Michigan Law Review

Volume 116 | Issue 7

2018

University Regulation of Student Speech: In Search of a Unified Mode of Analysis

Patrick Miller
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Education Law Commons, and the First Amendment Commons

Recommended Citation
Patrick Miller, *University Regulation of Student Speech: In Search of a Unified Mode of Analysis*, 116 MICH. L. REV. 1317 (2018).
Available at: https://repository.law.umich.edu/mlr/vol116/iss7/5

https://doi.org/10.36644/mlr.116.7.university

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

University Regulation of Student Speech: In Search of a Unified Mode of Analysis

*Patrick Miller**

Universities are meant to be open marketplaces of ideas. This requires a commitment to both freedom of expression and inclusivity, two values that may conflict. When public universities seek to promote inclusivity by prohibiting or punishing speech that is protected by the First Amendment, courts must intervene to vindicate students' rights. Currently, courts are split over the appropriate mode of analysis for reviewing public university regulation of student speech. This Note seeks to aid judicial review by clarifying the three existing approaches—public forum analysis, traditional categorical analysis, and a modified version of the Supreme Court's education-specific speech doctrine—and proposes a more precise version of education-specific analysis. This Note proposes that when student speech may not be reasonably attributed to the school, any attempt by the university to regulate the content of student speech must be narrowly tailored to target only exclusionary speech and to protect core moral and political speech.

Table of Contents

Introduction 1318
I. Harassing Speech and the University 1319
II. Judicial Review of University Action 1324
A. *Public Forum Analysis* 1325
1. The Contours of Public Forum Analysis 1325
2. The Virtues and Vices of Public Forum Analysis 1330
B. *Traditional First Amendment Categories* 1332
1. The Contours of Pure Categorical Analysis 1333
2. Courts Relying Solely on Categorical Analysis 1335
3. The Virtues and Vices of Pure Categorical Analysis .. 1336
C. *Education-Specific Analysis* 1337
1. The Contours of Education-Specific Analysis 1338
2. Courts Adopting an Education-Specific Analysis in the University Context 1340
III. A Better Way Forward 1340
Conclusion 1343

* J.D., May 2018, University of Michigan Law School. I am grateful to Jack Bernard for his invaluable guidance and encouragement, as well as Patricia Petrowski and everyone in the Office of the General Counsel for their support. I would also like to thank Katie for her patience, and my parents, Connor, Logan, and the entire staff of the *Michigan Law Review*, with special thanks to Z. Zheng and Philip Hammersley.

Introduction

The year 2017 was a trying time for universities as increasingly hateful demonstrations spread across the country. In an effort to maintain a welcoming and inclusive environment on their campuses, many public universities and colleges employ restrictions on offensive speech.[1] These restrictions include university speech codes and accompanying disciplinary actions. The chilling effects of such policies can have a profound effect on student speech, and many courts have invalidated campus speech codes under the First Amendment.[2] Yet universities continue to develop, modify, and enforce such policies in order to remove speech deemed offensive from campus discourse.[3]

Judicial review of university regulation of offensive student speech is particularly complicated because of the varying modes of First Amendment analysis used by courts. While some courts have adopted a public forum analysis, others use only traditional categorical analysis, and still others use an education-specific approach. Recent scholarship has also highlighted a divergence in opinions about the constitutional boundaries of student speech regulation. While some scholars argue that universities may legally regulate a good deal of speech,[4] others contend that the power of universities to regulate student speech is quite constrained,[5] and still others are unable to come to a conclusion on what the law is with regard to harassing speech.[6]

This Note argues that many university policies regarding offensive and harassing speech unconstitutionally infringe on student speech[7] and thus require careful judicial scrutiny. Such scrutiny is difficult, however, because of the conflict between the competing modes of analysis. In order to simplify and encourage searching judicial review of university speech policies, this Note argues that the Third Circuit's approach—which adapts the Supreme Court's education-specific speech cases[8] to the university setting—should be

---

1. While the freedom of speech is certainly important at private schools, they do not face the same First Amendment restraints, and thus this Note deals only with public universities and colleges.

2. *See infra* Part I.

3. *See id.*

4. *See* Alexander Tsesis, *Campus Speech and Harassment*, 101 Minn. L. Rev. 1863, 1899 (2017).

5. Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 Minn. L. Rev. 1801, 1817–18 (2017).

6. Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 Minn. L. Rev. 1943, 1963–70 (2017).

7. Speech by public university professors and officials may also be protected by the First Amendment, but as public employees, the First Amendment analysis is significantly different from the analysis of restrictions on student speech and is beyond the scope of this Note. *See generally id.* at 1970–84.

8. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

adopted and modified to better reflect First Amendment values and provide clear guidance to judges, university administrators, and students. When courts are reviewing university regulation of student speech, the university action should be invalidated unless it is narrowly tailored to prohibit only exclusionary speech and to protect core moral and political speech. In practice, this means that in order to punish a student for speech, the school would need to show that the speech created a hostile environment or substantially deprived the target of the speech of access to opportunities *and* that it was not an expression of moral or political conviction.[9]

Part I examines the current treatment of harassing and offensive speech on university campuses and concludes that judicial review is necessary because many universities are unconstitutionally restrictive in dealing with offensive speech. Part II evaluates the primary modes of analysis used by courts in evaluating university regulation of offensive student speech. Part III argues that the Third Circuit's approach best protects the First Amendment rights of students and suggests modifications to that approach to better protect speech.

I. Harassing Speech and the University

Speech is given a "transcendent value" in American society,[10] and the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[11] When speech rights are in tension with nonconstitutional interests, the First Amendment gives precedence to speech.[12] In part, this precedence stems from the recognition that speech rights respect individual autonomy, promote the robust debate a democracy requires, and foster a tolerant society.[13] Many of the ideas that Americans take for granted today were once considered dangerous and subversive and were targeted for censorship.[14] The vigorous search for truth requires that all views, especially unpopular views, get a fair hearing.[15] But to say that speech

9. "[M]oral and political discourse" is the "the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209–10 (3d Cir. 2001) (Alito, J.); *see also infra* Part III.

10. Speiser v. Randall, 357 U.S. 513, 526 (1958).

11. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

12. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. Rev. 685, 701–05 (1978).

13. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 535.

14. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 435–36 (1963) ("We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens." (footnotes omitted)).

15. Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it

holds a revered place in American society is not to minimize the harm that may come from allowing some speech that is highly offensive to go unpunished. Defending the right of extremist groups to propagate hateful views will subject some vulnerable groups to offensive speech.[16] Sexist or racist speech may be used to perpetuate the marginalization of some groups.[17] The robust protection of speech inevitably shelters many wrong-headed and hurtful ideas under the umbrella of the First Amendment.

Nevertheless, our constitutional order has elevated free speech to the status of a "transcendent value"[18] that requires "breathing space."[19] Furthermore, censorship is unlikely to solve the problems of hurtful speech. Some scholars argue that "censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship."[20] When hateful speakers face censorship, they may become martyrs and icons to extremist groups, rather than objects of derision.[21] Additionally, censorship is often used *against* marginalized groups, rather than to protect them.[22]

Instead of resorting to censorship, universities should consider every instance of hateful and harmful speech an opportunity to espouse the values of diversity, equity, and inclusion. The University of Michigan recently experienced a rash of anonymous hateful comments written around campus.[23] The resulting outpouring of support for minority students from the administration, various student organizations, and the student body at large has

---

induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

16. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2331–35 (1989).

17. *Id.*

18. Speiser v. Randall, 357 U.S. 513, 526 (1958).

19. *Button*, 371 U.S. at 433.

20. Strossen, *supra* note 13, at 554 (footnote omitted).

21. *Id.* at 559. Looking at the current American political climate, it is not hard to believe that censorship and disinvitations *increase* the popularity of repugnant figures like Milo Yiannopoulos. *See* Leigh Alexander, *Milo Yiannopoulos: Twitter Banning One Man Won't Undo His Poisonous Legacy*, Guardian (July 20, 2016, 2:11 PM), https://www.theguardian.com/technology/2016/jul/20/milo-yiannopoulos-twitter-ban-leslie-jones-bad-idea [https://perma.cc/K3WG-FQF9]; Erin Gloria Ryan, *Right-Wing 'Free Speech' Weeks Are Just Free Publicity for Milo Yiannopoulos*, Daily Beast (Sept. 24, 2017, 12:00 AM), http://www.thedailybeast.com/right-wing-free-speech-weeks-are-just-free-publicity-for-milo-yiannopoulos [https://perma.cc/7A7P-J6FM]; Jack Smith IV, *By Banning Milo Yiannopoulos, Twitter Just Created a Martyr for White Nationalism*, Mic (July 20, 2016), https://mic.com/articles/149305/milo-yiannopoulos-twitter-ban-martyr-for-white-nationalism [https://perma.cc/YE75-XPK5].

22. Strossen, *supra* note 13, at 556.

23. These incidents ranged from racist remarks on various sites around campus to slurs written on doors in residence halls. The administration has not been able to identify those responsible for the various messages. Andrew Hiyama, *Battle Lines: Unresolved Responses to Racist Incidents Online*, Mich. Daily (Sept. 24, 2017, 7:12 PM), https://www.michigandaily.com/section/administration/what-do-white-supremacy-battles-and-offline [https://perma.cc/R6LN-G6AP].

dwarfed the initial slurs and demonstrated the inclusive and welcoming nature of the university.[24] This is not to say that hateful comments should be encouraged because they can potentially produce a greater net balance of positive speech but that the energy of administrators is better spent on counterspeech than searching out and punishing the perpetrators.[25]

Doubtless, many university administrators are stalwart defenders of the First Amendment and the freedom of speech.[26] But modern universities are complex entities serving diverse groups of stakeholders with various competing interests. Consider, for example, the broad array of university functions identified by R. George Wright:

> [L]earning and research; anti-discrimination; providing educational opportunities and making societal contributions; advancement of knowledge; freedom of expression and communication; promoting economic growth; disinterested scholarship; serving as societal critic; moral cultivation of the students; professional training; preparation for competent democratic citizenship; reflecting or determining status and opportunity hierarchies or promoting social mobility; and fundamental personal transformation.[27]

Even a cursory glance at this list reveals competing objectives. Any attempts at moral cultivation, teaching professionalism, or combatting discrimination will require some type of response to offensive and inappropriate expression and communication. Yet preparing students for the realities of professional life and responsible citizenship requires equipping them to handle uncomfortable and controversial ideas.[28] This does not mean that American society *should* be characterized by pervasive offensive or hateful rhetoric, only that

24. Colin Beresford, *Students, Community Members Gather at University Rock to Paint over Racist Messages*, MICH. DAILY (Sept. 4, 2017, 2:11 PM), https://www.michigandaily.com/section/campus-life/students-community-members-gather-university-rock-paint-over-racist-messages [https://perma.cc/9A63-73VT]; Colin Beresford, *Student Kneels in the Diag for 24 Hour Protest of Anti-Black Racism*, MICH. DAILY (Sept. 25, 2017, 1:20 PM), https://www.michigandaily.com/section/campus-life/student-kneels-m-diag-joining-take-knee-protest [https://perma.cc/AVL4-47BQ].

25. Administrators condemning (but not punishing) hurtful speech is especially desirable in circumstances where it can both support the targeted student(s) and educate the offending student (e.g. about the requirements of professionalism in the workplace). In other circumstances, calling attention to the speech may only serve to encourage the offenders and give the speech further publicity (such as in the case of anonymous posters or chalk messages).

26. *E.g.*, Beth McMurtrie, *With a Strong Stance on Safe Spaces, U. of Chicago Sends a Mixed Message to Students*, CHRON. HIGHER EDUC. (Aug. 26, 2016), http://www.chronicle.com/article/With-a-Strong-Stance-on-Safe/237601 [https://perma.cc/A6L8-B64Q].

27. R. George Wright, *Campus Speech and the Functions of the University*, 43 J.C. & U.L. 1, 10–11 (2017) (footnotes omitted). Professor Wright compiled this list of functions from the statements of several prominent university presidents and historical figures. *Id.*

28. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/ [https://perma.cc/58SS-RXZZ] (arguing that by utilizing the techniques developed by cognitive behavioral therapy, students can increase their resilience and mental health). This is not to suggest that all students are equally subjected to insults and indignities on campus. Certainly some groups are more vulnerable and more often targeted by hate speech. Lukianoff and Haidt do not minimize the harmfulness of hateful speech, rather

some measure of offensive speech is inevitable, and universities are well positioned to help students develop resilience by teaching them healthy ways to cope with hateful and offensive speech.[29]

Caught between the desire to promote free expression and the desire to foster an inclusive and welcoming environment, university administrators may miscalculate and unconstitutionally regulate offensive student speech.[30] Mistakes are understandable—the law on campus speech regulation is fraught with ambiguity and uncertainty[31]—but the nature of the disciplinary process in universities makes overregulating speech costly. In the realm of the First Amendment, clarity is key, and mistakes may chill future expression.

A chilling effect on speech can be traced to uncertainty.[32] When students are confused about what the First Amendment protects, they may refrain from making comments that are actually protected for fear that they are not.[33] Even when students have a clear understanding of their rights, if they doubt the ability of enforcement proceedings to accurately sort protected from unprotected expression, they may refrain from voicing controversial ideas.[34] And even when checks in the enforcement process correctly exonerate a student whose speech was protected, the investigation and adjudication proceedings themselves may chill future speech—students may fear incurring the social and financial costs of potential disciplinary proceedings.[35]

University speech codes do not alleviate these problems because they are often ambiguous, and even those that are reasonably clear typically achieve

they argue that teaching students to respond to speech in a healthy way more effectively protects students' mental health than trying to put an end to hateful speech. *Id.*

29. *Id.*

30. *See, e.g.*, Eugene Volokh, *No, It's Not Constitutional for the University of Oklahoma to Expel Students for Racist Speech [UPDATED in Light of the 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 [https://perma.cc/7UC3-YQV7]; Papandrea, *supra* note 5, at 1804–06 (citing numerous recent examples of universities punishing students for offensive expression the author argues ought to have been protected).

31. *See infra* Part II.

32. When scholars refer to speech being "chilled," they are referring to the tendency of speakers to abstain from socially valuable, First Amendment protected speech, not unprotected speech. *See* Schauer, *supra* note 12, at 689–701.

33. *Id.*

34. *See id.*

35. *See id.*

that clarity by prohibiting far more speech than is constitutionally permissible.[36] While courts have invalidated many of the challenged speech codes,[37] the doctrine of standing[38] applied in some circuits prevents pre-enforcement challenges, allowing the codes to continue chilling speech until a student is disciplined and brings suit.[39] Consequently, campus speech codes continue to proliferate and often contain unconstitutional restrictions.[40]

Campus disciplinary proceedings are also fraught with uncertainties. Traditional First Amendment categories of unprotected speech have typically been built on the assumption that courts play a central role in this determination. Restrictions on speech were primarily enforced through either civil lawsuits (for example, defamation)[41] or criminal charges (for example, fighting words or obscenity).[42] In both cases, the courts are well positioned to protect the First Amendment rights of the accused, and the doctrine evolved around the realities of enforcement through some form of litigation.[43]

The educational setting is quite different,[44] and even within that broad category there are significant differences between K-12 institutions and institutions of higher education.[45] The primary mechanism of enforcement on campuses is not criminal or civil law but rather internal school or university processes, which have less stringent due process protections.[46] Indeed, many

36. Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 Geo. J.L. & Pub. Pol'y 481, 484–85, 494–96 (2009) (citing examples of infirm codes, such as an Ohio State University housing policy prohibiting "joke[s] about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc.").

37. *Id.*; *see also* McCauley v. Univ. of the V.I., 618 F.3d 232, 243–47 (3d Cir. 2010); DeJohn v. Temple Univ., 537 F.3d 301, 317–18 (3d Cir. 2008); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995); Roberts v. Haragan, 346 F. Supp. 2d 853, 858–59 (N.D. Tex. 2004); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1172 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

38. Standing is the right of a person to bring suit in court and seek redress, and often requires proof of injury-in-fact. *See* Jennifer L. Bruneau, Comment, *Injury-in-Fact in Chilling Effect Challenges to Public University Speech Codes*, 64 Cath. U. L. Rev. 975, 979–82 (2015).

39. *See id.* at 991–95.

40. Majeed, *supra* note 36, at 484–94.

41. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

42. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

43. For example, in the defamation context, the Supreme Court considered the costs of defending a civil suit in formulating a heavily speech-protective standard, and thus there is no need for lower courts to loosen ordinary summary judgment standards to protect defendants. *See Sullivan*, 376 U.S. at 279; Schauer, *supra* note 12, at 710–12.

44. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

45. *See* Papandrea, *supra* note 5, at 1849–51.

46. *See generally* Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 Penn St. L. Rev. 1001, 1011–12 (2016) (noting that accused students may be severely limited in their ability to obtain counsel, cross-examine witnesses, and admit exculpatory evidence).

universities struggle to provide adequate due process in disciplinary proceedings.[47] When it comes to speech, a single erroneous punishment of protected speech can have a significant chilling effect.[48]

Furthermore, stringent judicial review is necessary because many universities have shown reluctance to comply with judicial decisions regarding speech codes.[49] Although university speech codes are routinely invalidated in court, schools continue to promulgate policies that infringe on students' rights.[50] Some universities have promulgated highly restrictive speech codes even in the absence of hateful speech.[51] And some universities have not shied away from enforcing codes that run afoul of the First Amendment.[52] In the face of such stubbornness, courts must take an active role in reviewing university speech decisions.

II. Judicial Review of University Action

When universities restrict constitutionally protected speech, judicial review is important to vindicate the rights of university students. Unfortunately, courts differ in their analysis of university regulation of student speech, leading to confusion for both courts and universities and inconsistent protection for students. This Part identifies three competing modes of analysis used by lower courts in addressing regulation of offensive student speech. The three modes of analysis identified here are not mutually exclusive—courts often will blend various styles of analysis,[53] adding to the confusion. This confusion creates inconsistency in the courts and leaves university administrators without clear guidance. Section II.A examines public forum analysis and argues that it is ill-suited to address offensive speech on campus. Section II.B examines the use of traditional First Amendment categories to address student speech and concludes that this type of analysis is insufficient when used in isolation. Section II.C explains the

47. *See, e.g.*, Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 Ariz. St. L.J. 637, 654–61, 692–96 (2016).

48. *See* Majeed, *supra* note 36, at 500.

49. *See* Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 Law & Soc'y Rev. 345, 370–71 (2001); Majeed, *supra* note 36, at 484.

50. *See* Majeed, *supra* note 36, at 488–94.

51. *See* Gould, *supra* note 49, at 381–82 (describing two schools who implemented new speech codes in the 1990s, despite admissions by the officials promulgating the policies that the schools were not experiencing issues with harassment).

52. *See, e.g.*, Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007) (enjoining continued enforcement of the university speech code's "civility" requirement).

53. *E.g.*, Murakowski v. Univ. of Del., 575 F. Supp. 2d 571, 587 (D. Del. 2008) (deploying all three forms of analysis in an eclectic opinion). Furthermore, some courts consider the education-specific decisions to be merely a specialized means of forum analysis, such that a school campus is merely another type of forum with its own level of scrutiny. *See, e.g.*, Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 288–91 (E.D. Pa. 1991).

Third Circuit's analysis, which adapts the Supreme Court's education-specific First Amendment decisions to the university context.

A. *Public Forum Analysis*

Although public forum analysis is an important First Amendment doctrine,[54] it has been criticized by many courts and commentators.[55] In the context of regulating student speech, the doctrine has spawned considerable confusion in the lower courts, not only about *whether* it should be applied to educational institutions[56] but also about *how* it should be applied.[57]

1. The Contours of Public Forum Analysis

Public forum analysis is typically deployed when the government attempts to regulate speech on government property.[58] The basic analysis is straightforward: the court categorizes the public property as a particular type of forum, classifies the regulation, and then applies the relevant standard of review.[59] The classification of a forum and the type of regulation determine the level of scrutiny the court applies to the regulations.[60] Although courts generally follow these basic steps for public forum analysis, courts vary in the categories they recognize and the standards they apply.[61]

---

54. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

55. *E.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693–94 (1992) (Kennedy, J., concurring in the judgment) ("Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat. I believe that the Court's public forum analysis in these cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment."); United States v. Kokinda, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand." (citation omitted)); Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 Willamette L. Rev. 647, 660–76 (2010); David S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L. Rev. 143, 200–03 (1992); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1266 (1984); David A. Thomas, *Whither the Public Forum Doctrine: Has This Creature of the Courts Outlived Its Usefulness?*, 44 Real Prop. Tr. & Est. L.J. 637 (2010).

56. *See, e.g.*, *Slotterback*, 766 F. Supp. at 288–91 (declining to apply public forum analysis in the public school).

57. *Compare* Armstrong v. James Madison Univ., No. 5:16-cv-00053, 2017 WL 2390234, at *11 (W.D. Va. Feb. 23, 2017) (finding that speech occurring in nonpublic forum is unprotected) *adopted by* No. 5:16-cv-53, 2017 WL 2399338 (W.D. Va. June 1, 2017), *with* Burnham v. Ianni, 119 F.3d 668, 675 (8th Cir. 1997) (finding that speech is not automatically exempt from First Amendment protection merely because it occurs in a nonpublic forum).

58. Caplan, *supra* note 55, at 649–52; Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 Pepp. L. Rev. 273, 292 (2009).

59. *See, e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853, 858–59 (N.D. Tex. 2004).

60. *Id.*

61. Caplan, *supra* note 55, at 652–54.

The first step of the analysis, identifying the type of forum, has proven particularly difficult. The Supreme Court has not provided helpful direction in this area and has even used the same label to describe two very different categories of forums.[62] As a result, courts and commentators are divided even on the number of existing categories. Some recognize only two,[63] others three,[64] and others four.[65] Furthermore, courts are inconsistent in their forum labeling, which can lead other courts to conflate the categories.[66] Typically, regulations on speech in traditional public forums and designated public forums are subject to strict scrutiny.[67] It is difficult to pin down a precise standard of review for regulations on limited public forums, but at the very least they must be reasonable.[68] Regulations in nonpublic forums receive a lenient standard of review that only requires they be "reasonable."[69]

In the university context, the classification of a location is often quite difficult. The Supreme Court has noted, "[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[70] Yet, the Court went on, "A university differs in significant respects from public forums . . . . A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[71] These statements have led courts to differing conclusions about the classification of campus property.[72]

Identifying the type of regulation is also fraught with uncertainty. Regulations are classified based on whether or not they discriminate based on

62. *Id.* at 654 (noting the Supreme Court's use of the label "limited public forum" to describe both locations subject to public forum standards and locations subject to nonpublic forum standards).

63. *E.g.*, *id.* (advocating two types of forums: public and nonpublic).

64. *E.g.*, *Roberts*, 346 F. Supp. 2d at 859 (deploying three types of forums: the traditional public forum, the designated public forum, and the nonpublic forum).

65. *E.g.*, Amar & Brownstein, *supra* note 6, at 1945. Amar and Brownstein identify four types of forums: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum. *Id.* Elsewhere, Brownstein advocates a fifth category: the nonforum. Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. Davis L. Rev. 717, 721–22 (2009).

66. Amar & Brownstein, *supra* note 6, at 1945; Caplan, *supra* note 55, at 653–54; *see also* Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Nat. Res., 584 F.3d 719, 723 (7th Cir. 2009) (Posner, J.).

67. Amar & Brownstein, *supra* note 6, at 1945 (explaining that strict scrutiny is applied in traditional public forums and designated public forums for viewpoint-discriminatory and content-discriminatory regulations).

68. *Id.*

69. *Id.* (explaining that this lenient standard of review is applied in nonpublic forums to both content-discriminatory and content-neutral regulations).

70. Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981).

71. *Id.* at 268 n.5.

72. Amar & Brownstein, *supra* note 6, at 1965 n.96 (detailing the conflicting decisions reached by various courts).

content and viewpoint.[73] The distinctions are important—often determining whether a regulation is given strict scrutiny or rational basis review[74]—but drawing lines between the categories is difficult,[75] and even the Supreme Court has struggled to articulate a clear way to classify regulations.[76] This fluidity, especially when regulations purport to target only the "secondary effects" of speech, has led to scholarly fears that determined judges can easily "eviscerate" First Amendment freedoms.[77] In the context of speech that makes others uncomfortable, it is often difficult to determine whether or not a prohibition is content or viewpoint neutral, and even some scholars sympathetic to regulation admit that regulations addressing harassing speech are often content-discriminatory.[78]

Moving beyond the classification question, courts vary in the leeway they give to public universities to regulate speech within a given forum. In *O'Brien v. Welty* the Ninth Circuit deployed public forum analysis to determine whether the First Amendment barred a university's disciplinary actions against a student.[79] The case involved facial and as-applied challenges to Fresno State's campus regulations on harassment and intimidation.[80] The student challenging the regulations had been disciplined for videotaping his confrontations with two professors in their offices while their doors were open.[81] He alleged that he was calm and respectful, though assertive, and the district court dismissed for failure to state a claim, finding that the professors could have reasonably felt intimidated by the behavior within the meaning of the university regulations.[82] The court rejected the facial claim after a

73. *See id.* at 1945. A regulation may be content neutral, content-discriminatory and viewpoint neutral, or viewpoint-discriminatory. *Id.*

74. *Id.*

75. Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. Rev. 595, 602–08 (2003).

76. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830–31 (1995) ("As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one." (citation omitted)).

77. David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 Washburn L.J. 55, 60–61 (1997). The "secondary effects" doctrine has grown out of the Supreme Court's decisions upholding regulations on adult theaters. *Id.* at 61. By claiming to be regulating only the negative effects of speech, rather than its content, a clever jurist can characterize a regulation as content neutral, even though those effects stem directly from the content or viewpoint of the speech. *See id.* at 60–61.

78. Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 Iowa L. Rev. 1427, 1463–65 (2017) ("We must, I think, abandon the fiction that laws seeking to protect against discomfort and offense are content-neutral—they are not, since whatever their wording, their clear and undeniable purpose and effect is to suppress specific messages because of the discomfort or offense they engender.").

79. 818 F.3d 920, 930–31 (9th Cir. 2016).

80. *O'Brien*, 818 F.3d. at 929.

81. *Id.* at 924–29.

82. *Id.*

sparse analysis in which it determined that the terms "harass" and "intimidate" were precise enough to defeat an overbreadth or vagueness challenge.[83] In assessing the as-applied claim, the court identified the hallway and offices where the conduct occurred as nonpublic forums.[84] Concluding that the school had acted reasonably and without regard to the student's viewpoint in determining that the professors could have felt intimidated by the student's videotaping, the court upheld the disciplinary action as a valid regulation of speech.[85] Under this approach to public forum analysis, a great deal of student speech on campus will occur in limited public or nonpublic forums and thus be subject to a standard of review that is highly deferential to regulations.[86]

The Eighth Circuit has used an analysis that is superficially similar to the Ninth Circuit's analysis but uses a more stringent review. In *Burnham v. Ianni*, the court considered a student's challenge to actions taken by the University of Minnesota–Duluth.[87] Two students had collected and posted pictures on a department bulletin board depicting various faculty members posing with props representative of their research interests.[88] Two professors, an American studies professor and a classical civilizations professor, posed with historical weapons—a .45 pistol, and a Roman short sword, respectively.[89] When another professor was offended by the display, the university, after initially resisting the request, ultimately removed the pictures.[90] The students who had posted them sued.[91] In assessing the First Amendment interests, the Eighth Circuit used public forum analysis but found it unnecessary to determine whether the forum was a limited public forum or a nonpublic forum because, even if the board were a nonpublic forum, the regulation was unreasonable and viewpoint discriminatory.[92] Although the

83. *Id.* at 929–31. The analysis of the facial challenge was minimal—so much so that it is difficult to identify *any* mode of analysis in that portion of the opinion.

84. *Id.* at 931.

85. *Id.* at 931–32. The court went on to find that the plaintiff's First Amendment retaliation claim had been prematurely dismissed because the university's disciplinary action—though perfectly permissible if based on the plaintiff's unprotected actions in the hallway—could have possibly been motivated by separate expressive activity that was protected. *Id.* at 932–35.

86. *See, e.g.*, Armstrong v. James Madison Univ., No. 5:16-cv-00053, 2017 WL 2390234, at *9, *11 (W.D. Va. Feb. 23), *adopted by* No. 5:16-cv-53, 2017 WL 2399338 (W.D. Va. June 1, 2017).

87. 119 F.3d 668, 675 (8th Cir. 1997).

88. *Burnham*, 119 F.3d at 671.

89. *Id.*

90. *Id.* at 671–72.

91. *Id.*

92. *Id.* at 675–76, 675 n.12. Because the board had been created to display information about the history faculty, the court determined that it was unreasonable to suppress that type of information. Additionally, the decision to remove the pictures of the weapons had discriminated against the "view that the study of history necessarily involves a study of military history." *Id.* at 676.

two courts nominally applied the same standard of review, their level of deference to the schools varied.[93]

Courts rarely analyze challenges to university harassment codes using public forum analysis,[94] but at least one court has demonstrated what such an analysis would look like.[95] In *Roberts v. Haragan*, a district court in Texas deployed forum analysis to evaluate Texas Tech University's policies restricting the locations where students may engage in expressive speech and prohibiting "insults, epithets, ridicule, or personal attacks."[96] The court determined that the campus's open areas were essentially traditional public forums, but only for the university's students.[97] When the court turned to the harassment sections of the code, it noted that the code restricted more than the traditional unprotected categories of speech.[98] Consequently, the code was unconstitutionally overbroad because such restrictions were impermissible in the public forum areas on campus.[99] The court's analysis suggests that a university code that is tailored to operate only in nonpublic forums would be able to constitutionally restrict a great deal of speech—particularly in the classroom.[100] The Texas district court's respect for the rights of universities to restrict speech in the classroom stands in sharp contrast with other courts that have declined to apply forum analysis. For example, in *DeJohn v. Temple University*, the Third Circuit did not engage in any forum analysis in striking down provisions of Temple's speech code.[101] The court in that case seemed most concerned with the regulation of speech in the classroom,[102] arguably a forum where the university should receive considerable deference.[103] Likewise, *Doe v. University of Michigan* presented an

93. While it is possible that the student disciplined in *O'Brien* was understating his level of belligerence in his complaint, the procedural posture of the case required the court to credit his assurances that he was calm and respectful while videotaping his professors. *See* O'Brien v. Welty, 818 F.3d 920, 931 (9th Cir. 2016). Thus, the student conduct in both *O'Brien* and *Burnham* was relatively benign, and the difference in outcomes can be attributed to the stringency of the judicial standard of review, rather than factual differences.

94. The reasons for this are not entirely clear. Even some courts that use forum analysis for challenges to disciplinary action will not apply that analysis to challenges to speech codes. For example, the Ninth Circuit did not begin its forum analysis in *O'Brien* until after it had disposed of the facial challenge to the speech code. *Id.* at 930.

95. *See* Roberts v. Haragan, 346 F. Supp. 2d 853, 870–73 (N.D. Tex. 2004).

96. *Id.* at 870.

97. *Id.* at 858–64.

98. *Id.* at 872.

99. *Id.* at 871–73.

100. *Id.* at 872.

101. 537 F.3d 301 (3d Cir. 2008).

102. *See id.* at 315 ("It is well recognized that '[t]he college classroom with its surrounding environs is peculiarly the "marketplace of ideas [,]"' and '[t]he First Amendment guarantees wide freedom in matters of adult public discourse.' Discussion by adult students in a college classroom should not be restricted." (alteration in original) (citations omitted) (first quoting Healy v. James, 408 U.S. 169 (1972); then quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986))).

103. *See Roberts*, 346 F. Supp. 2d at 872; Brownstein, *supra* note 65, at 775–76.

opportunity to apply forum analysis to a university speech code.[104] The court was particularly disturbed by three instances where students faced discipline for comments made in the classroom setting, and it strongly suggested that classroom speech enjoyed heightened protection.[105] Had these two courts employed forum analysis, the classroom would most likely have been designated a nonpublic forum.[106] Finally, a district court in North Carolina recently used forum analysis in dismissing a First Amendment challenge to a university's disciplinary action for allegations of verbal sexual harassment.[107]

2. The Virtues and Vices of Public Forum Analysis

Public forum doctrine is particularly useful for determining who has the right to speak in any given location on a public university campus.[108] Universities regularly reserve certain forums for use by certain groups, and public forum doctrine helps courts to analyze those decisions and identify impermissible speech-related discrimination.[109] Setting up specific forums for certain kinds of speech facilitates debate on campus, and courts should

104. 721 F. Supp. 852, 865–66 (E.D. Mich. 1989). The challenge was brought by a psychology student who had not been sanctioned under the code but feared he might be. *Id.* at 858. In assessing the code, the court examined the language of the code, the university's compliance guide, and the enforcement history. *Doe v. Univ. of Mich.*, 721 F. Supp. at 859–61.

105. *See id.* at 865–66.

106. *See, e.g.*, Keeton v. Anderson-Wiley, 664 F.3d 865, 872 (11th Cir. 2011) (finding a university academic program to be a nonpublic forum where a university restricted speech that did not comply with professional standards); Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004) ("We thus find that the ATP's classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there 'in any reasonable manner.'" (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988))).

107. Armstrong v. James Madison Univ., No. 5:16-cv-00053, 2017 WL 2390234, at *12 (W.D. Va. Feb. 23), *adopted by* No. 5:16-cv-53, 2017 WL 2399338 (W.D. Va. June 1, 2017). An older man with an alumnus gym membership made unwelcome comments about romantically pursuing the student working the front desk. *Id.* at *1. The court dismissed the plaintiff's First Amendment retaliation claim, finding his speech unprotected because the campus gym was not a traditional or designated public forum, and the restrictions were not based on any controversial views espoused by the plaintiff. *Id.* at *12.

108. *See* Stone, *supra* note 58, at 292–94.

109. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 (2010) ("[T]he Court has permitted restrictions on access to a limited public forum, like the [Registered Student Organization] program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral[.]"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."); ACLU v. Mote, 423 F.3d 438, 442–46 (4th Cir. 2005) (finding that a public university's outdoor areas constitute a limited public forum, where the speech rights of the campus community and of outside groups can differ).

continue to apply public forum analysis to regulations prohibiting certain speakers from accessing certain forums.[110]

Furthermore, taking the context of a statement into account in regulating speech is intuitively sensible, and public forum doctrine attempts to do just that by focusing heavily on the location where the speech occurs.[111] Speech that may be unproblematic in a dormitory could be inflammatory in a more public area.[112] Similarly, in a public area, students may be able to avoid inflammatory speakers, while in dorms and classrooms they are more of a "captive audience."[113] But certain contexts involve difficult balances of rights. For example, it is certainly understandable that students desire to be free from insults in their residence halls, and yet other students have an interest in speaking their mind in the place they call home.[114] Under public forum analysis, a dormitory may be considered a nonpublic forum where the university would receive deferential rational basis review.[115] But if, as commentators have suggested, some universities are poor guardians of free speech rights, such a deferential standard is troubling.[116]

Public forum doctrine is ill suited for reviewing university regulation when the speaker has an unquestioned right to speak. Uncertainty chills speech, and the application of public forum analysis to college campuses creates "a patchwork quilt of free speech regimes" that is hardly conducive to free expression.[117] It is difficult for judges, much less students and administrators, to articulate the temporal and doctrinal lines between the various types of forums on campus.[118] When the degree of permissible regulation varies based on whether or not students have "crossed some invisible line between a public and non-public forum," some students will refrain from voicing constitutionally protected opinions for fear of being disciplined.[119] A uniform mode of analysis for offensive speech would aid both universities and students by drawing a consistent line between what is acceptable to censor and what is not.

Furthermore, forum analysis is completely inadequate for addressing the unique nature of harassing and offensive speech, which is often most harmful in the aggregate. First, offensive and unwelcome speech is not always

110. For example, a regulation prohibiting non-students from demonstrating in certain locations around campus. *Mote*, 423 F.3d at 441–42.

111. *See* Amar & Brownstein, *supra* note 6, at 1965 n.96.

112. For example, roommates may refer to each other using a particular slur in private with the mutual understanding that the term is not meant to be derogatory. Such use in a public place, however, may cause more of a stir.

113. Tsesis, *supra* note 4, at 1902–03.

114. Papandrea, *supra* note 5, at 1825.

115. *See* Amar & Brownstein, *supra* note 6, at 1963–68.

116. *See* Papandrea, *supra* note 5, at 1857.

117. Amar & Brownstein, *supra* note 6, at 1967; *see also supra* Part I (discussing the ambiguity of campus speech codes and the uncertainties involved in their enforcement).

118. Amar & Brownstein, *supra* note 6, at 1967.

119. *Id.* (quoting Brister v. Faulkner, 214 F.3d 675, 682 (5th Cir. 2000)).

isolated but rather may be scattered across many locations.[120] If each location requires a separate analysis to determine whether the speech was protected, any judicial review of disciplinary action would be overwhelmingly complex and thus ineffective. Second, harassment is increasingly taking place through electronic communication. How should text messages between students on campus be treated? Does the situation change if one student is on campus and the other is not? Plainly, courts will need to adopt another mode of analysis for dealing with purely online speech, but what approach is appropriate in situations involving a mixture of in-person and online speech? The wisdom of regulating student's online speech is fiercely debated,[121] and the legality of such a pursuit is unsettled.[122] Still, schools have taken an active role in battling student-on-student harassment in cyberspace, and courts must be able to coherently analyze school regulation of student speech.[123] A single mode of analysis that could address the cumulative effects of both in-person and online speech would simplify the inquiry for courts and provide clarity for schools contemplating disciplinary action. Forum analysis is unable to provide such a unified mode of analysis.[124]

B. *Traditional First Amendment Categories*

The categorical approach to First Amendment analysis was articulated in *Chaplinsky v. New Hampshire*:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[125]

---

120. Take, for example, the case of an unwelcome suitor—the offending remarks may come over a period of weeks and occur in dorms, classrooms, cafeterias, and social areas.

121. *See generally* Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-Campus Online Speech in the Age of Social Media*, 52 Willamette L. Rev. 405, 425–38 (2016) (reviewing *Tinker* and other Supreme Court cases that "refined the scope of student speech," exploring the applicability of *Tinker* to university campuses, and analyzing how appellate courts have addressed off-campus online speech).

122. *See, e.g.*, Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013) (agreeing with the Third Circuit's view that the "scope of *Tinker*'s 'interference with the rights of others' language is unclear" but declining to elaborate on when speech stops being merely offensive and starts interfering with others' rights); Yeasin v. Durham, 224 F. Supp. 3d 1194, 1203 (D. Kan. 2016) ("[C]ircuit courts have come to conflicting conclusions on whether a school can regulate off-campus, online student speech where such speech could foreseeably cause a material disruption to the administration of the school.").

123. *E.g.*, Koeppel v. Romano, 252 F. Supp. 3d 1310, 1323–24 (M.D. Fla. 2017) (upholding the expulsion of a student for sending intimidating, hostile, offensive, and threatening text messages to a classmate while both were off-campus).

124. This is not to say that forum analysis does not have a role to play on campus, only that it should be restricted to questions of access.

125. 315 U.S. 568, 571–72 (1942) (footnotes omitted).

The existence of such categories prevents judges from labeling an idea as "low value" merely because it is unpopular.[126] In practice, courts do not typically take the stirring language of *Chaplinsky* at face value—not all speech that falls into the five listed categories is unprotected,[127] nor does the fact that speech causes injury "by [its] very utterance"[128] make it unprotected.[129] Still, this oft-quoted opinion has served as the basis for a great deal of First Amendment jurisprudence.[130]

1. The Contours of Pure Categorical Analysis

The exact steps in a categorical analysis vary depending on whether the court is hearing a challenge to a disciplinary action,[131] a challenge to a speech code,[132] or both.[133] In assessing these challenges, courts operate with the baseline assumption that universities, as state actors, cannot prohibit speech unless it falls into one of the well-defined categories of unprotected speech.[134] In challenges to disciplinary actions, the focus of the analysis is on the speech itself, as opposed to the forum where the speech occurs.[135] If the speech at issue does not fall within the categories of unprotected speech, the court generally must determine whether or not the speech was "a substantial or motivating factor" for the punitive action.[136] In challenges to speech codes, the courts analyze the code using a standard First Amendment overbreadth analysis and determine whether or not the code is limited to prohibiting only unprotected speech.[137] In both postures, the key to the court's inquiry is its interpretation of the traditional First Amendment categories of unprotected speech. While some commentators have attempted to classify harassment as its own category of unprotected speech,[138] most have attempted to fit harassing and offensive speech into commonly accepted categories or to analogize it to narrow First Amendment doctrines that are not

126. Stone, *supra* note 58, at 284.

127. Wayne Batchis, *On the Categorical Approach to Free Speech—And the Protracted Failure to Delimit the True Threats Exception to the First Amendment*, 37 Pace L. Rev. 1, 13–14 (2016).

128. *Chaplinsky*, 315 U.S. at 572.

129. *See* Snyder v. Phelps, 562 U.S. 443, 458 (2011).

130. *See* Batchis, *supra* note 127, at 11–17.

131. *E.g.*, Johnson v. W. State Colo. Univ., 71 F. Supp. 3d 1217, 1228–31 (D. Colo. 2014).

132. *E.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

133. *E.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1180–81 (6th Cir. 1995).

134. *See Johnson*, 71 F. Supp. 3d at 1228.

135. *Id.*

136. Retzlaff v. de la Viña, 606 F. Supp. 2d 654, 657 (W.D. Tex. 2009).

137. UWM Post, Inc. v. Bd. of the Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1172 (E.D. Wis. 1991).

138. *E.g.*, Tsesis, *supra* note 4, at 1899. *But see* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209–10 (3d Cir. 2001) (Alito, J.) ("In short, we see little basis for the District Court's sweeping assertion that 'harassment'—at least when it consists of speech targeted solely on the basis of its expressive content—'has never been considered to be protected activity under the

truly categories.[139] Three categories of unprotected speech are most plausibly relevant in dealing with genuinely harassing speech: fighting words, true threats, and incitement.

Perhaps the most common category for evaluating offensive and harassing speech is the longstanding "fighting words" doctrine.[140] In a recent case arising in Florida, a district court held that pervasive, sexually explicit text messages from one student to another constituted fighting words, which the school could constitutionally punish.[141] A closely related class of speech is the "true threat." This category of speech encompasses 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."[142] This category of speech includes intimidation, and the doctrine protects individuals from "the fear of violence," as well as "the possibility that the threatened violence will occur."[143] Such a category is well suited to address one of the most pressing harms from harassing speech: the exclusion of certain groups for fear of violence. Indeed, a great deal of speech that is intimidating enough to deny equal access to resources and opportunities would fit in the category of true threats.[144] The doctrine allows universities to fight egregious speech on campus while respecting First Amendment rights.[145] Finally, speech may be restricted if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[146] This is a narrow category, and most offensive speech

First Amendment.' Such a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech.").

139. *See, e.g.*, Papandrea, *supra* note 5, at 1823–27 (refuting attempts to justify regulation of offensive speech on the basis of "captive audience" and "secondary effects" doctrines).

140. Some scholars question the vitality of the doctrine after *Snyder*. *E.g.*, Papandrea, *supra* note 5, at 1819 (doubting the survival the fighting words doctrine and noting the considerable disagreement on the exact contours of "fighting words"). Others insist it remains persuasive in the realm of harassment. *See, e.g.*, Tsesis, *supra* note 4, at 1895–96 ("There can be little doubt that a campus speech code with a fighting words provision would survive constitutional challenge.").

141. Koeppel v. Romano, 252 F. Supp. 3d 1310, 1324 (M.D. Fla. 2017) ("The Court finds that Koeppel's speech in this case is exactly the kind of speech described by the Supreme Court in *Chaplinky* [sic]. It was texted to Jane in order to intimidate her and contained words 'of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

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

143. *Id.* at 360.

144. *See* Majeed, *supra* note 36, at 516.

145. *See, e.g.*, Osei v. Temple Univ. of the Commonwealth Sys. of Higher Educ., No. 10–2042, 2011 WL 4549609, at *15 (E.D. Pa. Sept. 30, 2011) (rejecting a First Amendment challenge to a university's disciplinary actions against a student who sent threatening emails to a professor), *aff'd*, 518 F. App'x 86 (3d Cir. 2013).

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

will not amount to incitement, but it permits schools to censor calls to commit violence against disfavored groups.[147]

2. Courts Relying Solely on Categorical Analysis

Traditional categorical analysis at least implicitly plays a role in every analysis of harassing or offensive speech. It is virtually undisputed that schools can lawfully proscribe speech falling into one of the unprotected categories.[148] A few courts have ended their analysis after determining that the regulated speech did not fit into one of these categories, invalidating the code at issue.[149] Other courts proceed in the analysis to determine whether or not the school can put forward some other justification for the regulation, either through public forum analysis,[150] or an education-specific analysis.[151] This Section identifies the courts that have not elected to supplement the categorical analysis, but rather have invalidated school regulations after determining that they reach speech that does not fall in an unprotected category. *Johnson v. Western State Colorado University* is the only recent example of a court ending its inquiry into a school's disciplinary action after the categorical analysis in a case dealing with disciplinary action for harassing speech.[152] Johnson, a student at Western, sent a sexually explicit letter to his then-girlfriend describing sadomasochistic acts and expressing a desire to perform them on her.[153] One month later, they ended their relationship and the girl's mother handed over the letter to school officials, who used it in disciplinary proceedings against the student for "inappropriate behavior towards another student."[154] In considering the school's motion to dismiss the First Amendment claims, the court determined that the letter did not constitute a true threat, and therefore Johnson had sufficiently demonstrated that

147. Papandrea, *supra* note 5, at 1820.

148. With one important caveat—*R.A.V. v. City of St. Paul* suggests that regulation of even unprotected speech must be viewpoint neutral to pass constitutional scrutiny. 505 U.S. 377, 393–94 (1992). This is important for universities to consider when drafting speech codes, because many define harassment as behavior targeting certain protected classes, and courts have determined that such qualifications are viewpoint-discriminatory. *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995).

149. *E.g.*, UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1171–74 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

150. *See supra* Section II.A.

151. *See infra* Section II.C.

152. 71 F. Supp. 3d 1217, 1228–29 (D. Colo. 2014). In 1993, the Fourth Circuit used a similar (though brief) analysis to enjoin a school's sanctions against a fraternity that sponsored a racially insensitive "ugly woman contest." Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 389 (4th Cir. 1993). The university argued for the application of *Tinker*, but the court rejected that argument without substantial analysis. *Id.* at 393.

153. *Johnson*, 71 F. Supp. 3d at 1221–22. According to the student, such communication and conduct was a regular and mutually agreed-upon component of their relationship. *Id.*

154. *Id.* at 1222–23.

his speech was protected.[155] The court did not inquire into alternative justifications for the school's decision.[156]

More common is the use of categorical analysis as the sole form of inquiry in challenges to university speech codes.[157] It is worth noting that in some cases, categorical analysis is accompanied by an inquiry into whether the restriction is viewpoint neutral, without conducting a forum analysis. The Sixth Circuit used this approach in *Dambrot v. Central Michigan University* to invalidate CMU's harassment policy.[158] After comparing the policy to the category of fighting words and finding the restrictions overly broad, the court declared that the policy would be invalid even if it were limited to fighting words.[159] Relying on *R.A.V. v. City of St. Paul*,[160] the court declared that the policy constituted viewpoint discrimination because it specifically targeted racial harassment.[161]

3. The Virtues and Vices of Pure Categorical Analysis

The deployment of traditional First Amendment categories is so firmly entrenched that courts find it difficult to avoid engaging in at least some form of categorical analysis.[162] Still, even commentators who believe traditional categories are sufficient to protect students from truly harmful speech agree that at least some further analysis is necessary.[163] Additionally, the categories of unprotected speech do not provide clear guidance to university officials. Traditional First Amendment categories of unprotected speech have been primarily enforced by courts;[164] however, as noted in Part I, the majority of enforcement comes at the university level through speech codes and

155. *See id.* at 1229 ("[A] reasonable juror could conclude that the contents of the Dear Onna Letter did not constitute a 'true threat' and were, therefore, protected speech.").

156. *Id.*

157. *See, e.g.*, UWM Post, Inc. v. Bd. Of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1169–71 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852, 862–63 (E.D. Mich. 1989).

158. 55 F.3d 1177, 1184 (6th Cir. 1995).

159. *Dambrot*, 55 F.3d at 1184.

160. 505 U.S. 377, 393–94 (1992).

161. *Dambrot*, 55 F.3d at 1184.

162. *See* Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 Wm. & Mary L. Rev. 1339, 1345 (2015) (observing that while the Roberts Court does not appear eager to add new categories of unprotected speech, the Court's recent First Amendment jurisprudence indicates that existing categories will remain central to First Amendment analysis).

163. *See, e.g.*, Majeed, *supra* note 36, at 516 (advocating a "true harassment" approach that would prohibit speech that creates a hostile environment under various civil rights statutes, even if the speech does not fit in a traditional category).

164. *See supra* note 43 and accompanying text.

university disciplinary measures. Courts deploying the fighting words doctrine have promulgated confusing interpretations and have deployed the dictum in *Chaplisky* inconsistently.[165] While the categorical approach will (rightly) continue to play an important role in judicial review, supplementing it with an education-specific analysis would clarify the law for administrators and increase the coherence and predictability of judicial review.

C. *Education-Specific Analysis*

The Supreme Court's education-specific jurisprudence began with the *Tinker* decision, which addressed the regulation of student speech in middle and high schools.[166] Because the speech at issue was clearly pure political expression, the Court's analysis did not rely on categories.[167] *Tinker* famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and limited the ability of schools to suppress speech to that "which might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities."[168] Nearly two decades later, the Court issued two further decisions in the high school context: *Bethel School District No. 403 v. Fraser*[169] and *Hazelwood School District v. Kuhlmeier*.[170] *Fraser*'s analysis resembled a modified categorical approach that was more speech-restrictive in the school context, and the Court upheld the school's sanctions for lewd and indecent speech.[171] *Hazelwood* applied forum analysis to speech in a school newspaper and concluded that the paper was not a public forum, but rather a school-sponsored activity.[172] In such "school-sponsored expressive activities," schools may generally restrict student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[173] The application of these opinions to the university context raises many questions, and courts have differed on whether and how to apply the Supreme Court's education-specific analysis.[174]

165. *See* Batchis, *supra* note 127, at 12–22 (identifying the varying interpretations of *Chaplinsky* and arguing that the most widely used interpretation—the "low-value speech" approach—allows judges to inject their own value judgments into the analysis, compounding the confusion and inconsistency).

166. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504–05 (1969).

167. *Id.* at 505. Additionally, the decision came before the emergence of modern public forum doctrine, and the opinion bears little resemblance to that style of analysis. *See* Day, *supra* note 55, at 160–62.

168. 393 U.S. at 506, 514.

169. 478 U.S. 675, 675 (1986).

170. 484 U.S. 260, 260 (1988).

171. *Fraser*, 478 U.S. at 685.

172. *Hazelwood*, 484 U.S. at 269–70.

173. *Id.* at 273.

174. The Roberts Court ventured into the student speech context in *Morse v. Frederick*. 551 U.S. 393, 403–06 (2007). The opinion unhelpfully fails to adopt a clear form of analysis, and the case appears to stand only for the proposition that schools may restrict "student

1. The Contours of Education-Specific Analysis

Drawing a coherent analysis from *Tinker*, *Fraser*, and *Hazelwood* is no simple task, and, unsurprisingly, courts have differed in how they apply the doctrine in the university setting. The Third Circuit has the most developed doctrine in the harassment context, and this Section will set out the test as applied in that circuit's jurisprudence.

The first major opinion in this line of analysis—*Saxe v. State College Area School District*—came in the context of a challenge to a public school district's speech code banning "harassment."[175] In an opinion by then-Judge Alito, the Third Circuit invalidated the policy as overbroad.[176] After rejecting the lower court's assertion that "harassment" is a category of unprotected speech,[177] then-Judge Alito synthesized the Supreme Court's education cases:

> Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.[178]

The school's policy swept too broadly because it reached speech that was merely offensive, and it was not limited to speech that actually interfered with other students' rights.[179]

The Third Circuit considered the university context in *DeJohn v. Temple University*, where a graduate student challenged the university's policy prohibiting

> all forms of sexual harassment . . . 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.[180]

The court used the analysis articulated in *Saxe* but acknowledged that a university has "less leeway" to restrict speech than a primary or secondary

---

speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 403.

175. 240 F.3d 200, 202–04 (3d Cir. 2001).

176. *Id.* at 217.

177. *Id.* at 211.

178. *Id.* at 214.

179. *Id.* at 216–17. Shortly after the *Saxe* decision, a district court applied the analysis in the university context. In *Bair v. Shippensburg University*, the court noted that the ability of universities to censor student speech is more limited than that of primary and secondary schools, but did not opine on the extent of the difference because Shippensburg's code failed even the more lenient test. 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003).

180. 537 F.3d 301, 305 (3d Cir. 2008) (alteration in original).

school.[181] For example, *Fraser*'s carve out for lewd and indecent speech in high schools seems to be completely inapplicable in the university context because college students are generally adults.[182] The court found that Temple's policy was overbroad because it could cover political and religious speech that someone finds offensive.[183] Without "a showing of severity or pervasiveness," the code could chill protected speech, even if it were limited to speech that creates a hostile environment.[184] The court hinted that a policy with such narrow requirements might pass strict scrutiny review but refrained from commenting further.[185] In *McCauley v. University of the Virgin Islands*, the Third Circuit used the *DeJohn* analysis and defended at length the enhanced speech protections for university students, when compared with high school students.[186] Despite noting the stronger protections, the court declined to articulate an exact standard:

> Public universities have significantly less leeway in regulating student speech than public elementary or high schools. . . . At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.[187]

To summarize the Third Circuit's analysis, when student speech may reasonably be mistaken for the university's speech,[188] the school has a heightened ability to regulate.[189] In other circumstances, a university may only restrict student speech when it is "sever[e] or pervasive[ ];" that is to say, it must "objectively and subjectively create[ ] a hostile environment or

181. *DeJohn*, 537 F.3d at 316.

182. *See id.* at 315.

183. *Id.* at 317–18.

184. *Id.* at 318–20 (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 652 (1999)).

185. *Id.* at 319–20 ("[W]e do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech.").

186. 618 F.3d 232, 243–47 (3d Cir. 2010).

187. *Id.* at 247.

188. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213–14 (3d Cir. 2001). Other courts have adopted a similar interpretation of *Hazelwood*. *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."); Amar & Brownstein, *supra* note 6, at 1950–51 (outlining the argument that *Hazelwood* is analogous to government speech doctrine rather than public forum doctrine).

189. The Third Circuit has not had occasion to clarify how the *Hazelwood* standard applies to school-sponsored speech in the university setting. For thorough discussions of *Hazelwood* in the university setting, see Amar & Brownstein, *supra* note 6, at 1946–63, and Papandrea, *supra* note 5, at 1843–48.

substantially interfere[ ] with an individual's work."[190] The court has not yet explained what a speech policy that meets this standard would look like.

2. Courts Adopting an Education-Specific Analysis in the University Context

The Third Circuit's university-specific approach has gained some traction. A district court in Virginia recently adopted the Third Circuit's test in a case involving disciplinary measures taken against a student by George Mason University.[191] Similarly, a district court in Florida used the *DeJohn* analysis in rejecting a challenge to a university harassment code.[192] The code at issue included the "severe and pervasive" language suggested in *DeJohn*, and the court found it sufficiently speech protective.[193] A district court in Ohio applied the *DeJohn* analysis to a challenge to both a university speech code and a disciplinary action against a student based on that code.[194] Other courts have not adopted the Third Circuit's approach to modifying *Tinker* for higher education but have used *Hazelwood* in the university context.[195] The *Hazelwood* rule has caused confusion and controversy in the university context,[196] but the willingness of courts to adapt the secondary school decision to the university context may indicate an increased willingness to adapt the *Tinker* standard as well.

III. A Better Way Forward

The education-specific approach used in the Third Circuit, while not perfect, protects the First Amendment rights of students while allowing university administrators to take action against the speech that most severely affects targeted students. This Part evaluates the benefits and shortcomings of the Third Circuit's approach and proposes a clearer version of the *DeJohn* test to address some shortcomings.

---

190. *DeJohn*, 537 F.3d at 317–18.

191. Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 625–27 (E.D. Va. 2016).

192. Koeppel v. Romano, 252 F. Supp. 3d 1310, 1325–26 (M.D. Fla. 2017).

193. *Id.*

194. Marshall v. Ohio Univ., No. 2:15–cv–775, 2015 WL 1179955, at *6 (S.D. Ohio Mar. 13, 2015).

195. Although the Ninth Circuit uses forum analysis in addressing harassing speech, it has used *Hazelwood* in addressing speech in the curricular context. Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) ("[T]he parties have not identified, nor have we found, any Supreme Court case discussing the appropriate standard for reviewing a university's regulation of students' *curricular* speech. It is thus an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work. We conclude that it does."). Similarly, the Sixth Circuit used *Hazelwood* and *Tinker* to address university action against a student because of her religious speech in the curricular setting. Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012).

196. *See* Papandrea, *supra* note 5, at 1843–48.

First, the approach reflects well-established First Amendment principles that overprotect some speech of minimal value to provide sufficient "breathing space" to allow valuable speech to flourish.[197] As the *DeJohn* court admitted, the severe and pervasive standard will prevent universities from suppressing some speech that genuinely creates a harmful environment for some students.[198] This mirrors other areas of free speech doctrine that reflect speech's priority. For example, the standard for incitement explained in *Brandenburg* prohibits only speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[199] The *Brandenburg* standard reflects a fear that the difficulty in trying to distinguish passionate advocacy from incitement will lead to the erroneous punishment of legitimate advocacy.[200] Likewise, in the *DeJohn* test, the Third Circuit is concerned that universities will suppress legitimate moral and political speech because it is offensive.[201]

As noted in Part I, this overprotection of speech may underprotect marginalized students. Students are likely to abuse their right to speak freely, and the burden of this hurtful speech is likely to fall disproportionately on underrepresented groups.[202] Yet increased university regulation is unlikely to eliminate this problem. Speech restrictions are often enforced against the very groups they were meant to protect.[203] Additionally, censorship "makes heroes out of bigots."[204] When schools concentrate on solidarity and reconciliation instead of retribution, the campus climate improves as students and administrators mobilize against hate.[205]

There are some practical challenges to the standard articulated by the Third Circuit. While the Third Circuit's approach provides more guidance to students and administrators than either of the other standards, it is hardly a model of clarity. Still, unlike courts deploying public forum doctrine, with its patchwork quilt of forums and standards, courts in the Third Circuit need only sort out two standards—one for speech bearing "the imprimatur

---

197. *See* NAACP v. Button, 371 U.S. 415, 432–33 (1963).

198. DeJohn v. Temple Univ., 537 F.3d 301, 320 (3d Cir. 2008). Additionally, the court expressed doubts that schools would be justified suppressing speech merely because it unreasonably interferes with the work of other students. *Id.* at 319 ("If we were to construe 'unreasonable' as encompassing a subjective and objective component, it still does not necessarily follow that speech which effects an unreasonable interference with an individual's work justifies restricting another's First Amendment freedoms.").

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

200. Schauer, *supra* note 12, at 724–25.

201. *DeJohn*, 537 F.3d at 320. For example, the plaintiff in *DeJohn* was a graduate student who sued, claiming that under the school's harassment code, he could face disciplinary action for expressing controversial opinions regarding the role of women in the military. *Id.* at 305.

202. *See* Matsuda, *supra* note 16, at 2331–35.

203. Strossen, *supra* note 13, at 556–59 (noting historical instances where the antiracism laws were enforced against the minorities they were intended to protect).

204. *Id.* at 559 (quoting Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 438).

205. *See id.* at 560.

of the school," and one for all other speech.[206] The line between school-sponsored speech and nonsponsored speech is complex,[207] but it does not pose the same impossibilities public forum doctrine does in dealing with aggregate and online speech.[208]

A significant problem with the Third Circuit's standard is that it is largely consequentialist—that is, the protected status of speech depends significantly on how it is received. First, in some situations, the consequences of speech will be difficult for a speaker to know ex ante, which might discourage speakers from saying things that are valuable for fear they will be received poorly. Secondly, consequentialist speech standards often produce viewpoint discriminatory regulation.[209] For example, by assuming that certain inflammatory speakers would have detrimental effects on some groups, administrators can censor viewpoints they consider inflammatory, while permitting others they view as benign.[210] By relying primarily on the consequences of speech, the Third Circuit's approach opens the door to uneven enforcement. In order to alleviate this risk, courts adopting (and adapting) the Third Circuit's approach should require universities to narrowly tailor speech regulation to target only exclusionary speech targeting a particular student[211] and to insulate "core protected speech."[212] The *DeJohn* court does not define "core protected speech,"[213] but presumably it had in mind the definition articulated in *Saxe*: "moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment."[214] Thus, in order to punish a student for

206. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213–14 (3d Cir. 2001) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)); *see also DeJohn*, 537 F.3d at 317 n.17.

207. *See* Papandrea, *supra* note 5, at 1843–48.

208. *See supra* Section II.A.2.

209. I am indebted to Professor Krotoszynski for this observation, which he shared at an author workshop. Workshop with Ronald J. Krotoszynski, Jr., John S. Stone Chairholder of Law & Dir. of Faculty Research, Univ. of Ala. Sch. of Law, in Ann Arbor, Mich. (Sept. 21, 2017) (discussing Ronald J. Krotoszynski, Jr., The Disappearing First Amendment: On the Decline of Freedom of Speech and the Growing Problem of Inequality Among Speakers (forthcoming 2019) (manuscript at 33–36) (on file with the *Michigan Law Review*) [hereinafter Krotoszynski, The Disappearing First Amendment]).

210. Professor Krotosyzynski uses the example of a university administrator who invites Peter Singer to advocate the killing of newborns with birth defects but prohibits Milo Yiannopoulos from speaking because the latter is more likely to produce student unrest. Krotoszynski, The Disappearing First Amendment (manuscript at 35).

211. That is, speech that "objectively and subjectively creates a hostile environment" or substantially hinders a student's access to educational opportunities. *DeJohn*, 537 F.3d at 318. Speech that targets one particular student is less likely to be core protective speech and is more likely to be exclusionary than speech directed to a broad audience. *Cf.* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1843–72 (1992) (arguing that workplace harassment law should distinguish between one-to-one speech and one-to-many speech and ought to provide less protection to the former category).

212. *DeJohn*, 537 F.3d at 318.

213. *Id.*

214. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2001).

speech, the school would need to show that the speech created a hostile environment or substantially deprived the victims of access to opportunities, *and* that it was not an expression of a moral or political opinion.[215] This standard, while still somewhat consequentialist, would put the burden on universities to ensure that they are not regulating speech merely because they disagree with it or because it has caused a disruptive reaction.

This approach also leaves open various methods for universities to protect students from harassment. For example, no contact orders can be narrowly tailored to pass constitutional muster.[216] By proscribing contact with an individual as opposed to the expression of certain ideas, these orders can avoid suppressing core speech while insulating targeted students from potential tormentors.[217] Such an order is likely to satisfy the proposed narrow tailoring requirement and will prevent individual students from facing harassment. Additionally, universities remain free to condemn even protected speech and to reaffirm that a campus is inclusive and welcoming. Tolerating hateful or offensive speech does not require a school to ratify it or stay silent. Although it may be wise to remain silent in some circumstances to avoid giving unnecessary publicity to isolated acts of hatred, administrators remain free to speak out against hateful ideas and to encourage solidarity with targeted groups. Finally, universities are able to regulate speech that falls into the traditional categories of unprotected speech, as well as speech that is exclusionary and does not express core moral or political beliefs.

Conclusion

Speech transforms culture—censorship only temporarily hides the rot and prevents effective engagement. By analyzing university regulation of offensive student speech under the *DeJohn* standard, judges, administrators, and students can have a reasonably clear idea of what the Constitution requires and when offensive speech becomes harassment. This clarity promotes speech and encourages opinions that challenge the status quo. By utilizing reasonable and constitutionally permissible tools, such as counterspeech, narrowly drafted harassment codes, and no-contact orders, schools can provide inclusive and welcoming environments. Each instance of hateful speech provides an opportunity to condemn hate and extol the virtues of tolerance, even if it means tolerating ideas that are hateful.

215. Again, this standard will allow some odious and hurtful language to go unpunished in the name of the transcendent value of speech. *See supra* Part I.

216. *See generally* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. 781, 826–43 (2013) (proposing ways to avoid First Amendment violations in civil harassment orders).

217. *Id.* at 842 (explaining that a carefully crafted no-contact order can protect a student's safety and privacy without infringing on the speaker's right to communicate with others).