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Article

**A Close-up, Modern Look at First
Amendment Academic Freedom Rights of
Public College Students and Faculty**

Vikram David Amar[†] & Alan E. Brownstein^{††}

In this Article, we offer a current examination of just how much the First Amendment does—or does not—confer special “academic freedom” privileges on members of public university communities. Most of our focus is doctrinal, although we do identify and critique various theoretical and functional justifications for and against First Amendment protections along the way. In a similar vein, many of our observations are descriptive—we try to categorize and analyze what courts, when confronted with modern disputes, do and are likely to do—but at various points we interject some normative arguments in favor of a robust role for free speech in the modern public university. While issues relating to university students and faculty are in important respects different, we address both in an attempt to flesh out the meaning of First Amendment academic freedom in higher education somewhat comprehensively. Our Article discusses First Amendment considerations with respect to students first, and then with respect to faculty. Finally, we close with some brief observations about legal academic freedom protections that extend beyond the First Amendment realm.

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I. AN OVERVIEW OF THE FIRST AMENDMENT RIGHTS
OF PUBLIC COLLEGE STUDENTS

Describing the scope and meaning of the academic freedom of public university students is a daunting task. To some extent, it is a matter of university policy and custom. A university may elect to permit its students more freedom of speech than it is required to tolerate by the First Amendment or other legal mandates—subject of course to limitations imposed by law to protect the rights of other students or third parties. Our focus in this Article, however, is on the extent to which the Constitution—in particular, the First Amendment—protects the academic freedom of students and faculty at public colleges and universities. That question is not susceptible to a clear or easy answer. Indeed, we freely acknowledge that this Article raises far more questions than it can even attempt to resolve.

Two branches of free speech doctrine may apply to student speech on public college campuses. One branch is grounded in public high school cases that appear to treat the regulation of student speech on school grounds as a special situation to be evaluated under a distinctive framework of review. While we recognize (and address) the fact that the high school and college settings may differ with regard to compulsory attendance, maturity of students, etc., the analyses drawn from high school cases are often used as starting points for courts confronting disputes in the university setting, and sometimes for good reason. So we think it helpful to identify paradigmatic high school cases up front. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that school authorities can restrict private student expression only if the speech at issue materially disrupts the educational program or impinges on the rights of other students.¹ In a subsequent case, *Hazelwood School District v. Kuhlmeier*, the Court also applied an education-specific framework, although it distinguished *Tinker* in holding that student speech in school-sponsored activities could be restricted as long as the reason for doing so was reasonably related to legitimate pedagogical concerns.²

The other doctrinal branch involves more conventional free speech doctrine in which the standard of review applied by courts is determined by examining the nature of the regulation restricting speech, the location in which the speech occurs, and

1. 393 U.S. 503, 513 (1969).

2. 484 U.S. 260, 272–73 (1988).

the kind of speech being regulated—with the analysis of the location where the speech occurs being particularly vexing. Courts are tasked with categorizing a speech location as either a traditional public forum, a designated or limited public forum, or a non-public forum.³ This determination is often critical because the standard of review of different regulations varies depending on the kind of forum which is at issue. In a traditional public forum, viewpoint- and content-discriminatory regulations receive strict scrutiny and content-neutral regulations receive intermediate level scrutiny.⁴ By contrast, in a non-public forum—the default category for most public property—although viewpoint-discriminatory regulations still receive strict scrutiny, both content-discriminatory and content-neutral restrictions will be upheld as long as they are found to be reasonable regulations of speech—a relatively lenient standard of review.⁵

The designated and limited public forums are the most difficult to understand, in part because the courts have not always used these terms consistently or coherently. The designated public forum is best described as an “area[] that the government has affirmatively opened up generally for expressive purposes.”⁶ Speech regulations governing a designated public forum are evaluated under the same rigorous standard of review applied to regulations governing traditional public forums.⁷ Limited public forums are “forums created for, and limited to, specific expressive purposes and speakers.”⁸ The standard of review applied to speech regulations governing limited public forums is particularly complicated. Enforcement of the parameters for restricting access to the limited public forum for its specific purpose will be upheld if the parameters are viewpoint-neutral and reasonable.⁹

3. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983).

4. *Id.*

5. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677–78, 682 (1998).

6. Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 507 (2011).

7. *Id.*

8. *Id.*

9. *Id.* at 506; see also *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004).

As intimated earlier, the *Tinker* line of authority seems entirely distinct from forum doctrine. Indeed, *Tinker* was decided before forum doctrine became very fully developed. Perhaps not surprisingly, the great majority of lower courts treat *Tinker* as having created a *sui generis* standard entirely divorced from questions about the nature of the forum or the kind of regulation which is at issue.¹⁰ More importantly for our purposes, *Tinker* is rarely employed as the proper standard of review for student speech cases at colleges or universities.¹¹

The relationship between the *Hazelwood* analysis and forum doctrine is even harder to understand. The incoherence of judicial discussions about any meaningful relationship between the two and the ambiguous analysis of indeterminate factors discussed within the *Hazelwood* opinion itself has sown considerable confusion.¹² Moreover, unlike *Tinker*, *Hazelwood* has a reach that in fact has extended to college campuses. While the Court in *Hazelwood* explicitly left the issue of the decision's applicability to colleges open,¹³ the majority of lower courts considering the issue have agreed that *Hazelwood* applies to the regulation of school-sponsored student speech at a public university at least in some circumstances.¹⁴ Thus, any discussion of

10. See Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS. L. REV. 717, 730–34, 742–44 (2009).

11. *But see* DeJohn v. Temple Univ., 537 F.3d 301, 317 (3d Cir. 2008) (applying a *Tinker* “threat of disruption” standard in evaluating university sexual harassment policy).

12. See Brownstein, *supra* note 10, at 744–84.

13. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

14. See, e.g., *Jane Doe I v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211 (11th Cir. 2016) (accepting *Hazelwood* standard for university student speech, but concluding that activity at issue was not a school-sponsored activity); *Ward v. Polite*, 667 F.3d 727, 732–33 (6th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 874–76 (11th Cir. 2011); *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285–89 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 947–51 (9th Cir. 2002); *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346–47 (11th Cir. 1989).

Other courts have refused to apply *Hazelwood* to free speech cases involving students at universities. See, e.g., *O'Brien v. Welty*, 818 F.3d 920, 932–33 (9th Cir. 2016) (confirming that the Ninth Circuit has not extended *Hazelwood* to the university setting); *Oyama v. Univ. of Haw.*, 813 F.3d 850, 862–63 (9th Cir. 2015) (explaining that the Ninth Circuit has so far “declined to apply [*Hazelwood*’s] deferential standard in the university setting” although it has not formally rejected the standard, either); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247, 250 n.12 (3d Cir. 2010) (emphatically insisting that public universities have less leeway in regulating student speech than public elementary or

student academic freedom on college campuses has to begin with a deep, if sometimes unsatisfying, analysis of the *Hazelwood* decision.

Hazelwood involved a free speech claim brought by student staff members of a high school newspaper published in a graded, faculty-supervised journalism class who challenged the decision by the school's principal to censor certain articles the paper planned to publish.¹⁵ The federal court of appeals sided with the students, who argued both that the school had created a public forum in its operation of the student newspaper and that the principal's reasons for censoring the paper could not satisfy the standard set out by the Supreme Court in *Tinker*. There was nothing about the censored articles which suggested that they would materially disrupt the educational mission of the school or impinge on the rights of other students.¹⁶

The Supreme Court reversed. Justice White, writing for the majority, began his analysis by insisting that the free speech rights of students in public schools were not "coextensive with the rights of adults in other settings."¹⁷ Government could censor student speech in a public school that could not otherwise be censored if it was expressed outside of the school or student settings.¹⁸ The justification for adopting a special rule for students in public schools was grounded in part on the nature and function of educational institutions—what the Court described as "the special characteristics of the school environment."¹⁹ To a significant extent, this is little more than constitutional law embodying common sense. Schools are in the business of evaluating and regulating speech. The function of education involves discrimination among ideas, information,

high schools, but also noting cryptically that "we decline to consider whether the teachings of *Hazelwood* apply in the university setting"); *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (en banc) (determining that the district court erred in applying *Hazelwood*—a case involving the First Amendment rights of high school students—to a university setting); *Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (concluding that *Hazelwood* is not applicable to cases involving college newspapers).

15. *Hazelwood*, 484 U.S. at 262–64.

16. *Id.* at 265–66.

17. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

18. *Id.*

19. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

and the styles of expression. Content-neutral education is an oxymoron.²⁰

Justice White also alluded to a federalism and separation-of-powers foundation for his position. The task of resolving educational issues arising out of the operation of the public schools should be decided by local school boards, school administrators, and teachers—not federal judges.²¹ The federal judiciary should not become a de facto national school board setting policy for the country's schools.

At this point in his opinion, Justice White seemingly reverses course, speaking not of school-specific considerations but in more familiar forum-analysis terms. Perhaps the Court believed it had to respond to the conclusion of the court of appeals that the school created a public forum by publishing the student newspaper. In any case, Justice White engages in a conventional forum inquiry and demonstrates, at least to the majority's satisfaction, that the evidence does not establish by policy or practice that the school intended to open up the pages of the newspaper to indiscriminate student use or to relinquish any selective control over the content of the periodical.²²

This analysis, however, has some built-in limitations: (1) it applies conventional forum analysis to speech in a high school setting while school is in session; and (2) it suggests that if school authorities intentionally create some kind of designated or limited public forum in a school-sponsored activity, they can be held to have waived any special prerogatives they might otherwise assert for regulating student speech.²³ More importantly, Justice White's opinion, perhaps inadvertently, raises another forum question. Generally speaking, public property that is not a traditional public forum (a street or a park), and which has not been intentionally opened up by the government for private expressive purposes, is identified as a non-public forum.²⁴ By citing conventional public forum/non-public forum cases in its discussion of whether the Hazelwood school author-

20. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1287 (10th Cir. 2004).

21. *Hazelwood*, 484 U.S. at 267, 273.

22. *Id.* at 267–71.

23. See *id.* It is clear that forum analysis applies when schools regulate access to school facilities that are not being used for the school's educational purposes. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390–93 (1993); *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981). The creation of a forum in an ongoing school activity is another matter entirely.

24. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998).

ities have created a designated public forum, Justice White's opinion can be read to imply that school-sponsored activities are by default a non-public forum and should be treated as such.²⁵ Justice White repeatedly writes that because the school has not created a full-fledged public forum in the pages of the student newspaper, it is entitled to regulate the content of the publication in any reasonable way.²⁶ This reasonableness language parallels the standard of review applied in non-public forum cases and Justice White cites conventional non-public forum case law to support his conclusion.²⁷

We are not convinced that this is the best reading of *Hazelwood*.²⁸ We recognize that several district and circuit courts have interpreted *Hazelwood* to hold that at least some school-sponsored activities should be characterized as non-public forums.²⁹ Accordingly, these courts conclude that the regulation of student speech in these activities should be evaluated under the same standard of review applied to speech regulations in a non-public forum. Other courts, however, reject this position and read *Hazelwood* to create a distinct standard of review for the regulation of speech in school-sponsored activities.³⁰ This issue is critically important because while content-discriminatory and content-neutral restrictions on speech in a non-public forum will be upheld as long as they are reasonable, viewpoint-discriminatory regulations of speech in a non-public forum receive strict scrutiny review. Thus, if school-sponsored activities are non-public forums, school administrators and teachers cannot discriminate on the basis of viewpoint in regulating student speech. Because the question of whether, as a categorical matter, *Hazelwood* identifies school-sponsored activities as non-public forums remains contested, the question of whether school authorities can discriminate on the basis of viewpoint in regulating school-sponsored activities remains indeterminate as well.³¹

25. *Hazelwood*, 484 U.S. at 267–70.

26. *Id.* at 267, 270.

27. *Id.* at 267 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)).

28. See *Brownstein*, *supra* note 10, at 776–84.

29. *Id.* at 777 n.202 (citing cases identifying school-sponsored activities that may be non-public forums).

30. *Id.* at 781 n.221 (citing cases that use *Hazelwood* as a distinct standard).

31. See *id.* at 776–84 (summarizing arguments that appear on both sides

After completing its discussion of why the Hazelwood student newspaper is not a public forum, Justice White's opinion shifts direction once again. The issue in school-sponsored activities cases is not whether a school must tolerate student speech, it explains; that was the issue resolved in *Tinker* for private student speech.³² When student speech is expressed in a school-sponsored activity, the issue is whether the First Amendment requires "a school affirmatively to promote particular student speech."³³ School authorities must surely have the ability to control student speech that community members "might reasonably perceive to bear the imprimatur of the school."³⁴ When a school is essentially refusing "to lend its name and resources to the dissemination of student expression," its regulation of student speech will be upheld as long as it is "reasonably related to legitimate pedagogical concerns."³⁵ Only when the school's actions serve "no valid educational purpose" does the First Amendment require judicial intervention.³⁶

This analysis supports an analogy between the regulation of school-sponsored activities and yet another First Amendment doctrinal category—so-called government speech. When the issue is whether government resources will be used directly or indirectly to promote a particular message, the First Amendment provides little, if any, constraint on the government's decisions. Justice White's language in this part of the opinion resonates with such an understanding. Asking whether government decisions are reasonably related to legitimate state interests or whether they serve no valid purpose smacks of highly deferential rational basis review. Similarly, the Court has held that when the government is engaged in a state function that requires the exercise of editorial discretion, the First Amendment does not require judicial review of the state's intrinsically discretionary decisions.³⁷ If one were attracted to this analogy, the open questions would be why the Court in *Hazelwood* suggested that there are *any* real free speech constraints on the messages a school chooses to endorse and, if

of the circuit split).

32. See *Hazelwood*, 484 U.S. at 270–71.

33. *Id.*

34. *Id.* at 271.

35. *Id.* at 272–73.

36. *Id.* at 273.

37. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998).

some such constraints exist, how exactly a court is to determine what constitutes a legitimate pedagogical purpose.³⁸

Finally, Justice White appears to shift course yet again toward the institutional analysis with which he began his opinion. He suggests that the distinctive nature of public schools requires that educators be given special prerogatives. Schools must be able to regulate student speech in order to ensure that students learn what the school is trying to teach.³⁹ Educators must be able to take into account the maturity level of students, and limit the material students are exposed to accordingly.⁴⁰ Administrators need to be able to restrict student speech in circumstances where the school would be erroneously perceived as endorsing the student's message.⁴¹ Finally, disputes about what is taught in a public school and how it is taught are much more a matter for local political and professional decision-making than they are problems to be resolved through federal constitutional adjudication.⁴²

As noted earlier, many, but certainly not all, lower courts have determined that *Hazelwood* extends to public colleges and universities. Often the decision to apply or not to apply *Hazelwood* is conclusory, with little justification offered for the court's decision.⁴³ In other cases, the court determines whether *Hazelwood* applies to the particular context in which the free speech dispute arose, but explicitly leaves open the applicability of *Hazelwood* in other circumstances.⁴⁴

Given the intrinsic ambiguity as to *Hazelwood's* meaning, the wariness of some courts to apply *Hazelwood* in a college setting is understandable. The case law applying *Hazelwood* to free speech disputes in elementary, junior high, and high school

38. What constitutes a legitimate pedagogical purpose, of course, has not been an easy question for courts to answer. See Brownstein, *supra* note 10, at 775–76.

39. *Hazelwood*, 484 U.S. at 271.

40. *Id.*

41. *Id.* at 271–72.

42. *Id.* at 273.

43. See, e.g., *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (stating simply that *Hazelwood* does not apply to colleges and universities).

44. See, e.g., *Oyama v. Univ. of Haw.*, 813 F.3d 850, 864 n.10 (9th Cir. 2015) (stating that *Hazelwood* does not apply to the case before it involving student speech in a professional certification program, but “we need not and do not decide whether the *Hazelwood* standard can ever apply in the context of student speech at the college and university level”).

settings can be charitably described as an incoherent shambles.⁴⁵ There is little reason to believe it will be better reasoned and more consistent at the college level where courts must confront the additional question of how *Hazelwood's* application should change in the setting of a public university. Yet it is not remotely clear what framework courts should apply instead of *Hazelwood*. Thus, in *McCauley v. University of the Virgin Islands*, for example, a Third Circuit panel warned that the *Hazelwood* analysis should not be taken as gospel in adjudicating free speech cases involving public universities because elementary and high school authorities have more “leeway” in regulating student speech than their university counterparts.⁴⁶ But the court conceded that “it is difficult to explain how this principle should be applied in practice and it is unlikely that any broad categorical rules will emerge from its application.”⁴⁷ This difficulty of identifying alternative doctrine may help explain the willingness of some courts to apply *Hazelwood* in the university context.

On the merits, there are arguments on both sides as to whether the *Hazelwood* analysis should extend to public universities. We can begin by focusing on the situation where a *Hazelwood* standard might seem most justified—core curricular decisions, pedagogical choices, professorial control of the classroom, and the evaluation of research and other student work product. *Hazelwood* itself—and lower courts applying its analysis to elementary schools and high schools—suggests that maximum deference is due school authorities in these situations.⁴⁸ Is there any basis for thinking that deference in these realms should not be extended to a university’s administration and faculty?

One reason identified by some courts relates to the age of students whose speech is restricted. College students are incrementally older and more emotionally and intellectually mature than public school students. They are deemed to be more independent and less impressionable than students attending

45. See generally Brownstein, *supra* note 10, at 719–75 (describing how lower courts have inconsistently applied *Hazelwood*).

46. 618 F.3d 232, 247 (3d Cir. 2010).

47. *Id.*

48. See Brownstein, *supra* note 10, at 759, 775–76 (describing how various courts have deferred to schools in cases involving “pedagogical concern[s]” relating to curriculum and classroom decisions).

public schools.⁴⁹ College administrators no longer have an *in loco parentis* relationship with students.⁵⁰ They do not need to impose order and discipline on college students as they would if they were dealing with children attending public school.⁵¹ College students are adults and should have the same free speech rights as adults. Judges opposed to the application of *Hazelwood* emphasize some or all of these arguments in explaining why *Hazelwood* provides an inappropriate framework for adjudicating free speech cases.

All of these contentions are accurate at least to some extent, but it is not altogether clear why this differential in age should be a determinant factor in resolving the deference due administrators and instructors in free speech disputes. This is particularly true in light of the current Court's apparent disposition to treat the free speech rights of teenagers to be largely equivalent to the free speech rights of adults.⁵² There is a far greater difference in age and maturity between a student in elementary school and a student in high school than there is between a high school senior and a community college freshman, and yet *Hazelwood* applies across this age spectrum.⁵³ It may be true that the age and maturity of students are relevant to an evaluation of the pedagogical purpose of a challenged restriction on speech⁵⁴—perhaps a middle school English teacher

49. See, e.g., *Oyama*, 813 F.3d at 863; *McCauley*, 618 F.3d at 246.

50. See, e.g., *McCauley*, 618 F.3d at 243–45.

51. See, e.g., *id.* at 245–46; *DeJohn v. Temple Univ.*, 537 F.3d 301, 315–16 (3d Cir. 2008) (explaining the special need of public elementary and secondary school administrators to maintain discipline, a concern that is largely lacking at the university level).

52. See *Brown v. Merch. Entm't Ass'n*, 564 U.S. 786, 790–99 (2011) (relying on traditional First Amendment doctrine to examine a statute prohibiting the sale of violent video games to minors). In *B.H. ex rel. Hawk v. Easton Area School District*, a student free speech case challenging restrictions at a public high school, the court quoted *Brown* in affirming that “minors are entitled to a significant measure of First Amendment protection’ and the government does not ‘have a free floating power to restrict the ideas to which children may be exposed.’” 725 F.3d 293, 314 (3d Cir. 2013) (en banc) (citation omitted) (quoting *Brown*, 564 U.S. at 794).

53. See generally *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc) (“[M]any high school seniors are older than some college freshmen and junior colleges are similar to many high schools.”).

54. See, e.g., *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012) (suggesting that, in some instances, whether a student is in high school or college could be determinative); *Hosty*, 412 F.3d at 734 (emphasizing differences in emotional maturity); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289–90 (10th Cir. 2004) (noting maturity differences between high school and college students); *Pompeo v. Bd. of Regents of Univ. of N.M.*, 58 F. Supp. 3d 1187, 1190 (D.N.M.

may legitimately limit speech about human sexuality that might be an entirely reasonable subject of discussion in a college literature class⁵⁵—but the standard of review applied would be the same in both cases.

Most importantly, the lack of maturity of students in public schools was only one of the grounds the Court asserted to justify the *Hazelwood* standard of review. And in our judgment it was probably the least important. The core arguments underlying the *Hazelwood* decision were the need to control student speech in school-sponsored activities in order to accomplish the school's pedagogical goals and the repeated concern about controlling expression that bore the imprimatur of the school. To what extent do these interests change if the school in question is a university instead of a high school?

One plausible response to this question asserts that the mission of the university is fundamentally different than that of a public school. The function of the university isn't to instill orthodoxy; it is to encourage inquiry and debate in the unfettered marketplace of ideas.⁵⁶ Students need some degree of academic freedom to develop the creativity and analytic skills that are necessary to develop new knowledge and engage an increasingly changing world.⁵⁷ Freedom of speech is the foundation of the role that public universities play in our society and that freedom extends to student speech in the college classroom as well as the university at large.⁵⁸

2014) (discussing relevance of maturity expectations to examination of a course syllabus).

55. See, e.g., *Ward*, 667 F.3d at 734.

56. See, e.g., *DeJohn*, 537 F.3d at 315 (“It is well recognized that ‘the college classroom with its surrounding environs is peculiarly the marketplace of ideas’” (quoting *Healy v. James*, 408 U.S. 169, 180 (1972))).

57. As the court in *Oyama v. University of Hawaii* explained in justifying the importance of academic freedom and student free speech rights in a public university, “the progress of our professions . . . may depend upon the ‘discord and dissent’ of students training to enter them: it is by challenging the inherited wisdom of their respective fields that the next generation of professionals may develop solutions to the problems that vexed their predecessors.” 813 F.3d 850, 864 (9th Cir. 2015) (quoting *Rodriguez v. Maricopa Cty. Cmt. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010)). Accordingly, any adjudication of public college student free speech claims must “reflect the ‘special niche’ universities occupy ‘in our constitutional tradition.’” *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)). Significantly, “the Court’s [high school] student speech cases provide no basis for doing so.” *Id.*

58. See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242 (3d Cir. 2010) (discussing the “‘critical importance’ free speech has in our public uni-

We appreciate the force of this argument, but there is a contrary argument that deserves attention as well. Inquiry and debate in a college classroom may require orchestration. The goal of having numerous ideas expressed and evaluated may be starkly inconsistent with the right of each student to express what he or she thinks is important during a class discussion. Further, not all ideas are of equal relevance or merit. Nor are all sources of information of equal quality or veracity.⁵⁹ A university classroom is not a public forum where all speech must be accepted on a content-neutral basis.⁶⁰

Also, the university's role as a certifying or credentialing institution must be more stringent than a public school's. A high school may strive to have all students develop and learn to the best of their ability. Graduation does not necessarily demonstrate competence in any specific area of expertise or for any particular vocation. A university degree purports to recognize that the graduate has a body of knowledge and skills that are necessary for employment in a particular field or more advanced, specialized study. Indeed, the more advanced the course of study, the more important it is that students master particular material and skills.⁶¹ Many programs involve stu-

versities" (quoting *DeJohn*, 537 F.3d at 314); *DeJohn*, 537 F.3d at 315 ("Discussion by adult students in a college classroom should not be restricted.").

59. In *Axson-Flynn v. Johnson*, for example, the court found the reasoning of *Settle v. Dickson County School Board*, a high school case, to be fully applicable to a college free speech case. See *Axson-Flynn*, 356 F.3d at 1287 (citing *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155–56 (6th Cir. 1995)). *Settle* explained that

teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. . . . [I]t is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions—in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech.

Settle, 53 F.3d at 155–56; see also *Ward*, 667 F.3d at 733–34 (explaining that the key common denominator in high school and college student free speech cases is "student" and that, during instructional activities at both levels, teachers need the authority to restrict student speech in order to further pedagogical goals).

60. See, e.g., *Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011) (finding that Augusta State University's counseling program constituted a non-public forum).

61. See *Axson-Flynn*, 356 F.3d at 1290–91 (implying that the need for academic discipline does not necessarily diminish as students grow older and that, indeed, the need for rigorous control over the educational environment may increase as the course of study progresses).

dents participating in field work or directly providing services to clients as part of their training.⁶² In many cases, the parameters of permissible debate necessarily narrow to satisfy the university's role in establishing and confirming competency and awarding credentials.⁶³

Perhaps most importantly, rigorous judicial review of a teacher, department, or university's educational decisions in the name of protecting student speech risks subordinating the academic freedom of the faculty and institution to the expressive prerogatives of students—and it assigns to the federal courts the authority to determine what constitutes acceptable pedagogical and educational standards.⁶⁴ Here there is an additional distinction between the high school and university context, but it is a distinction that does not necessarily undermine the propriety of adjudicating certain student speech disputes at a university under *Hazelwood*.

The separation-of-powers and federalism concerns which supported judicial deference to local school boards and school administrators in *Hazelwood* may be less important in a college context.⁶⁵ Public universities are not always under the control

62. See, e.g., *Keeton*, 664 F.3d at 876 (recognizing the student clinical practicum in which students are trained to counsel clients is school-sponsored activity which bears the imprimatur of the university). When students' speech is restricted while they are actually providing counseling to clients as part of their professional training, some courts evaluate such speech regulations under the doctrinal framework applied to restrictions on public employee speech. See, e.g., *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007) (ruling that the test for regulating private speech of employees applied because *Watts* was not simply a student, but an employee of the counseling practicum).

63. See, e.g., *Oyama v. Univ. of Haw.*, 813 F.3d 850, 866–72 (9th Cir. 2015) (finding that the university had “legitimate concerns” and could “take action” to deny him certification); Emily Gold Waldman, *University Imprimatur on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 413 (2013) (noting the existence of “significant deference [to universities] in the certification cases”).

64. Federal judges, not surprisingly, are often wary of assuming any such role. See, e.g., *Keeton*, 664 F.3d at 883 (Pryor, J., concurring) (“In matters of instruction and academic programs, federal judges must . . . exercise restraint.”).

65. It is worth noting that some conservative members of the current Court seem far less interested in separation of powers and federalism concerns in the student speech context than the Justices who formed the *Hazelwood* majority. To these Justices, school authorities are state actors and there is every reason to be as suspicious of their decisions to restrict student speech as the speech restrictive decisions of any other government official. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 422–25 (2007) (Alito, J., concurring) (arguing that public school authorities “act as agents of the State” when they regulate student speech).

of an elected board. Moreover, the idea that publicly elected officials should control the operation of a public university has nowhere near the persuasive traction of the argument that elementary schools and high schools should be under local, democratically established control. Indeed, the opposite is the case. It is often recognized that the university as an institution needs considerable autonomy and academic freedom to do its job effectively.

While this last argument may persuasively distinguish public colleges from public high schools in one sense, it may be a pyrrhic victory for the purpose of arguing for less judicial deference to college administrators and faculty in student speech cases. The commitment to university institutional autonomy and the academic freedom of departments and faculty⁶⁶ may provide an even stronger impetus to, and foundation for, judicial deference than the arguments for local control of public schools. And there is no comparable tradition or functional justification for recognizing the institutional autonomy of public schools or the academic freedom of their instructional staff.

The final foundation for applying *Hazelwood* to universities relates to student expression that bears the imprimatur of the school. There is no plausible basis for arguing that student speech in a classroom could be reasonably perceived to bear the imprimatur of the school when students are asked to express their own views on a subject.⁶⁷ But that is true both for discussions in high school and college classes. The approval of written work and research projects is more problematic. No one will think that the student handing in his or her assignment is speaking for the school. However, by accepting and positively evaluating student work product, the school is arguably giving the content of the project an imprimatur of approval.

This concern has been accepted by some courts adjudicating disputes involving the certification of students for professional roles such as a teacher. Thus, as one court explained:

66. See, e.g., *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring) (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985)) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.”); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (“[T]he curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere.”).

67. *Keeton*, 664 F.3d at 882 (Pryor, J., concurring).

“When the University recommends a student for certification [as a teacher], it communicates to the world that, in its view, that student is fit to practice the profession; as a result, the University places its ‘imprimatur’ on each student it approves to teach.”⁶⁸ Arguably, the scope of this argument may apply to degrees which do not involve formal certification as well.

There is one additional reason to doubt that college students have greater free speech rights than their junior high school or high school counterparts. Public school students are subject to compulsory education laws. They are required to attend school and in doing so subject themselves to the school’s speech regulations. College students have the opportunity to examine the curriculum of a college beforehand and will make the decision to attend a particular university as a matter of choice. There is at least an argument that this lack of compulsion counts against a university student’s challenge to curricular or pedagogical decisions that limit his or her speech.⁶⁹

We do not purport to choose sides on the propriety of applying *Hazelwood* to university student speech disputes arising out of core school-sponsored activities. There are strong arguments both for applying and for rejecting *Hazelwood* and perhaps even stronger arguments for applying it in one context but not another. Our primary point is to demonstrate the uncertainty that pervades the adjudication of these cases as a constitutional matter. If uncertainty as to whether a right or freedom will be protected chills the exercise of that right, students allegedly exercising their free speech rights in school-sponsored activities at a university may experience some cold drafts while doing so.

As a descriptive matter, we think in many cases that college students will have a difficult time successfully asserting free speech challenges against university decisions regarding the content of courses and pedagogy in the classroom or with regard to the supervision and evaluation of research and writing projects.⁷⁰ This does not mean, however, that students will

68. *Oyama*, 813 F.3d at 862; see also Waldman, *supra* note 63, at 393 (discussing how students certified by a university bear its imprimatur).

69. See, e.g., *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012) (“A prospective university student has the capacity to learn what a curriculum requires before applying to the school and before matriculating there.”).

70. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1288 (10th Cir. 2004) (quoting *Brown*, 308 F.3d at 949 with approval) (confirming that student free speech cases “make clear that the First Amendment does not require an educator to change the assignment to suit the student’s opinion or to approve

always be without redress. As we explained earlier, some courts interpret *Hazelwood* to be grounded in non-public forum doctrine. In these circuits, an argument that college classroom or research and writing restrictions constitute viewpoint discrimination cannot be dismissed out of hand.⁷¹

Even if a court does not hold that viewpoint discrimination necessarily requires strict scrutiny review,⁷² courts recognize that as a general matter, viewpoint discrimination runs counter to core free speech principles. Accordingly, while applying deferential review, a court may still be uneasy with the argument that viewpoint discrimination serves a valid pedagogical purpose. Certainly, college students may not be punished because they hold or express religious or political beliefs that are inconsistent with the passionately held opinions of college administrators or professors.⁷³ However, establishing that a professor or department's decision restricting speech is based on animus toward a student's religious or political beliefs rather than permissible academic or professional evaluations of the quality of the student's work and her commitment to academic or professional standards may be a very difficult burden of proof for a student to satisfy.⁷⁴

There is an unstated due process dimension to freedom of speech claims on campus that may also provide some incidental protection to students. Courts may be suspicious of academic or professional standards asserted to justify speech restrictions that are recognized for the first time after a student's speech has been sanctioned and she has challenged the university's decision.⁷⁵ When after-the-fact rationalizations are offered to

the work of a student that, in his or her judgment, fails to meet a legitimate academic standard").

71. See, e.g., *Keeton*, 664 F.3d at 871–77 (characterizing master's program in counseling to be a non-public forum requiring viewpoint neutrality and recognizing the applicability of *Hazelwood* to review of the program's requirements).

72. See, e.g., *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 58 F. Supp. 3d 1187, 1189 (D.N.M. 2014) (holding that *Hazelwood* does not require viewpoint neutrality in the regulation of a student's curricular speech).

73. *Keeton*, 664 F.3d at 872; *Axson-Flynn*, 356 F.3d at 1293.

74. See, e.g., *Keeton*, 664 F.3d at 872–75 (discussing student's difficulty in proving discrimination on the basis of her stated religious beliefs); *id.* at 880–83 (Pryor, J., concurring) (noting that a public university cannot discriminate against student speech simply because it is concerned "that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university").

75. See, e.g., *Ward v. Polite*, 667 F.3d 727, 736 (6th Cir. 2012) (discussing

defend a university's actions, courts may be more open to the argument that the university is attempting to conceal impermissible motives. Similarly, courts may not countenance the sand-bagging of students by changing standards to exclude unpopular speech. Thus, a professor who describes the content of a course as controversial and invites disagreement with the professor's views in the syllabus will have difficulty explaining why a particular student's speech on a class assignment is unacceptable and requires the student's exclusion from the class.⁷⁶

There is also a distinction drawn between the regulation of speech in a school-sponsored activity and retaliation against students who express disagreement about the content or operation of a school-sponsored activity. A student who privately complains to an instructor or the administration about class requirements and is threatened with sanctions for doing so is engaged in protected expression which does not bear the imprimatur of the school.⁷⁷ While students may be required to comply with curricular demands with which they disagree, they have a free speech right to express that disagreement in appropriate circumstances.⁷⁸

What if a university restricts student speech in an activity that is not a part of the curriculum, but is arguably sufficiently school-sponsored to still fall within the analytic rubric of *Hazelwood*? Lower courts have struggled to determine the parameters of *Hazelwood* in public school cases. The resulting attempts to distinguish school-sponsored from non-school-sponsored activities have produced a hodge-podge of inconsistent holdings.⁷⁹

Some, but certainly not all, of this confusion may be avoided in university cases because there are strong reasons for narrowing the range of non-curricular activities to which *Hazelwood* applies on a university campus. College student organizations are often considered to be more independent of the university than public school clubs and activities. The uni-

the possibility that a reasonable jury could find the university's policy on referrals "an after-the-fact invention").

76. *Pompeo*, 58 F. Supp. 3d at 1190.

77. *Jane Doe I v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211 (11th Cir. 2016).

78. *Keeton*, 664 F.3d at 874 (explaining that a student remains free to express disagreement with the curriculum of a university's counseling program, but she must abide by the professional requirements imposed by the program).

79. See *Brownstein*, *supra* note 10, at 758–70.

versity student group is less likely to have a faculty sponsor. The range of student organizations on a college campus is typically so broad and involves so many diverse perspectives that it would be impossible to believe that the university endorses all of their discordant expressive activities.⁸⁰ Thus, in many cases there is little risk that student speech outside of curricular activities will be understood to bear the imprimatur of the school. Indeed, universities often explicitly disclaim any suggestion that they endorse the expressive activities of student organizations.⁸¹ No one sensibly thinks that the University of Illinois Student Republican Club reflects the political position of the university administration or its faculty.

There are other non-curricular student activities which are sponsored by universities and which the university maintains are intended to further specific educational goals. Student governments are one example. Here, for instance, courts have held that restrictions on participation in a student government election and the regulation of electioneering activities are reviewable under a *Hazelwood* analysis.⁸² University student newspapers and other periodicals are also alleged to serve educational purposes and courts have considered *Hazelwood* in reviewing university restrictions on the content of these publications.⁸³

In this regard, it is clear that money matters and the fact that a university funds a student activity or periodical may support deferential review of restrictions on student speech under *Hazelwood* or under government speech doctrine which permits the government to control the messages it expresses or

80. Indeed, when a university sponsors a broad range of student organizations, it will be held to have created a limited public forum. *See, e.g.*, *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 674 (2010) (noting that the law school created a limited public forum through its Registered Student Organization requirements); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (ruling that the Student Activities Fund, which funded many student groups, created a limited public forum).

81. *Rosenberger*, 515 U.S. at 823–24.

82. *See, e.g.*, *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344 (11th Cir. 1989) (applying *Hazelwood* analysis to university regulations of student government campaign literature and debates); *Flint v. Dennison*, 361 F. Supp. 2d 1215, 1218–20 (D. Mont. 2005) (applying *Hazelwood* analysis to spending limits for student government elections).

83. *See, e.g.*, *Hosty v. Carter*, 412 F.3d 731, 735–38 (7th Cir. 2005) (en banc) (holding that *Hazelwood's* framework applies to subsidized student newspapers).

subsidizes.⁸⁴ However, the presence or absence of university funding is not dispositive in determining how rigorously courts should review the regulation of university-subsidized student expressive activities. The fact that a university student newspaper is financially self-sufficient from advertising revenue standing alone may not conclusively establish its independence from university control. One can imagine a situation in which a financially self-sufficient student newspaper was created with university capital, bears the university's name, and has always been subject to close administrative or faculty supervision of its content. These would be relevant factors for a court to consider in determining the appropriate standard of review to apply to censorship of the periodical.

Similarly, the existence of university funding does not necessarily support deferential judicial review. University subsidies can be provided in such a manner that courts will find that the university has created some kind of public forum for diverse student expression.⁸⁵ That finding would require the application of strict scrutiny for content- and viewpoint-discriminatory regulations of speech. Although it is uncommon, in some circumstances, state law explicitly declares that a student newspaper at a public university constitutes a public forum.⁸⁶

A particular thorny question may arise when student groups invite controversial speakers to campus, sometimes with the indirect or direct financial support of the university. If these events are considered to be school-sponsored activities, speech restrictions limiting disturbances of the speaker's lecture can be upheld under highly deferential review. It is at least arguable that greater protection might be extended to the

84. *Id.*

85. *See, e.g., Rosenberger*, 515 U.S. at 824–29 (deeming legal principles pertaining to limited public forums applicable to university's Student Activities Fund, the goal of which was "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University'"); *Hosty*, 412 F.3d at 737 (stating that the rules established by the Student Communications Media Board composed of both students and faculty members, pertaining to a subsidized student publication, "could be thought . . . to create a designated public forum"); *Kincaid v. Gibson*, 236 F.3d 342, 351 (6th Cir. 2001) (en banc) (finding that university-subsidized yearbook constituted a limited public forum); *Lueth v. St. Clair Cty. Cmty. Coll.*, 732 F. Supp. 1410, 1415 (E.D. Mich. 1990) (deeming university's student-run, university-funded newspaper "a forum for public expression").

86. *See, e.g., Moore v. Watson*, 838 F. Supp. 2d 735, 755–56 (N.D. Ill. 2012) (recognizing that by virtue of Illinois state law, the student newspaper at a public university constitutes a designated public forum).

“heckling” of a speaker in a non-academic setting.⁸⁷ The argument that the invited speaker’s lecture is a school-sponsored activity would most likely be enhanced if an academic department or unit co-sponsors the event—a not uncommon occurrence.

Finally, we confront the regulation of student speech that cannot be characterized as school-sponsored. Off campus, students are residents of a municipality and state. They are subject to all of the laws restricting speech that govern the expression of non-students. And they are protected by the same free speech doctrine that applies to everyone else in the community. To what extent does this analysis change when students engage in expressive activities on campus?

The problem is complicated for several reasons. As noted previously, courts have recognized the historic function of the university as a location where new, creative, unorthodox, and critical ideas can be exchanged and debated. In modern times at least, that tradition of open thought and experiment and a corresponding abstract commitment to freedom of speech has extended to students.⁸⁸ That understanding supports a constitutional regime protecting the free speech rights of students—even in circumstances in which their speech would not be protected off campus.

Conversely, there is the reality that the university owns most, if not all, campus property. In a conventional town, most suppliers of goods and services, such as restaurants, stores, and apartment buildings are under private ownership. The government has no authority to restrict the private speech of patrons in such locations. The private owners of these enterprises on the other hand have no constitutional constraints limiting their authority to control expressive activities of patrons on their property. When the university takes on these conventionally private roles, we might evaluate its ability to restrict student speech under various models. All such property might be considered to be a non-public forum unless it is deliberately

87. In *In re Kay*, for example, the California Supreme Court concluded that while no one has a free speech right to disrupt or obstruct a meeting, some negative expressive conduct from the audience such as heckling, interruptions, asking hard questions, and booing would receive some First Amendment protection. 464 P.2d 142, 147 (Cal. 1970). Whether allegedly disruptive conduct could be sanctioned required a multi-factor analysis examining both the nature of the meeting and the extent to which the protestors’ conduct had substantially impaired the event. *Id.* at 150–51.

88. See, e.g., *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006).

opened up for expressive purposes. Alternatively, the university acting as a proprietor rather than a regulator might be given the same authority to restrict the speech of its student patrons as a private landlord or restaurant owner. Yet another alternative suggests that because the university controls the entire environment in which students live, because a college campus is recognized as a location where speech and unorthodox ideas should be freely and robustly exchanged (both inside and outside the classroom), and because students are self-actualizing individuals with dignity interests deserving of respect, university restrictions on speech in the general campus must be subject to some level of serious review.⁸⁹

Even if we put areas where the university operates as a proprietor, such as dormitories and dining halls, aside, there are no easy answers to the question of how student free speech rights vary by campus location. The uses to which property is put on a university campus are extraordinarily diverse.

A modern university contains a variety of fora. Its facilities may include private offices, classrooms, laboratories, academic medical centers, concert halls, large sports stadiums and arenas, and open spaces [O]pen spaces . . . at most major universities, come in a number of different types. Some are enclosed quadrangles bordered on all sides by university buildings and traversed by sidewalks, while others are grassy areas or plazas on the edge of campus⁹⁰

The analogies available to us remain ambiguous. The streets and parks of a town are traditional public forums where speech is provided maximum constitutional protection.⁹¹ All other public property is a non-public forum unless the govern-

89. One court noted the following in explaining why college administrators should have less leeway in regulating student speech than high school administrators:

[U]niversity students, unlike public elementary and high school students, often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day. The concept of the “schoolhouse gate” . . . and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school . . . does not translate well to an environment where the student is constantly within the confines of the schoolhouse.

McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2009).

90. *Bowman*, 444 F.3d at 976–77; see also *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (explaining that because the public university at issue includes “classrooms, lecture halls, private offices, laboratories, dormitories, a performing arts center, sports facilities, open spaces, a botanical garden, a planetarium, a center for wildlife education, and a museum[,] . . . any attempt to affix a single label on so large and diverse a campus likely would render the forum analysis meaningless”).

91. *Bowman*, 444 F.3d at 975–76.

ment intentionally opens the property up for general or specific expressive purposes—with the government waiving any right of selective review of the speakers granted access to the so-called designated or limited public forum.⁹² The parameters of the traditional public forum are jealously guarded by doctrine. An interior sidewalk leading to a post office, for example, is a non-public forum.⁹³ While the fact that people may come and go at will on public property is relevant to an analysis of whether a public forum exists, it is only one factor to consider and is not dispositive of the issue.⁹⁴

Should the walkways, paths, and park-like open spaces on a university campus be analogized to municipal streets and parks⁹⁵ or are they more appropriately analogized to an interior sidewalk and characterized as a non-public forum?⁹⁶ And what

92. *Id.*

93. *United States v. Kokinda*, 497 U.S. 720, 730 (1990).

94. *United States v. Grace*, 461 U.S. 171, 177 (1983).

95. Some courts have noted the resemblance between a university campus and a municipality. In *Hays County Guardian v. Supple*, for example, the court described Southwest Texas State University in these terms:

Roughly 5,000 students live and work on the campus, making the campus, in the words of the University's own promotional booklet, a "town" of which the resident student will be a "contributing citizen" and "voting member." The campus's function as the site of a community of full-time residents makes it "a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment[]" . . . and suggests an intended role more akin to a public street or park than a non-public forum.

969 F.2d 111, 117 (5th Cir. 1992) (citation omitted) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981)).

96. While most courts do not conclude that a street-like or park-like area on a college campus is a traditional public forum, the case law remains uncertain and provides little in the way of clear standards or guidelines for adjudicating location-based free speech disputes. In *Brister v. Faulkner*, for example, the court held that university property linking the city sidewalk to the entrance to a university events center was a public forum for constitutional purposes because the property at issue was indistinguishable from the public sidewalk adjacent to it. 214 F.3d 675, 682–83 (5th Cir. 2000). Similarly, the court held in *McGlone v. Bell* that perimeter sidewalks surrounding a public university, which were owned by the university but were adjacent to and indistinguishable from municipal sidewalks, were properly characterized as a traditional public forum. 681 F.3d 718, 732–33 (6th Cir. 2012).

Most open areas within a campus, however, will not be misunderstood to be municipal streets or parks and will be understood to be university, rather than municipal, property. Determining how such internal campus property should be characterized for free speech purposes has proven to be a problematic task. In *Bowman v. White*, the court explained that because a university serves different functions than municipal streets, parks, or theaters, "streets, sidewalks, and other open areas that might otherwise be traditional public

about all of the other campus property which is used for myriad different purposes? Is all other university property by default a non-public forum?⁹⁷ While courts are reluctant to identify a campus location as a traditional public forum, clearly, in some

fora may be treated differently when they fall within the boundaries of [a] [u]niversity's vast campus." 444 F.3d at 978. Judge Bye's concurring opinion, however, challenged the majority's analysis. He argued that locations on a university campus that have the physical characteristics of streets and parks and are used as open public thoroughfares are traditional public forums. *Id.* at 984–91 (Bye, J., concurring). In *Souders v. Lucero*, the court determined that even an open college campus is not a public forum similar to streets and parks as to which both students and nonstudents alike have a right of access. 196 F.3d 1040, 1044 (9th Cir. 1999). In *Gilles v. Garland*, an opinion regrettably not selected for publication, the court held that open space at a public university identified as the academic quad was a limited public forum. 281 F. App'x 501, 510–11 (6th Cir. 2008). Accordingly, speech regulations governing such areas would be upheld as long as they were content-neutral and reasonable. While concurring in the judgment, Judge Moore challenged that conclusion and argued that a majority of circuits have held that open spaces on a college campus are designated public forums. *Id.* at 513–14 (Moore, J., concurring). As such, speech regulations governing designated public forums would be subject to strict scrutiny review. *Id.* at 514 (Moore, J., concurring). In yet another case, *American Civil Liberties Union v. Mote*, a public university permitted members of the university community to engage in public speaking and distribute handbills in outdoor areas of campus. 423 F.3d 438, 442 (4th Cir. 2005). Members of the general public were permitted access to these same outdoor areas for virtually all purposes except for public speaking and the distribution of leaflets. *Id.* Only university community members were permitted to engage in these expressive activities in most open outdoor campus locations. *Id.* The court determined that these campus areas were a non-public forum by default. *Id.* at 444. However, because they had been opened for particular expressive uses, they now constituted a limited public forum. *Id.* As such, speech restrictions governing their use would be upheld if they were viewpoint-neutral and reasonable in light of their purpose. *Id.* at 445.

Examining the issues from yet another perspective, in *Bloedorn v. Grube*, the court concluded that neither an on-campus interior sidewalk, a pedestrian mall, nor a rotunda could be characterized as a traditional public forum. 631 F.3d 1218, 1232–34 (11th Cir. 2011). While the physical characteristics of these locations on campus certainly resembled streets and parks, the physical characteristics of the property standing alone “cannot dictate forum analysis.” *Id.* at 1233. Most importantly, the traditional purpose and use of university property is distinct from the purpose and customary uses of municipal streets and parks. *Id.* at 1233–34. After considering the university's regulations limiting access to the campus for expressive purposes, the court concluded that the locations at issue were properly determined to be a limited public forum. *Id.* at 1235. See generally Nathan W. Kellum, *If It Looks Like a Duck . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1 (2005) (discussing how many universities' positions toward free speech on campus run afoul of Supreme Court decisions).

97. See, e.g., *O'Brien v. Welty*, 818 F.3d 920, 931 (9th Cir. 2016) (finding that second floor hallway and offices of the social sciences building was a non-public forum).

circumstances the university will be held to have created a designated or limited public forum.⁹⁸ When it does so, students receive increased protection in those locations against content-discriminatory speech regulations. However, determining what constitutes a designated or limited public forum can be a confusing problem for lower courts to resolve as a matter of law⁹⁹ and in many cases, it will require a fact-specific analysis based on the adjudication of disputed facts.¹⁰⁰

All of this indeterminacy is no friend to freedom of speech. Uncertainty chills speech. As a Fifth Circuit panel explained in a case involving the status of university property at the University of Texas, Austin,

If individuals are left to guess whether they have crossed some invisible line between a public and non-public forum, and if that line divides two worlds—one in which they are free to engage in free speech, and another in which they can be held criminally liable for that speech—then there can be no doubt that some will be less likely to pursue their constitutional rights, even in the world where their speech would be protected.¹⁰¹

It would seem, however, that some significant degree of uncertainty is unavoidable in a context where different uses of property with correspondingly different statuses as a traditional public forum, designated public forum, limited public forum, and non-public forum exist in a patchwork quilt of free speech regimes. Courts have recognized that “fora have geographical boundaries [and] different kinds of fora may abut.”¹⁰² In such circumstances by taking a single step, students may find their

98. See, e.g., *Bowman*, 444 F.3d at 978–79 (holding that specific open areas in a public university are unlimited designated public forums accessible both to student and non-student speakers); *Hays Cty. Guardian*, 969 F.2d at 118 (holding that the university’s outdoor premises where student expression was routinely permitted constituted a designated public forum).

99. See, e.g., *Bowman*, 444 F.3d at 975 (describing lower court forum decisions as far from lucid and involving substantial confusion). The confusion exists at all levels of decision-making. In *Christian Legal Society v. Martinez*, for example, the Supreme Court applied the same deferential standard of review previously thought to be reserved for non-public forums to speech and association regulations governing what the Court described as a limited public forum. See Brownstein & Amar, *supra* note 6, at 507–08.

100. See, e.g., *Bowman*, 444 F.3d at 979 (explicitly limiting its designated public forum holding to only the three areas on campus at issue in the case before it); *Brister*, 214 F.3d at 683 n.5 (noting that the public forum holding applies only to the specific property at issue in the case and does not apply to any other property in the vicinity).

101. *Brister*, 214 F.3d at 682–83.

102. *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1232 (S.D. Ala. 2016).

free speech rights transformed from the full panoply of constitutional protection to far more limited protection that accepts substantial restrictions on speech.¹⁰³

If university property is generally characterized as a non-public forum, student free speech rights might be sharply restricted. Content-discriminatory speech regulations would be upheld as long as they are reasonable—a very deferential standard of review. Pursuant to accepted Supreme Court authority, the government may restrict controversial speech and political advocacy in a non-public forum in order to maintain an appearance of neutrality.¹⁰⁴ Following this line of reasoning, at least one district court has upheld a university's restrictions on student speech near the perimeter of the campus for the purpose of avoiding any suggestion that the university was taking a position on divisive political issues.¹⁰⁵ Even in a non-public forum, students would still have free speech rights against viewpoint-discriminatory restrictions on their expression.¹⁰⁶ That is not insignificant protection. Still, because students would have greater protection against content-discriminatory laws in those locations where the university has created a designated or broadly defined limited public forum, determining whether a campus location is a public or non-public forum has considerable importance.

The line drawing here may be particularly acute when university administrators struggle to respond to campus protests. One problem involves challenges to the university's commitment to viewpoint neutrality. It is black letter free speech doctrine that the university cannot treat certain protests more or less favorably than others because of the message the protesters are expressing. Content-neutral time, place, and manner rules may be enforced and will be upheld if they are reasonable in a non-public forum or satisfy intermediate level scrutiny in a traditional or limited public forum. But the key requirement is that these regulations must be enforced neutrally and equally.

103. *Id.*

104. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 808–10 (1985).

105. *Waldrop*, 162 F. Supp. 3d at 1234–36.

106. *See, e.g., Gerlich v. Leath*, No 4:14-CV-00264-JEG, 2015 WL 4097755, at *7 (S.D. Iowa Jan. 6, 2015) (ruling that viewpoint-discriminatory decision restricting student organization's message on t-shirts would violate the First Amendment).

This is easier said than done. Often the police and administrative authorities responding to a campus protest are confronted with hard choices. The rigid enforcement of campus time, place, and manner rules against protestors may exacerbate an incident and result in greater disorder and danger to third parties. It may often seem advisable to waive the enforcement of the campus rules at least temporarily. The problem arises when other protestors insist that they be granted the same accommodation and relaxation of campus speech regulations that prior protestors expressing a different message received. It may be that the facts on the ground do not warrant waiving speech regulations for the second protest. But that difference in treatment may be difficult to defend after the fact when the most obvious difference between two protests is that one group of protestors was allowed to violate the allegedly neutral speech regulations while other protestors expressing a different message were required to comply with the same regulations.

A somewhat similar predicament arises with regard to the creation of a designated or limited public forum. Many of these cases are relatively easy to resolve. If a university generally allows most student groups to use classrooms after-hours for meetings and other expressive activities, it will be difficult for the administration to insist that it has not created a designated or limited public forum. But what if the administration is confronted with protests in administration buildings or other locations where student expressive activity is considered far less appropriate and is prohibited by campus rules? If the administration repeatedly allows different protest groups to commandeer these facilities for ongoing protest activity, does there reach a point where, by its conduct and practice, the university may be held to have created a limited public forum for campus protests in those specific locations?¹⁰⁷ Here again, the demands of free speech doctrine for uniformity of treatment may clash with the practical exigencies that university administrators confront in dealing with specific incidents on campus.

This difficulty is aggravated by free speech rules that prohibit government institutions from leaving decisions about who may speak and how, and when and where particular expression may occur, to the unbridled discretion of public officials. This

107. See, e.g., *Waldrop*, 162 F. Supp. 3d at 1279–85 (closely examining alleged exceptions to the university's speech policy to determine whether in practice it has created a far more open forum than its stated policy suggests).

long-standing requirement for traditional public forums has been extended to non-public forums.¹⁰⁸ There is certainly an argument to be made that, for free speech purposes, there is little distinction between university speech regulations that can be waived at an administrator's discretion during student protests and the kind of unbridled discretion regime that the First Amendment prohibits.

II. THE EXTENT TO WHICH UNIVERSITY FACULTY ENJOY ANY SPECIAL FIRST AMENDMENT ACADEMIC FREEDOM

We next turn to the academic freedom enjoyed by faculty at public universities. As noted above, faculty may enjoy freedom to control curricula, classrooms, student research, and the like when they are authorized by university higher-ups to do so, but what First Amendment rights do they have when they clash with university administrators and political oversight bodies? Many public universities are grappling with these issues frequently and prominently these days. The two universities with which we are associated are good examples: at the University of Illinois (where one of us is now dean of the law school) a very public controversy arose in the last few years surrounding the (non)hiring of Steven Salaita based on the content of his tweets;¹⁰⁹ and at the University of California (where both of us served as law professors for over two decades) the Office of the President issued definitional guidance and, some would say, threats to faculty and staff concerning so-called microaggressions.¹¹⁰ These great public universities are two of many that

108. See, e.g., *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 343–44 (2d Cir. 2015) (finding that the unbridled discretion doctrine applies to non-public forums).

109. Good background on the Steven Salaita controversy (involving the university's 2014 decision not to follow through with a tenured appointment for Professor Salaita based on controversial tweets and other social media utterances he made) can be found in the Report on the Investigation into the Matter of Steven Salaita. COMM. ON ACAD. FREEDOM & TENURE (CAFT), UNIV. OF ILL. AT URBANA-CHAMPAIGN, REPORT ON THE INVESTIGATION INTO THE MATTER OF STEVEN SALAITA, <http://www.ais.illinois.edu/documents/CAFTReport.pdf> [hereinafter CAFT REPORT].

110. "Microaggressions," which can lead to a legally actionable hostile learning environment, are defined for these purposes as "the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership." TOOL: RECOGNIZING MICROAGGRESSIONS AND THE MESSAGES THEY SEND,

currently find themselves at the epicenter of conflict over freedom of expression at, and the orderly functioning of, public institutions of higher education.

In the space below, we briefly examine the breadth of so-called “academic freedom” enjoyed under the First Amendment by (even fully tenured) faculty at public universities by comparing the scope of liberties of public professors with three relevant counterparts: public university students (discussed above), non-professorial public employees, and private university professors. And again, we focus primarily on the liberties enjoyed by virtue of the First Amendment—freedoms that arise from other aspects of the Constitution such as due process, and non-constitutional sources altogether (such as academic freedom traditions, state statutes or constitutions, or contract law) are important to be sure, but they will receive lesser attention in our Article.

Notwithstanding talk in some Supreme Court cases about the importance of “academic freedom” and the special role university faculties play in American democracy and society, it is not clear that even tenured public university professors enjoy any special expressive latitude, at least under the First Amendment. Indeed, the First Amendment in many respects protects public university students significantly more than faculty, because students are regulated individuals (as students and/or residents of a campus community), whereas faculty are government employees. Settled First Amendment doctrine gives the government far more latitude to regulate the speech of its workers than the speech of its citizenry, both because the smooth functioning of government is an interest that is weighed against free speech, and because (in some settings) government itself speaks through its employees. These basic notions are captured, in an overstated and somewhat flippant way, by the quip of Oliver Wendell Holmes Jr., who (while serving as a state appellate judge at the time) remarked in a case: “The petitioner [a police officer] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”¹¹¹ A more accurate, nuanced, and helpful explication

http://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf [hereinafter MICROAGGRESSION AVOIDANCE GUIDE].

111. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). We note that the modern Court has not embraced Justice Holmes’s reasoning to its full logical conclusion.

of these ideas has been provided by the Court in a series of cases involving the First Amendment and public employment handed down over the last half century.¹¹²

In *Pickering v. Board of Education*, a case involving a public teacher who was dismissed for writing and publishing a letter in a newspaper criticizing, among other things, the Board of Education's fiscal policies and the job performance of the Board's superintendent, the Court made clear that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."¹¹³ Because of these interests, the government may impose sanctions on expressive activities of government employees even when such restraints "would be plainly unconstitutional if applied to the public at large."¹¹⁴

Under the so-called "*Pickering* balancing test," the government's interests in "promoting the efficiency of the public services it performs through its employees" must be weighed against the employee's interest in free speech.¹¹⁵ At the first stage, the employee must show that his or her speech pertains to a matter of public concern (as opposed to a workplace grievance) as to which there is a meaningful First Amendment interest.¹¹⁶ At the second stage, the government can prevail by showing that the employee's speech—even if relevant to public debate—does in fact interfere in a significant way with the operations of the governmental unit in question.¹¹⁷ Importantly, the *Pickering* framework does not allow the government to use its authority as employer to "silence discourse, not because it hampers public functions but simply because superiors [in the government department or office] disagree with the content of employees' speech."¹¹⁸

A decade ago, in *Garcetti v. Ceballos*,¹¹⁹ the Court substantially refined the analysis to be undertaken in cases

112. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Pickering v. Bd. of Educ.* 391 U.S. 563 (1968).

113. 391 U.S. at 568.

114. *Nat'l Treasury Emps. Union*, 513 U.S. at 465.

115. *Pickering*, 391 U.S. at 568.

116. *Id.* at 571–72.

117. *Id.* at 572–73.

118. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

119. 547 U.S. 410 (2006).

when public employers discipline employees for expressive activities. The employee in *Ceballos* was a line district attorney who wrote a memo challenging a police affidavit used to support a warrant application, and who then claimed he was improperly retaliated against for the written content and advocacy contained in the memo.¹²⁰ The Supreme Court ruled that as long as “public employees [are] mak[ing] statements pursuant to their official duties [as was true with the *Ceballos* plaintiff], the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline,”¹²¹ even if the matters on which they are speaking are of public concern. The *Ceballos* Court, seemingly prompted by a comment in the dissent about academic freedom,¹²² declined to decide whether its new framework would apply to “speech related to scholarship or teaching.”¹²³

The key distinction in *Ceballos* is between speech qua employee and speech qua citizen. What a public employee says as part of his job—to fulfill his assigned duties—is not protected by the First Amendment, even if it involves a matter of public concern. Only what public employees say as citizens in their private capacities receives constitutional protection. If *Ceballos* were to apply to all academic settings, its speech-limiting ef-

120. *Id.* at 413–15.

121. *Id.* at 421.

122. *Id.* at 438–39 (Souter, J., dissenting) (“This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to . . . official duties.”); see also *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (determining that a governmental inquiry into the contents of a scholar’s lectures at a state university “unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread”).

123. *Ceballos*, 547 U.S. at 425.

fects would be obvious. No public educators would be protected by First Amendment academic freedom with regard to on-the-job speech.

These limitations on free speech protection would not only undermine academic freedom; they would raise difficult problems of application as well. Deciding what is on-the-job speech is not always easy. The scope of what constitutes employee, as opposed to citizen, speech can be unclear. With regard to K–12 instructors, perhaps all of a teacher’s statements during class can be viewed as part of the job, but what of conversations with students out of class, during lunch period, or before the school day formally begins? More problematically, how do we determine the job parameters of university professors who are often expected—as part of the scholarship and service components of their job—to speak to government, the press, professional associations, and other audiences, and to publish articles and books for diverse dissemination? If courts find such expression to be part of the job, and unprotected, then university professors may be punished for speaking in situations where they would have the most impact—when their comments are based on their professional expertise. Far from having *greater* protection for their speech than the average citizen under the rubric of academic freedom, as many people might assume, education workers would actually have much, much *less*. Most citizens do not risk their livelihood when they publish articles or books or speak out on public issues.

Perhaps in significant part because of these problems, the federal courts of appeals have not uniformly or wholeheartedly rushed to apply *Ceballos* to the higher education sphere, even though it does seem regularly to be implemented in the K–12 realm. Regarding post-secondary instructors, the Seventh Circuit at least recognizes *Ceballos*’s arguable relevance, and has at a high level of generality applied *Ceballos*’s teachings concerning “the appropriate weight to [be given] to the public employer’s interests,” even in cases where it believes the ruling in *Ceballos* “is not directly” on point.¹²⁴ By contrast, the Ninth and Fourth Circuits have explicitly determined that *Ceballos* does not govern First Amendment claims by university academics.¹²⁵

124. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006).

125. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (per curiam); *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007).

But even if *Ceballos* doesn't absolutely eliminate public professors' First Amendment claims, the *Pickering* standard (which courts that have not applied *Ceballos* to higher education continue to use) is already generous to public university employers. Indeed, concerns over academic freedom may influence the decision by some courts to apply *Pickering* rather than (the more absolutist) *Ceballos*, but academic freedom doesn't do much work in the cases thereafter and arguably is largely irrelevant to this analysis. Teachers and professors are public employees, no different than police officers or nurses. Under this approach, public employee expression is protected when it addresses matters of public concern, but that protection is balanced against, and may be outweighed by, competing state interests. Ad hoc balancing tests are necessarily indeterminate and uncertain in their application, and uncertainty chills speech.

Moreover, taken literally, *Pickering's* focus on whether speech involves a matter of public concern seems to protect some teachers more than others. Math professors may seldom write on matters of public concern. Their academic freedom, under this test, would be near non-existent. Social studies teachers or law professors regularly speak and write on matters of public concern and would have much of their expression protected to some extent, subject to the court's balancing analysis. If differential equations ever become a public issue, professors who comment on it will receive free speech protection, too.

Perhaps the most pro-academic-freedom First Amendment lower court case we have come across is *Rodriguez v. Maricopa County Community College District*, in which the Ninth Circuit spoke broadly—in the context of a community college professor's seemingly racist emails which were distributed through the college email system to all district employees—about the need for public college teachers to have leeway under the First Amendment because “[i]ntellectual advancement has traditionally progressed through discord and dissent.”¹²⁶ And the role of colleges and universities in fostering that exchange “will not survive if certain points of view [are] declared beyond the pale.”¹²⁷ For this reason, “[t]he desire to maintain a sedate academic environment . . . [does not] justify limitations on a teacher's freedom to express himself on political issues in vigorous,

126. 605 F.3d 703, 708 (9th Cir. 2010).

127. *Id.*

argumentative, unmeasured, and even distinctly unpleasant terms.”¹²⁸

But as ambitious as the *Rodriguez* case was in its discussion of the First Amendment values of academic freedom, the case was about a narrower issue—namely, whether the math professor’s racist emails constituted harassment and thus created a hostile work environment under Title VII such that college administrators were remiss in not taking disciplinary actions against the professor.¹²⁹ The court ruled that because the emails weren’t targeted to anyone in particular, they did not constitute harassment, and thus the administrators could not be sued for failing to take action.¹³⁰ There is language in the case suggesting that the professor’s emails are protected from sanction by the First Amendment,¹³¹ but such language is utter dicta, since no disciplinary action was initiated. Moreover, the broad dicta is itself not very thoroughly explicated, insofar as the opinion nowhere discusses the fact that the professor was a public employee; the opinion cites and quotes numerous cases involving government regulation of private individuals¹³² but never confronts, let alone overcomes, the power *Pickering* confers on government employers to avoid disruption.

All of the foregoing makes clear that, compared to students, public university faculty may enjoy considerably less expressive leeway in many circumstances. Consider, as an illustration, the University of California’s document providing examples of impermissible microaggressions that we adverted to earlier. No public university could even vaguely threaten a student (as opposed to a faculty member) with punishment for creating a hostile learning environment by using the phrase “America is a melting pot”—no matter the context in which that phrase was invoked.¹³³ Nor could any public university impose negative consequences on a student for posting on social media the intemperate (and in the minds of many people anti-

128. *Id.* at 708–09 (quoting *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)).

129. *Id.* at 706–07.

130. *Id.* at 708–10.

131. *Id.* at 710–11.

132. *See id.* at 709 (invoking *Meyer v. Nebraska*, 262 U.S. 390 (1923), which held unconstitutional a state law forbidding the teaching of any subject in a foreign language to students who had not yet passed the eighth grade).

133. *See* MICROAGGRESSION AVOIDANCE GUIDE, *supra* note 110.

Semitic) comments that Steven Salaita—whose tenured position at the University of Illinois never materialized—tweeted.

Indeed, close inspection reveals that professors may fare more poorly even than many other public university employees. As the post-*Pickering* cases from the Supreme Court and lower courts make clear, the kinds of government function disruption that can justify discipline—disturbing harmony among co-workers, detrimental impact on close working relationships, interference with the speaker’s performance of duties—are the very kinds of problems that arise often in the higher education setting, where faculty must work closely with—and be trusted by—students and fellow academics. Moreover, “[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails.”¹³⁴ One lower court has elaborated on that point to say that “[t]he level of protection afforded to an employee’s activities will vary with the amount of authority and public accountability the employee’s position entails. A position requiring confidentiality, policymaking, or public contact lessens the public employer’s burden in firing an employee for expression that offends the employer.”¹³⁵ And with regard to educators, a public school teacher “is a position [that] by its very nature requires a degree of public trust not found in many other positions of public employment.”¹³⁶

Add to this the fact that government discrimination concerning the content of public professor speech is inevitable and necessary in a way that is not true for other public employees. Public university employers invariably must make decisions about the hiring, promotion, and retention of professors based on the content (even the viewpoint) of what these professors say and write. The questions asked at hiring and promotion stages—are the professor’s expressed views scientifically plausible, adequately supported, rigorously reasoned, appropriately attentive to counterargument, etc.—are, at their core, content-based inquiries. Even the Ninth Circuit ruling declining to apply *Ceballos* to higher education makes this clear:

[T]he evaluation of a professor’s writing for purposes of tenure or promotion involves a judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-

134. *Rankin v. McPherson*, 483 U.S. 378, 390 (1987).

135. *Melzer v. Bd. of Educ.*, 336 F.3d 185, 197 (2d Cir. 2003) (citation omitted).

136. *Id.* at 198.

based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate. Here too, recognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.¹³⁷

If a building maintenance worker on campus prominently proclaims his birther views, he may be immune from sanction. But if an American history professor does, that shoddy evaluation of historical facts can be used against him in professional assessments. Another example: many people think that the constitutional Obamacare challenge was very weak analytically, even though it got four votes at the Supreme Court.¹³⁸ If, five years ago, a law dean decided not to go forward with someone's tenure file because she thought the candidate's article laying out what the author believed to be a forceful constitutional challenge to Obamacare was poor scholarship, would the dean be guilty of violating academic freedom?

To be sure, none of this means that public universities can use their content-based authority over faculty as a means of censoring political expression that is clearly citizen advocacy and unrelated to one's job as a professor. An administrator punishing a faculty member for urging, on her own time, the repeal of Obamacare is different than the administrator determining that the faculty member's article arguing Obamacare is beyond Congress's constitutional powers is poor scholarship that cuts against promotion.

Finally, perhaps most problematically, even under *Pickering*—the more pro-speech of the potentially applicable tests—off-campus speech can sometimes affect credibility in school, and First Amendment cases recognize that government may sometimes take account of “off-the-job” expression in deciding whether a person is fit to perform a public job. As one lower court observed in allowing a school district to discipline a physics teacher for being an active and outspoken member of a group (the North American Man/Boy Love Association) advocating sexual relationships between men and boys, the *Pickering* balancing test is “not limited to conduct occurring at or di-

137. *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014).

138. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). For one essay (before the Court's ruling) explaining the weakness of the plaintiffs' challenge, see Vikram David Amar, *Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FLA. INT'L L. REV. 9 (2010).

rectly relating to the workplace.”¹³⁹ Drawing on clear Supreme Court directives, the court reminded that “[a]ttenuation of time, place or content of speech from the workplace is ultimately accounted for in the balancing part of the process, but those factors will not absolutely preclude government regulation.”¹⁴⁰

This contextual approach makes good practical sense and has implications for professors, given the nature of their jobs: if a university groundskeeper is the leader of a local KKK chapter, he is not (by virtue of his nonviolent KKK activities) incapable of being an effective groundskeeper. But if a public school law professor is a KKK leader, can he really be effective and credible in teaching minority (or white) students? Even protectors of academic freedom values that chafe against “civility” being used to rescind a faculty job offer distinguish between “civility” and “professional fitness,” which would encompass both scholarly values and teaching effectiveness. The report by the University of Illinois Committee on Academic Freedom and Tenure on the Salaita matter (which contained significant criticism of the University of Illinois administration), for example, tried to distinguish between “civility,” which was too vague a basis on which to rescind a faculty job offer, and “professional fitness,” a criteria for employment on which off-the-job and private expressive activities could reasonably bear.¹⁴¹ Given this reality and that the inherent nature of a professor’s job requires him to deal with a wide range of students in settings of mutual trust, public professors must be more careful than many (most) other public employees in what they say and do even when they are away from the worksite.

Consider in this regard the very recent flap over the Oregon law faculty member’s wearing of a costume that included blackface at a private, off-campus Halloween party—but one to which she invited students and faculty members. According to press accounts, the tenured Oregon law professor, Nancy Shurtz, was placed on paid administrative leave after her use of blackface became known.¹⁴² University of Oregon

139. *Melzer*, 336 F.3d at 194.

140. *Id.*; see also *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006) (observing that instructor’s expressive actions at grocery store might give rise to sanction since the “instructor/student relationship does not end the moment the instructional period is over”).

141. See CAFT REPORT, *supra* note 109, at 23–31.

142. See, e.g., Rick Anderson, *University of Oregon Censures White Professor for Wearing Blackface to Halloween Party*, L.A. TIMES (Dec. 23, 2016), <http://www.latimes.com/nation/la-na-oregon-blackface-20161223-story.html>.

President Michael Schill, himself a former law dean, issued a university statement saying: “We condemn [her] action unequivocally as anathema to the University of Oregon’s cherished values of racial diversity and inclusion. The use of blackface, even in jest at a Halloween party, is patently offensive and reinforces historically racist stereotypes. It was a stupid act and is in no way defensible.”¹⁴³

Professor Shurtz explained that her costume was inspired by Damon Tweedy, an African American doctor who penned the bestselling memoir *Black Man in a White Coat: A Doctor’s Reflections on Race and Medicine*: “I chose my costume based on a book that I read and liked. . . . I thought I would be able to teach with this costume. . . . I am sorry if it did not come off well. I . . . would not want to offend.”¹⁴⁴ Meanwhile, a letter signed by twenty-three of her Oregon law faculty colleagues calls for her resignation, saying “[i]f . . . you did in fact wear blackface to a Halloween party, you need to resign. It doesn’t matter what your intentions were. . . . Your actions implicate all of us and our community.”¹⁴⁵

We think Professor Shurtz’s colleagues are wrong, even as to First Amendment freedoms, about whether intent matters. After all, the reason (correctly identified by those calling for her resignation) that Shurtz’s actions warrant serious scrutiny is that they may undermine her (and the university’s) trust and credibility with students, alumni, and the community. But wouldn’t students, alumni, and the outside world want to know *why* she did what she did in deciding how much less they like and trust her and the law school? If she did it to mock African Americans (or merely “in jest” because she is flippant about race), aren’t they likely to be *much more* angry and disaffected than if she did it to support the cause of racial equality (like the author of *Black Like Me* who feigned blackness to document racism), even if her attempt was clumsy, ill advised, and ultimately counterproductive?

143. *UO Leadership Speaks out About Unacceptable Behavior*, AROUND O (Nov. 1, 2016), <http://around.uoregon.edu/content/uo-leadership-speaks-out-about-unacceptable-behavior>.

144. Ashley Collman, *University of Oregon Law Professor Is Suspended After Dressing in Blackface at a Halloween Party*, DAILY MAIL (Nov. 3, 2016), <http://www.dailymail.co.uk/news/article-3901766/University-Oregon-law-professor-suspended-dressing-blackface-Halloween-party.html>.

145. Monique Judge, *University of Oregon Law Professor Wears Blackface Costume to Halloween Party*, ROOT (Nov. 3, 2016), <http://www.theroot.com/university-of-oregon-law-professor-wears-blackface-cost-1790857570>.

But our bigger point here is that even if intent matters, and even if the sanction of removal would seem hard to justify under First Amendment principles, the university might be able to impose some significantly lesser sanction on Professor Shurtz's seemingly negligent decision to speak in a way that was likely to cause disruption to the university's operations and community relations.¹⁴⁶ The fact that the university temporarily suspended her shows it thought it had the power to do so; could anyone imagine the university suspending its mailroom clerk for the same unfortunate mistake?¹⁴⁷

Finally, a few words are in order about whether the modern framework described above is in any meaningful way a retreat from the "foundational" academic freedom cases from the 1950s and 1960s in which states were prevented from imposing loyalty oaths and the like on public professors as a condition of employment. To begin with, some of the most oft-cited language about the First Amendment's protection of university academic freedom in these cases is drawn from dissents, not majority opinions. For example, Justice Douglas's dissenting language in *Adler v. Board of Education* to the effect that academic freedom is central to "the pursuit of truth which the First Amendment was designed to protect"¹⁴⁸ is frequently quoted by academic freedom proponents, but less quoted is Justice Minton's majority opinion, which observes—in a way that doesn't fully capture the nuance of the *Pickering* doctrine that would ensue—that while

146. The University of Oregon has in an administrative proceeding reasserted its right to impose some sanction, even though the punishment to be imposed has not yet been finally determined. For an argument supporting freedom of expression in a university setting, see Eugene Volokh, *Silencing Professor Speech To Prevent Students from Being Offended – or from Fearing Discrimination by the Professors*, WASH. POST (Dec. 30, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/30/silencing-professor-speech-to-prevent-students-from-being-offended-or-from-fearing-discrimination-by-the-professors>; cf. *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016) (upholding a "stupid but constitutional" school policy imposing sanction for teacher's use of the N-word, even though the teacher was using it to illustrate why it shouldn't be used and the harm that it causes, because the school policy forbade use of the word altogether).

147. See *Rankin v. McPherson*, 483 U.S. 378, 391 (1987) (differentiating between employees who have regular contact with the public and other employees such as computer operators, electricians, and file clerks, who may be more immune from sanction for their speech because of the less high-profile positions they occupy).

148. 342 U.S. 485, 511 (1952) (Douglas, J., dissenting), *overruled by* *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

[i]t is clear that [public employees] have the right under our law to assemble, speak, think and believe as they will . . . [i]t is equally clear that they have no right to work for the State in the school system on their own terms. . . . If they do not choose to work on [the terms offered by the state], they are at liberty to retain their beliefs and associations and go elsewhere.¹⁴⁹

Once again, this simplistic and absolutist language from Justice Minton doesn't reflect current law, but we must remember that even as the cases reviewing attempts to rid civil service of "subversives" were being decided, the government employer element of the disputes was in the mix. More importantly, in these pre-*Pickering* cases, which the government lost or should have lost, the government was not making the specific showings of disruption to government operations needed to uphold public employee discipline; instead, it was arguing that all civil service should be free of anyone who holds dangerous beliefs—not that a particular person's belief, because of his or her particular job, was in fact or in all predictive likelihood going to interfere with government operations. Even today's framework that allows for significant government employer leeway in the regulation of public employee expression does not, as observed earlier, permit the government to use its employer status to "silence discourse, not because it hampers public functions but simply because superiors [in the government department or office] disagree with the content of employees' speech"¹⁵⁰—precisely what government was trying to do during the early Cold War.

As we have seen, from a First Amendment perspective, the academic freedom of public university faculty is limited and uncertain. However, free speech doctrine provides some protection to faculty expression, particularly with regard to off-campus political speech that is unrelated to a faculty member's duties as a professional academic. While some faculty speech may straddle the line between the academic expression of an employee that may be subject to university evaluation and control and related citizen commentary on public policy matters, other speech activities—such as partisan political campaigning or spiritual expression as part of a religious congregation—cannot reasonably be subsumed under the rubric of academic duties, however broadly they may be defined. Further, there are clear constitutional grounds for restricting any state actor,

149. *Id.* at 492 (citation omitted).

150. *Rankin*, 483 U.S. at 384.

including a university administration, from sanctioning such political or religious expression.

When we compare public university professors' rights to those enjoyed by private university professor counterparts, we see, on the one hand, that no such constitutional guarantees protect faculty at private universities from restrictions on their speech imposed by their employers. The private university, after all, is not a state actor. Indeed, the constitutional shoe is very much on the other foot in this circumstance. To the extent the First Amendment applies at all to an academic freedom dispute between a private university and its faculty, it would protect the right of the private university to choose and enforce its own values. Freedom of speech, association, and religion all coalesce to protect the autonomy of a private university, which limits the speech of its faculty on or off campus. Legislation attempting to protect the academic freedom of private university faculty would have to take account of these constitutional guarantees.

Courts may consider the institutional autonomy and academic freedom of a *public* university as a state interest to be balanced against the free speech rights of faculty. The state's interest in affirming the autonomy of its public universities in disputes with faculty, however, is different than recognizing a constitutional right to public university institutional autonomy that protects the exercise of authority to restrict faculty speech. On the constitutional ledger, private universities are protected by the First Amendment against state interference in their governance to some extent and they are not limited by it at all when they restrict faculty speech.

Of course, on the other hand, a different analysis applies if faculty of either a public or a private university are sanctioned by non-university state actors for off-campus speech. Here, faculty would have the full panoply of free speech rights available to any citizen. Faculty, like other public employees, only have limited free speech rights when the government acts as their employer—not when it acts in its general regulatory capacity. If a faculty member is going to be arrested for inciting unlawful conduct, for example, he or she would be protected under *Brandenburg v. Ohio* against criminal sanction, unless he or she intended “imminent lawless action” that was in fact likely to ensue.¹⁵¹

151. 395 U.S. 444, 447 (1969) (per curiam).

From a contemporary perspective, there is a strong cultural commitment to academic freedom at many private universities. That commitment extends to public universities as well. Both institutions are subject to challenges from outside forces who may exercise financial leverage over colleges: the taxpayers through the legislature for public universities and alumni and other donors for private colleges. Constitutional law contributes to the resolution of those conflicts to only a limited extent—in favor of the faculty at public universities and in favor of the institutional administration at private colleges.

III. POSTSCRIPT: BEYOND THE FIRST AMENDMENT

Given the analyses and comparisons we have offered, in which public professors often fare worse than their counterparts, the very term “academic freedom” as applied to the public professoriate may seem inapt—usually we think of “freedoms” as especially generous liberties or licenses, not watered-down rights. And yet there are several important ways in which public professors do enjoy special “academic freedoms” that we should note before concluding.

First, as we have written elsewhere, the First Amendment is not the only constitutional provision arguably relevant to academic freedom; principles of due process and notice also play an important role.¹⁵² Most people talk about academic freedom in terms of a freedom to express ideas, but perhaps an important additional approach is to think about it as a freedom to know what you can and cannot express. Vagueness and notice protections have special applicability to the public education setting, both at universities and at secondary schools. For example, think of K–12 teachers who get in trouble for teaching controversial topics in ways later deemed improper by local authorities. Courts do and should make sure that public professors are not misled into expressing themselves in ways that later could result in their sanction or dismissal. We need—and the Constitution may require—clear *ex ante* standards that eliminate chilling effects for public academics if the public academy has any meaningful role to play in democracy. So, as Eugene Volokh has pointed out, one of the most troubling aspects of the University of California’s microaggression guidance document (even if the UC can constitutionally define and pun-

152. Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 17, 25 nn. 36–37 (2005).

ish microaggressions quite broadly) is the chilling effect the inscrutability of the document creates.¹⁵³ Even if government has the authority to control the expression of its public professors, it should be required to do so clearly, both to avoid due process problems and to expose its censorial decisions to political heat they deserve. In a related vein, in the Salaita affair—putting the First Amendment aside—one of Mr. Salaita’s strongest claims may arise from implicit promises made in the university’s offer letter about the extent to which his freedom of expression would be allowed.¹⁵⁴

And, as we hope we have made clear throughout this Article, another important kind of academic freedom is grounded not in free speech or clear notice principles, but non-constitutional sources altogether. As we noted in Part II, state constitutions, contract law, industry practice, and the like may give rise to legally or culturally binding rules that protect public professors, even as the contours of such rules will vary by state and by university—and perhaps also by campus or even department. Academic freedom is an important idea, even apart from any First Amendment or other constitutional footing it enjoys.¹⁵⁵

153. See Eugene Volokh, *UC Teaching Faculty Members Not To Criticize Race-Based Affirmative Action, Call America “Melting Pot,” and More*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/16/uc-teaching-faculty-members-not-to-criticize-race-based-affirmative-action-call-america-melting-pot-and-more>.

154. The offer letter could be read to have incorporated academic freedom principles embodied in the policies of the American Association of University Professors. See CAFT REPORT, *supra* note 109, at Document 2.

155. See generally MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (Yale Univ. Press 2009).