ARE UNIVERSITIES SCHOOLS? THE CASE FOR CONTINUITY IN THE REGULATION OF STUDENT SPEECH

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INTRODUCTION

Are universities schools? The question seems almost silly to ask: of course universities are schools. They have teachers and students, like schools. They have grades, like schools. There are classes and extracurricular activities, also like schools. But recent writings on the issue of "free speech on campus" have raised the improbable specter that universities are less educational institutions than they are public forums like parks and sidewalks, where a free-wheeling exchange of ideas and opinions takes place, unrestricted by any sense of academic mission or school discipline.[1] Some

 Those who have read the work of Robert Post and Jacob Levy on this subject will recognize the debt I have to them. I especially relied on Robert Post's The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044434 and Jacob Levy's Safe Spaces, Academic Freedom, and the University as a Complex Association, Lecture at Georgia State University (Feb. 15, 2016) (transcript available at http://bleedingheartlibertarians.com/2016/03/safe-spaces-academic-freedom-and-the-university-as-a-complex-association/). I first tested some of these ideas in an op-ed several years ago. *See* Chad Flanders, Opinion, *Oklahoma Frat Case Touches on a Suprisingly Murky Area of Law*, CLEVELAND (Mar. 27, 2015, 11:13 AM), https://www.cleveland.com/opinion/index.ssf/2015/03/oklahoma_frat_case_touches_on.html. Thanks to John Inazu for conversations on the topics in this essay, and to Ash Bhagwat, Sean Oliveria, Will Baude, and Morgan Hazelton for comments on a previous draft. All errors are my own.

[1] See, for example, ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 62–63 (2017), which states: "[I]nstitutions of higher education can either protect an orthodoxy against challenge or be willing to permit all ideas; . . . Either there is complete protection for the expression of all ideas and views, or there is an orthodoxy of belief. . . . *We believe there is no middle ground*." (emphasis added). For a discussion of commentators who apply generic First

of this rhetoric is of course exaggerated, and some of it can be taken out of context.[2] Nonetheless, the overall impression is that public universities are required to host and accommodate all viewpoints, no matter how loathsome, and protect any expression in any place and at any time or else risk running afoul of the First Amendment.[3]

There is reason to take this position seriously. Academic commentators have been quick to appeal to cases dealing with true public forums (streets and parks[4]) to reject many types of limits on speech at the university level.[5] They have argued that the U.S. Supreme Court's decisions on hate speech,[6] fighting words,[7] true threats,[8] and incitement,[9] should control with regard to campus speech, rather than its decisions dealing with educational

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Amendment doctrine to universities rather than using school-speech cases, see *infra* note 10.

2 For example, Chemerinsky and Gillman end up tempering their "stark choice" later in their book by distinguishing spaces within an institution of higher education where speech can and cannot be regulated. *See* CHEMERINSKY & GILLMAN, *supra* note 1, at 112 (drawing a distinction between the "professional" and "free speech" zones at colleges and universities). For another example of this, compare *DeJohn v. Temple University*, 537 F.3d 301, 315 (3d Cir. 2008) ("Discussion by adult students in a college classroom *should not be restricted*." (emphasis added)) with *id.* at 316 ("Accordingly, in determining whether Temple University's policy passes constitutional muster under our reasoning in *Saxe*, we keep in mind that Temple's administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators." (emphasis added)).

3 *See* Post, *supra* note *, at 9–11 (citing sources that say attempts to limit campus speech violate the First Amendment); *see also* Opinion, *The Free Speech-Hate Speech Trade-Off*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/opinion/berkeley-dean-erwin-chemerinsky.html (quoting Erwin Chemerinsky saying, "[i]t is important to recognize that a public university has *no choice* but to allow speakers on campus even if their message is regarded as hateful or racist." (emphasis added)); *id.* ("The central principle of the First Amendment—and of academic freedom—is that all ideas and views can be expressed. Sometimes they are ideas and views that we might consider noble, that advance equality. Sometimes they might be ideas that we abhor.").

4 Traditional public forums, such as streets and parks, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

5 *See* Robert C. Post, *There Is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017, 11:33 AM), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests ("Underlying Chemerinsky's post is the assumption that speech within the university (and outside the classroom) is the same as in the public sphere.").

6 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (proscribing state prohibitions of bias-motivated expressive conduct so as not to offend the First Amendment).

7 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that states can regulate the use of "fighting words" without offending the First Amendment).

8 Watts v. United States, 394 U.S. 705 (1969) (holding that a statute prohibiting threats upon the President's life should not be applied so as to suppress free speech).

9 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that, while states can prohibit speech that is "directed to inciting or producing imminent lawless action," they cannot prohibit speech that merely advocates for the use of force generally).

institutions.[10] The Supreme Court's few decisions on the rights of university students have helped fuel the analogy between universities and public forums. In one case, the Court went so far as to write that "the precedents of this Court *leave no room* for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[11] The classroom, Justice Powell went on to state, is quintessentially the "marketplace of ideas."[12]

All of this, however, ignores the fact that universities are not public forums, but *schools*—with classes and teachers, final exams, and grades. While the Supreme Court has occasionally engaged in rhetorical excess in older cases,[13] the Court has never explicitly ruled that its classic public school decisions—*Tinker*,[14] *Hazelwood*,[15] *Fraser*,[16] and, most recently, *Morse*[17]—

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10 *See, e.g.*, Sean Clark, *Misconceptions About the Fighting Words Exception*, FIRE (Sept. 20, 2006), https://www.thefire.org/misconceptions-about-the-fighting-words-exception/ ("It now seems clear that lewd, vulgar, or profane speech doesn't fall within the fighting words exception. But someone forgot to tell college administrators . . . . "); Zach Greenberg, *Rejecting the 'Heckler's Veto,'* FIRE (June 14, 2017), https://www.thefire.org/rejecting-the-hecklers-veto/ ("Unfortunately, many colleges have recently ratified the heckler's veto by canceling events featuring invited speakers in response to actual or perceived threats of violence or other disruption."); George Leef, *The 'Right' to Disrupt Free Speech on Campus—It Doesn't Exist*, FORBES (Jan. 5, 2018, 7:52 AM), https://www.forbes.com/sites/georgeleef/2018/01/05/the-right-to-disrupt-free-speech-on-campus-it-doesnt-exist (applying non-school cases to controversies regarding university speech); Jesse Singal, *There Have Been So Many Bad Lefty Free-Speech Takes Lately*, N.Y. MAG.: DAILY INTELLIGENCER (Nov. 12, 2017, 8:30 PM), http://nymag.com/daily/intelligencer/2017/11/there-have-been-so-many-bad-lefty-free-speech-takes-lately.html; Geoffrey R. Stone, Opinion, *Richard Spencer's Right to Speak at Auburn*, N.Y. TIMES (Apr. 18, 2017), https://www.nytimes.com/2017/04/18/opinion/richard-spencers-right-to-speak-at-auburn.html (opining that the First Amendment prevents universities from engaging in viewpoint discrimination).

11 Healy v. James, 408 U.S. 169, 180 (1972) (emphasis added) (holding that college may have violated Petitioners' First Amendment rights when it declined to recognize a local chapter of Students for a Democratic Society as a campus organization). The decision in *Healy* is surprisingly ambiguous: the end result was a remand to determine whether the student group was in fact willing to abide by "reasonable" university regulations. *Id.* at 170. It was by no means an unambiguous victory for the student group.

12 *Id.* at 180 (internal quotations omitted).

13 See especially the *Healy* and *Papish* cases discussed *infra* Part I.

14 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (upholding Constitutional protection for a protest by Iowa public school students who wore black armbands in opposition to the Government's Vietnam policy).

15 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (high school principal did not violate respondents' First Amendment rights by withholding select articles from publication in the school newspaper).

16 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that School District acted consistently with the First Amendment when it disciplined respondent for giving a lewd speech at a school-sponsored assembly).

17 Morse v. Frederick, 551 U.S. 393 (2007) (holding that school officials did not violate the First Amendment when they confiscated student's pro-drug banner and suspended him).

are limited only to schools other than universities.[18] And, although it is sensible to see distinctions between high schools and universities, the most accurate way to characterize the difference between high schools and universities is that they are points on a continuum. Just as it would be wrong to ignore the differences between high schoolers and university students (or between elementary and middle school students),[19] it would also be wrong to ignore the similarities between the institutions and the actors involved, or what the *Tinker* Court called the "special characteristics of the school environment."[20] It is not a matter of there being an "on/off switch," as one court called it,[21] or a "stop-go distinction" in the words of another.[22]

Much modern commentary underplays the fact that the difference between schools is one of degree and not of kind.[23] The goals of a university *qua* school do not differ radically from those of a high school, nor are the problems and challenges faced by the two types of institutions entirely distinct. They both, in the words of one opinion, have to deal with *students*.[24] When we realize this, the nature of the First Amendment challenge in this area becomes clearer. The First Amendment challenge does not consist of

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18 *See, e.g.*, *Hazelwood*, 484 U.S. at 273 n.7 (1988) ("A number of lower federal courts have . . . recognized that educators' decisions with regard to the content of school-sponsored . . . expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the . . . university level." (citations omitted)); *see also* Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-Campus Online Speech in the Age of Social Media*, 52 WILLAMETTE L. REV. 405, 427–28 (2016) ("Unfortunately, the Court has never definitively answered the question as to whether the general rules applicable under standard First Amendment doctrine would apply in the same way in the university context."). *See generally* John Inazu, *The Purpose (and Limits) of the University* 14–17 (Wash. Univ. in St. Louis Legal Studies Research Paper No. 18-02-03), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130381 (noting that lower courts have been "less than clear" in deciding whether the free speech standards of the *Tinker* line of cases apply in the university setting, and collecting citations).

19 *See* Walker-Serrano v. Leonard, 325 F.3d 412, 416–17 (3d Cir. 2003) ("There can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students.").

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

21 Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) ("[*Hazelwood*] does not even hint at the possibility of an on/off switch: high-school papers reviewable, college papers not reviewable. It addresses degrees of deference.").

22 Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) ("Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high-school and university levels, and we decline to create one.").

23 *See* discussion *infra* Part I. *See also* Tracey Wirmani, Note, Tinker *Takes on* Tatro*: The Minnesota Supreme Court's Missed Opportunity*, 65 OKLA. L. REV. 769, 783 (2013) ("The *Tinker* test was designed to only assess the speech of primary and secondary students and is premised on the in loco parentis theory; thus, it is inapplicable in the university context."); *see also infra* notes 26 & 28.

24 *See infra* note 89.

applying public forum doctrine to a place that is not a public forum (the university); it consists of appropriately translating the principles of *Tinker* et al. to colleges and universities.[25] In facing this challenge, the decisions by circuit courts dealing with high school and middle school students are helpful. Although the holdings in those cases should not be imported wholesale to cases involving universities,[26] they can give us guidance as to what the stakes are and how universities might handle the difficult issues of hate speech, harassment, and bias.[27] Only if we saw a clear break—rather than a sort of continuity—between grade schools and universities, would we would reject this line of inquiry. But taking that view would be a mistake.[28]

My short essay has three parts. In the first part, I examine and explain the rhetoric advancing what I call the "break" view of speech at universities, which situates universities as types of institutions that are more similar to traditional public forums than they are to high schools or middle schools. In the second part, I look at how lower courts have applied the principles of the Court's educational cases (the *Tinker* line) in contexts other than universities to see how the weighing and balancing of interests proceeds in those cases. In the third part, I argue for the "continuity" view, which advocates for applying the *Tinker* line of cases to universities in a way that takes seriously the idea that universities are in fact schools and not pure "marketplaces of ideas," where speech generally goes unregulated, and restrictions on speech can only be made in the face of imminent threats.

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25 *See, e.g.*, Defoe v. Spiva, 625 F.3d 324, 340 (6th Cir. 2010) (Rogers, J., concurring) ("Thus drug use may be advocated on the streets and in the public square, but not in the public schools. Similarly, racial contempt can be advocated on the streets and in the public square, but not necessarily in the public schools.").

26 *See, e.g.*, Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1852 (2017) ("It is generally agreed that colleges and universities no longer have a custodial relationship with their students . . . the wholesale application of the Court's K-12 jurisprudence would make little sense . . . .").

27 For a good overview, see generally Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165 (2011) (arguing that modern Supreme Court decisions proscribing hate speech are consistent with its earlier precedents, such as *Tinker*).

28 A version of the kind of non sequitur I mean to combat seems present in a recent essay by Clay Calvert. Clay Calvert, *Reconsidering Incitement,* Tinker *and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109, 123 (2018), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1254&context=nulr_online&preview_mode=1&z=1516859046 ("[F]rom a free-speech perspective . . . reducing the First Amendment rights of university students . . . to those of high school pupils by vesting university officials with a test devised for high schools . . . suffocate[s] free expression. *Therefore, Tinker should not be used by universities as a tool to squelch speech* . . . ." (emphasis added) (citations omitted)). But Calvert moves too quickly—he goes from noting that high-school and university students are different to the idea that *Tinker* should not be used in the university setting at all because doing so would be to "suffocate" or "squelch" speech. *Id.*; *see also id.* at 117 (asserting that applying *Tinker* to public universities is "misguided").

I
UNIVERSITIES AS UNIQUE (THE "BREAK" VIEW)

The idea that there is a profound conceptual "break" between the high school environment and a college or university environment represents not so much a legal doctrine as a vision of what university life is (or should be) like. Thus, it is a little misleading when those arguing for a maximum free-speech view of the university say that their position is rooted in *doctrine* or more simply, in "the law."[29] While there certainly is *some* law that counsels treating universities like public forums,[30] this point of view also stems from a broader normative ideal about what should be happening at the university. Those who see the university as a public forum have an "idea of a university," as we might put it, invoking Cardinal Newman's famous book[31]––and even a conception of the university's *mission*, which might involve the cultivation of a certain free-wheeling ethos, where tolerance is demanded and offense expected. On this view, the university—far from being the next modest step away from high school—is a place where children suddenly become adults, where students at once convert into citizens, and where, both inside and outside the university, there is debate and dissensus, and conformity is questioned (if not quashed altogether).[32] "Break" proponents feel that those who attend college or university should be expected to be exposed to a wide variety of ideas,[33] to be challenged, and to even be shocked

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29 *See, e.g.*, Erwin Chemerinsky, *Hate Speech Is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017, 4:33 AM), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest ("The Supreme Court repeatedly has said that the First Amendment means public institutions cannot punish speech, or exclude speakers, on the grounds that it is hateful or deeply offensive. This includes public colleges and universities."). It is misleading in another respect as well: it presupposes what doctrinal resources we should use. As I argue later, the correct doctrine to apply is the *Tinker* line of cases, rather than public forum cases. *See infra* Part III.

30 *See, e.g.*, Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 671 (1973) (finding that universities do not create a "dual standard" for free speech); Healy v. James, 408 U.S. 169, 180 (1972) ("[U]niversities are not enclaves immune from the sweep of the First Amendment.").

31 JOHN HENRY NEWMAN, THE IDEA OF A UNIVERSITY DEFINED AND ILLUSTRATED: IN NINE DISCOURSES DELIVERED TO THE CATHOLICS OF DUBLIN (2008), http://www.gutenberg.org/files/24526/24526-pdf.pdf.

32 For a good statement of this kind of vision, see Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1954 (2017) (internal citations omitted) ("The function of the university isn't to instill orthodoxy; it is to encourage inquiry and debate in the unfettered marketplace of ideas. 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."). *But see id.* at 1955 (articulating the "contrary argument" that meaningful inquiry and debate in colleges may "require orchestration").

33 *See, e.g.*, McCauley v. Univ. of the V.I., 618 F.3d 232, 244 (3d Cir. 2010) ("Modern-day public universities are intended to function as marketplaces of ideas, where students interact with each other and with their professors in a collaborative learning environment.").

or insulted.[34] The response to these challenges and insults should not be to suppress speech or to restrict it, but to respond to it with more speech.[35]

There are limits universities can apply to speech, even on the "break" view, and they come in two broad sorts. The first sort is those limits that would ordinarily apply to speech—even to a rally in a public park or to someone delivering a speech on a public sidewalk—that is, to speech in traditional public forums. It almost goes without saying that universities can prohibit speech that incites others to lawlessness, that threatens others, or involves "fighting words." These types of speech can be limited in universities because they can be limited *anywhere*.[36] Sometimes these lines (where permissible speech shades into the impermissible) will be hard to draw, but the line drawing here is no different than the line drawing that has to be done in other contexts—such as when advocacy crosses the line into incitement, or when a reasonable person would perceive something as a threat. In the same vein, universities can put reasonable time, place, and manner restrictions on speech, just as the government can generally put reasonable time, place, and manner restrictions on speech in public forums.[37] So students cannot have protests that obstruct the operation of the university, hold the university administration building hostage with a protest, or have a rally at the same time as a basketball game.[38] But these are actually no

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34 *See, e.g.*, Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) ("[C]ontroversial and sometimes offensive ideas and viewpoints are central to the educational mission of universities. It follows that university students cannot thrive without a certain thickness of skin that allows them to engage with expressions that might cause 'distress' or 'discomfort[]' . . . .").

35 *See* Written Statement from David L. Hudson, Jr., Ombudsman, Newseum Institute First Amendment Center, to the Judiciary Committee of the United States House of Representatives, Subcommittee on the Constitution and Civil Justice (Apr. 4, 2017), https://judiciary.house.gov/wp-content/uploads/2017/03/Testimony-Hudson-04.04.2017.pdf ("When dealing with controversial speakers who will offend others, college and university officials should embrace and advance the counter-speech principle rather than resort to silencing and disinviting controversial speakers. Only in a true emergency should they resort to more drastic measures.").

36 Universities can regulate these "categories" of speech because, in general, they are categorical "exceptions" to the protections of the First Amendment. *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010). These are the categories of speech for which, according to the Court, there is a long history of permissible regulation. *Id.*

37 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . .").

38 Even if *all* of a university is a public forum and best analyzed in those terms—both of which I doubt—the university is still entitled to place reasonable time, place, and manner restrictions on speech in that forum, provided those restrictions are not content-based. *See, e.g.*, Bowman v. White, 444 F.3d 967, 980 (8th Cir. 2006) (upon finding that a university's outdoor areas were unlimited designated public forums, the court ascertained that "the Policy impermissibly restrain[ed] free expression" by "analyz[ing] the University's time, place, and manner restrictions using the appropriate scrutiny standard, which require[d] a restriction on speech to be content-neutral and narrowly tailored to serve a significant government interest"). Spaces in the university that are

different than limitations on occupying the mayor's office or having a rally at a park when the park is closed.[39] These "ordinary" limits on speech (the first sort of limit on speech I am considering) are compatible with an emphasis, indeed an insistence, that speech at a university be uninhibited and robust to the greatest extent possible.[40] The reasonable and acceptable limits we can put on traditional public forums can apply to universities as well, which in their own way (according to the "break" ideal) are a kind of public forum.

If the first broad set of limits is not unique to the university *qua* university, the second set is. Unlike a traditional public forum, the university is not wholly made up of public spaces; it also includes classrooms, where instruction occurs. In the classroom, there are limits on student expression. For example, a student can of course be marked down (and even disciplined) if he writes an essay on the Super Bowl, when the assignment is to write on Shakespeare's *Hamlet*.[41] Or, to take a slightly less extreme example, a teacher can fail a student paper that expresses the "opinion" that World War II was started by the Illuminati, or that Pearl Harbor was faked. This would be viewpoint discrimination in any other context: a person is being discriminated against for expressing a particular point of view that the teacher (an actor employed by the state[42]) disagrees with.[43] Such "viewpoint discrimination" has to be acceptable if a university is going to have any

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nonpublic have a greater leeway in regulating on the basis of content, and can even restrict speech altogether. *See* Gilles v. Blanchard, 477 F.3d 466, 471 (7th Cir. 2007) ("Vincennes University has placed the lawn completely off limits to uninvited outsiders . . . . Confining solicitations to the walkway in front of the student union is entirely appropriate. . . . Letting solicitors into the middle of the campus would disrupt the campus atmosphere.").

39 *See* Chemerinsky, *supra* note 29 ("Even though there is a First Amendment right to speak, that does not mean that protesters have the right to demonstrate in the middle of a freeway at rush hour. A campus surely could prohibit a large demonstration in a classroom building while classes are in session.").

40 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

41 *See* Post, *supra* note 5 ("If I am teaching a course on constitutional law, my students had better discuss constitutional law and not the World Series.").

42 Hayut v. State Univ. of N.Y., 352 F.3d 733, 744 (2d Cir. 2003) ("We think it clear that a professor employed at a state university is a state actor.").

43 "Content-based discrimination" occurs when the state restricts speech based on the *subject matter* of that speech. "Viewpoint-based discrimination" is a particular type of content-based discrimination: it is when the state restricts *one side* of a debate on a particular topic. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

educational function, as opposed to being a free-for-all.[44] It has to be permissible for teachers to convey some sense that theirs is the right (or just the better informed) view and that students should strive to emulate it.[45] No classroom can be a true marketplace of ideas, where the test of truth is not some established standard, but whatever gets accepted by the "consumers." Classrooms, in this sense, are far from being unregulated markets, where anyone is free to speak about anything, and the test of truth is what gets accepted by the majority.

Still, "break" proponents view restrictions on classroom speech as, in some sense, anomalous.[46] Although there have to be some limits in the university classroom, it still should approximate a *sort* of marketplace, where students are exposed to a variety of different ideas, and where they express contrarian points of view and challenge the teacher rather than blindly follow the teacher's lead.[47] Certainly, according to "break" proponents, outside the classroom, the ideal of the marketplace should rule—here is where the only limits are pretty much the limits of the traditional public forum.[48] Student groups should be many and pluralistic. Invited speakers should come from all over the political and ideological spectrum. Those speakers should provoke and even "incite," in the sense of inspiring opposition and contestation from the student body.[49] The university administration should

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44 *See* Papandrea, *supra* note 26, at 1857 ("Applying standard First Amendment doctrine to these decisions would be virtually impossible and inconsistent with the academic enterprise.").

45 *See* Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155–56 (6th Cir. 1995) ("[T]eachers . . . 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]n a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject.").

46 *See, e.g.*, CHEMERINSKY & GILLMAN, *supra* note 1, at 113 ("Colleges and universities can never punish the expression of ideas. The very core of a university's mission requires protection of all views, no matter how objectionable or offensive they may be to some students and faculty.").

47 For support for this vision in a judicial opinion, see *Hosty v. Carter*, 412 F.3d 731, 741 (7th Cir. 2005) (Wood, J., dissenting) ("A university has a different purpose—to expose students to a 'marketplace of ideas.'").

48 *See, e.g.*, Papandrea, *supra* note 26, at 1858 ("Professors and universities should not be given broad power to restrict speech outside of the classroom setting unless that speech is unprotected speech . . . or meets the 'severe and pervasive' and 'objectively offensive' standard for hostile learning environment claims under Title VI or Title IX.").

49 *See* Larry Atkins, *There Should Be Free Speech on College Campuses for Conservative Students, Conservative Speakers, and Liberal Professors*, HUFFINGTON POST (Aug. 28, 2017, 9:21 AM), https://www.huffingtonpost.com/entry/there-should-be-free-speech-on-college-campuses-for_us_59a4144fe4b0a62d0987b0b3 ("Universities shouldn't shelter students and protect them in a liberal bubble. It's good for them to be exposed to ideas that might differ from theirs."); Amy X. Wang, *This Is Why Nazi Speakers Should Be Allowed to Come to College Campuses*, QUARTZ (Oct. 12, 2017), https://qz.com/1100921/free-speech-a-stat-shows-why-nazi-speakers-should-be-allowed-onto-college-campuses/ ("[T]here is value yet in letting polarizing figures—however seemingly discriminatory, racist, or otherwise offensive they are—come to campus."). *But cf.* Aaron R. Hanlon, *Why Colleges Have a Right to Reject Hateful Speakers Like Ann Coulter*, NEW REPUBLIC

be largely hands-off, intervening only when there is no other opportunity to avoid a threat, harassment, or imminent lawless action.

This vision of the university finds support in two relatively neglected U.S. Supreme Court cases, *Healy* and *Papish*.[50] *Healy* concerned a restriction on a student group, a chapter of the national group Students for a Democratic Society (SDS). In upholding the associational rights of the group, the Court expressed strong support for viewing the university as a public forum for First Amendment purposes. Citing the famous admonition of the *Tinker* court, which announced that students and teachers do not shed their First Amendment rights at the schoolhouse gate, the Court dismissed the view that colleges and universities could be "enclaves" where the First Amendment did not apply.[51] But the *Healy* Court took it one step further than *Tinker*: It held that the First Amendment should apply with no "less force" at a university than "in the community at large."[52] This is the apotheosis of the "break" ideal of colleges and universities: the First Amendment applies equally in universities as it does outside of them. Even further—and almost to the point of absurdity—the *Healy* Court endorsed the idea that "the college *classroom* with its surrounding environs is peculiarly the 'marketplace of ideas.'"[53] A later case, *Papish*, while not as emphatic as *Healy*, goes out of its way to endorse *Healy*'s vision and seemingly condone the argument that the only "legitimate" regulations in a university are "reasonable" time, place, and manner restrictions.[54]

It is possible to exaggerate the importance of *Healy* and *Papish*. They are 1970s opinions that seem to reflect some of the tumult and division of that era; the prose is sometimes purple, especially the concurring opinion of Justice Douglas in *Healy*, which is strongly in the key of the counterculture.[55] Indeed, it may be that *only* Justice Douglas fully subscribes to the utopian

(Apr. 24, 2017), https://newrepublic.com/article/142218/colleges-right-reject-hateful-speakers-like-ann-coulter ("To treat the open forum of the classroom or the campus like just another town square—and thus to explain value judgment and knowledge prioritization on campus in terms of censorship or 'shutting down' speech—is misguided.").

50 Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973); Healy v. James, 408 U.S. 169, 180 (1972).

51 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism. . . . Students in school as well as out of school are 'persons' under our Constitution.").

52 *Healy*, 408 U.S. at 180–81.

53 *Id.* (emphasis added).

54 *Papish* involved the distribution of a newspaper on campus, and the majority in that case allowed that a university could place restrictions on "the time, place, and manner" of the newspaper's distribution. *Papish*, 410 U.S. at 670.

55 *See, e.g.*, Stephen Botein, *Two Judges, Two Cultures*, 84 YALE L.J. 151, 156 (1974) (book review) (noting Douglas's "flirtatious use of radical vocabulary from the late 1960's" in his autobiography).

"break" view in its fullest extent: Universities exist to foment "rebellion," "ferment," and shake society out of its traditions, or else they risk becoming "useless appendages" to the status quo.[56] Moreover, the relevance of *Healy* and *Papish* to the broader "free speech on campus" debate may be limited. The newspaper in *Papish* ("The Free Press Underground") was not produced or subsidized by the university (although the student who ran it was enrolled at the university), and so could quite rightly claim that it should not fall under university rules. And the result in *Healy*, which dealt with whether the SDS should be recognized as an official student group at the university, was not a total win for the SDS. The Court remanded for further fact finding on whether the SDS had expressed an unwillingness to follow a rule requiring them to "abide by reasonable campus . . . regulations."[57] Depending on the content of those permissible "regulations," the actual freedom for student campus groups could be quite narrow, as perhaps the Court's more recent case in *Christian Legal Society* demonstrated.[58]

II
THE REGULATION OF HIGH SCHOOLS

In contrast with the free speech utopia that "break" proponents envision for universities, the regulation of high schools in the past several decades can come to seem nearly draconian. *Tinker*—the foundational case concerning the right to free speech for high school students—is remembered for being strongly pro-free speech, and it is.[59] However, *Tinker* contemplated a potentially wide range of permissible restrictions on free speech, which are no less a part of its holding. Nothing in *Tinker* was meant to overthrow "the comprehensive authority of the States and of school officials . . . to prescribe

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56 *Healy*, 408 U.S. at 197 (Douglas, J., concurring) ("Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.").

57 *Healy*, 408 U.S. at 193–94; *see also id.* ("Assuming the existence of a valid rule, however, we do conclude that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees."). The limitations on what "rules" a campus could pass is left unclear by the opinion. It could be that the only valid rules for student associations are in fact those that are consistent with reasonable time, place, and manner restrictions on speech, but the Court did not say as much.

58 In this case, a Christian student group was denied official recognition by the university because it did not—the university claims—abide by its nondiscrimination policy. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 696 (2010).

59 In an especially emphatic passage, the Court wrote: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

and control conduct in the schools."[60] Under *Tinker*, student speech that "materially and substantially disrupt[s]" school activities can be regulated and even sanctioned.[61] So too can speech that infringes on the rights of other students, however this might be interpreted.[62] Most broadly, speech that "substantially interfere[s] with" the school's interest in "discipline" can also be restricted.[63] It is unclear how, exactly, to distinguish each of these three formulations. The first and third may end up being equivalent—"discipline" can be read as part of what is necessary to prevent disruption to school activities. What does seem separate is the question of when speech not only interferes with classroom or other school functions, but also with the rights of other students. Indeed, lower courts have seen these as distinct standards.[64]

If *Tinker* itself contains the seeds of potentially broad regulation of speech in high schools, later Supreme Court cases would see further grounds for limiting student speech. One such case, *Fraser*,[65] allowed vulgar or offensive speech to be restricted, although it is usually seen as a bizarre, unprincipled decision (even by members of the Court[66]). Another case, *Hazelwood*,[67] gave schools the power to censor speech made by students, so long as that speech is part of a school-sponsored, school-created activity.[68] A third case, *Morse*,[69] expanded and clarified the power of schools to punish speech along two dimensions: first, as against drug-related (or drug-promoting) speech; and second, as against speech occurring during off-campus activities. All of these decisions can be seen as making rather narrow holdings: *Fraser* limited to dirty words, *Hazelwood* to school newspapers and *Morse* to drugs. But all of these cases undoubtedly have language in

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60 *Id.* at 507.

61 *Id*. at 513.

62 *Id*.

63 *Id.* at 505, 509, 511.

64 *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1175 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007) (relying on the provision in *Tinker* about the rights of other students in contrast to the district court's reliance on the "substantial disruption" provision); *id.* at 1180 n.21 ("The two *Tinker* prongs are stated in the alternative.").

65 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (restricting lewd or vulgar speech).

66 As Justice Roberts put it in his opinion, "The mode of analysis employed in *Fraser* is not entirely clear." Morse v. Frederick, 551 U.S. 393, 404 (2007).

67 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (approving restrictions on speech in the context of an event that is school-sponsored, provided the restriction is "reasonably related to legitimate pedagogical concerns").

68 *Id.* at 273 ("[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

69 *See Morse*, 551 U.S. at 403 (restricting speech that can be reasonably viewed as promoting the illegal use of drugs).

them that can be, and has been by some, read very expansively.[70] *Fraser* could apply to all "offensive" speech; *Hazelwood* to any speech that conceivably has the imprimatur of the school; and *Morse* to all speech that places the physical or emotional safety of students at risk.[71]

What emerges is a vision of high school life that may seem unduly restrictive, but it is restrictive for a reason. And, in some respects, it represents an inspiring and even aspirational vision. The purposes of high school are many and varied: socialization, maturation, playing sports, learning a musical instrument, etc. But high school should primarily be about *education*.[72] Students are there to learn, but there are ever-present threats to schools being able to accomplish this mission—mostly threats presented by the students themselves. Students may have good ideas, and want to express them. But they may also have silly or hurtful ideas, or be unaware of how expressing those ideas might frustrate the school's ability to accomplish its educational mission.[73] It is the obligation of school administrators to protect other students and their ability to learn, and also to protect students from themselves. There is, of course, a risk that school administrators may be *too* aggressive in limiting speech. Part of education is students saying silly things and making mistakes; that is how learning can happen, too. But this balance––how much speech, how much regulation—is going to be made in the context of how to advance the school's educational mission, not how to best promote free exchange of ideas. The marketplace of ideas is a means in high school, not an end in itself.

The main way in which these issues have arisen—which require finding the balance between restricting speech and freedom of speech—is in a series of Confederate flag cases.[74] Circuit courts have been more than willing to

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70 Judge Posner seems to say precisely this: "From *Morse* and *Fraser* we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school . . . the school can forbid the speech." Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 674 (7th Cir. 2008).

71 For the latter view, see Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1100 (S.D. Cal. 2007), *aff'd in part, vacated in part*, 318 F. App'x 540 (9th Cir. 2009) ("Although this Court's review of *Morse* reveals that the majority made it clear its decision is limited to speech concerning illegal drug use . . . this Court agrees with defendants that the reasoning presented in *Morse* lends support for a finding that the speech at issue in the instant case may properly be restricted by school officials *if it is considered harmful.*" (emphasis added)).

72 For an expression of this view, see Post, *supra* note *, at 23–24.

73 As Judge Posner put it in a high school speech case, "[t]he contribution that kids can make to the marketplace in ideas and opinions is modest and a school's countervailing interest in protecting its students from offensive speech by their classmates is undeniable." *Nuxoll*, 523 F.3d at 671.

74 *See, e.g.*, Barr v. Lafon, 538 F.3d 554, 568–69 & 569 n.7 (6th Cir. 2008) (collecting cases where schools banned the display of the Confederate flag). *See generally* Fern L. Kletter, *Propriety of Prohibition of Display or Wearing of Confederate Flag*, 66 A.L.R. 6th 493 (2018) (collecting more cases). *Barr* is also an example of the extremely deferential approach many courts take when

find "substantial disruption"[75] to the school when students wear Confederate flag t-shirts (or even draw a Confederate flag), provided that there has been a history of racial tension in the school.[76] But the standard for that "history" has been rather variable, and courts have tended to defer to school administrators.[77] What is notable—as a recent Ninth Circuit court case has shown in great relief—is how the response of the schools in these cases basically puts into effect a heckler's veto: a situation where the disruptive response of others is used as the basis for restricting speech.[78] Still more evident is the lack of any strict requirement that violence in response to the speech has to be imminent.[79] And over all of these cases hangs the possibility of viewpoint discrimination—a challenge commonly made in lawsuits against the schools.[80] Certainly, it is not too difficult to see restrictions on Confederate flags in a school environment as a kind of restriction on hate speech or even a prohibition on "verbal assault."[81] Such overzealous

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reviewing the actions of school administrators restricting expression. *Barr*, 538 F.3d at 574.

75 *See supra* note 64.

76 *See generally* Alexandra Brown, *Silencing the Rebel Yell: Exceptions to the First Amendment After* Defoe Ex Rel. Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010), 37 S. ILL. U. L.J. 465, 470–73 (2013) (discussing cases where a history of racial disruption was relevant to decisions banning the display of the Confederate flag).

77 *See, e.g.*, Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246, 1247 (11th Cir. 2003) ("[Student] rights should not interfere with a school administrator's professional observation that certain expressions . . . could lead to an unhealthy[] and potentially unsafe learning environment . . . . Short of a constitutional violation based on a school administrator's unsubstantiated infringement [on student speech] . . . this Court will not interfere with the administration of a school."); *see also* Hardwick v. Heyward, 674 F. Supp. 2d 725, 742 (D.S.C. 2009) (holding that school officials were "not required nor expected 'to employ the same level of precision in drafting school disciplinary procedures as is expected of legislative bodies crafting criminal restrictions'").

78 *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 777–78 (9th Cir. 2014) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)) ("Where speech 'for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others,' school officials may limit the speech."); *see also id.* ("The cases do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reactions of onlookers or a combination of circumstances.").

79 One court has described the test as, "whether school officials 'might reasonably portend disruption' from the student speech at issue." Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008); *see also* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 673 (7th Cir. 2008) (holding that "[i]t is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.'").

80 *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1184 (9th Cir. 2006) (addressing student's argument that school's prohibition of his T-shirt condemning homosexuality constituted viewpoint discrimination). This challenge is commonly rejected by courts. *See id.* at 1185 (citing *Scott*, 324 F.3d at 1248; West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000)) ("Thus, pursuant to *Tinker*, courts have allowed schools to ban the display of Confederate flags despite the fact that such a ban may constitute viewpoint discrimination.").

81 *See Harper*, 445 F.3d at 1178 ("[S]tudents who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such . . . . psychological attacks that cause to question their self-worth and their rightful

protection of student sensibilities would be badly out of place in an ordinary public forum. In other words, these cases treat high school as a unique context where limits on speech that would be wholly out of place in a traditional forum are not only permitted, but are something of a commonplace occurrence because we are dealing with kids at school.[82] Surely, the instances where students are sent home, or asked to change their shirts, are likely greater than those cases in which the students or their parents choose to litigate.

Of course, high school administrators can make mistakes. They can misjudge the risk of a violent response and end up censoring harmless speech (something that is especially worrisome given judicial deference to school administrators). Principals and other school officials can be biased in their decisions regarding what speech is vulgar or lewd. They may prohibit the expression of viewpoints that are valid, which could have been the basis of healthy debate or discussion. They might use repression when more speech would be a better response. But our question should always be, better for *what*? When a school administrator suppresses a viewpoint out of spite or ignorance, that is a loss—and a loss in two ways. It is a loss for freedom of expression and it is a (related) loss for sound school discipline. When, however, an administrator disciplines a student whose speech does genuinely represent a threat to the school—not just in terms of violence, but in terms of the school being able to fulfill its educational mission, because of speech that makes it difficult for students to learn, or for teachers to teach[83]—then that is fundamentally a win for the high school. It may not be the most speech-maximizing thing for the administrator to do, but that is not the job of the administrator, nor, more importantly, is it the job of the school.[84] Again, free speech is not the end of a high school; it is, at best, one of many means for a high school to achieve its goal of educating its students the best that it can.

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place in society.").

82 *See, e.g.*, *Nuxoll*, 523 F.3d at 674–75 ("[H]igh school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students.").

83 A school's educational mission can be threatened by many other things short of violence. *See, e.g.*, Defoe v. Spiva, 625 F.3d 324, 340 (6th Cir. 2010) (Rogers, J., concurring) ("Racial tension obviously interferes with learning in ways that even strongly-held political views do not. Anger, hostility, and contempt are not elements of a sound learning strategy, or school administrators could at least so conclude."); *see also Scott*, 324 F.3d at 1249 (holding that school administrator did not err in banning the display of Confederate flags on school property due to the trauma and violence such displays may provoke).

84 Although I do not pursue the point in great detail here, it seems obvious to me that sometimes when we limit insults and name-calling, what results is *better* and *more* debate, not less and worse debate.

The mission can seem, and often is, all-encompassing. High schools have sports teams, they have newspapers, and they have student groups. But these are not autonomous or even semi-autonomous parts of the high school, or at least, not ideally. They are other means the school has of fulfilling its mission of education. The breadth of the high school experience (it includes not just class, but also plays, bands, chess clubs, sports teams, etc.) shows us that we should view the goal of education not only from a narrow, academic standpoint. Schools educate in many ways, not just in the classroom.[85] At the pinnacle, however, is the actual, physical classroom, where the educational mission is most exemplified and, when it goes well, most fulfilled. The other parts of the school are sometimes obviously subordinate to it—as when a school sports star is suspended because of poor performance in the classroom. But the classroom also acts as a sort of model for all of the other activities that go on in the school; they are meant to be *learning* experiences. It should not be the goal (or not the main goal) of a sports team to win the state high school sports championship. It is to operate as a forum for the education of the students on the team. Everything is subordinate to this goal. If a school subordinated its education goals for the sake of a state swimming championship, for instance, it would in a very real sense cease to be a school. So too if the school decided to be a public forum, rather than an *educational institution*.

III
THE CASE FOR CONTINUITY

In the first two parts, I have painted pictures of two extremes. No college is in fact a pure free market for ideas that has no constraints on speech other than those that could exist in a traditional public forum—indeed, no college or university could really be that way and claim very long that it was an "educational institution." And no high school (at least that I am aware of) is so rigidly focused on education that any student who utters a word that departs from that mission will be policed and punished if it distracts other students from learning. We might speak instead of *tendencies* in each level of institution, where universities and colleges *tend* toward the free market ideal and high schools *tend* toward the disciplinarian model. Even here there may be exceptions, where some high schools might aspire to be more open and some universities more closed. If we include private collegiate institutions in the mix—those not constrained by the First Amendment—we might see rules that are perhaps more consistent with the high school model. Thus, we have to be careful about any generalizations.

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[85] And the reach of a school can sometimes even extend to off-campus speech that nonetheless affects what goes on at school. This is obviously a large topic that I cannot treat here.

But even in making this point, we are on our way to seeing what is flawed in the "break" model. If some colleges and universities are more like high schools and some are less so, then we cannot posit a decisive break between the nature of a high school and the nature of a university. There is nothing intrinsic to the idea of a university that requires it to represent a radical break from what schools—and students—do in high school. And now I *do* want to make a generalization: the transition between high school and college is (at least, usually) one of continuity, rather than one that represents a clean break. Consider: the first year of high school will differ from the last year of high school, in the sense that students are given more freedom, more independence, and their ideas and debates will be taken more seriously. But then again, the last year of high school may be similar in many respects to the first year of college.[86] Students may need to be told the rules: that they have to earn the right to have their opinions taken seriously and that they cannot act like they own the school, as they did when they were seniors in high school. They must show up on time to class and do their homework. As they go through college, they may gradually begin to be treated less like students and more like citizens. The point, though, is that none of this process occurs all at once and that the transition from high school to college and then through college is just that: a transition where we can expect change, but also a great deal of continuity. The rules at play will be different, but not *radically* different.[87] It will be a matter of more or less, not all or nothing.[88]

Two things make it the case that there has to be some degree of continuity between high school and college, which in fact may be two angles of the same phenomenon.[89] First, both are dealing with *students*. Being a student usually connotes both that one is at an earlier stage of intellectual development and that one is under some instruction. The former can and usually does mean relative youth. It almost always means this as a high

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86 *See* Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (reasoning that the line between high school and college is not "bright," since "many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools"). This is even ignoring the existence of junior colleges, further blurring lines.

87 The famous line from the *Fraser* case, I think, hits exactly the right note here: "[t]he constitutional rights of students in public school are not *automatically* coextensive with the rights of adults in other settings." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (emphasis added).

88 For a lighthearted look at the similarities between high school and college, see Lindsey Hemenez, *10 Reasons Why College Is Still Exactly Like High School*, HUFFINGTON POST (Dec. 6, 2017, 11:17 PM), https://www.huffingtonpost.com/lindsey-hemenez/10-reasons-why-college-is_b_6860830.html (noting that colleges, like high schools, have "8 a.m. classes" and "daily homework").

89 My argument here need not deny that there are many other asymmetries between college and high school. *Cf.* Papandrea, *supra* note 26, at 1849–52 (describing the ways "[p]rimary and secondary education is significantly different from higher education").

school student—one is still considered a child in high school, or at most a young adult. College students may be considered adults, and are adults for many purposes under the law,[90] although they can at the same time still be relatively immature.[91] But this gets us to the further fact that all of those in high school and all of those in college are going there to be instructed. This may not require that one be young in a chronological sense, but it does connote a condition of if not ignorance, then a relative lack of knowledge. And instruction requires some discipline. One may be left more or less free to explore and study on one's own, but one still needs to be guided. *All* students, at whatever stage of their lives, are persons who need and seek instruction. This is a thread that connects those in high school to those in college to those in graduate school, and even beyond. All schools have students.[92]

Second, and relatedly, schools have *classes*. Classes are (for better or worse) the main vehicle for educational instruction. Classes, to work, have to be managed well. There may be lectures in a class, and for this, there must be attention paid to the person lecturing. Classes can also be run in a way that accommodates discussion; in a seminar, this may be all that there is. But even discussions need to be moderated and guided, so that some point is reached and some lesson is learned. Debate may be, and ideally would be, robust and uninhibited, but within limits. A robust and uninhibited debate about Chaucer should not involve attacks on China's foreign policy because those are not helpful—they distract from, rather than contribute to, the educational focus of the discussion. This applies to both form and content, as students learn to engage one another civilly, rather than make ad hominem attacks.[93] Classes may be more or less rigidly managed, but they must in *some sense* be managed, both day to day and as a whole: grades are usually given out as measures of how well someone did in learning the lessons. This

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90 *See id.* at 1849 (arguing that if individuals over eighteen are allowed to vote and engage in free speech, they should also have to endure offensive speech).

91 The question, again, is one of degree—as in, more or less mature, rather than "mature" and "not mature." *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 289 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").

92 Ward v. Polite, 667 F.3d 727, 733 (6th Cir. 2012) ("The *Hazelwood* test . . . arose in the context of speech by high school students, not . . . college or graduate students. But for the same reason this test works for students who have not yet entered high school . . . it works for students who have graduated from high school. *The key word is student*." (emphasis added) (citing Curry v. Hensiner, 513 F.3d 570, 577–78 (6th Cir. 2008) (elementary school); Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 153 (6th Cir. 1995) (junior high school)).

93 West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233–34 (D. Kan. 1998) ("Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in 'terms of debate highly offensive or highly threatening to others.'").

too is a form of institutional control, and grades can and do act as both an incentive and as a sanction to those whose views do not show that they have actually learned anything. Again, the standards may shift and change as one goes from high school to college; the standards may get higher, lower, or become looser. But there must always be standards, if education is to have any substance.

As mentioned previously, the fact that schools have students and classes may be two ways of getting at the same thing. The goal of schools is education.[94] Classes are the medium of that education, and students are the object. What those students and classes are like will be different, but they will not be radically different—at least not if universities are to remain schools. Students in college will be more mature and can be trusted more to learn on their own.[95] Classes in college should be more receptive to student speech, because students in college will tend, as a general matter, to have more and better things to say than high schoolers. And the college environment may be—deliberately—less totalizing. Universities may sponsor student groups, as may high schools, but universities may give those groups greater autonomy. Those groups may have advisors, but the function of the advisor may be very different in the college or university case than in the high school case. A college newspaper will be run (and controlled) very differently than a high school newspaper will. But, as stated above, these are all points along a continuum—it is not as if a college all of a sudden does not have students or classes, and instead has only citizens and a public forum. The college or university has an overall mission and structure, and that structure dictates that there be some constraints if education is going to happen.[96]

On the continuity view, the relevant standards for educational

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94 For an eloquent meditation on the nature of higher education, see generally ANTHONY T. KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE (2007) (emphasizing that the key question at the center of all higher education should be: What is the meaning of life?).

95 Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist., 682 F.2d 858, 863 n.4 (9th Cir. 1982) (reasoning that different considerations govern the application of the First Amendment, depending on the level of institution because of students' age, immaturity, and susceptibility); Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1052–53 (1969).

96 This is something that the Supreme Court seemed generally aware of in its recent decision in *Christian Legal Society*. Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 685–86 (2010) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982); Healy v. James, 408 U.S. 169, 180 (1972)) (reasoning that judges should not substitute their own judgment for that of school administrators because the court's inquiry is dependent on the educational context and particular characteristics of the school environment). Significant here, too, is the fact that in dealing with a university, the Court felt free to cite from cases that dealt with high schools, i.e., the *Tinker* line of cases.

institutions are precisely those that are found in the *Tinker* quartet of cases, with the significant caveat that the doctrine has to be adjusted to fit the needs and characteristics of students in college.[97] There should be a higher threshold for when disruptive speech can be prohibited and punished. What counts as "vulgar" should be greatly reduced in scope. The need for intensive faculty control and supervision of student publications and student groups should be relaxed.[98] There may be more room for genuine "off campus" student speech and behavior. However, there is a great difference between saying that these standards should be different and saying that these standards do not apply at all—that the relevant standards are the ones we use for regulating public forums. This misunderstands what a university is, which is a place for students to take classes and to learn.[99] It is in the context of this educational mission, and not an abstract ideal of freedom of speech, that decisions about campus speech need to be made. To hold that the relevant aspiration is freedom of speech misconstrues the place of speech in a university, or for that matter, in any school. Tolerating a wide variety of speech frequently is a very good way to advance the mission of education: students need to be free to voice their opinions, and to hear the opinions of others. For that matter, *faculty* need to hear those opinions and need to be challenged so that they do not become mere appendages of the status quo.[100] Learning often happens best in an environment where there is frank and open discussion. But that this happens sometimes does not mean it always happens; nor does it mean that frank and open discussion should be unlimited and unchecked. Sometimes, shutting down an opinion or a conversation can

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97 *See, e.g.*, Walker-Serrano v. Leonard, 325 F.3d 412, 416 (3d Cir. 2003) ("But any analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student.").

98 Although this is an open question. One might think that as students mature, the need for more aggressive standards *increases* rather than decreases. What would pass for an A in high school might be grounds for dismissal in a graduate program. *See, e.g.*, Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002) ("The Supreme Court's jurisprudence does not hold that an institution's interest in . . . limiting a student's speech to that which is germane to a particular *academic* assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as a student's learning progresses.").

99 It also misunderstands the *stakes*; with public forums, the stakes can sometimes rise to the level of criminal sanctions. With school discipline, we are talking (at most) of expulsion. Justice Rehnquist drew the contrast in his dissent in *Papish*: "[A] wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well." Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 677 (1973) (Rehnquist, J., dissenting). See also Rehnquist's dissent in *Healy*, which makes the same point at somewhat greater length. *Healy*, 480 U.S at 203.

100 As Justice Douglas emphasized in his concurring opinion in *Healy*, 480 U.S. at 197.

also advance the educational prospects of all students.[101] That these are difficult decisions that require a lot of judgment does not mean that restrictions on speech should never happen. They happen all the time in high schools.[102] And school administrators will sometimes make mistakes in deciding to come down hard on some speech. Their job, however, is not to be protectors of free speech in an unregulated marketplace: Their goal is to make the school a place where learning can happen. Universities and university officials should—by all means—be mindful of the good of free speech, but that good needs to be seen in context. It is a relative good, not an absolute one, and when that good conflicts with the overarching purpose of the school, free speech can and should be limited.

CONCLUSION

My conclusion is in some respects a very modest one. I am not making any claim about how university administrators *should* react in the face of, say, an invitation made by a student group to a right-wing speaker. These, as I remarked at the conclusion of the previous part, will be matters of administrative judgment. They will be resolved, in large part, in connection with how the university understands what its mission is.[103] I, of course, have my own opinions about particular cases and about how to approach them. But my argument is also, in other ways, immodest. I have maintained that the best way to look at university First Amendment cases is not by treating universities as akin to public forums, but by treating them as *schools*. This means not applying cases about hate speech, true threats, or incitement from public forum cases. Rather, it means translating cases like *Tinker* to education at all levels, and not just in high school and below. As I have emphasized, this should not entail a straight application of high school cases like *Tinker* to colleges.[104] High school students and classes are in many ways obviously different from college and university classes—and graduate level

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101 *See supra* notes 84 & 93.

102 *Cf. supra* note 71 (describing case in which the judiciary upheld restrictions to speech in school for speech that was offensive and harmful).

103 Rodney Smolla seems to me to ask many of the right questions. *See, e.g.*, Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 L. & CONTEMP. PROBS. 195, 223–24 (1990) ("Might not the university say that part of its legitimate mission is to teach students how to contend vigorously within the marketplace of ideas while nevertheless observing certain norms of civility?").

104 For some good examples of courts recognizing this point (although with very different outcomes), see *Tatro v. University of Minnesota*, 800 N.W.2d 811, 821 (Minn. Ct. App. 2011) (holding that the *Tinker* line of cases should be applied to universities in such a way that recognizes that "a substantial disruption in a primary school may look very different in a university") and *Doe v. Rector & Visitors of George Mason University*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) (holding that *Tinker* should be applied to universities in a way that accounts for institutional differences between universities and secondary schools).

classes are more different still.[105] But there is no radical break, as seems suggested by many commentators and sometimes, even the Supreme Court.[106] Universities, at the end of the day, are schools, and the law regarding schools is what we should be applying to them.[107]

105 As one court put it in a case involving classroom speech at the University of Utah: "Although we are applying *Hazelwood* to a university context, we are not unmindful of the differences in maturity between university and high school students. Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is 'reasonably related to legitimate pedagogical concerns.'" Axson-Flynn v. Johnson, 356 F.3d 1277, 1289–90 (10th Cir. 2004) (citing Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993)).

106 As in the *Healy* and *Papish* cases. *See supra* note 50 and accompanying text.

107 The movement to make *all* university spaces "public forums" by legislative fiat in a way proves my point—and strikes me as a troubling trend. *See, e.g.*, Andrew Blake, *Florida Lawmakers Ban 'Free Speech Zones' on College Campuses*, WASH. TIMES (Mar. 6, 2018), https://www.washingtontimes.com/news/2018/mar/6/florida-lawmakers-ban-free-speech-zones-college-ca/. If all university spaces were already public forums through and through, there would be no need for legislation of this sort.