SEARCHING FOR BALANCE WITH STUDENT FREE SPEECH: CAMPUS SPEECH ZONES, INSTITUTIONAL AUTHORITY, AND LEGISLATIVE PREROGATIVES

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INTRODUCTION

Free speech controversies on college and university campuses have resulted in a steady stream of media headlines.[1] U.S. Attorney General Jeff

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1. *See, e.g.*, Nicholas B. Dirks, *The Real Issue in the Campus Speech Debate*: *The University is Under Assault*, WASH. POST (Aug. 9, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/08/09/the-real-issue-in-the-campus-speech-debate-the-university-is-under-assault/?utm_term=.1aa36d34d1bb (arguing that challenges to free speech from the "extreme" right and left present a fundamental challenge to the concept of the appropriate role of a university); Christine Hauser, *Campuses Grapple with Balancing Free Speech and Security after Protests*, N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/us/texas-aandm-speaking-policy-richard-spencer.html (considering how allowing speakers must be balanced against campus safety issues); Elliot C. McLaughlin, *War on Campus*: *The Escalating Battle over College Free Speech*, CNN (May 1, 2017, 12:04 PM),

Sessions has decried colleges and universities as largely antagonistic to free speech and pledged involvement by the U.S. Department of Justice on this perceived issue.[2] Previously, white nationalists used inflammatory speech and actions to intimidate students and others at the University of Virginia and surrounding areas of campus.[3] The events in Charlottesville, Virginia, prompted several universities to, at least initially, deny Richard Spencer, a proponent of white supremacy, permission to speak on their campuses.[4] In another high-profile incident, students sought to disrupt a talk by Charles Murray, a political scientist and conservative author, at Middlebury College.[5] Student disruptions and riots also broke out at the University of California at Berkeley over separate planned appearances by contentious political commentators Ann Coulter[6] and Milo Yiannopolous.[7] These and other controversies have created sharp debates over the extent to which colleges and universities should be able to limit potentially objectionable speech on campus.

While recent incidents have garnered headlines, institutions have long struggled to balance their commitments to free speech with other prerogatives, such as the advancement of diversity and social justice goals, or managing events so as to not disrupt other campus functions. In debates over campus speech, both old and new, an important issue relates to the rights of students to access open campus areas—such as courtyards or sidewalks—at public colleges and universities for speech and expressive activities. This essay considers the continued reliance by some public higher education institutions on designated free speech zones for purposes of containing student speech and expressive activities, such as petition gathering or

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http://www.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html (discussing clashes over controversial speakers at campuses throughout the United States).

2. Rebecca R. Ruiz, *Sessions Calls for 'Recommitment' to Free Speech on Campus, Diving into Debate*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/us/politics/jeff-sessions-campus-free-speech-georgetown.html (covering speech by Jeff Sessions at Georgetown University Law Center on free speech in higher education).

3. Scott Jaschik, *White Nationalists Rally at University of Virginia*, INSIDE HIGHER ED (Aug. 14, 2017), https://www.insidehighered.com/news/2017/08/14/white-nationalists-rally-university-virginia.

4. Jeremy Bauer-Wolf, *Legal Grounds to Turn Away White Supremacist Speakers*, INSIDE HIGHER ED (Aug. 17, 2017), https://www.insidehighered.com/news/2017/08/17/public-universities-are-solid-ground-cancel-richard-spencer-events-legal-experts-say.

5. Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO (May 28, 2017), http://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195.

6. Susan Svrluga, William Wan & Elizabeth Dwoskin, *There Was No Ann Coulter Speech. But Protestors Converged on Berkeley*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/27/theres-no-speech-planned-but-protesters-are-converging-on-berkeley-today/?utm_term=.d1dc063d10ec.

7. Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused $100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 PM), http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html.

leafletting, to particular campus locations.[8] Public colleges and universities have come under increasing legal scrutiny for reliance on speech zones and have been subject to critiques that the use of speech zones conflicts with institutional values related to the open exchange of ideas.

In the essay, the authors examine the permissibility of student speech zones under the First Amendment. Related to this discussion, the essay also considers recent state legislative efforts to prohibit public colleges and universities from enforcing such campus speech zones. The authors are supportive of legislative measures related to speech zones, but several provisions in proposed state laws and model legislation go beyond this issue and would potentially undercut student free speech rights and unduly interfere with institutional autonomy to manage and respond to issues involving speech and expression on campus. Instead, legislators should exercise restraint when it comes to campus speech laws and not become overly intrusive in how public colleges and universities manage and respond to speech issues on campus, such as when disciplinary measures are warranted for disruption of a campus speaker by a student or when campus leaders make public comments on behalf of the institution in response to a controversial issue on campus.

Before considering legal standards and debates related to the (im)permissibility of speech zones for students in open campus areas, the authors in Part I first discuss several factors that influence our positionality in how we approach current debates, legal and otherwise, over free speech issues in higher education. Next, Part II provides overall context regarding key legal standards that courts have used to define student speech rights and institutional authority in relation to open campus areas. As discussed in this section, courts have often turned to forum analysis to provide the legal standards applicable to open campus spaces and student speech. The section considers how courts have not always been consistent regarding how to define the type of forum at issue and the accompanying legal standards. As covered in Part III, legal decisions reveal multiple courts are skeptical of institutional speech regulations deemed overly restrictive as to student speech in open campus areas. Part IV discusses how student speech cases provide an additional legal lens to evaluate student speech rights in open campus areas in addition to forum standards. Even as courts sort out college students' First Amendment rights to access open campus areas, as considered in Part V, multiple states have moved to enact laws to prohibit them. In conclusion, the final Part of the essay contends that trends against the use of speech zones in relation to students represent a salutary development that pushes institutions to live up to their intellectual commitments to students' free speech. Even so, other trends, such as proposals to force public colleges

8. Speech zones can also be employed by public colleges and universities to regulate the speech and expressive activities of individuals unaffiliated with the institution. This essay focuses on the use of speech zones in relation to students.

and universities to punish students who disrupt the speech of others, are too intrusive on institutional autonomy.

I. SOME COMMENTS ON AUTHORS' POSITIONALITY

An important point of contention in recent campus speech controversies—which echoes in some respects an earlier period of legal wrangling over campus speech codes and hate speech—involves the principle that offensive or hurtful speech is often protected by the First Amendment. Nevertheless, in current campus speech controversies, one line of argument has arisen that colleges and universities should not have to tolerate speakers who demean or espouse hatred of individuals or groups on such bases as race or sexual orientation.[9] In multiple instances, students have advocated for such restrictions or sought to disrupt speakers when it comes to campus access for some speakers.[10] Some commentators have made light of the argument that First Amendment speech rights should be weighed against other concerns, such as cultivating welcoming campus climates that foster student success and embrace multiculturalism.[11] A popular response to students challenging or disrupting speech they view as offensive has been to label them as "snowflakes."[12] We reject this type of dismissive stance toward students and others who have questioned free speech standards at colleges and universities. Instead, our approach is to consider debates over campus speech in the broader context of the multiple, and often competing, goals that colleges and universities fulfill in society.[13]

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9. *See, e.g.*, Aaron R. Hanlon, *Why Colleges Have a Right to Reject Hateful Speakers Like Ann Coulter*, NEW REPUBLIC (Apr. 24, 2017), https://newrepublic.com/article/142218/colleges-right-reject-hateful-speakers-like-ann-coulter; *See also* K-Sue Park, Opinion, *The A.C.L.U. Needs to Rethink Free Speech*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/opinion/aclu-first-amendment-trump-charlottesville.html (articulates the view that generally, free speech concerns do not exist in a vacuum but are influenced by overall social conditions and inequalities).

10. *See, e.g.*, Caroline Glenn, *When Does Protesting College Speakers Go Too Far?*, USA TODAY (May 13, 2017, 11:24 AM), https://www.usatoday.com/story/news/nation-now/2017/05/13/when-does-protesting-college-speakers-go-too-far/321130001/; Nick Roll, *Blocking a President from Talking*, INSIDE HIGHER ED (Oct. 9, 2017), https://www.insidehighered.com/news/2017/10/09/speaker-interruptions-continue-controversial-policy-adopted-wisconsin; Nick Roll, *2 More Campus Speakers Shouted Down*, INSIDE HIGHER ED (Oct. 12, 2017), https://www.insidehighered.com/news/2017/10/12/speaker-protests-continue-options-punishments-unclear.

11. *See, e.g.*, Robert Holland, *Universities Invent New Devices to Stifle Speech and Protect Snowflakes*, THE HILL (Apr. 3, 2017, 1:00 PM), http://thehill.com/blogs/pundits-blog/education/326999-universities-invent-new-devices-to-stifle-speech-and-protect-snowflakes; Marc A. Thiessen, *Millennials Are Snowflakes: Here's the Data to Prove It*, NEWSWEEK (Sept. 25, 2017, 1:40 PM), http://www.newsweek.com/millennials-are-snowflakes-heres-data-prove-it-670662.

12. *Id.*

13. *See generally* CLARK KERR, THE USES OF THE UNIVERSITY (5th ed. 2001).

First Amendment speech standards are largely based on the idea that government does not pick and choose which ideas are superior.[14] Keeping channels of communication open allows for the testing of competing views in the marketplace of ideas. However, serving as marketplaces for ideas—marketplaces not based on concepts of quality control—represents only one of the many purposes that colleges and universities serve in the United States. Public higher education institutions are also committed to supporting scholarly research and discourse that is evaluated on concepts of peer review and adherence to particular disciplinary or methodological approaches. In this type of intellectual discourse and inquiry, and in contrast to the need for governmental neutrality toward a speaker's message that is often important in First Amendment speech contexts, scholarly speech is regularly subject to quality assessments. For instance, when a professor is denied tenure based on a failure to satisfy scholarly expectations, internal and external assessments have typically been made regarding the scholarship's value and quality.[15] As part of their missions, colleges and universities also seek to further goals related to diversity and inclusion, as evidenced in mission statements, mottos, and creeds that may be in opposition to certain ideas that can be voiced by controversial speakers.

Some individuals and groups—such as the Goldwater Institute in Arizona, which has weighed in on the issue of campus speech with model legislation[16]—are uncomfortable with the idea that public colleges and universities may be just as responsible for cultivating supportive climates for racial and ethnic minority students as they are for being sites for speakers who reflect the range of political discourse in a polarized, partisan society. A provision in the Goldwater Institute's model legislation calls upon institutional leaders to be neutral on public controversies.[17] Additionally, rather than leaving autonomy with institutions to decide how to respond to particular incidents, the organization's model legislation would require institutions to discipline protesters who disrupt campus speakers.[18] We see such countermeasures as a response to an exaggerated or manufactured perception of throngs of protesters overtaking each of the thousands of college campuses across the United States. The Foundation for Individual

14. *See generally* United States v. Alvarez, 567 U.S. 709 (2012).

15. Debates abound over tenure and the value of peer review. Our point in this instance is not to wade into these conversations. Rather, we seek to point out that much speech that takes place in higher education is subject to quality control standards—good or bad—that are typically not a part of First Amendment analysis when it comes to assessment of speech rights.

16. Stanley Kurtz, James Manley & Jonathan Butcher, *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST. (Jan. 30, 2017), http://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf. The model legislation from the Goldwater Institute, a think tank that advocates for libertarian and conservative public policy positions, has been influential in the language included in proposed and enacted state campus speech laws discussed in Part VI.

17. *Id.* at 5.

18. *Id.* at 20.

Rights in Education (FIRE) recently surveyed a national sample of two- and four-year college students. On one hand, they found that only a small percentage of students stated that they might be willing to try to prevent fellow students from attending a speech on campus or disrupt such an event.[19] On the other hand, ninety-three percent (93%) of students in the survey agreed that colleges should extend invitations to a variety of campus speakers.[20]

Moving directly beyond the First Amendment student speech realm, but still useful to show that threats to campus speech can have a politically conservative bend, the governing board for the University of North Carolina moved to prohibit the University of North Carolina School of Law's Center for Civil Rights from litigating cases to remedy civil rights injustices.[21] Both the Goldwater Institute model legislation and the action in North Carolina illustrate efforts to curtail actions by public colleges and universities viewed as overly partisan and left-leaning. From our perspective, some of the critiques over student speech rights in higher education represent larger efforts in some quarters to suppress perceived liberal predilections in higher education, even if it means suppressing speech or academic freedom in certain situations.

In terms of our own positionality, we are supportive of institutional values related to diversity and inclusivity, but, at times, commitments in these areas can come into tension with those related to free speech. Additionally, colleges and universities must balance free speech concerns with other considerations, such as costs incurred by controversial speakers and maintaining the daily functions of the institution.[22] Especially after events such as the violence and unrest that occurred at the University of Virginia following a gathering of white nationalists, an institution might seek to ban a speaker on grounds that safety rights preclude being able to host the event.[23] Indeed, some institutions, such as Texas A&M University, have moved to block potential speakers who are viewed as a threat by many individuals on campus.[24] In addition, despite the importance of supporting speech and

19. Kelsey Ann Naughton, *Speaking Freely: What Students Think about Expression at American Colleges*, FIRE (Oct. 2017), https://www.thefire.org/publications/student-attitudes-free-speech-survey/student-attitudes-free-speech-survey-full-text/.

20. *Id.*

21. Nick Roll, *UNC Board Bars Litigation by Law School Center*, INSIDE HIGHER ED (Sept. 11, 2017), https://www.insidehighered.com/news/2017/09/11/north-carolina-board-bars-unc-center-civil-rights-litigating.

22. *See, e.g.*, Suhauna Hussain, *The Costs of the Campus Speech Wars Are Piling Up for the Police*, CHRON. OF HIGHER EDUC. (July 3, 2017), http://www.chronicle.com/article/The-Costs-of-the-Campus-Speech/240527; Chris Quintana, *What Berkeley's $800,000 Did—and Didn't—Buy During 'Free Speech Week'*, CHRON. OF HIGHER EDUC (Oct. 10, 2017), http://www.chronicle.com/article/What-Berkeley-s-800000-Did/241419.

23. Peter Schmidt, *Charlottesville Violence Sparks New Worries About Safety During Campus Protests*, CHRON. OF HIGHER EDUC. (Aug. 15, 2017), http://www.chronicle.com/article/Charlottesville-Violence/240927.

24. *See, e.g.*, Hanlon, *supra* note 9.

expression, colleges and universities must also prioritize their primary functions of allowing students to safely attend classes. Thus, keeping in mind that institutional expenditures are largely borne by taxpayers or student tuition and fees, a relevant issue for consideration should be: *What are reasonable costs for institutions to absorb to ensure the safety of speakers, attendees, and others on campus?* Beyond cost, how much disruption must an institution incur when it comes to speech and expressive activities that can make it difficult for students to learn and for faculty and staff to do their jobs? Increasingly, students and their parents bear large financial costs for tuition and other expenses. Many students may not feel that they are paying or taking on student loan debt to "give up" their campus for speech and expressive activities that disrupt their attendance at classes or other aspects of the collegiate experience. Such considerations may not trump constitutional concerns, but they are not irrelevant to discussions of speech rights on campus, and we do not view such concerns in a pejorative sense.

The aforementioned considerations do not negate an institution's legal or educative responsibilities to provide access to student speakers, but allowing access to campus spaces for speech and expressive activities is only one aspect of the multiple functions carried out at public colleges and universities. When students or outside observers raise concerns about certain campus speakers or types of speech, they create opportunities to examine and seriously reflect upon their objections. The exercise of carefully asking how a speaker may support the educational or scholarly mission of a college does not mean that institutional leaders should automatically agree to censor or prevent speakers from coming to campus. While the authors of this essay may disagree that canceling or uninviting speakers is the best way to address student, faculty, or citizen concerns, we reject the premise that concerns about the negative impacts of hateful or hurtful speakers do not merit serious intellectual engagement. Rather, concerns about speakers often raise issues worthy of serious consideration and reflection about inequities that exist at our higher education institutions and beyond.

II. FORUM STANDARDS AND OPEN CAMPUS AREAS

As with property under the control of other types of governmental actors, forum standards often provide the determinative legal rules that determine whether open areas on public college and university campuses must be made available for student speech and expressive activities.[25] Under forum analysis, governmental property is subject to varying standards regarding access for speech and expressive activities, depending on the

25. For a discussion of the use of forum analysis in higher education see Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005).

property's historical use or designated purpose by the government.[26] Under forum standards, there exist (1) the traditional or designated public forum,[27] (2) a middle type of forum—sometimes referred to as a limited public forum[28]—where use is limited to particular groups or for particular purposes,[29] and (3) the nonpublic forum.[30]

Many types of governmental property are not available for speech and expressive activities by the general public.[31] In contrast, some governmental property, such as courtyards or sidewalks, are by tradition and custom viewed as an open forum for citizen speech, constituting a traditional public forum.[32] Likewise, a governmental actor may voluntarily choose to designate property it owns—the designated public forum—as a forum for citizen speech functionally equivalent to a traditional public forum. Under forum standards, a forum may also be reserved to a particular class of individuals—such as students—and not to others—such as those unaffiliated with an institution—or reserved for speech on particular issues.[33] Additionally, the standards for governmental property may shift depending on usage, such as when a public school allows community groups to use its facilities when classes or other school activities are not in session.[34] Thus, a key step in forum analysis involves classifying the type of forum under consideration and the operable First Amendment standards for the forum type in relation to students or others seeking access to the forum.

When an open campus area is classified as a traditional or designated public forum, colleges and universities are limited in the extent to which they can control access to, or impose regulations on, that space, which can also

26. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.").

27. Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) ("[M]embers of the public retain strong free speech rights when they venture into public streets and parks. . . . ").

28. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). Courts have not always been consistent in naming or describing this middle forum.

29. *See generally* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009). In the case of public colleges and universities, for instance, as developed in this essay, language in some opinions can be taken to suggest that public colleges and universities can limit certain open forums to students but then must apply the legal standards typically associated with the traditional or designated public forum.

30. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of the subject matter and speaker identity.").

31. *Id.* at 46 (holding that school mail facilities constituted a nonpublic forum).

32. *Pleasant Grove City*, 555 U.S. at 469.

33. *Id.* at 470.

34. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (involving a school district policy that governed the use of school facilities by the general public—resulting in a limited public forum—when not being used for school purposes).

reach individuals unaffiliated with the institution.[35] As raised in this essay, a question exists whether a traditional or designated public forum may exist only in relation to students and not for speakers unaffiliated with the institution.[36] Typically, if a forum is not open to all members of the general public, then it falls into the middle category of fora—the limited public forum.[37] However, in several legal decisions, courts have expressed skepticism about whether public colleges or universities may regulate student speech by categorizing all or most open campus areas as limited or nonpublic fora in relation to students.[38] The extent of institutional legal authority over student speech in open campus areas has important implications when it comes to student speech zones. Namely, does a public college or university possess legal discretion to restrict student speech and expression to specific "speech zones" in outdoor areas on campus? To begin to address this question, this section provides an overview of First Amendment standards generally applicable to college student speech before turning specifically in Part III to speech zones and open campus areas.

The U.S. Supreme Court and lower courts have established that public college and university students possess important speech rights in relation to their institutions.[39] These decisions mandate that public college students do not forfeit their First Amendment rights in exchange for admission. At the same time, the extent of available student speech rights in public higher education depends on several factors. Along with the context in which the speech arises—i.e., traditional, designated, or nonpublic forum—the nature of the speech can also implicate institutional authority.[40] In terms of context, courts have recognized, for instance, that colleges and universities possess greater legal discretion to regulate student speech that arises in class settings, whether residential or online.[41] Institutions may regulate student speech that implicates educator authority, even if the speech

35. *Pleasant Grove City*, 555 U.S. at 469-70 (citing Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 800 (1985)) ("Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.").

36. As developed in this essay in Part IV, judicial discussion of traditional and designated public fora would not seem to suggest exclusion to particular groups such as students. However, as illustrated by language in opinions discussed in this essay, at least some courts seem to indicate that the legal standards applicable to these types of fora could be used in applying to open campus fora that are limited to students.

37. Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661, 681 (2010) (discussing the use of limited public forum analysis in the context of colleges and universities limiting official recognition of student organizations to those groups only limited to student members).

38. *See infra* Part IV.

39. For a discussion of First Amendment rights available to college students, see Jeffrey C. Sun, Neal H. Hutchens & James D. Breslin, *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49 (2013).

40. *Id.* at 53-71.

41. *Id.* at 65-71.

does not take place in instructional settings (such as on the basis of professionalism standards as might be present in a student-teacher education program).[42] In contrast to student speech arising in class contexts, public colleges and universities tend to possess less control over student speech that occurs in non-class related situations. No matter the setting in which the speech takes place, public college and university officials are also able to restrict speech and discipline students for speech that represents a true threat to others[43] or otherwise meets the standards of harassment under relevant laws such as Title IX[44] or Title VI.[45]

In the context of campus fora, in *Widmar v. Vincent*,[46] the U.S. Supreme Court held that when a campus forum has been made available to students, the institution must not favor or disfavor particular viewpoints in providing access to the forum.[47] Additionally, the Court's opinion in this case noted that, in many respects, campus areas are akin to traditional open fora as it relates to students.[48] Still, the Court stated in *Widmar* that a college campus "differs in significant respects from public forums such as streets or parks or even municipal theaters."[49] As such, according to the Court, public higher education institutions retain discretion to "impose reasonable regulations compatible with that [educational] mission upon the use of its campus and facilities."[50] Additionally, a public college or university operates under no legal obligation to "make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings."[51]

In relation to forum determinations with open campus areas and students, within either a traditional or designated public forum, governmental restrictions on the content of speech must survive strict scrutiny.[52] As long as

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42. *See generally* Neal H. Hutchens & Mercy Roberg, *Professionalism Standards and College Students' First Amendment Speech Rights*, 342 ED. LAW REP. 16 (2017).

43. Virginia v. Black, 538 U.S. 343, 359 (2003) (citing Watts v. United States, 394 U.S. 705, 708 (per curiam)) (explaining, "'True threats'" 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.").

44. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012).

45. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012).

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

47. *Id.* at 277; *See also* Healy v. James, 408 U.S. 169 (1972). In *Healy*, the Supreme Court rejected the position that the alternative of a group of students to meet off campus supported a conclusion that no deprivation of First Amendment rights had occurred. *Id.* at 182-83. While affirming students' First Amendment rights on campus, the Court also discussed that institutions could restrict speech and expressive activities that "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189.

48. *Widmar*, 454 U.S. at 267 n.5.

49. *Id.*

50. *Id.*

51. *Id.*

52. Cornelius v. NAACP Legal Def. Fund & Educ. Fund, 473 US. 788, 800 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("[S]peakers can

a restriction is content neutral, a governmental actor my impose reasonable time, place, and manner regulations.[53] Such restrictions, however, must be narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels for communication.[54] Under time, place, and manner standards, the government may, for instance, restrict the use of sound amplification devices, because such a restriction bears no relation to the content of the speech involved.[55]

As discussed, courts have recognized a category of fora between the traditional/designated forum and the nonpublic forum. However, they have not always demonstrated consensus over how exactly to characterize this type of middle forum—we use the term "limited public forum."[56] With a limited public forum, the government may open a space to certain groups, or for specific types of speech or expressive activities.[57] With a limited public forum, restrictions must be reasonable in relation to the forum's purpose, and the government must not engage in viewpoint discrimination in the treatment of those otherwise permitted to access the forum.[58] For instance, if a public college or university has created a forum for student political groups, then it cannot favor or disfavor one group over another on the basis of espoused political beliefs.

A classroom demonstrates the concept of a nonpublic forum in the context of student speech. In a nonpublic forum, governmental authority to regulate speech is substantially greater than it would be in a traditional or designated public forum. To illustrate, in *Axson-Flynn v. Johnson*, a college theater major claimed that her First Amendment rights were violated when instructors refused her request to refrain from reciting certain words or phrases in classroom acting exercises that she found objectionable on religious grounds.[59] In its analysis, the Court stated that it first needed to determine what kind of forum the classroom constituted.[60] While the student's speech claim also depended upon the fact that the speech directly involved an instructional activity,[61] the classroom's designation as a

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be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

53. *Perry Educ. Ass'n*, 460 U.S. at 45.

54. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 308 (1984) (upholding National Park Service regulation that prohibited sleeping overnight in LaFayette Park near the White House and the National Mall as applied to a demonstration to raise awareness of homelessness).

55. Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

56. *See generally* Rohr, *supra* note 29 at 322; *see also* Gilles v. Blanchard, 477 F.3d 466, 474 (7th Cir. 2007) (discussing how courts have used the terms "'limited designated public forum' (versus the 'true forum'), the 'limited public forum,' or the 'limited forum'").

57. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

58. *Id.* at 106-07 (citing Cornelius v. NAACP Legal Def. Fund & Educ. Fund, 473 US. 788, 806 (1985)).

59. 356 F.3d 1277 (10th Cir. 2004).

60. *Id.* at 1284-86.

61. *See infra* Part IV.

nonpublic forum supported institutional authority to require the student to recite all the words in an assignment. The Court concluded that no basis existed to conclude that the classroom constituted a traditional or designated public forum, or whether heightened speech protections would apply.[62] As a nonpublic forum, the institution "could regulate the speech that takes place there [the classroom] 'in any reasonable manner.'"[63]

Multiple fora can exist on public college and university campuses. These can range from nonpublic fora, such as classrooms (at least when classes are in session), to limited and traditional/designated public fora. Additionally, depending on its usage at a particular time, a campus space can take the form of more than one type of forum. For instance, an auditorium might be used for performances (a nonpublic forum) but then also be made available when not in use for university functions to be reserved by student groups or members of the general public (a designated or limited public forum). Legal disputes may arise regarding access by students to otherwise seemingly "public" spaces on campus, especially those typically found to be traditional public fora outside of the university context, such as sidewalks or courtyards. Litigation often centers on the extent to which institutions may control these open campus areas in relation to students. In the next section, we focus on the legal authority of public colleges and universities to treat specific campus areas as designated free speech zones for students, while seeking to classify most other campus areas as either a nonpublic or limited public forum for student speech.

III. STUDENTS, OPEN CAMPUS AREAS, AND SPEECH ZONES

As shown in the discussion in this section, multiple courts have resisted institutional free-speech zone policies that they deem as overly restrictive when it comes to student speech. At the same time, even among cases in which courts have been dubious of institutional authority to enforce speech zones, important questions remain unresolved. To what extent must an institution provide students access to open campus areas? Furthermore, if a forum is limited to students, what kind of forum is created exactly? Is the resulting forum a type of traditional/designated forum, despite the fact that it is limited to students? Or is the resulting forum a limited public forum that is subject to standards of reasonableness and viewpoint neutrality when it comes to limits on institutional authority?

A case involving the University of Cincinnati[64] illustrates how a court may not favorably view speech zone policies that limit student speech and expression to small areas on public campuses. Students at the university sought to collect signatures for a petition drive to have a labor-related

62. 356 F.3d at 1285.

63. *Id.* (quoting Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988)).

64. Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012).

measure placed on the ballot for an upcoming state election.[65] The students encountered university rules that limited demonstrations, picketing, and rallies to a free speech zone that comprised a small part (0.01 percent) of campus.[66] The students also alleged that the university enforced a policy that meant any speakers had to provide a minimum of a five-day notice to be able to engage in any speech or expressive activity.[67]

Legal arguments in the case centered on forum analyses for the various open campus areas that students sought to access. Students contended that the free speech zone constituted a traditional public forum and that other open areas at which they sought to gather petitions were designated public fora in relation to students.[68] The university countered that all the open campus spaces in question were limited public fora, which meant any institutional regulations would be evaluated based on standards of reasonableness and viewpoint neutrality.[69]

In analyzing the fora at issue, the Court discussed that forum classifications depend on factors that include "the traditional use of the property, the objective use and purposes of the space, the government intent and policy with respect to the property, and its physical characteristics and location."[70] In determining how to classify the speech zone, the Court distinguished between the university's "*subjective*" intent to restrict access versus its adoption of "*objective* criteria [that] demonstrate[d] that the University ha[d] traditionally made the Free Speech Area available to students as a designated public forum."[71] The Court noted that the university also characterized the space as the "main free speech area" to which it had allowed demonstrations, rallies, and pickets even while disallowing such activities in other areas.[72] According to the Court, the university had, "as a matter of course," made the free speech area available for student speech and expressive activity.[73] Based on these considerations, the Court classified the free speech area as a designated public forum.[74] Furthermore, the Court also decided that other campus areas under consideration, such as interior sidewalks, also constituted designated public fora, at least for students.[75]

An important point to consider in the case involves the fact that the Court interpreted all the fora in question as designated public fora. The Court did not analyze the students' argument that the free speech zone constituted

65. *Id.* at *1.
66. *Id.* at *3.
67. *Id.* at *2.
68. *Id.* at *3.
69. *Id.*
70. *Id.* (citing Cornelius v. NAACP Legal Def. Fund & Educ. Fund, 473 US. 788, 802 (1985)).
71. *Id.* at *4 (emphasis in original).
72. *Id.*
73. *Id.*
74. *Id.* at *5.
75. *Id.*

a type of traditional public forum, at least in relation to students.[76] The significance of this issue relates to the fact that the government retains ultimate authority to re-classify a designated public forum. While many institutions may be unlikely to re-categorize a forum open for student expression based on pushback from students, this is not necessarily always the case. For example, Ohio University, in the wake of multiple protests, moved to establish, with an interim policy, that indoor spaces previously available for student speech and expressive activity were no longer an open forum.[77] The incident illustrates that a relevant question in the student speech realm involves the extent to which public institutions retain legal control to limit student speech by re-classifying open campus areas as limited or nonpublic fora.

In *Williams*, the Court did offer in dicta some views about the limits of institutional authority to regulate student speech. It described the University of Cincinnati's assertion to control student speech in open campus spaces as "anathema to the nature of a university" and to the idea of higher education institutions serving as a marketplace for ideas.[78] Additionally, the Court stated that it was unaware of any previous legal decisions holding that a public college or university "may constitutionally designate its entire campus as a limited public forum *as applied to students*."[79] The Court, however, did not elaborate upon this idea and what limits might exist under the First Amendment about how a college or university may choose to classify open campus spaces when it comes to student speech and expression and overall access to such areas.

Other courts have shown skepticism over institutional policies viewed as overly restrictive of student speech in open campus spaces. For example, a federal appeals court held that multiple open campus areas at the University of Texas at Austin constituted designated public fora in relation to students.[80] The University had contended that these areas should be interpreted as either limited or nonpublic fora.[81] The University further argued that if the campus areas were categorized as designated public fora, then the spaces in question would have to be open to individuals unaffiliated with the institution along with students.[82] The Court found this argument unpersuasive, stating that its task was "simply to determine whether outdoor open areas of the University campus, accessible to students generally, have been designated as a forum for *student* expression."[83] Looking to institutional

76. *Id.*

77. Jeremy Bauer-Wolf, *A Total Prohibition*, INSIDE HIGHER ED (Sept. 13, 2017), https://www.insidehighered.com/news/2017/09/13/ohio-universitys-new-free-expression-policy-bars-indoor-protests.

78. *Williams*, 2012 WL 2160969, at *5.

79. *Id.* (emphasis in original).

80. Justice for All v. Faulkner, 410 F. 3d 760, 769 (5th Cir. 2005).

81. *Id.* at 766.

82. *Id.*

83. *Id.* at 767 (emphasis in original).

rules and statements, the Court stated that the institution had granted "students too broad a guarantee of expressive freedom now to claim it intended its campus to function as a limited public forum."[84] Applying the standards applicable to a designated public forum, the Court invalidated the University of Texas' prohibition on anonymous leafletting in open campus spaces as an unreasonable regulation.[85]

In other cases, courts have also emphasized institutional policy as a basis to invalidate efforts to constrain student speech activities. For example, in a case involving the University of Houston,[86] a federal district court decided that the University, based on past policy and practice, had "purposefully opened" a campus plaza for student speech and expression over a period of years.[87] After a dispute over the use of the plaza, the University sought to re-classify it as a limited public forum or nonpublic forum instead of a designated public forum.[88] The Court rejected the institution's arguments that the change in policy rendered the students' First Amendment arguments moot.[89] However, in not allowing such a re-classification to serve as a basis to make the students' claims moot, the Court did not elaborate upon the circumstances in which a public college or university could permissibly re-classify fora that it had previously made available to students.

The cases involving the University of Cincinnati, University of Texas at Austin, and the University of Houston illustrate how courts have interpreted institutional policy in ways that are sympathetic to student speech rights in open campus areas. Even though the cases raised the topic of institutional authority to determine forum standards, the courts did little to address potential limits on the authority of colleges and universities to categorize or re-categorize open campus areas in terms of forum standards. This is not an abstract discussion, as some public colleges and universities continue to enforce speech zones that restrict campus speech and expression to relatively small areas on campus.

One exception to an overall lack of explicit judicial consideration of the issue comes from a case involving Texas Tech University.[90] In the decision, a federal district court speculated on whether public higher education institutions must treat at least some campus areas as a type of open forum in terms of students. The Court pointed to two "axioms" relevant to its inquiry.[91] First, an entire university campus does not constitute some sort of

84. *Id*. at 769.
85. *Id.* at 771.
86. Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575 (S.D. Tex. 2003).
87. *Id.* at 582.
88. *Id.* at 580.
89. *Id.* at 581 (rejecting such arguments in part because the university continued to defend the constitutionality of the original policy).
90. Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Texas 2004).
91. *Id.* at 861.

public forum.[92] Second, the Court noted that previous decisions recognized that a public college or university campus has many characteristics of a public forum, at least when it comes to students.[93] Keeping both these directives in mind, the Court offered the "preliminary assumption" that "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not."[94] Having determined that at least some, but not all, open campus spaces constituted open fora in terms of students, the Court stated that the University could designate more spaces as open fora, but it could not go below this idea of some kind of a minimum—though the Court did not clarify exactly how such a determination is made.[95]

Despite not offering specific criteria to determine how much of a campus must be open to students, the Court did offer some thoughts on a rationale for finding certain open campus areas as open fora for students. The Court discussed how design factors in with similarities to traditional public fora such as parks and sidewalks could be taken into consideration when making forum determinations as to students.[96] The language suggests that for students, the campus environment can be viewed in certain respects as a microcosm of the larger society.

In this special societal subset, students can be viewed to constitute the citizenry, with certain campus fora available to them just as would be the case for the general public in other settings in terms of access to governmental property. Such an approach is not inconsistent with the Supreme Court's observation in *Widmar v. Vincent* that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[97] Along these lines, in a case involving the University of Nevada at Las Vegas, the Nevada Supreme Court discussed that "when reviewing restrictions placed on students' speech activities, courts have found university campuses to be designated public forums. However, when the rights being restricted belong to nonstudents, courts have generally held university facilities and campuses to be limited public or nonpublic forums."[98]

While not fully articulated, it may well be that future court decisions could outline a special category of forum analysis relative to students and their institutions. It is not unprecedented for the Supreme Court to adjust First Amendment rules to a collegiate environment. In *Board of Regents of the*

92. *Id.* (citing United States v. Grace, 461 U.S. 171, 177-78 (1983)).
93. *Id.* at 861 (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).
94. *Id.* at 861.
95. *Id.* at 862.
96. *Id.* at 861 n.8.
97. *Widmar*, 454 U.S. at 267 n.5.
98. Univ. and Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't., 100 P.3d 179, 190 (Nev. 2004) (holding that, at least to nonstudents, the UNLV campus constituted a limited public forum).

University of Wisconsin System v. Southworth,[99] the Court held that public colleges and universities may impose mandatory student fees that can be used to support the activities of recognized student organizations.[100] In *Southworth*, a group of students challenged the fees as a form of impermissible compelled speech.[101] The students argued that the situation facing them was equivalent to instances where the Supreme Court had invalidated using membership fees to a teacher's union and a state bar association—organizations to which the objectors had to belong based on their professional positions—to fund political speech not germane to the principal functions of the organizations.[102] The Supreme Court rejected the students' argument in *Southworth*.[103]

Determining that a germaneness test would prove unworkable in a collegiate setting, the Court offered the following:

> If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.[104]

Considering the intellectual purposes of a public university, the Court determined that an institution could implement a mandatory fee program to support student organizations.[105] Specifically, it turned to the standards applicable to the limited public forum—viewpoint neutrality and reasonableness—to evaluate the distribution of funding under a mandatory student fee structure.[106]

Thus, the case presents an example of the Supreme Court calibrating First Amendment standards in a manner appropriate to students and a public higher education environment. To avoid confusion, we are not suggesting that *Southworth* stands for the proposition that all open campus areas should be viewed as a limited public forum in relation to students. A public college or university does not have to maintain a mandatory student fee program for the support of student organizations. It is also worth noting that access to open campus areas for students would not need to be predicated on receiving recognition as an official student organization. Our point in discussing *Southworth* is to demonstrate how the Supreme Court has differentiated First Amendment standards dealing with student speech from other First Amendment speech cases not involving higher education.

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99. 529 U.S. 217 (2000).
100. *Id.* at 233.
101. *Id.* at 227.
102. *Id.* at 230.
103. *Id.* at 232.
104. *Id.*
105. *Id.* at 233.
106. *Id.*

While language in some court opinions suggests that traditional/designated public fora rules may be the appropriate standards to apply to student speech in various open campus spaces, not all courts have been sympathetic to student claims regarding such campus areas. In a case involving a student organization at the University of South Alabama,[107] students sought to distribute flyers and engage in "peaceful demonstrations" at various outdoor places on campus.[108] Initially, the University limited student speech and expressive activity to a free speech zone near the student center.[109] During litigation, the institution revised its standards to expand the available spaces.[110] The students still sought access to an area referred to as the "Perimeter," which included "most spaces between the street side of campus buildings and the public sidewalks paralleling [two streets through campus]."[111] The Court rejected the assertion that the space in question should be viewed as a traditional public forum.[112] While accepting the proposition that it is "theoretically" possible that the Perimeter constituted a designated public forum for students and a limited public forum for those unaffiliated with the University,[113] the Court determined that the institution had made clear determinations in policy and practice that the Perimeter did not constitute an open forum for student speech and expressive activity.[114]

While several courts have offered views suggesting that students are vested with First Amendment speech rights for at least some open campus areas that operate independent of institutional mandates, such a conclusion is far from certain. At most, courts may be willing to afford public colleges and universities limited leeway in interpreting student speech policies for open campus areas in a narrow manner. As perhaps indicated with the case involving the University of South Alabama, an institution's clear expression of policy backed by practice that aligns with the official policy may mean that public colleges and universities enjoy considerable discretion when it comes to regulating student speech in open campus areas. Conversely, as litigation continues, courts may begin to articulate clearer limits on institutional authority to restrict student speech in open campus spaces. One potential avenue is the recognition of campus fora for students that are a special subset of the traditional public forum or, alternatively, even if not

107. Students for Life USA v. Waldrop, 162 F. Supp. 3d 1216 (S.D. Ala. 2016).
108. *Id.* at 1219.
109. *Id.* at 1220.
110. *Id.*
111. *Id.*
112. *Id.* at 1223.
113. *Id.* at 1224.
114. *Id.* at 1230. Alongside a clear policy statement, the court discussed that the students failed to demonstrate that the university had engaged in sufficient practices related to the Perimeter that resulted in the creation of a designated public forum. *Id.* at 1229. According to the Court, the students "failed to show a consistent or even sporadic practice by the University of authorizing, contrary to its formal policy, indiscriminate use of the Perimeter for general student discourse." *Id.* at 1225.

labeled as such, that function under the same legal standards as applied to traditional and designated public fora. The next section considers other alternatives to establish student speech rights in open campus areas. Besides limiting analysis to cases centered on forum standards, courts could also apply legal rules from other lines of precedent involving student speech in determining the extent of college student speech rights in open spaces on campus.

IV. BEYOND FORUM ANALYSIS

With student speech rights, apart from forum analysis, other First Amendment protections for student speech are relevant, especially in relation to the use of speech zones and restrictions on certain expressive activities, such as handing out flyers. As noted in *Widmar v. Vincent*, the Supreme Court discussed that, when it comes to students, a college or university campus in many respects resembles open fora as are found in the context of other governmental property.[115] Beyond forum analysis, cases such as *Widmar*—and *Healy v. James*[116]—also demonstrate the Supreme Court making clear that First Amendment speech protections apply to public college students. Outside of a forum analysis, are there other speech protections—whether grounded in concepts of student academic freedom or from *Tinker v. Des Moines Independent Community School District*[117]—that should apply to college students' speech claims made pursuant to speech and expressive activities in open campus areas?

At times, commentators have referred to the concept of students' academic freedom rights.[118] The American Association of University Professors endorses the concept of student free speech and inquiry as a fundamental aspect of higher education.[119] Courts have also demonstrated interest in the issue of student speech rights as members of the campus community. In *Oyama v. University of Hawaii*,[120] for example, a student, dismissed from a teacher education program based on comments and actions that led faculty to conclude he was unfit for student teaching, challenged the dismissal.[121] This decision left him unable to qualify for professional

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

116. 408 U.S. 169 (1972) (holding that student group could not be denied access to meet on campus).

117. 393 U.S. 503 (1969). The *Tinker* case is discussed later in this section.

118. For consideration of the issue, see 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 (2017).

119. *Academic Freedom of Students and Professors, and Political Discrimination*, AM. ASS'N. U. PROFESSORS, https://www.aaup.org/academic-freedom-students-and-professors-and-political-discrimination (discussing that the notion students possess legally cognizable academic freedom rights represents a contested issue).

120. 813 F.3d 850 (9th Cir. 2015).

121. *Id.* at 855. For example, the student, Oyama, asserted in a paper that consensual sex with a minor should not be illegal. *Id.* at 856. When questioned by a faculty member, he

licensure as a teacher.[122] Based on his rejection from student teaching and unable to reach a compromise with the University, Oyama challenged the actions taken against him as an infringement of his First Amendment rights.[123] A federal district court held that the standards announced by the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeir*[124] provided an acceptable legal basis to exclude Oyama from student teaching.[125] The U.S. Court of Appeals for the Ninth Circuit affirmed summary judgment against Oyama, but it based its decision on legal standards other than *Kuhlmeir*. The Court described the First Amendment situation under review as of a "hybrid nature," comingling "characteristics of both a student and a public employee."[126] For our purposes, the significant point arises from the Court's refusal to look exclusively to either of these lines of precedent. Namely, the Court discussed how neither grouping of cases failed to account for the academic freedom concerns present in higher education.[127]

A case such as *Oyama* raises questions over how First Amendment analysis should take into account student speech rights in a curricular-related context, but such concerns are also present in the cases involving student speech in open campus areas. In particular, how are student speech cases, notably *Tinker*, potentially implicated in relation to the use of student speech zones?[128] In *Tinker*, the Supreme Court held that a high school could not prohibit students from wearing black armbands as a form of silent protest to the Vietnam War.[129] The Court discussed that absent a substantial disruption to the educational environment or speech that constituted an impediment on the educational rights of other students, independent student speech is protected by the First Amendment.[130]

In considering the applicability of student speech cases—*Tinker* in particular—in relation to student speech zones, an important point to keep in mind is the need to calibrate the standards of substantial disruption or impeding the educational rights of other students to a collegiate environment. Some commentators—rightly in our view—have criticized courts for the

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stated that he would uphold state legal requirements but did not recant this position. *Id.* Oyama also made comments concerning students with disabilities that alarmed educators. *Id.* at 856-57.

122. *Id.* at 854.

123. *Id.* at 859.

124. 484 U.S. 260 (1988). In the case, a secondary school newspaper was censored by the principal. *Id.* at 263-64. The Supreme Court held that because the newspaper was connected to a journalism class and involved student speech that is school-sponsored in nature, it could be censored without violating the First Amendment. *Id.* at 274.

125. *Oyama*, 813 F.3d at 859-60.

126. *Id.* at 860.

127. *Id.* at 863, 866.

128. A "hat tip" goes to Lee Tyner, former general counsel at the University of Mississippi, for a conversation on the lack of a coherency in terms of the student speech line of cases and application of forum standards in addressing student speech claims.

129. *Tinker*, 393 U.S. at 514.

130. *Id.* at 513.

importation of these standards—especially *Kuhlmeir*—without making the necessary adjustments for their application to college students.[131] With the issue of student speech in open campus areas, however, the *Kuhlmeir* standards are well removed from any kind of notion of school-sponsored speech. In fact, with the concept of forum analysis, the point is that, even though the speech is taking place on government property, it is not governmental speech at issue. Rather, such fora are intended as places of independent citizen speech, which would encompass student speech in open campus areas. Accordingly, the type of independent student speech at issue in *Tinker* is more relevant to student speech in open campus spaces.

If a court were to appropriately tailor *Tinker*-esque standards to collegiate speech, what would this mean for open campus areas? That is, should the speech rights available to public college and university students—especially if influenced by concepts related to student academic freedom—also inform the ways in which courts interpret student speech rights? If so, this could influence the extent to which an institution could, for example, declare all or most of the campus a limited or nonpublic forum in relation to open campus areas and then relegate student speech to small speech zones. It could also impact, apart from speech zone usage by groups of students, whether an individual student or small group of students seeking signatures for a petition or handing out flyers would result in the type of substantial disruption that would be subject to institutional authority.

Thus, along with forum standards, courts could consider what baseline speech rights should be possessed by public college students in open campus spaces independent of the concept of forum analysis. Doing so would create some interpretational challenges—especially given struggles by some courts over not treating college students like their elementary and secondary peers for First Amendment purposes—but it could help solve others as well. Looking to *Tinker* concepts could provide a basis to evaluate the level of access that is appropriate for students to open campus areas apart from or along with forum standards. For instance, even if open campus areas reserved for students are interpreted as a limited public forum—as opposed to a traditional/designated public forum—these standards could prove helpful in relation to determining what constitutes a reasonable restriction on college students' speech in such a forum. Furthermore, even as to open campus areas labeled as a nonpublic forum, these standards could provide a basis to prohibit restrictions on at least certain types of student speech, such as petition gathering or leafletting. If applied in a way suitable to public college students, *Tinker* and other student speech cases provide a basis to take into account the speech rights that should accrue to students—independent of

131. *See, e.g.*, Frank D. LoMonte, *"The Key Word Is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305 (2013); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017); Sun et al., *supra* note 39.

forum analysis—based on their status as members of an academic community.

V. STATE LEGISLATIVE EFFORTS TO RE-SHAPE STUDENT AND INSTITUTIONAL SPEECH RIGHTS

Even as courts consider the permissibility of student speech zones under the First Amendment, some states have moved to prohibit their use at public institutions. Along with addressing speech zones, provisions in state laws or in proposed legislation have sought to regulate other facets of individual campus speech rights, such as mandating disciplinary measures against students who disrupt a campus speaker. Model legislation from the Goldwater Institute that has provided a pattern for state legislative proposals also contains provisions that pertain to institutionally-based speech. In particular, the model legislation calls for institutional leaders to take a neutral stance on matters of public controversy. This section considers recently enacted state laws and proposed legislative measures dealing with individuals speech rights on campus and institutional responsibilities and roles in matters of free speech and expression.

At least eight states—Arizona,[132] Colorado,[133] Kentucky,[134] Missouri,[135] North Carolina,[136] Tennessee,[137] Virginia,[138] and Utah[139]— have enacted laws that, among their provisions, address the use of student speech zones. Virginia's law, enacted in 2014, illustrates the types of provisions found in these statutes:

> Public institutions of higher education shall not impose restrictions on the time, place, and manner of student speech that (i) occurs in the outdoor areas of the institution's campus and (ii) is protected by the First Amendment to the United States Constitution unless the restrictions (a) are reasonable, (b) are justified without reference to the content of the regulated speech, (c) are narrowly tailored to serve a significant governmental interest, and (d) leave open ample alternative channels for communication of the information.[140]

132. ARIZ. REV. STAT. ANN. § 15-1864 (2017).
133. COLO. REV. STAT. § 23-5-144 (2017).
134. KY. REV. STAT. ANN. § 158.183 (West 2017).
135. MO. REV. STAT. § 173.1550 (2017).
136. N.C. GEN. STAT. § 116-300 (2017).
137. 2017 Tenn. Pub. Acts Ch. 336.
138. VA. CODE ANN. § 23.1-401 (West 2017).
139. UTAH CODE ANN. § 53b-27-201 (West 2017).
140. VA. CODE ANN. § 23.1-401 (West 2017).

Under the Virginia standards, and those in other state laws, institutions must abide by the First Amendment rules governing traditional/designated public fora in terms of regulating student speech in open campus areas.

For supporters of student speech rights, these laws represent a welcome development in making public college campuses open and accessible for student speech and expression. Other states are likely to continue weighing the enactment of similar laws. Alongside resistance by multiple courts, legislative trends against speech zones in these laws suggest that institutions still legally permitted to use student speech zones should reflect on their appropriateness for a collegiate environment. That is, apart from legal mandates, institutions' use of speech zones runs contrary to the concept of colleges and universities as places for the free exchange of ideas. Whether public or private, institutional leaders should consider carefully the value of speech zones in terms of adhering to institutional prerogatives in the area of free speech and the open exchange of ideas. Such contemplation could lead institutions to conclude that speech zones, even if not subject to an active legal challenge or state legal provision, are at odds with values of free inquiry espoused by most colleges and universities.

While state laws that ban speech zones represent a useful development in the student speech realm in our view, other statutory provisions have been considered in state campus speech bills that, under the guise of free speech, are problematic in furthering the goals of intellectual inquiry on campus. Several of these provisions are more focused on furthering a narrative that colleges and universities are antagonistic to free speech—at least of those individuals from the political right—and, thus, require that state legislatures should mandate heavily prescriptive rules for how public colleges and universities deal with speech controversies on campus. These proposed rules go much further than guaranteeing access to open campus areas for students. In particular, some provisions seek to mandate that institutions must punish students who disrupt the speech of others.

While enacted in a diluted form in terms of imposing specific requirements on institutions, North Carolina passed a campus speech law that requires public institutions to have policies in place that address the issue of student discipline for the disruption of speakers.[141] Proposed legislation seems to have prompted the governing board of the University of Wisconsin to adopt a policy aimed at students who interfere with campus speakers.[142]

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141. Matthew Burn, *UNC Official OK with Revised 'Free Speech' Bill*, WRAL.COM (Apr. 24, 2017), http://www.wral.com/unc-officials-ok-with-revised-free-speech-bill/16662870/.

142. Karen Herzog, *Regents Approve Punishments up to Expulsion for UW Students Who Repeatedly Disrupt Speakers*, MILWAUKEE J. SENTINEL (Oct. 6, 2017), http://www.jsonline.com/story/news/education/2017/10/06/regents-consider-punishments-uw-students-who-disrupt-speakers/738438001/.

Under the policy, a student who has twice previously disrupted a speaker is subject to suspension for a third offense.[143] Such a requirement leaves university officials having to enforce an overly cumbersome rule for when punishment should or should not occur for opposing a campus speaker. In fact, free speech could be chilled by students refraining from speech and expressive activity based on fear of punishment.

Furthermore, disruption provisions may actually infringe on students' First Amendment rights based on the difficulty in crafting standards that are not vague and do not encroach on speech and expressive activity that is protected by the First Amendment. Based on such concerns, the Foundational for Individual Rights in Education (FIRE)—an influential group that has promoted student free speech in higher education—came out against this type of requirement in the Wisconsin bill that preceded the University of Wisconsin policy.[144] The American Civil Liberties Union (ACLU) also expressed concern over the requirement originally considered in the North Carolina legislation to punish those who disrupt speakers.[145] As noted earlier, speaker disruption provisions can be traced to language in model legislation from the Goldwater Institute discussed earlier in the essay.[146]

Forcing colleges and universities to take punitive action against all types of disruption of speakers takes away needed discretion for colleges and universities to be able to carry out their educational mission. It also creates difficulty in enforcement, as it places a heavy burden on institutions to define what constitutes a disruption and then to identify disruptors. A better approach is to let institutions make decisions on a case-by-case basis for when punishment is warranted, such as when disruptions present a threat to public safety. Rather than fixate on punitive enforcement, colleges and universities should instead focus on ways to promote an exchange of ideas in which individuals are able to disagree with, but also abide, speech that they find objectionable.

Another provision in the Goldwater Institute model legislation calls for institutions to assume a neutral stance on issue of public controversy.[147] In essence, the legislation proposes to muzzle institutional leaders on various speech issues to weaken the notion that institutions are able to espouse values related to, for instance, diversity and inclusion. Apart from concerns over misunderstanding the place of colleges as appropriately being able to advocate for certain positions, this kind of legislation would prove

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143. *Id.*

144. Colleen Flaherty, *Words Fly on Free Speech Bill*, INSIDE HIGHER ED (May 15, 2017), https://www.insidehighered.com/news/2017/05/15/critics-proposed-legislation-first-amendment-rights-wisconsin-public-universities.

145. Ray Gronberg, *Rights Group Has Qualms about 'Free Speech' Bill Targeting UNC*, HERALD SUN (May 4, 2017), http://www.heraldsun.com/news/local/education/article148662214.html.

146. Kurtz, et al., *supra* note 16.

147. *Id.* at 20.

exceptionally difficult to implement. Namely, under what circumstances exactly would a subject exactly qualify as controversial? For example, there are many individuals now dubious of college football based on, among other things, the physical threats to players, including risk for traumatic brain injuries. As such, would that mean that a public college or university president would be forced to refrain from commenting in an official capacity on an upcoming football game? On most any conceivable topic, there may exist some level of controversy. Seeking to force public higher education institutions to remain neutral is not realistic given the array of issues arising on college campuses.

The model legislation aims to correct what the organization views as too much of a left-leaning bias in American higher education and promote a narrative that the only threats to free speech on college campuses come from the political left.[148] In our view, the speaker disruption and neutrality provisions are best viewed as using free speech as intellectual cover to undermine institutional autonomy rather than just reflective of concerns over free speech. Echoing such a stance, consider the speech by Attorney General Jeff Sessions at Georgetown University Law Center where he derided the current status of free expression on campus.[149] It would be interesting to discover when Sessions became a free speech "warrior." As the Attorney General of Alabama, Sessions sought to prevent a LGBTQ-focused conference at the University of Alabama.[150]

In a similar vein, the Goldwater Institute model legislation uses free speech as camouflage for efforts to further a particular ideological vision of higher education and society. In some ways, critics of free speech from the political left have been more transparent in offering the view that free speech concerns are secondary to other interests. It is important to keep in mind that campus speech debates are encompassed in larger societal and political debates surrounding higher education, with potential intrusions of free speech capable of coming from the political right as well as the political left.

CONCLUSION

The defining free speech issues of the summer of 2017 related to issues of religion and racism. Some want colleges and universities to ensure students' rights to engage in a wide range of speech, including that which is demeaning toward particular individuals and groups in society. Others defend institutional leaders' decisions to block hate speech and students'

148. *Id.*

149. Ruiz, *supra* note 2.

150. Mark Joseph Stern, *Sessions the Censor*, SLATE (Oct. 3, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/jeff_sessions_tried_to_stop_lgbtq_students_from_meeting_at_a_public_university.html; *See also* David W. Dunlap, *Judge Voids an Alabama Law Against Gay Campus Groups*, N.Y. TIMES (Jan. 31, 1996), http://www.nytimes.com/1996/01/31/us/judge-voids-an-alabama-law-against-gay-campus-groups.html.

ability to protest speakers. These goals are not incompatible. Rather than choosing winners and losers according to forum standards, there is a middle ground that protects an array of student speech. Student speech zones should be abolished, and student speech rights should be widely extended across college and university campuses—limited only when speech or expression would interrupt instruction, impede regular operations, or pose threats to public safety. At the same time, legislators (and the courts) should be careful not to undermine institutional autonomy by prescribing overly prescriptive standards that can actually undercut student speech rights or that unwisely seek to muzzle institutional speech on controversial issues on campus and beyond.

Colleges and universities are expected to fulfill many societal goals; in fact, some people argue that they are expected to be "all things to all people." In addition to providing spaces for student development through speech and debate, colleges and universities are expected to protect campus safety, cultivate civic engagement, promote student body diversity, create welcoming learning environments for all groups of students, and be good stewards of public funds and tuition dollars. Therefore, we argue that in times of campus crisis, student speech should be considered in relation to various elements of institutional missions. While there is a place for legal decisions or statutes to assure a baseline of access for student speech, including in open campus areas, some proposals go too far. We firmly believe that shared governance processes that include administrators, faculty members, staff, and students are more appropriately suited to resolving many speech disputes than legislation that seeks to demand political neutrality from institutions or to divest campus professionals of discretion concerning when students should be subject to discipline for protesting campus speakers.