SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 68 | Issue 1

2017

Trumping the First Amendment: Student-Driven Calls for Speech Restrictions on Public College Campuses

Katlyn Ayn Patton

Trumping the First Amendment: Student-Driven Calls for Speech Restrictions on Public College Campuses

Contents

Introduction

Throughout the 2016 presidential race, public displays of support for Donald Trump's candidacy on college campuses elicited strong reactions from droves of offended students. Minority students felt targeted by Mr. Trump's campaign—as well as by members of the campus community who supported him—and called for administrators to respond. At Ohio University ("OU"), fraternity members painted "Trump 2016" and "Build the Wall!!" on a popular graffiti wall on campus—a place where individuals and student organizations create artwork and advertise their organizations and events.[1] The painting elicited backlash from the university community, many members of which felt that the message was derogatory towards immigrants and

1. Megan Henry, *Greek Week Events Altered After Members Paint "Build the Wall"*, The Post (Sept. 14, 2016, 9:20 PM), http://www.thepostathens.com/article/2016/04/greek-week-events-altered-after-members-painted-build-the-wall [https://perma.cc/58TT-7WCW].

people of Latin American heritage.[2] Although the university did not formally sanction the students involved, the incident led to the cancellation of many Greek Week activities.[3]

Months later, as the election approached, another image appeared. This time, the slogan "Build the Wall" was accompanied by the image of a hangman.[4] The individuals responsible for this display were never identified, but their message provoked strong responses condemning this kind of expression on a college campus.[5] University officials characterized the incidents—and the purpose of the wall in general—as a means by which the community could learn the power of words and images.[6]

Similarly, at Emory University, students spoke out against sidewalk chalkings supporting Trump as targeting students of color.[7] In the wake of Mr. Trump's victory, similar incidents have occurred on campuses across the United States.[8]

Although the universities did not formally sanction anyone in either instance, the uproar raises questions concerning the extent of these students' First Amendment rights and the demand for safe spaces on campus. Chalkings similar to those at Emory appeared on campus sidewalks across the country and sparked a national debate concerning free speech and inclusion on college campuses.[9] Today, college administrators focus on safe spaces and inclusion on campus. However, public

2. *Id.*

3. *Id.*

4. *Images Depicting a Hanged Figure, 'Build the Wall' Appear on Graffiti Wall at Ohio University*, THE POST (Sept. 20, 2016, 9:10 AM), http://www.thepostathens.com/article/2016/09/ohio-university-graffiti-wall-build-the-wall-hanged-figure [https://perma.cc/76KR-LEQB] [hereinafter *Build the Wall*].

5. *Id.*

6. *Id.*

7. Susan Svrluga, *Someone Wrote 'Trump 2016' on Emory's Campus in Chalk. Some Students Say They No Longer Feel Safe.*, WASH. POST (Mar. 24 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/ [https://perma.cc/5HY4-MF9T]. Emory is a private university, but these events reflect those occurring on campuses across the United States.

8. Katherine Knott & Shannon Najmadabi, *Traumatized and Indignant, College Students React to a Trump Presidency*, CHRON. HIGHER EDUC. (Nov. 9, 2016), http://www.chronicle.com/article/TraumatizedIndignant/238357?cid=cp65 [https://perma.cc/4NAQ-4H3M].

9. Katie Rogers, *Pro-Trump Chalk Messages Cause Conflict on College Campuses*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/2016/

college and university campuses, as state actors, have limited tools with which to respond to these concerns without infringing upon students' free speech rights,[10] and administrators across the country are currently grappling with how to do so.[11]

This Note will explore the options available to public colleges and universities to respond to this kind of personal political expression on campus in the form of leafleting, chalking, or painting spaces such as the OU graffiti wall.[12] Part I will consider where these spaces fit within the public forum doctrine and the different First Amendment standards courts apply depending upon the type of forum at issue. Part II will examine the ways in which colleges and universities have attempted to respond to the backlash against pro-Trump speech on campus. Part II will also examine the implications of student-driven restrictions on speech. Part III will argue that the OU graffiti wall, like sidewalks, are designated public fora; therefore, courts should review restrictions on expression in these fora with strict scrutiny. Part IV will discuss the public policy rationales supporting the application of strict scrutiny on restrictions on expression in the context of public higher education. Part IV will also examine and dismiss potential legal and public policy arguments that, although these spaces are designated public fora, this type of speech is not protected due to its content.

I. THE PUBLIC FORUM DOCTRINE

This Part will provide background concerning how courts analyze free speech claims. The freedom of expression guaranteed under the

04/02/us/pro-trump-chalk-messages-cause-conflicts-on-college-campuses.html?_r=0 [https://perma.cc/KK9M-DR82].

10. *See* U.S. CONST. amend. I; *see also* U.S. CONST. amend. XIV, § 1.

11. Scott Jaschik, *Free Speech in Contentious Times*, INSIDE HIGHER ED (Nov. 14, 2016), https://www.insidehighered.com/news/2016/11/14/meeting-state-university-leaders-varying-opinions-free-speech-contentious-times#.WCmmqb9ezg9.mailto [https://perma.cc/NJL4-9EAB].

12. This Note is limited to a discussion of public college and university campuses, as private colleges and universities are not state actors and therefore not subject to the First Amendment. Public and private colleges also argue that their non-profit status requires them to restrict political speech. The IRS regulations are clear, however, that it is the institution's speech—not the individual students' speech—that is restricted by the tax code. *See* Rev. Rul. 72-513, 1972-2 C.B. 246 ("The provision of facilities and faculty advisors for a campus newspaper that publishes the students' editorial opinions on political and legislative matters does not constitute an attempt by the university to influence legislation or participate in political campaigns."); *see also* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (listing 21 hypothetical situations in which a § 501(c)(3) nonprofit has or has not "participat[ed] or intervene[ed], directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office").

First Amendment is not absolute, and courts consider where the expression occurs in analyzing permissible restrictions. The Supreme Court provides verbal constructions for each type of forum—public, designated public, limited public, and nonpublic—as well as the standards by which courts should review restrictions on expression in each forum. This Note will focus specifically on those standards applied in cases involving public schools.

A. Public Fora

Traditional public fora are the spaces in which courts provide the most protection to individuals alleging their right to free expression has been restricted. They are "places which by long tradition or by government fiat have been devoted to assembly and debate," in which "the rights of the State to limit expressive activity are sharply circumscribed."[13] These spaces are used in the democratic tradition of free assembly and debate amongst citizens on public questions.[14] The seminal examples of public fora are streets and parks.[15]

Although public college and university campuses are owned by a state actor, courts have not held entire public campuses to be public fora.[16] Each space on the campus must meet the definition of a public forum described above, a standard which has proven difficult to meet.[17] In both *Perry* and *Hershey*, plaintiffs argued that certain spaces in public schools were public fora, and in both cases the court disagreed.[18]

In *Perry*, the parties debated how to apply forum analysis in the context of a public school district's interschool mail system and teacher mailboxes. The school district entered into an exclusive collective bargaining agreement with a union, and a rival union sued on the grounds that the school district violated its free speech rights by prohibiting its use of the interschool mail system and teacher mailboxes.[19] The Supreme Court held that the mailboxes were not public fora because "there [was] no indication in the record that the school mailboxes and interschool delivery system [were] open for use by the general public."[20]

13. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

14. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

15. Hershey v. Goldstein, 938 F. Supp. 2d 491, 506 (S.D.N.Y. 2013).

16. *Id.* at 509.

17. *See id.* (explaining that many cases refused to hold entire college campuses to be traditional public forums).

18. 460 U.S. at 47; 938 F. Supp. 2d at 508.

19. *Perry*, 460 U.S. at 39.

20. *Id.* at 47.

The Court in *Perry* came to this decision based on a tripartite framework that identified public, limited public, and non-public fora as calling for different standards of review.[21] Subsequently, the United States District Court for the Southern District of New York applied the framework in *Perry* to a case arising on a public college campus.

In *Hershey*, plaintiff Richard Hershey was an advocate of vegetarianism who was arrested after attempting to pass out leaflets on the sidewalk on the campus of Lehman College.[22] Hershey was not a student at Lehman.[23] Campus security removed Hershey from the campus sidewalk, and he argued that this action deprived him of his right to free expression because the sidewalk was a public forum.[24] The district court disagreed and, using the *Perry* framework, explained that public college and university campuses are public fora only when the administration intentionally opens these spaces for use by the general public.[25]

If a space is a public forum, then state actors have limited means to restrict expression in the space. In the realm of the public forum, content-based restrictions must be narrowly tailored to serve a compelling state interest.[26] Reasonable "time, place, and manner restrictions" are permissible as long as they are "content-neutral" and "narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication."[27] Status as a public forum is not the only means by which expression in a space may warrant this strict standard of review.

---

21. *See infra* Parts I.B and I.C (discussing limited public and nonpublic fora).

22. 938 F. Supp. 2d at 499. Lehman College is a public liberal arts college and part of the City University of New York system. *Id.*

23. *See id.* at 503 ("Lehman . . . had an unwritten policy prohibiting outsiders from leafleting on campus.").

24. *Id.* at 508. The Supreme Court has held that not all sidewalks are public fora. *See* United States v. Kokinda, 497 U.S. 720 (1990) (holding that the sidewalk outside a post office is not a public forum); *see also* Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on political activities and distribution of campaign literature on a military base even though public roads traversed the base).

25. *Hershey*, 938 F. Supp. at 508. The court ultimately held that the public sidewalk surrounding Lehman's campus constituted a public forum and denied the college's motion to dismiss Hershey's claims relating to leafleting in that space. *Id.* at 514.

26. *Id.* at 506. *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

27. *Hershey*, 938 F. Supp. 2d at 506 (quoting *Perry*, 460 U.S. at 45).

B. Limited and Designated Public Fora

Spaces on public college and university campuses are more likely designated or limited public fora than they are public fora because such spaces are open to students to express themselves as members of the campus community. A designated public forum is space that a state actor has intentionally opened to the general public for the purpose of serving as a public forum.[28] A limited public forum is similar, but occurs when a state actor opens what would otherwise be considered a non-public forum for use by a specific group of people[29] or for a limited purpose.[30]

In *Hershey*, the court determined that the on-campus space where plaintiff attempted to leaflet was a limited public forum open only to members of the university community.[31] In making this determination, the court emphasized the purpose of the property in question, stating that "a college campus serves a narrower purpose [than a traditional public forum], and outside visitors are not automatically welcomed as invitees, as at a shopping mall, but are more properly viewed as 'classic licensees,' subject to reasonable restrictions."[32] These restrictions are subject to a lower standard of review than those applicable to public fora—they need only be viewpoint-neutral and reasonable in light of the forum's purpose which, in this case and in the spaces that are the subject of this Note, is education.[33]

In *Roberts v. Haragan*,[34] the United States District Court for the Northern District of Texas faced a fact pattern similar to the one in *Hershey*, but the speaker was a student. Plaintiff Jason Roberts was a student at Texas Tech University Law School who wanted to pass out literature on campus about his religious and political views—the content of which expressly condemned homosexuality.[35] The school's policy required Roberts to request permission for his activities, but

28. *Id.* at 507; *Perry*, 460 U.S. at 45.

29. *Hershey*, 938 F. Supp. 2d at 507.

30. *Id.* at 510 (noting that college campuses serve a narrower purpose than other spaces, such as airport terminals which may serve as both an airport and a shopping mall).

31. *Id.*

32. *Id.* (citing Gilles v. Blanchard, 477 F.3d 466, 472 (7th Cir. 2007)).

33. *Id.* at 508.

34. 346 F. Supp. 2d 853 (N.D. Tex. 2004).

35. *Id.* at 856.

when he did so, his request was denied.[36] The court held that "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public for[a], at least for the University's students."[37] As a result of this finding, content-based restrictions on speech in these areas are subject to strict scrutiny.[38]

In the case of *Widmar v. Vincent*,[39] the Supreme Court considered the applicable standard for restricting speech in a limited public forum. Like in *Roberts*, the *Widmar* plaintiffs were members of the community to whom the space was opened: students at the university, rather than outside activists. The student organization in *Widmar* sought to continue its use of university facilities for religious activities and discussion which it had been doing before the university implemented a regulation prohibiting use of school buildings or grounds for religious purposes.[40] Because the individuals seeking to use the space for expressive activity were among those to whom the forum was open, the Court held that any content-based restriction would only be upheld if it was necessary to serve a compelling state interest and narrowly drawn to achieve that end[41]—the same standard courts use to evaluate restrictions on expression in public fora.[42] In that case, the school's interest was complying with its constitutional obligations under the Establishment Clause, which the Court admitted was compelling.[43] However, the Court still declined to uphold the restriction because it was not necessary to uphold the state interest.[44] "[I]n the absence of empirical evidence that religious groups will dominate [the university]'s open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'"[45]

C. Nonpublic Fora

Nonpublic fora exist where public property is neither traditionally used as a place in which individuals share ideas, nor has a state actor

36. *Id.* at 856–57. Roberts' request was granted on administrative appeal, but he challenged the University's policy requiring permission in the first place as unconstitutional on its face. *Id.* at 857–58.

37. *Id.* at 861.

38. *Id.* at 862.

39. 454 U.S. 263 (1981).

40. *Id.* at 265.

41. *Id.* at 267, 270.

42. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

43. *Widmar*, 454 U.S. at 271.

44. *Id.* at 276.

45. *Id.* at 275.

designated it as such.[46] Examples of nonpublic fora include airport terminals, sports stadiums, military bases, and jailhouse grounds.[47] State actors have more power to restrict speech in these fora than in any of the previous three. "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[48]

II. Colleges and Universities Respond

This Part will examine the ways in which public colleges and universities have traditionally responded to offensive speech through student codes of conduct. It will also examine how higher education administrators are experimenting with new tools in order to respond to recent incidents.

A. Speech Codes

Speech codes are the incarnation of one of a college or university's most integral and unpleasant functions: discipline.[49] It is also the arena in which colleges and universities pose the greatest threat to the individual rights of students.[50] Federal courts have held that colleges and universities have the right to enact reasonable rules governing student conduct.[51]

Prior to the "Build the Wall" incident at Ohio University, a student challenged the university's speech code in federal court on the grounds

46. *Perry*, 460 U.S. at 46.

47. Hershey v. Goldstein, 938 F. Supp. 2d 491, 507 (S.D.N.Y. 2013).

48. *Perry*, 460 U.S. at 46 (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

49. Provisions of Title IX-mandated college and university sexual harassment codes that may infringe on free expression are outside the scope of this Note.

50. *See generally* Richard C. Ratliff, Constitutional Rights of College Students (1972) (studying the state of student rights on campus ten years after *Dixon v. Alabama State Board of Education* which guaranteed students some degree of due process rights in campus disciplinary proceedings).

51. *See* Healy v. James, 408 U.S. 169, 192 (1972) ("[A] college has the inherent power to promulgate rules and regulations; that it has the inherent power to properly discipline . . . that it may expect that its students adhere to generally accepted standards of conduct." (quoting Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1089 (8th Cir. 1969))).

that certain provisions had a chilling effect on free speech.[52] The university ultimately settled the lawsuit and paid the plaintiff $32,000 in damages.[53] Ohio University's speech code has since been amended, and the analogous provision in the current code specifically prohibits harassment, discrimination, and retaliation with repetitious references to the First Amendment.[54] However, not all public colleges and universities have similarly narrow codes.

According to the Foundation for Individual Rights in Education ("FIRE"), of the 345 public colleges and universities it surveyed in 2017, 33.9% employed speech codes that warranted a "Red Light" rating under its methodology.[55] According to FIRE, a Red Light speech code is one that "clearly and substantially restrict[s] freedom of speech," meaning that "the threat to free speech . . . is obvious on the face of the policy and does not depend on how the policy is applied" and "is broadly applicable to campus expression."[56] The "Build the Wall" and "Trump 2016" displays at public universities employing these more restrictive codes could serve as a tool for universities to curtail this controversial speech; however, these restrictions are likely to be found unconstitutional if challenged in court.[57]

52. Complaint, Smith v. McDavis, No. 2:14-CV-670 (S.D. Ohio July 1, 2017) (alleging that the "Harm to Others" provision of the 2014 version of the Ohio University Student Code of Conduct had a chilling effect on free speech because it was overly broad in forbidding any act that "demeans, degrades, or disgraces" another).

53. Collin Binkley, *Ohio University Settles Free-speech Lawsuit Over Suggestive T-shirt*, COLUMBUS DISPATCH (Feb. 3, 2015 8:40AM), http://www.dispatch.com/content/stories/local/2015/02/02/Ohio_University_settles_free_speech_lawsuit.html# [https://perma.cc/4857-MYRF] ("Ohio University agreed to pay $32,000 in a settlement with a student who sued.").

54. OHIO UNIVERSITY, STUDENT CODE OF CONDUCT 8 (2015), https://www.ohio.edu/communitystandards/upload/Ohio-University-Student-Code-of-Conduct-effective-081915.pdf [https://perma.cc/BZ8T-42V7] (last visited Mar. 19, 2017).

55. FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 7 (2017) [hereinafter SPOTLIGHT ON SPEECH CODES], https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [https://perma.cc/B76M-EZUF] (last visited Mar. 19, 2017).

56. *Id.* at 5.

57. *Id.* at 11; *see infra* Parts III and IV (arguing sidewalks and spaces like the OU graffiti wall are limited public fora as to students, therefore restrictions on expression in these spaces should be construed narrowly).

B. Bias Response Teams and Student-Driven Speech Restrictions

Perhaps the most interesting aspect of the recent calls for more restriction on campus speech is that they originate not with administrators, but with students.[58] In the case of the Ohio University graffiti wall, it was students who painted over the messages they found offensive and students who called for a response on campus.[59] A common response amongst universities has been to create an administrative procedure by which students with this type of grievance may report it to the administration.[60]

According to one administrator, a bias incident response team is meant to "funnel those [student] complaints to a central source and then to disseminate them out to the appropriate parties."[61] The Ohio State University was one of the first institutions to create a bias response team;[62] the Ohio State University Bias Assessment and Response Team was created in 2006.[63] The stated mission of this team is to serve as a voluntary mechanism for community members to report bias incidents, and to refer them to other departments, such as the

58. Conor Friedersdorf, *The Glaring Evidence That Free Speech Is Threatened on Campus*, ATLANTIC (Mar. 4, 2016), http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/ [https://perma.cc/WW63-69JT]. *See also* GREG LUKIANOFF, FREEDOM FROM SPEECH (2014) (arguing that academia will continue to see calls to disinvite controversial campus speakers and establish safe zones as part of a global trend favoring intellectual comfort over free speech).

59. Henry, *supra* note 1; *Build the Wall*, *supra* note 4.

60. Jake New, *Defending BARTs*, INSIDE HIGHER ED (Sept. 12, 2016), https://www.insidehighered.com/news/2016/09/12/despite-recent-criticism-college-officials-say-bias-response-teams-fill-important [https://perma.cc/4NQD-XZEW] ("'There has clearly been an increase in campuses creating both bias response teams in addition to a more clearly defined process for how members of the campus community can report an incident of bias,' Kevin Kruger, president of NASPA: Student Affairs Administrators in Higher Education, said.").

61. Nadia Dreid, *Amid Concerns About Stifling Speech, Colleges Take a New Look at Bias-Response Teams*, CHRON. HIGHER EDUC. (Sept. 28, 2016), http://www.chronicle.com/article/Amid-Concerns-About-Stifling/237918 [https://perma.cc/EWN9-ZF5F] (quoting Kevin Bailey, student affairs professional at the University of West Florida).

62. Rio Fernandes, *In a Charged Climate, Colleges Adopt Bias-Response Teams*, CHRON. HIGHER EDUC. (Feb. 1, 2016), http://www.chronicle.com/article/In-a-Charged-Climate-Colleges/235120 [https://perma.cc/8ZEU-83TQ].

63. Ohio State University Office of Student Life, *History of the Bias Assessment and Response Team*, http://www.studentaffairs.osu.edu/bias/history-of-bart.aspx [https://perma.cc/EP9C-RBLC] (last visited Mar. 19, 2017).

student conduct office, if necessary.[64] Schools across the country have established similar mechanisms, but at least one school has subsequently disbanded its bias response team due to concerns about the chilling effect on free expression.[65]

Most formulations of the bias response teams cited in student affairs news and literature are composed either of faculty members alone or a combination of faculty and staff.[66] Considering the rather novel situation on college and university campuses in which students are calling for restrictions on other students' free expression, institutions may consider creating bias response teams composed at least partly of students. However, because any authority these teams have to respond to incidents derives from the institution, they would still be considered state actors for First Amendment purposes.[67]

C. An Alternative Path: The Case of the University of Chicago

In the midst of this national debate, administrators at the University of Chicago took a different approach to the issue of free speech on campus. Every member of the freshman class of 2020 received a letter from Dean of Students John Ellison indicating the university's policy against the use of trigger warnings and safe spaces.[68] The letter

64. *Id.*

65. Jeffrey Aaron Snyder & Amna Khalid, *The Rise of "Bias Response Teams" on Campus*, NEW REPUBLIC (Mar. 30, 2016), https://newrepublic.com/article/132195/rise-bias-response-teams-campus [https://perma.cc/6WUD-RVCQ] (noting that "more than 100 colleges and universities have Bias Response Teams"); Dreid, *supra* note 61 (reporting that the University of Northern Colorado disbanded its bias response team).

66. Snyder, *supra* note 65.

67. Although the state-action doctrine is unsettled, it is generally accepted that a sufficient nexus between private action and the state action justifies a conclusion that state action exists. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 508 n.19 (1985) ("Although there are many separate tests for determining whether there is sufficient state involvement to justify a finding that state action exists, the Court has made clear that the overall inquiry is whether there is an adequate nexus between the private behavior and the state."); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."). Students acting in the context of a university-established entity restricting speech likely satisfy this test. *Cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725–26 (1961) (holding that the operator of a private restaurant located in a municipal parking garage had engaged in unconstitutional racial discrimination because the restaurant operator was so closely connected with the local government that owned the structure).

68. Pete Grieve, *University to Freshmen: Don't Expect Safe Spaces or Trigger Warnings*, CHI. MAROON (Aug. 24, 2016), https://www.chicagomaroon.

reinforced the university's commitment to academic freedom and specifically mentioned that events hosting controversial speakers would not be cancelled for that reason.[69]

Public response to the letter both on and off campus was mixed. Some praised the university for its commitment to creating an educational space in which the marketplace of ideas can flourish.[70] Others claimed that the letter prohibited safe spaces and therefore restricted professors' academic freedom to choose to use such tools in their classrooms.[71] The University of Chicago also received a Green Light rating from FIRE for its speech code,[72] meaning that its written policies do not pose a serious threat to free speech.[73] Only 3.8% of the 104 private schools FIRE surveyed received a similar rating.[74]

Although the letter raises issues such as the academic freedom of professors, it demonstrates a recognition by the university that students on campus have a right to both hear and protest controversial speakers and express controversial ideas themselves. In addition, such a policy is less likely to result in an impermissible restriction on student speech in a limited public forum on campus.

---

com/2016/08/24/university-to-freshmen-dont-expect-safe-spaces-or-trigger-warnings/ [https://perma.cc/5BNE-HD6X].

69. *Id.*

70. Chicago Tribune Editorial Board, *Why the U. of Chicago Is the Universe of Common Sense*, CHI. TRIB. (Aug. 25, 2016), http://www.chicagotribune.com/news/opinion/editorials/ct-university-chicago-safe-spaces-trigger-warnings-edit-20160825-story.html [https://perma.cc/AE3P-N4RU] ("An editorial in the Chicago Tribune praised the letter as 'refreshingly direct,' applauding its 'commitment to the marketplace of ideas, the implicit endorsement of democratic freedoms, and the sheer feistiness.'").

71. Andy Thomason, *U. of Chicago's Condemning of Safe Spaces and Trigger Warnings Reignites Debate*, CHRON. HIGHER EDUC. (Aug. 25, 2016), http://www.chronicle.com/blogs/ticker/u-of-chicagos-condemning-of-safe-spaces-and-trigger-warnings-reignites-debate/113760 [https://perma.cc/D7QU-946K] ("[D]efenders of trigger warnings and safe spaces have ripped the letter, saying its statements actually undermine the 'commitment to academic freedom' cited as their motivation.").

72. Foundation for Individual Rights in Education, *Spotlight: University of Chicago*, https://www.thefire.org/schools/university-of-chicago/ [https://perma.cc/XSN8-L6LA] (last visited Mar. 19, 2017).

73. SPOTLIGHT ON SPEECH CODES, *supra* note 55, at 5.

74. *Id.* at 7.

III. The Ohio University Graffiti Wall and Spaces Like It Are Limited Public Fora

For the purposes of free speech analysis, all public property, including property owned by state actors such as colleges and universities, is one of four types of fora: public; limited public; designated public; or nonpublic.[75] This Part will argue that the most appropriate means of analyzing the Ohio University graffiti wall and on-campus sidewalks, parks, and streets is by designating them as limited public fora; this argument follows the analysis of *Hershey*, *Roberts*, and *Widmar*, and is supported by sound public policy in favor of free expression in an educational environment populated by adult students.

Widmar concerned a religious student organization that freely utilized school facilities at the University of Missouri at Kansas City until the school adopted a regulation prohibiting religious worship in university buildings or on university grounds.[76] As discussed in Part I, the *Widmar* Court concluded that the campus facilities the students sought to use were limited public fora and open to student groups.[77] The Court applied the standard applicable to public fora generally: any restriction must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end.[78]

In most of the recent controversies surrounding pro-Trump expressions, the actors have been students or—in cases in which the actors were not identified—presumably students.[79] Therefore, the strict scrutiny standard that the Court applied to the restriction at issue in *Widmar* is the standard most appropriate for restrictions on student speech of this kind.

The court in *Hershey* also considered the purpose of the space in analyzing whether the forum was open to Hershey to leaflet.[80] In that case, the court determined that the college had a strong interest in preserving use of its space and facilities for students for the purpose of education.[81] Recent use of campus spaces—like sidewalks or the OU graffiti wall—to express support for a political candidate are more akin to *Roberts* than to *Hershey* because the speakers are students. However, both cases support the argument that the space is open to students to

75. *See supra* Part I.

76. Widmar v. Vincent, 454 U.S. 263, 265 (1981).

77. *Id.* at 267.

78. *Id.* at 270.

79. Henry, *supra* note 1.

80. Hershey v. Goldstein, 938 F. Supp. 2d 491, 510 (S.D.N.Y. 2013).

81. *Id.*

further the educational purpose of colleges and universities. Students are expressing their political views in these spaces,[82] and this expression is consistent with the educational mission of a college or university—developing well-informed citizens.[83]

Although the social issues presented by these controversial messages are pervasive,[84] the educational purpose of colleges and universities favors freedom of expression on campus except in narrow circumstances.[85] Free speech advocates argue that restrictions on campus speech affect the nation as a whole because it is the responsibility of colleges to develop deep and nuanced thinkers.[86] Regulations that have a chilling effect on free speech necessarily run counter to that goal. In 2015, the House Subcommittee on the Constitution and Civil Justice held a hearing concerning First Amendment protections on college campuses.[87] Jamin Raskin, a longtime law professor at American University, highlighted the policy concerns implicated by restricting freedom of expression on college campuses in particular.[88] According to Raskin, higher education "is the paradigm exemplar of free discourse and debate in our vibrant, pluralist, and multicultural democracy. So

82. Henry, *supra* note 1.

83. Svrluga, *supra* note 7 ("Part of being in college is having experiences where you question your values, question what you believe.").

84. The impact pro-Trump speech—and other offensive or derogatory political speech—has on minority students on college campuses is an important issue in higher education, and increasing student awareness of its effects should be a priority. Much modern First Amendment doctrine grew out of the civil rights movement. *See generally* Harry Kalven, The Negro and the First Amendment 6 (1965) (examining "three fresh problems for free-speech theory churned up" by the civil rights movement). However, these topics are outside the scope of this Note.

85. *See infra* Part IV.

86. *See, e.g.*, Greg Lukianoff, Unlearning Liberty 7–12 (2014) ("Our national discussion is dominated by people with a college education. So, if we assume that colleges and universities are supposed to make us deeper, more creative and nuanced thinkers, we should be enjoying a golden age of American discourse."). Educators make similar arguments. *See* Derek Bok, Beyond the Ivory Tower: Social Responsibilities of the Modern University 61–91 (1982) (arguing that higher education influences society by shaping inquiring minds).

87. *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter *House Subcommittee Hearing*].

88. *Id.* at 59 (statement of Jamin Raskin, American University Washington College of Law).

if we have no freedom of thought and speech on campus, it is hard to imagine where we are going to have it in the United States."[89]

Scholars have echoed this sentiment since the end of the *in loco parentis* doctrine in higher education in the mid-20th century.[90] The concept of *in loco parentis* originated in the English common law as the idea that teachers had a share of parental power over their students.[91] The American higher education and legal systems adhered to this doctrine in the context of college and university campuses from the early years of the nation through the 1960s,[92] even after the First Amendment was incorporated against the states.[93] The doctrine provided colleges and universities with discretion to exercise disciplinary power akin to that of a parent without the fear of litigation.[94]

---

89. *Id.*

90. RATLIFF, *supra* note 50, at 163 (arguing that even a university's ability to enact reasonable rules should be construed narrowly in order to encourage free and open debate and society's interest in free expression).

91. 1 WILLIAM BLACKSTONE, COMMENTARIES *441 (parents "may also delegate part of [their] parental authority . . . to the tutor or schoolmaster . . . who is then *in loco parentis*, and has a such a portion of the power of the parent"); Brian Jackson, Note, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1144 (1991) ("The parent delegated part of his authority to the tutor or schoolmaster of his child. The schoolmaster was then *in loco parentis* and had a partial share of parental power.").

92. *See* Waugh v. Bd. of Trs. of Univ. of Miss., 237 U.S. 589, 597 (1915) (holding that the University could require a student to renounce his allegiance to a fraternity because such a requirement was within the realm of state authority); *see also* Tanton v. McKenney, 197 N.W. 510, 513 (Mich. 1924) (holding that in the absence of a clear abuse of discretion, public school authorities—not the courts—have authority to prescribe rules of conduct; the school was acting within its purview when refusing plaintiff readmission on the grounds that she smoked cigarettes and engaged in other improper conduct).

93. The Supreme Court incorporated the First Amendment against the states in 1925. Gitlow v. New York, 268 U.S. 653, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). *See* Webb v. State Univ. of N.Y., 125 F.Supp, 910, 912 (N.D.N.Y. 1954) (holding that the Board of Trustees had supervisory authority to ban membership in national social organizations).

94. ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF MODERN UNIVERSITIES: WHO ASSUMES THE RISK OF COLLEGE LIFE? 18 (1999) ("Under the blanket [of *in loco parentis*], a university was free to exercise disciplinary power—or not—with wide discretion and little concern for litigation.").

In 1961, the Supreme Court effectively ended the *in loco parentis* doctrine at public colleges and universities when it denied certiorari in *Dixon v. Alabama State Board of Education*.[95] In that case, the United States Court of Appeals for the Fifth Circuit held that public colleges and universities could not expel students for alleged misconduct without affording them due process rights of notice and an opportunity to be heard.[96] This decision laid the groundwork for future cases holding public colleges and universities legally responsible for infringement of student rights.[97]

The *in loco parentis* doctrine remains the basis for imposing a duty of care on teachers in the context of K-12 public schools.[98] Many of the seminal cases on student speech rights occurred in the context of K-12 public schools.[99] It is important to note the impact that age has on any discussion of college responsibility for protecting students from exposure to ideas they may find offensive. One justification for the demise of the *in loco parentis* doctrine on college and university campuses is that student populations were older than 18, the age of majority, and changing social conditions in the 1960s made the model unworkable.[100] College and university students are adults who are engaged in an academic community whose purported purpose is to foster well-informed citizens. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[101] The issues that have surfaced in relation to President Trump's campaign and presidency are

95. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

96. *Id.* at 158–59.

97. *See* Wood v. Davison, 351 F. Supp. 543, 546 (N.D. Ga. 1972) ("Although University administrators once had an almost unrestricted power to deal with students under the theory of *in loco parentis*, it is now clear that constitutional restraints on authority apply on campuses of state supported [educational] institutions with fully as much sanction as public streets and in public parks."). *See also* Healy v. James, 408 U.S. 169 (1972) (holding that university violated its students' First Amendment rights when it denied them recognition as a student organization).

98. Bickel & Lake, *supra* note 94, at 29 ("[I]n K-12 education today *in loco parentis* is the basis for imposing duties of care . . . .").

99. *See infra* Part IV.

100. Jackson, *supra* note 91, at 1148 ("The influx of older students, the lowering of the age of majority, and changing social conditions made the common-law approach untenable at most institutions."); Bickel & Lake, *supra* note 94, at 35–36 ("The demise of *in loco parentis* was hastened by the fact that university life in the 1960s (and 1970s) became a focal point of the major social issues of the time. . . . The fall of *in loco parentis* in the 1960s correlated exactly with the rise of student economic power and the rise of student civil rights.").

101. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

divisive, but stifling speech concerning these issues on college campuses runs counter to the purpose of free speech that Justice Brandeis discussed in his famous concurrence.

These policy concerns justify a high burden on higher education institutions defending restrictions on free speech, an argument echoed by the Supreme Court in its decision in *Healy v. James*.[102] In *Healy*, a public college refused to recognize a local chapter of Students for a Democratic Society as a student organization.[103] SDS was recognized by some as a national organization with a reputation of being violent and disruptive.[104] University officials relied on this national reputation as a justification for refusing to recognize SDS.[105] The group was barred from access to campus facilities because it was not a recognized student organization.[106] The Supreme Court remanded the case for consideration of whether the administration permissibly refused to recognize the local chapter because SDS allegedly exhibited an "unwillingness to be bound by reasonable school rules governing conduct."[107] But the Court agreed that to consider campus facilities to be nonpublic fora would be to permit broad restrictions on speech incompatible with policy in favor of free speech.[108]

In his testimony before the House Subcommittee on the Constitution and Civil Justice, FIRE President and CEO Greg Lukianoff presented an alternative means of protecting student speech on campus.[109] Lukianoff lobbied Congress to pass legislation declaring all open areas on public campuses to be traditional public fora.[110]

102. 408 U.S. 169, 184 (1972) ("While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action.").

103. *Id.* at 179.

104. *Id.* at 171.

105. *Id.* at 174 n.4.

106. *Id.* at 181–82.

107. *Id.* at 191–93.

108. *Id.* at 194 ("[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility . . . [but] we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.").

109. *House Subcommittee Hearing*, *supra* note 87, at 21 (statement of Greg Lukianoff, First Amendment Specialized Attorney and President and CEO of the Foundation for Individual Rights in Education).

110. *Id.* Lukianoff's suggestion is modeled on a Virginia law prohibiting public colleges and universities from establishing specific free speech zones. *Id.* at 35 (written testimony of Greg Lukianoff); Va. Code Ann. § 23.1-401 (2016)

"Establishing that outdoor areas on public campuses are traditional public for[a] will ensure that our public universities continue to be a traditional space for debate aptly and memorably recognized by the Supreme Court as 'peculiarly the "marketplace of ideas."'"[111] Although this alternative is more protective of student speech, and would likely protect the speech of an outsider like Hershey, only Virginia and Missouri have passed these kinds of laws.[112] However, under the existing public forum doctrine, public colleges and universities that wish to curtail student speech in these areas still face a formidable hurdle.

Because college sidewalks and spaces traditionally used by students and student organizations to advertise and express their views, such as the OU graffiti wall, are most properly considered limited public fora intentionally held open to those students, a state institution that wishes to restrict speech in these spaces must prove that it is furthering a compelling interest and that the restriction is narrowly tailored to serve that interest. Content-neutral time, place and manner restrictions on speech in these spaces must leave open ample alternative means of communication.

IV. Content-Based Restrictions on Speech in Limited Public Fora on College Campuses Should Be Construed Narrowly

The Supreme Court does not ignore the special circumstances of the school environment in analyzing challenges to restrictions on student speech.[113] In its most famous opinion concerning student-speech rights, however, the Court also affirmed that "students [and] teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[114] This tension between educational interests and the right to free speech has led to various outcomes when

(originally enacted as Va. Code Ann. § 23-9.2:13 (2014)) (incorporating strict scrutiny as the appropriate standard of review for all restrictions of speech on campus).

111. *House Subcommittee Hearing*, *supra* note 87, at 36 (written testimony of Greg Lukianoff) (quoting Healy v. James, 408 U.S. 169, 180 (1972) (internal citation omitted)).

112. Va. Code Ann. § 23.1-401 (2016) (originally enacted as Va. Code Ann. § 23-9.2:13 (2014)); Mo. Ann. Stat. § 172.1550 (2015).

113. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students.").

114. *Id.*

students bring free speech claims in court, some in favor of the student[115] and some in favor of the regulation.[116] This Part will argue that absent extreme circumstances, public institutions of higher education do not have a legitimate educational interest in restricting speech in limited public fora on campus—even political speech that is arguably offensive. Although many of the cases discussed in this Part involve public school students, rather than college or university students, the same First Amendment requirements apply to public colleges and universities. In addition, colleges and universities have a weaker argument that speech regulations are necessary to their educational mission and environment because their students are adults.[117]

In *Tinker v. Des Moines Independent Community School District*,[118] three minor students were suspended for wearing armbands in protest against the United States' actions in Vietnam.[119] The Supreme Court held that the suspension and prohibition on armbands violated the First Amendment[120] and pointed to several factors relevant to the analysis here. First, the restriction was not viewpoint-neutral—it referred specifically to armbands and not to other kinds of political speech.[121] The school district adopted the policy under which plaintiffs were suspended after it was made aware of a plan to wear armbands in protest against

115. *See, e.g.*, *id.* (finding in favor of students and holding that the school's suspension of students for wearing armbands to protest the Vietnam war was a violation of their First Amendment right); Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988) (holding high school's policy that student-written materials be submitted for approval before they could be distributed on school premises was overbroad and violated the students' First Amendment rights).

116. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 410 (2007) (reversing appellate court's ruling and stating that the appellate court should find that the high school did not violate student's First Amendment rights when it suspended him for hanging a banner that read "BONG HiTS 4 JESUS" during a school-sanctioned event because schools can restrict speech that could reasonably be regarded as encouraging illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (holding that a high school may exercise editorial discretion over articles published in school-sponsored newspapers as long as its actions are reasonably related to legitimate pedagogical concerns); Bethel Sch. Dist. v. Frazer, 478 U.S. 675 (1986) (holding that a school could suspend a student who delivered a sexually explicit speech in front of his classmates because public schools can prohibit vulgar and offensive terms in school).

117. *See supra* notes 100–101 and accompanying text (discussing the duty and relevance of the *in loco parentis* imposes on various actors such as teachers and how the ages of students affects that duty).

118. 393 U.S. 503 (1969).

119. *Id.* at 504.

120. *Id.* at 514.

121. *Id.* at 510–11.

the Vietnam War.[122] The school district enacted the policy in order to suppress this particular viewpoint.[123] The Court reiterated the policy argument discussed in Part III.[124] Freedom of expression is an integral part of education because, although the expression of unorthodox opinions may inspire fear, "this sort of hazardous freedom is the basis of our national strength and of the independence and vigor of Americans."[125] For these reasons, the Court held that the school district could restrict speech only when it had evidence that the restriction was necessary to avoid "material[] and substantial[] interfere[nce] with the requirements of appropriate discipline in the operation of the school."[126]

Scholars argue that over time the Court has loosened the standard by which it reviews restrictions on free speech, like the one in *Tinker*, by creating more reasons for which schools can restrict speech.[127] These exceptions are generally content-based and focus on the potential impact on, or harm to, the students in an educational environment.[128] They range from *Tinker*'s narrow exception for expression that materially and substantially interferes with school discipline[129] to restrictions on speech that runs counter to what the state sees as a school's specific educational goal.[130]

In *Bethel School District v. Fraser*,[131] a high school student delivered a speech to the student body using explicit sexual innuendo

122. *Id.* at 504.

123. *Id.*

124. *Id.* at 512 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

125. *Tinker*, 393 U.S. at 508–09.

126. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

127. *See* Anne Proffitt Dupre, *The Story of* Hazelwood School District v. Kuhlmeier*: Student Press and the School Censor*, *in* EDUCATION LAW STORIES 221, 235 (Michael A. Olivas & Ronna Greff Schneider eds., 2008) (discussing *Hazelwood*, its aftermath, and its standard for review of school censorship—"reasonably related to a legitimate pedagogical concern").

128. *See* Rosemary C. Salamone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 274–300 (1992) (summarizing post-*Hazelwood* decisions in lower courts).

129. *Tinker*, 393 U.S. at 513 (quoting *Burnside*, 363 F.2d at 749).

130. *See* Morse v. Frederick, 551 U.S. 393 (2007) (finding that a school could suspend a student who displayed banner with reference to illegal drug use because part of a school's mission is to educate students about the harmfulness of illegal drugs).

131. 478 U.S. 675 (1986).

and was suspended for two days.[132] When the student challenged his suspension as a violation of the First Amendment, the Supreme Court found for the school; it held that public schools have a right to punish students for lewd and indecent speech that undermines their basic educational mission.[133] The Court distinguished this case from *Tinker* based on content and impact. In *Tinker*, the students were peacefully exercising political speech, whereas the student in *Bethel* gave a sexually explicit speech that arguably caused a greater disruption.[134] The court did not overrule *Tinker*; it simply granted schools leeway to restrict speech in a broader set of situations.

Not even two years after its decision in *Bethel*, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*,[135] which further broadened school authority to restrict student speech when the speech is school-sponsored.[136] In *Hazelwood*, student journalists wrote a story about teenage pregnancy for their high school newspaper.[137] The newspaper was funded by the school, and students received school credit for their participation.[138] The principal decided that the newspaper should not publish the teenage pregnancy story.[139] When the students challenged his decision as violating their First Amendment rights, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[140]

Although scholars correctly point to this decision as a much greater restriction on speech than *Tinker*,[141] it may not apply for the purposes of expression in limited public fora on college campuses. Individual students and unofficial student groups chalk on campus and utilize spaces like the graffiti wall. The rationale for the Court's decision in *Hazelwood*

132. *Id.* at 678.

133. *Id.* at 685.

134. *Id.* at 680.

135. 484 U.S. 260 (1988).

136. *Id.* at 271–72 ("A school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards.").

137. *Id.* at 263.

138. *Id.* at 262, 268.

139. *Id.* at 264.

140. *Id.* at 273.

141. *See* Dupre, *supra* note 127, at 238 ("It does not have to be the best decision under the circumstances, or even a good decision, as long as a court can find that there was a 'legitimate' concern with respect to education.").

was that the school newspaper in question was part of the curriculum;[142] the same cannot be said of campus graffiti. In addition, part of the principal's justification for refusing to print the article at issue in *Hazelwood* was its mature content and the concern that it would promote irresponsible behavior.[143] Similar justifications are not compatible with the reality of a college campus populated with adult students.[144]

The United States Court of Appeals for the Ninth Circuit focused on this distinction between school-sponsored speech and individual student speech in its decision in *Burch v. Barker*.[145] Like *Hazelwood*, this case involved a student-written newspaper, but unlike *Hazelwood*, the paper was not school-sponsored.[146] This distinction proved pivotal to the court's decision that the school's pre-distribution review policy was overbroad and must be limited to reasonable time, place, and manner restrictions, or satisfy the *Tinker* rule that the restriction was necessary to avoid material and substantial interference with the school's disciplinary requirements.[147]

Finally, in *Morse v. Frederick*,[148] the Supreme Court expanded the concept of a public school's educational interest in individual student speech to its most broad point. In that case, a student displayed a banner with the phrase "BONG HiTS 4 JESUS" on it during a school assembly to view the Olympic Torch Relay.[149] The Court held that the school did not violate the First Amendment when it suspended the student because his speech was "reasonably viewed as promoting illegal drug use," a subject in which the school had a duty to educate students.[150]

Although, in the years since *Tinker*, the realm of permissible government restrictions on student speech has expanded, public colleges

142. *Hazelwood*, 484 U.S. at 268.

143. *Id.* at 263, 272.

144. *See* Jackson, *supra* note 91, at 1148 ("The influx of older students, the lowering of the age of majority, and changing social conditions made the common-law approach untenable at most institutions").

145. 861 F.2d 1149 (9th Cir. 1988).

146. *Id.* at 1150.

147. *Id.* at 1158; *see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1969)) ("Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.").

148. 551 U.S. 393 (2007).

149. *Id.* at 397.

150. *Id.* at 403, 408.

and universities remain limited in their ability to restrict speech in limited public fora. With regard to the offensive political speech at issue on campuses across the country, acceptance of a heckler's veto of student speech runs against both strong public policy concerns[151] and the Supreme Court's framework for assessing regulation of student speech.[152] "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[153] For this reason, content-based restrictions on speech are disfavored, and should be similarly disfavored as a matter of campus policy given the special responsibility of colleges and universities to educate informed citizens.

Conclusion

Open spaces on college campuses such as sidewalks, parks, the OU graffiti wall, and the like are properly categorized as limited public fora because the universities open these spaces to students for purposes of expression and communication. As limited public fora, speech in these spaces is protected and, as state actors, colleges and universities may only enforce restrictions on this speech that are necessarily drawn to serve a compelling state interest and narrowly tailored to achieve that end. Any content-neutral time, place, and manner restrictions must be reasonable and leave open ample alternative means of communication.

The debate concerning what public colleges and universities can do to restrict speech on campus must occur with the First Amendment and public forum doctrine in mind. Although colleges and universities may enact speech codes as part of their right to regulate campus discipline, overly broad speech codes that restrict speech for reasons that do not constitute a compelling government interest, such as those that effectively permit a heckler's veto for offensive speech, violate the First Amendment. The advent of bias reporting teams represents a similar, though student-driven, threat.

"The University's interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its students, for whom the University is a community, in having adequate opportunities and venues available for free

151. *See supra* Part III (explaining that in educational environments populated by adults students, free expression is essential in developing well-informed citizens).

152. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 215–16 (1983) ("The Court's reluctance to accept the 'heckler's veto' . . . seem[s] well-grounded in the central precepts of the first amendment.").

153. *Id.* at 215 (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

expression."[154] Both law and public policy support the categorization of open spaces on campus as limited public fora, and public college and university administrators must be mindful of these factors as they attempt to respond to the current climate calling for increased restriction on student speech.

Katlyn Ayn Patton[†]

154. Roberts v. Haragan, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004).

† J.D. Candidate, 2018, Case Western Reserve University School of Law. I would like to thank Professor Emeritus Jonathan L. Entin for his guidance in crafting and polishing this Note, the Editors of Volume 68 of the Case Western Reserve Law Review for their contribution to this publication, and the Athens, Ohio residents past and present who inspired my interest in student speech rights.