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The First Amendment, The University and Conflict: An Introduction to the Symposium

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Universities across the country have experienced a dramatic increase in free speech conflicts–i.e., an experience of discord between individuals or groups of speakers.[1] These conflicts occur in various forms. For example, members of university communities (e.g., students, staff, or faculty) have protested controversial speakers.[2] Some have called for universities to disinvite controversial speakers.[3] Others have heckled or shouted down speakers.[4] Finally, some members of university communities – usually students – have protested university officials' or other students' expression by occupying buildings,[5] camping[6] or interrupting meetings[7] in order to disseminate their message. It is common to view resolution of these conflicts through a First Amendment lens. That is, when such conflicts arise, we

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1. A conflict typically involves a situation where people experience "discord due to an obstruction or irritation by one or more other people." EVERT VAN DE VLIERT, COMPLEX INTERPERSONAL CONFLICT BEHAVIOR: THEORETICAL FRONTIERS 5 (1997).

2. *See, e.g.*, Emanuella Grinberg & Elliot C. McLaughlin*, Against Its Wishes, Auburn Hosts White Nationalist Richard Spencer*, CNN (Apr. 19, 2017) (discussing protests outside Richard Spencer's speech at the University of Auburn), https://www.cnn.com/2017/04/18/politics/auburn-richard-spencer-protests/index.html; *see also* CHRON. OF HIGHER EDUC., DEALING WITH CONTROVERSIAL SPEAKERS ON CAMPUS (2017) http://www.chronicle.com/items/biz/resource/ChronFocus_ControversialSpeakersv3_i.pdf. (discussing Auburn conflict).

3. *See, e.g.*, *Charles Murray At Middlebury: Unacceptable and Unethical, Say Over 500 Alumni* (Mar. 2, 2017) (discussing Middlebury College community's response to speaker invitation to Charles Murray, author of *The Bell Curve*), https://beyondthegreenmidd.wordpress.com/2017/03/02/charles-murray-at-middlebury-unacceptable-and-unethical-say-over-500-alumni/; CHRON. OF HIGHER EDUC., *supra* note 2, at 5 (describing calls for the University of California (Berkeley) to ban Milo Yiannopoulous from campus).

4. *See* CHRON. OF HIGHER EDUC., *supra* note 2, at 13 (discussing Middlebury protests interrupting Murray's speech); Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO (May 28, 2017) (same), http://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195. Jeremy Bauer-Wolf, *Spencer Gets to Speak*, INSIDE HIGHER ED (Oct. 20, 2017) (describing heckling and shouting protestors who interrupted Richard Spencer's speech at the University of Florida), https://www.insidehighered.com/news/2017/10/20/spencers-talk-florida-met-protests-and-attempts-shout-him-down.

5. Lindsey Bever, *Protests Erupt, Classes Cancelled after Racist Notes Enrage a Minnesota College*, WASH. POST (May 1, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/01/protests-erupt-classes-canceled-after-racist-notes-enrage-a-minnesota-college/?utm_term=.aee6d29149cb.

6. Jonathan Peters, *Why Journalists Have the Right to Cover the University of Missouri Protests*, COLUM. J. REV. (Nov. 10, 2015), http://www.cjr.org/united_states_project/university_of_missouri_protests_first_amendment.php.

7. Koran Addo, *Protestors Interrupt University of Missouri Curators Meeting*, ST. LOUIS POST-DISPATCH (Feb. 15, 2016), http://www.stltoday.com/news/local/education/protesters-interrupt-university-of-missouri-curators-meeting/article_80357f93-0434-5f38-a300-a0d817e742b0.html.

tend to ask whether or how the First Amendment protects the original speaker's rights or, conversely, we frame the conflict as involving one group of speakers censoring another.[8] It is not altogether clear, however, that a First Amendment frame sufficiently addresses these conflicts.

Some speech conflicts – e.g., attempts by public university officials to regulate protests or non-university speakers on campus – clearly implicate the First Amendment, which explicitly prohibits the government from abridging freedom of speech.[9] Yet even in seemingly straightforward cases, the First Amendment provides fewer clear answers than we sometimes think. The Supreme Court's free speech doctrine establishes reasonably clear rules: Officials generally cannot regulate speech in a public forum based on its content; thus, absent a finding that speech is "low value," such as a threat, incitement to unlawful action or fighting words, the Court heavily disfavors such content-based regulations.[10] On the other hand, government officials may impose reasonable time, place and manner restrictions on speakers as long as they regulate without reference to the content of the speech and leave open ample alternatives of communication.[11] However, these rules apply only to traditional public fora – such as streets, parks and sidewalks[12] – or designated public fora – public property which the state has opened for use by the public as a place for expressive activity.[13] With government property that is a non-public forum, the state has greater regulatory leeway to restrict speakers and preserve its property for other uses.[14]

The very complexity of campuses makes these seemingly straightforward rules difficult to apply. Universities consist of various spaces – outdoor green spaces, buildings that contain offices, classrooms, cafeterias, auditoriums and laboratories, and buildings that contain living spaces, such as dormitories. In these spaces, numerous activities occur, including classes, research, intra-mural sports, university-sponsored events, student-sponsored activities, and a wide variety of routine daily tasks that occur in most workplaces. Some spaces are used for multiple activities depending on the time of day. To what extent does this myriad activity affect the forum and content discrimination analysis above?

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8. In truth, these questions are often entwined as observers often presume the free speech rights of one speaker while questioning the actions of another group as censorship or intolerance. For example, during student protests against Milo Yiannopoulos's attempt to speak at Berkeley, commentators noted that students were "'rioting to demand that free speech be denied'" and that "'even the most liberal, open-minded campuses harbor intolerance for those that disagree with them.'" *See* CHRON. OF HIGHER EDUC., *supra* note 2, at 5 (quoting, respectively, the Heritage Foundation and Young Americans for Liberty).

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press[.]"). Although the First Amendment textually refers only to Congress, the Supreme Court recognizes that it also applies to the actions of state and local officials. Gitlow v. New York, 268 U.S. 652 (1925).

10. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015); McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014); Snyder v. Phelps, 562 U.S. 443, 458 (2011).

11. *Reed*, 135 S. Ct. at 2226; *Phelps*, 562 U.S. at 456-57; *McCullen*, 134 S. Ct. at 2529.

12. Hague v. C.I.O., 307 U.S. 496, 515-16 (1939).

13. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) ("Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

14. *Perry*, 460 U.S. at 46 (noting that "the state may reserve [a non-public] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

Consider, for example, the notion of a traditional public forum. Universities are filled with outdoor spaces in which members of the university community gather, where people often lounge, eat, play Frisbee, talk with friends, etc. Such spaces are essentially like a park. But the question remains whether *all* such spaces are traditional public fora or whether a university can claim that some of them are not for purposes of protests because it often uses those spaces for its own purposes – e.g., for formal gift announcements, graduation ceremonies, or various university events. In other words, is property that otherwise has the characteristics of a park, occasionally not a park for purposes of forum analysis? To complicate this analysis, consider that some states have enacted legislation declaring that the "outdoor areas of campuses of public institutions … shall be deemed traditional public forums."[15] Although superficially modeled on the Supreme Court's forum jurisprudence, the breadth of such laws goes far beyond the Court's recognition of "streets, parks, and sidewalks" as traditional public fora. They have thus generated substantial confusion on campuses regarding the extent to which university officials must allow expressive activity to occur in all outdoor spaces, including such places as surface parking lots, courtyards adjacent to university hospitals, etc.[16]

As another example, consider the extent to which a university controls the access of non-university speakers to its buildings. If a university generally does not allow outside speakers to rent space like auditoriums and classrooms for non-university sponsored events, it may successfully argue that such spaces qualify as non-public fora. As a result, the university may turn down independent outside speaker requests as long as its refusal is not an attempt to suppress a particular viewpoint. But if the university has allowed such rentals of space, courts may find those spaces to be designated public fora, making exclusions of speakers considerably more difficult.[17] It is not clear when universities' actions create a designated as opposed to non-public forum. This problem is made worse by the Court's recognition of a hybrid category of forum – the limited public forum – where the government has opened the forum for expressive purposes by some speakers or on some topics but not generally to the public.[18] The line between these fora has been highly contested within the Supreme Court[19] and highly controversial among commentators.[20] As a result, universities are left to wonder whether and when they can or should allow access to their facilities beyond the university community consistent with the First Amendment.

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15. MO. REV. STAT. § 173.1550(2) (2015). Tennessee and Virginia have also enacted laws that declare all accessible, non-restricted, outdoor areas of university property to be traditional public fora. *See* 2017 Tenn. S.B. 723; VA. CODE ANN. § 23-9.2:13 (2014).

16. As a member of the University of Missouri's Ad Hoc Joint Committee on Protests, Public Spaces, Free Speech and the Press, *see* https://committees.missouri.edu/protests-free-speech/, the author can attest to the difficult questions that arose while determining how to interpret Section 173.1550(2) of Missouri's law. Ultimately, the Committee arrived at a scheduled list of outdoor properties available for expressive use in different circumstances. *See* University of Missouri Business Policy and Procedure Online Manual, Ch. 6, §6:050 http://bppm.missouri.edu/chapter6/6_050.html.

17. Grinberg & McLaughlin, *supra* note 2 (discussing court order forcing Auburn University to host Richard Spencer in light of the university's creation of a designated public forum).

18. *Perry*, 460 U.S. at 45 n.7.

19. *Compare* Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 802-05 (1985) (O'Connor, J.) and *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting).

20. *See, e.g.*, Steven G. Gey, *Reopening the Public Forum-From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1536-37 (1998).

Aside from the lack of clarity in free speech law, the First Amendment does not fully address many of the issues arising out of a university's decision to approve or deny access to its facilities. For example, a university choosing to close its buildings to all non-university actors for expressive purposes may do so consistent with the First Amendment (thus creating a non-public forum), but conflict may arise as a result. Large public spaces are at a premium in many communities, which may have come to depend on the availability of such resources for various events. To close off building resources may strain "town and gown" relationships. On the other hand, a university making its facilities freely available for rental (creating a designated public forum) will also experience conflict although possibly of a different kind. In such a forum, universities will be unable to turn away many controversial speakers. Campus community members may want to stage counter-protests or to have other events of their own in response. Universities increasingly must tackle the substantive and tactical issues raised by these conflicts. Accordingly, although the First Amendment is relevant to the university's decision, it is only one aspect of the overall free speech conflict.

These are some of the difficulties raised by free speech conflicts when the First Amendment clearly does apply. Too often, however, we frame speech conflicts as involving the First Amendment when it is not appropriate to do so. When speech conflicts arise between two private individuals or groups, the First Amendment's rules are often inapplicable. For example, when members of a campus community protest an invited speaker or argue that the university rescind their invitation, the First Amendment's prohibition on censorship simply is not implicated.[21] Yet critics frequently argue that campus protestors are intolerant of others or engage in censorship inconsistent with the First Amendment.[22] This criticism often results from the emotional and highly fraught nature of the protests, which has caused "an atmosphere of intense pushback and protest that has made some speakers hesitant to express their views and has subjected others to a range of social pressure and backlash, from shaming and ostracism to boycotts and economic reprisal."[23] But this is quite different from violent or disruptive protests, which the Supreme Court's free speech rules do prohibit.[24] Those same rules, however, make clear that the First Amendment contemplates angry, raucous and uncivil interactions between groups of speakers.[25] Viewing these campus speech conflicts through a narrow First

21. The First Amendment may apply if university officials were to act on calls to rescind an invitation. *See* Gitlow, 268 U.S. 652.

22. *See* Christina E. Wells, *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment*, 89 U. COLO. L. REV. 101, 110-11, 113-14, 116 (2018) (describing criticism of protests and other campus community responses to speakers at University of Missouri, Yale University and Middlebury College).

23. Thomas Healy, *Who's Afraid of Free Speech*, THE ATLANTIC (June 18, 2017), https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/.

24. When protests physically or otherwise interfere with a speaker's ability to express themselves, the Supreme Court's doctrine recognizes the rights of the speaker over the rights of the "hostile audience." *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); *see also* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 521 n. 557 (1999) (collecting cases imposing duty on the police to protect speakers).

25. S*ee* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately

Amendment frame simply does not capture much of what we need to understand about such conflicts. In fact, such a frame detracts from the underlying substantive issues that a university may need to address in order to effectively deal with the conflict.

This Symposium addresses our continuing issues with campus speech conflicts. It aims to help us recognize that speech conflicts are not abstract disputes between ideas – Justice Holmes's famous rhetoric notwithstanding.[26] Rather our words and ideas represent underlying conflicts between very real people and groups. The speech we use may cause, exacerbate, or resolve conflicts. Sometimes the Supreme Court's free speech doctrine can aid our understanding and resolution of these conflicts. Other times it cannot. Regardless, simply relying on a First Amendment frame – i.e., claiming that it is one's right to express oneself in a particular way – may be unhelpful to resolving a conflict, even if that claim is substantively correct. This gathering of free speech experts, dispute resolution experts, and campus administrators aims to provide a framework for discussing campus speech conflicts that works both within and beyond the First Amendment frame.

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produce a more capable citizenry and more perfect polity[.]"). For more in-depth discussion, see Wells, *supra* note 22, at 119-21.

26. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market…").