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“A Long and Winding Road”: The South Dakota Intellectual Diversity Bill of 2019

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Jon K. Lauck*

“A Long and Winding Road”: The South Dakota Intellectual Diversity Bill of 2019

TABLE OF CONTENTS

I. Introduction	674
II. Background	675
III. Prehistory	678
A. 2006 Legislation	678
B. 2018 Legislation	679
C. BOR Policy Changes	681
IV. Legislative History	682
A. Framing the Bill	682
B. The House of Representatives	686
C. The State Senate	688
V. Analysis	694
A. The Chicago Statement	694
B. Speech Zones	697
C. Student Group Funding and Free Exercise	699
D. Intellectual Diversity	702
E. Harassment	708
F. Developing a Dakota Diversity Model	709
VI. Conclusion	717

I. INTRODUCTION

During the winter of 2019 and after two years of debate, South Dakota became the first state in the nation to adopt legislation promoting intellectual diversity at its state universities. House Bill 1087 was adopted in the wake of growing public concern about American univer-

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sities becoming too ideologically one-sided and too prone to censorship and restrictions on free speech. Much of the friction underlying the framing and passage of H.B. 1087 involved disagreements between state legislators and the South Dakota Board of Regents (BOR), which is the body appointed by the governor to oversee the state university system and which generally seeks to maintain its autonomy.¹ Despite this friction and many questions of authority arising from it, the South Dakota Supreme Court has concluded that the BOR is subject to the control of the legislature.² This Article explains the legislative history behind H.B. 1087, discusses the accompanying legal questions raised by its passage, and highlights the new model of diversity created by H.B. 1087. Given the prominence of the public policy issues underlying H.B. 1087, other states are likely to follow suit with similar legislative debates and laws.

II. BACKGROUND

Christian colleges, ubiquitous in the Midwest, dominated the early years of American higher education.³ This trend continued into the late nineteenth century in South Dakota, which saw the formation of several private religious colleges, such as Augustana College, Dakota Collegiate Institute (later University of Sioux Falls), Groton Collegiate Institute, Redfield College, Yankton College, Mount Marty College, Presentation College, Columbus College, Pierre University (later Huron College), and Dakota Wesleyan University. At the same time, American public higher education grew and witnessed the creation of important state-controlled institutions such as the University of Wis-

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1. S.D. CONST. art. XIV, § 3 (setting forth the Constitutional authority for the creation of the South Dakota Board of Regents); S.D. CODIFIED LAWS § 13-53-4 (2018) (granting the power to manage universities to the BOR); S.D. CODIFIED LAWS §§ 13-49-1, 3 (2018) (setting the membership of the BOR at nine, appointed by the Governor and confirmed by the Senate, and limiting service to two six-year terms); S.D. CODIFIED LAWS § 13-49-2 (2018) (prohibiting regents from being from the same county and requiring that no more than six regents be from the same political party).
 2. *Kanaly v. State ex rel. Janklow*, 368 N.W.2d 819, 825 (S.D. 1985); *S.D. Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 451 (S.D. 1984); *Bd. of Regents v. Carter*, 228 N.W.2d 621, 625 (S.D. 1975) (rejecting the idea that the BOR is a “fourth branch of government”).
 3. KENNETH H. WHEELER, *CULTIVATING REGIONALISM: HIGHER EDUCATION AND THE MAKING OF THE AMERICAN MIDWEST* (2011); Russell M. Storey, *The Rise of the Denominational College*, 25 OHIO HIST. J. 52 (1916); Thomas N. Hoover, *The Beginnings of Higher Education in the Northwest Territory*, 50 OHIO HIST. J. 244 (1941); E. Kidd Lockard, *The Influence of New England in Denominational Colleges in the Northwest, 1830-1860*, 53 OHIO HIST. J. 1 (1944) (noting that the number of denominational colleges in the Midwest grew from 32 in 1840 to 102 by 1860); Daniel T. Johnson, *Financing Western Colleges, 1844-1862*, 65 J. ILL. STATE HIST. SOC’Y 43 (1972).

consin, the University of Minnesota, and Michigan State University—all of which were abetted by the federal Morrill Act.⁴

In South Dakota, state-controlled institutions were similarly established. These included “Normal Schools,” or institutions for training elementary school teachers, at Madison, Springfield, Aberdeen, and Spearfish, in addition to the University at Vermillion, the State College of Agriculture and Mechanic Arts at Brookings, and the School of Mines in Rapid City.⁵ These colleges eventually became universities. The college at Springfield, however, closed after several legislative attempts that finally culminated in a bruising political battle during the 1980s.⁶ Many other legislative reform efforts have been launched to restructure higher education in South Dakota.⁷ In 1953 and 1963, for example, the legislature passed laws to fund studies designed to lead to a reorganization of South Dakota higher education.⁸ Additionally, in 1968 the legislature created the Office of Higher Education and ordered it to create a master plan for the state’s universities, a process that led to a major battle over the idea of moving the engineering program at South Dakota State University to the School of Mines.⁹ Throughout the 1960s and 1970s there were political strug-

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4. George Paul Schmidt, *Colleges in Ferment*, 59 AM. HIST. REV. 19, 28 (1953); ROGER L. WILLIAMS, THE ORIGINS OF FEDERAL SUPPORT FOR HIGHER EDUCATION: GEORGE W. ATHERTON AND THE LAND-GRANT COLLEGE MOVEMENT (1991); John Y. Simon, *The Politics of the Morrill Act*, 37 AG. HIST. 103, 4 (1963) (noting the Midwestern origins of the land-grant colleges); Martin Ridge, *Frederick Jackson Turner at Indiana University*, 89 IND. MAG. HIST. 211 (1993) (reprinting Frederick Jackson Turner’s account of the rise of public colleges in the Midwest).
 5. *State ex rel. Prchal v. Dailey*, 234 N.W. 45, 46, 52 (S.D. 1931) (Campbell, J., concurring); see also U.S. DEPT OF THE INTERIOR, BUREAU OF EDUC., THE EDUCATIONAL SYSTEM OF SOUTH DAKOTA, 222–90 (Bulletin no. 31, 1918) (describing South Dakota normal schools and public colleges and recommending that all South Dakota higher education institutions be converted into one university).
 6. Marshall Damgaard, *Closing Time: A Twenty-Five-Year Retrospective on the Life and Death of the University of South Dakota at Springfield*, 39 S.D. HIST. 189 (2009); *Dakota Town Upset by Plan to Close School*, N.Y. TIMES (May 6, 1984), <https://nyti.ms/29x4Ek4> [<https://perma.unl.edu/6NF4-FEWP>].
 7. Damgaard, *supra* note 6; see generally RICHARD BOWEN, HIGHER EDUCATION IN SOUTH DAKOTA (1981).
 8. CEDRIC CUMMINS, THE UNIVERSITY OF SOUTH DAKOTA, 1862–1966, 304–07 (1975); J. HOWARD KRAMER, HIGHLIGHTS OF THE HISTORY OF HIGHER EDUCATION IN SOUTH DAKOTA (1970) (describing the 1922 New York Bureau of Municipal Research study, the 1953 study conducted by Griffenhagen and Associates Consultants in Public Administration and Finance out of Chicago, the 1963 study by Dr. Harvey Davis commissioned by the state legislature, the 1964 study by Dr. Max Myers commissioned by the state legislature, the 1967 study by the Office of Education at the U.S. Department of Health, Education, and Welfare, the 1970 Master Plan, and other sundry studies and legislative responses).
 9. See Engineering Controversy Records, Box 2114 (1962–71) (on file with South Dakota State University Archives and Special Collections); AMY DUNKLE, THE COLLEGE ON THE HILL: A SENSE OF SOUTH DAKOTA STATE UNIVERSITY HISTORY 161–69 (2003); BOWEN, *supra* note 7, at 53–54 (noting how the “middle sixties

gles over forcing South Dakota universities into a single university system, closing campuses, gubernatorial control over higher education, and other matters.¹⁰ These legislative arguments and many other disputes among experts over the proper organization of higher education in South Dakota can be reviewed and analyzed by consulting the numerous studies conducted on the health of South Dakota’s public colleges.¹¹

What remains clear throughout the many debates is that public higher education in South Dakota has always been subject to legislative control.¹² While the South Dakota Constitution conferred the power to manage state institutions of higher education upon the BOR at statehood, the legislature maintained control.¹³ Regental management was subject to “such rules and restrictions as the Legislature shall provide.”¹⁴ When the state’s Normal Schools, which were designed to train grade school teachers, also began to operate as teachers’ colleges, which were designed to train high school teachers, the Supreme Court made clear that such a change in focus was not allowable without legislative approval.¹⁵ The Supreme Court declared that “[i]t is for the Legislature to determine the educational policy of the state, not for this court or the regents.”¹⁶ Courses of study and the nature and purpose of state institutions of higher education were subject to legislative control.¹⁷ The BOR was not allowed to “expend public funds for education, unless the education for which it is expended is authorized by law.”¹⁸ South Dakota case law requires the “acts of the

discontent with insufficient discipline over the presidents led to another legislative statutory intrusion, this one creating the office of commissioner of higher education in 1968” and explaining subsequent quarrels over the powers of the commissioner, the university presidents, and the BOR and more legislative intervention); KRAMER, *supra* note 8, at 473–77.

10. BOWEN, *supra* note 7, at 15, 49, 51 (noting “ceaseless wrangling over control of Regents’ system activities”).
11. These studies are also recounted in RICHARD D. GIBB, A MASTER PLAN FOR PUBLIC HIGHER EDUCATION IN SOUTH DAKOTA (1970). *See also* KRAMER, *supra* note 8, at 417–18 (“Rarely did a legislative session go by without one or more bills being introduced which, if they had passed, would have dramatically reshaped the organization and instructional programs of the state-supported colleges”).
12. PATRICK M. GARRY, THE SOUTH DAKOTA STATE CONSTITUTION 228–29 (2014).
13. S.D. CONST. art. XIV, § 3.
14. *Id.*
15. State *ex rel.* Prchal v. Dailey, 234 N.W. 45 (S.D. 1931). South Dakota’s four technical schools are now governed by a new oversight body after being removed from the control of local school districts. Megan Raposa, *Supporters Grateful for Amendment R Win*, ARGUS LEADER (Nov. 9, 2016), <https://www.argusleader.com/story/news/education/2016/11/09/supporters-grateful-narrow-amendment-r-win/93540632/> [<https://perma.unl.edu/7JAH-S6LG>].
16. *Dailey*, 234 N.W. at 49.
17. *Id.* at 52 (Campbell, J., concurring).
18. *Id.* at 47.

regents” to be “authorized by the statutes” passed by the legislature.¹⁹ The long-term precedents establishing legislative control of higher education have been recognized consistently in recent decades by the courts.²⁰ Legislative control is also clear from various statutory requirements that govern South Dakota higher education.²¹

III. PREHISTORY

A. 2006 Legislation

The 2019 intellectual diversity legislation adopted in South Dakota has an extensive prehistory. This prehistory includes a debate during the 2006 South Dakota legislative session over related legislation.²² The session saw the introduction of House Bill 1222, a bill to “require regental institutions to annually report to the Legislature regarding intellectual diversity.”²³ H.B. 1222, introduced by Republican Representative Phyllis Heineman, chair of the House Education Committee, consisted of two sections. The first required the filing of annual reports explaining what steps universities took to promote intellectual diversity. The second listed specific steps that might be taken to advance the first section, including steps related to promoting free speech on campus.²⁴ The American Council of Trustees and Alumni (ACTA), which had recently released a report entitled “Intellectual Diversity: A Time for Action,” actively supported H.B. 1222.²⁵

H.B. 1222 had twenty-five cosponsors: twenty-two Republicans and three Democrats.²⁶ It passed out of the House Education Committee

19. *Id.*

20. *Kanaly v. State ex rel. Janklow*, 368 N.W.2d 819, 825 (S.D. 1985); *S.D. Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 451 (S.D. 1984); *Bd. of Regents v. Carter*, 228 N.W.2d 621, 625 (S.D. 1975).

21. See S.D. CODIFIED LAWS §§ 12-49, 13-51 (creating new positions such as the BOR Executive Director and Student Regent and a BOR scholarship program and requiring, inter alia, that the BOR receive legislative approval to construct buildings).

22. Celeste Calvitto, *Bill Seeks ‘Intellectual Diversity,’* RAPID CITY J. (Jan. 25, 2006), https://rapidcityjournal.com/news/local/govt-and-politics/bill-seeks-intellectual-diversity/article_8ab74b0f-4def-5abb-9996-562e04839427.html [<https://perma.unl.edu/G4ZP-WHRN>].

23. H.R. 1222, 2006 Legis. Assemb., 81st Sess. (S.D. 2006).

24. *Id.*

25. Press Release, American Council of Trustees and Alumni, Intellectual Diversity Bill Passes South Dakota Education Committee; Full Vote to Take Place Today; ACTA President Testifies in Favor (Feb. 8, 2006), https://www.goacta.org/news/intellectual_diversity_bill_passes_south_dakota_education_committee [<https://perma.unl.edu/ADU4-E5JN>]; AM. COUNCIL OF TRS. AND ALUMNI, INTELLECTUAL DIVERSITY: A TIME FOR ACTION (Dec. 2005), https://www.goacta.org/images/download/intellectual_diversity.pdf [<https://perma.unl.edu/AH5S-TV6U>] [hereinafter INTELLECTUAL DIVERSITY].

26. Calvitto, *supra* note 22.

in a 10–5 vote and passed the full House in a 42–26 vote.²⁷ The Senate State Affairs Committee then received H.B. 1222, where main sponsor Senator Lee Schoenbeck and BOR Executive Director Tad Perry had a sharp exchange.²⁸ Schoenbeck recited various reports that the BOR already filed, including a diversity report, and challenged the BOR’s argument that another report would be out of the ordinary.²⁹ H.B. 1222 passed out of the Senate committee in a 6–3 vote and went to the Senate floor, where, in the final days of the session, it failed 15–18 after heavy lobbying in opposition to the bill from the BOR, the American Civil Liberties Union, and teachers unions.³⁰ After the legislative battle, the BOR agreed to file voluntary reports, which ended after a few years.

B. 2018 Legislation

In 2018, the South Dakota Legislature revisited the issues of free speech and intellectual diversity on campus. Several issues re-started the debate. In 2017, the Foundation for Individual Rights in Education (FIRE) had given the University of South Dakota a “red” designation—a warning that it was violating speech rights through practices such as restrictive “speech zones” and its Guidelines for the Awareness and Prevention of Acts of Cultural Insensitivity and Bullying at USD.³¹

Legislators became aware of how the President’s Council on Diversity and Inclusiveness at USD issued the Guidelines for the Awareness and Prevention of Acts of Cultural Insensitivity and Bullying and how these guidelines restricted speech that might cause “hurt feelings.”³² The student newspaper at USD editorialized in favor of ad-

27. Jennifer Jacobson, *Political-Bias Bill Passes S.D. House*, AM. COUNCIL OF TRS. AND ALUMNI (Feb. 17, 2006), https://www.goacta.org/news/political_bias_bill_passes_sd_house [<https://perma.unl.edu/W2TU-3DRM>]; Chet Brokaw, *House Panel Approves University Diversity Plan*, AM. COUNCIL OF TRS. AND ALUMNI (Feb. 7, 2006), https://www.goacta.org/news/house_panel_approves_university_diversity_plan [<https://perma.unl.edu/SS46-SQNE>].

28. *Intellectual Diversity Bill Passes SD Senate Committee*, S.D. POL. (Feb. 22, 2006), https://southdakotapolitics.blogs.com/south_dakota_politics/2006/02/intellectual_di_8.html [<https://perma.unl.edu/4KHT-8CJC>].

29. *See Legis. Hearing on H.R. 1222 Before the S. State Affairs Comm.*, 2006 Legis. Assemb., 81st Sess. (S.D. 2006).

30. Sara Hebel, *South Dakota Senate Kills Bill Requiring Annual Reports on Intellectual Diversity at Colleges*, CHRON. OF HIGHER EDUC. (Feb. 27, 2006), <https://www.chronicle.com/article/South-Dakota-Senate-Kills-Bill/118630> [<https://perma.unl.edu/6WC8-KFDM>].

31. Faith Bottum, *South Dakota to Consider Free Speech Bill After College Under Fire for Restrictive Codes*, WASH. FREE BEACON (Jan. 29, 2018), <https://freebeacon.com/culture/south-dakota-consider-free-speech-bill-college-fire-restrictive-codes/> [<https://perma.unl.edu/H9BD-9DLE>].

32. Jesus Trevino, USD Associate Vice-President for Diversity, crafted the guidelines. Letter from Kevin V. Schieffer, President, S.D. Bd. of Regents, to Lee

addressing these guidelines and other speech infringements highlighted by FIRE.³³ Another speech issue raised by legislators during the 2018 legislative session concerned the treatment of a film at USD.³⁴ The state's largest newspaper reported that the showing of the film *Honor Diaries* at USD had been canceled due to objections from Muslim groups and was only allowed to be shown later if a post-film rebuttal was arranged.³⁵

These incidents contributed to the introduction of House Bill 1073 during the 2018 legislative session. H.B. 1073 totaled nine sections and six pages. The bill focused on free speech matters such as the existence of limited free speech zones on campus, but also included a provision requiring universities to report on their efforts to promote intellectual diversity.³⁶ Several Republican legislators and FIRE supported the bill. The BOR, the South Dakota Board of Technical Education, some student body presidents, the ACLU, teachers unions, and Democrats strongly opposed the bill. Some Republicans also criticized the legislation for including a provision allowing lawsuits against the state.³⁷ H.B. 1073 failed 9–3 in the House Judiciary Committee and its Senate companion, Senate Bill 198 (S.B. 198), failed 4–3 in the Senate Education Committee.³⁸ The chairman of the Education Committee, Senator Jim Bolin, voted against S.B. 198 in order to provide the BOR time to make needed reforms and because he objected to the provision on lawsuits.³⁹

Qualm, House Majority Leader, S.D. Legislature (Sept. 14, 2018), bit.ly/2HFh2zy [<https://perma.unl.edu/W9QZ-8QKJ>]. Trevino was South Dakota's first Associate Vice-President for Diversity. Braley Dodson, *Who's Who at USD? Q&A: Associate Vice President for Diversity Jesus Trevino*, VOLANTE (May 1, 2014), <http://volanteonline.com/2014/05/jesus-trevino-qa/> [<https://perma.unl.edu/85NZ-9SMS>].

33. *Editorial, USD Should Alter Free Speech Policies*, VOLANTE (Sept. 27, 2017), <http://volanteonline.com/2017/09/usd-should-support-free-speech/> [<https://perma.unl.edu/A5QE-XUER>].
34. *Free Speech Policies Listening Session: Revised Agenda Item: 13-A, 25*, S.D. Bd. OF REGENTS (June 26–28, 2018), bit.ly/2PeQk5l [<https://perma.unl.edu/BY7V-RP9F>] [hereinafter *Revised Agenda Item: 13-A*] (containing SDSU Student Senate minutes from January 29, 2018).
35. Jonathan Ellis, *University of South Dakota Movie Incident Looms Large in Campus Free Speech Debate*, ARGUS LEADER (Feb. 1, 2018), <https://www.argusleader.com/story/news/2018/02/01/usd-movie-incident-looms-large-campus-free-speech-debate/1086442001/> [<https://perma.unl.edu/6K9Y-UHVX>].
36. H.R. 1073, 2018 Legis. Assemb., 93rd Sess. § 7(2) (S.D. 2018).
37. H.R. 1073, 2018 Legis. Assemb., 93rd Sess. § 8 (S.D. 2018).
38. Dana Ferguson, *Lawmakers Table Campus Free Speech Bill, Its Twin Lives on in S.D. Legislature*, ARGUS LEADER (Feb. 2, 2018), <https://www.argusleader.com/story/news/politics/2018/02/02/lawmakers-table-campus-free-speech-bill-its-twin-lives-s-d-legislature/300187002/> [<https://perma.unl.edu/5XU9-SEEEY>]; *Legis. Hearing on S.B. 1073 Before the S. Educ. Comm.*, 2018 Legis. Assemb., 93rd Sess. (S.D. 2018).
39. *See Legis. Hearing on S.B. 1073 Before the S. Educ. Comm.*, 2018 Legis. Assemb., 93rd Sess. (S.D. 2018).

C. BOR Policy Changes

After the skirmishes of the 2018 legislative session and in keeping with commitments to some legislators, the BOR began a process of reviewing its policies on free speech. The reconsideration of existing speech policies was caused by concerns raised during the legislative session and opinions expressed by groups such as FIRE, the Alliance Defending Freedom, and others. At the May 2018 BOR meeting, the BOR first considered amending BOR policies relating to speech.⁴⁰ At the same time, the BOR issued a call for comments on university speech policies.⁴¹

In June 2018, the BOR had a “free speech policies listening session” as part of its regular meeting schedule.⁴² This session, held at South Dakota State University in Brookings, was predicated on discussing events on campuses around the country that undermined free speech. These events included, for example, a professor who harassed a student speaker at the University of Nebraska.⁴³

In September, the BOR released draft changes to seven different university speech policies and invited comment.⁴⁴ The BOR had a first reading of the new policies at its meeting at the School of Mines in Rapid City in October.⁴⁵ The BOR addressed “harassment,” the definition of which would persist into the 2019 legislative session as a controversial issue.⁴⁶ The BOR also proposed adopting a modified version of the University of Chicago free speech statement, which included the

40. S.D. Bd. OF REGENTS, POLICY MANUAL 3:4; *Approved Agenda May 8–10, 2018*, S.D. Bd. OF REGENTS (2018), <https://www.sdbor.edu/the-board/agendaitems/Pages/May-2018.aspx> [<https://perma.unl.edu/3ZL9-SQY3>].

41. Letter from Bob Sutton, President, BOR, and Kevin Schieffer, Vice President, BOR, to general public (May 23, 2018), *reprinted in Revised Agenda Item: 13-A*, *supra* note 34, at 4.

42. *Tentative Agenda*, S.D. Bd. OF REGENTS (June 26–28, 2018), bit.ly/327T9Kx [<https://perma.unl.edu/V64W-PFJR>].

43. *Revised Agenda Item: 13-A*, *supra* note 34; Rick Ruggles, *Lecturer Accused of Harassing Conservative Student Will No Longer Work at UNL; 2 PR Officials Also out*, OMAHA WORLD HERALD (Nov. 19, 2017), https://www.omaha.com/news/education/lecturer-accused-of-harassing-conservative-student-will-no-longer-work/article_0a127208-cbfa-11e7-89dd-2b859c3ef2bd.html [<https://perma.unl.edu/U58H-USTQ>].

44. Press Release, S.D. Bd. of Regents, Public Comment Invited on Draft Free Speech Policies (Sept. 14, 2018), https://www.sdbor.edu/mediapubs/New%20Press%20Releases/091418_Policies.pdf [<https://perma.unl.edu/NJ9L-ADRA>].

45. Christopher Vondracek, *Regents to Consider Free-Speech Policies*, RAPID CITY J. (Oct. 3, 2018), https://rapidcityjournal.com/news/latest/regents-to-consider-free-speech-policies/article_48b26897-9968-5e45-ab24-c01d54493e41.html [<https://perma.unl.edu/3VKA-XT2A>].

46. *Academic and Student Affairs: Agenda Item: 5-B(1)*, S.D. Bd. OF REGENTS, (Oct. 2–4, 2018), bit.ly/37Cpzy4 [<https://perma.unl.edu/C4JS-K2XP>] [*hereinafter Agenda Item: 5-B(1)*].

promotion of “professional diversity.”⁴⁷ The BOR voted unanimously to approve the first reading of the new free speech policies at their October 2018 meeting.⁴⁸ The proposed policies were unanimously adopted in their final form at the December 2018 BOR meeting with one important change.⁴⁹ In the “Commitment to Freedom of Expression” policy, or the modified Chicago Statement, the phrase “professional diversity” was changed to “intellectual diversity” to be in keeping with the wider policy debate about promoting a broad variety of viewpoints on campus instead of maintaining the dominance of one ideological point of view.⁵⁰ South Dakota’s largest newspaper reported that the policy “could invite scrutiny of the ideological makeup of university faculties. Studies show that university faculties in some departments tend to skew overwhelmingly to the political left.”⁵¹

IV. LEGISLATIVE HISTORY

A. Framing the Bill

On the legislative front, the speech and intellectual diversity matters did not fade away after the failure of the 2018 bills. Instead, legislative leaders began a long-term process of gathering information to prepare for the next session and to write new legislation. In July 2018 House Majority Leader Lee Qualm sent a long letter to the BOR requesting information about various issues relating to intellectual diversity and free speech on South Dakota campuses.⁵² The BOR responded in September.⁵³

47. *Id.* at 7–8.

48. Christopher Vondracek, *Regents Give Initial OK to Free-Speech Policies*, RAPID CITY J. (Oct. 4, 2018), https://rapidcityjournal.com/news/local/regents-give-initial-ok-to-free-speech-policies/article_60c83db2-83ad-5ebc-95ea-29d6aac56b12.html [<https://perma.unl.edu/CZ4K-79DN>].

49. *Academic and Student Affairs, Revised Agenda Item: 5-E(1)*, S.D. Bd. OF REGENTS, (Dec. 4–6, 2018), bit.ly/2P0IAAnl [<https://perma.unl.edu/87A3-ZHGX>] [hereinafter *Agenda Item: 5-E(1)*].

50. S.D. Bd. OF REGENTS, POLICY MANUAL 1:32, HANDOUT A (Dec. 2018), <https://www.sdbor.edu/policy/Documents/1-32.pdf> [<https://perma.unl.edu/S6A8-QENP>]; Jonathan Ellis, *New Policy Promotes University Free Speech, Intellectual Diversity Among Faculty*, ARGUS LEADER (Dec. 12, 2018), <https://www.argusleader.com/story/news/2018/12/12/new-policy-promotes-university-free-speech-intellectual-diversity-among-faculty/2282543002/> [<https://perma.unl.edu/TJP5-UJBN>].

51. Ellis, *supra* note 50.

52. Letter from Lee Qualm, House Majority Leader, S.D. Legislature, to Kevin V. Schieffer, President, S.D. Bd. of Regents (July 2, 2018), bit.ly/3bP0Zgu [<https://perma.unl.edu/25FT-HMQ2>]; see also Patrick M. Garry, *When Legislatures Become the Ally of Academic Freedom: The First State Intellectual Diversity Statute and Its Effect on Academic Freedom*, 71 S.C. L. REV. 175 (2019) (discussing legislative efforts regarding intellectual diversity and free speech at universities).

53. Letter from Kevin V. Schieffer, President, S.D. Bd. of Regents, to Lee Qualm, House Majority Leader, S.D. Legislature (Sept. 14, 2018), bit.ly/2HFH2zy [<https://perma.unl.edu/63GS-C3A9>].

In October, Senator Jim Stalzer and Representative Sue Peterson sent a long letter to the BOR requesting additional information and following up on the Qualm letter.⁵⁴ The BOR responded in November.⁵⁵ In December, Senator Stalzer, Representative Peterson, Leader Qualm, and Senate Majority Leader Kris Langer sent a letter requesting more information and emphasizing that they believed the previous BOR responses to be incomplete or evasive.⁵⁶ The BOR responded in January, just as the new legislature was convening.⁵⁷ The information these letters generated was critical to the construction of the 2019 bill. While legislators appreciated the extensive review of speech policies and the speech code reforms adopted by the BOR in 2018, they thought it crucial to codify and strengthen these reforms so future BOR decisions would not undermine them. Representative Sue Peterson, the primary sponsor of the bill, said, “We are very pleased that the Board of Regents has adopted the promotion of intellectual diversity as official policy for South Dakota universities. We believe, however, that we must lock in these reforms by way of concrete steps toward implementation of the policy and via legislation.”⁵⁸ Legislators argued the new policies could be easily reversed by future BOR rule changes. Given the gravity of the free speech issues involved, they believed a permanent statute was necessary.

Representative Peterson contacted Anita Thomas, the Principal Legislative Attorney with the Legislative Research Council (LRC), in December 2018 about drafting legislation. To promote free speech on

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54. Letter from Sue Peterson, Representative, S.D. Legislature, and Jim Stalzer, Senator, S.D. Legislature, to Molly Weisgram, Exec. Assistant, S.D. Bd. of Regents (Oct. 5, 2018), <https://www.sdbor.edu/administrative-offices/infogovtrelations/Documents/10.05.2018%20Sen.%20Stalzer%20and%20Rep.%20Peterson%20Letter.pdf> [<https://perma.unl.edu/6DVM-S4K6>]; Joseph Bottum, *Free Speech and Expensive Schools in South Dakota: Leaked Documents Suggest a Showdown is Coming*, SPECTATOR: USA (Oct. 5, 2018), <https://spectator.us/free-speech-south-dakota/> [<https://perma.unl.edu/7RWW-6AEH>].
 55. Letter from Paul B. Beran, Exec. Dir. & CEO, S.D. Bd. of Regents, to Sue Peterson, Representative, S.D. Legislature, and Jim Stalzer, Senator, S.D. Legislature (Nov. 1, 2018), [bit.ly/324OwB2](https://perma.unl.edu/N5QN-KTYV) [<https://perma.unl.edu/N5QN-KTYV>].
 56. Letter from Jim Stalzer, Senator, S.D. Legislature, Kris Langer, Senate Majority Leader, S.D. Legislature, Lee Qualm, House Majority Leader, S.D. Legislature, and Sue Peterson, Representative, S.D. Legislature, to Paul B. Beran, Exec. Dir. & CEO, S.D. Bd. of Regents (Dec. 10, 2018), [bit.ly/2VahzS2](https://perma.unl.edu/B32K-H44P) [<https://perma.unl.edu/B32K-H44P>].
 57. Letter from Kevin V. Schieffer, President, S.D. Bd. of Regents, to Jim Stalzer, Senator, S.D. Legislature, Kris Langer, Senate Majority Leader, S.D. Legislature, Lee Qualm, House Majority Leader, S.D. Legislature, and Sue Peterson, Representative, S.D. Legislature (Jan. 3, 2019), [bit.ly/37BdObb](https://perma.unl.edu/3RJF-9LC3) [<https://perma.unl.edu/3RJF-9LC3>].
 58. Graham Piro, *Push to Support Intellectual Diversity in South Dakota Universities Underway in Legislature*, THE COLLEGE FIX (Jan. 30, 2019), <https://www.thecollegefix.com/push-to-support-intellectual-diversity-in-south-dakota-universities-underway-in-legislature/> [<https://perma.unl.edu/P3R2-X6F4>].

campus, Peterson sought a bill based on model legislation from the American Legislative Exchange Council and the Alliance Defending Freedom.⁵⁹ In addition to the free speech provisions, Peterson instructed the LRC to include several items: (1) intellectual diversity reporting requirements; (2) freedom of association protections for student groups; (3) codification of the Chicago Statement; (4) more civics and history course requirements for college students (modeled on a Texas law); (5) intellectual diversity in university hiring statements; (6) the abolition of diversity offices (modeled on a recent Tennessee law); (7) the prevention of lawsuits against the state of South Dakota; and (8) an exclusion from the bill's requirements for the state technical schools (due to resistance from technical schools to the legislation proposed in 2018).⁶⁰

After further instructions and refinements from legislators, the first draft of the legislation included the following provisions: (1) annual campus reports on intellectual diversity; (2) a requirement that a civics test must be passed in order to graduate from college; (3) the abolition of campus diversity/equity/inclusion offices; (4) the adoption of intellectual diversity as part of the equal employment opportunity hiring criteria for faculty; (5) the abolition of speech zones; (6) freedom of association for student groups; (7) non-discrimination between student groups seeking funding for their activities; (8) allowing student groups to choose their own leadership based on their own rules; (9) the reform of college faculty hiring committees; (10) the abolition of discrimination in hiring based on intellectual diversity; (11) the codification of the Chicago Statement; (12) the abolition of tenure for faculty in the humanities and social sciences; and (13) the adoption of five year renewable contracts instead (based on a recent Florida law).⁶¹ The bill required five-member faculty hiring committees, including a

59. E-mail from Sue Peterson, Representative, S.D. Legislature, to Anita Thomas, Principal Legislative Attorney, S.D. Legislative Research Council (Dec. 14, 2018) (on file with author).

60. *Id.* See TEX. EDUC. CODE § 51.301 (1995) (requiring a Texas public university student to take six semester hours in government or political science courses focused on the U.S. Constitution and state constitutions, especially the Texas constitution); TEX. EDUC. CODE § 51.302 (1995) (requiring a Texas public university student to take six semester hours in American History); Megan Boehnke, *University of Tennessee Disbands Office of Diversity*, TENNESSEAN (May 20, 2016, 2:47 PM), <https://www.tennessean.com/story/news/politics/2016/05/20/university-tennessee-disbands-office-diversity/84666222/> [https://perma.unl.edu/Q8WN-29HM].

61. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019) (Draft Print Dec. 27, 2018); Shelby Webb, *SCF to Use Three-Year 'Rolling' Contracts for Faculty*, HERALD-TRIBUNE (June 8, 2016), <https://www.heraldtribune.com/article/LK/20160608/News/606119571/SH> [https://perma.unl.edu/6LQK-YNGC]; E-mail from Anita Thomas, Principal Legislative Attorney, S.D. Legislative Research Council, to Sue Peterson, Representative, S.D. Legislature, (Dec. 27, 2018) (on file with author).

person from the community in which the university hiring a new faculty member was located, an alumni from that institution, and a Governor-appointed member. For the civics test, students were required to score above an eighty-five percent on the national citizenship test to graduate. The draft bill totaled thirteen sections and was nine pages long.⁶²

The legislature further modified the bill based on input of various constituencies. A version circulated on January 4, 2019 provided that reports written in pursuit of the act should be posted on a university's website and should be clear that a student must complete three credits in both history and government studies to graduate.⁶³ A version circulated on January 7, 2019 set the selection process for five-member faculty hiring committees: two members appointed by the BOR, one member appointed by the chair of the House Committee on Education, one member appointed by the chair of the Senate Committee on Education, and one member appointed by the Governor.⁶⁴ This version totaled nine pages and fourteen sections.⁶⁵

Another version of the bill was circulated on January 9, 2019.⁶⁶ This version made clear that the abolition of tenure would not apply retroactively.⁶⁷ The section reforming faculty hiring committees was revised to clarify that certain mandated members of faculty hiring committees could not have been employed by the universities in the towns where they resided.⁶⁸ This version included fourteen sections and was ten pages long.⁶⁹

A final version of the legislation was introduced in the House on January 25, 2019 and designated as House Bill 1087. Speaker of the House Steve Haugaard, House Majority Leader Lee Qualm, and Representative Peterson sponsored the final version of the House bill. On the Senate side, Senate President Pro Tempore Brock Greenfield, Senate Majority Leader Kris Langer, and Senators Jim Stalzer and Ryan Maher sponsored the bill. Peterson and Maher also served as co-chairs of the influential Government Operations and Audit Committee. The final version of the bill totaled eight pages with twelve sections and

62. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019) (Draft Print Dec. 27, 2018).

63. E-mail from Anita Thomas, Principal Legislative Attorney, S.D. Legislative Research Council, to Sue Peterson, Representative, S.D. Legislature (Jan. 4, 2019) (on file with author).

64. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019) (Draft Print Jan. 7, 2019).

65. *Id.*

66. E-mail from Anita Thomas, Principal Legislative Attorney, S.D. Legislative Research Council, to Sue Peterson, Representative, S.D. Legislature (Jan. 9, 2019) (on file with author).

67. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019) (Draft Print Jan. 9, 2019).

68. *Id.*

69. *Id.*

differed from the December draft.⁷⁰ Sections 1 (tenure abolition) and 2 (hiring committee reform) of the initial draft bill were dropped from the December draft.⁷¹ The Speaker of the House assigned the bill to the House Education Committee.

B. The House of Representatives

The first hearing on the bill was February 6, 2019 in the House Committee on Education. At the hearing, some general clean-up amendments relating to language and timing were quickly added to the bill and no parties objected.⁷² Proponents included Professor Jon Schaff of Northern State University—who argued in favor of the additional history and civics offerings in the bill—and students—who said that many of their fellow students were supportive of the legislation and that the faculty on campus were not ideologically diverse.⁷³ ACTA, FIRE, and other groups also supported the bill.⁷⁴ The opponents, led by the BOR, emphasized that the bill would trigger litigation and would increase student costs. Representatives of student government argued that the definition of harassment should remain broad and that additional curriculum requirements would be costly. One student testified that during “diversity training” in his dormitory, he and others were “condemned for their beliefs.”⁷⁵ University presidents and the representative of the state teachers union (the South Dakota Education Association) also opposed the bill.⁷⁶ The bill passed out of committee by a 9–6 vote.

70. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019).

71. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019) (Draft Print Dec. 27, 2018).

72. For the technical amendments to H.R. 1087, see *House Bill 1087*, S.D. LEGISLATURE LEGIS. RES. COUNCIL, https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1087&Session=2019 [https://perma.unl.edu/2FW4-HJS8] (last visited Sept. 2, 2019).

73. See Jon D. Schaff, *What Groucho Marx Can Teach Us About Liberal Education*, FRONT PORCH REPUBLIC (Jan. 17, 2019), <https://www.frontporchrepublic.com/2019/01/what-groucho-marx-can-teach-us-about-liberal-education/> [https://perma.unl.edu/QJ99-JKH8].

74. Erik Gross, *South Dakota Legislature Files Bill to Promote Intellectual Diversity and Free Expression*, AM. LEGIS. EXCHANGE COUNCIL (Feb. 4, 2019), <https://www.goacta.org/news/south-dakota-legislature-files-bill-to-promote-intellectual-diversity-and-free-expression> [https://perma.unl.edu/T4EV-KZH5].

75. *Promote Intellectual Diversity at Certain Institutions of Higher Education: Hearing on H.B. 1087 Before the H. Comm., on Educ.*, H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019) (testimony of Trevor Gunlicks, S.D. State Univ. Student, Bill Proponent).

76. See HOUSE EDUC. COMM., S.D. LEGISLATURE, *House Education–2019*, S.D. LEGISLATURE LEGIS. RES. COUNCIL (Feb. 6, 2019), https://sdlegislature.gov/Legislative_Session/Committees/Default.aspx?tab=Minutes&Committee=427&document=2062019745AM&Session=2019&Action=129128 [https://perma.unl.edu/G3A9-TA7J] (testimony begins at 4:40).

After House committee passage of H.B. 1087, South Dakota Governor Kristi Noem, elected in the fall of 2018, asked to meet with Representative Peterson about the bill on February 8, 2019. Based on objections from the BOR and the Governor’s own analysis, Noem asked that the enhanced history and civics requirements for college graduates and the citizenship test sections of the bill be deleted, but agreed to support the general bill.⁷⁷ Noem raised concerns about the academic requirements increasing the time it would take to earn a college degree.⁷⁸ The citizenship test also duplicated a similar high school requirement the Governor sought via different legislation.⁷⁹ Representative Peterson and her supporters agreed to drop these provisions in order to win Governor Noem’s support.

The Governor’s office rejected the BOR’s concern about the bill’s various reporting requirements, including on intellectual diversity, as being too onerous. The Governor argued that “state agencies file reports all the time.”⁸⁰ The Governor also recalled a time when she attended a panel discussion at SDSU during Constitution Day and no speaker defended the Constitution. After this episode, Noem became convinced reforms in higher education were necessary.⁸¹ A year earlier, Noem had endorsed similar legislation and noted that “conservative or Christian voices” are often “purposely silenced on our college campuses.”⁸² In a December 2018 meeting, before the start of the legislative session, Noem “made clear to the BOR that she would be focused on promoting free speech and intellectual diversity on campus.”⁸³ Behind the scenes, the Governor’s staff urged the BOR to come to the table and negotiate more seriously because some form of legislation was likely to pass during the 2019 legislative session.⁸⁴

77. H. JOURNAL, 2019 Legis. Assemb., 94th Sess. 321 (S.D. 2019); E-mail from Tony Venhuizen, Senior Advisor to S.D. Governor Kristi Noem, to author (Apr. 17, 2019) (on file with author).

78. James Nord, Associated Press, *Noem Signals Change Ahead for ‘Intellectual Diversity’ Bill*, U.S. NEWS & WORLD REP. (Feb. 8, 2019), <https://www.usnews.com/news/best-states/south-dakota/articles/2019-02-08/noem-signals-change-ahead-for-intellectual-diversity-bill> [<https://perma.unl.edu/2D4C-664S>].

79. H.R. 1066, 2019 Legis. Assemb., 94th Sess. (S.D. 2019); Sarah Mearhoff, *SD House Passes Bill Requiring Citizenship Tests for High School Graduation*, RAPID CITY J. (Feb. 14, 2019), https://rapidcityjournal.com/news/legislature/sd-house-passes-bill-requiring-citizenship-tests-for-high-school/article_3b8a46e3-9be4-5927-a797-bd2dacd3cd81.html [<https://perma.unl.edu/FK23-UQ3N>] (noting this bill passed the House 38–31 but an amended version of the bill ultimately failed in the Senate 13–21).

80. E-mail from Tony Venhuizen to author, *supra* note 77.

81. *Id.*

82. Press Release, Kristi Noem, Kristi for Governor, Free Speech Is Not Optional on College Campuses, It’s a Right (Jan. 16, 2018), [bit.ly/2Pepl9Q](https://www.kristinoem.com/newsroom/2018/01/16/free-speech-is-not-optional-on-college-campuses-its-a-right) [<https://perma.unl.edu/3BDD-NA64>] (endorsing H.B. 1073 during the 2018 legislative session).

83. E-mail from Tony Venhuizen to author, *supra* note 77.

84. *Id.*

The Governor's staff also made it clear that they were not convinced by the BOR that the bill's definition of harassment was too narrow and dismissed the BOR's concern as a "snowflake" interpretation.⁸⁵ After being amended as per the Governor's request, the new version of the bill totaled eight sections and seven pages.

On February 19, the House considered the revised bill. Representative Tim Reid of Brookings objected to the bill's definition of harassment and argued that its elements should be connected via "or" instead of "and" because requiring all of the elements created too high of a burden to prove harassment and would not allow universities to remove signs on campus deemed offensive. House Majority Lee Qualm responded by arguing that the tighter definition of harassment involving multiple elements was more appropriate because one statement should not constitute harassment. He argued a proper definition of harassment required ongoing mistreatment. Representative Ray Ring of Vermillion also opposed the revised bill, arguing the problem the bill sought to address was "mostly on the coasts" and that the bill "encroache[d] on the autonomy of the BOR." Rising in support of the bill, Representative Jon Hansen of Dell Rapids explained how his effort to start a Catholic Thomas More Society at the USD law school was undermined by the administration's unwillingness to fund the group, while simultaneously allowing funding for other groups.⁸⁶ Governor Noem's office urged passage of the bill in the House and the House passed the bill 44–24.⁸⁷

C. The State Senate

Next, the bill went to the Senate State Affairs Committee for a hearing on Wednesday, February 27. A few technical amendments were made to the bill to begin the proceedings.⁸⁸ Two SDSU students, Baylee Dittman and Kyle Hartman, testified in favor of the bill and argued that the student government representatives were pushing the BOR agenda and ignoring the views of many students. Hartman testified that he attempted to hang an American flag in his dormitory on 9/11, but that it was taken down by the residence hall director and a dispute ensued over Hartman's right to display the flag.⁸⁹ Other proponents included Joe Cohn of FIRE.

The BOR led the opposition, warning of future lawsuits and argued for a lighter standard for harassment. The BOR opined that the South

85. *Id.*

86. H. JOURNAL, 2019 Legis. Assemb., 94th Sess. 321 (S.D. 2019).

87. E-mail from Tony Venhuizen to author, *supra* note 77.

88. For the technical amendments to H.R. 1087, see *House Bill 1087*, *supra* note 72.

89. Graham Piro, *South Dakota Protects Free Speech on Campus*, NAT'L REV. (Mar. 25, 2019), <https://www.nationalreview.com/2019/03/south-dakota-protects-free-speech-on-campus/> [https://perma.unl.edu/U8ZB-SNEU].

Dakota Constitution barred religious groups from receiving campus funds. It also argued that requiring universities to report on the free speech controversies on their campuses would create a ready-made list for trial lawyers to consult. University presidents and student governments opposed the legislation too. Student witnesses and Democrats on the committee argued that BOR autonomy should be preserved and that the legislature should not interfere with BOR operations.

The bill was killed—or “moved to the 41st day”— by a vote of 6–3. Three of the Republican Senators who voted “no” were from the college towns of Spearfish, Aberdeen, and Madison and had been lobbied by the BOR. The fourth, Jim Bolin, was a former K–12 educator who was a prominent voice on education matters. Bolin recognized the work that the BOR had already done on speech matters and suggested giving the BOR more time to implement their policies.⁹⁰ Two Democrats also voted “no.”

On the evening of February 27, the same day as the Senate committee vote, South Dakota’s leading conservative blog reported on an event that would change the course of H.B. 1087. The blog, *South Dakota War College*, revealed that students at the University of South Dakota Law School had attempted to have a “Hawaiian Day” to relieve the blues of the particularly brutal winter.⁹¹ The law students’ party was canceled, however, because Hawaiian Day was viewed as contravening USD’s “inclusive excellence policy.”⁹² The USD students agreed to cancel Hawaiian Day and instead have “Beach Day,” where they would still wear leis. But in a second decision, the wearing of leis was also deemed “culturally insensitive.”⁹³ The fate of Hawaiian Day became a topic of discussion across the state and was later examined by the Government Operations and Audit Committee.⁹⁴

90. See H. EDUC. COMM., *supra* note 76.

91. Mackenzie L. Huber, *It Might Seem Like the Worst Winter Ever, but Data Says It’s Not*, ARGUS LEADER (Feb. 21, 2019), <https://www.argusleader.com/get-access/?return=https%3A%2F%2Fwww.argusleader.com%2Fstory%2Fweather%2F2019%2F02%2F21%2Fnews-sioux-falls-weather-national-weather-service-winter-cold-snow%2F2922056002%2F> [https://perma.unl.edu/X2ED-S9HM].

92. Pat Powers, *On Day Campus Free Speech Bill Killed in Committee. . USD Censoring ‘Hawaiian Day?’*, S.D. WAR C. (Feb. 27, 2019), <http://dakotawarcollege.com/on-day-campus-free-speech-bill-killed-in-committee-usd-censoring-hawaiian-day/> [https://perma.unl.edu/T4ZA-6TBV].

93. Jonathan Ellis, *USD Law Students Change Party Theme After ‘Hawaiian Day’ Deemed ‘Culturally Insensitive,’* ARGUS LEADER (Feb. 28, 2019), <https://www.argusleader.com/story/news/2019/02/28/university-south-dakota-law-school-hawaiian-party-theme-nixed-usd-deemed-inappropriate/3020086002/> [https://perma.unl.edu/UZ2A-YE3A].

94. Trevor J. Mitchell & Jonathan Ellis, *USD President Launches Investigation into Law School’s ‘Hawaiian Day’ Decision*, ARGUS LEADER (Mar. 4, 2019), [bit.ly/2V5OGXg](https://www.argusleader.com/story/news/2019/03/04/USD-president-launches-investigation-into-law-schools-hawaiian-day-decision/) [https://perma.unl.edu/Q54D-8TS4]; Del Bartels, *Gov’t Operations and Audit Committee Grills USD Officials on Free Speech*, PIERRE CAP. J. (Apr. 24,

On Friday, February 28, the Sioux Falls newspaper ran a story about the Hawaiian Day controversy.⁹⁵ The next day, Senator Al Novstrap, an Aberdeen Republican who had voted against H.B. 1087 in committee, called Representative Peterson and said he wanted to support some form of free speech bill in light of the Hawaiian Day matter.⁹⁶ As the news of the Hawaiian Day incident spread, more legislators began to express more support for H.B. 1087.⁹⁷ The BOR promised a full investigation of the matter and while advocating free speech, the BOR President stated, “We do no service to our students by indoctrinating them with ‘political correctness’ run amok.” Nonetheless, legislators made plans to hold a vote in the Senate State Affairs Committee on Monday, March 4 to revive H.B. 1087.⁹⁸ The vote to revive the bill was 7–2.⁹⁹ Four Republican Senators who had voted earlier to kill the bill voted to revive it and the two Democrats on the committee voted against reviving the bill.

One reason for reviving the bill was the ongoing negotiations between the proponents of H.B. 1087 and the BOR over an acceptable bill. The discussion focused on a compromise bill drafted by the BOR that had been presented to its proponents before the first Senate hearing. This bill totaled four sections and two pages. Thinking that their full bill would pass, proponents of H.B. 1087 rejected the BOR-drafted compromise. After their full bill was defeated in a Senate committee and in the wake of the Hawaiian Day controversy and the growing interest in reviving H.B. 1087, the proponents drafted a new proposal based on the compromise drafted earlier by the BOR.¹⁰⁰ The proponents presented the new compromise to the BOR on Friday, March 9 in the wake of the Hawaiian Day matter. This version was six sections and three pages long. It became known as the “Friday Version” of the

2019), https://www.capjournal.com/cjbureau/gov-t-operations-and-audit-committee-grills-usd-officials-on/article_76f9a93c-66c1-11e9-b87c-2b337907175e.html [https://perma.unl.edu/LB2M-LK6A].

95. Ellis, *supra* note 94.

96. E-mail from Sue Peterson, Representative, S.D. Legislature, to author (May 1, 2019) (on file with author).

97. Bob McDermott, Representative, Haw. State House of Representatives, *Letter to the Editor: The Lei is a Symbol of Inclusiveness and Welcoming*, VOLANTE (Mar. 4, 2019), <http://volanteonline.com/2019/03/letter-to-the-editor-the-lei-is-a-symbol-of-inclusiveness-and-welcoming/> [https://perma.unl.edu/AG2K-M3QD] (“Someone in South Dakota has their head stuck in a snowbank”).

98. Press Release, S.D. Bd. of Regents, Regents Applaud USD President on Free Speech Action (Mar. 4, 2019), <https://www.sdbor.edu/mediapubs/New%20Press%20Releases/030419Speech.pdf> [https://perma.unl.edu/7SW7-LEE7].

99. Jonathan Ellis, *Revived After Hawaii Day Controversy, Free Speech Bill Advances*, ARGUS LEADER (Mar. 6, 2019, 3:55 PM), <https://www.argusleader.com/story/news/2019/03/06/revived-after-usd-hawaii-day-controversy-free-speech-bill-advances/3084917002/> [https://perma.unl.edu/C4CB-ZMDA].

100. E-mail from Sue Peterson to author, *supra* note 96.

legislation.¹⁰¹ It included a shortened iteration of the Chicago Statement, which was placed at the beginning of the legislation because it specifically forbade the actions taken at USD regarding Hawaiian Day.¹⁰² It also included the narrow definition of harassment and the provision about annual reporting on intellectual diversity. These sections were inserted into the BOR’s earlier compromise proposal so that the BOR could not in good faith reject the language in the free speech sections of the bill because they had been drafted by the BOR.¹⁰³ The BOR provisions related to speech zones, ending student group funding discrimination, and freedom of association.

To add to the complexity of the negotiations, a “Saturday Version” also emerged. Some of the proponents had a discussion with the President of the BOR, Kevin Schieffer, who rejected the Friday Version because he thought the BOR had already prevailed. He explained the earlier BOR compromise bill was no longer operative because it had been offered before the BOR prevailed at the Senate hearing. These negotiations produced the Saturday Version of the bill, which amounted to two sections: a version of the Chicago Statement that directly addressed the Hawaiian Day controversy and a requirement for the BOR to submit a report by the end of 2019 addressing the BOR’s efforts to promote intellectual diversity. Schieffer urged Senators on the State Affairs Committee to (1) oppose any legislation, (2) pass the Saturday Version, or (3) adopt the Friday Version. As a last resort, he suggested passing the original version of H.B. 1087.¹⁰⁴

Meanwhile, other proponents of H.B. 1087 thought the Saturday Version was far too mild given the magnitude of the Hawaiian Day controversy. Adding to the fluidity of the situation, in the middle of the Saturday negotiations, President Trump gave a speech demanding that colleges protect free speech and threatening to withhold federal funding if they did not.¹⁰⁵ The BOR Executive Director and lawyer, who were both engaged in hourly negotiations with proponents and other legislators sympathetic to the bill, agreed the Saturday Version would not be sufficient given the shifting political dynamics in the Senate. Sympathetic legislators followed Representative Peterson’s lead and sought a stronger version of H.B. 1087. A slightly amended Friday Version emerged that the proponents, their allies, the BOR, and the Governor’s office endorsed. This version totaled five sections and three pages. The five sections focused on (1) definitions, (2) the

101. *Id.*

102. *Id.*

103. *Id.*

104. Letter from Kevin V. Schieffer, President, S.D. Bd. of Regents, to S.D. Senate State Affairs Comm. (Mar. 5, 2019).

105. Michael D. Shear, *Trumps Says He Will Sign Free Speech Order for College Campuses*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/politics/trump-free-speech-colleges.html> [https://perma.unl.edu/2CCX-GZU8].

Chicago Statement, (3) open forums on campus, (4) free association and student group funding, and (5) intellectual diversity. The only substantive changes from the original Friday Version were the deletion of a section dealing with the definition of harassment and a strengthening of the intellectual diversity reporting provision. Instead of simply reporting on what campuses were doing “to promote and ensure intellectual diversity and the free exchange of ideas,” universities were also required to describe “any events or occurrences that impeded intellectual diversity and the free exchange of ideas.”¹⁰⁶

On Wednesday, March 6, the Senate State Affairs Committee reconsidered the bill. The Friday Version was substituted for the version of the legislation that the committee had earlier considered. Witnesses emphasized that the new version of the bill represented a compromise that all parties supported. Quoting a Beatles song he heard that morning, Tony Venhuizen called the negotiation process a “long and winding road.”¹⁰⁷ Senator Stace Nelson, appearing at the committee dais as part of another bill, urged passage of H.B. 1087 because South Dakota had become a national “laughing stock” after the Hawaiian Day incident. Although no witnesses opposed the bill and the BOR, legislative leadership, and Governor all voiced support, Democrats on the committee opposed it. Democratic Senate Minority Leader Troy Heinert argued that the open forums guaranteed in the bill could cause outside groups to re-enact lynchings on campus and promote the arrival of groups such as white nationalists, Black Panthers, and the American Indian Movement. Heinert argued the bill put students in danger. Democratic Senator Craig Kennedy raised questions about the intellectual diversity reporting provisions in the bill and how extensive and detailed these reports must be. In response to questions about the intellectual diversity reporting in the bill, Paul Beran of the BOR cited examples of items that might be included in reports, the invitation of speakers representing a variety of views, campus activities that could be connected to varying points of view, and new classes and programs representing various forms of thought. The new Friday Version passed out of committee 6–3.¹⁰⁸

The Senate was scheduled to take up the bill on Thursday, March 7, 2019. Instead of voting as planned, Senators who were angry with Representative Peterson for passing a veteran’s tuition bill in the House instead of sending it to a conference committee delayed the vote

106. H.R. 1087, 2019 Legis. Assemb., 94th Sess. (S.D. 2019).

107. E-mail from Tony Venhuizen, Senior Advisor to S.D. Governor Kristi Noem, to Senate State Affairs Comm. (Mar. 6, 2019) (on file with author); THE BEATLES, *The Long and Winding Road*, on LET IT BE (Apple Records 1970).

108. See HOUSE EDUC. COMM., *supra* note 76.

on H.B. 1087.¹⁰⁹ The Senate further delayed voting on the bill because they wanted the House to pass a bill funding pheasant habitats. The pheasant bill fell short of its required two-thirds vote, so the Senate caucus delayed action on H.B. 1087 to pressure the House to pass the pheasant bill.¹¹⁰ The process of holding bills hostage to promote passage of other bills is common at the end of the South Dakota legislative session.

After a deal was finally made on the pheasant bill, the Senate commenced debate on H.B. 1087.¹¹¹ Senator Jim Stalzer, the main Senate sponsor, highlighted the compromise nature of the bill and that all the parties involved had reached an agreement through a long process of bargaining and debate.¹¹² He called the bill a strong statement in favor of open debate on campus and against the stifling effects of political correctness. Senator Jim Bolin argued that the bill represented a broad agreement amongst the parties involved and decided to vote in favor of the bill after much contemplation. Senator Lee Schoenbeck, a lawyer, highlighted the importance of protecting free speech and argued that the best response to statements a person dislikes is more discussion and debate. He said it was crucial that students be exposed to many ideas and the full breadth of the political spectrum. Senate Republican leader Brock Greenfield emphasized the long fact-finding and deliberative process that led to the bill.

In opposition, Democratic Senator Reynold Nesiba said he hoped the intellectual diversity provision of the bill would cause free market advocates in economics departments to hire more Marxist economists. Senate Democratic leader Troy Heinert again denounced the open forum provision of the bill as an opening for the Klu Klux Klan to have mock lynchings on campus. He argued that people would not attend state universities because they would fear for their safety.¹¹³ After debate concluded, the bill went to a vote in the Senate and passed 26–7. Four Democrats and three Republicans voted against the bill. Two Senators were excused.

The slightly amended Friday Version of H.B. 1087, which passed the Senate, was sent back to the House. On March 12, 2019, the House

109. E-mail from Tony Venhuizen, Senior Advisor to S.D. Governor Kristi Noem, to author (May 4, 2019) (on file with author).

110. *Id.*

111. Lisa Kaczke, *Gov. Kristi Noem Signs Pheasant Habitat Fund Legislation into Law*, ARGUS LEADER (Apr. 1, 2019), [bit.ly/2vJIKCj](https://perma.unl.edu/MNG7-UDWP) [<https://perma.unl.edu/MNG7-UDWP>].

112. Senator Stalzer was named the “most successful legislator” of 2018 for his ability to pass his bills. See Lisa Kaczke, *How Effective Were Your Legislators? 1 in 5 Didn't File Any Bills*, ARGUS LEADER (Mar. 29, 2019), [bit.ly/3bR49k4](https://perma.unl.edu/EV55-RBWX) [<https://perma.unl.edu/EV55-RBWX>].

113. The Senate debate is recorded and available at the South Dakota Legislative Research Council website. See *House Bill 1087*, *supra* note 72.

passed the new version 51–12. All present House Democrats voted against the bill. On March 13, the approved bill was sent to Governor Noem, who signed the bill into law on March 20.¹¹⁴ On March 21, President Trump also signed an executive order requiring the protection of free speech on college campuses that receive federal funds.¹¹⁵ On July 1, the bill went into effect.

V. ANALYSIS

The enacted version of H.B. 1087 totals five sections. The first section is comprised of legal definitions and the remaining four include more substantive statutory language. This portion of the Article discusses the four substantive sections and the definitions within the sections that they affect. It discusses the section of H.B. 1087 focused on harassment, which was dropped from the bill in the final hours of the legislative debate, and the potential for South Dakota to create a new model of diversity promotion for American higher education.

A. The Chicago Statement

Section 2 of H.B. 1087 is a reformulation of the now famous Chicago Statement on free expression first announced in 2015 by the University of Chicago (UChicago). The Chicago Statement was based on the work of the University of Chicago Committee on Freedom of Expression, which was appointed by UChicago President Robert Zimmer and Provost Eric Isaacs. The Committee issued its “Report of the Committee on Freedom of Expression” after several incidents of speakers being shouted down on American campuses and other instances of speech and expression being curtailed in the academic setting. The Committee cited previous UChicago presidents’ support of free expression, including statements from William Rainey Harper, Robert M. Hutchins, Edward Levi, and Hanna Holborn Gray. The report singled out Robert M. Hutchins, who launched the Great Books program at UChicago, by stating: “[a]s Robert M. Hutchins observed, without a

114. Jonathan Ellis, *Noem, GOP Target University ‘Political Correctness’ with First-of-Its-Kind Diversity, Speech Law*, ARGUS LEADER (Mar. 22, 2019), <https://www.argusleader.com/story/news/2019/03/20/gov-kristi-noem-gop-target-university-political-correctness-south-dakota-legislature-free-speech/3226155002/> [https://perma.unl.edu/UYX7-3ZAS] [hereinafter *Noem, GOP Target University*]; Christopher Vondracek, *First-of-Its-Kind ‘Campus Intellectual Diversity’ Law Passed to Bolster Conservative Thought*, WASH. TIMES (Mar. 21, 2019), <https://www.washingtontimes.com/news/2019/mar/21/south-dakota-enacts-law-to-bolster-conservative-in/> [https://perma.unl.edu/MEK2-KYGP].

115. Susan Svrluga, *Trump Signs Executive Order on Free Speech on College Campuses*, WASH. POST (Mar. 21, 2019), [wapo.st/2P6UgeD](https://www.washingtonpost.com/news/energy-environment/wp/2019/03/21/trump-signs-executive-order-on-free-speech-on-college-campuses/) [https://perma.unl.edu/4NX2-ZY7Y].

vibrant commitment to free and open inquiry, a university ceases to be a university.”¹¹⁶

The Committee held that “the University’s fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.”¹¹⁷ In 2016, the Dean of Students at UChicago informed all incoming freshmen that “we do not support so-called ‘trigger warnings,’ we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual ‘safe spaces’ where individuals can retreat from ideas and perspectives at odds with their own.”¹¹⁸ In his letter to students, the Dean of Students included a history of UChicago’s previous free speech policies.¹¹⁹ Written by historian John Boyer, it stressed UChicago’s tradition of supporting free speech: the “free expression of opposing views,” “hearing from all sides on an issue,” Justice Oliver Wendell Holmes’s promotion of the “free trade in ideas,” obtaining “some ideas about both sides of many important questions,” and a “commitment to *intellectual diversity*,” including the presence on campus of “outspoken conservatives.”¹²⁰

During the free speech legislation debate in 2018 in the South Dakota legislature, the Chicago Statement was often noted and the BOR subsequently expressed interest in adopting it as policy. William Richardson, the long-serving chair of the political science department at the University of South Dakota, also issued a statement urging adop-

116. COMM. ON FREEDOM AND EXPRESSION, UNIV. OF CHI., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015). See Roger L. Geiger & Karen Paulson, *Robert Maynard Hutchins and the University of Chicago*, 101 AM. J. EDUC. 180, 183 (1993); Mary Ann Dzuback, *Hutchins, Adler, and the University of Chicago: A Critical Juncture*, 99 AM. J. EDUC. 57, 62 (1990) (connecting Hutchins’s advocacy to his Midwestern background).

117. COMM. ON FREEDOM AND EXPRESSION, UNIV. OF CHI., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015).

118. Letter from John (Jay) Ellison, Dean of Students, Univ. of Chi., to incoming freshmen students, Univ. of Chi. (2016), reprinted in *Revised Agenda Item: 13-A*, *supra* note 34. For more information on the growth of restrictions on campus speech, see Lee Ann Rabe, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 JOHN MARSHALL L. REV. 205 (2003); Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990); Jennifer Medina, *Warning: The Literary Canon Could Make Students Squirm*, N.Y. TIMES (May 17, 2014), <https://www.nytimes.com/2014/05/18/us/warning-the-literary-canon-could-make-students-squirm.html> [https://perma.unl.edu/27CR-24RQ].

119. Letter from John Ellison to incoming freshmen students, *supra* note 118.

120. JOHN W. BOYER, *ACADEMIC FREEDOM AND THE MODERN UNIVERSITY: THE EXPERIENCE OF THE UNIVERSITY OF CHICAGO* 25, 30, 33, 53, 56, 65 (2016) (emphasis added).

tion of the Chicago Statement.¹²¹ Members of a committee at USD on which Richardson had earlier served urged adoption of a version of the Chicago Statement as the basis of USD's speech policy, but the USD administration did not accept the recommendation.¹²² In December 2018, the BOR adopted a version of the Chicago Statement as official policy.¹²³ It included "encouraging intellectual diversity in faculty and fostering the ability of members of the institutions' community to engage in . . . debate and deliberation in an effective and responsible manner."¹²⁴ The new statement replaced an older one-sentence statement encouraging the "timely and rational discussion of topics whereby the ethical and intellectual development of the student body and general welfare of the public may be promoted."¹²⁵

In the final draft of H.B. 1087, which became law, the first substantive section was a shortened version of the Chicago Statement requiring a "commitment to the principles of free expression . . . in an environment that is intellectually and ideologically diverse" and preventing the shielding of students from "constitutionally protected speech, including ideas and opinions they find offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed."¹²⁶ Legislators placed the Chicago Statement in the first substantive section of H.B. 1087 because it specifically addressed the Hawaiian Day situation and made clear its illegality.¹²⁷ More generally, this section of H.B. 1087 rendered policies such as USD's Guidelines for the Awareness and Prevention of Acts of Cultural Insensitivity and Bullying null and void, terminated safe spaces, and allowed events like Hawaiian Day.¹²⁸

121. Letter from William D. Richardson, Distinguished Professor Emeritus, Univ. of S.D., to Kevin V. Schieffer, Vice-President, S.D. Bd. of Regents (June 14, 2018), reprinted in *Revised Agenda Item: 13-A*, *supra* note 34, at 8.

122. Letter from Kevin V. Schieffer to Lee Qualm, *supra* note 32.

123. S.D. Bd. of Regents, POLICY MANUAL 1:32 (2018), <https://www.sdbor.edu/policy/Documents/1-32.pdf> [<https://perma.unl.edu/A5NE-9KAC>].

124. *Id.*

125. For the earlier version of the BOR's Policy Manual, see *Agenda Item: 5-B(1)*, *supra* note 46 at 7.

126. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 2 (S.D. 2019).

127. Email from Sue Peterson to author, *supra* note 96.

128. Regarding the debate over safe spaces at South Dakota universities, see Pat Powers, *During Free Speech Act Testimony, SDSU President Dunn Claimed 'No Safe Zones' at University. But, Where Did That Safe Zone Sign Come From?*, S.D. WAR COLLEGE (Mar. 5, 2019), <http://dakotawarcollege.com/during-free-speech-act-testimony-sdsu-president-dunn-claimed-no-safe-zones-at-university-but-where-did-that-safe-zone-sign-come-from/> [<https://perma.unl.edu/R95C-RZJV>]. For diverse opinions on safe spaces, see Vinay Harpalani, "Safe Spaces" and the Educational Benefits of Diversity, 13 DUKE J. CONST. L. PUB. POL'Y 117 (2017); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1867-76 (2017).

Notably, some professors at USD objected to the adoption of the Chicago Statement. They believed that its open speech provisions might be “disruptive to the pedagogical aims of the classroom.”¹²⁹ They argued that because of the Chicago Statement, “classroom instruction could be significantly hampered by the faculty member’s inability or chilled willingness to create and enforce policies that delimit the scope, tone and vocabulary of the classroom.”¹³⁰ In contrast to the USD professors, the Faculty Senate at Dakota State University endorsed the adoption of the Chicago Statement.¹³¹ Marshall Damgaard, who taught political science at USD from 2009 to 2018, informed the BOR that his classes, which frequently focused on controversial topics and included partisan speakers, had never had its “pedagogical aims” disrupted by open speech.¹³² He pointed to the great success he had when placing “passionate, opinionated young people into a classroom or meeting room with articulate, forceful public policy leaders”¹³³ Regardless of the objections of the USD professors who opposed the Chicago Statement and in keeping with the views of Damgaard and the DSU Faculty Senate, the BOR voted to adopt the Chicago Statement as policy and the state legislature codified it with the passage of H.B. 1087.

B. Speech Zones

Section 3 of H.B. 1087 focuses on the outdoor areas of college campuses and makes clear that they shall serve as “designated public forums.” This section stems from discussions that took place during the 2018 legislative session about the existence of “speech zones” on South Dakota campuses that limited the exercise of speech rights to certain areas.¹³⁴ For example, USD policy had required that open forums, speeches, and protests “be restricted to the Free Speech areas on campus and must be approved by the Muenster University Center Administration.”¹³⁵ H.B. 1087 made such rules illegal and declared

129. Letter from Bridget Diamond-Welch, Julie Hellwege, Elise Boxer, Sara Lampert, Cassandra McKeon, and Molly Rozum to S.D. Bd. of Regents (Oct. 5, 2018), *reprinted in Agenda Item: 5-E(1)*, *supra* note 49, at 69.

130. *Id.*

131. Letter from Dale Droge, President of the Gen. Faculty, Dakota State Univ., to President Schieffer and Members of S.D. Bd. of Regents (Dec. 1, 2018), *reprinted in Agenda Item: 5-E(1)*, *supra* note 49, at 91–92.

132. Letter from Marshall Damgaard to Paul B. Beran, Exec. Dir. & CEO, S.D. Bd. of Regents, and S.D. Bd. of Regents (Dec. 27, 2018) (on file with author).

133. *Id.*

134. *See generally* Jennifer R. Huddleston, *Free Speech in the Age of Political Correctness: Removing Free Speech Zones on College Campuses to Encourage Civil Discourse*, 8 ALA. C.R. & C.L. L. REV. 279 (2017); Carol L. Zeiner, *Zoned Out! Examining Campus Free Speech Zones*, 66 LA. L. REV. 1 (2005).

135. Letter from Kevin V. Schieffer to Lee Qualm, *supra* note 53 (discussing Free Speech Policy 7.007).

university campuses open forums subject only to narrow time, place, and manner restrictions in keeping with prevailing free speech case law.¹³⁶ Restrictions on speech in designated public forums are subject to strict scrutiny, similar to restrictions on speech in traditional public forums.¹³⁷ H.B. 1087 recognized the important distinction between a limited and an unlimited public forum and clarified that any restrictions on expression on South Dakota campuses must be given the heightened scrutiny that accompanies a public forum designation.¹³⁸ H.B. 1087 further defined the “expressive activity” that would be allowed in campus open forums as “any lawful noncommercial verbal or written means by which one person communicates ideas to another, and includes peaceful assembly, protests, speeches, distribution of literature, the carrying of signs, and the circulation of petitions”¹³⁹ The abolition of speech zones should allow South Dakota universities to avoid litigation by eliminating circumstances where the zones are so confining as to violate students’ First Amendment rights.¹⁴⁰

Questions surrounding § 3 of H.B. 1087 persist because the abolition of speech zones divided student leaders. College Republicans generally supported these efforts to eliminate restrictions on free speech.¹⁴¹ Some other students, however, opposed the changes in free speech rules. USD student leaders argued that designating campuses as “public forums . . . may attract individuals who seek to promote disturbance, not discourse, on our campuses” and that it was a higher priority that students “feel safe.”¹⁴² They also argued it was critical

136. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

137. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Bowman v. White*, 444 F.3d 967, 974 (8th Cir. 2006) (holding that in the case of a designated public forum, the “government may enforce a reasonable, content-neutral time, place and manner restriction . . . if the restriction is necessary to serve a significant government interest and is narrowly drawn to achieve that interest”); Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 *IND. L.J.* 267, 270 (2004). *But see* *Riemers v. State ex rel. Univ. of N.D.*, 767 N.W.2d 832, 839 (2009) (ruling the University of North Dakota had not been deemed a designated public forum via statute).

138. *Bowman*, 444 F.3d at 976.

139. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 1(1) (S.D. 2019).

140. *Univ. of Cincinnati Chapter of Young Ams. for Freedom v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012). For discussion of a related regional case, see Miguel Octavio, *Shapiro Lawsuit Against UMN Partially Moves Forward*, *MINN. DAILY* (Feb. 27, 2019), <https://www.mndaily.com/article/2019/02/brshapiro> [<https://perma.unl.edu/Z7PS-MNVF>].

141. *Revised Agenda Item: 13-A*, *supra* note 34, at 25 (containing University of South Dakota Student Senate Minutes from January 29, 2018).

142. Letter from Josh Sorbe, Student Body President, Univ. of S.D., and Madison Green, Student Body Vice President, Univ. of S.D., to S.D. Bd. of Regents (June 21, 2018), *reprinted in Revised Agenda Item: 13-A*, *supra* note 34, at 18 (quoting previous USD Student Body President Teagan McNary).

for education that students have a “comfortable learning environment.”¹⁴³ Using the exact same language, the student leaders opined that free speech laws could “attract individuals who seek to promote disturbance not discourse on our campuses.”¹⁴⁴ USD Student Senator Irakoze Naftari argued that “this bill means hate speech will be allowed” and USD Student Senator Kade Walker argued that the bill “would give more groups a platform for hate speech.”¹⁴⁵ USD Student Senator Rishard Rameez said “allowing outside forces to make students feel not at home or unsafe is not okay.”¹⁴⁶ USD Student Senator Semehar Ghebrekidan said “hate groups” might come to campus and create an “unsafe and unsettling environment.”¹⁴⁷

Student opposition and legislators’ objections to the public forum designation may keep these free speech issues alive for future policymakers to revisit. The case law surrounding what constitutes reasonable time, place, and manner restrictions on speech in public forums will also remain operative and subject to public debate, legislative intervention, and potential litigation. Given that H.B. 1087 directly proclaimed that college campuses are public forums, litigation is not necessary to determine the precise forum designation of a campus. However, litigation over the validity of time, place, and manner restrictions that a university may adopt is possible.

C. Student Group Funding and Free Exercise

Section 4 of H.B. 1087 addresses two concerns. The first is the funding of student groups. In earlier years, BOR policy prohibited certain groups from obtaining funds for their operations. Specifically, BOR policy prohibited funding that “will be used for sectarian ceremonies or exercises.”¹⁴⁸ BOR policy was based on the BOR’s reading of the South Dakota Constitution.¹⁴⁹ However, § 4 of H.B. 1087 clarified

143. *Id.*

144. Univ. of S.D. Student S. Res. 17-12-R (2018), *reprinted in Revised Agenda Item: 13-A, supra* note 34, at 23.

145. *Revised Agenda Item: 13-A, supra* note 34, at 25 (containing University of South Dakota Student Senate Minutes from January 29, 2018).

146. *Id.*

147. *Id.* at 43 (containing University of South Dakota Student Senate Minutes from February 12, 2018).

148. S.D. Bd. of Regents Policy Manual 3:18(3)(A)(1) (2018), <https://www.sdbor.edu/policy/documents/3-18.pdf> [<https://perma.unl.edu/Q3LS-PMXD>].

149. S.D. CONST. art. VI, § 3 (“No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.”). On the discriminatory intent of this section, which is a form of the anti-Catholic Blaine Amendment of the late nineteenth century, see Patrick M. Garry & Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. REV. 14, 30–31 (2014); Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 513 (2003); Richard Baer, *Perspectives on Religion and Education in American Law and Politics: The Supreme*

that universities cannot discriminate against student groups based on their views and that “[f]unds allocated to student organizations shall be distributed in a nondiscriminatory manner.”¹⁵⁰ In the course of the final negotiations, however, the BOR asked that the phrase “in accordance with applicable state and federal authority” be added to H.B. 1087 so that the bill factors in the state constitution.¹⁵¹

The South Dakota state constitutional provision in question is unlikely to undermine the overall thrust of § 4 of H.B. 1087 given the current state of constitutional law. As noted by several free speech groups who participated in the BOR speech policy review process, applicable First Amendment case law likely nullifies the state law in question. The Supreme Court has held that policies that prohibit the distribution of funds to religiously-based student groups are unconstitutional because they result in viewpoint discrimination.¹⁵² In a case involving the interpretation of the Missouri constitution, the Supreme Court held that state constitutional bans on sectarian funding are nullified by the First Amendment’s requirement of viewpoint neutrality in the allocation of funding.¹⁵³ In another Supreme Court case, the University of Missouri-Kansas City’s (UMKC) attempt to limit funds to religious student groups was rejected and UMKC’s citation of the Missouri state constitution was ruled inapplicable.¹⁵⁴ H.B. 1087 proponents cited copious case law supporting their view on the discriminatory treatment of student groups from the Eighth Circuit Court of Appeals, which has jurisdiction over South Dakota. H.B. 1087’s overall effect, the debate surrounding its adoption, and the recognition of the applicable Supreme Court case law will ensure religiously-oriented student groups at South Dakota public colleges are eligible for funding. The clarity offered by H.B. 1087 likely saved South Dakota from litigation focused on its previous method of funding student groups, which was unconstitutional under extant First Amendment case law.

Section 4 of H.B. 1087 also addresses the issue of student control of student organizations, or students’ ability to choose their own mem-

Court’s Discriminatory Use of the Term “Sectarian,” 6 J.L. & POL. 449, 457 (1990); Jon Lauck, “You Can’t Mix Wheat and Potatoes in the Same Bin”: *Anti-Catholicism in Early Dakota*, 38 S.D. HIST. 1 (2008); *State v. Weedman*, 226 N.W. 348, 349–51 (S.D. 1929); 20 S.D. CONG. REC. 2100–01 (Feb. 20, 1889). *See generally* Jon Lauck, PRAIRIE REPUBLIC: THE POLITICAL CULTURE OF DAKOTA TERRITORY, 1879–1889 (2010); Jon Lauck, “The Organic Law of a Great Commonwealth”: *The Framing of the South Dakota Constitution*, 53 S.D. L. REV. 203 (2008).

150. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 4 (S.D. 2019).

151. *Id.*

152. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–32 (1995); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

153. *Trinity Lutheran Church of Colum., Inc. v. Comer*, 137 S. Ct. 2012, 2017–20 (2012).

154. *Widmar v. Vincent*, 454 U.S. 263 (1981).

bers and leaders.¹⁵⁵ H.B. 1087 prohibits universities from interfering in student groups’ ability to require their members and leaders to “adhere to the organization’s sincerely held beliefs, comply with the organization’s standards of conduct, or further the organization’s mission or purpose.”¹⁵⁶ This provision stems, in part, from a University of Iowa case in which the university claimed the Business Leaders in Christ student group violated the university’s human rights policy and caused the university to revoke the official recognition of the group. The university argued that the student group violated the policy by allowing only non-LGBTQ students to serve in leadership positions in keeping with the student groups’ religious beliefs. A federal court in Iowa ruled that the University of Iowa discriminated based upon viewpoint because other student groups—the Chinese Students and Scholars Association, the National Lawyers Guild, and an acapella group—limited their membership to certain individuals based upon ethnicity, beliefs, and gender.¹⁵⁷ The Iowa court reached its decision in the middle of the legislative session that yielded H.B. 1087 in South Dakota.¹⁵⁸ During the legislative session, the framers of H.B. 1087 often noted the ongoing case against the University of Iowa and sought a legislative solution.¹⁵⁹ Proponent lawyers also reminded legislators that recent Supreme Court case law allowed religious groups to select their leaders without government interference under the Free Exercise and Establishment Clauses of the First Amendment.¹⁶⁰ Students groups, they argued, cannot be disbanded by a university because a university policy might deem that student group “unwelcoming.”¹⁶¹ H.B. 1087 clarifies that student groups—re-

155. For the importance of this issue, see Letter from Blake Meadows, Legal Counsel, Center for Acad. Freedom, to President Sutton and Members of the S.D. Bd. of Regents (June 28, 2018), reprinted in *Revised Agenda Item: 13-A*, supra note 34, at 91–101.

156. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 4 (S.D. 2019).

157. *BLinC v. Univ. of Iowa*, No. 3:17-CV-00080-SMR-SBJ (S.D. Iowa Feb. 6, 2019).

158. Ian Richardson, *Court: University of Iowa Can’t Keep Student Group from Requiring Leaders to Follow Religious Beliefs*, DES MOINES REG. (Feb. 6, 2019, 7:32 PM), <https://www.desmoinesregister.com/story/news/education/2019/02/06/university-iowa-christian-student-group-religious-beliefs-court-business-leaders-in-christ-tippie-ia/2796463002/> [https://perma.unl.edu/QWZ7-QJDY]; Jeremy Bauer-Wolf, *Win for Christian Group at Iowa*, INSIDE HIGHER EDUC. (Feb. 8, 2019), <https://www.insidehighered.com/news/2019/02/08/judge-backs-christian-group-dispute-university-iowa> [https://perma.unl.edu/2MM5-YZMR].

159. Iowa subsequently adopted a free speech law following *BLinC*. See Stephen Gruber-Miller & Aimee Breaux, *Kim Reynolds Signs Bill Requiring Iowa Universities to Respect ‘Free Speech’ on Campus*, DES MOINES REG. (Mar. 27, 2019, 12:17 PM), <https://www.desmoinesregister.com/story/news/politics/2019/03/27/free-speech-on-campus-governor-kim-reynolds-bill-university-iowa-business-leaders-christ-uisu-uni/3288307002/> [https://perma.unl.edu/3PE2-DRWV].

160. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

161. *Healy v. James*, 408 U.S. 169, 194 (1972).

ligious and non-religious—are to be treated equally on South Dakota’s public campuses and not discriminated against based upon their governance structures or rules.

D. Intellectual Diversity

Section 5 of H.B. 1087 requires universities to report annually on the actions they take “to promote and ensure intellectual diversity and the free exchange of ideas” and describe “any events or occurrences that [have] impeded intellectual diversity and the free exchange of ideas” on campus.¹⁶² The legislative history surrounding the intellectual diversity law provides a broader understanding of this section’s requirements. The 2006 legislation on intellectual diversity, for example, was closely connected to the work of ACTA and its call for higher education stakeholders to take action to address the ideological imbalance on campus.¹⁶³ ACTA concluded that the “academy has become one-sided and coercive—indeed, even hostile—to a multiplicity of viewpoints.”¹⁶⁴ Citing various studies, ACTA argued that “college faculties are overwhelmingly one-sided in their political and ideological views, especially in the value-laden fields of the humanities and social sciences.”¹⁶⁵ ACTA suggested that: (1) stakeholders abolish campus speech codes; (2) encourage balance among the speakers welcomed to campus; (3) prevent speakers from being shouted down; (4) use intellectual diversity as a criteria in hiring new faculty; (5) hire visiting professors to enhance intellectual diversity on campus; (6) encourage “closed and dogmatic” departments to hire new professors with varying points of view; (7) establish new academic programs focused on the Great Books, Western Civilization, and the American Founding to counter-balance leftist perspectives; and (8) prohibit discrimination in the funding of student groups.¹⁶⁶

The 2018 legislation in South Dakota also highlighted the importance of promoting intellectual diversity. H.B. 1073 included a provision requiring annual reports on intellectual diversity, which was considered during the 2018 legislative session.¹⁶⁷ Senator Jim Bolin, chairman of the Senate Education Committee during the 2018 legislative session, also urged the BOR to inform students that they “should expect to be exposed and challenged by a wide variety of viewpoints on campus” and urged the adoption of policies at each university “to pro-

162. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 5 (S.D. 2019).

163. *See* Intellectual Diversity, *supra* note 25.

164. *Id.* at 5; JOHN PATRICK DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* 290–91 (1992) (discussing the origins of ideological one-sidedness on campus).

165. INTELLECTUAL DIVERSITY, *supra* note 25, at 7.

166. *Id.* at 12–16; Robert M. O’Neil, *Bias, “Balance,” and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985, 989 (2006).

167. H.R. 1073, 2018 Legis. Assemb., 93rd Sess. § 7(2) (S.D. 2018).

mote and encourage a wide spectrum of diverse opinions and viewpoints from outside speakers.”¹⁶⁸ In December 2018, after several months of rule-making, the BOR unanimously adopted the promotion of intellectual diversity as official BOR policy.¹⁶⁹ The ACTA and National Association of Scholars, both of which promoted efforts to enhance intellectual diversity on campus, praised this decision.¹⁷⁰

The exchanges between the BOR and legislators before the passage of H.B. 1087 also focused on the details of crafting and implementing policies designed to promote intellectual diversity. When the BOR seemed to sidestep the original meaning of intellectual diversity by defining it in a “comprehensive and multidimensional manner,” the legislators swiftly corrected their interpretation.¹⁷¹ Legislators made clear that “we define intellectual diversity as the presence of a wide variety of ideological and political opinions on campus and not simply the domination of one ideological bloc.”¹⁷² They also stressed that the 2018 free speech legislation clearly defined intellectual diversity as a “variety of political, ideological, and other perspectives.”¹⁷³ The first section of the 2019 bill provided another precise definition, defining it as “a learning environment that exposes students to and encourages exploration of a variety of ideological and political perspectives.”¹⁷⁴

After much of the BOR-legislator correspondence had been exchanged and at the time the BOR adopted the promotion of intellectual diversity as official policy, the BOR President made clear to legislators that he had “read in detail all of the studies you cite in your letter and others I previously received from Heterodox.”¹⁷⁵ The latter referred to the work of Heterodox Academy, which was founded in 2015 with the specific purpose of bringing intellectual diversity back

168. Letter from Senator Jim Bolin, Chair, S.D. S. Educ. Comm., to Regental Staff, reprinted in *Revised Agenda Item: 13-A*, *supra* note 34, at 7.

169. Ellis, *supra* note 50.

170. *New Policy Supports Freedom of Speech and Intellectual Diversity*, NAT'L ASS'N OF SCHOLARS (Dec. 20, 2018), https://www.nas.org/blogs/dicta/new_policy_supports_freedom_of_speech_and_intellectual_diversity [<https://perma.unl.edu/R9GPRFJE>]; Elliott Cole, *South Dakota University System Policy Will Promote Free Expression and Intellectual Diversity*, AM. COUNCIL OF TRS. AND ALUMNI (Dec. 14, 2018), <https://www.goacta.org/news/south-dakota-university-system-policy-will-promote-free-speech-and-intellectual-diversity> [<https://perma.unl.edu/4PZ9-U7D2>].

171. Letter from Paul B. Beran to Sue Peterson, *supra* note 55.

172. Letter from Jim Stalzer, Kris Langer, Lee Qualm, and Sue Peterson to Paul B. Beran, *supra* note 56.

173. *Id.*; H.R. 1073, 2019 Legis. Assemb., 93rd Sess. § 1(5) (S.D. 2018).

174. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 1(2) (S.D. 2019).

175. Letter from Kevin V. Schieffer to Jim Stalzer, Kris Langer, Lee Qualm, and Sue Peterson, *supra* note 57.

into academe.¹⁷⁶ New York University Professor Jonathan Haidt, leader of Heterodox Academy, co-authored a book with FIRE CEO Greg Lukianoff that was published during the summer of 2018. The book animated and informed the intellectual diversity debate.¹⁷⁷ The work of Manhattan Institute scholar Heather McDonald also undergirded the free speech and intellectual diversity debate in South Dakota.¹⁷⁸ So did the work of Princeton government professor Keith Whittington and the views of Wesleyan University president Michael Roth, who conceded “[t]here is no denying the left-leaning political bias on American college campuses.”¹⁷⁹ The studies cited by legislators, which the BOR President also reviewed, included a National Association of Scholars analysis that revealed how ideologically one-sided American campuses had become.¹⁸⁰ The study, titled “Homogenous,” found that forty percent of colleges had no Republican faculty members and the remainder had very few.¹⁸¹

The correspondence between legislators and BOR officials and the legislative testimony made evident that all parties involved understood the need to promote greater ideological balance on campuses. The Executive Director of the BOR argued that the “Board has made very clear that it wishes to promote intellectual diversity” and said the BOR would “explore seminars, lecture series, courses, programs or fellow options that would further advance this effort on our campuses.”¹⁸² He also noted how the “University of Colorado implemented

176. Emily Esfahani Smith, *A Movement Rises to Take Back Higher Education*, WALL ST. J. (June 17, 2018), <https://www.wsj.com/articles/a-movement-rises-to-take-back-higher-education-1529258360> [<https://perma.unl.edu/W97W-M5Q4>].

177. GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018).

178. HEATHER McDONALD, *THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE* (2018).

179. KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* (2018); Michael S. Roth, *The Opening of the Liberal Mind*, WALL ST. J. (May 11, 2017, 11:06 AM), <https://www.wsj.com/articles/the-opening-of-the-liberal-mind-1494515186> [<https://perma.unl.edu/52E6-B8KC>] (calling for “deeper intellectual and political diversity” on campus because the “full range of conservative ideas and traditions . . . seldom get the sustained, scholarly attention that they deserve.”); *see also* FRANK FUREDI, *WHAT’S HAPPENED TO THE UNIVERSITY?* (2017) (discussing “why campus culture is undergoing such a dramatic transformation and why the term moral quarantine refers to the infantilizing project of insulating students from offence and a variety of moral harms.”).

180. Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty*, NAT’L ASS’N OF SCHOLARS (Apr. 24, 2018), bit.ly/32jHGHy [<https://perma.unl.edu/EC5B-PHWH>].

181. *Id.*

182. Letter from Paul B. Beran, Exec. Dir. & CEO, S.D. Bd. of Regents, to Jim Stalzer, Senator, S.D. Legislature, Kris Langer, Senate Majority Leader, S.D. Legislature, Sue Peterson, Representative, S.D. Legislature, and Lee Qualm, House Majority Leader, S.D. Legislature (Jan. 3, 2019), <https://www.sdbor.edu/administra>

a visiting fellow of conservative thought and policy in 2013.”¹⁸³ The BOR President also supported the Colorado initiative.¹⁸⁴ Legislators in turn suggested the promotion of programs on the Great Books, American history and thought, Western Civilization, and constitutional history and the creation of chairs for the teaching of the history of conservative thought.¹⁸⁵ Legislators also suggested that South Dakota universities offer minors in the “American Constitutional Heritage,” “Conservative Political Thought,” “The Great Books,” and “The Heritage of Greece and Rome.”¹⁸⁶ Drawing on the work of Arizona State University and the University of Arizona and their “freedom schools,” South Dakota legislators endorsed recent laws passed by the Arizona state legislature promoting new programs to “focus on Western thinking from the ancient Greeks to the Founding Fathers and beyond.”¹⁸⁷

The legislative correspondence also emphasized a rebalancing of campus programming and curriculum offerings in favor of American history and against the agenda of campus diversity offices. Legislators questioned the rationale for the build-up of diversity offices and their tendency to promote programming related to social justice causes as-

diverse-offices/infogovtreations/Documents/2019.01.03%20%20Intellectual%20Diversity%20Response%20(FINAL).pdf [https://perma.unl.edu/B33A-TTQH]. In a similar approach, the President of Wesleyan University has recruited more students with military service experience, launched a “new initiative for intellectual diversity” to expose students to “ideas outside of the liberal consensus,” and started “offering courses and programs to cover topics such as ‘the philosophical and economic foundations of private property, free enterprise and market economies’ and ‘the relationship of tolerance to individual rights, freedom and voluntary association.’” Roth, *supra* note 179.

183. Letter from Paul Beran to Jim Stalzer, *supra* note 182; Sydni Dunn, *U. of Colorado Is in Search of a Scholar of Conservative Thought*, CHRON. OF HIGHER EDUC. (Feb. 26, 2013), <https://www.chronicle.com/article/U-of-Colorado-Is-in-Search-of-137567> [https://perma.unl.edu/48QQ-EFL4]; Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 L. & CONTEMP. PROBS. 155, 156 (1990) (recognizing the argument “that institutions of higher education are behaving like homes of left-wing orthodoxy, so that conservatism cannot get a hearing on campus.”).
184. Letter from Kevin V. Schieffer to Lee Qualm, *supra* note 53.
185. Letter from Sue Peterson and Jim Stalzer to Molly Weisgram, *supra* note 54.
186. *Id.*
187. Letter from Lee Qualm to Kevin V. Schieffer, *supra* note 52; Stephanie Saul, *Arizona Republicans Inject Schools of Conservative Thought into State Universities*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/us/arizona-state-conservatives.html> [https://perma.unl.edu/F4RZ-QA4Q] (describing the appropriation of \$7 million to both Arizona State University and the University of Arizona and the hiring of six new professors to be a part of the programs); see also Mark Bauerline, *Wisdom First, Job Skills Second*, CTRY J. (2019), <https://www.city-journal.org/humanities-crisis-in-higher-education> [https://perma.unl.edu/W2EK-HJ6H] (describing the “Great Books-style initiative called the Lyceum Program” at Clemson University).

sociated with the political left.¹⁸⁸ Early versions of H.B. 1087 abolished these offices. Legislators also suggested that left-leaning minors such as “Inclusion and Equity” and “Peace and Conflict Studies” be dropped in favor of minors in constitutionalism and conservative thought.¹⁸⁹ At the same time, legislators advocated a new emphasis on courses and other offerings that promoted the study of American history.¹⁹⁰ Legislators pointed to a recent ACTA report noting that only eighteen percent of colleges require an American history course for graduation.¹⁹¹ The first versions of H.B. 1087, including the version that passed the House committee, included provisions requiring South Dakota public university students to take three credits of American history and three credits of American government to graduate.¹⁹²

Given all the discussions and this extensive legislative history, one should expect the BOR’s intellectual diversity reports to focus on: (1) university-level efforts to bolster the teaching of American history and civics; (2) the creation of programs that focus on American constitutional thought, the Western canon, the Great Books, and Western Civilization more generally; (3) the hiring of professors who can teach the former and also offer courses and programs in conservative thought; and (4) steps to lessen the prominence of programs and offices associated with the political left.¹⁹³ A component of the reports

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188. Letter from Jim Stalzer, Kris Langer, Lee Qualm, and Sue Peterson to Paul B. Beran, *supra* note 56. For a recent proposal to reform or create alternative diversity offices, see Stanley Kurtz, *The Campus Intellectual Diversity Act*, NAT’L ASS’N OF SCHOLARS (Feb. 12, 2019), https://www.nas.org/blogs/dicta/the_campus_intellectual_diversity_act [<https://perma.unl.edu/865M-MRV9>]; see also Bruce Thornton, *Cultivating Sophistry*, 6 ARION: J. OF HUMAN. & THE CLASSICS 180, 200 (1998) (arguing that “increasingly, multicultural courses replace rather than supplement courses in the Western tradition, which hardly is taught at all anymore”).
189. Letter from Sue Peterson and Jim Stalzer to Molly Weisgram, *supra* note 54.
190. Letter from Jim Stalzer, Kris Langer, Lee Qualm, and Sue Peterson to Paul B. Beran, *supra* note 56.
191. AM. COUNCIL OF TRS. AND ALUMNI, A CRISIS IN CIVIC EDUCATION (Jan. 2016); Max Boot, *Americans’ Ignorance of History Is a National Scandal*, WASH. POST (Feb. 20, 2019), wapo.st/2HNMqfH [<https://perma.unl.edu/LY75-G7TM>].
192. H.R. 1087, 94th Leg., Reg. Sess. § 10 (S.D. 2019).
193. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 5(1) (2019); see, e.g., HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994); Katherine Chaddock Reynolds, *A Canon of Democratic Intent: Reinterpreting the Roots of the Great Books Movement*, 22 HIST. HIGHER ED. ANN. 5, 19 (2002) (emphasizing that the Great Books movement “supported the idea of the liberal arts and the great books as a means of democratic access to education, rather than a method of protective gate keeping among the intellectual elite”); Gilbert Allardyce, *The Rise and Fall of the Western Civilization Course*, 87 AM. HIST. REV. 695, 705–08 (1982) (explaining the emergence of the Western Civilization course at Columbia University a century ago as a compulsory two-year course along with noting its weaknesses); Richard Bernstein, *In Dispute on Bias, Stanford Is Likely to Alter Western Culture Program*, N.Y. TIMES (Jan. 19, 1988), <https://www.nytimes.com/1988/01/19/us/in-dispute-on-bias-stanford-is-likely-to-alter-western-culture-program.html?mtrref=www.google.com&gwh=A4B985B38B514B9983C53BACDBF8>

may address efforts to lessen the overall effects of what has become known as “political correctness,” or efforts to restrain open expression, which played a major role in the legislative debate and in the media coverage of H.B. 1087.¹⁹⁴ The reports will also include a section that lists anything that may have “impeded” any efforts to promote intellectual diversity on campus and any examples of the infringement of free speech or the open exchange of ideas on campus.¹⁹⁵ In June of 2019, the BOR held a hearing at South Dakota State University on

986E&gwt=pay&assetType=REGIWALL [https://perma.unl.edu/N3XH-H3MH] (describing the demise of the Western Civilization course at Stanford and student protests against it: “Hey hey, ho, ho, Western culture’s got to go”); Lawrence W. Levine, *Clio, Canons, and Culture*, 80 J. AMER. HIST. 849, 849–67 (Dec. 1993) (explaining the original emphasis on a classical curriculum at American colleges, the rise of electives in the late nineteenth century, the return of more general education requirements such as Western Civilization, and then the decline of Western Civilization courses); DANIEL BELL, THE REFORMING OF GENERAL EDUCATION: THE COLUMBIA COLLEGE EXPERIENCE IN ITS NATIONAL SETTING (1966) (calling for three mandatory terms of Classical-Western Civilization); George Paul Schmidt, *Colleges in Ferment*, 59 AM. HIST. REV. 19, 20 (1953) (describing the original college curriculum as “Aristotle via Aquinas topped off with the Renaissance. Its lineaments had been sketched in the Elizabethan Statutes for Cambridge in 1750 and the Laudian Code for Oxford in 1636, whence it had been transplanted, in limited form, to Harvard”); MERLE CURTI, THE GROWTH OF AMERICAN THOUGHT 224 (1943); Tim Lacy, *Dreams of a Democratic Culture: Revising the Origins of the Great Books Idea, 1869–1921*, 7 J. GILDED AGE PROGRESSIVE ERA 397, 397–441 (2008); TIM LACY, THE DREAM OF A DEMOCRATIC CULTURE: MORTIMER J. ADLER AND THE GREAT BOOKS IDEA (2013); Lionel Trilling, *The Uncertain Future of the Humanistic Educational Ideal*, 44 AMER. SCHOLAR 52, 55–56 (1974–1975); Irving Howe, *The Value of the Canon*, NEW REPUBLIC (Feb. 18, 1991), <https://newrepublic.com/article/119442/irving-howe-value-canon-essay-literature-and-education> [https://perma.unl.edu/R2SX-EH2L]; JOHN M. ELLIS, LITERATURE LOST: SOCIAL AGENDAS AND THE CORRUPTION OF THE HUMANITIES (1997); KEITH WINDSCHUTTLE, THE KILLING OF HISTORY: HOW A DISCIPLINE IS BEING MURDERED BY LITERARY CRITICS AND SOCIAL THEORISTS (1994); John Heath & Victor Davis Hanson, *Who Killed Homer?*, STAN. MAG. (Sept.–Oct. 1998), <https://stanfordmag.org/contents/who-killed-homer> [https://perma.unl.edu/T7GL-B2RE]; JOAN SHELLEY RUBIN, THE MAKING OF MIDDLEBROW CULTURE (1992).

194. *Noem, GOP Target University*, *supra* note 114. For a thorough review of the debate over the impact of political correctness on campus, see Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987 (2017); see also Louis Menand, *What Are Universities for?*, HARPER’S MAG. (Dec. 1991), bit.ly/37AzZ0t [https://perma.unl.edu/CX8P-64BR] (“It is now regarded as legitimate by some professors to argue that the absence of a political intention or a multicultural focus in another professor’s work constitutes a prima facie disqualification for professional advancement”); John R. Searle, *The Storm Over the University*, N.Y. REV. OF BOOKS (Dec. 6, 1990), <https://www.nybooks.com/articles/1990/12/06/the-storm-over-the-university/> [https://perma.unl.edu/X2VX-WJK2] (describing the emergence of the view that the “aim of a liberal education is to create political radicals, and the main point of reading the ‘canon’ is to demythologize it by showing how it is used as a tool by the existing system of oppression”); JAMES ATLAS, BATTLE OF THE BOOKS: THE CURRICULUM DEBATE IN AMERICA 11–12 (1990).

195. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 5(2) (S.D. 2019).

future plans to implement H.B. 1087.¹⁹⁶ The testimony and correspondence related to the hearing provides some additional clues as to the form of future intellectual diversity reports.¹⁹⁷ The first round of these reports were due on December 1, 2019.¹⁹⁸

E. Harassment

The inclusion of a provision defining harassment became one of the more persistent questions during the debate over H.B. 1087. During the summer of 2018, individuals and groups who participated in the BOR's open forums about campus speech policies weighed in on the issue of how to define harassment. Free speech groups argued the BOR policy defined harassment too broadly and in a manner that might infringe upon speech rights. After the BOR modified the definition in response to criticism, it remained controversial. The BOR's proposed modification created a standard of harassment that required conduct that was "severe *or* pervasive enough to create an objectively and subjectively intimidating hostile or demeaning environment."¹⁹⁹

H.B. 1087 proponents, in every version of the bill except the last, defined harassment as "conduct that is unwelcome, so severe, pervasive, *and* objectively offensive that a student is effectively denied equal access to educational opportunities."²⁰⁰ H.B. 1087 proponents required a tighter definition of harassment through the use of "and" instead of "or" in the list of elements of harassment, and the debate

196. See Jonathan Ellis, *Lawmakers Question Cost, Role of University Diversity Offices*, ARGUS LEADER (June 24, 2019), <https://www.argusleader.com/get-access/?return=https%3A%2F%2Fwww.argusleader.com%2Fstory%2Fnews%2F2019%2F06%2F24%2Fsouth-dakota-lawmakers-question-cost-role-university-diversity-offices%2F1528332001%2F> [https://perma.unl.edu/927M-KWBD].

197. *Id.*; Sarah Mearhoff, *SD Universities Grapple with New Intellectual Diversity Law*, RAPID CITY J. (June 27, 2019), bit.ly/3bQYxGk [https://perma.unl.edu/REE8-UC6K]; Kevin Schieffer, *Intellectual Diversity—Moving South Dakota Universities Forward*, BROOKINGS REG. (July 19, 2019), <https://www.brookingsregister.com/article/intellectual-diversity-moving-south-dakota-universities-forward> [https://perma.unl.edu/F4MK-S7YK]; Adam Sabes, *SD Lawmakers Put 'Diversity Offices on Blast: 'Taxpayers . . . Would Not Approve,'* CAMPUS REFORM (July 3, 2019), <https://www.campusreform.org/?ID=13410> [https://perma.unl.edu/ERD3-JHJ9]; Christopher Vondracek, *South Dakota Colleges Grapple with New Intellectual Diversity Law Implementation: Regents Balk at Ideas for Preserving Conservative Viewpoints*, WASH. TIMES (June 26, 2019), <https://www.washingtontimes.com/news/2019/jun/26/south-dakota-colleges-grapple-new-intellectual-div/> [https://perma.unl.edu/HF2M-H8A4]; see *Tenative Agenda*, S.D. BD. OF REGENTS (June 26–27, 2019), bit.ly/2T7D4R6 [https://perma.unl.edu/TV62-ZB7D] (discussing "Intellectual Diversity Public Conversation").

198. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 5 (S.D. 2019).

199. S.D. BD. OF REGENTS POLICY MANUAL 2.2.1, reprinted in *Agenda Item: 5-E(1)*, *supra* note 49 (emphasis added).

200. H.R. 1087, 2019 Legis. Assemb., 94th Sess. §§ 1, 5 (S.D. 2019) (Friday version) (emphasis added).

over this choice persisted throughout the discussion of H.B. 1087. Proponents of H.B. 1087 relied on Supreme Court precedent that held the elements of peer harassment in schools required conduct that was “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”²⁰¹

In the course of the debate over the definition of harassment, student groups objected to changes that tightened the definition. Students at USD pointed to a recent and high-profile sexual assault case on campus.²⁰² They argued the BOR’s proposal to add “severe or pervasive” to the definition of harassment was too high of a standard and requested that the definition remain as conduct that “has the purpose or effect of creating an objectively and subjectively intimidating, hostile, or demeaning environment.”²⁰³ The South Dakota Student Federation also objected to changing how the BOR defined harassment by adding the “severe or pervasive” element.²⁰⁴ The student objections did not lead to a change in proposed BOR policy and legislators dropped the more restrictive definition of harassment from H.B. 1087. The BOR adopted the definition of harassment proposed during the fall of 2018, which remains operative. As of this writing, BOR policy defines harassment as “[c]onduct towards another person that is severe or pervasive enough to create an objectively and subjectively intimidating, hostile, or demeaning environment that substantially interferes with the individual’s ability to participate in or to realize the intended benefits of an Institutional activity or resource.”²⁰⁵ Given the extensive debate of 2018 and 2019, the question of how to best define harassment may persist.

F. Developing a Dakota Diversity Model

One of the major consequences of the passage of H.B. 1087 is that a new form of diversity has been researched, discussed, debated, and codified into statutory law. The emergence of a new way of thinking about diversity should not be surprising given the extensive evolution the term has undergone since it emerged as a legal principle in the

201. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

202. Danielle Ferguson, *Former University of South Dakota Student-Athlete Found Not Guilty in Attempted Rape Trial*, ARGUS LEADER (Aug. 21, 2018, 11:08 AM), [bit.ly/2V9YUWR](https://perma.unl.edu/N7V3-5SKP) [https://perma.unl.edu/N7V3-5SKP].

203. Letter from Josh Sorbe and Madison Green to S.D. Bd. of Regents, *supra* note 142.

204. Letter from Matthew Yetter, Exec. Dir., S.D. Student Fed’n, and Ryan Sailors, Chair, S.D. Student Fed’n, to Bd. of Regents (Nov. 10, 2018), *reprinted in Agenda Item: 5-E(1)*, *supra* note 49, at 75.

205. S.D. Bd. OF REGENTS, POLICY MANUAL 3:4, 2.4.5 (2019).

famous *Bakke* case of 1978 and later spread through academia.²⁰⁶ After a recent and extensive analysis, Ofra Bloch has concluded that the meaning of diversity in the academic setting is “fundamentally and historically ambiguous.”²⁰⁷ The meaning of diversity, she argues, “was never fixed, but dynamic and constantly renegotiated” between various agendas, values, and emphases.²⁰⁸

South Dakota has marched into this world of vagueness, fluctuating case law, widespread and contradictory commentary, and general legal uncertainty with some clarity and specificity. By way of H.B. 1087, the people’s representatives in the state legislature clearly defined diversity in a precise statute that passed by large margins. Instead of trying to derive meaning from vague references in distant legal opinions around which various interpretations have risen and fallen or from a mountain of confusing and inconsistent commentary, South Dakota made clear that the focus in its public institutions of higher education should be on *intellectual* diversity, or the creation of a “learning environment that exposes students to and encourages exploration of a variety of ideological and political perspectives.”²⁰⁹ It is obvious via the plain meaning rule that the South Dakota legislature is seeking to address the dominance of leftist or left-leaning perspectives on campus by requiring universities to also foster the presence of conservative viewpoints, or to promote intellectual diversity.²¹⁰

South Dakota’s emphasis on intellectual diversity in its new statute is arguably closer to Justice Powell’s thinking in *Bakke* than much of the commentary on diversity that followed. Powell drew upon then-recent jurisprudence related to higher education when arguing that the “Nation’s future depends upon leaders trained through wide exposure to that *robust exchange of ideas* which discovers truth ‘out of a

206. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

207. Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 U. PA. J. CONST. L. 1145, 1211 (2018).

208. *Id.* at 1154; see also Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1849 (1996) (discussing the varying and confusing meanings of the term diversity); Anna Holmes, *Has ‘Diversity’ Lost Its Meaning?*, N.Y. TIMES (Oct. 27, 2015), <https://www.nytimes.com/2015/11/01/magazine/has-diversity-lost-its-meaning.html> [<https://perma.unl.edu/4TDL-FCXW>] (“[I]t doesn’t seem that anyone has settled on what diversity actually means”); Spencer Kornhaber, *A Person Can’t Be Diverse*, THE ATLANTIC (Jan. 26, 2016), bit.ly/2P7dvhQ [<https://perma.unl.edu/5SBS-RCS8>] (deeming “diversity” an “empty buzzword, or even deceitful one”); Jonathan P. Feingold, *Diversity Drift*, 9 WAKE FOREST L. REV. ONLINE 14 (Feb. 28, 2019), <http://wakeforestlawreview.com/2019/02/diversity-drift/> [<https://perma.unl.edu/ZE59-VWQB>] (concluding calls for diversity “lack a clear and coherent normative anchor”); Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 720–22 (2008).

209. H.R. 1087, 2019 Legis. Assemb., 94th Sess. § 1(2) (S.D. 2019); see ALLAN BLOOM, *GIANTS AND DWARFS: ESSAYS 1960–1990* 363 (1991) (highlighting the need for “true diversity,” or the diversity of opinions and thought).

210. *Argus Leader v. Hagen*, 739 N.W.2d 475, 480 (S.D. 2007).

multitude of tongues, [rather] than through any kind of authoritative selection.”²¹¹ New research demonstrates how Powell drew deeply on the work of Archibald Cox, who represented the University of California in *Bakke* and wrote the original brief four years earlier in a different case that became the basis of the diversity holding in *Bakke*.²¹² Powell, through Cox, channeled Harvard’s history of promoting diversity on campus. This included the work of postwar deans such as Wilbur J. Bender, a product of Goshen, Indiana who made it a high priority to recruit students with different experiences from various regions of the country.²¹³

Cox also drew on the notion of a “marketplace of ideas” or “allowing many diverse, competing ideas to be freely expressed,” a line of thought dating to Justice Holmes’s famous dissent in *Abrams v. United States*.²¹⁴ Powell and Cox similarly invoked the legacy of the famed Harvard President Charles Eliot, who believed campuses should be home to a “collision of views.”²¹⁵ Eliot’s ideas were grounded in his deep understanding of John Stuart Mill, who “was primarily concerned with the value of insuring that in any debate there were people with diverse points of view, developed from diverse backgrounds and experiences.”²¹⁶ Eliot also strongly advocated the study of the Great Books, especially Mill’s *On Liberty*, and recognized their

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211. *Bakke*, 438 U.S. at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))) (emphasis added).
212. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL’Y & L. 158, 172–74 (2018) (revealing Powell’s instruction to rely specifically on Cox’s argument and Harvard’s student diversification model).
213. *Id.* at 175 (noting that Bender was someone “who arrived at Harvard from outside the usual private New England prep school pipeline”). Bender wrote a report in 1960 highlighting the need for students from a “variety of . . . backgrounds” that created a “college with some snobs and some Scandinavian farm boys who skate beautifully and some bright Bronx premeds.” *Id.* at 180. Bender’s successor, who “grew up on a farm in Idaho,” also emphasized the importance of finding students “from all regions of the country, from all walks of life.” *Id.* at 176.
214. 250 U.S. 616 (1919); Oppenheimer, *supra* note 212, at 187. Holmes advocated the “free trade in ideas” and argued that the “best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Abrams*, 250 U.S. at 630; see also Stephen Rohde, *The Hundred Years’ War Over Free Speech*, L.A. REV. BOOKS (Mar. 8, 2019), <https://lareviewofbooks.org/article/the-hundred-years-war-over-free-speech/> [<https://perma.unl.edu/73DA-JRBU>] (noting Holmes’s “sense that attitudinal adaptation is encouraged by having a plethora of points of view which help weed out the fallacious and the obsolete”).
215. Oppenheimer, *supra* note 212, at 191.
216. *Id.* at 192 (referencing JOHN STUART MILL, *ON LIBERTY* (1859)). Eliot and Mill were not focused on race when promoting diversity, but instead on “class, background and experience.” Oppenheimer, *supra* note 212, at 192.

importance to promoting the “value of diversity of opinion.”²¹⁷ Reflecting on his victory in *Bakke* years later and in keeping with Holmes, Eliot, and Mill, Cox emphasized that universities must promote “diversity of all sorts, not just racial or ethnic diversity,” to comply with constitutional law.²¹⁸

In addition to more accurately pursuing the deeper agenda of *Bakke* and better grasping *Bakke*’s broader understanding of diversity, South Dakota’s definition of diversity can be linked to the overall goal of promoting a properly functioning, deliberative democracy. It emphasizes the importance of robust democratic forums where many ideas can be discussed and the critical need to reform intellectual monocultures. Consistent with one strand of thinking about diversity, South Dakota embraced the goal of a working democratic pluralism, an idea organic to the Midwest, born in the early twentieth century.²¹⁹ This pluralism is grounded in American political traditions and ideals.²²⁰ A focus on American pluralism can be found in the Supreme Court’s emphasis on diversity as a method of sustaining “our political and cultural heritage” and in H.B. 1087’s efforts to promote the reinvigoration of the study of civics and American history.²²¹

217. Oppenheimer, *supra* note 212, at 192 (explaining how Eliot embraced the idea of a “five-foot shelf of great books,” which he selected and which became the “Harvard Classics”); Adam Kirsch, *The “Five-Foot Shelf” Reconsidered*, HARV. MAG. (Nov.–Dec. 2001), <https://harvardmagazine.com/2001/11/the-five-foot-shelf-reco.html> [<https://perma.unl.edu/GW5G-MHW9>] (noting how “Mill is almost excessively favored” by Eliot, who includes both *On Liberty* and Mill’s *Autobiography* in the “Harvard Classics”); see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* 249 (1987) (“Freedom of the mind requires not only, or not even specially, the absence of legal constraints but the presence of alternative thoughts. The most successful tyranny is not the one that uses force to assure uniformity but the one that removes the awareness of other possibilities, that makes it seem inconceivable that other ways are viable, that removes the sense that there is an outside.”).

218. Oppenheimer, *supra* note 212, at 200.

219. Bloch, *supra* note 207, at 1179; Michael S. Steiner, *‘An Easterner in the Hinterland’: Horace Meyer Kallen, the University of Wisconsin, and the Regional Roots of Cultural Pluralism, 1911–1917*, in *THE SEER AND THE SOWER: ESSAYS ON THE INTELLECTUAL HISTORY OF THE AMERICAN MIDWEST* (Jon K. Lauck et al. eds., forthcoming 2020); IRENE TAVISS THOMSON, *CULTURE WARS AND ENDURING AMERICAN DILEMMAS* 110–11 (2010).

220. Oppenheimer, *supra* note 212, at 193 (noting Charles Eliot’s embrace of pluralism).

221. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). The South Dakota Supreme Court has also recognized the civic component of public higher education and the importance of traditional modes of learning and, in higher education case law, it has invoked the South Dakota Constitution’s recognition that education is important because the “stability of a republican form of government depend[s] on the morality and intelligence of the people.” *State ex rel. Prchal v. Dailey*, 234 N.W. 45, 47 (S.D. 1931) (quoting S.D. CONST. art. VIII, § 1). “During the whole history of our nation,” the court has

South Dakota advocated and adopted its new diversity model in the midst of a broader debate over a form of “toxic diversity” increasingly seen as too racialized and focused on divisive identity politics to the exclusion of broadly accepted democratic practices.²²² In keeping with a non-toxic form of diversity focused on pluralistic ideals such as that intended by H.B. 1087, the South Dakota BOR President fondly viewed the Heterodox Academy definition, which emphasized reasoned and rational debate: “Viewpoint diversity refers to the state of a community or group in which members approach questions or problems from multiple perspectives. *When a community is marked by intellectual humility, empathy, trust, and curiosity, viewpoint diversity gives rise to engaged and civil debate, constructive disagreement, and shared progress towards truth.*”²²³

By focusing on the quality of the debate and on *intellectual* diversity, the new South Dakota approach can also honor genuine intellectualism, a focus on scholarship and thinking and books and learning instead of the frictions of a world overtaken by the gestures and politics of identity and conflict between identity groups.²²⁴ This focus conjures Randolph Bourne’s image of an “old, noble ideal of a community of scholarship.”²²⁵ It bespeaks an “island of intellectual inquiry and robust discourse,” a “place that embraces, heart and soul, John Stuart Mill’s wide-open marketplace.”²²⁶ It is a humane and learned place—one populated with damp libraries, dusty archives, seminar rooms, coffee houses, and discussions over cognac, not constant partisan war-

explained, “religion and education have been recognized as the foundation pillars of American civilization.” *State ex rel. Eveland v. Erickson*, 182 N.W. 315, 316 (S.D. 1921).

222. Stephanie S., *Toxic Diversity vs. Genuine Diversity: A Handy Chart*, THE RIGHT GEEK (Mar. 10, 2019, 9:24 AM), <https://therightgeek.blogspot.com/2019/03/toxic-diversity-vs-genuine-diversity.html> [<https://perma.unl.edu/4T4Y-XCEZ>]; DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA (2005); Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html> [<https://perma.unl.edu/3SXG-4BN2>]; Nathan Heller, *The Big Uneasy: What’s Rolling the Liberal-Arts Campus?*, NEW YORKER (May 23, 2016), <https://www.newyorker.com/magazine/2016/05/30/the-new-activism-of-liberal-arts-colleges> [<https://perma.unl.edu/3VC8-NGBB>]; Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 AM. SCHOLAR 337, 340 (1990); Sohrab Ahmari, THE NEW PHILISTINES: HOW IDENTITY POLITICS DISFIGURE THE ARTS 96 (2016).
223. Letter from Kevin V. Schieffer to Jim Stalzer, Kris Langer, Lee Qualm, and Sue Peterson, *supra* note 57 (emphasis in original).
224. See RUSSELL JACOBY, THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME (1987).
225. Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 L. & CONTEMP. PROBS. 195, 216 (1990) (quoting Bourne, *The Idea of a University*, in RANDOLPH S. BOURNE, WAR AND THE INTELLECTUALS: ESSAYS 1915–1919 152, 154 (Carl Resek, ed., 1964)).
226. Smolla, *supra* note 225, at 216–17.

fare and fear of sudden visits from the PC police.²²⁷ It is a place of deliberation, good faith, and openness.²²⁸ It is a place of “sweetness and light,” where one learns the “best which has been thought and said,” and the pursuit of intelligence and beauty are norms.²²⁹

In this new model of diversity community is honored, scholars are not marginalized and objects of scorn for their writings and beliefs, and students are genuinely taught to think and weigh arguments and evidence. As the Supreme Court has held, “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust.”²³⁰ In this new system, scholars who may have been previously mistreated will have some supportive colleagues. The Harvard admissions plan that served as the basis of Powell’s reasoning in *Bakke* recognized that “a truly heterogeneous environment” requires a significant presence of diverse thinkers, not simply a few token individuals, which is an important consideration as the BOR implements H.B. 1087.²³¹ Most impor-

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227. Jonathan R. Cole, *The Chilling Effect of Fear at America’s Colleges*, THE ATLANTIC (June 9, 2016), <https://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/> [<https://perma.unl.edu/R54M-RN9F>]; Colleen A. Sheehan & James Matthew Wilson, *A Mole Hunt for Diversity ‘Bias’ at Villanova*, WALL ST. J. (Mar. 29, 2019), <https://www.wsj.com/articles/a-mole-hunt-for-diversity-bias-at-villanova-11553898400> [<https://perma.unl.edu/WGD3-363Y>] (rejecting “ideological policing” and a campus “atmosphere of fear-imposed silence”); Wendy Kammer, *The Progressive Ideas Behind the Lack of Free Speech on Campus*, WASH. POST (Feb. 20, 2015), [wapo.st/39Q9JkV](https://www.washingtonpost.com/archive/local/2015/02/20/local-news/progressive-ideas-behind-the-lack-of-free-speech-on-campus/) [<https://perma.unl.edu/8XVP-MMCP>] (criticizing the “soft authoritarianism” of some campuses); David Brooks, *A Nation of Weavers*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/opinion/culture-compassion.html> [<https://perma.unl.edu/JAV8-HUYW>] (criticizing the growing “culture of fear, distrust, tribalism, shaming and strife”).
228. A useful model could be the composite ideals of due process which are defined by good faith truth-seeking, unbiased tribunals, reliance on evidence and arguments, opportunities to present ideas and for fair rebuttals, extensive notice of meetings and hearings, reliance on expertise and scholarly literature, an emphasis on writings and documentation, public outreach, and a general belief in the republic of letters. See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267, 1279–1305 (1975); see also PETER NOVICK, THE NOBLE DREAM: THE ‘OBJECTIVITY QUESTION’ AND THE AMERICAN HISTORICAL PROFESSION 4 (1988) (describing the historical profession’s one-time commitment to reducing bias, gathering evidence and documentation for arguments, verifying sources, logical criticism, and objectivity).
229. MATTHEW ARNOLD, CULTURE AND ANARCHY: AN ESSAY IN POLITICAL AND SOCIAL CRITICISM (1869).
230. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).
231. Letter from Sue Peterson and Jim Stalzer to Molly Weisgram, *supra* note 54 (advocating that the BOR “aggressively pursue the promotion of intellectual diversity” and “avoid mere tokenism, i.e. the creation of just one or two counter-voices”); Oppenheimer, *supra* note 212, at 167; see also *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (recognizing the University of Michigan’s argument about the need for a “critical mass” of individuals for meaningful diversity to exist); Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 722 (2008) (describing tokenism as the accommodation of a few “representatives” of a group with little resulting change).

tantly, in this vision, the university is a place of openness, learning, and tutoring, where a professor avoids indoctrinating students and instead allows them an “opportunity fairly to examine other opinions” and “habituates” students “to looking not only patiently but methodically on both sides, before adopting any conclusion upon controverted issues,” as per the classic mission statement of the American Association of University Professors.²³² If students continue to detect a strong one-sidedness on campus, “self-muzzling” will persist, open inquiry will shrivel, and education will fail.²³³

In addition to prizing viewpoint diversity, reasoned democratic deliberation, and intellectualism, the South Dakota diversity model is also bolstered by regionalist theory. The Harvard plan, which is the basis of the *Bakke* diversity ruling, grounded itself in a postwar effort to promote more regional balance in the rarified air of the Ivy League. It was designed to lessen the dominance of the Eastern seaboard in the nation’s governing institutions and intellectual circles. This sentiment, articulated by a Hoosier at Harvard, represented a broader movement that gained steam in the decades after World War I and sought to give voice to the interior regions of the country.²³⁴ The marginalization and alienation of “flyover country,” which this movement sought to address, persists and animates much of the present social and cultural friction in the nation, including the battles over diversity in higher education.²³⁵ A focus on intellectual diversity in coming years should include a focus on regional diversity and the promotion of regional literature, history, and art alongside the older clas-

232. Committee on Academic Freedom and Academic Tenure, *General Report of the Committee on Academic Freedom and Academic Tenure*, 91 IND. L.J. 57 (1915). The American Historical Association’s 1974 “Statement of Professional Standards” also declared that the “vitality and development” of history “have depended on continuous colloquy among historians of *diverse points of view*.” Levine, *supra* note 193, at 853 (emphasis added).

233. Letter from William D. Richardson to Kevin V. Schieffer, *supra* note 121; Peter Wright, *Problematic: The Battle for Free Speech*, HARV. POL. REV. (Dec. 6, 2015), bit.ly/3bM4a8J [https://perma.unl.edu/K75T-4TEC] (noting the problem of “student self-censorship”); Smith, *supra* note 176 (arguing that the “censorious climate of higher education has predictably created a culture of self-censorship”); PETER SHAW, THE WAR AGAINST THE INTELLECT: EPISODES IN THE DECLINE OF DISCOURSE xiii–xiv (1989) (noting the “atmosphere of intimidation”); Rand Richards Cooper, *Is This ‘Common’ Language?: A College’s Misguided Guide*, COMMONWEAL (Apr. 22, 2019), https://www.commonwealmagazine.org/common-language [https://perma.unl.edu/P2YV-77LD]; Glenn Loury, *Self-Censorship*, 60 PARTISAN REV. 608–20 (1993).

234. JON K. LAUCK, FROM WARM CENTER TO RAGGED EDGE: THE EROSION OF MIDWESTERN LITERARY AND HISTORICAL REGIONALISM, 1920–1965 (2017).

235. TIMOTHY P. CARNEY, ALIENATED AMERICA: WHY SOME PLACES THRIVE WHILE OTHERS COLLAPSE (2019).

sics of Western Civilization.²³⁶ This emphasis would correlate with the original basis of the *Bakke* decision, decades of struggle by cultural regionalists against coastal domination, the regional grounding of the first formulation of American pluralism, and the origination of H.B. 1087 in South Dakota.

Although great flexibility is afforded to universities under H.B. 1087, the specific results of the new law might take the following form. Universities will take steps to bolster curricular offerings in once-dominant subjects in American colleges—such as American history and Greek and Roman Classics—as intended by the proponents of H.B. 1087. For example, South Dakota colleges could mandate that each graduate take a certain number of credits in American history, consistent with early versions of H.B. 1087. Courses and programs in the Great Books and Western Civilization, which became popular in the early twentieth century and were often mentioned by legislators during the H.B. 1087 debate, are also likely arenas of expansion, as are courses in conservative thought.

These new and revived areas of emphasis can exist beside some more recent areas of scholarly attention, which were inspired by efforts to include more voices in the historical past. These voices include the regionalists who believed that local cultural traditions deserved attention in addition to some of the voices of the multicultural movement of more recent years. When the presidents of Harvard and Yale debated the proper form of the college curriculum in the 1880s, Harvard President Charles Williams Eliot, an inspiration for Justice Powell's ruling in *Bakke*, argued that a university “while not neglecting the ancient treasures of learning has to keep a watchful eye upon the new fields of discovery, and has to invite its students to walk in new-made as well as in long-trodden paths.”²³⁷ By combining the old and the new and including a wide variety of ideological perspectives in the curriculum, South Dakota universities will meet the expectations of the framers of H.B. 1087 and do much to support intellectual diversity and preserve the nation's intellectual traditions.

236. See LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 109–13 (1965) (noting the emergence of regional traditions in higher education); ROBERT L. DORMAN, *REVOLT OF THE PROVINCES: THE REGIONALIST MOVEMENT IN AMERICA 1920–45* (1993) (on the development of regional writing and culture and resistance to the central metropole); Michael S. Steiner, *The Birth of the Midwest and the Rise of Regional Theory*, in *FINDING A NEW MIDWESTERN HISTORY* 3–24 (Jon K. Lauck et al. eds. 2018).

237. PETER WATSON, *THE MODERN MIND: AN INTELLECTUAL HISTORY OF THE 20TH CENTURY* 726 (2000).

VI. CONCLUSION

In response to growing concerns over ideological one-sidedness and restrictions on free speech on South Dakota’s public campuses, South Dakota lawmakers took decisive action. They considered sweeping reforms to South Dakota higher education, including new curricular requirements, the abolition of tenure and diversity offices, and reforms to faculty hiring committees. In the end—after an extensive process of information gathering, listening sessions, legislative hearings, and media coverage—the legislative leaders, the Governor, and the BOR agreed to a compromise piece of reform legislation that passed in the legislature by wide margins.

The legislation focused on promoting free speech and intellectual diversity at South Dakota’s public universities. While implementation and certain legal questions remain, South Dakota created a new opportunity to reaffirm the principles of open debate and spark genuine discussion on campuses. South Dakota also attempted to promote a pluralistic environment on campus where many voices can be heard. South Dakota’s reforms may reduce the level of tension, toxic strife, and censorious sentiments on campus and promote an environment focused more on learning and less on social friction. Given the historical tendency of populist reforms to start in South Dakota and spread outward, the likelihood of other states pursuing and adopting similar legislation appears high.²³⁸ Thus, a variation on the Dakota Model is likely to spread to other states, but not all state-level diversity approaches need to be the same. A diversity of diversity initiatives is wise for many of the same reasons that experts defend diversity generally.

238. R. ALTON LEE, *PRINCIPLE OVER PARTY: THE FARMERS’ ALLIANCE AND POPULISM IN SOUTH DAKOTA, 1880–1900* (2011); Frank Kermode, *Institutional Control of Interpretation*, 43 *SALMAGUNDI* 72, 82 (1979) (arguing that disruptions to existing academic regimes and canons “usually depend on the penetration of the academy by enthusiastic movements from without”).