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## Article

# The Free Speech Rights of University Students

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In March 2014, University of Oklahoma President David Boren reacted swiftly when a video surfaced online revealing members of the SAE fraternity singing a racist song<sup>1</sup> on a bus. Two young men leading the singing were immediately expelled. Boren explained in a letter to the students that they had been expelled due to their “leadership role in leading a racist and exclusionary chant which has created a hostile educational environment for others.”<sup>2</sup> Several prominent First Amendment scholars denounced the expulsions, arguing that the racist speech was entitled to constitutional protection.<sup>3</sup>

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1. The song is set to the tune of “If You’re Happy and You Know It,” and appears to contain the following lyrics:

There will never be a . . . SAE  
There will never be a . . . SAE  
You can hang ’em from a tree  
But he’ll never [inaudible—possibly “sign”] with me  
There will never be a . . . SAE.

Matt Pearce, *Is University of Oklahoma Frat’s Racist Chant Protected by 1st Amendment?*, L.A. TIMES (Mar. 10, 2015), <http://www.latimes.com/nation/la-na-oklahoma-fraternity-explainer-20150310-story.html#page=1>.

2. Manny Fernandez & Erik Eckholm, *Expulsion of Two Oklahoma Students over Video Leads to Free Speech Debate*, N.Y. TIMES (Mar. 11, 2015), [http://www.nytimes.com/2015/03/12/us/expulsion-of-two-oklahoma-students-leads-to-free-speech-debate.html?\\_r=0](http://www.nytimes.com/2015/03/12/us/expulsion-of-two-oklahoma-students-leads-to-free-speech-debate.html?_r=0).

3. See, e.g., *id.* (summarizing views of prominent First Amendment experts); Pearce, *supra* note 1 (quoting experts stating that the speech is protected); Eugene Volokh, *No, It’s Not Constitutional for University of Oklahoma To Expel Students for Racist Speech [UPDATED in Light of Students’ Expulsion]*, WASH. POST: VOLOKH CONSPIRACY (Mar. 10, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/10no-a-public-university-may-not-expel-students-for-racist-speech>.

All around the country, colleges and universities are increasingly punishing or censoring students who engage in offensive speech. While concerns that a failure to act will lead to liability under federal anti-discrimination law may offer a partial explanation for this conduct, in many instances the possibility of liability is weak or non-existent. Except in the most extreme circumstances, schools are not required to expel students for their speech in order to avoid liability. Instead, schools appear to punish students for their expressive activities in order to demonstrate a steadfast commitment to fostering a tolerant and inclusive environment.<sup>4</sup>

The question this Article seeks to address is whether the First Amendment affords public institutions of higher education special latitude to punish students for their offensive speech.<sup>5</sup> Although universities are frequently recognized as the “quintessential marketplace of ideas,”<sup>6</sup> arguments that public colleges and universities have—or should have—some measure of institutional academic freedom to restrict offensive speech have been gaining traction. Around the country, public colleges and universities have been asserting broad authority to punish or restrict their students’ speech and associational rights.<sup>7</sup> In

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4. PEN America’s October 2016 report summarizes the current debate as one raising “serious questions about how rights to free speech, freedom of assembly, and academic freedom intersect with the quest to address some of the most vexing challenges of diversity and inclusion faced by students, faculty, and administrators.” PEN AM., AND CAMPUS FOR ALL: DIVERSITY, INCLUSION, AND FREEDOM OF SPEECH AT U.S. UNIVERSITIES 4 (2016), [https://pen.org/sites/default/files/PEN\\_campus\\_report\\_final\\_online\\_2.pdf](https://pen.org/sites/default/files/PEN_campus_report_final_online_2.pdf) [hereinafter PEN AM. REPORT]. The vice chancellor for legal affairs at UCLA has similarly observed that “[t]hese situations are very, very challenging for universities.” Pearce, *supra* note 1 (quoting Kevin Reed’s explanation that “when there’s ‘conduct and behavior that makes members of the student body feel unsafe, unprotected, a subject of hate . . . universities have an obligation to act to try to remedy that situation, to prevent it . . . Balancing that obligation with the 1st Amendment is the university’s challenge”).

5. This Article will focus on public colleges and universities because the First Amendment does not apply at private institutions of higher education. To the extent that private institutions look to First Amendment doctrine for guidance, however, the analysis in this Article may be useful in that context as well.

6. *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) (citing *Healy v. James*, 408 U.S. 169, 180 (1972)).

7. Chad Flanders, *Oklahoma Frat Case Touches on a Surprisingly Murky Area of Law*, CLEVELAND.COM (Mar. 27, 2015), [http://www.cleveland.com/opinion/index.ssf/2015/03/oklahoma\\_frat\\_case\\_touches\\_on.html](http://www.cleveland.com/opinion/index.ssf/2015/03/oklahoma_frat_case_touches_on.html) (suggesting the possibility that public university students have the same limited speech rights as public employees).

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addition to punishing students for their non-curricular expression, like the University of Oklahoma example offered at the outset, public colleges and universities are increasingly punishing students for their speech when it is deemed inconsistent with vague “professionalism” standards and imposing sweeping requirements that student-athletes essentially waive their First Amendment rights as a condition of participation in an extracurricular activity.

This Article concludes that the authority of public universities to restrict student speech is, or at least should be, quite narrow. In reaching this conclusion, the Article confronts and rejects arguments that public universities should receive broad institutional deference to restrict student speech in the name of improving the educational environment. Any deference public universities receive must be limited to speech that occurs in the context of academic activities, and any such deference they do receive should not be absolute.

Furthermore, this Article contends courts should resist the growing use (or misuse) of the government speech doctrine. Under the government speech doctrine, First Amendment restrictions do not apply when the government itself is speaking.<sup>8</sup> Although it should be clear that students, particularly college and university students, do not speak for the university, institutions of higher education are increasingly caving to various constituencies inside and outside of the university who believe that they do. Rather than appreciating the traditional role of the university as the quintessential marketplace of ideas, students, alumni, and the public frequently appear to believe that whenever a school tolerates offensive speech, the university is endorsing those viewpoints.

Part I of this Article outlines some of the recent issues involving online student speech that have arisen in the higher education context, particularly in the age of social media. This initial Part outlines the potential for liability schools might face under federal statutes for creating or permitting hostile educational environments and concludes that fears of liability under these statutes cannot fully explain why universities are increasingly less tolerant of offensive speech. Part II sets out the contours of traditional First Amendment doctrine, which offers robust protection for offensive speech except when it crosses the line into certain categories of unprotected or lesser-protected

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8. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

speech. Part III expands on the doctrinal analysis of Part II with close consideration of the Supreme Court's jurisprudence relating to students in both the K-12 and higher education setting. One of the key questions in this Part is whether the Court's decisions in the K-12 context should have any application in the higher education setting. This Part argues that these cases should have little, if any, application when public colleges and universities have punished their students because the population and function of the two types of educational institutions are fundamentally different. Part IV focuses on the question of whether institutions of higher education should be given deference to punish speech that does not fit into their educational mission. This Part concludes that such deference is dangerous and misplaced in the university environment.

### I. STUDENT SPEECH TODAY

Since at least the 1970s, universities have struggled to determine whether to accommodate offensive speech on campus, and hate speech codes have been around since the 1980s.<sup>9</sup> But today's calls for greater control of speech on campus are arguably even louder, stronger, and more robust than they have been in past decade, and arguably include demands to restrict much more speech.

Public colleges and universities are struggling more than ever to balance their obligations under the First Amendment and their desire to create inclusive communities.<sup>10</sup> While student pressure to punish those who engage in offensive speech grows, so does a backlash to this pressure, echoed in the political debates in our increasingly polarized society.<sup>11</sup> The development of e-mail, social media, and mobile phones has complicated already complex questions about whether and when a

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9. See Benjamin M. Welch, *An Examination of University Speech Codes' Constitutionality and Their Impact on High-Level Discourse* 1-13 (Aug. 2014) (unpublished M.A. thesis, University of Nebraska), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1046&context=journalismdiss> (providing a history of university free speech codes).

10. See Susan Svrluga, *Slurs, Blackface, and Gorilla Masks: The Academic Year Opened with Racial Ugliness*, WASH. POST (Oct. 7, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/10/07/slurs-blackface-and-gorilla-masks-the-academic-year-opened-with-racial-ugliness/?tid=hybrid\\_collaborative\\_1\\_na](https://www.washingtonpost.com/news/grade-point/wp/2016/10/07/slurs-blackface-and-gorilla-masks-the-academic-year-opened-with-racial-ugliness/?tid=hybrid_collaborative_1_na) (describing various racially charged incidents on college campuses across the country, university responses, and subsequent societal debate).

11. *Id.*

university can—or even must—punish students for their digital expressive activities occurring both on and off campus, and inside and outside of the curricular setting.<sup>12</sup>

In recent years, public colleges and universities have faced pressure to shut down social media websites and apps known to host offensive content. In past years, the most popular targets were Autoadmit.com<sup>13</sup> and JuicyCampus.com;<sup>14</sup> more recently, students around the country have asked administrators to block access to a popular mobile phone app Yik Yak.<sup>15</sup> Yik Yak allows users to post anonymous messages to people within a small geographic radius. Although the app has some positive uses,<sup>16</sup> it also has been used to call for the lynching of the black student body president, the gang rape at a university women's center, and countless other offensive statements.<sup>17</sup>

When universities can determine who is making offensive statements, then it faces calls to punish those students, and to do so quickly. The University of Oklahoma case mentioned at the outset of this Article is one example. Another occurred in September 2016 when Kansas State University expelled a student who posted on Snapchat picture of herself using a cosmetic clay mask with the racially offensive caption, “[f]eels good to finally be a [racial slur].”<sup>18</sup> Other universities have punished students for similar types of expression.<sup>19</sup>

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12. Public colleges and universities also must grapple with professor and staff speech issues, but those issues are beyond the scope of this Article.

13. Ilana Seager, *Law Graduates Settle Suit*, YALE DAILY NEWS (Oct. 23, 2009), <http://yaledailynews.com/blog/2009/10/23/law-graduates-settle-suit>.

14. Robert Shibley, *Tennessee State Bans JuicyCampus.com from Network*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Nov. 20, 2008), <https://www.thefire.org/Tennessee-state-bans-juicycampuscom-from-network>.

15. Tasnim Shamma, *Yik Yak Tests Universities' Defense of Free Speech*, NAT'L PUB. RADIO (Jan. 23, 2016), <http://www.npr.org/sections/alltechconsidered/2016/01/23/463197593/yik-yak-tests-universities-defense-of-free-speech>.

16. Amanda Hess, *The Upside of Yik Yak*, SLATE (Mar. 10, 2015), [http://www.slate.com/articles/technology/users/2015/03/yik\\_yak\\_the\\_anonymous\\_messaging\\_app\\_with\\_a\\_terrible\\_rep\\_is\\_actually\\_pretty.html](http://www.slate.com/articles/technology/users/2015/03/yik_yak_the_anonymous_messaging_app_with_a_terrible_rep_is_actually_pretty.html).

17. Shamma, *supra* note 15.

18. Susan Svrluga, *“I Am Truly Sorry”: Student Apologizes for Snapchat Image that Had Racial Slur*, WASH. POST (Sept. 18, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/09/18/i-am-truly-sorry-former-kansas-state-student-apologizes-for-snapchat-image-that-had-racial-slur>.

19. Quinnipiac expelled a student who posted on Snapchat a picture of a friend wearing a cosmetic clay mask with the caption “Black Lives Matter.” Leigh Frillici, *Student No Longer at Quinnipiac After Posting Racially Insensitive Snapchat Photo*, WTNH NEWS 8 (Sept. 21, 2016), <http://wtnh.com/>

To be sure, not all universities respond with immediate expulsions. A quick look at how various public and private universities have handled these situations reveals the range of possibilities. For example, when a UCLA student posted a video mocking “Asians in the Library,”<sup>20</sup> UCLA responded with a statement from the Chancellor condemning the video.<sup>21</sup> UCLA did not expel the student, although the student withdrew anyway after apologizing and citing concerns for her own safety on campus.<sup>22</sup> But even UCLA has become quicker to punish students for their offensive speech as student demands for the punishment of speakers have grown more strident.<sup>23</sup>

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2016/09/21/quinnipiac-student-no-longer-with-quinnipiac-after-posting-racially-insensitive-snapchat-photo. Several students at the University of North Dakota posted pictures of themselves in clay masks with the same caption, “Black Lives Matter.” Jack Jenkins, *White North Dakota Students Dress in Blackface, Post Picture with Caption ‘Black Lives Matter,’* THINKPROGRESS (Sept. 24, 2016), <https://thinkprogress.org/north-dakota-blackface-1a2233a5e24f#.mrpq2q3r4>. Around the same time, another group of students stole their roommate’s phone and posted a picture of themselves on her Snapchat account with the caption, “[w]e locked the black bitch out!” Peter Holley, *‘Inexcusable’: Students’ Photos, One in Blackface, Trigger Backlash and University Investigation*, WASH. POST (Sept. 26, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/09/26/inexcusable-students-blackface-photos-trigger-backlash-university-investigation>. These expulsions also raise serious due process concerns as well. One can only speculate that some universities have decided that appearing to be sympathetic to calls for an “inclusive” and “safe” environment are worth the subsequent costs of violating constitutional rights.

20. SirBigDickNigga, *Asians in the Library: UCLA Rant (Original Uncut Video) and Apology*, YOUTUBE (Mar. 13, 2011), <https://www.youtube.com/watch?v=zQR01qItgo8>.

21. Gene D. Block, *Chancellor Block Appalled by Student Video Disparaging Asians*, UCLA NEWSROOM (Mar. 14, 2011), <http://newsroom.ucla.edu/stories/chancellor-block-statement-199032>. The university communicated its message both through a statement as well as a video of its own that it posted on YouTube. UCLA, *UCLA Chancellor Appalled by Student Video*, YOUTUBE (Mar. 14, 2011), <https://www.youtube.com/watch?v=6feGp0GQVJ8>. Other students also responded with their own videos. See, e.g., Jimmy Wong, *Ching Chong! Asians in the Library Song (Response to UCLA’s Alexandra Wallace)*, YOUTUBE (Mar. 15, 2011), <https://www.youtube.com/watch?v=zulEMWj3sVA>.

22. Kate Parkinson-Morgan, *Alexandra Wallace Apologizes, Announces She Will No Longer Attend UCLA*, DAILY BRUIN (Mar. 18, 2011), <http://dailybruin.com/2011/03/18/alexandra-wallace-apologizes-announces-she-will-no-longer-attend-ucla>.

23. Conor Friedersdorf, *The Anti-Free-Speech Movement at UCLA*, THE ATLANTIC (Oct. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/10/the-anti-free-speech-movement-at-ucla/410638>. In October 2015, the university suspended a fraternity and sorority for holding a mixer called “Kanye Western” in which partygoers dressed as Kanye West and Kim Kardashian. Some of those dressing as Kanye apparently wore baggy clothes and soot on their

Some scholars have argued that universities need to punish students who engage in offensive speech online to avoid liability under Title VI and Title IX. All universities are subject to these federal anti-discrimination laws. Title IX provides in pertinent part that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”<sup>24</sup> The Court has held this statute supports a private cause of action alleging hostile environment harassment.<sup>25</sup> In order for a college or university to be liable, a plaintiff must show that the conduct at issue is “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.”<sup>26</sup> In addition, the plaintiff must prove the institution had “actual knowledge” of this conduct and acted in a manner suggesting “deliberate indifference.”<sup>27</sup> Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in “any program or activity receiving Federal financial assistance.”<sup>28</sup> The Supreme Court has held that like Title IX, Title IV supports a private cause of action alleging intentional discrimination.<sup>29</sup>

Schools’ exposure to liability under federal law for permitting the existence of a hostile educational environment is much narrower than many universities might realize. Speech is not actionable unless it creates a hostile environment that is “se-

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faces (it is not clear this was blackface); those dressing as Kim wore big fake butts. When pictures of the party appeared on social media, some students claimed the costumes were racist. The partygoers claimed they were mocking pop culture by dressing up as specific people; they claim no one wore blackface but rather were dressed up as miners with soot on their faces. UCLA issued a statement: “While we do not yet have all the facts, the alleged behavior is inconsistent with good judgment as well as our principles of community.” See Veronica Rocha, *Kanye West-Themed Frat Party at UCLA Sparks Protest, Claims of Racism*, L.A. TIMES (Oct. 8, 2015), <http://www.latimes.com/local/lanow/la-me-ln-ucla-blackface-kanye-party-20151008-story.html>.

24. 20 U.S.C. § 1681(a) (2012).

25. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992).

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

27. *Id.* at 642–43.

28. 42 U.S.C. § 2000d (2012).

29. *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001) (holding private parties may sue under Title VI to challenge intentional discrimination and that disparate impact claims are not cognizable).

vere or pervasive.”<sup>30</sup> A single, isolated instance of speech does not generally give rise to a hostile environment claim unless it is “extraordinarily severe.”<sup>31</sup> The offensiveness of the speech is evaluated under an objective reasonable person standard.<sup>32</sup> A few Title VII cases in the lower courts involving employees who display the Confederate flag are instructive. In these cases, the hostile environment claims generally lost, for several possible reasons: employers were unable to demonstrate that the Confederate flag actually disrupted the workplace;<sup>33</sup> the speaker’s co-workers were not exposed to the speech in the workplace;<sup>34</sup> and no reasonable person could be offended by the flag accompanied by the words “[h]eritage, not [h]ate.”<sup>35</sup> Furthermore, unlike employers, university officials are not as likely to face the dilemma of retaining an employee, particularly a supervisor, who engages in offensive speech that might be used down the road to support a negligent retention claim or discrimination lawsuit.<sup>36</sup>

In the context of discussing the University of Oklahoma video, Professor Noah Feldman has argued that “[g]iven that the speech was literally designed to inculcate the value of racial discrimination by making pledges recite their commitment never to admit a black member to the fraternity . . . [r]emoving the chant leaders from campus is aimed to fulfill the educa-

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30. *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 57 (3d Cir. 2004).

31. *See, e.g., id.* at 59 (“It is . . . well settled in this Circuit that even a single act’ [can create a hostile environment if it is] ‘extraordinarily severe’ . . . .” (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000))).

32. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

33. *Carpenter v. City of Tampa*, No. 8:03 CV 451 T 17 EAJ, 2005 WL 1463206 (M.D. Fla. June 21, 2005) (holding employee had First Amendment right to leave Confederate flag decal on his private vehicle).

34. *Greer v. City of Warren*, Civ. No. 1:10-cv-01065, 2012 WL 1014658 (W.D. Ark. Mar. 23, 2012) (holding a police officer had a First Amendment right to post the Confederate flag at his private residence and on his private MySpace page, given the lack of evidence that his co-workers were exposed to the flag in the workplace); *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131, 1138 (D. Kan. 2002).

35. *Erickson*, 209 F. Supp. 2d at 1147; *see also* *Clay v. United Parcel Serv., Inc.*, No. 13-2240-SAC, 2014 WL 5298173 (D. Kan. Oct. 15, 2014) (“Plaintiff complained about the flag, Defendant investigated it, found no racial animus, and concluded that the employee was free to display the flag in her car window. This was a reasonable conclusion which does not demonstrate race discrimination on the part of the employer.”).

36. Eugene Volokh, *Deterring Speech: When Is It “McCarthyism”? When Is It Proper?*, 93 CAL. L. REV. 1413, 1434–38 (2005) (explaining liability risks employers face if they retain employees who engage in racial or other offensive speech).

tional goal of creating a nonhostile educational environment.”<sup>37</sup> Feldman recognizes, however, that “[i]t’s a tricky question whether speech not directed at anyone in particular should be treated as conduct creating a hostile environment.”<sup>38</sup> While some universities may punish offensive speech out of an excess of caution,<sup>39</sup> it seems unlikely that a fear of liability offers a full explanation for the increasing punishment of offensive speech.

Indeed, universities have cited other reasons for punishing offensive speech that have nothing at all to do with anti-discrimination laws. For example, a recent trend among universities is to justify the punishment of students for offensive speech as incompatible with the student’s chosen profession.<sup>40</sup> For example, in 2010 a mortuary student at the University of Minnesota was placed on probation, received a failing grade in a class, and was forced to complete a psychiatric evaluation after she posted several sarcastic and joking comments about cadavers on her personal Facebook page. The Supreme Court of Minnesota upheld the university’s actions.<sup>41</sup> The Tenth Circuit held that an acting program could exclude a student who refuses to use profanity, unless she can prove that religious discrimination was a primary factor for the professors’ decision.<sup>42</sup> More recently, the Eighth Circuit upheld a public college’s decision to remove a student from a nursing program for unprofessional

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37. Noah Feldman, *Balancing the First Amendment vs. Racist Chants at Oklahoma*, CHI. TRIB., Mar. 12, 2015, at C23.

38. See *id.*; see also Cristian Farias, *The Two Oklahoma Students Expelled for Their Racist Chant Have a Strong Free Speech Defense*, NEW REPUBLIC (Mar. 11, 2015), <http://www.newrepublic.com/article/121269/oklahoma-fraternity-racist-video-shouldnt-get-students-expelled> (expressing concern that the hostile environment justification is too malleable to satisfy First Amendment standards); See AMY GAJDA, *THE TRIALS OF ACADEME* 92 (2009) (“The difficulty for universities is that they are caught between expanding legal protections for both free speech and nondiscrimination on campus, with relatively little reliable guidance from the courts about how the sometimes conflicting mandates are to be reconciled.”).

39. Of course, as Eugene Volokh has pointed out in the context of hostile environment claims in the employment context, an employer can’t just tell its employees, “you can generally make [offensive] statements, but not when they in the aggregate are so severe or pervasive as to create a hostile environment.” Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 310 (1996).

40. For an excellent article on this trend, see Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382 (2013).

41. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012).

42. *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

conduct for sarcastic comments he made on his Facebook page relating to his frustrations with a group project and his fellow students' failure to use mechanical pencils.<sup>43</sup> The Ninth Circuit also recently relied on a "professionalism" standard when it upheld a school's decision to reject a student from a student-teaching program.<sup>44</sup>

Universities have also stepped up their efforts to control the speech of their student-athletes.<sup>45</sup> As a condition of participating in a sport, public university students must consent to the monitoring of their social media accounts and agree not to post anything on those accounts that would place the university in a bad light.<sup>46</sup> Although these attempts to control athletes' speech may, in some cases, be connected to improving team dynamics and performance, they also appear to be motivated by an interest in preventing these high-profile students from representing the school in embarrassing or politically unpopular ways. For example, student athletes who chose to kneel during the playing of the national anthem to protest police killings of African Americans have come under a firestorm of criticism, with alumni and even state legislators threatening to cut off funding to the university and the athletic program.<sup>47</sup> At East Carolina University (ECU), the university faced a firestorm of criticism from angry alumni threatening to end their financial support of the school after a number of football players kneeled during the National Anthem. Initially, the ECU Chancellor issued a press release recognizing that although some fans may

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43. *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016).

44. *Oyama v. Univ. of Haw.*, 813 F.3d 850, 856 (9th Cir. 2015) (rejecting a challenge to expulsion of a student based on his statements in a reflection assignment that he believed online child predation should be legal and that highly disabled students should not be mainstreamed).

45. Ken Paulson, *Twitter Crackdowns Do College Athletes, Free Speech No Favors*, FIRST AMEND. CTR. (Apr. 17, 2012), <http://www.firstamendmentcenter.org/twitter-crackdowns-do-college-athletes-free-speech-no-favors> (summarizing recent trends).

46. *Id.*

47. See, e.g., Associated Press, *Arkansas Players Face Backlash After Kneeling During Anthem*, USA TODAY (Nov. 8, 2016), <http://sports.usatoday.com/2016/11/08/arkansas-players-face-backlash-after-kneeling-during-anthem-2> (reporting some Republican lawmakers threatened to cut off funding to the University of Arkansas sports program); Jane Stancill, *ECU Faculty Groups Support Free Speech Rights After Band Protest*, NEWS & OBSERVER (Nov. 2, 2016), <http://www.newsobserver.com/news/local/education/article112161412.html> (reporting ECU Faculty Senate passed a resolution in favor of the students after Chancellor received complaints from alumni threatening to cut off donations, and parents threatened to withdraw their students).

have been “disappoint[ed]” with the students’ kneeling, their protest was “part of the free exchange of ideas on a university campus.”<sup>48</sup> Soon thereafter, however, other university officials, including the band director, director of the School of Music, and the dean for the School of Arts and Communications, issued a second press release indicating that the university would not respect the students’ exercise of their speech rights: “While we affirm the right of all our students to express their opinions, protests of this nature by the Marching Pirates will not be tolerated moving forward.”<sup>49</sup> Even North Carolina Governor Pat McCrory condemned the students, asserting that “[t]hey have every right to express their First Amendment rights outside the stadium.”<sup>50</sup>

Several commentators have offered theories for why large numbers of college students today are calling for speech restrictions on their campuses.<sup>51</sup> Defenders of student activists contend that these students are continuing “the American tradition of using free expression and civil disobedience to advance social change,” particularly given “the vital imperatives of racial and gender justice” that are important not just on colleges campuses but in society at large.<sup>52</sup> These tensions might be magnified on campuses where student bodies are more diverse than ever, coming from “vastly different backgrounds, cultures, and levels of economic and even physical security.”<sup>53</sup> In addition, some have argued that “political life and discourse is at the boiling point” with the election of President Trump, and

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48. Statement from Dr. Cecil Stanton, Chancellor, E. Carolina Univ. (Oct. 1, 2016), <https://mgtvwnct.files.wordpress.com/2016/10/ecu-chancellor-statement.pdf>.

49. See Jessica Chasmar, *East Carolina University: Future Protests of National Anthem ‘Will Not Be Tolerated,’* WASH. TIMES (Oct. 4, 2016), <http://www.washingtontimes.com/news/2016/oct/4/east-carolina-university-future-protests-of-nation>.

50. Jane Stancill, *ECU Band Protest Still Stoking Strong Emotions*, NEWS & OBSERVER (Oct. 7, 2016), <http://www.newsobserver.com/news/local/education/article106695287.html> (reporting McCrory’s reelection campaign was distributing copies of his videotaped interview where he made this statement).

51. Although surveys suggest students value free speech on college campuses, alarmingly high numbers also say they would support speech restrictions on “racist, sexist, homophobic, or otherwise offensive” expression as well as restrictions on Halloween costumes based on offensive stereotypes. PEN AM. REPORT, *supra* note 4, at 13.

52. *Id.* at 5.

53. *Id.* at 13.

they may see “free speech” as a cover for attacks on marginalized people.<sup>54</sup>

Critics characterize activists as “coddled students” who have no tolerance for “dissent and offense.”<sup>55</sup> Some complain the reason some students advocate for “trigger warnings” and “safe spaces” is that that young people today do not grow up as independently as they once did.<sup>56</sup> In many places around the country, kids are no longer allowed to play outside unsupervised as fears of abduction run rampant. Sheltered by their “helicopter parents,” some lament, college students today are still closely connected to their families, perhaps in part due to technological developments like cellphones, social media, and e-mail.<sup>57</sup> As a result, the argument runs, college has become a time of an “extended period of adolescence” rather than a time when students transition to full adulthood.<sup>58</sup> Under this theory, higher education students still want their parents, teachers, and administrators to set rules about what is permitted—and not permitted—in civil discourse.

It is also possible that university administrators are simply increasingly less tolerant of offensive speech. This may be the result of “liberal intolerance” of conservative ideas.<sup>59</sup> Proportionately few professors are conservative; some studies suggest that conservatives find it harder to get academic positions and are stigmatized if they do manage to get hired.<sup>60</sup> As one commentator provocatively quipped, “We’re fine with people who don’t look like us, as long as they think like us.”<sup>61</sup>

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54. Allison Stanger, *Understanding the Angry Mob at Middlebury that Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html>.

55. *Id.* at 4.

56. See, e.g., Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356>.

57. *Id.*

58. A. Douglas Stone & Mary Schwab-Stone, *The Sheltering Campus: Why College Is Not Home*, N.Y. TIMES (Feb. 5, 2016), <http://www.nytimes.com/2016/02/07/education/edlife/adolescent-development-college-students.html>.

59. Nicholas Kristof, *A Confession of Liberal Intolerance*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/opinions/sunday/a-confession-of-liberal-intolerance.html>.

60. *Id.*

61. *Id.*

Intolerance for offensive speech may also stem from a desire to please demanding students.<sup>62</sup> Universities may worry that offensive speech on their campuses will impact the university “brand” and turn away prospective students, who are looking for a more nurturing environment.<sup>63</sup> *New York Times* columnist Frank Bruni has identified a worrying trend in higher education where students “have come to act as customers—the ones who set the terms, the ones who are always right—and the degree to which they are treated that way.”<sup>64</sup> Universities that refuse to censor offensive speech risk being labeled insensitive or even racist.<sup>65</sup> One commentator to an op-ed defending the expelled University of Oklahoma students said:

If the behavior of those students is unchecked, then that behavior is representative of and reflects upon the University and its culture on several levels.

Naturally, no institution or organization, private or public, wants to be seen as condoning or approving in any way such racist (or sexist or any other) behavior.<sup>66</sup>

In the age of social media, it is easier for offensive speech to go viral, “infect” the university environment, and tarnish the uni-

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62. There are notable exceptions to this; one example is the 2016 University of Chicago letter to first-year students. Richard Pérez-Peña, Mitch Smith, & Stephanie Saul, *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. TIMES (Aug. 26, 2016), <http://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html>.

63. See PEN AM. REPORT, *supra* note 4, at 43 (noting another important trend is “viewing students as paying consumers who must be satisfied by their experience on campus, lest they vote with their checkbooks by transferring to a new institution, or use their influence on social media and elsewhere to tarnish the university’s reputation”).

64. Frank Bruni, *In College Turmoil, Signs of a Changed Relationship with Students*, N.Y. TIMES (June 22, 2016), <http://www.nytimes.com/2016/06/23/education/in-college-turmoil-signs-of-a-changed-relationship-with-students.html>. Bruni has been one of the most outspoken critics of the “striking transformation” in the last twenty-five years of the money schools are willing to spend to provide their students with amenities like spruced up dormitories, more luxurious dining halls, better equipped gymnasiums, and state-of-the-art swimming pools, putting greens, arcades, theaters, and even water parks. *Id.*

65. See S. Cagle Juhan, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA. L. REV. 1577, 1592–93 (2012) (noting that “powerful student interest groups . . . lobby administrators, who, in turn, face substantial pressure to avoid appearing insufficiently attentive to certain constituencies, as well as to diversity and tolerance norms”).

66. Astraia Orianthia, Comment to *Oklahoma Students’ Racist Song Is Protected Speech: Editorial*, CLEVELAND.COM (Mar. 18, 2015), [http://www.cleveland.com/opinion/index.ssf/2015/03/oklahoma\\_students\\_hateful\\_sing.html](http://www.cleveland.com/opinion/index.ssf/2015/03/oklahoma_students_hateful_sing.html).

versity's reputation. Universities are less concerned about the backlash they might face from over-zealously censoring offensive speech because students face tremendous pressure not to engage in such speech at all, and those who do often accept their punishments without legal challenge.<sup>67</sup>

Students and administrators also appear more willing to credit emotional harm as a reason to silence speakers. Indeed, this same trend can be seen in some recent First Amendment scholarship debating whether the Court's jurisprudence fails to account for the real "harm"—as in emotional harm—some offensive speech can cause.<sup>68</sup> As Greg Lukianoff of the Foundation for Individual Rights in Education has argued, it seems to be "generally considered unacceptable to question the reasonableness . . . of someone's emotional state, particularly if those emotions are linked to one's group identity."<sup>69</sup> Students are admirably passionate about the issues of the day, like the Black Lives Matter movement, which largely center around equality. Many activists want to eradicate not just discrimination but an entire environment that makes discrimination possible.<sup>70</sup> As one public intellectual has pointed out, these activists "want to police social norms so that hurtful comments are no longer tolerated and so that real bigotry is given no tacit support."<sup>71</sup> Under this approach, discussions about difficult topics are not tolerated even when they are simply "bringing unacceptable words [or ideas] into the public square."<sup>72</sup> Relatedly, another possible explanation for the heated debate on college campuses

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67. Juhan, *supra* note 65, at 1593 ("There are also strong disincentives for students to advocate for, much less litigate, their free speech rights in the face of university hostility.").

68. See, e.g., Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81.

69. Lukianoff & Haidt, *supra* note 56.

70. See David Brooks, *The Campus Crusaders*, N.Y. TIMES (June. 2, 2015), <https://www.nytimes.com/2015/06/02/opinion/david-brooks-the-campus-crusaders.html>.

71. *Id.*

72. *Id.* Brooks refers to incidents where students attacked speakers who mentioned offensive words only to condemn them. For example, Wendy Kaminer was attacked when she used the "n" word during an event at Smith College, and a Brandeis professor suffered the same fate for mentioning a Hispanic slur, even though he did so in the context of condemning it. *Id.* Relatedly, Laura Kipnis at Northwestern was accused of creating a hostile environment when she wrote an article questioning sexual mores on college campuses. *Id.* Judith Shulevitz explored these and other similar examples in her well-known *New York Times* essay. Judith Shulevitz, *In College and Hiding from Scary Ideas*, N.Y. TIMES, Mar. 21, 2015, at SR1.

is that the national dialogue as a whole is more polarized, which leads to greater “demonization” of the other side.<sup>73</sup>

In considering what might have changed in the last few decades, it is worth considering the possibility that public university administrators believe that developments in First Amendment jurisprudence give them greater power to restrict offensive speech on their campuses. Even though the Court has continued to reaffirm that the First Amendment requires the toleration of offensive speech,<sup>74</sup> the Court has watered down the First Amendment protections in various government institutions, including the workplace<sup>75</sup> and schools.<sup>76</sup> In these contexts, the Court has generally been convinced that the proper functioning of these institutions demands some flexibility in the usual First Amendment rules. Critics of the Court’s controversial decisions in cases like *R.A.V. v. City of St. Paul* would ideally like the Court to revisit its protection of hate speech, but in the meantime, they can argue that the rule of this case should not apply in certain institutional settings, like public schools and government workplaces. Furthermore, while the Court has not directly held that universities are entitled to a measure of deference when they restrict student speech on campus, in recent years the Court has expressly embraced deference in the affirmative action and freedom of association contexts.<sup>77</sup> Part III will discuss these cases in greater detail.<sup>78</sup>

## II. APPLICATION OF STANDARD FIRST AMENDMENT DOCTRINE

Because the scope of statutory liability under federal anti-discrimination law is not as broad as many believe, in at least some situations public colleges and universities choose to restrict student speech not because they legally are required to do so, but because they *want* to do so. Then the question is wheth-

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73. Lukianoff & Haidt, *supra* note 56.

74. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010).

75. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

76. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007).

77. *See cases infra* Part III.A.2.

78. This may be giving professors and administrators in higher education too much credit. I suspect that in many instances, the punishment comes first and the legal arguments come later, if and when litigation is threatened. Based on my personal observations, most professors, including law school professors, do not have a good grasp of the law governing student speech rights unless they have sought guidance from university counsel.

er the First Amendment gives them this power, and under what circumstances. This Part will begin by examining what the Supreme Court has said about the constitutionality of anti-discrimination laws when used to restrict speech. Next, the Part explains how standard First Amendment doctrine provides very limited protection for university attempts to restrict or punish speech that is believed to create—or at least pose the risk of creating—a hostile or discriminatory environment.

#### A. THE SUPREME COURT'S MISSING ANALYSIS

Remarkably, it remains an open question whether punishing offensive speech that creates a hostile learning environment is constitutional under the First Amendment. Surprisingly, the Supreme Court has never directly held that anti-discrimination laws are consistent with the First Amendment, although it has repeatedly suggested in dicta that they are. Despite the paucity of Supreme Court precedent directly addressing this difficult issue, some commentators have proclaimed that the constitutionality of hostile environment claims is not up for debate.<sup>79</sup> What is not clear, however, is the rationale for this understanding. In light of this gap in the Court's jurisprudence, it remains unclear how to reconcile the Court's decisions striking down viewpoint-based laws with its repeated suggestions that anti-harassment laws do not violate the First Amendment. The Court's recent decision in *Reed v. Town of Gilbert*,<sup>80</sup> which declared that all content-based laws are subject to strict scrutiny, makes this even more confusing.

In 1986, the Court held in *Meritor Savings Bank v. Vinson* that Title VII prohibited hostile environment sexual harassment.<sup>81</sup> The Court made clear, however, that the workplace conduct must "affect . . . a 'term, condition, or privilege' of employment within the meaning of Title VII."<sup>82</sup> To do so, the Court explained, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"<sup>83</sup> In 1993, in *Harris v.*

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79. See, e.g., Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 958–59 (2009) (stating that "[d]espite these arguments, the illegality of speech that contributes to a hostile work environment is a fait accompli," given what the Court has said in dicta).

80. 135 S. Ct. 2218 (2015).

81. 477 U.S. 57, 73 (1986).

82. *Id.* at 64–66.

83. *Id.* at 67.

*Forklift Systems, Inc.*, the Court clarified that plaintiffs must demonstrate that a “reasonable person” would find the work environment objectively hostile or abusive and that the plaintiff herself perceived the work environment to be hostile or abusive.<sup>84</sup>

In between *Meritor* and *Harris*, the Court decided *R.A.V. v. City of St. Paul*. In that case, the Court struck down a local ordinance banning fighting words motivated by race, color, creed, religion, or gender.<sup>85</sup> In dicta, the Court noted that Title VII was different because it banned only “conduct,” not speech, but the Court offered no analysis to support this conclusion.<sup>86</sup> *R.A.V.* itself does not help explain the constitutionality of hostile environment laws because these laws do not target a subset of otherwise constitutionally proscribable speech as “the worst of the worst.” Of course some hate speech might be labeled the “worst of the worst”; for example, as discussed in greater detail below, the Court has held that a burning cross directed at a specific individual with the intent to intimidate is not entitled to constitutional protection.<sup>87</sup> But much of the offensive speech subject to punishment on college campuses would not fall within this category. The next part examines some other possible justifications for carving out offensive speech from the protections of the First Amendment.

#### B. USING STANDARD FIRST AMENDMENT DOCTRINE TO RESTRICT OFFENSIVE STUDENT SPEECH

Various scholars have embraced a wide variety of First Amendment doctrines to support the constitutionality of anti-harassment statutes in the workplace and in the education context: (1) is not speech at all and therefore falls outside of the First Amendment; (2) employees and students are “captive audiences”; (3) harassment laws are permissible time, place, and manner restrictions; and (4) the “secondary effects” doctrine applies. None of these doctrines works particularly well, or at

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84. 510 U.S. 17, 21 (1993).

85. 505 U.S. 377, 393 (1992).

86. *Id.* at 389. Not all members of the Court agreed with this statement. In dissent, Justice White argued that Title VII was also unconstitutional because “it ‘imposes special prohibitions on those speakers who express views on disfavored subjects.’ Under the broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review.” *Id.* at 409–10 (White, J., dissenting).

87. *See, e.g., Virginia v. Black*, 538 U.S. 343, 363 (2003) (holding that cross burning with the intent to intimidate is not protected speech).

the very least, none of them can provide a full explanation for the constitutionality of these laws, or how the schools apply them.

It is really troubling to declare that all speech that contributes to a hostile environment is not speech at all. In *Holder v. Humanitarian Law Project*, the Court declared that even laws that are aimed at “conduct” are subject to strict scrutiny if “as applied . . . the conduct triggering coverage under the statute consists of communicating a message.”<sup>88</sup> Indeed, the reason schools want to punish students who engage in offensive speech is precisely because the schools believe the message of that speech is antithetical to the values and mission of the institution.<sup>89</sup> Declaring that speech that creates a hostile environment is not “speech” under the First Amendment is particularly troubling given expanding conceptions of what kind of expressive activities are problematic. In addition, the trend in courts around the country is expanding First Amendment coverage, not reducing it. The real struggle right now is figuring out whether our traditional framework for dealing with free speech questions makes sense given this expanding scope of the First Amendment.

“Harassment” is not a category of unprotected or lesser-protected speech; neither is “offensive” speech.<sup>90</sup> Indeed, it is regarded as a “bedrock principle” that the First Amendment protects offensive speech.<sup>91</sup> That said, some harassing or offensive student speech will fall within a category of unprotected or lesser-protected speech. The most likely categories are fighting words, true threats, incitement, and defamation. The question in any case will be whether the expression at issue satisfies all of the requirements for these categories of speech. These cate-

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88. 561 U.S. 1, 28 (2010).

89. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 392 (4th Cir. 1993) (involving a university that punished students for “ugly woman contest” precisely because of its message).

90. Some scholars have suggested that the First Amendment never tolerates the restriction of speech that creates a hostile educational environment. See, e.g., Howard M. Wasserman, *University of Oklahoma Expels the First Amendment*, JURIST TWENTY (Mar. 14, 2015), <http://jurist.org/forum/2015/03/howard-wasserman-first-amendment.php> (“The need to avoid a hostile environment is not recognized as a basis for limiting otherwise-protected, even if hateful, expression.”).

91. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

gories are very carefully defined and will come into play in very few circumstances.

### 1. Fighting Words

Some harassing speech might properly fall within the category of fighting words, but this approach is problematic for a number of reasons. The first is that it is not entirely clear this category of speech even exists anymore because the Court has not invoked “fighting words” to uphold a speech restriction since *Chaplinsky*.<sup>92</sup> The Court rejected fighting words claims in *R.A.V. v. City of St. Paul*<sup>93</sup> and *Snyder v. Phelps*.<sup>94</sup>

Even if this category of speech exists, it is unclear exactly what it is. Historically, the Court has suggested this category has two possible definitions: (1) offensive or abusive language that by its very utterance inflicts injury; or (2) language that by its very nature, judged by the probable reaction of a person of common intelligence, is likely to produce a violent reaction.<sup>95</sup> It is not clear that the first type of fighting words is consistent with modern First Amendment jurisprudence. The Court has indicated that the First Amendment requires people to tolerate insulting, outrageous, and offensive speech.<sup>96</sup>

The second type of fighting words is not much more promising. It is hardly clear why speech should lose protection whenever it arouses an audience to anger. People often get angry when they hear speech they do not like. In addition, as one scholar has noted, the concern with hostile environment harassment is not that victims will engage in violence in response to the speech, but rather they will not speak at all.<sup>97</sup> Another obstacle is that for speech to constitute fighting words, it has to be directed to a specific individual.<sup>98</sup> Some speech certainly

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92. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

93. 505 U.S. 377, 386 (1992).

94. 562 U.S. 443, 451 n.3 (2011).

95. *See id.* at 465; *Cohen v. California*, 403 U.S. 15, 20 (1971).

96. *Snyder*, 562 U.S. at 458; *Cohen*, 403 U.S. at 18–19. This result might be different if there were a captive audience; this possibility will be discussed in a moment.

97. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 421 (“The problem is that she is not going to fight back—that she will be intimidated and silenced by their heckling.”).

98. *See Cohen*, 403 U.S. at 26 (holding that a “Fuck the Draft” jacket did not constitute fighting words because speech was not specifically directed to a particular individual).

meets this requirement, but so much speech does not. For example, the video of the fraternity members singing a racist song was not directed to a particular individual.<sup>99</sup> Furthermore, the very doctrine of fighting words is inconsistent with the university setting. As one lower court has said, “Communications which provoke a response, especially in the university setting, have historically been deemed an objective to be sought after rather than a detriment to be avoided.”<sup>100</sup>

## 2. Incitement

Colleges and universities are on firmer footing if the offensive student speech constitutes incitement, but in most cases, the speech will not be able to meet all of the requirements of this category of unprotected expression.

Current First Amendment doctrine permits the punishment of speech that incites unlawful conduct, but the speaker must have subjectively intended to incite that unlawful conduct and directly advocated the unlawful action, and the unlawful action must be “imminent.”<sup>101</sup> Most speech fails to meet this standard; the imminence requirement alone will be fatal in most cases, particularly those cases that involve digital expression where there will almost always be a significant time delay between the speech and action.

## 3. True Threats

Although the category of “true threats” will encompass some speech that makes students feel unsafe, this category, too, has particular requirements that will pose obstacles in some cases.

The Court has held that the “true threats” doctrine “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>102</sup> An individual need not intend to carry out the threat; the purpose of the true threats doctrine is to protect people from the fear of violence and the disruption in their lives that

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99. *See supra* notes 1–3.

100. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370–71 (M.D. Pa. 2003).

101. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

102. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

fear can cause.<sup>103</sup> It is important to keep in mind, however, that the Court has recognized that some speech containing threatening language may be fully protected speech.

For example, in *Watts v. United States*, the Court struck down a conviction for threatening the President because the allegedly threatening statement was “political hyperbole.”<sup>104</sup> In that case, the defendant was taking part in a public rally against police brutality and stated, “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.”<sup>105</sup> In throwing out the conviction, the Court cited its famous assertion in *New York Times Co. v. Sullivan* that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>106</sup> The Court held that the context of Watts’s statement, as well as “the expressly conditional nature of the statement and the reaction of the listeners,” made it clear that the government could not show that the defendant had made a true threat.<sup>107</sup> Similarly, in *Virginia v. Black*, the Court made clear that not all cross burning is necessarily done with the necessary intent to intimidate and that a contextual inquiry is essential in each case to determine whether that intent is present.<sup>108</sup>

It remains an open issue whether the speaker must subjectively intend to place an individual in fear of violence in order for his speech to constitute a true threat. In *Elonis v. United States*, the Court failed to answer the question of whether the First Amendment also requires a speaker to have intended to

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103. *Id.* at 360.

104. 394 U.S. 705, 708 (1969) (per curiam).

105. *Id.* at 706.

106. *Id.* at 708 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

107. *Id.*

108. 538 U.S. 343, 365–66 (2003) (O’Connor, J., plurality opinion) (“As the history of cross burning indicates, a burning cross is not always intended to intimidate.”). Justice Souter, joined by two other Justices, also recognized that cross burning is not always done with the intent to intimidate but would have struck down the statute as unconstitutional, rather than sever the “prima facie” evidence clause of the statute, as the plurality suggested was possible. *Id.* at 380–81 (Souter, J., concurring in part and dissenting in part) (“As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone . . . .”); *id.* at 367 (O’Connor, J., plurality opinion) (“We also leave open the possibility that the provision is severable . . . .”).

place the subject of the threat in fear for his or her safety.<sup>109</sup> The Court instead held that although the federal threats statute at issue in that case<sup>110</sup> did not contain a scienter requirement,<sup>111</sup> general requirements of federal criminal law require that the government prove more than simply that the defendant acted negligently.<sup>112</sup> This case provides little insight into what sort of intent standard would be required if a school relied on the true threats doctrine to expel or suspend students; administrative punishments are not criminal in nature.

At the very least, the student's fear would have to be "objectively reasonable."<sup>113</sup> The Oklahoma fraternity song would not satisfy this standard, even if sometimes students might claim they feel "unsafe" on campus.<sup>114</sup> The song was not directed at any particular individual, and in fact the speech came to light only after the video someone took of the bus ride was posted online.<sup>115</sup>

#### 4. Defamation

False, defamatory, and unprivileged speech is actionable under the common law<sup>116</sup> and considered lesser-protected speech under the First Amendment.<sup>117</sup> Some offensive speech on college campuses might be actionable defamation, and school officials would be free to punish such speech without any constitutional concerns.

That said, the tort of defamation is subject to several important limitations that will limit the usefulness of this category of speech. For example, the First Amendment fully protects hyperbolic speech<sup>118</sup> as well as any other statements that can-

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109. 135 S. Ct. 2001, 2012–13 (2015).

110. 18 U.S.C. § 875(c) (2012).

111. *Elonis*, 135 S. Ct. at 2008–09.

112. *Id.* at 2011–12.

113. See Fernandez & Eckholm, *supra* note 2 (stating that the legal scholars they interviewed believed that the racist chant could be legally punished if it led "a reasonable person to fear for his or her safety").

114. See *id.* (stating that Oklahoma University students interviewed supported the decision to expel the chanters, based on the reference to lynching and the fact that it might make students feel unsafe).

115. *Id.*

116. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

117. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official must prove that a defamatory statement was made with actual malice).

118. See, e.g., *Greenbelt Co-op Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970) (the

not be proven true or false.<sup>119</sup> In addition, individuals seeking to restrict student speech on the grounds that it is defamatory must overcome the tort's "of and concerning" requirement—the challenged statement must be about the plaintiff.<sup>120</sup> In *Beauharnais v. Illinois*, the Court upheld a criminal libel statute punishing speech that "portray[ed] depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion,"<sup>121</sup> but it is unlikely that this case is still good law.<sup>122</sup> It was decided before the Court recognized in *New York Times Co. v. Sullivan* that defamation was not entirely outside the protections of the First Amendment,<sup>123</sup> and group libel seems inconsistent with *R.A.V. v. City of St. Paul*, which held that laws singling out fighting words targeting certain racial or other minority groups is unconstitutional.<sup>124</sup>

The biggest obstacle for defamation claims will typically be a failure to satisfy the requirement that the speech be "of and concerning" a particular student or small group of students.<sup>125</sup> Speech that tends to lower the reputation of all students belonging to a particular group will not satisfy this standard. For example, the "Asians in the Library" video would not be actionable defamation because the speaker referred to all Asians and not to any one person in particular.<sup>126</sup>

## 5. The Captive Audience Doctrine

It is possible that universities could look to the "captive audience" doctrine to justify the restriction of student speech in some limited circumstances.<sup>127</sup> Scholars disagree on whether

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First Amendment fully protects rhetorical hyperbole).

119. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990).

120. See, e.g., *Sullivan*, 376 U.S. at 267 ("The jury must find that the words were published 'of and concerning' the plaintiff . . .").

121. 343 U.S. 250, 251 (1952).

122. See, e.g., *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 672 (7th Cir. 2008) ("[T]hough *Beauharnais* . . . has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited." (citation omitted)).

123. *Sullivan*, 376 U.S. at 268 (explaining that the argument that the Constitution did not protect "libelous" publications did not end the inquiry).

124. 505 U.S. 377, 391 (1992).

125. See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

126. See *supra* note 20.

127. See, e.g., Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 376 (1991) (explaining that a hate speech policy "may express greater concern with speech which occurs in a dormitory or classroom, or where there otherwise is a 'cap-

the captive audience doctrine can be used to justify hostile environment harassment laws.<sup>128</sup> It is entirely unclear under what circumstances the Court would be willing to embrace the doctrine because the cases have dealt with such varying factual scenarios.<sup>129</sup> The Court has not always embraced the captive audience doctrine,<sup>130</sup> and defining this doctrine is a study in frustration. It is not clear whether and how it would apply, if at all, on university campuses.

The Court has embraced the doctrine in the context of broadcast television,<sup>131</sup> public transportation,<sup>132</sup> and unsolicited mail,<sup>133</sup> but rejected it in the context of a school board meeting<sup>134</sup> and in a courthouse.<sup>135</sup> As J.M. Balkin has noted, “There is simply no bright line test to tell us whether a situation of speech involves coercion or not.”<sup>136</sup> The Court has frequently stated that confronting offensive speech is part of daily life.<sup>137</sup>

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tive audience,’ than with speech which occurs at scheduled rallies and public addresses”).

128. For different views on the applicability of the captive audience doctrine to the workplace, see Balkin, *supra* note 97, at 423 (arguing that the average worker is a captive audience); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 18–19 (noting the lack of clarity regarding when an audience is “captive” because the doctrine is “inchoate” and seems to depend more on “the character of the place” than “the degree of audience captivity”); Volokh, *supra* note 39, at 314–15 (arguing that the Supreme Court should not find that employees in the workplace are “captive”).

129. See *infra* notes 131–35 and accompanying text.

130. See *infra* notes 134–35 and accompanying text.

131. Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

132. Lehman v. City of Shaker Heights, 418 U.S. 298, 305–08 (1974) (Douglas, J., concurring) (agreeing with majority that city could ban political ads on public transportation to protect captive audience).

133. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 735–38 (1970).

134. Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

135. Cohen v. California, 403 U.S. 15, 21–22 (1971).

136. Balkin, *supra* note 97, at 415; see also Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

137. See, e.g., Snyder v. Phelps, 562 U.S. 443, 458 (2011) (speech on matters of public concern “cannot be restricted simply because it is upsetting or arouses contempt”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (“Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes.’” (footnotes omitted) (quoting *Cohen*, 403 U.S. at 21)); *Cohen*, 403 U.S. at 21 (“[W]e have . . . consistently stressed that ‘we are

Those who do not wish to hear offensive speech can “avert their eyes”—or ears—and engage in counterspeech if they do not like what they hear.<sup>138</sup>

Applying the captive audience doctrine to the university setting is particularly problematic. Most fundamentally, universities are a place, like the public square, where students are supposed to confront ideas with which they disagree, sometimes vehemently.<sup>139</sup> Allowing universities to silence speakers who engage in speech other people find “offensive” seems particularly incongruous with the university setting.

Furthermore, even if the captive audience doctrine had some application to university students, its relevance would depend on the particular context in which the doctrine is asserted.<sup>140</sup> The strongest settings for the application of the captive audience doctrine would be in dormitories and maybe in classrooms.<sup>141</sup>

The difficulty of applying the captive audience doctrine in the dormitories, however, is that both speakers and audiences call that place “home.”<sup>142</sup> Students who cannot easily escape offensive speech in their dormitory common areas, bathrooms, or rooms might argue that they should not have to tolerate such speech when they are “home,” but likewise speakers might just as readily contend that their speech rights should not be so readily restricted when they are also speaking at home.<sup>143</sup> In addition, one of the benefits of residential life in the university setting is to expose students to the different lifestyles, back-

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often “captives” outside the sanctuary of the home and subject to objectionable speech.” (quoting *Rowan*, 397 U.S. at 738)).

138. See, e.g., *Cohen*, 403 U.S. at 21 (suggesting that those in the courtroom look away).

139. See Balkin, *supra* note 97, at 424 n.103 (explaining that a university may have an interest in “enforced toleration of the intolerant”).

140. See *id.* (stating that students’ interest in being free from coercion would be different in different contexts).

141. Battaglia, *supra* note 127 (explaining that a hate speech policy “may express greater concern with speech which occurs in a dormitory or classroom, or where there otherwise is a ‘captive audience,’ than with speech which occurs at scheduled rallies and public addresses”).

142. See HOUS. & FOOD SERVS., LIVING ON CAMPUS AT THE CENTER OF IT ALL 2, <https://ou.edu/content/dam/HousingFood/Documents/Users-Aaron-Desktop-Forms-Exemption.pdf> (“Most of the highest ranked universities in the nation require virtually 100% of their freshmen to live on campus.”).

143. See *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 735–38 (1969) (“The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality . . .”).

grounds, and beliefs of their classmates.<sup>144</sup> Allowing students to silence their classmates whenever they are offended would undermine this important benefit of residential life.

A captive audience argument in classrooms is even more difficult because we expect students to tolerate speech they do not like or might even find offensive when made in the context of a class discussion. It might be possible to extend the doctrine to extracurricular activities, although in many instances participating in such activities is not as “essential” and unavoidable as attending class and living in a dormitory is.<sup>145</sup>

Even if the captive audience doctrine applies in classes and dormitories, however, it would not apply to many other settings where public universities and colleges restrict expression. The captive audience rationale would not apply to optional lectures and speakers on campus.<sup>146</sup> It would not apply to speakers in areas around campus that resemble streets, parks, and sidewalks.<sup>147</sup> And it is very hard to see how the captive audience doctrine would apply to most social media platforms, unless students are required to use social media as part of their classes. For example, it does not appear that any University of Oklahoma student was in any way forced or coerced to watch the racist SAE video discussed in the introduction of this Article,<sup>148</sup> or any UCLA student the YouTube video “Asians in the Library.”<sup>149</sup>

## 6. Time, Place, and Manner Restrictions

Universities may constitutionally take advantage of time, place, and manner restrictions to limit some speech. The Court has made clear that even in quintessential public fora, the government has the power to impose content neutral speech re-

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144. See *HOUS. & FOOD SERVS.*, *supra* note 142, at 3 (stating that living on campus will lead to being able to “meet more people of diverse backgrounds from different parts of the world”).

145. J.M. Balkin has conceded that the captive audience doctrine might carry more weight in certain parts of the university than others. Balkin, *supra* note 97, at 424 n.103 (suggesting the captive audience doctrine might have application in the classroom and the dormitory).

146. See Battaglia, *supra* note 127 (stating that “scheduled rallies and public addresses” would be of less concern for school policies).

147. See Balkin, *supra* note 97, at 424 n.103 (explaining that speech in dormitories would be treated differently from “arguments in the public streets outside the campus”).

148. See *supra* notes 1–3 and accompanying text.

149. See *supra* notes 20–23 and accompanying text.

strictions that serve significant government interests.<sup>150</sup> The important limitation on the utility of time, place, and manner restrictions, however, is that they be content-neutral and applied even-handedly.<sup>151</sup> As a result, time, place, and manner restrictions are not particularly useful in most situations where the college or university wants to punish or restrict speech specifically because of its offensive content.

## 7. Secondary Effects Doctrine

The secondary effects doctrine is of even more limited assistance to universities. This doctrine has developed in the context of adult entertainment, where the Court has indulged the fiction that zoning laws aimed at establishments that offer such entertainment are not impermissibly content-based because they are aimed at the “secondary effects” of that speech on crime rates and property values.<sup>152</sup> This reasoning seems questionable at best, but in any event, the Court has showed no willingness to extend this doctrine beyond the context of adult entertainment. Any attempts to apply the secondary effects doctrine to offensive speech in the university setting should fail because it is obvious that the regulation of such expression is aimed directly at the communicative value of the speech and its impact on the audience.

All in all, traditional First Amendment doctrine—even without taking into account the Court’s cases involving the educational context in particular—give schools some ability to restrict or punish students’ expression activities. But it certainly does not give them all of the power they might want.

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150. See, e.g., *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (“[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.”).

151. See, e.g., *id.* at 93–94 (finding that the ordinance in question was not content-neutral, and therefore not could not be sustained).

152. See, e.g., *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 433–42 (2002) (giving deference to city to engage in zoning to address the secondary effects of multi-use adult establishments); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (holding that zoning of adult establishments was content-neutral under secondary effects doctrine because “[t]he ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protec[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life,’ not to suppress the expression of unpopular views”).

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### III. THE SUPREME COURT AND STUDENTS

The Supreme Court has decided several cases in the higher education setting involving the speech rights of students. These decisions leave open some important questions about the scope of a public university's authority to restrict or punish the speech of its students. In recent years, some lower courts have used the courts' decisions relating to K–12 public education to provide this missing guidance. In addition, some lower courts have looked to the doctrinal approach that has evolved in the context of public employment and have increasingly recognized the right to punish students for speech that does not satisfy “professional” standards.

Relying on decisions in the K–12 and workplace contexts is deeply troubling in light of the fundamental differences between universities, workplaces, and K–12 schools. The increasing use of professionalism standards is likewise dangerous because such standards are often vague and their application is subject to the significant discretion of university administrators.

#### A. SUPREME COURT PRECEDENT IN THE HIGHER EDUCATION CONTEXT

The Supreme Court's cases involving the free speech rights of university students suggest that they enjoy robust protection.<sup>153</sup> These cases generally contain very speech-protective language, and the Court has time and time again singled out the university as a special institution in the marketplace of ideas. Simultaneously, however, the Court has indicated that it is also appropriate to defer to university administrators. This tension sends mixed messages and provides little guidance when trying to determine what sort of limits the First Amend-

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153. It is unclear whether students can stake a claim to academic freedom, particularly when that claim conflicts with the university's own claim to academic freedom. Some of the Court's precedents suggest that students enjoy some measure of academic freedom themselves. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”). But many scholars have argued that the rights students enjoy rest solidly on the First Amendment and not the doctrine of academic freedom. *See, e.g., Scott R. Bauries, Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 *MISS. L.J.* 677, 679 (2014) (“[T]he Supreme Court has never recognized academic freedom as a unique or ‘special’ individual right under the First Amendment that inheres only in academics.”).

ment might place on public universities' restrictions of student speech.

### 1. Student Speech Cases

In a number of cases, the Court has suggested that university students have robust speech rights. In *Healy v. James*, for example, the Court held that a college could not deny recognition to a student group on the grounds that it thought the group's philosophy was "antithetical to the school's policies."<sup>154</sup> The overall thrust of the opinion is that the speech rights of university students are nearly co-extensive with adults in society at large. Specifically, the Court stated:

The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.<sup>155</sup>

*Healy* left open the possibility that the college could deny recognition to a student group that posed a likelihood of disruption or failed to follow reasonable time, place, and manner rules.<sup>156</sup> The Court made clear that a university would face a "heavy burden" to justify a restraint on associational activities.<sup>157</sup> The Court gave short shrift to the college's argument that it should not be forced to give its "administrative seal of official college respectability."<sup>158</sup> The Court held that non-recognition was an "impermissible, albeit indirect, infringement" of the students' associational rights.<sup>159</sup>

A year after *Healy*, the Court once again ruled in favor of a student, holding that a public university could not expel a student for distributing on campus a newspaper with "indecent" content on a day prospective students were visiting with their

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154. 408 U.S. 169, 175 (1972).

155. *Id.* at 180–81 (citations omitted) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

156. *Id.* at 192–93.

157. *Id.* at 184.

158. *Id.* at 182 (quoting *Healy v. James*, 319 F. Supp. 113, 116 (D. Conn. 1970)).

159. *Id.* at 183.

parents.<sup>160</sup> In *Papish v. Board of Curators*, the Court relied on *Healy* to hold that a school could not punish a student for “the mere dissemination of ideas” that were “offensive to good taste” when the speech could not be “labeled as constitutionally obscene or otherwise unprotected.”<sup>161</sup> The Court also rejected the school’s argument that its actions were the result of a valid time, place, and manner restriction because it was clear the student was expelled “because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution.”<sup>162</sup> In a footnote, the Court also noted that the university had failed to assert that the newspaper disrupted the operation of the school.<sup>163</sup> In dissent, Justice Rehnquist criticized the Court’s “wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates.”<sup>164</sup>

Until recently, the Court has held firmly that universities cannot treat students and student groups differently based on their viewpoints. In *Widmar v. Vincent*, the Court held a state university could not exclude religious groups from using the university’s facilities otherwise open for registered student groups.<sup>165</sup> The Court rejected the university’s arguments that the exclusion was consistent with its mission to provide a “secular” education and held that the usual First Amendment rules applied in the university setting.<sup>166</sup> Importantly, the Court explained that “an open forum in a public university does not con-

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160. *Papish v. Bd. of Curators*, 410 U.S. 667, 667–70, 668 n.3 (1973).

161. *Id.* at 670. The newspaper contained a political cartoon “depicting policemen raping the Statue of Liberty and the Goddess of Justice”; the paper also contained an article entitled “M----f---- Acquitted.” *Id.* at 667.

162. *Id.* at 670.

163. *Id.* at 670 n.6 (“[I]n the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.”). The Court does not cite *Tinker* here, but this language is clearly coming from that case. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969) (“[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . .”).

164. *Papish*, 410 U.S. at 677 (Rehnquist, J., dissenting). The dissenters also believed that the student’s use of profanity was not protected expression. *Id.* at 676.

165. 454 U.S. 263, 277 (1981).

166. *Id.* at 267 (holding that once the university had created an open forum, it had “assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms” (footnote omitted)).

fer any imprimatur of state approval on religious sects or practices,”<sup>167</sup> and that because university students are adults, “[t]hey are less impressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion.”<sup>168</sup>

Similarly, in both *Rosenberger v. Rector & Visitors of the University of Virginia* and *Board of Regents v. Southworth*, the Court held that mandatory student activity fees are constitutional only if viewpoint-neutral criteria are used to distribute them.<sup>169</sup> In both *Rosenberger* and *Southworth*, the Court agreed with the general principle that a university “must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission,”<sup>170</sup> but it can engage in viewpoint discrimination only if it is the university’s own speech.<sup>171</sup> The Court explained in no uncertain terms how dangerous the suppression of student speech on the basis of viewpoint is in the university setting: “For the University . . . to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”<sup>172</sup>

Lurking in the background of *Healy*, *Southworth*, *Widmar*, and *Rosenberger* were suggestions from various Justices that traditional First Amendment principles should not control in the higher education setting. Indeed, these strict principles would clearly not make sense in some contexts. In *Widmar*, the Court went out of its way to make clear that its holding does

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167. *Id.* at 274.

168. *Id.* at 274 n.14. In her *Rosenberger* concurrence, Justice O’Connor asserted that when a forum has a “wide array” of speech, “any perception that the University endorses one particular viewpoint would be illogical.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 850 (1995).

169. *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000); *Rosenberger*, 515 U.S. at 841.

170. *Rosenberger*, 515 U.S. at 832.

171. *Id.* at 834 (“A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University’s own speech, which is controlled by different principles.”); see *Southworth*, 529 U.S. at 229 (“If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker.”); see also *id.* at 235 (“Where the University speaks, either in its own name or through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.”).

172. *Rosenberger*, 515 U.S. at 836.

not question “the right of the University to make academic judgments as to how to allocate scarce resources or ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’”<sup>173</sup> More specifically, Justice Stevens pointed out in his *Widmar* concurrence that universities have to make content-based decisions all the time: “They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written.”<sup>174</sup> The question becomes how far does this deference extend; does it extend so far as to apply whenever a college or university contends that a speech restriction is consistent with their mission? Justice Souter raised this question in his *Southworth* concurrence, where he posited that “protecting a university’s discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.”<sup>175</sup>

In *Christian Legal Society v. Martinez*,<sup>176</sup> the view that the Court should defer to a university’s decisions took center stage. In that case, a law student group at Hastings Law School challenged the school’s requirement that any student group seeking official recognition and access to school funds and facilities had to abide by an “accept-all-comers” nondiscrimination policy.<sup>177</sup> This is a perfect example of a school policy that the law does not require—indeed, after *Boy Scouts of America v. Dale*, expressive associations are entitled to exclude members who do not share their core beliefs<sup>178</sup>—but Hastings adopted the non-

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173. 454 U.S. at 276 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

174. *Id.* at 278 (Stevens, J., concurring). Justice Stevens also mentions that schools offering extracurricular activities have to determine “the content of those activities.” *Id.*

175. 529 U.S. at 239 (Souter, J., concurring) (citing *Sweezy*, 354 U.S. at 262–64 (Frankfurter, J. concurring)). In that case, the university had not made an argument that it was entitled to deference based on its educational mission or academic freedom principles.

176. *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010).

177. *Id.* at 668. The policy, as written, was not actually an all-comers policy but rather prohibited discrimination based on “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation,” but the parties litigated the case in the district court as if it were an all-comers policy. *Id.* at 670.

178. 530 U.S. 640, 659 (2000).

discrimination policy, it claimed, in order to promote reasonable educational purposes<sup>179</sup> and to promote inclusivity.<sup>180</sup>

In evaluating the reasonableness of Hastings' policy, the Court expressly stated that "[o]ur inquiry is shaped by the educational context in which it arises," given the "special characteristics of the school environment."<sup>181</sup> In addition, the Court cautioned against substituting its own judgment for the "on-the-ground expertise and experience of school administrators"<sup>182</sup> and concluded that Hastings' policy was entitled to "due decent respect" and "appropriate regard."<sup>183</sup> Although the Court questioned the wisdom of Hastings' policy,<sup>184</sup> it deferred uncritically to Hastings' assertion that the policy promoted the university's goals to encourage "tolerance, cooperation, and learning among students" and was consistent with the State's disdain for discrimination.<sup>185</sup>

The dissent complained bitterly that the majority's deference to the university was inconsistent with *Healy* and the Court's other higher education student speech cases.<sup>186</sup> Several scholars have joined the lament. Richard Epstein complained that the high level of deference the Court gave Hastings "had the unfortunate consequence of letting Hastings run roughshod over a weak and defenseless religious organization under its banner of toleration, cooperation, and learning."<sup>187</sup> Another scholar noted that the decision "marks a return to an early-American understanding of student rights" that rested on the

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179. *Martinez*, 561 U.S. at 668.

180. *See id.* at 694 ("Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.").

181. *Id.* at 685–86 (quoting *Widmar v. Vincent*, 454 U.S. 265, 268 n.5 (1981)).

182. *Id.*

183. *Id.* at 687.

184. *See, e.g., id.* at 701 (Stevens, J. concurring) ("This approach may or might not be the wisest choice.").

185. *Id.* at 689 (quoting Joint Appendix II, *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371), 2010 WL 363298, at \*349). It seems odd that a goal of "toleration" requires students groups to abandon their core beliefs, rather than require students to learn to accept that there will always be other people who do not share their beliefs.

186. *Id.* at 718–21 (Alito, J., dissenting).

187. Richard Epstein, *Church and State at the Crossroads*: *Christian Legal Society v. Martinez*, 2010 CATO SUP. CT. REV. 105, 107.

assumption that “school officials knew better than [the courts] how to educate students in their charge.”<sup>188</sup>

Despite the deep chasm between the liberal and conservative Justices in *Martinez*, all of them agreed that the right of the students to express any discriminatory views they wanted remained. “Although registered student groups must conform their conduct to the Law School’s regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one. . . . Today’s decision thus continues this Court’s tradition of ‘protect[ing] the freedom to express “the thought that we hate.”’<sup>189</sup>

The Court has never directly addressed whether universities may restrict their students’ off-campus speech consistent with the First Amendment. In *Southworth*, however, the Court did reject an argument that the university had no legitimate interest in supporting its students’ expressive activities off campus.<sup>190</sup> In that case, a group of students argued that the university should not be permitted to require them to contribute to student activity fees. In rejecting their arguments that the support of extracurricular student speech was not “germane” to the university’s mission, the Court responded that such an inquiry was “unmanageable. . . . [P]articularly where the State undertakes to stimulate the whole universe of speech and ideas.”<sup>191</sup> The Court added that “[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.”<sup>192</sup> Furthermore, the Court remarked that “[u]niversities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse.”<sup>193</sup>

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188. Timothy J. Tracey, *The Demise of Equal Access and a Return to the Early-American Understanding of Student Rights*, 43 U. MEM. L. REV. 557, 636 (2013).

189. *Martinez*, 561 U.S. at 696–97 n.26 (quoting *id.* at 706 (Alito, J. dissenting)).

190. 529 U.S. 217, 234 (2000) (“We make no distinction between campus activities and the off-campus expressive activities of objectionable [student organizations] . . . find[ing] no principled way . . . to impose upon the University, as a constitutional matter, a requirement to adopt geographic or spatial restrictions.”).

191. *Id.* at 232.

192. *Id.*

193. *Id.* at 234.

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One issue that has come up is whether college and universities should have the same authority to restrict speech in curricular and extracurricular matters. In *Martinez*, the majority rejected the argument that the university should receive less deference on its decisions relating to extracurricular activities because “extracurricular programs are, today, essential parts of the educational process.”<sup>194</sup> Citing K–12 cases, the Court added that “[s]chools . . . enjoy ‘a significant measure of authority over the type of officially recognized activities in which their students participate.’”<sup>195</sup>

As this brief history demonstrates, the Court has been more solicitous of universities’ claims that the usual First Amendment rules should not apply on campus and that they are entitled to some measure of deference to determine what speech to permit consistent with their missions. The scope of this deference remains unclear.

## 2. Academic Freedom

In evaluating the ability public colleges and universities have to restrict or punish the speech of their students, an essential consideration is how much deference should schools receive for the decisions they make. Amy Gajda contends that “courts today often wholly disregard or discount the significance of the academic context in enforcing the First Amendment.”<sup>196</sup> She adds that when they do take the institutional context into account, they tend to oversimplify and focus on students’ free speech rights without regard to the academic setting.<sup>197</sup> Although the Court has not been clear about how much deference universities should get when free speech rights are at issue, its decisions in the context of affirmative education suggest this deference could be quite broad.

As Part II reveals, public universities have a hard time relying on traditional First Amendment doctrine to justify their efforts to restrict speech. But some scholars have argued that universities are entitled to some measure of deference when determining what speech to tolerate on campus. This deference can be based on two different but related theories: (i) the aca-

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194. *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 687 (2010).

195. *Id.* at 686–87 (quoting *Bd. of Educ. of Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 240 (1990)).

196. GAJDA, *supra* note 39, at 108.

197. *Id.*

democratic freedom of the university; and (ii) deference to an institutional actor.

As Peter Byrne has colorfully put it, the doctrine of academic freedom “[l]ack[s] definition or guiding principle” and as a result, “the doctrine floats in the law, picking up decisions as a hull does barnacles.”<sup>198</sup> Perhaps the most famous articulation of academic freedom came in Justice Frankfurter’s concurrence in *Sweezy v. New Hampshire*.<sup>199</sup> Frankfurter wrote passionately about the importance of leaving universities unfettered “to examine, question, modify or reject traditional ideas and beliefs.”<sup>200</sup> Quoting a statement about South African universities, Frankfurter wrote: “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>201</sup> Frankfurter was concerned about “governmental intrusion into the intellectual life of a university” that might directly or indirectly “check the ardor and fearlessness of scholars.”<sup>202</sup>

The government intrusion at issue in that case did not involve the appropriateness of judicial review; instead, in that case, the New Hampshire legislature had questioned a professor about his “subversive” beliefs. If anything, Frankfurter’s concurrence—and *Sweezy* as a whole—suggests that the judiciary plays an important role in checking government attempts to interfere with academic freedom. At the same time, Frankfurter’s opinion leaves open the possibility that students also enjoy some measure of academic freedom, although this idea has not gained much traction in the case law. In addition, one gaping hole in his opinion is how we should value and compare the academic freedom of the universities, professors, and students when they are in conflict.

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198. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 253 (1989).

199. 354 U.S. 234 (1957).

200. *Id.* at 262 (Frankfurter, J., concurring) (quoting The Open Universities in South Africa 10–12 (a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand)).

201. *Id.* at 263.

202. *Id.* at 261, 262.

One approach is to defer to universities to strike this balance for themselves.<sup>203</sup> The Supreme Court has embraced some deference to universities in the context of admissions, tenure determinations, and academic standards. In *Grutter v. University of Michigan*, for example, the Supreme Court held that it was appropriate to “defer” to the law school’s “educational judgment” that “diversity is essential to its educational mission.”<sup>204</sup> The Court held that judges must give a “degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”<sup>205</sup> In subsequent decisions, the Court made clear that, although strict scrutiny applies to affirmative action programs, “the decision to pursue ‘the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.”<sup>206</sup> The Court explained that while universities cannot pursue racial quotas, “[o]nce . . . a university gives ‘a reasoned, principled explanation’ for its decision, deference must be given ‘to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.’”<sup>207</sup> In rejecting arguments that the university had failed to demonstrate that affirmative action was needed over and above its top-ten-percent admission plan, the Court referred to universities as “laboratories for experimentation” that must be given “[c]onsiderable deference” to “defin[e] those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”<sup>208</sup>

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203. See, e.g., PAUL HOWITZ, FIRST AMENDMENT INSTITUTIONS 127 (2013) (arguing decisions regarding student speech are “matters of *academic judgment* which ought to be left to the universities themselves”); Feldman, *supra* note 37 (“The balance between a civil educational community and academic freedom is subtle and difficult. But the First Amendment should be read to allow universities like Oklahoma to find that balance for themselves.”).

204. *Grutter v. Univ. of Mich.*, 539 U.S. 306, 328 (2003).

205. *Id.* at 328.

206. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (*Fisher II*) (quoting *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) (*Fisher I*)).

207. *Id.* (quoting *Fisher I*, 133 S. Ct. at 2419). The Court has accepted that a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” *Id.* at 2210 (quoting *Grutter*, 539 U.S. at 330). Diversity also “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” *Id.* (quoting *Grutter*, 539 U.S. at 330).

208. *Id.* at 2214 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (Kennedy, J. concurring)).

The Court has also showed an unwillingness to interfere with curriculum decisions. In *Board of Curators of the University of Missouri v. Horowitz*, the Court rejected a procedural due process claim brought by a medical student dismissed from medical school at public university for her poor clinical performance.<sup>209</sup> In the course of determining that the school had afforded the student sufficient due process, the Court noted that for at least fifty years state and federal courts had distinguished between dismissals for “disciplinary reasons” and dismissals based on “academic” performance, holding that hearings might be required for the former but not the later.<sup>210</sup> The student argued she was entitled to a hearing because her dismissal was based in part on personal hygiene and timeliness issues, which are not, in her view, as “academic” issues. The Court rejected this argument, explaining that “[p]ersonal hygiene and timeliness may be as important factors in a school’s determination of whether a student will make a good medical doctor as the student’s ability to take a case history or diagnose an illness.”<sup>211</sup> The Court stated that “the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.”<sup>212</sup> As a result, the Court concluded that an adversarial hearing would “risk deterioration” of the “faculty-student relationship.”<sup>213</sup>

The limits of the deference embraced in *Grutter* are unclear. For example, relying heavily on *Grutter*, the AAUP argued in *Rumsfeld v. FAIR* that instilling values is part of a university education, and consequently academic freedom includes not just decisions relating to teaching and research but also “the standards and methods that faculties bring to bear to shape the educational environment outside the classroom, including by modeling and instilling professional values that students will carry into postgraduate employment.”<sup>214</sup> Indeed, the

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209. 435 U.S. 78 (1978).

210. *Id.* at 91 n.6.

211. *Id.*

212. *Id.* at 90.

213. *Id.*

214. Brief for Amicus Curiae the Am. Ass’n of Univ. Professors (AAUP), *Rumsfeld v. F. for Acad. & Inst. Rights (FAIR)*, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347170, at \*3–4 [hereinafter Brief for AAUP as Amicus Curiae Supporting Respondents]. For criticism, see J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the Four Freedoms of a*

AAUP contends that pretty much everything a university does “throughout the educational environment” enjoys academic freedom.<sup>215</sup> The AAUP argued that universities are entitled to deference in their decisions relating to career replacement.<sup>216</sup> To support this argument, the AAUP relied on statements in *Grutter* that one of the purposes of universities is to prepare students for post-graduate employment.<sup>217</sup>

## B. TROUBLING RELIANCE ON K–12 CASES

The Supreme Court has decided four cases relating to the free speech rights of students in public primary and secondary schools. These cases leave open a number of important questions, including the issue of when schools can punish students for speech that does not take place on school grounds or as part of a school-sponsored activity. The Supreme Court has never explicitly determined whether this series of cases applies in the university setting, but some lower courts have done so.

### 1. *Tinker* and *Fraser*

In *Tinker v. Des Moines Independent School District*, the Court famously held that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>218</sup> The Court emphasized that schools could not be “enclaves of totalitarianism” and that student speech played an important role in the “marketplace of ideas.”<sup>219</sup> At the same time, the Court said that a determination of the student speech rights must be made “in light of the special characteristics of the school environment.”<sup>220</sup> Schools cannot restrict speech based on an “undifferentiated fear or apprehension of disturbance” because all expression poses the risk of an

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*University*, 77 U. COLO. L. REV. 929, 951 (2006) (“Inculcation of human values or modeling of professional values, while legitimate, do not stand at the center of higher education; investigation, discussion, critique, and judgment do.”).

215. Brief for AAUP as Amicus Curiae Supporting Respondents, *supra* note 214, at \*9.

216. *Id.* FAIR itself involved a challenge to the Solomon Amendment, which threatened universities with the loss of federal funding if they excluded military recruiters from campus.

217. *Id.* at \*12 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship. . . .” (quoting *Grutter v. Bolinger*, 539 U.S. 306, 331–32 (2003))).

218. 393 U.S. 503, 506 (1969).

219. *Id.* at 511–12.

220. *Id.* at 506.

argument or disturbance.<sup>221</sup> But school officials can act when they “reasonably forecast”<sup>222</sup> that the expression will cause a “material and substantial interference with schoolwork or discipline,”<sup>223</sup> or that the speech “inv[ades] the rights of others.”<sup>224</sup> The Court concluded that the school had failed to demonstrate that students wearing black armbands satisfied this standard.<sup>225</sup>

Although *Tinker* is often regarded as the high-water mark for student speech rights, in recent years courts have applied the “substantial disruption” standard expansively to give schools broad authority to restrict their students’ speech rights.<sup>226</sup> Lower courts have held that schools can restrict speech even if there is no evidence of actual disruption; instead, a reasonable prediction that the speech at issue would result in a substantial disruption would be enough. In some courts, this disruption can even be an inconvenience to the administrators, who have to deal with the students, parents, and broad community reacting to the speech.<sup>227</sup>

In addition, *Tinker*’s statement that schools can restrict speech that “invades the rights of others”<sup>228</sup> has begun to gain traction in the lower courts, although it remains very controversial. What this language means is unclear, and there are very few decisions discussing it. If “the rights of others”<sup>229</sup> prong does more than simply underscore that schools can prohibit speech that is otherwise unprotected under the First Amendment (such as fighting words or true threats), then this approach does not add much. It is also does not add much given that the “substantial disruption”<sup>230</sup> standard allows schools to act if speech interferes with a student’s ability to learn.<sup>231</sup> But

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221. *Id.* at 508.

222. *Id.* at 514.

223. *Id.* at 511.

224. *Id.* at 513.

225. *Id.* at 514.

226. See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1049 (2008).

227. See, e.g., *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

228. Brief for AAUP as Amicus Curiae Supporting Respondents, *supra* note 214.

229. *Id.*

230. *Id.* at 514.

231. See, e.g., *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 674 (7th Cir. 2008) (“[I]f there is reason to think that a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or

at least one court has held that the “rights of others” prong of *Tinker* can offer a substantial alternative basis for punishing student speech.<sup>232</sup> In *Harper v. Poway Unified School District*, the Ninth Circuit relied on this prong to uphold a school’s censorship of a t-shirt with a biblical verse and an anti-gay message.<sup>233</sup> A searing Judge Kozinski dissent attacked the majority for embracing such a standardless and malleable approach to student speech.<sup>234</sup>

The Supreme Court has cited *Tinker* in some of its university speech cases, but it has never relied on the *Tinker* standard to restrict speech. In *Healy*, discussed above, the Court cited *Tinker* repeatedly, both for its broad pronouncement that students do not abandon their First Amendment rights at the schoolhouse gates and also for its recognition that First Amendment rights can vary depending on the “special characteristics” of the environment in which they are asserted.<sup>235</sup> But the Court issued a rather speech-protective decision, suggesting that the “special characteristics” language had little impact on the Court’s determination of the case.<sup>236</sup> *Papish* also cited the language (although not the case name) but likewise strongly rejected the university’s arguments that the usual rules of the First Amendment did not apply on college campuses.<sup>237</sup> In *Widmar*, the Court favorably cited *Tinker*’s holding that the First Amendment must be applied “in light of the special characteristics of the school environment,”<sup>238</sup> but only to emphasize that a school need not open its facilities “to students and non-

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other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech.”).

232. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

233. 445 F.3d at 1185 (relying on *Tinker*’s “rights of others” prong).

234. *Id.* at 1197–98 (Kozinski, J., dissenting) (criticizing the majority’s reliance on the “rights of others” prong; “[s]urely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech”).

235. *Healy v. James*, 408 U.S. 169, 180 (1972).

236. Justice Rehnquist’s concurring opinion in *Healy* embraced the majority’s reliance on *Tinker* and suggested that there is a “constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other.” *Healy*, 408 U.S. at 203 (Rehnquist, J., concurring).

237. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 n.6 (1973).

238. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1973) (quoting *Tinker*, 393 U.S. at 506).

students alike.”<sup>239</sup> The Court made clear that “students enjoy First Amendment rights of speech and association on . . . campus” and any denial of their rights is subject to the usual stringent levels of scrutiny in non-university cases.<sup>240</sup>

The lower courts have not discussed at great length whether *Tinker* applies in the university setting. The Third Circuit is one of the few courts to suggest that because *Tinker* arose out of the K–12 context, it does not establish the proper framework for analyzing student speech claims in the higher education environment.<sup>241</sup> In *DeJohn*, the court declared that university officials have less leeway than public elementary or high school officials to restrict student speech and held that the following speech code was overbroad and therefore unconstitutional:

[A]ll forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual’s work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.<sup>242</sup>

The Third Circuit held that this policy was unconstitutional because it permitted the punishment of speech that had the “purpose” or motive of causing an intimidating, hostile, or offensive environment even if it does not in fact create a hostile environment.<sup>243</sup> The court explained that the code therefore does not even meet the *Tinker* test, which requires the school to show the speech poses a substantial risk of “actual, material disruption.”<sup>244</sup> In addition, the court criticized the policy for failing to include a requirement that the speech create severe and pervasive hostile educational environment; without such a requirement, the code “provides no shelter for core protected speech.”<sup>245</sup>

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239. *Id.*

240. *Id.*

241. *DeJohn v. Temple Univ.*, 537 F.3d 301, 310–18 (3d Cir. 2008) (“[W]e must point out that there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school.”). The Court goes on to hold that in the university context, any speech restriction must “at least” satisfy the *Tinker* test. *Id.*

242. *Id.* at 305.

243. *Id.*

244. *Id.* at 317 (“The focus on motive is contrary to *Tinker*’s requirement that speech cannot be prohibited in the absence of a tenable threat of disruption.”).

245. *Id.* at 317–18.

Since *Tinker*, the Court has clawed back on the student speech rights at school. This process began in *Bethel School District No. 403 v. Fraser*, where the Court held that schools could punish students for “plainly offensive” speech.<sup>246</sup> At issue in *Fraser* was a speech with sexual innuendos a student gave at a school assembly.<sup>247</sup> The Court did not rely on *Tinker*’s substantial disruption or invasion of the rights of others justifications; instead, the decision appeared to give schools authority to restrict speech in order to promote “socially appropriate behavior.”<sup>248</sup> The Court emphasized the importance of deferring to public schools’ “basic educational mission”<sup>249</sup> to “[inculcate] fundamental values necessary to the maintenance of a democratic political system.”<sup>250</sup> Subsequent Court opinions make clear that schools can punish speech at school that would be fully protected if made outside of school.<sup>251</sup>

It appears quite clear that *Fraser* itself would have come out differently if a public university student had made the speech at issue. College and university students do not need to be sheltered from “bad words” or sexually suggestive language. That said, *Fraser*’s emphasis on affording K–12 schools leeway to restrict speech in order to promote their “basic educational mission” does have possible resonance in the higher education setting.

## 2. *Hazelwood* and the Government Speech Doctrine

In *Hazelwood School District v. Kuhlmeier*, the Court gave schools the authority to restrict student expression in any school-sponsored forum—including “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school” as long as the school’s actions are “reasonably related to legitimate pedagogical concerns.”<sup>252</sup> One reason the Court gave for giving schools such broad authority was that high school students are not emotionally mature and likely to be inappropriately influenced by speech on controversial issues that they believe the

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246. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

247. *Id.*

248. *Id.* at 681.

249. *Id.* at 685.

250. *Id.* at 681.

251. See Papandrea, *supra* note 226.

252. 484 U.S. 260, 271–73 (1988).

school endorses.<sup>253</sup> Echoing *Fraser*, the Court once again stated that federal courts should defer to the decisions of school administrators to restrict speech that is inconsistent with its basic educational mission.<sup>254</sup>

*Hazelwood* specifically left open the question “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”<sup>255</sup> The Supreme Court has cited *Hazelwood* in a handful of higher education decisions,<sup>256</sup> and lower courts have frequently held that *Hazelwood* should apply in that context as well, especially in cases involving curriculum decisions.<sup>257</sup> Courts explain that the reasoning of *Hazelwood* is equally applicable to the university setting because universities have traditionally exercised control over speech that occurs as part of the curriculum, and this speech clearly bears the “imprimatur” of the university.<sup>258</sup> In addition, courts have reasoned that it is appropriate to give the substantial deference to curricular decisions that *Hazelwood* mandates because schools plainly must be able to exercise all sorts of control over the curriculum in order to teach students effectively; thus, viewpoint-based decisions are inevitable.<sup>259</sup> These courts contend that *Tinker*’s substantial disruption standard would not be sufficient to protect the educational process.<sup>260</sup>

Even in the context of curriculum decisions, however, not all courts—and certainly not all judges—have agreed *Hazelwood* should apply. In one particularly significant dissent,

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253. *Id.* at 272.

254. *Id.* at 266–67.

255. *Id.* at 273 n.7.

256. *See, e.g.*, *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 685 (2010) (citing *Hazelwood* to support argument for deference); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (citing *Hazelwood* in context of explaining that different legal principles would apply in a case involving the university’s own speech).

257. *See, e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (holding *Hazelwood* established appropriate standard for evaluating challenge to acting class requirement that student speak offensive words in script); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) (applying *Hazelwood* in case involving master’s degree thesis); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (applying *Hazelwood* in case involving challenge to university restrictions on professor’s classroom speech).

258. *See Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc) (applying *Hazelwood* to college newspaper funded by school); *Axson-Flynn*, 356 F.3d at 1288–90.

259. *Axson-Flynn*, 356 F.3d at 1290–91.

260. *Id.* at 1290.

Judge Reinhardt of the Ninth Circuit argued that it is inappropriate to apply a standard the Supreme Court established for “emotionally less mature high school students” in cases involving higher education, where “academic freedom and vigorous debate are supposed to flourish.”<sup>261</sup>

Another concern related to the application of *Hazelwood* to the university context is how deferential the standard is usually applied. This deference stands in contrast to other educational contexts where courts have required universities to give more detailed explanations for their refusals to accommodate requests for curricular deviations. In *Wynne v. Tufts University School of Medicine*, for example, the First Circuit affirmed summary judgment for the university when it was sued for refusing to give a student an oral exam instead of a written exam in biochemistry only after it had “demythologized the institutional thought processes leading to its determination.”<sup>262</sup> The court required the institution to demonstrate that the accommodation “would result in either lowering academic standards or requiring substantial program alteration.”<sup>263</sup> Even in the context of the sort of “genuinely academic decision,” the court required the university to show that it had engaged in “reasoned deliberations” before deferring to “the faculty’s professional judgment.”<sup>264</sup> The court demanded this sort of reasoned decision-making even though there was no allegation in that case that the university had asserted pedagogical reasons as a pretext for discrimination.

One open question for many courts is whether the *Hazelwood* test can be used in higher education cases involving extracurricular activities.<sup>265</sup> The Seventh Circuit, in an opinion authored by Judge Easterbrook, has held that the deferential

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261. *Brown*, 308 F.3d at 957 (Reinhardt, J., dissenting).

262. *Wynne v. Tufts Univ. Sch. of Med.*, (*Wynne II*) 976 F.2d 791, 795 (1st Cir. 1992).

263. *Id.* at 793.

264. *Wynne v. Tufts* (*Wynne I*), 932 F.2d 19, 25 (1st Cir. 1991) (en banc). Applying the principles of *Wynne I* and *Wynne II*, a federal district court in Massachusetts rejected a claim that Boston University must allow a student to substitute another course for the foreign language requirement, but only after a diverse committee met seven times to discuss whether a foreign language requirement was important for a liberal arts education. See *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82 (D. Mass. 1998).

265. See *Axson-Flynn*, 356 F.3d at 1289–90 (suggesting it is not appropriate to apply *Hazelwood* outside of curricular context); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (noting that educators have traditionally enjoyed more deference in the curricular than extracurricular setting).

standard of *Hazelwood* makes sense outside of the curricular context: “Extracurricular activities may be outside any public forum . . . without falling outside all university governance. Let us not forget that academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts.”<sup>266</sup> Other courts have disagreed. For example, the Sixth Circuit, sitting en banc, reasoned that *Hazelwood* applied “only marginally” when a public university confiscated the school-funded, student-produced yearbook.<sup>267</sup> In reaching this conclusion, the court noted that the readers of the yearbook were likely to be young adults, not children, and that “[t]he university is a special place for purposes of First Amendment jurisprudence.”<sup>268</sup>

Some lower courts have recognized that *Hazelwood* at least in part is based on giving schools the power to control speech that is reasonably regarded as bearing their “imprimatur.”<sup>269</sup> Although *Hazelwood* predated the development of the government speech doctrine, it appears to be closely related to it. The precise contours of the government speech doctrine are unclear, but the basic idea is that the First Amendment does not apply when the government itself is speaking.

The government speech doctrine allows state actors to speak without the usual First Amendment limitations. In many situations, this doctrine supports our common-sense understandings—for example, the U.S. Surgeon General should not have to issue statements both supporting and condemning the use of tobacco products—but most of its applications have been controversial. The government speech doctrine is reflected in cases like *Garcetti*, where the Court has said that public employers should be able to control whatever employees say in the course of performing their job duties—and in student speech cases like *Hazelwood*, which allow schools to restrict speech that “bears the school’s imprimatur.”<sup>270</sup>

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266. *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc).

267. *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (en banc).

268. *Id.* at 352.

269. *See, e.g., Corlett v. Oakland Univ. Bd. of Trs.*, 958 F. Supp.2d 795, 806 (E.D. Mich. 2013) (“*Hazelwood* applies only where the speech in question reasonably could be construed as representing the school’s own viewpoint.”).

270. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

The Supreme Court has struggled to define when the government speech doctrine is implicated. In its most recent government speech case, *Walker v. Texas*, the Court appeared to set up a three-part test: (1) the relevant history; (2) the amount of government control over speech; and (3) whether a reasonable person would believe the government is speaking.<sup>271</sup> In *Walker* itself, the Court held that Texas's specialty license plates constituted government speech.<sup>272</sup> This decision was remarkable for many reasons, but let it suffice to note that it is hard to believe, as Justice Alito argued in dissent, that a reasonable person would believe that Texas supports the University of Florida sports program or thinks that we all should be golfing instead of driving.<sup>273</sup> *Walker* has potentially huge implications for speech rights of university students.<sup>274</sup>

Although *Walker* appears to set forth a three-part test, the history and control prongs are really in service of the third: whether a reasonable observer would believe the government is speaking. One would hope in the university context, it would be easy enough for students to argue that it is not, in fact, reasonable for anyone to assume that their speech is the speech of the school. As Justice O'Connor once said, "The proposition that schools do not endorse everything they fail to censor is not complicated."<sup>275</sup> But the problem with the reasonable observer inquiry, as with *Hazelwood's* "imprimatur" inquiry, is that it is incredibly elastic. In the context of specialty license plates, it is hard to imagine any reasonable person believing that the 400 different types of specialty license plates represent the State of Texas. Nevertheless, relying in part on the answers to the history and control inquiry, the Court concluded that a reasonable person might in fact reach that conclusion. After all, a reasonable person who does not understand the government's obligations under the public forum doctrine might erroneously assume that the government endorses any speech that appears on its property.

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271. 135 S. Ct. 2239 (2015).

272. *Id.* at 2253.

273. *Id.* at 2255 (Alito, J., dissenting).

274. For a lengthier discussion of the uncertain implications of *Walker*, see Mary-Rose Papandrea, *The Government Brand*, 110 NW. L. REV. 1195, 1226–34 (2016).

275. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring).

In some lower court student speech cases, courts have concluded that granting a student a degree itself bears the imprimatur of the school. These courts usually recognize that the underlying speech at issue—like a student’s Facebook posts—does not itself bear the imprimatur of the school, but the decision to graduate students despite what they have posted indicates a “certification” that these students are suitable to enter the profession.<sup>276</sup>

### 3. *Morse v. Frederick*

One more K–12 case bears mention: *Morse v. Frederick*. In that case, the Court held that public schools could restrict speech that is reasonably interpreted to promote drug use.<sup>277</sup> Although the Court emphasized the “special characteristics of the school environment” that limit student speech rights, the Court rejected arguments that the First Amendment permits schools to restrict any speech that they might determine is offensive to the school’s educational mission.<sup>278</sup> At the same time, the Court has made clear that schools are not entitled to restrict speech whenever it interferes with their “educational mission.” The Court expressed concern that such a standard would be too vague and result in the suppression of too much speech because “much political and religious speech might be perceived as offensive to some.”<sup>279</sup>

All of the Court’s K–12 cases involve speech that occurred on school grounds or during a school-sponsored activity. As a result, they give very little guidance to lower courts grappling with the difficult issues arising in digital communications such as e-mails, blogs, and social media.<sup>280</sup> Although most courts recognize the difficulties of applying *Fraser* and *Morse* to speech that does not appear at school,<sup>281</sup> the courts are deeply split about whether and how to apply the Court’s K–12 school speech

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276. For an excellent discussion of these cases, see Emily Gold Waldman, *University Imprimatur on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 393–98 (2013).

277. *Morse v. Frederick*, 551 U.S. 393 (2007).

278. *Id.* at 408.

279. *Id.* at 409.

280. In *Morse*, the Court recognized that the lower courts disagreed about when schools have authority to restrict speech outside of school. *See id.* at 401 (“There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . . but not on these facts.”).

281. Papandrea, *supra* note 226, at 1069–70.

cases in this context.<sup>282</sup> Accordingly, even if these cases were applicable to the higher education setting they do not answer the question of how much power public schools should have to interfere with their students' "off campus" speech.

#### 4. Problems with Applying K–12 Cases to Higher Education

There are some very good reasons to doubt whether any of the K–12 cases should apply in the higher education context.

Primary and secondary education is significantly different from higher education. The students in K–12 are (for the most part) minors, while students in higher education are (for the most part) adults. While there are some unresolved questions regarding the First Amendment rights of minors even outside of the First Amendment context,<sup>283</sup> there is no question that university students enjoy the same full First Amendment rights as other adults. Although divide between "childhood" and "adulthood" is somewhat randomly set at eighteen for many (but not all) legal purposes, and recent scientific evidence suggests the development of the human brain continues through the mid-20s, the fact remains that in our society, individuals over eighteen are indeed generally recognized to be fully developed individuals. At the very least, people who are eighteen have the right to vote, and if nothing else, the right to engage in free speech—and the duty to endure offensive speech—should accompany that right. That some high school

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282. *Id.* at 1056–69. For more recent decisions, see, for example, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 389–96 (5th Cir. 2015) (holding that the school could punish a student for speech on his social media page because it was directed to the school, and school officials thought the speech was threatening, harassing, and intimidating); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2012) (holding that a school violated the First Amendment when it suspended a student who had created a fake online profile mocking the principal); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 570–75 (4th Cir. 2011) (holding that the First Amendment permitted a school to punish one of its students for creating a MySpace page mocking another student); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216–19 (3d Cir. 2011) (holding that a school violated the First Amendment by disciplining a student who created a fake online profile of the principal on her home computer).

283. The Court has held that the First Amendment permits some restrictions on the speech children receive. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968). The Court has never directly held that children have more limited rights to speak, but some argue that because children are subject to the authority of their parents and do not possess the right to vote, their right to speak is not co-extensive with adults. For more discussion of this argument, see Papandrea, *supra* note 226.

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students are adults and some university students are minors does not necessarily argue in favor of reducing the speech rights of university students; it could just as easily argue in favor of recognizing more robust speech rights of high school students.

One reason some give for affording even K–12 students robust First Amendment rights at school is that primary and secondary school education is compulsory in every State, and the only choices students and families have to avoid schools with speech restrictions with which they disagree is private or parochial school, or home schooling. Students attending public universities often face similar constraints in where they attend school. Public universities cost far less than comparable private universities, particularly for in-state students, and transferring from one university to another involves tremendous costs, both financial and otherwise. Furthermore, it is hardly justifiable to tell a university student that he or she does not *have* to go to college or graduate school. At the same time, we do not allow people to argue that speech on their local streets and sidewalks should be restricted because it is difficult to move to another city; it is not entirely clear why the analysis should be any different in the university setting. In most instances, the speech is not directed to any particular students, and students who find the speech offensive are not a captive audience.

Those who argue in favor of speech restrictions argue that universities, or at least parts of a university, are “home” for the students. Indeed, many universities are residential, providing housing for some of their students, and at many, students are required to live in campus housing for some period of time. This means that students do not just spend a portion of their day on campus; they eat, drink, and sleep on campus. This tension between protecting a vigorous marketplace of ideas and creating a comfortable “home” for students was dramatically on display in a controversy at Yale over Halloween costumes. A group of university administrators signed a letter urging students to be culturally sensitive when selecting their Halloween costumes.<sup>284</sup> A Yale instructor was who was also the “master” of Silliman College—one of the residential colleges at Yale—criticized the wisdom of this admonition and faced student attacks. In a moment captured on video, a student confronted the master in the

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284. E-mail from the Intercultural Affairs Comm., Found. for Individual Rights in Educ. (FIRE) to Yale Students (Oct. 27, 2015), <https://www.thefire.org/email-from-intercultural-affairs>.

residential college courtyard and yelled that her job was “to create a place of comfort and home” for the students and not about creating “an intellectual space.”<sup>285</sup> The instructor ultimately resigned from Yale.<sup>286</sup>

These arguments about the university as a “home,” however, point just as readily, and perhaps even more strongly, in favor of protecting the rights of the speakers. At least in the K–12 context, students (theoretically) retain their full First Amendment rights when they go home. Even the lower courts that have upheld school punishment of off-campus K–12 speech have done so after finding some nexus with the school itself. Students residing on college campuses cannot retreat to their “homes” to exercise their full First Amendment rights.

Another reason given for affording K–12 students reduced First Amendment protections at school is because the schools are acting *in loco parentis*. The Supreme Court itself has given mixed messages on this rationale; it has rejected it in the speech context, but it has embraced it in the Fourth Amendment context.<sup>287</sup> Whatever the merits of this argument in the K–12 context, it has no merit in the college and university context. Interestingly, it is true that historically it was commonly understood that higher education institutions did have the same rights and responsibilities as the parents of their students, but ever since the 1960s, when universities tried to punish students for participating in a civil rights movement, this theory has lost traction.<sup>288</sup> In addition, the doctrine was out of place as sprawling research universities became more prevalent, and students were no longer under close supervision.<sup>289</sup> It

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285. Conor Friedersdorf, *The New Intolerance of Student Activism*, THE ATLANTIC (Nov. 9, 2015), <http://www.theatlantic.com/politics/archive/2015/11/the-new-intolerance-of-student-activism-at-yale/414810>. Some commentators have agreed with this position. See, e.g., Glenda Elizabeth Gilmore, *At Yale, the Issue Is Not Free Speech but Judgment*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/13/opinion/at-yale-the-issue-is-not-free-speech-but-judgment.html>.

286. Anemona Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, N.Y. TIMES (Dec. 7, 2015), <http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html>.

287. Papandrea, *supra* note 226.

288. Tracey, *supra* note 188 (tracing the doctrine of *in loco parentis*); Joseph Storch, *In Loco Parentis, Post-Juicy Campus*, INSIDE HIGHER ED (Sept. 17, 2009), <https://www.insidehighered.com/views/2009/09/17/loco-parentis-post-juicy-campus>.

289. Tracey, *supra* note 188, at 625 (noting that with changes in the university, “the doctrine of *in loco parentis* no longer fit the real world of higher

is generally agreed that colleges and universities no longer have a custodial relationship with their students; it is purely educational.<sup>290</sup>

Although the wholesale application of the Court's K-12 jurisprudence would make little sense, one aspect of these cases would. In *Morse*, the Court sharply rejected the school's argument that it should be entitled to restrict speech whenever it interfered with the "mission" of the school. The Court was concerned that schools would readily engage in viewpoint-based discrimination against disfavored messages in the light of protecting its mission, and thereby eviscerate meaningful First Amendment protection for students. It is not clear why universities would be given more deference to restrict speech in keeping with their self-defined "educational missions" than local primary and secondary schools.

### C. PUBLIC EMPLOYEE CASES

Some lower courts, particularly in the K-12 context, have relied on the Court's government employee cases to determine the speech rights of students. This line of cases is ill-suited for the higher education setting.

Increasingly courts have embraced the public employee framework in the university setting when students are involved in externships or clinical placements.<sup>291</sup> In *Watts v. Florida International University*, for example, a student seeking a degree in social work was fired from his field placement for "inappropriate behavior related to patients, regarding religion" after he told a patient that she could seek a bereavement support group in a church.<sup>292</sup> In *Snyder v. Millersville University*, an education student was no longer permitted to do her student teaching at a local high school when the school administrators discovered photos she had posted on her MySpace webpage of herself dressed as a pirate holding a plastic cup and the caption "Drunken Pirate."<sup>293</sup> In both cases, the students could not re-

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education").

290. See Nicola A. Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 641 (2011).

291. See, e.g., *Vejo v. Portland Pub. Sch.*, No. 3:14-cv-01656-AA, 2016 WL 4708534, at \*8 (D. Or. Sept. 6, 2016) (applying the public employee framework in a case where the student's internship was terminated).

292. 495 F.3d 1289, 1292 (11th Cir. 2007).

293. No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

ceive their degrees because the field placements were required for graduation. In evaluating their free speech claims, the lower courts assumed the framework for public employees would apply to the students' free speech claims against their universities, as if they had sued their field placement supervisors directly.

The Court's public employment cases, which give government employees broad authority to restrict speech, are based on an assumption that when the government is acting as an employer, it should have the power to restrict speech that interferes with the proper and efficient function of the workplace. This is why the Court has held that speech related to an employee's job duties enjoys absolutely no constitutional protection,<sup>294</sup> and that public employers can punish their employees for any speech that does not relate to a matter of public concern.<sup>295</sup> Although the Court has recognized that employees (like students) do not entirely forfeit their First Amendment rights by taking a job with the government,<sup>296</sup> the protections they enjoy are extraordinarily limited. I have argued elsewhere that this framework is problematic, but regardless, it is a poor fit for evaluating the interests at stake in the higher education setting.

#### D. PROFESSIONAL STANDARDS

An increasingly popular argument for the power of universities to limit their students' speech rights is that the restrictions are consistent with professional standards. These arguments have come into play not just in professional schools (like law and medicine) but also undergraduate programs that prepare students for certain careers, like teaching and even mortuary science.<sup>297</sup>

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294. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (rejecting "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties").

295. *Connick v. Myers*, 461 U.S. 138, 154 (1983) ("Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office.").

296. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) ("[W]e hold that . . . absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

297. *See, e.g., Oyama v. Univ. of Haw.*, 813 F.3d 850, 854–55 (9th Cir. 2015) (applying the professional standard argument to those pursuing teach-

The argument in favor of professionalism standards is that the mission of the schools is to prepare students for a particular profession, and the failure to abide by certain professionalism standards indicates an unsuitability for the profession.

One of the best examples of a case where a professionalism standard was used is *Tatro v. University of Minnesota*, where a mortuary science student suffered significant disciplinary sanctions for making posts on her Facebook page about her experience in anatomy lab.<sup>298</sup> The Supreme Court of Minnesota held that “a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.”<sup>299</sup>

Although the opinion cites the standard for strict scrutiny, its analysis was anything but. The court concluded that the student had violated an anatomy lab course rule providing that “conversational language of cadaver dissection outside the laboratory” should be “respectful and discreet,” but “blogging” about the anatomy lab or the cadaver dissection” was prohibited.<sup>300</sup> “Blogging” included any speech on Facebook or Twitter.<sup>301</sup> It is hard to see how this rule is a narrowly tailored rule. It would cover “the entire broad class of responsible, sensitive, thoroughly professional blog posts” relating to genuine matters of public concern, as well as blog posts that were entirely innocuous.<sup>302</sup> In addition, the court concluded that this rule was “directly related to established professional conduct standards”

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ing licenses); *Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012) (applying the professional standard argument to those pursuing counseling licenses); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875–76 (11th Cir. 2011) (holding the imposition of a remedial plan designed to align a counseling student’s conduct with the ACA Code of Ethics was a “reasonable restriction on [the student’s] speech”); *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005) (en banc) (“When a school regulates speech for which it also pays . . . the appropriate question is whether ‘the actions are reasonably related to legitimate pedagogical concerns.’”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (applying the professional standard argument to actor training programs); *Brown v. Li*, 308 F.3d 939, 947 (9th Cir. 2002); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012) (applying the professional standard argument to mortuary science).

298. *Tatro*, 816 N.W.2d at 512–13.

299. *Id.* at 521.

300. *Id.* at 512.

301. *Id.*

302. R. George Wright, *Standards of Professional Conduct as Limitations on Student Speech*, 11 FIRST AMEND. L. REV. 426, 433 (2013).

only after “[g]iving deference to the curriculum decisions of the University . . . .”<sup>303</sup>

*Tatro* specifically held that neither *Tinker* nor *Hazelwood* provided the relevant legal standard for analysis and remarkably relied on *Morse* and *Fraser* to support its creation of an entirely new “professionalism” standard.<sup>304</sup> The court explained that *Tinker* did not apply because the sanctions were not imposed because the Facebook posts created a substantial disruption on campus or within the mortuary program.<sup>305</sup> *Hazelwood* was inapplicable, too, the court held, because no one would reasonably believe that *Tatro*’s posts were school-sponsored speech; in addition, the test was too permissive for the college setting because it would potentially allow the school to censor speech “to cover values like ‘discipline, courtesy, and respect for authority.’”<sup>306</sup> Tellingly, the court relied on *Morse* and *Fraser* to support its conclusion that First Amendment rights must be considered in light of the “special characteristics of the school environment.”<sup>307</sup> Here, the court concluded, the relevant school environment was a professional school environment, which means the university “is entitled to set and enforce reasonable course standards designed to teach professional norms.”<sup>308</sup>

Although the court apparently thought this professionalism standard offered students more speech protection than the *Hazelwood* test, it is probably a tie at best. Under *Hazelwood*, students can challenge speech restrictions by arguing that the school did not have a legitimate pedagogical concern or that the speech would not be reasonably regarded as bearing the school’s imprimatur. Under a professionalism standard, a student might argue that the professional standards at issue simply do not exist, are themselves unconstitutional, or pretextual.<sup>309</sup>

In these professionalism cases, the lower courts have rejected arguments that schools have less—or no—authority to

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303. *Tatro*, 816 N.W.2d at 522–23.

304. *Id.* at 517–20.

305. *Id.* at 519–20.

306. *Id.* at 518.

307. *Id.* at 520.

308. *Id.*

309. Wright, *supra* note 302, at 429–30 (setting forth the very limited grounds on which a student might challenge a speech restriction justified under a professionalism standard and concluding “it is difficult to imagine a student free speech claim prevailing in *Tatro*-like cases”).

restrict online speech. As noted earlier, lower courts are deeply divided in the K–12 setting about whether and when schools can punish their students' online speech. In the professionalism cases, the courts tend to dodge that issue entirely by reasoning that any speech, no matter where it is published, can demonstrate a failure to comply with professional standards.<sup>310</sup>

These professionalism arguments have an elastic character and threaten to encompass virtually any decision a school might make. In *Axson-Flynn v. Johnson*, an acting student brought a First Amendment claim against the University of Utah after she was punished for refusing to use profanity or take God's name in vain in acting class.<sup>311</sup> The school claimed that these exercises were part of its "methodology for preparing students for careers in professional acting."<sup>312</sup> The school lost its motion for summary judgment because there was evidence in the record suggesting that this "professionalism" justification was pretext for religious discrimination.<sup>313</sup>

In *Rumsfeld v. FAIR*, for example, the AAUP argued in its amicus brief that law schools must be permitted to exclude employees who discriminate because it is against the rules of professional conduct for lawyers to engage in discrimination.<sup>314</sup> In a University of North Carolina School of Law Halloween costume controversy, the law school administration suggested that culturally insensitive costumes were not consistent with professional values.<sup>315</sup> These two examples suggest the potential breadth of a professionalism standard, which would allow a

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310. See, e.g., *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (rejecting a student's First Amendment challenge to a university decision to remove him from the nursing program after he made Facebook posts reflecting his frustrations working with another student).

311. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280–81 (10th Cir. 2004).

312. *Id.* at 1291.

313. *Id.* at 1293.

314. Brief for AAUP as Amicus Curiae Supporting Respondents, *supra* note 214, at \*13.

315. The letter the UNC Law administration drafted was admittedly ambiguous. It may have been making the claim that tampering with posters was not professional conduct. But either way, the appeal to professional standards is notable and disturbing, particularly when the school could have simply asserted a content-neutral policy prohibiting the destruction of student posters. The professional rules of ethics seem to have little relevance to the matter. See Peter Bonilla, *UNC, Halloween, and the 'Professionalism' Threat to the First Amendment*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Oct. 31, 2014), <https://www.thefire.org/unc-halloween-professionalism-threat-first-amendment>.

public university or college to justify all sorts of speech restrictions.

#### IV. LIMITING DEFERENCE TO THE UNIVERSITY

Granting public colleges and universities broad deference to restrict their students' expressive activities is problematic on a number of levels. As one commentator has argued, they are "astonishingly poor guarantors of the First Amendment when hateful or offensive speech is at issue."<sup>316</sup>

At the root of this question is "an impoverished understanding of the unique and complex functions performed by our universities."<sup>317</sup> The university does not possess any special right under the mantle of academic freedom to restrict student speech as it sees fit. Instead, any speech restrictions must be limited, as Peter Byrne has argued, to those "necessary to the functions of higher education" in the pursuit of "truth and the controvertibility of dogma."<sup>318</sup>

Although the similarities between curricular and extracurricular activities may seem arbitrary, it makes perfect sense to give colleges and universities more leeway to control what happens in the classroom than in the dormitories, on the playing fields, and on Facebook. As Justice Stevens argued in his *Widmar* concurrence, universities have to make content-based decisions all the time: "They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written."<sup>319</sup> Applying standard First Amendment doctrine to these decisions would be virtually impossible and inconsistent with the academic enterprise. These sorts of decisions also seem at the core of academic freedom, no matter how that doctrine is defined.

But even with respect to decisions relating to the curriculum, the deference the university receives should not be absolute. Professors should be given wide latitude to restrict classroom speech that is disruptive to the learning environment, as *Tinker* imagined, but this disruption should be actual and not

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316. Juhan, *supra* note 65, at 1595.

317. Byrne, *supra* note 198, at 254.

318. *Id.* at 264–65.

319. *Widmar v. Vincent*, 454 U.S. 263, 278 (Stevens, J., concurring). Justice Stevens also mentioned that schools offering extracurricular activities have to determine "the content of those activities." *Id.*

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merely speculative. Even in the classroom setting, professors may inappropriately prohibit certain points of view or punish students whose views are not in the mainstream.

Permitting schools to rely on professionalism standards to deny students credit or a diploma is very dangerous. First, professionalism standards themselves are hardly free from First Amendment controversy. A recent flood of literature is addressing the constitutionality of such standards.<sup>320</sup> Even putting to one side questions about what level of scrutiny to give such rules, the rules themselves can be vague and independently unenforceable. *Tatro* offers a perfect example of a case where the professional rules mandating “respect” for the dead arguably interferes with the freedom of expression. Such a rule is of dubious constitutionality whether it applies to a student or a practicing mortician. Furthermore, the professionalism standards are vague and subject to abuse. While in some instances the failure to behave professionally at an internship should be grounds for denying credit, a lack of professional speech generally should rarely be grounds for denying a student a diploma. Schools should take care to distinguish, as appropriate, the difference between graduating a student for fulfilling the curricular requirements for a degree and certifying a student for admission to licensure. The two decisions are not equivalent, and they should not be treated as equivalent.

Professors and universities should not be given broad power to restrict speech outside of the classroom setting unless that speech is unprotected speech, as outlined in Part II, or meets the “severe and pervasive” and “objectively offensive” standard for hostile learning environment claims under Title VI or Title IX.

Rather than trying to make the campus as a whole a “safe space” free of offensive speech, public colleges and universities should support affinity groups where students can gain support from those who share their views and background. With this support, these students can gain confidence to enter the larger debates occurring on campus. The “all-comers” policy in *Martinez* undermines how the right of association can contribute to a robust speech environment on campus. To be sure, the right of association is not absolute, and it can give way to anti-

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320. See, e.g., Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1289 (2015) (“The mere fact that the speakers are professionals and the listeners are clients or patients does not extinguish or diminish First Amendment protections or concerns.”).

discrimination laws, particularly when the organization's core identity is not offended by an all-comers policy.<sup>321</sup> But affinity groups, single-sex fraternities and sororities, religious groups and other groups where limits on membership are closely related to the purposes of the organization should not be required to admit members who will undermine the purposes of the association.<sup>322</sup>

Limiting the ability public colleges and universities have to punish or censor speech does not mean that they are powerless to respond when student speech is offensive and undermines the school's core values. Instead, they should not be afraid to condemn that speech and explain why that speech is offensive to the school's values. The school should use the offensive speech as a moment to educate the student body.

One recent example is instructive of the approach to student speech that this Article advocates. Recently at the public law school where I teach, the administration was asked to take action when unknown students crossed out "Black Lives Matter" and wrote "All Lives Matter" on a poster on the school's "Free Speech" bulletin board.<sup>323</sup> Some students called for an investigation into the identity of the defacer and swift punishment. It proved impossible to identify the culprit, but nevertheless the administration, working with students, quickly called a town hall meeting to discuss the incident. At this meeting, the school came together to talk about why marking up the sign was so hurtful to some students. In this forum, the administration heard from African-American students who said they literally fear for their lives when they are driving their cars. Other

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321. *But see* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000) (holding the Boy Scouts were not required to allow a homosexual assistant scoutmaster to be a member of their organization because it went against the organization's core identity).

322. This is not to say that all exclusionary student groups necessarily have a constitutional right to choose their members without regard to discrimination laws. The Jaycees, formerly the United States Junior Chamber of Commerce, is an organization founded to give young men training in business and civic activities. Linda Greenhouse, *Court Says States Can Force Jaycees To Admit Women*, N.Y. TIMES (July 4, 1984), <http://www.nytimes.com/1984/07/04/us/court-says-states-can-force-jaycees-to-admit-women.html>. The Supreme Court held that the Jaycees were required to admit women because they could not demonstrate that excluding women was central to the purposes of the association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 627-28 (1984).

323. This Free Speech Board was apparently created around 2000 as a place for students to express their political views, rather than papering the walls of the law school. The need for such a forum was more obvious in the pre-social media days of the early 2000s than it is today.

students expressed frustration with the Free Speech Board as a medium of communication because it did not foster dialogue among people holding diverse views. By the end of the meeting, it became strikingly clear that the incident on the Free Speech Board was symptomatic of a larger issue at the law school, which was the lack of dialogue on racial justice issues and stratification and isolation of white and black students. The path forward is hardly clear, but what is clear is that censoring students who disagree with the Black Lives Matter movement will not solve the issues facing the law school. Instead, censorship would simply put a band aid over the problem and potentially inflame the hostility of students who are silenced for their own views.

Rather than misusing *Hazelwood* and the government speech doctrine to interfere with the free speech rights of their students, public colleges and universities should use their voices to engage in unmistakably government speech to condemn speech that interferes with the core values and mission of the institution.<sup>324</sup> It is when the institution fails to stand up for its core values and mission that those values and mission are most threatened.

### CONCLUSION

As the President of Brown University Christina Paxson has said, what universities do is “difficult and important” because “we live in a society that often feels more divided and rancorous than ever, fractured along lines of race, ethnicity, income, and ideology.”<sup>325</sup> Public universities and colleges need to recognize that some of their students are suffering, and not only when they are at school. The answer to this pain, however, is not stifling free speech but embracing it. With a continued commitment to the foundational free speech principles and a recognition that our universities are the marketplace of ideas, higher education institutions can feel comfortable rejecting

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324. PEN America recently embraced this same message. See PEN AM., *supra* note 4 (“When a university’s values are breached, its precepts threatened, or its constituents violated in a significant way, it is incumbent on top administrators to speak out.”).

325. Christina Paxson, *Brown University President: A Safe Space for Freedom of Expression*, WASH. POST. (Sept. 5, 2016), [https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-dont-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62\\_story.html](https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-dont-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62_story.html).

calls to punish offensive speech and instead use the occurrence of that speech as a moment to teach and engage with their students. Public colleges and universities are not powerless to address speech that undermines their core mission and values. They can condemn speech that undermines that mission and use the unfortunate occasion of offensive speech as a teaching opportunity.