels of political intervention in university governance are likely to become a normal feature of higher education law. Indeed, with the increasing polarization of public opinion about universities—along with increased

³⁸⁴ Scott, *supra* note 377.

³⁸⁵ 2017–2018 REPORT ON FREE SPEECH AND FREE EXPRESSION WITHIN THE UNIVERSITY, *supra* note 64, at 3, 3 n.6.

³⁸⁶ See *Spotlight on Speech Codes 2019*, FIRE, <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2019/> [<https://perma.cc/89L9-VJ2T>].

³⁸⁷ See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 626 (1819) (“The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June 1816, and is entitled, ‘an act to amend the charter, and enlarge and improve the corporation of Dartmouth College.’”); see also U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from passing any law “impairing the Obligation of Contracts”).

partisanship more generally among Americans—observations based on the status quo may understate the likely future involvement of political actors in university life.

A. Likely Trends in Public and Elite Opinion

Commenting on how higher education has become “a partisan wedge issue,” Gallup pollster Brandon Busteed noted, “[w]hen we see an issue that’s split by political party, any kind of issue, it usually never recovers.”³⁸⁸ Reaction to the 2017 Pew results presented above³⁸⁹ suggests that the divide will increase. The president of the National Association of Scholars, a conservative advocacy group, announced that he was “heartened by the news,” noting that he had worked hard “to persuade ordinary Americans that something is terribly amiss in higher education.”³⁹⁰ He offered “the real credit” to students, faculty members, and administrators “whose fecklessness in the face of students’ outrageous violations of the norms of the academic community has shaken public confidence in higher education’s basic ability to provide an environment where ideas can be freely debated.”³⁹¹ In other words, Republicans hate higher education, which is good news because of “all the social-justice warriors, race hustlers, faculty ideologues, and administrative enablers who have brought about this change in public opinion.”³⁹² He then suggested that the “other 42 percent”—those Republicans who did not report a negative opinion of colleges and universities—“are not yet paying attention.”³⁹³

The National Association of Scholars publishes *Academic Questions*, a journal of scholarship about higher education.³⁹⁴ It conducts conferences and events on topics like “Charting Academic Freedom: 103 Years of Debate.”³⁹⁵ Its board of directors includes serious scholars with appointments at leading universities.³⁹⁶ If

³⁸⁸ Greenblatt, *supra* note 2. Although this Article probably could do without the injection of another hot-button political issue, one might make a comparison here to Americans’ attitudes about Israel. For decades, Israel has enjoyed strong bipartisan support among politicians and the public. More recently, some supporters of Israel have worried that the issue is becoming partisan—with conservatives more likely to support Israel—which could have bad consequences for Israel in the long term. *E.g.*, Daniel Byman & Tamara Cofman Wittes, *In Trump We Trust? Israel and the Trump Administration*, LAWFARE (Oct. 26, 2018, 8:00 AM), <https://www.lawfareblog.com/trump-we-trust-israel-trump-administration> [<https://perma.cc/XJD5-CV2H>] (“President Trump’s final vulnerability for Israel is one in which Prime Minister Netanyahu has been an active and willing participant: building an increasingly partisan political base of support for Israel’s approach to the Palestinian issue inside the United States.”).

³⁸⁹ See *supra* Section III.C.

³⁹⁰ Peter Wood, *Colleges are to Blame for the Contempt in Which They’re Held*, CHRON. HIGHER EDUC. (July 12, 2017), <https://www.chronicle.com/article/Colleges-Are-to-Blame-for-the/240617> [<https://perma.cc/B2YY-NGWD>] (mentioning appearances on talk radio, along with publication of articles and attendance at “grassroots events”).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *An Unorthodox Journal Studying the Virtues & Vices of the American Higher Education Establishment*, NAT’L ASS’N SCHOLARS, <https://www.nas.org/academic-questions> [<https://perma.cc/T6TH-VFDF>].

³⁹⁵ See *Charting Academic Freedom: 103 Years of Debate*, NAT’L ASS’N SCHOLARS, <https://www.nas.org/reports/charting-academic-freedom-103-years-of-debate> [<https://perma.cc/JB9Z-CTL7>].

³⁹⁶ NAT’L ASS’N OF SCHOLARS, ANNUAL REPORT 2016 2 (2016) (listing professors at, among other institutions, Ohio University, University at Buffalo, University of Pennsylvania, Case Western Reserve University, and the University of Texas).

NAS so desired, it might be able to convince Republican voters and politicians that the problems of American higher education—while certainly real—are not quite as bad as they sometimes appear. But the leadership of NAS does not so desire. Instead, its president was pleased to announce that “Republican voters have at last begun to relinquish their fond hope that our colleges and universities are, despite numerous defects, still a net good for the United States” and that “conservatives” have lost patience “with an institution they are by nature inclined to love.”³⁹⁷

The leadership of NAS interlocks with that of other advocacy institutes known for sharp criticism of higher education, particularly the sort of criticism echoed in right-wing media. For example, former NAS board member Anne Neal cofounded the American Council of Trustees and Alumni and was its president from 2003 to 2016.³⁹⁸ Past NAS board member Candace de Russey is “a member of the advisory boards of FIRE, the Independent Women’s Forum, the International Institute of Classical Humanities, and the Cardinal Newman Society.”³⁹⁹ NAS board member Ward Connerly, perhaps best known for his advocacy of the ballot initiative ending race-based affirmative action at public institutions in California,⁴⁰⁰ is the founder and president of the American Civil Rights Institute.⁴⁰¹ The late Herbert London, a past NAS board chairman, served as president of the Hudson Institute and of the London Center for Policy Research.⁴⁰²

More importantly, conservative opinion leaders with far broader followings than advocacy institute leaders are fomenting hatred of higher education. Speaking on a university campus in October 2017, Donald Trump, Jr. said that universities make the following offer to parents: “We’ll take \$200,000 of your money; in exchange we’ll train your children to hate our country.”⁴⁰³ Trump essentially offered higher education a similar deal, for half the price. In exchange for his \$100,000 fee, he attacked universities for purportedly defining “hate speech” as “anything that says America is a good country and our founders were great people, that we need borders.”⁴⁰⁴ He added that universities “indoctrinate” students, “punish them” for disagreeing with the party line, and “make them unemployable by teaching them

³⁹⁷ Wood, *supra* note 390.

³⁹⁸ Anne D. Neal, Senior Fellow, ACTA: AM. COUNCIL TRS. & ALUMNI, https://www.goacta.org/staff/anne_d_neal [<https://perma.cc/UR5J-X5R7>] (noting appearances on Fox News and Fox Business News); see also NAT’L ASS’N OF SCHOLARS, *supra* note 396, at 2. I gladly acknowledge that some of ACTA’s work has been useful and important, including its advocacy for the restoration of ROTC at Columbia. See Jacques Barzun, *Columbia University’s ROTC Shame*, WALL ST. J.: OPINION (Mar. 10, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704132204576190482383897922> [<https://perma.cc/H5X5-CYJB>]. Also, while on the topic of ACTA’s board, I should mention that my father is a member.

³⁹⁹ NAT’L ASS’N OF SCHOLARS, *supra* note 396, at 2.

⁴⁰⁰ See *supra* notes 18–20 and accompanying text.

⁴⁰¹ NAT’L ASS’N OF SCHOLARS, *supra* note 396, at 2.

⁴⁰² *Id.*; see also Herbert London, MANHATTAN INST., <https://www.manhattan-institute.org/expert/herbert-london> [<https://perma.cc/VLE8-UFFA>]. See generally LONDON CTR. FOR POL’Y RES., <https://londoncenter.org/> [<https://perma.cc/C9J5-GGLA>] (featuring books with titles such as “The Encyclopedia of Militant Islam” and “The BDS War Against Israel”).

⁴⁰³ Jeff Caplan, *Trump Jr. Scolds Universities during UNT Speech, a Fundraiser for Scholarships*, FT. WORTH STAR-TELEGRAM (Oct. 24, 2017, 3:22 PM), <https://www.star-telegram.com/news/politics-government/national-politics/article180651831.html>.

⁴⁰⁴ *Id.*

courses in zombie studies, [and] underwater basket weaving.”⁴⁰⁵ Trump’s talk received widespread media coverage, both in print newspapers⁴⁰⁶ and conservative websites.⁴⁰⁷

In September 2017, then-Attorney General Jeff Sessions spoke at Georgetown Law School, telling his audience, “[t]he American university . . . is transforming into an echo chamber of political correctness and homogenous thought, a shelter for fragile egos.”⁴⁰⁸ He said, “[f]reedom of thought and speech on the American campus are under attack.”⁴⁰⁹ He then recounted examples gathered by the Foundation for Individual Rights in Education, and he promised that “the Department of Justice will do its part in this struggle” to “protect students’ free expression.”⁴¹⁰ After next invoking the memories of “[f]our little girls” murdered in “the 16th Street Baptist Church bombing in Birmingham” fifty-four years earlier, Sessions quoted Dr. Martin Luther King Jr. and called upon his audience to stand up for free speech, warning that “the future of our Republic depends on it.”⁴¹¹

As part of its 2017 polling on universities, Gallup asked respondents to explain their confidence in higher education, or lack of confidence.⁴¹² Gallup reported that:

Republicans with low levels of confidence in colleges are most likely to cite their belief that colleges and universities are too liberal and political, that colleges don’t allow students to think for themselves and are pushing their own agenda, or that students are not taught the right material or are poorly educated.⁴¹³

Democrats with low confidence in higher education raised different concerns. They were “much more likely to cite issues dealing with practical aspects of higher education—saying colleges are too expensive,

⁴⁰⁵ *Id.*

⁴⁰⁶ *E.g., id.*; Kim Phillips-Fein, *How the Right Learned to Loathe Higher Education*, CHRON. HIGHER EDUC. (Jan. 31, 2019), <https://www.chronicle.com/article/How-the-Right-Learned-to/245580> [<https://perma.cc/E9F2-WJAZ>]; Kevin Sullivan & Mary Jordan, *Elitists, Crybabies and Junky Degrees*, WASH. POST (Nov. 25, 2017), https://www.washingtonpost.com/sf/national/2017/11/25/elitists-crybabies-and-junky-degrees/?utm_term=.6f4c7cb03853 [<https://perma.cc/JKX7-GFPB>].

⁴⁰⁷ *E.g.*, Jeffrey Rodack, *Trump Jr.: Colleges Don’t Teach Civility Anymore*, NEWSMAX (Oct. 25, 2017, 12:45 PM), <https://www.newsmax.com/us/trump-jr-colleges-civility-free-speech/2017/10/25/id/822028/> [<https://perma.cc/N7KY-QQUP>] (“Donald Trump Jr. blasted American universities for reigning in free speech and distorting traditional values.”); Nikita Vladimirov, *Trump Jr: Universities are ‘Captive to Political Hatreds,’* CAMPUS REFORM (Oct. 25, 2017, 1:45 PM), <https://www.campusreform.org/?ID=10036> [<https://perma.cc/2Q6D-TRM5>] (“Echoing Republican concerns about the value of higher education, President Trump’s son further berated universities for straying from their educational mission.”).

⁴⁰⁸ Lisa Marie Segarra, *Colleges are an ‘Echo Chamber of Political Correctness.’ Read Jeff Sessions’ Speech on Campus Free Speech*, TIME (Sept. 26, 2017), <http://time.com/4957604/jeff-sessions-georgetown-law-speech-transcript/> [<https://perma.cc/XL7Q-GRZ4>] (including a full transcript of his remarks as prepared for delivery).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* There is something ironic about universities hosting speakers like Sessions and Trump, who then denounce universities as intolerant of conservative speakers. It evokes the saying by Robert Frost that “a liberal is a man too broadminded to take his own side in a quarrel.”

⁴¹² Newport & Busteded, *supra* note 368.

⁴¹³ *Id.*

are not well-run or have deteriorating quality, or that college graduates aren't able to find jobs."⁴¹⁴

As Democrats and Republicans have diverged in their opinions on higher education, political polarization among Americans has increased more generally. In October 2017, the Pew Research Center reported that “[i]n political values ranging from views of government and the social safety net to opinions about immigrants, race and homosexuality, Americans are less likely than in the past to hold a mix of conservative and liberal views.”⁴¹⁵ As recently as 1994, forty-nine percent of survey respondents held a roughly equal mix of conservative and liberal positions on issues such as race, immigration, homosexuality, and the social safety net.⁴¹⁶ In 2015, thirty-eight percent of respondents had a roughly equal mix, and by 2017 the number had dropped to thirty-two percent.⁴¹⁷ Concluding that “Republicans and Democrats are now further apart ideologically than at any point in more than two decades,” Pew noted that “[t]he median Republican is now more conservative than 97% of Democrats, and the median Democrat is more liberal than 95% of Republicans.”⁴¹⁸ Accordingly, given the partisan divide over the value of higher education, the most passionate critics of universities are likely to have strongly conservative positions on topics such as race, taxation, and the proper role of government.

Also in October 2017, Pew reported that “ideological consistency—the shares of Americans holding liberal or conservative views across a wider range of issues—is increasingly associated with partisanship.”⁴¹⁹ In other words, party affiliation is a better predictor of a person’s views on topics such as “government, race, immigration, national security, [and] environmental protection” than are factors such as “gender, race and ethnicity, religious observance or education.”⁴²⁰ Pew observed yawning gaps among Democrats and Republicans about multiple issues currently of great importance to higher education. For example, on the question of whether “racial discrimination is the main reason many blacks cannot get ahead,” the partisan gap in opinions was fifty points, compared with thirteen points in 1994, when the question was first asked.⁴²¹ University leaders promoting race-conscious admissions therefore must navigate a partisan minefield, even more so than when California and Michigan electorates voted to ban the practice at their states’ public institutions.

Pew observed an opinion gap nearly as large on immigration, with similar trends in recent decades. Overall, sixty-five percent of Americans surveyed said that

⁴¹⁴ *Id.* (“Few Democrats join Republicans in citing colleges as too political or citing specifics in the ways students are taught.”).

⁴¹⁵ Jocelyn Kiley, *In Polarized Era, Fewer Americans Hold a Mix of Conservative and Liberal Views*, PEW RES. CTR.: FACT TANK (Oct. 23, 2017), <http://www.pewresearch.org/fact-tank/2017/10/23/in-polarized-era-fewer-americans-hold-a-mix-of-conservative-and-liberal-views/> [<https://perma.cc/3HXA-DWJL>].

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. (Oct. 5, 2017), <http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/XF7S-KGTF>].

⁴²¹ *Id.*

“immigrants strengthen the country ‘because of their hard work and talents,’” with twenty-six percent responding that “immigrants are a burden ‘because they take our jobs, housing and health care.’”⁴²² The number of Democrats saying that immigrants strengthen the country had increased from thirty-two percent in 1994 to eighty-four percent in 2017.⁴²³ For Republicans, thirty percent said immigrants strengthened the country in 1994, with forty-two percent saying so in 2017.⁴²⁴ Respondents from both parties had become more favorable toward immigrants between 1994 and 2017. Because Democrats became so much more favorable, however, the parties now have a forty-two percent gap on the question. University leaders deciding whether to admit undocumented immigrants—or, more controversially, whether to offer them in-state tuition—must consider the polarization of the electorate on the value of immigrants to American society.

B. The Challenge Presented by Rapid Legal Change

Academia is beginning to recognize the challenges presented by the new era of higher education law,⁴²⁵ and the responses of colleges and universities to these challenges likely will affect higher education law and policy for decades. At the nation’s oldest public university—the University of North Carolina—both the system president and the flagship campus chancellor were swept away during the 2018–2019 academic year by the hurricane of state politics. President Margaret Spellings announced her resignation in October 2018, effective March 1, 2019.⁴²⁶ UNC-Chapel Hill Chancellor Carol Folt then announced her resignation in January 2019.⁴²⁷ If Spellings—who served as U.S. Secretary of Education under President George W. Bush—lacks the educational and political skills to manage a public university system in a state with a Republican legislature, administrators without similar experience will surely find the task daunting. Her successor will face the

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* Among Republicans in 2017, forty-four percent said immigrants were a burden. *Id.*

⁴²⁵ See, e.g., Marco Abel & Julia Schleck, *Academic Freedom, Radical Hospitality, and the Necessity of Counterspeech*, AM. ASS’N U. PROFESSORS (Winter 2019) <https://www.aaup.org/article/academic-freedom-radical-hospitality-and-necessity-counterspeech#.XYZ53ZJKgWo> [<https://perma.cc/SNV2-YK5T>]; Karin Fischer, *For a Dissatisfied Public, Colleges’ Internal Affairs Become Fair Game*, CHRON. HIGHER EDUC. (Feb. 18, 2019, 2:36 PM) <https://www.chronicle.com/interactives/Trend19-Intrusion-Main> [<https://perma.cc/SW3G-X54M>]; Steve Kolowich, *The American Campus, Under Siege*, CHRON. HIGHER EDUC. (Mar. 4, 2018), <https://www.chronicle.com/article/Colleges-Are-Under-Fire-They/242635> [<https://perma.cc/5PWX-GDEG>] (“Now, emboldened by a president and an attorney general who share their disdain for what they see as political correctness, Republican lawmakers and activists are pouncing.”).

⁴²⁶ Melissa Korn, *Margaret Spellings Resigns as President of University of North Carolina System*, WALL ST. J. (Oct. 26, 2018, 1:30 PM), <https://www.wsj.com/articles/margaret-spellings-resigns-as-president-of-university-of-north-carolina-system-1540575042> [<https://perma.cc/823V-QNFT>]; see also *supra* Section I.B (describing Spellings’ political struggles).

⁴²⁷ *Chancellor Folt Announces Resignation, Orders Confederate Monument Pedestal to be Removed Intact*, UNC-CHAPEL HILL (Jan. 14, 2019), <https://www.unc.edu/posts/2019/01/14/folt-resignation-orders-confederate-monument-pedestal-removed/> [<https://perma.cc/S6A3-VZ8C>]; Harris, *supra* note 277; see also *supra* Section I.H (discussing “Silent Sam” monument issue).

same political environment and will have the responsibility of recruiting a new chancellor for Chapel Hill, one ready to enter the minefield Folt recently exited.

As they adapt to the new political-legal reality, university leaders will concurrently face the perennial challenge of all administrators—the budget. Particularly at public institutions, which grew accustomed to generous state appropriations during the twentieth century and now see declining financial support, administrators will struggle to find needed funds.⁴²⁸ Although decreased state appropriations might remove one tool by which legislators might control state universities—as one cannot threaten to withhold money already not being provided—appropriations remain vital to most public institutions.⁴²⁹ Further, the trend of declining appropriations may be fueled by increasing political polarization.⁴³⁰

Compounding the difficulty is that much of the political intervention described in this Article affects important academic values, such as academic freedom and the need to promote diverse and inclusive campus environments. If a state legislature abolishes tenure at its public university system, campuses will have trouble recruiting and retaining faculty. If instead the legislature erases funding for the diversity and inclusion office, the decision sends a certain message to prospective students. Affirmative action bans affect the composition of entering classes.⁴³¹ College and university leaders ignore their newly political legal environments not only at their own peril, but at everyone's.

In subsequent research, it would be useful to place rapid changes to higher education law in the context of other rapid legal changes. For example, just as advocacy institutes have drafted bills related to campus speech that have been considered and adopted in multiple states, advocacy institutes have promoted legislation related to ballot access (such as voter identification card requirements),⁴³² the minimum wage (such as state law laws prohibiting municipalities from setting local minimum wages),⁴³³ and abortion (imposing onerous requirements on

⁴²⁸ See Jeffrey J. Selingo, *States' Decision to Reduce Support for Higher Education Comes at a Cost*, WASH. POST (Sept. 8, 2018, 7:35 PM), <https://www.washingtonpost.com/education/2018/09/08/states-decision-reduce-support-higher-education-comes-cost/> [<https://perma.cc/6NVQ-EWXP>]; see also *Missouri Protests*, *supra* note 32, at 70.

⁴²⁹ David A. Tandberg & Erik C. Ness, *State Capital Expenditures for Higher Education: "Where the Real Politics Happens,"* 36 J. EDUC. FIN. 394, 395–97 (2011).

⁴³⁰ See Luciana Dar & Dong-Wook Lee, *Partisanship, Political Polarization, and State Higher Education Budget Outcomes*, 85 J. HIGHER EDUC. 469, 478 (2014) (noting effect of partisan strength on public higher education funding); see also Erin Lynn Heath Sperling, *Perspectives and Practices Related to Higher Education Policy-Making: A Case Study Analysis of One Legislative Session in Minnesota*, U. HOUSTON L. CTR.: INST. FOR HIGHER EDUC. L. & GOVERNANCE 13, 15, <http://www.law.uh.edu/ihelg/monograph/07-05.pdf> [<https://perma.cc/5X6V-GHRU>] (noting how negative interactions with decision makers led to proposals to reduce funding).

⁴³¹ See Brief of the President and the Chancellors of the University of California as Amici Curiae in Support of Respondents at 29–31, 33–34, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) (No. 14-981).

⁴³² E.g., Alan Greenblatt, *ALEC Enjoys a New Wave of Influence and Criticism*, GOVERNING (Dec. 2011), <https://www.governing.com/topics/politics/ALEC-enjoys-new-wave-influence-criticism.html> [<https://perma.cc/HVR2-FLGP>].

⁴³³ E.g., Yuki Noguchi, *As Cities Raise Minimum Wages, Many States are Rolling them Back*, NPR (July 18, 2017, 4:39 PM), <https://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back> [<https://perma.cc/XS4G-ZS5Q>].

providers).⁴³⁴ Further, one might research who funds the advocacy institutes promoting new higher education laws. And one might compare activity related to higher education with nationwide efforts to reshape state legislatures more generally, to reshape the judiciary, and to reshape the media.

C. Possible Answers to the Challenge

What then, is to be done? Because this Article is primarily about higher education law and only incidentally about best administrative practices, I will opine only briefly on how college and university leaders—as well as supporters of academia more generally—might respond to the challenges presented above. Answering these questions will require immense skill from academic leaders for decades to come, and the best responses will vary from place to place, as well as from time to time. Nonetheless, a few suggestions come to mind.

Tuition. Academic leaders should do everything in their power to slow the rise of tuition. If the cost of college attendance increases at a rate greater than the inflation rate of the general American economy every year, public discontent with academia is likely to increase each year as well. For a long time, public universities helped to keep their private counterparts in check. The existence of excellent low-cost public institutions prevented most private institutions from charging outrageous amounts. In recent decades, however, public tuition has inflated more quickly than private tuition, in part because of state disinvestment in higher education. The problem is serious and even without the fear of public anger it would be important to keep tuition costs manageable.

Debt. The indebtedness of college graduates is of course affected by tuition, but tuition is not the only factor. Institutions of higher education, along with the associations that support them, should press relentlessly for political solutions to the student debt crisis. Esoteric items like origination fees and the compounding of debt while students remain enrolled have important effects on total debt burdens. The federal government has immense power to affect the student loan market, and advocates for higher education should remain ever vigilant for opportunities to improve the financial prospects of student borrowers.⁴³⁵

Campus speech. Although I believe the “campus speech crisis” is greatly exaggerated, I freely acknowledge that there is room for improvement. Organizations that support university officials—such as associations of student affairs professionals and of college and university lawyers—should develop training modules on how to create campus cultures that support both free speech and an inclusive environment. Campus leaders should not be caught unprepared when Ben Shapiro or Turning Point USA arrives looking for a high-profile confrontation. Officials who respond to “bias incidents” should be trained on how to support marginalized students without

⁴³⁴ E.g., Elizabeth Dias et al., ‘This is a Wave’: Inside the Network of Anti-Abortion Activists Winning Across the Country, N.Y. TIMES (May 18, 2019, 1:57 PM), <https://www.nytimes.com/2019/05/18/us/anti-abortion-laws.html> [<https://perma.cc/7EGF-5Q67>].

⁴³⁵ See, e.g., S.B. 1696, 116th Cong., 1st Reg. Sess. (2019) (the “Student Loan Tax Elimination Act” of 2019).

providing ammunition to those who argue that such support inevitably involves censorship and the suppression of conservative views.

Political engagement. If greater political involvement in higher education law is inevitable, then trustees and administrators will have no choice about whether to engage more directly in the political process. Public universities have employed lobbyists for decades, and both public and private institutions are represented by associations like the American Council on Education that advocate in Washington about higher education policy. This advocacy has likely helped to avoid some of the worst policy outcomes that were proposed and not enacted in recent years. Lacking expertise about how best to influence state and federal officials, I will not propose here how colleges and universities can improve on current efforts. It would seem, however, that more money and attention could sensibly be devoted to improving relations with legislators. Top administrators—already run ragged keeping up with donors—will have to make time for even more meetings with politicians. Trustees, who often have impressive public reputations and may have longstanding connections with state politicians, should assist with this task.

Public outreach. Universities already spend money on advertising, and public institutions have offices dedicated to engagement with the citizens of their states. It would help if private institutions would join this project, providing more resources for a broad-based campaign by colleges and universities to better explain their value—and values—to a skeptical public. Faculty can present at high schools and Rotary clubs across the land. Institutions can provide even more opportunities for members of the public to visit campuses and see for themselves what goes on there. Institutions would be wise to make public engagement a part of how faculty and certain staff are evaluated.

Stay true to our principles. Finally, I urge academics to hold fast to our values even in difficult political times. That is not the same as ignoring fair criticism, and it certainly does not involve needlessly antagonizing the electorate. But some university goals and activities remain worthy despite political opposition. Diversity and inclusion are valuable pursuits. Academic freedom promotes excellent research and teaching, encouraging the discovery and transmission of knowledge that otherwise might remain unfound or suppressed. Philosophy and English are vital fields of study, and students who pursue those majors learn skills valuable both at work and in their broader lives.

In the decades to come, the leaders of our richest private universities will be best placed to lead some of the public and political engagement described here. They are least vulnerable to political attacks, and the prestige of their institutions gives their pronouncements a certain gravitas. It may be tempting for them to duck controversy and simply continue the fine work that their massive endowments help them to afford. But a sufficiently angry public will find a way to seize that money. Academic institutions must all hang together or we shall all hang separately.

In a future article, it would be useful to identify universities that have successfully navigated these challenges in recent years. Such an article could also elaborate on the suggestions presented in this subpart.

CONCLUSION

Absent unexpected changes in public opinion trends, Democrats and Republicans will likely continue to hold sharply divergent views on higher education. Data on political polarization, along with evidence that once an issue become partisan it tends to remain so, suggest that Republican dissatisfaction with colleges and universities will endure and perhaps even intensify. The resulting legislative intervention into college and university operations observed in recent years will remain an important feature in higher education law, as will executive branch action at the state and federal level. Responding to this challenging legal environment will test the skills of university administrators and trustees, especially—but not exclusively—at public universities in states with conservative electorates.