NOTES

FREE SPEECH, HATE SPEECH, AND THE HOSTILE SPEECH ENVIRONMENT

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INTRODUCTION

THE First Amendment protects a wide array of distasteful,[1] disturbing,[2] defamatory or factually false,[3] profane,[4] "anti-American,"[5] and hateful[6] speech. Such protection has been justified, at least in part, by the sentiment that the First Amendment prevents the government from prescribing orthodoxy "in politics, nationalism, religion, or other matters of opinion."[7] Officials must not regulate speech based on their disagreement with it[8] or because society finds it offensive or unsavory.[9]

Unfortunately, the liberty interest inherent in the freedom of speech can collide with the equality interest that law and society hold dear. This conflict is palpable in the context of higher educa-

[1] E.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (involving a parody of pastor getting drunk and fornicating with his mother).

[2] E.g., United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (describing videos in which animals are brutally crushed).

[3] E.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring a heightened showing of "actual malice" in defamation claims by public officials); United States v. Alvarez, 617 F.3d 1198, 1213 (9th Cir. 2010) (protecting factually false statements regarding military service), aff'd, 132 S. Ct. 2537 (2012).

[4] E.g., Cohen v. California, 403 U.S. 15, 16, 26 (1971) (jacket bearing "Fuck the Draft").

[5] E.g., United States v. Eichman, 496 U.S. 310, 319 (1990) (flag burning); Texas v. Johnson, 491 U.S. 397, 420 (1989) (same).

[6] E.g., Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (allowing anti-gay, anti-American protests near soldier's funeral); Collin v. Smith, 578 F.2d 1197, 1199, 1210 (7th Cir. 1978) (involving Nazi parade through town populated by many Holocaust survivors).

[7] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[8] R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

[9] *Eichman*, 496 U.S. at 319. Indeed, although our constitutional rights are not absolute, free speech comes closest to that mark. See UWM Post v. Bd. of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991); Carl Auerbach, The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech, 23 U. Chi. L. Rev. 173, 188 (1956).

tion,[10] where historically strong free speech interests clash with equality, diversity, and tolerance interests. This tension reaches floodtide when students propound hateful and intolerant ideas. Surprisingly (at least in light of existing legal doctrine), public colleges and universities have erred on the side of regulating "hate speech" and vigorously, though less surprisingly, promoted norms that suggest the invalidity and undesirability of prejudiced views.

It is that phenomenon—public higher education's effort to quash hate speech through regulation and adverse inculcation—with which this Note is concerned. Rather than wading into the widely discussed and largely stale normative debate about whether hate speech should receive constitutional protection, this Note takes a different approach; setting aside the normative issue, it starts from the easily demonstrable and descriptive premise that hate speech is generally protected. From there, borrowing terminology from Title VII's "hostile work environment" framework, this Note applies free speech doctrine to the phenomenon of campus hate speech in order to draw out a cause of action that, although hitherto unarticulated, flows naturally from existing First Amendment jurisprudence. The result—the novel "hostile speech environment" claim brought under 42 U.S.C. § 1983—is necessary to shield speech that is protected by law yet frequently and easily abridged by public colleges and universities.

Part I reviews Supreme Court precedents on hate speech generally and lower court cases regarding hate speech on college campuses. This case law demonstrates that hate speech, although deplorable, is afforded First Amendment protection.[11]

Part II discusses the continuing problem of hate speech regulation at public institutions of higher education. "Speech codes"—policies forbidding certain kinds of offensive, demeaning, or dis-

[10] See Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U. L. Rev. 939, 962 (2009); Tina Anne Syring, Overcoming Racism on College Campuses by Restricting Speech, 14 Hamline J. Pub. L. & Pol'y 97, 97 (1993); Bryan Christopher Adams, Comment, Shouting Epithets on a Crowded Campus—A Lesson in Tolerating Intolerance, 44 Ala. L. Rev. 157, 159, 162 (1992); Catherine B. Johnson, Note, Stopping Hate Speech Without Stifling Speech, 27 Fordham Urb. L.J. 1821, 1844 (2000); see also Deborah Epstein, Can a "Dumb Ass Woman" Achieve Equality in the Workplace?, 84 Geo. L.J. 399, 399–400 (1996) (noting the same liberty/equality conflict in the Title VII context).

[11] See infra Sections I.A–B.

criminatory speech—sometimes do foster free speech interests by constraining standardless, discretionary government action. Nevertheless, both formal, written speech codes and informal, "implicit" ones introduce more First Amendment problems than they solve. Protected speech is chilled, the likelihood of viewpoint discrimination is increased, and constituencies that oppose unpopular speech can easily "capture" university administrators by convincing them to sanction such speech.[12] Despite the vices of speech codes and the constitutionally protected status of hate speech, it remains widely regulated in higher education, as several examples show.[13] Strong incentives drive colleges, universities, and their administrators to continue their hostility towards hateful or politically incorrect speech; equally powerful disincentives dissuade students from advocating for their rights when administrators take adverse action against them.

Part III offers the hostile speech environment cause of action as a solution to the problem of unconstitutional treatment of hate speech on college campuses. Rejecting calls for a "hostile *academic* environment" claim that would justify regulating hate speech, this Note argues that the freedom of speech cuts in the opposite direction, demanding that public institutions refrain from creating campus environments that are "severely or pervasively" hostile towards constitutionally protected views.[14] Because educators and administrators have demonstrated an unwillingness to abide by First Amendment boundaries, the hostile speech environment claim is necessary to ensure that even unpopular and misguided (but constitutionally protected) speech is not suppressed.

Doctrinally, this cause of action is supported by (1) the freedom of thought that inheres in the freedom of speech and (2) the application of the captive audience doctrine to government speech. Policy and pedagogical considerations lend credence to the hostile speech environment claim as well.[15] Lest this new cause of action overwhelm courts with an avalanche of litigation against the government, Part III concludes by explaining why the hostile speech environment framework is a narrow one that constrains public in-

[12] See infra Section II.A.
[13] See infra Section II.B.
[14] See infra Section III.A.
[15] See infra Section III.B.

stitutions of higher education but would rarely apply in other settings such as secondary schools, the government workplace, or against government speech generally.[16]

This Note offers a defense of the First Amendment, not a defense of hate speech. Strong policy and educational reasons for restricting hate speech abound, and reasonable people can disagree about whether those policy arguments should overtake First Amendment interests. Descriptively, however, the weight of precedent suggests that they do not. Most scholarly analysis focuses on whether that result is correct or desirable, but this Note, taking precedent largely as it stands, explores the consequences of current hate speech doctrine as applied in the university setting. The reader should not confuse, as some have,[17] a defense of free speech with an endorsement of the speech's content.

I. BACKGROUND: HATE SPEECH AND THE COLLEGE CAMPUS

Beginning in the late 1980s and early 1990s, hate speech became a hotly debated issue on college campuses and in legal academia, a trend that continues today.[18] As the early controversies festered,

[16] See infra Section III.C.

[17] E.g., Jeanne Craddock, Constitutional Law—Words That Injure; Laws that Silence, 22 Fla. St. U. L. Rev. 1047, 1050 n.8 (1995) (citing Jamin B. Raskin, The Great PC Cover-up, Cal. Law., Feb. 1994, at 68 (accusing conservatives of justifying racist views through the First Amendment)). Several writers have identified the tendency to associate the defense of speech with the underlying speech itself. See, e.g., Erica Goldberg, On the Intersection of Speech and Politics, Concurring Opinions, Apr. 26, 2012, 5:43 PM, http://www.concurringopinions.com/archives/2012/04/on-the-intersection-of-speech-and-politics.html; Howard Wasserman, Freedom of Speech and the Politics of the Underlying Speech, PrawfsBlog, Apr. 27, 2012, 9:54 AM, http://prawfsblawg.blogs.com/prawfsblawg/2012/04/freedom-of-speech-and-the-politics-of-the-underlying-speech.html. That authors defending unpopular speech on First Amendment grounds feel compelled to disclaim peremptorily their endorsement of those views, e.g., David E. Bernstein, Defending the First Amendment from Antidiscrimination Laws, 82 N.C. L. Rev. 223, 228 (2003), or respond to accusations that they hold them, e.g., Marjorie Heins, Comment, Banning Words, 18 Harv. C.R.-C.L. L. Rev. 585, 587 n.11 (1983), highlights the hostility and pressure to conform faced by those who actually do espouse hateful views.

[18] See Craddock, supra note 17, at 1048; Lawrence Friedman, Regulating Hate Speech at Public Universities after *R.A.V. v. City of St. Paul*, 37 How. L.J. 1, 4 (1993); Richard Page & Kay Hunnicutt, Freedom for the Thought That We Hate: A Policy Analysis of Student Speech Regulation at America's Twenty Largest Public Universities, 21 J.C. & U.L. 1, 1 (1994); Thomas Schweitzer, Hate Speech on Campus and the First Amendment, 27 Conn. L. Rev. 493, 496, 505 (1995); Syring, supra note 10; Alex-

many—perhaps most—colleges and universities adopted speech codes or otherwise sought to regulate campus speech.[19] These efforts gave rise to litigation in which such policies failed to withstand judicial scrutiny.[20] Before reviewing lower court cases addressing hate speech and speech codes on college campuses, an overview of Supreme Court precedents on hate speech provides an introduction to the doctrine.

A. Supreme Court Precedents on Hate Speech Generally

R.A.V. v. City of St. Paul concerned a city ordinance banning symbols that aroused anger, alarm, or resentment based on race, color, creed, religion, or gender.[21] Local youths burned a cross on a black family's yard; forgoing an array of available charges such as trespass or vandalism, the city prosecuted the youths under the ordinance.[22] Even though the Minnesota Supreme Court construed the statute to cover only "fighting words,"[23] the U.S. Supreme Court found the ordinance unconstitutional because it outlawed speech "solely on the basis of the subjects the speech covers."[24]

The regulation represented both content and viewpoint discrimination, causing the ordinance to be presumptively and facially invalid.[25] Most importantly for this Note's purposes, the Court implied that hate speech is a category of speech to which First

ander Tsesis, Burning Crosses on Campus: University Hate Speech Codes, 43 Conn. L. Rev. 617, 621 (2010); Melissa Weberman, University Hate Speech Policies and the Captive Audience Doctrine, 36 Ohio N.U. L. Rev. 553, 553 (2010); Adams, supra note 10, at 157; Johnson, supra note 10, at 1822; see also Philip Weinberg, *R.A.V.* and *Mitchell*: Making Hate Crime a Trivial Pursuit, 25 Conn. L. Rev. 299, 312 (1993) (noting a general trend in society).

[19] See Page & Hunnicutt, supra note 18, at 2; Schweitzer, supra note 18, at 505; Weberman, supra note 18, at 554 n.8, 561; Weinberg, supra note 18, at 312–13; Johnson, supra note 10, at 1822.

[20] See Epstein, supra note 10, at 425–26; Weberman, supra note 18, at 589; Johnson, supra note 10, at 1822.

[21] 505 U.S. 377, 380 (1992).

[22] Id. at 379–80.

[23] The fighting words doctrine originated in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Jessica Karner, Comment, Political Speech, Sexual Harassment, and a Captive Workforce, 83 Calif. L. Rev. 637, 662 (1995). Under that doctrine, words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are unprotected speech. *Chaplinsky*, 315 U.S. at 571–72.

[24] *R.A.V.*, 505 U.S. at 381.

[25] Id. at 386, 391–92.

Amendment protection applies.[26] Thus, *R.A.V.* "seriously undermines the basic theory supporting the use of campus [speech] codes,"[27] severely limiting the methods universities may use to combat hate speech.[28]

After *R.A.V.*, the Supreme Court passed judgment on a cross-burning statute in *Virginia v. Black*.[29] The defendants were prosecuted for burning crosses during Ku Klux Klan rallies in rural Virginia.[30] The Court upheld as constitutional the Commonwealth's ban on such burnings when they are conducted with intent to intimidate.[31] From this, one could plausibly argue that a state may regulate hate speech generally.

Two reasons cut against that conclusion, however. First, as the Court noted, cross burning has a uniquely pernicious history, as it represents a virulent form of intimidation that often signals impending violence.[32] Thus, cross burning is distinguishable from the purely verbal epithets that are often the subject of campus speech codes. Second, the Court held unconstitutional Virginia's law that made cross burning per se evidence of the intent-to-intimidate element required to convict under the statute.[33] Thus, while *Black* suggests that at least some hate speech (cross burning) can be regulated if done "with intent to intimidate," something exogenous to the hate speech itself must serve as evidence of intent. As a result, as long as hate speech is not accompanied either by conduct or a bold-faced statement of intent to intimidate, it will be difficult to make the necessary showing.[34] All told, *Black* (1) applies to a narrow, historically unique subset of hate speech that (2) is symbolic,

[26] Id. at 383–85. The Court evaluates whether speech is protected not on an ad hoc basis, but by determining if the category of speech at issue warrants protection; this "definitional balancing" weighs the value of the speech category against the legitimate state interests of the regulation. James Weinstein, Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply, 97 Va. L. Rev. 633, 638–39 (2011).

[27] Adams, supra note 10, at 178.

[28] Friedman, supra note 18, at 2.

[29] 538 U.S. 343, 348–52 (2003).

[30] Id. at 348–49.

[31] Id. at 347–48.

[32] Id. at 363.

[33] Id. at 347–48.

[34] See DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008) (noting that laws against harassment may not proscribe pure expression without impeding upon First Amendment rights).

rather than pure, speech, and (3) does not disturb *R.A.V.*'s conclusion that hate speech generally falls within the First Amendment's ambit.

At first glance, the sixty-year-old case *Beauharnais v. Illinois*[35] seems to imply that the government can regulate hate speech in a manner consistent with the First Amendment. Beauharnais, who distributed racist pamphlets, was convicted under a state statute outlawing portrayals of classes of citizens of any "race, color, creed or religion" as "deprav[ed], criminal[], unchast[e], or lack[ing] in virtue."[36] The Supreme Court upheld the conviction as a valid criminalization of "group libel."[37] Subsequent changes in libel and First Amendment law, however, leave *Beauharnais*'s authority dubious. Although the view is not unanimous,[38] the weight of opinion from an ideologically diverse list of scholars holds that, in the wake of *New York Times v. Sullivan*,[39] *Brandenburg v. Ohio*,[40] *R.A.V.*,[41] and other cases, *Beauharnais* is now bad law.[42]

With that brief survey of Supreme Court doctrine in tow, a discussion of lower court cases regarding college hate speech and speech codes is in order. Although a number of cases could be discussed,[43] this Note focuses upon three cases that are among the earliest and most widely cited on the topic of campus hate speech.

[35] 343 U.S. 250 (1952).
[36] Id. at 251–52.
[37] Id. at 258, 261.
[38] See, e.g., Tsesis, supra note 18, at 635–38.
[39] 376 U.S. 254 (1964).
[40] 395 U.S. 444 (1969).
[41] 505 U.S. 377.
[42] See J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev. 2295, 2309 n.41 (1999); Charles Lawrence, If He Hollers Let Him Go: Regulating Racists Speech on Campus, 1990 Duke L.J. 431, 464; Tsesis, supra note 18, at 635–38 (citing Eugene Volokh, Rodney Smolla, Erwin Chemerinsky, and Cass Sunstein); see also Joshua S. Press, Comment, Teachers, Leave Those Kids Alone? On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory, 102 Nw. U. L. Rev. 987, 1000–01 (2008).
[43] See, e.g., DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); Murakowski v. Univ. of Del., 575 F. Supp. 2d 571 (D. Del. 2008).

B. Lower Court Cases on Campus Hate Speech

During the late 1980s, the University of Michigan adopted a "Policy on Discrimination and Discriminatory Harassment" that forbade and punished verbal or physical behavior "stigmatizing or victimizing" individuals on the basis of, among other categories, their race, sex, religion, sexual orientation, or veteran status.[44] Students violating the policy were subject to formal or informal proceedings that could result in sanctions ranging from reprimand or compelled community service to suspension or expulsion.[45]

An anonymous psychology graduate student filed suit, fearing that he would be charged under the policy if he led a classroom discussion on controversial theories of biologically based differences between sexes and races.[46] In *Doe v. University of Michigan*, a federal district court permanently enjoined parts of the policy that restricted speech.[47] Since its enactment, the court held that the policy had been "consistently applied to reach *protected* speech."[48] The court cited three examples of the university regulating protected speech: one in which a student voiced his opposition to homosexuality; one in which a student read an allegedly homophobic limerick in a public speaking class; and one in which a student, during a class discussion about expected difficulties with the course, expressed that he had heard minorities were not treated fairly by the grading system.[49] Thus, the Court declared that the policy was overbroad facially and as applied, in addition to being vague.[50]

In *UWM Post v. Board of Regents*, the University of Wisconsin faced a similar challenge to its system-wide policy on racist and discriminatory conduct.[51] Nine documented incidents resulted in sanctions under the policy, most of which involved either vile, profane, and offensive name-calling or derisive comments based on the listener's race or sex.[52] The court declared the policy overbroad and

[44] Doe v. Univ. of Mich., 721 F. Supp. 852, 853–54, 856 (E.D. Mich. 1989).
[45] Id. at 857.
[46] Id. at 858.
[47] Id. at 853–54.
[48] Id. at 865 (emphasis added).
[49] Id. at 865–66.
[50] Id. at 866–67.
[51] 774 F. Supp. 1163, 1164–65 (E.D. Wis. 1991).
[52] Id. at 1167–68. The remarks included: "piece of shit nigger," "South American immigrant," "fucking bitch," "you've got nice tits," "[i]t's people like you [Asian-

void for vagueness; it also rebuffed the university's arguments for the policy under the fighting words doctrine and Title VII.[53]

Lastly, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment against George Mason University when school officials sanctioned a fraternity for its "ugly woman contest," wherein fraternity members dressed in drag as a fundraising ploy.[54] During the event, one member dressed as an offensive, stereotyped caricature of a black woman.[55] Several students decried the event's "racist and sexist implications" and met with a university administrator, who agreed that the event created a "hostile learning environment" and imposed sanctions on the organization and its members.[56] The court found that the sanctions violated the fraternity members' free speech rights, noting that the production was protected and that the university discriminated against the group on the basis of the speech's content and viewpoint.[57]

Notably, the university did not base its sanctions on any formal, written policy, but instead reached its decision based on an ad hoc, discretionary decision by a single administrator.[58] Once litigation commenced, a university administrator's affidavit offered a "mission statement" trumpeting principles of diversity,[59] but it hardly provided ex ante notice to the students. Moreover, the school's Vice President claimed that the fraternity's behavior "was completely antithetical to the University's mission."[60] That may well have been true, but the sanctions ignored the fact that enforcement of the school's mission had to operate within First Amendment constraints. Administrators' ability to make ad hoc, discretionary

Americans]—that's the reason this country is screwed up," and a parody of an immigration official demanding documentation from a Turkish-American. Id.

[53] Id. at 1172–73, 1177, 1180–81.

[54] 993 F.2d 386, 387–88 (4th Cir. 1993).

[55] Id. at 388.

[56] Id. The administrator found a hostile learning environment despite the event being an extracurricular fundraiser staged in the student union cafeteria. Id. at 387.

[57] Id. at 392–93. Viewpoint and content discrimination are heavily disfavored in First Amendment jurisprudence. Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477, 479 (2011).

[58] *Iota Xi*, 993 F.2d at 388.

[59] Id. at 388–89.

[60] Id. at 389, 392.

judgments regarding hate speech is an important issue that Part II will address in greater detail.

The lesson of the aforementioned cases is straightforward: hate speech is generally protected by the First Amendment.[61] There is no general First Amendment exception for offensive, prejudiced, or demeaning speech.[62] Moreover, as *UWM Post* and other sources make clear, the fighting words exception[63] has been narrowed to such an extent that hate speech is unlikely to fit within it.[64] Taking this doctrine as a launching point, Part II explores how and why it has not been adhered to in higher education.

II. THE PROBLEM: SUPPRESSION OF AND HOSTILITY TOWARDS PROTECTED SPEECH

A. Two Virtues and Three Vices of Speech Codes

Speech codes have practical significance: a written policy offers guidance, both to those applying it and those to whom it applies.[65] In other words, regulators look to the policy to guide administrative decisions, while regulatees look to the policy to guide behavior, having been put on notice that certain actions will subject them to sanctions.[66] In addition to this clarifying function, speech policies serve an important purpose during litigation. Even if a policy violates free speech, its mere existence provides the court with a touchstone for examining both facial and as-applied challenges. In this way, even unconstitutional speech codes help facilitate the First Amendment by constraining regulatory discretion and providing a written standard that judges can evaluate.[67]

[61] See Azhar Majeed, The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights, 35 J.C. & U.L. 385, 397 (2009); Schweitzer, supra note 18, at 493–94, 504.

[62] See DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204, 206, 210 (3d Cir. 2001); Majeed, supra note 61, at 421; Schweitzer, supra note 18, at 493–94.

[63] See supra note 23.

[64] *UWM Post*, 774 F. Supp. at 1172–73; Heins, supra note 17, at 589, 591 (citing cases).

[65] Gia Lee, First Amendment Enforcement in Government Institutions and Programs, 56 UCLA L. Rev. 1691, 1692, 1697, 1747 (2009).

[66] Id.

[67] See id. at 1692, 1697. Enacting speech policies can also encourage deliberation on free speech values. Id. at 1692, 1697, 1746.

Paradoxically, then, the unconstitutionality of speech codes on free speech grounds has made protecting free speech more difficult: as long as the impulse to regulate speech remains,[68] institutions can continue handicapping speech while skirting the aforementioned practical constraints of a formal policy. Because these formal policies were, or are, likely to be struck down, many colleges and universities now employ systems of ad hoc, informal, discretionary decision making that are "potentially more dangerous and insidious[ly] threat[ening] to First Amendment protection" than the codes they replaced.[69]

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University[70] illustrates the problem with a discretionary system: government bureaucrats serve as roving commissioners, picking and choosing which speech to regulate, often on the grounds that certain groups object to it.[71] The danger is threefold. First, the absence of a written policy leaves a vacuum. By their very nature, decisions made on a case-by-case basis lack debated, agreed-upon, and disseminated principles that can guide action.[72] Thus, one cannot ex ante abide by guidelines that are unknowable until after one speaks. The result is the commonly cited "chilling effect": speakers will say less, even if their speech would be constitutionally protected, because they cannot be assured that they will not be punished for it.[73]

Second, informal, standardless decision-making processes about what speech should be allowed are viewed with particular skepticism in First Amendment doctrine because they both contribute to the chilling effect and enhance the risk of discriminatory or arbitrary regulation.[74] Ad hoc judgments allow universities to sanction

[68] See infra Section II.B.

[69] Adams, supra note 10, at 167.

[70] 993 F.2d 386, 387–88 (4th Cir. 1993).

[71] Adams, supra note 10, at 167; cf. Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 29–30, 38 (1975) (noting similar dangers with vague or overbroad laws).

[72] See Craddock, supra note 17, at 1053; Adams, supra note 10, at 167.

[73] Craddock, supra note 17, at 1054.

[74] See, e.g., N.Y. Times v. United States, 403 U.S. 713, 714 (1971); Near v. Minnesota, 283 U.S. 697, 712–13 (1931).

speech because they disapprove of it, which is precisely the outcome that the First Amendment was designed to prevent.[75]

The third and related concern is that administrators are easily captured by campus constituencies that mobilize against hateful or merely unpopular speech.[76] The *Iota Xi* case offers a clear example of this problem. Students objecting to the fraternity's speech convinced an administrator that the speech created a hostile educational environment and conflicted with the university's mission; administrators subsequently imposed sanctions, despite not having done so in an initial meeting with the fraternity that occurred the same day as the one with the offended students.[77]

The risk of "captured" administrators is especially high when hate speech is at issue.[78] Hate speech frequently targets minorities or historically disfavored groups. These constituencies, in addition to understandably disagreeing with hate speech that disparages them, are some of the most vocal proponents and defenders of the equality, diversity, and tolerance norms that have gained incredible purchase in the realm of higher education.[79] Accusations or perceptions that a university or its administrators are not sympathetic enough to these norms or to the groups invoking them can have adverse consequences for a university's prestige and an administra-

[75] Craddock, supra note 17, at 1053.

[76] Id. at 1053–55; Adams, supra note 10, at 167; see also Steven D. Smith, Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem, 87 Denv. U. L. Rev. 945, 961 (2010). For a generalized discussion of institutional capture and free speech, see Smith, supra, at 956–64.

[77] *Iota Xi*, 993 F.2d at 388.

[78] See Timothy Shiell, Campus Hate Speech on Trial 62–63 (1998); see also Florence W. Dore, What about the First Amendment?, *in* The Boundaries of Freedom of Expression & Order in American Democracy 247, 247–50 (Thomas R. Hensley ed., 2001).

[79] Martin Golding, Free Speech on Campus 5, 12 n.10 (2000); John Fekete, Academic Freedom Versus the Intrusive University, *in* Academic Freedom and the Inclusive University 77, 82–83 (Sharon E. Kahn & Dennis Pavlich eds., 2000); Graham Good, The New Sectarianism and the Liberal University, *in* Academic Freedom and the Inclusive University, supra, at 84, 86–90, 92; Harvey Shulman, Judaic Studies and Western Civilization: Identity Politics and the Academy, *in* Academic Freedom and the Inclusive University, supra, at 94, 94–97, 99; see also Shiell, supra note 78, at 18–19, 22–24, 28–29, 86; Stanley Fish, What's Sauce for One Goose: The Logic of Academic Freedom, *in* Academic Freedom and the Inclusive University, supra, at 3, 10; Stan Persky, Academic Freedom and its Distractions, *in* Academic Freedom and the Inclusive University, supra, at 64, 67–69, 72.

tor's career.[80] Therefore, there are strong personal and institutional incentives to err on the side of equality, diversity, and tolerance ideals and against constitutionally protected speech.[81]

One observer has aptly termed ad hoc decision-making processes "implicit speech codes."[82] Ultimately, however, whether explicit or implicit, speech codes increase (1) the chilling effect on speech, (2) the danger of viewpoint discrimination, and (3) the opportunity for constituencies to suppress opponents by capturing administrators.[83]

B. First Amendment Defiance: Ad Hoc Regulation and Speech Codes' Persistence

The unbridled discretion inherent in implicit speech codes is not a hypothetical problem in higher education. Students at North Carolina State University freely promote their messages by paint-

[80] See, e.g., Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1180–81 (6th Cir. 1995); Shiell, supra note 78, at 18–19, 22–24, 86, 153. In a forthcoming article in the *Harvard Law Review*, Professor Nancy Leong identifies the gravitational pull of the "diversity" norm, and articulates the harmful, non-speech effect of "racial capitalism." See generally Nancy Leong, Racial Capitalism, 126 Harv. L. Rev. (forthcoming 2013) (manuscript at 1–7), available at http://ssrn.com/abstract=2009877; see also id. (manuscript at 60–81). Leong views racial capitalism—"the process of deriving social or economic value from racial identity"—as an unfortunate result of the diversity rationale created by the Supreme Court in *Grutter v. Bollinger* and *Regents of the University of California v. Bakke* for affirmative action in higher education. Id. (manuscript at 2–4, 12, 14, 54). Because of the Court's justification, there has arisen a corresponding "legal and social preoccupation with diversity" such that there is now a "pervasive trend in American society of valuing [it]." Id. (manuscript at 5, 18–19, 21). In turn, the diversity rationale has caused the commodification of racial identity. Id. (manuscript at 3). Leong is especially critical of racial capitalism engaged in by universities when they attempt to appear more diverse than they really are. Id. (manuscript at 2 & n.4, 47–51). For instance, one study of over 350 colleges and universities showed that their pictorial promotional materials frequently overrepresented the number of non-white students as compared to the actual composition of the student body. Id. (manuscript at 48). The study found that over seventy-five percent of the institutions surveyed engaged in this practice by overrepresenting black students. Id. In fact, the University of Wisconsin went even further by photoshopping a minority student into a photo in its undergraduate application packet. Id. (manuscript at 48–49). The school settled a subsequent lawsuit. Id. (manuscript at 49).

[81] See Shiell, supra note 78, at 28–29, 153; see also Shulman, supra note 79, at 101.

[82] Craddock, supra note 17, at 1053–55.

[83] See supra notes 70–81 and accompanying text.

ing in the school's "Free Expression Tunnel."[84] In both 2008 and 2010, however, when racist and homophobic comments adorned the tunnel's walls, university officials quickly and stealthily painted over the remarks because the comments "had gone over the edge of what was acceptable."[85] Despite the potential chilling effect, the university also posted a sign warning that the tunnel is subject to video surveillance, although students claimed that "that doesn't stop anyone" from posting his or her message.[86]

In 2008, the University of Rhode Island ("URI") initiated a police investigation of racist statements made about then-candidate Barack Obama.[87] The criminal investigation was triggered by "insensitive, inappropriate and degrading messages" left on university public access computers.[88] Despite claiming to acknowledge that the perpetrators were entitled to their political views and refusing to divulge the messages' contents, URI's Provost proclaimed that "none of us should be allowed to openly and maliciously insult others on the basis of race or religion without consequences."[89] What role the Provost believed the First Amendment should play was not immediately clear.[90] In another New England incident, the University of New Hampshire kicked a student out of its dorms when he posted flyers suggesting that freshmen women could lose weight by eschewing the elevator for the stairs.[91]

As discussed above, these informal decisions (even more than formal policies) can be used by campus groups to censor oppo-

[84] WTVD, NC State Obama Graffiti Reveals No Threat, ABC11, Nov. 6, 2008, http://abclocal.go.com/wtvd/story?section=news/local&id=6490435 [hereinafter WTVD, NC State].

[85] Id.; see also Staff Reports, Hate Speech Prompts Protests at N.C. State's Tunnel, News & Observer, Nov. 4, 2010, http://www.newsobserver.com/2010/11/04/780527/students-protest-at-nc-states.html; WTVD, Freedom of Speech at What Cost?, ABC11, Nov. 3, 2010, http://abclocal.go.com/wtvd/story?section=news/local&id=7762583 [hereinafter WTVD, Freedom of Speech].

[86] WTVD, Freedom of Speech, supra note 85.

[87] Tsesis, supra note 18, at 624.

[88] Kate Bramson, URI Probes 'Hate Speech' Messages, Providence J., Oct. 24, 2008, at B2.

[89] Id.

[90] Cf. Healy v. James, 408 U.S. 169, 187 (1972) ("The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been . . . the mere expression of them would not justify the denial of First Amendment rights.").

[91] Majeed, supra note 61, at 392.

nents. As Professor David Bernstein eloquently put it, "campus intolerance of any speech deemed offensive to designated victim groups has led to serious miscarriages of justice, as campus activist groups utilize speech codes to suppress dissent from politically correct orthodoxy."[92]

Although not directly involving hate speech, a recent controversy at the University of Virginia illustrates the dynamics that can lead to captured administrators. Some students sought university recognition for a new organization called the Student Alliance for Sexual Healing ("SASH"), aimed at helping students reconcile their sexuality with their religious beliefs.[93] SASH described itself as wanting to "provide a forum for University students struggling with their sexual identity to discuss their sexuality in an environment that respects their faith," with the "primar[y] focus on the quiet, confidential healing . . . of the minority of people who want to actively change their same sex attraction."[94] This position caused a "student outcry," specifically from Lesbian, Gay, Bisexual & Transgender ("LGBT") groups who closed ranks to oppose the university's recognition of SASH. One LGBT leader asserted that SASH's "message is anti-gay" and so "we feel that this group is targeting our minority, and *we cannot allow this organization to form*."[95] Another LGBT organization "worr[ied] . . . that [SASH is] going to attract a set of [freshmen] who are confused, and they're going to be offering them *one set of views that we believe to be false*."[96]

The merits of SASH's mission are highly debatable, and the LGBT groups are certainly entitled to their opinions. Yet the implication of the LGBT groups' comments is clear: we disagree, *and therefore* the university should deny recognition and the corresponding benefits that the school gives to other organizations (including our own). That view, flagrantly violative of First Amendment doctrine, is nevertheless widely held by powerful student interest groups that lobby administrators, who, in turn, face sub-

[92] Bernstein, supra note 17, at 241.

[93] Kaz Komolafe, Student Outcry Arises from 'Healing' Group, Cavalier Daily (Charlottesville, Va.), Sept. 14, 2011, at A1.

[94] Id.

[95] Id. (emphasis added).

[96] Id. (emphasis added).

stantial pressure to avoid appearing insufficiently attentive to certain constituencies, as well as to diversity and tolerance norms. Despite this potential pitfall, the University of Virginia's administration maintains its sincere commitment to the First Amendment, as President Teresa Sullivan has stated in response to the controversy that she "give[s] a lot of deference to the First Amendment both in terms of freedom of association and freedom of speech, not to mention freedom of religion."[97] Still, one worries about the consistency of this view across institutions and over time.

Thus far, only the incentives to regulate inflammatory, offensive, or hateful speech have been addressed. There are also strong disincentives for students to advocate for, much less litigate, their free speech rights in the face of university hostility. For one, there is forceful pressure, often vigorously fostered and promoted by the university itself,[98] to conform to the orthodox views that reject the ideas underlying hate speech. Take a first-year dormitory. Enormous social pressure[99] is placed on students to refrain from espousing hateful or politically incorrect views. With the barrage of chatter about "sense of community and belonging," "acceptance," "diversity," and "tolerance" at freshman orientation, dorm orientation, hall meetings, and from university officials (some of whom, like resident or graduate advisors, live in the dorm), it seems implausible to say that such sentiments are exclusively and authentically derived from non-state actors.[100] While cultivating such an atmosphere is normatively desirable, we should at least consider that free speech issues might be implicated when government seeks to foster a value-laden environment with the clear purpose of alienating and reforming (or at least silencing) those who hold unorthodox views.[101]

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[97] Id.

[98] See, e.g., supra notes 84–91 and accompanying text; infra notes 106–09, 168–70, and accompanying text.

[99] See Lee v. Weisman, 505 U.S. 577, 592–94 (1992) (citing studies of effects of social pressure).

[100] See, e.g., Golding, supra note 79, at 47–48; see also David Richards, Toleration and the Constitution 169 (1986).

[101] "[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Weisman*, 505 U.S. at 594; see also Richards, supra note 100; Charles Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum. L. Rev. 960, 962 (1953); Daryl L. Levinson, Rights Essentialism and Re-

Take a more concrete example: A student makes a one-off, profane, sexist (or racist, or homophobic, and so on) comment to another student. Say the listener reports the incident to her resident advisor. Assume the advisor then meets with the student, who receives some sort of oral or written reprimand and is required to meet with a full-time university employee, who in turn reiterates the university's commitment to and the importance of the values of equality, diversity, and tolerance. In some cases, sanctions such as expulsion from dorms might attach,[102] but assume here that the student only gets the proverbial slap on the wrist in the form of a "don't do it again or else" lecture, or is required to undergo some kind of diversity or tolerance counseling.[103]

It seems difficult to maintain that, if the student's speech is protected, a First Amendment violation has not transpired.[104] The school has indubitably sanctioned the student because of his speech and likely for its content and viewpoint, and the school's action unquestionably chills speech.[105] Equally important, what reasonable recourse does the student have? Even if he considers suing, a rational cost-benefit analysis likely dissuades him from taking action. The threat or initiation of a lawsuit would, at best, garner an apology through gritted teeth or a nominal damages award, and at worst he would be told to go away or be out the time and money invested in litigation. In sum, there are strong incentives for the university to regulate his speech and for the student to do nothing about it.

As if this incentive structure was not disturbing enough, universities continue to maintain or enact speech codes despite courts' consistent conclusions that they are unconstitutional.[106] At the University of Iowa, actionable sexual harassment occurs when one merely "says . . . something sexually related that you don't want them to say."[107] Kansas State University forbids "generalized sexist

medial Equilibration, 99 Colum. L. Rev. 857, 905 & n.196 (1999); Kelly Sarabyn, Prescribing Orthodoxy, 8 Cardozo Pub. L. Pol'y & Ethics J. 367, 401 (2010).

[102] See Adams, supra note 10, at 163 n.46.

[103] E.g., Sarabyn, supra note 101, at 403–04.

[104] See Corbin, supra note 10, at 1012–15; Sarabyn, supra note 101, at 369, 404.

[105] See, e.g., Karst, supra note 71, at 53; Sarabyn, supra note 101, at 403–04.

[106] See Epstein, supra note 10, at 426; Majeed, supra note 61, at 385; Weberman, supra note 18, at 562.

[107] Majeed, supra note 61, at 386, 393.

statements that convey insulting or degrading attitudes about women."[108] Finally, Shippensburg State University singled out any "act of intolerance" for sanctions, although its policy was quickly struck down by a federal judge.[109]

The point is that colleges and universities, if left to their own devices, are astonishingly poor guarantors of the First Amendment when hateful or offensive speech is at issue. On the one hand, they enact policies that almost uniformly fail to meet constitutional standards. On the other hand, when policies are nonexistent, they rely on a series of ad hoc "judgment calls" that lack principled standards of application, lead to arbitrary results often based on viewpoint discrimination, and impose unconstitutional sanctions that punish and chill speech. Either situation presents First Amendment problems that spring from a pervasive hostility towards views that the institution sees as its mission to extinguish from members of its community.

Some scholars endorse a cause of action in tort against hate speakers, while some universities track tort law when fashioning their policies.[110] Accepting, as Part I demonstrated, that hate speech is protected speech, this Note takes the opposite approach: it advocates for a First Amendment claim under 42 U.S.C. § 1983[111] against public colleges and universities that make pervasive efforts to alienate, chastise, punish, or indoctrinate those who hold or espouse hateful or unpopular views. In part because universities have proved unwilling to abide by the bounds of the First Amendment and in part because the chilling effect of hate speech regulation in the academic context is especially problematic,[112] more vigorous efforts to protect the freedom of speech are necessary.

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[108] Id. at 393.

[109] Weberman, supra note 18, at 562 n.66; see Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 362, 373–74 (M.D. Pa. 2003).

[110] See Syring, supra note 10, at 102–03 (citing a University of Texas policy); Adams, supra note 10, at 161–62 (citing others).

[111] 42 U.S.C. § 1983 affords a remedy against defendants who violate constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State." Thus, the hostile speech environment claim applies against those acting on behalf of public, rather than private, institutions. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 928–32 (1982).

[112] E.g., Richard Fallon, Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, 1994 Sup. Ct. Rev. 1, 55; Syring, supra note 10, at 111–13.

III. THE HOSTILE SPEECH ENVIRONMENT CAUSE OF ACTION

A. A Section 1983 Solution

1. Why Section 1983?

Although, for reasons discussed below, Section 1983 is the preferred vehicle for bringing a hostile speech environment claim, it is not the exclusive litigation method. Plaintiffs are not foreclosed from seeking injunctive relief under *Ex Parte Young*[113] or requesting a declaratory judgment under the Declaratory Judgment Act.[114] *Ex Parte Young* long ago established that a state officer could be sued for injunctive relief for constitutional violations.[115] The Eleventh Amendment does not bar the suit, as the "fiction" of the case teaches that the sued state officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[116] Thus, a student may sue to enjoin public university officials from further cultivation of a hostile speech environment.

Alternatively, a potential litigant might file a declaratory judgment. The Declaratory Judgment Act allows federal courts to "declare the rights and other legal relations of any interested party seeking [a] declaration," provided that the case presents an actual controversy and is otherwise within the court's jurisdiction.[117] Any resulting judgment has the same "force and effect" of a final judgment, with the court retaining discretion to grant "necessary and proper relief."[118]

Despite these alternatives, Section 1983 remains the preferable litigation tool. An overriding consideration is the risk of mootness. When students file suit but graduate before final conclusion of the case, claims for declaratory or injunctive relief become moot and are subject to dismissal or vacatur.[119] Section 1983, on the other

[113] 209 U.S. 123 (1908).
[114] 28 U.S.C. § 2201 (2006).
[115] *Young*, 209 U.S. at 159–60, 165–68.
[116] Id. at 159–60; see Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 n.25 (1984).
[117] 28 U.S.C. § 2201 (2006).
[118] Id. §§ 2201–02.
[119] See, e.g., Bd. of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975) (per curiam); Mellen v. Bunting, 327 F.3d 355, 363–65 (4th Cir. 2003); Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 792, 797–99 (9th Cir. 1999) (en banc).

hand, provides a damages claim[120] that does not moot out if a plaintiff graduates.[121]

Furthermore, in addition to the threat of liability for damages, Section 1983 defendants face the prospect of paying attorney's fees.[122] With motivation for protecting free speech often lacking in higher education,[123] the prospect of damages and attorney's fees incentivizes First Amendment adherence: administrators will aim to avoid personal liability by not violating the freedom of speech in the first place, students will have an economically rational reason to litigate their free speech rights when violated, and attorneys will have a financial motive to take these cases.

All told, the danger of mootness and the possibility of damages and attorney's fees make proceeding under Section 1983 the most attractive method of litigating a hostile speech environment claim. To achieve realistic prospects for success, however, a hate speaker's Section 1983 hostile speech environment claim must rest on a sounder foundation than other "hostile environment" causes of actions that have been proposed as justifications for regulating campus hate speech. The next Subsection addresses that issue.

2. Why Not a Hostile Academic Environment Claim?

Some authors liken hate speech in higher education to the creation of a hostile work environment under Title VII and therefore claim that, like harassing speech in the workplace, hate speech can and should be regulated on campus.[124] The basic premise is that the "harassment [occasioned by hate speech] could easily become so severe that part of a university's campus could be viewed as a 'hostile academic environment' for certain students."[125] Presumably, then, colleges would be justified in regulating hate speech so as to avoid liability for allowing a hostile academic environment to take root.

This cause of action would turn the law on its head. First, any hostile academic environment claim resting on an equal protection

[120] See Farrar v. Hobby, 506 U.S. 103, 112 (1992).
[121] See *Mellen*, 327 F.3d at 365; *Madison Sch. Dist.*, 177 F.3d at 798.
[122] See 42 U.S.C. § 1988(b) (2006); *Farrar*, 506 U.S. at 112–16.
[123] See supra Part II.
[124] See, e.g., Press, supra note 42, at 1005, 1014.
[125] Id. at 1017.

(or other constitutionally based) rationale must (1) take a university's non-regulation of a private individual's constitutionally protected hate speech and (2) masquerade that non-regulation as state action.[126] Even if the hostile academic environment framework relies on only Title VII premises, the claim elevates the "Title VII-ish" (and thus statute-based) interests of listeners to be free from harassing speech over the constitutionally entrenched (and thus higher-order[127]) First Amendment rights of hate speakers.

In actuality, the legal interests at stake cut in precisely the opposite direction. Given that speakers' First Amendment rights are at issue, a "hostile speech environment" claim to protect one's hate speech from public university regulation is on far sounder legal footing than a "hostile academic environment" claim to protect students from private hate speakers: the hostile speech environment claim protects free speech rights, while the hostile academic environment claim endorses government infringement of them. As shown above, there can be little doubt that colleges and universities are both actively hostile to hate speakers' messages and actively attempting to effectuate that hostility in the campus community;[128] a hostile academic environment framework would only compound the problem.

Rejecting a hostile academic environment cause of action while espousing the validity of a hostile speech environment claim may initially seem contradictory. After all, if students' hate messages are not actionable, how can or why should a university's anti-hate actions be actionable? There are three responses.

First, because hate speech is constitutionally protected,[129] a hostile academic environment claim (which silences protected speech) is undermined and a hostile speech environment cause of action (which shields protected speech) is supported. For instance, as Justice Kennedy has written, "a [college] student's claim that the school should remedy a sexually hostile environment will conflict

[126] See Shiell, supra note 78, at 30; see also Golding, supra note 79, at 56; infra notes 133–35 and accompanying text.

[127] See U.S. Const. art. VI, cl. 2; UWM Post v. Bd. of Regents, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).

[128] See, e.g., supra Section II.B; supra notes, 84–90, 106–09 and accompanying text; see also infra notes 168–70 and accompanying text.

[129] See supra Part I.

with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment."[130] Moreover, courts have consistently concluded that speakers' First Amendment interests are not balanced away by the equality, diversity, and tolerance interests of listeners and the institution, a stance that implies the invalidity of the hostile academic environment claim's premises.[131]

Second and relatedly, statutory non-discrimination laws are a common legal basis of hostile academic environment arguments.[132] The hostile speech environment notion, however, involves constitutional rights that are legally superior to those based in statutes.[133]

Third, as suggested above, a hostile speech environment claim fits comfortably within the confines of state action doctrine, whereas the hostile academic environment does not. Those who favor a hostile academic environment claim must confront the problem that private speech rather than governmental action is what creates the environment. The creation of a hostile speech environment, however, rests on government efforts to suppress speech. Proponents of the hostile academic environment cause of action attempt to overcome this difficulty by recasting state action, arguing that a university's inaction in response to the hate speech of private parties amounts to state action.[134] Such piggybacking, however, poses a problem when a constitutional provision underpins hostile academic environment arguments.[135] Aside from contravening traditional understandings of the state action doctrine,[136] the notion that the government's failure to remedy hate speech is government action ignores the fact that the First Amendment precludes the government from regulating that speech in the first place.

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[130] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 682–83 (1999) (Kennedy, J., dissenting); see also id. at 666–68; id. at 649 (majority opinion) ("[I]t would be entirely reasonable for a school to refrain from a form of disciplinary action [based on a harassment claim] that would expose it to constitutional . . . claims.").

[131] See James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491, 500, 512 (2011); supra Part I.

[132] See e.g., Majeed, supra note 61, at 405–06.

[133] See supra note 127 and accompanying text.

[134] See, e.g., Shiell, supra note 78, at 30; Friedman, supra note 18, at 23–24; Majeed, supra note 61, at 405–06; Schweitzer, supra note 18, at 497–98.

[135] See Friedman, supra note 18, at 24–25; see also supra note 126 and accompanying text.

[136] See Golding, supra note 79, at 56.

These arguments are not unprecedented as critiques of the hostile academic environment concept,[137] but they are unique as a defense of the novel notion of a hostile speech environment. What, then, is the substance of a hostile speech environment claim? The subsequent Subsection answers that question.

3. Mechanics of the Hostile Speech Environment Cause of Action

This Note proposes three elements for the hostile speech environment cause of action. On its face, the framework applies to all speech, but, given the distinctive dynamics of higher education, hate speech in that context provides the strongest example of the claim's necessity and application.

First, a claimant must show that his or her speech is protected. If, for example, the speech amounted to true threats,[138] fighting words (theoretically possible although practically difficult given the increasing minimization of that doctrine), or was accompanied by otherwise regulable conduct (such as a physical assault), plaintiffs could not establish a hostile speech environment. Of course, hate speech itself is generally protected[139] and therefore would serve as a valid basis for the claim.[140]

Second, state action traceable to the university must regulate, chill, or suppress the claimant's protected speech. Put another way, the state, through its actors at a public college or university, must be hostile to the speech and manifest that hostility in some form. Other students' or organizations' authentic condemnation of speakers and their views presents no First Amendment, and hence no hostile speech environment, issue. Nevertheless, when the university, through speech codes, sanctions, policies, or actions, ac-

[137] See UWM Post v. Bd. of Regents, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); Page & Hunnicutt, supra note 18, at 27–28.

[138] See Virginia v. Black, 528 U.S. 343, 359 (2003).

[139] See supra Part I.

[140] It bears noting that a hostile speech environment could exist for any type of speech. In other words, the cause of action is not exclusive to hate speech. For instance, in addition to an Establishment Clause claim, there could be a Free Speech Clause-based hostile speech environment claim for severe or pervasive hostility towards religious (or non-religious) viewpoints. Cf. C.F. v. Capistrano Unified Sch. Dist., 654 F.3d 975, 978, 985–87 (9th Cir. 2011) (granting qualified immunity and not considering the underlying merits of plaintiff's constitutional claim because his teacher's hostility to his religion was not clearly established as unlawful).

tively strives to inundate the speaker with the incorrectness of his message or successfully infuses the community with a belief system antithetical to the speaker's views, the state has acted for the purposes of the second element.[141] This is because, as research on informal social control suggests, the government can "effectively influence behavior by inculcating, altering, or leveraging social norms."[142] Of course, direct regulation often fulfills the state action requirement necessary for a freestanding First Amendment claim. Just as a boss's quid pro quo offer is independently actionable under Title VII and can also be part of a broader hostile work environment,[143] so too can particularized sanctions comprise sui generis causes of action while simultaneously providing evidence of a hostile speech environment.

Finally, similar to Title VII hostile work environment doctrine, the hostility manifested by a state university towards a speaker must be "sufficiently severe or pervasive" as to reasonably affect the speaker's speech and create an environment objectively abusive towards that speech.[144] Thus, the question should generally be whether the university has created an atmosphere in which hostility towards the speech is so severe, pervasive, or persistent that the speaker cannot fairly engage in her First Amendment rights.[145] If all university freshmen were required to attend an informational session on equality and the university's tolerance policy was posted in every dormitory, a hostile speech environment may not exist.[146] If,

[141] See Black, supra note 101, at 968; see also supra note 101 and accompanying text; infra note 164 and accompanying text.

[142] Levinson, supra note 101.

[143] See Balkin, supra note 42, at 2297.

[144] Cf. Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (noting that Title VII is violated when "discriminatory intimidation, ridicule, and insult is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986) (same).

[145] See, e.g., Sarabyn, supra note 101, at 410; cf. Balkin, supra note 42, at 2309 (discussing "material alter[ation] [of] workplace conditions" in Title VII context); Arthur Coleman & Jonathan Alger, Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses, 23 J.C. & U.L. 91, 110 (1996) (articulating requirements of "severe or pervasive" prong when applied in higher education); Levinson, supra note 101, at 905.

[146] Of course, gray areas exist. Universities' recent practice of posting fliers on the back of dormitory bathroom stall doors, e.g., Sara Almario, The Stall Seat Journal, The Collegian (Fresno, Cal.), Jan. 25, 2010, at 5, available at

however, the university also had a history of enacting unconstitutional speech codes and sanctioned a student who made hateful comments in the cafeteria by suspending her dining privileges and requiring that she undergo diversity counseling, a hostile speech environment likely does exist.

The lesson is that a totality-of-the-circumstances approach should be taken. As with a Title VII hostile work environment claim, for which it is not enough that a plaintiff found some instance of conduct objectionable,[147] so too would a hostile speech environment claim fail when a student finds sundry university policies offensive or contrary to her opinions. Moreover, just like hostile work environment claims, in which conduct not severe or pervasive enough to create an objectively hostile environment is beyond the scope of Title VII,[148] a hostile speech environment would not exist when government action is not severe or pervasive enough to be considered objectively hostile to an individual's speech. This determination is made "only by looking at all the circumstances."[149] The inquiry "requires careful consideration of the social context in which particular behavior occurs and is experienced."[150] Of course, university life is traditionally associated with vigorous First Amendment protection, freedom of thought, and the open exchange of ideas,[151] thus suggesting that the hostile speech environment framework might be an appropriate and useful mechanism for protecting free speech in the university context.[152]

One might criticize the hostile speech environment cause of action as being too vague or open-ended,[153] but it is at least as deter-

http://collegian.csufresno.edu/2010/01/25/the-stall-seat-journal/, seems highly objectionable because it unfairly and unavoidably forces speech upon dormitory residents.

[147] *Harris*, 510 U.S. at 21.

[148] Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998); *Harris*, 510 U.S. at 21.

[149] *Harris*, 510 U.S. at 23; accord *Oncale*, 523 U.S. at 81.

[150] *Oncale*, 523 U.S. at 81.

[151] See Rust v. Sullivan, 500 U.S. 173, 200 (1991); Healy v. James, 408 U.S. 169, 180 (1972); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Fallon, supra note 112, at 52.

[152] See Lee, supra note 65, at 1726 (explaining that, where First Amendment norms are especially robust, courts play a more critical role).

[153] See *Harris*, 510 U.S. at 24–25 (Scalia, J., concurring) (decrying the "severe or pervasive" prong of Title VII's hostile work environment claim as "inherently vague,"

minate, and probably more so, than the hostile work environment framework. By borrowing Title VII's "severe or pervasive" prong, the hostile speech environment cause of action rests on a foundation that, despite fissures, has been endorsed by the Supreme Court[154] and survives as a staple of employment litigation without gridlocking the courts. Those who object to the hostile speech environment cause of action on administrability or vagueness grounds must be willing to scrap hostile work environment claims on the same principle. In fact, hostile speech environment claims likely would be easier to administer than hostile work environment claims: the first two prongs of a hostile speech environment claim ("protected speech at issue" and the state action requirement) are familiar judicial inquiries that would weed out cases before an analysis of the "severe or pervasive" element is needed.

The hostile speech environment cause of action protects free speech by ensuring that colleges and universities cannot inflict a First Amendment death by a thousand cuts. On campus, government action is pervasive,[155] yet isolated incidents are often insufficiently severe to warrant the investment of time and money necessary to advocate for one's rights.[156] Given the anti-speech incentives for both the speaker and the regulator,[157] a hostile speech environment claim under Section 1983 is necessary to ensure that universities fully align their policies and actions with the First Amendment.

B. Further Doctrinal and Practical Justifications

If, as has been argued, a hostile speech environment is actionable under Section 1983 to enforce the First Amendment, one must demand that it has some broad-based foundation in free speech law and theory. This Section offers two such hooks: the freedom of thought[158] as a necessary component of the freedom of speech, and

"add[ing] little certitude," and leaving the jury "virtually unguided," but nevertheless assenting to its status and admitting "no alternative" exists).

[154] Id. at 18–22 (majority opinion); id. at 24–25 (Scalia, J., concurring).

[155] See infra notes 180–81 and accompanying text.

[156] See supra text accompanying notes 102–05.

[157] See supra text accompanying notes 102–05; supra notes 78–81 and accompanying text.

[158] Freedom of thought has been conceived of either as a necessary, legally enforceable precondition for free speech or as a freestanding First Amendment right. See in-

the captive audience doctrine. Practical considerations also favor protecting speech by way of the hostile speech environment framework.

1. Freedom of Speech and Freedom of Thought

If freedom of speech is to have any content, there must exist a corresponding freedom of thought that protects the "*process* by which ideas and expressions are generated, nurtured, and mooted" because "individual freedom of thought is a clear requisite for meaningful freedom of speech protections."[159] The Supreme Court, in *Wooley v. Maynard*, suggested that freedom of thought was a fundamental First Amendment guarantee, and that the right to speak or not to speak was merely a subset of that more basic freedom.[160] In the famous Pledge of Allegiance case of *West Virginia Board of Education v. Barnette*, the Court declared that "the purpose of the First Amendment to our Constitution [is] to reserve from all official control" "*the sphere of intellect* and spirit."[161] Individual Justices have since emphasized that the First Amendment protects an individual's right to "autonomous control over the *development* and expression of one's intellect."[162] In recognizing that free speech cannot be valued or protected without some corresponding (or preexisting) valuation and protection of free thought,

fra Subsection III.B.1. Under either conceptualization, a violation of free thought would provide the basis for a First Amendment claim under Section 1983.

[159] Seana Valentine Shiffrin, What Is Really Wrong with Compelled Association?, 99 Nw. U. L. Rev. 839, 873–74 (2005) [hereinafter Shiffrin, Compelled Association]; accord id. at 875–76; Seana Valentine Shiffrin, Reply to Critics, 27 Const. Comment. 417, 419–20 (2011) [hereinafter Shiffrin, Reply].

[160] 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); see also Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 Const. Comment. 283, 283 (2011) ("We should understand freedom of speech as, centrally, protecting freedom of thought.").

[161] 319 U.S. 624, 642 (1943) (emphasis added); see also Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 791 (1988); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977); Stanley v. Georgia, 394 U.S. 557, 565–66 (1969).

[162] E.g., Paris Adult Theatre v. Slaton, 413 U.S. 49, 85 n.9 (1973) (Brennan, J., dissenting) (emphasis added) (quoting Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring)); see also C. Edwin Baker, Autonomy and Free Speech, 27 Const. Comment. 251, 276 (2011).

these passages validate the constitutional status of the freedom of thought.[163]

That the Court discusses freedom of thought in the context of compelled speech is unsurprising. In cases such as *Barnette* and *Wooley*, the aim of the government's action was to circumvent freedom of thought in order to facilitate adherence to the government's message.[164] One scholar even defines compelled speech as the attempt to change a speaker's mental impressions without engaging the speaker's mental, deliberative capacities.[165] Consequently, compelled speech violates the right to be free from "coercive state interference" regarding the process of thought formation and revision.[166] Most importantly for present purposes, this definition offers no analytical reason why the "coercive state interference" that abridges the freedom of thought cannot manifest itself as government speech, for instance, in the form of pervasively disseminated government policies.[167]

[163] See Shiffrin, supra note 160, at 288; Shiffrin, Reply, supra note 159.

[164] Shiffrin, supra note 160, at 301–02.

[165] Micah Schwartzman, Conscience, Speech, and Money, 97 Va. L. Rev. 317, 350 (2011).

[166] Id. at 353.

[167] Joseph Blocher, Viewpoint Neutrality and Government Speech, 52 B.C. L. Rev. 695, 698–99, 706–16, 724–25 (2011) (noting that government speech often directly regulates private speakers and is viewpoint discriminatory); Sarabyn, supra note 101, at 410 (stating that "[t]he pervasiveness of the [government's] message chills thought by influencing citizens through mass exposure and giving the impression of near-universal agreement" while simultaneously suggesting the government is hostile to those opposing its view); cf. Gia B. Lee, Persuasion, Transparency, and Government Speech, 56 Hastings L.J. 983, 1030–31 (2005) (arguing that the First Amendment suggests that the government should be transparent when it speaks). Admittedly, the Supreme Court has ruled that the government's speech is generally not constrained by the First Amendment. See Pleasant Grove v. Summum, 555 U.S. 460, 467 (2009); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553, 560 (2005). But as this Note, see supra Section III.B, and other authors suggest, that conclusion simply does not square with the corpus of First Amendment law. See Thomas I. Emerson, The System of Freedom of Expression 700 (1971); Blocher, supra, at 698–99; Corbin, supra note 10, at 942, 980–81; Robert D. Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 Calif. L. Rev. 1104, 1106, 1108–09 (1979); Sarabyn, supra note 101, at 394–95; Edward H. Ziegler, Jr., Governmental Speech and the Constitution: The Limits of Official Partisanship, 21 B.C. L. Rev. 578, 616 (1980). Indeed, cases like *Barnette* and *Wooley* came out the way they did precisely because the government forced its speech on citizens. Unfortunately, because of the doctrinal and theoretical complexity of government speech, see Frederick Schauer, Is Government Speech a Problem?, 35 Stan. L. Rev. 373, 386 (1983) (reviewing Mark G. Yudof, When Gov-

Yet on the issue of hate speech, freedom of thought (or speech) is sometimes what colleges and universities appear not to want. Instead, attempts are occasionally made to inculcate particular viewpoints and conceptualizations of mantras such as "diversity" in an effort to squash out the thoughts and expressions inherent in hateful (or merely politically incorrect) speech. Speech codes are but one of many manifestations of the "attempt to dictate primarily how students (and faculty) think."[168] There is a substantial and concerted effort to "enforce[] . . . a 'politically correct' orthodoxy" through "raw political power"[169] despite the glaring fact that imposing such an orthodoxy is exactly what the First Amendment forbids.[170] Individuals have an interest in freely and authentically formulating their thoughts, beliefs, and opinions without being bombarded by mentally meddlesome messages.[171] Freedom of

ernment Speaks: Politics, Law, and Government Expression in America (1983)), considerations of scope and space foreclose a more robust treatment of the issue outside of the arguments presented in Section III.B and the contours of permitted government speech articulated in Subsection III.C.3.

[168] Suzanna Sherry, Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech, 75 Minn. L. Rev. 933, 942 (1991). For an example teetering on the brink of such efforts, consider the (admittedly voluntary) "diversity pledge" at the University of Virginia School of Law, which states that mere "[t]houghts . . . of prejudice have no place in the UVA Law community." Karin Agness, Diversity Pledge, Nat'l Rev. Online, Feb. 6, 2009, http://www.nationalreview.com/phi-beta-cons/41080/diversity-pledge. Student leaders have not been bashful about trumpeting the thought-control element of the pledge. One student body president proudly wrote in the school newspaper that "[b]y signing this diversity pledge, [signatories] are openly affirming [their] belief that thoughts and acts of prejudice have no place at UVA Law." Brian Leung, Reflections on Success and New Vision for the Future, Va. L. Wkly., Feb. 15, 2008, at 3, available at http://www.lawweekly.org/pdf_archives/20080215.pdf. Some students and student leaders claim the diversity pledge does not "represent[] [a] commitment to any particular kind of diversity," but instead "all forms of student diversity" are promoted. Jordan Fox, With Diversity Gains, Law School Battles Perceptions, Va. L. Wkly., Feb. 18, 2011, at 3, available at http://www.lawweekly.org/pdf_archives/20110218.pdf. It is difficult to ascertain the meaning of such statements considering that the very text of the diversity pledge singles out a particular conception of diversity—one which would include individuals who hold prejudiced views—for exclusion from the community.

[169] Sherry, supra note 168, at 942, 944.

[170] See *Wooley*, 430 U.S. at 714–15; *Barnette*, 319 U.S. at 642; Schwartzman, supra note 165 (noting that freedom of thought is infringed when there is coercive interference with the formation and revision of thoughts and beliefs).

[171] See Shiffrin, supra note 160, at 290; see also Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); Black, supra note 101, at 968; Corbin, supra note 10, at 971–72; Schwartzman, supra note 165.

thought cannot be maintained in the face of constant, officious interference that attempts to overwhelm the mind into submissive acceptance of the propounded view.[172] Thus, while state action may not burden speech directly, it can still endanger or obstruct freedom of thought to the degree necessary to justify restrictions on the government and its speech.[173]

In short, colleges and universities make concerted and elaborate efforts to promote (and even coerce) particular values,[174] trying to "exert substantive influence on mental content in ways that are indifferent to and attempt to bypass the thinker's authentic consideration of and conscious engagement with [an] idea."[175] But whether codified as a law compelling speech or a series of pervasively and invasively disseminated policies hostile to a given viewpoint, the infringement on the freedom of thought and freedom of speech is the same whenever government activity aims to inculcate beliefs through brute force rather than intellectual engagement.[176]

The prohibition against violating the freedom of thought and speech does not mean that institutions are barred from engaging individuals' thoughts or advocating positions that the school thinks are correct.[177] Individuals must be able to retain basic control over their mental processes in order to ensure their freedom of speech,[178] but the existence of speech regulations, the conditioning of benefits upon assent to equality ideals, and the widespread, ceaseless emphasis on diversity and tolerance norms have reached a floodtide that erodes that ability. Others have noted that such efforts are

[172] See Corbin, supra note 10, at 977–78; Shiffrin, Reply, supra note 159, at 434, 437.

[173] See Shiffrin, Reply, supra note 159, at 419; see also Blocher, supra note 167 (claiming that government speech is often direct regulation and viewpoint discrimination); Levinson, supra note 101, at 905 (noting the government's ability to act and to change behavior by facilitating certain social norms); Shiffrin, Reply, supra note 159, at 418 (asserting that a free speech theory based on freedom of thought might demand governmental abstention from actively hindering disfavored speech).

[174] Sherry, supra note 168, at 941.

[175] Shiffrin, Compelled Association, supra note 159, at 874.

[176] Shiffrin, supra note 160, at 287, 300.

[177] See Shiffrin, Compelled Association, supra note 159, at 875; infra Subsection III.C.3.

[178] Shiffrin, Compelled Association, supra note 159, at 875–76; see also Shiffrin, supra note 160, at 297 (emphasizing freedom of thought as central to free speech).

First Amendment violations.[179] The hostile speech environment framework articulates a cause of action for that violation.

2. Captive Audience Doctrine and Government Speech

State action is omnipresent in public higher education; as one scholar put it, "the school environment pervades the life of the student."[180] Especially if a student lives on campus, it is entirely possible for him or her to spend months at a time insulated in a cocoon of government undertakings. She wakes up in a university-owned room on a university-owned bed. After showering in the university-owned bathroom, she rides the university-owned bus manned by a university-paid driver to the university-owned classroom, where she listens to a university-tenured employee lecture. Afterwards, she eats university-prepared food at the university-operated cafeteria before returning to her snug, university-owned bed. As a result, there is a significant power relationship between the institution and its students,[181] with the university having extensive control over the day-to-day experiences and aspects of students' lives.

From this dynamic, strong arguments based on the captive audience doctrine[182] can be made in support of the hostile speech environment. In fact, students are often a captive audience on campus.[183] Two education lawyers sum up the captive audience doctrine nicely:

> [I]f "substantial privacy interests [of the listener] are being invaded in an essentially intolerable manner," and if he has little to no choice in the decision about whether to "turn off" the expres-

[179] See, e.g., Sarabyn, supra note 101; Shiffrin, Compelled Association, supra note 159, at 875; see also Corbin, supra note 10, at 965, 980–98 (articulating and applying the right against compelled listening). Professor Shiffrin also challenges the legitimacy of a state that undercuts the prerequisites for free thought. Shiffrin, Reply, supra note 159, at 417–18.

[180] Adams, supra note 10, at 178.

[181] Majeed, supra note 61, at 450–51.

[182] See generally Madsen v. Women's Health Ctr., 512 U.S. 753, 781 (1994); Frisby v. Schultz, 487 U.S. 474, 487 (1988); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736, 738 (1970). The doctrine was christened in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting), although the notion was raised in Congress as early at 1924. See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 127–28 (1973) (citing remarks by Commerce Secretary Hoover).

[183] See Corbin, supra note 10.

> sion, the offensiveness of the expression may justify restrictions on that expression that would not be permitted absent the "captive" surroundings.[184]

If a listener sometimes has a First Amendment right not to receive speech and the government's speech pervades the university context, then the government may have a First Amendment duty to refrain from speaking.[185] Restated, the listener may have a First Amendment cause of action (a hostile speech environment claim) to make the government leave him alone.

This reasoning is an atypical invocation of the captive audience doctrine. Most commentators who have applied the captive audience doctrine to higher education have done so to argue in favor of hate speech regulation, at least in limited contexts such as dormitories.[186] Since hate speech is protected as a general matter, across-the-board speech codes justified by the captive audience doctrine are unlikely to be legal. In the dorm context, the argument is that, because there is "no right to force speech into the home of an unwilling listener,"[187] hate speech in dorms is a valid object of regulation. The argument ignores the fact that First Amendment interests exist on both sides equally[188] and that such equality drops away in the case of government speech.

If there is a right not to receive speech in one's home, surely a fortiori there is a right to speak freely in one's own home, especially given that it is the "traditional place where one can reasonably expect a zone of privacy."[189] It would be odd to say that the government may prevent an outsider from directing speech at your home while it simultaneously could regulate your speech within your home. Thus, when one roommate accosts another with hate

[184] Coleman & Alger, supra note 145, at 102; see also Corbin, supra note 10, at 941 ("Under this doctrine, a listener's right to privacy may trump a speaker's right to communicate."); id. at 943–51.

[185] See Corbin, supra note 10, at 942, 980–81.

[186] E.g., Coleman & Alger, supra note 145, at 121–22; Weberman, supra note 18, at 560, 576–79.

[187] Adams, supra note 10, at 181 (citing *Frisby*, 487 U.S. at 485); see also Corbin, supra note 10, at 944; Epstein, supra note 10, at 423.

[188] Cf. Karst, supra note 71, at 48, 51 (discussing competing First Amendment interests in media access cases).

[189] Corbin, supra note 10, at 946; see also Georgia v. Randolph, 547 U.S. 103, 115 (2006); *Frisby*, 487 U.S. at 484; Stanley v. Georgia, 394 U.S. 557, 565, 568 (1969).

speech, the First Amendment is at war with itself: to whatever extent the captive audience doctrine might allow a university to regulate hate speech directed at someone in his or her home, the university is equally prevented from regulating speech that one makes in his own home.[190] This issue is thorny and does not demand resolution here, although as a general proposition the (thus far) unsuccessful efforts to impose speech codes and the general protection afforded hate speech suggest that the speaker rather than the listener wins out.[191] Moreover, those in favor of regulation offer little more than the mere ipse dixit that the harm is greater on the listener than the speaker, so the balance should be struck against the speaker.[192]

Regardless, this dueling dynamic melts away when we have government speech directed at a private listener rather than private speech directed at a private listener.[193] The First Amendment interests are no longer in equipoise, and the captive audience doctrine is better suited to protect, rather than regulate, hateful and unpopular speech. That is, the private listener (the student who holds hateful views) in a hostile speech environment cannot, in any real sense, avoid speech with which he disagrees (the university's anti-hate speech message). When *X* unfairly imposes on *Y* the speech of *X* with which *Y* disagrees and cannot fairly avoid, the captive audience doctrine is in play. Far from being a reason to reject a free speech claim, the fact that *X* is the government is exactly what triggers First Amendment scrutiny.

To approach the matter from a different angle, let us return once more to antidiscrimination law. Those who defend Title VII hostile work environment claims against free speech qualms often cite the captive audience doctrine as justification.[194] If that line of reasoning is true—if one is captive "when [one is] unavoidably and unfairly coerced into listening,"[195] and the workplace is a setting where such

[190] An unstated, but supportable, premise of this argument is that one's dormitory is one's home. See Corbin, supra note 10, at 963.

[191] See supra Part I; see also Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 474 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

[192] See Weberman, supra note 18, at 578–79.

[193] See Sarabyn, supra note 101, at 402.

[194] See, e.g., Corbin, supra note 10, at 959–60; Epstein, supra note 10, at 422–26.

[195] Balkin, supra note 42, at 2310–11.

coercion is unavoidable and unfair—then the argument surely holds for the university setting, a place where the government's speech (through its agents or policies) is almost all-encompassing and far more extensive than in the nine-to-five workplace. Defenders of the hostile work environment answer First Amendment objections by noting that the point of Title VII and the captive audience doctrine is to prevent the unfair choice between the necessity of work and the avoidance of undesirable speech.[196] If that argument holds, then it cannot be an objection to the hostile speech environment framework that a student can "simply" elect to drop out, transfer, or tolerate the hostile government speech.[197] The choice is just as unfair in the educational context as in the professional context. Education is the major prerequisite for gainful employment, and the cost of attending a private university rather than a public one is often prohibitive.

3. Practical and Pedagogical Considerations

There are strong policy justifications for both protecting speech that is covered by the First Amendment and rejecting the impulse to regulate and censor. As the academic community realizes, regulating ideas can do more harm than good. The American Association of University Professors has recognized that hate speech cannot and should not be banned.[198] Nurturing ideas and fostering debate are central missions of the university,[199] and institutionalized hostility toward particular views is anathema to those purposes.

Moreover, when values are imposed on a community rather than allowed to spring organically from it, those values are undermined by a lack of authenticity.[200] As current Columbia University president and noted First Amendment scholar Lee Bollinger has ob-

[196] See id. at 2312; Epstein, supra note 10, at 430, 440; Fallon, supra note 112, at 43.

[197] See Lee, supra note 65, at 1716; cf. Black, supra note 101, at 963–65 (noting unfair burdens and impracticalities on captive audiences when they are faced with changing their habits to avoid speech); Corbin, supra note 10, at 963 (making the same workplace/college analogy and unfairness argument but concluding in favor of regulating hate speakers).

[198] Syring, supra note 10, at 105.

[199] See Coleman & Alger, supra note 145, at 99, 111; Epstein, supra note 10, at 426 n.158; supra note 151 and accompanying text.

[200] Shiffrin, Compelled Association, supra note 159, at 878.

served, the toleration of intolerance reaffirms community norms.[201] Even one of the most vociferous advocates of regulating and suppressing hate speech admits that tolerating intolerance demonstrates the strength of a community's commitment to tolerance.[202]

Aside from communal justifications, rationales for protecting hate speech also pertain to the speaker. If colleges and universities believe that their mission is to educate and they are of the opinion that hate speech is wrong, they should seek out students who espouse hateful viewpoints. Regulating hate speech frustrates this end: suppression deters those who hold hateful views from voicing them, and it is thus impossible to identify the students who would benefit most from engagement with alternative ideas. The important distinction to draw, however, is that engagement does not mean indoctrination, nor does it mean persuasion by bombardment and ostracism: those tactics often cause only resentment that reifies and entrenches the speaker's hateful beliefs.[203]

C. Limitations on Hostile Speech Environment Claims

Nothing in the analytical content of the hostile speech environment claim limits it to the higher education setting. A communist, in hopes of enjoining government speech, could potentially bring a hostile speech environment claim against federal, state, or local governments for their constant advocacy of democratic ideals and browbeating of those who hold socialist ones. However, that result might severely handicap the government's ability to function. One can imagine similar causes of action that would be practically and politically undesirable and possibly provide good reason to reject the framework.

In actuality, however, the hostile speech environment claim's potentially boundless analytical scope is confined by practical realities. In the communist example, the "severe or pervasive" element would be absent. Society simply has too many modes of communication, too many sources of information, and too much freedom to choose among them for one to conclude that the government's po-

[201] Lee C. Bollinger, Free Speech and Intellectual Values, 92 Yale L.J. 438, 460 (1983).

[202] See Lawrence, supra note 42, at 434–36.

[203] See Majeed, supra note 61, at 398; Sherry, supra note 168, at 944.

sition on a given issue is so overwhelming or all-encompassing that it amounts to objectively pervasive hostility to the opposing view.

Additionally, recalling that the "severe or pervasive" prong is a context-dependent, all-things-considered determination,[204] the nature of an enterprise and the value system unique to it will often obviate hostile speech environment claims. For instance, the government's role in implementing policy, protecting its citizenry, executing the law, and informing voters of its positions—in other words, the government's ability to be a government[205]—would be a relevant consideration in the hypothetical communist case.[206] Generalizing from that example, the reasons that make a hostile speech environment claim appropriate in public higher education also undercut its applicability to contexts in which one might intuitively assume it would be a proper fit.

1. Secondary Education

Secondary education seems like a setting in which the hostile speech environment claim naturally would apply. It does not, however, because of three considerations: who is being educated, the nature of the education, and the scope of the state action.

The subjects of secondary education are almost always minors, while students in higher education are usually of legal majority. This difference is one reason constitutional protection of free speech rights is more vigorous in the higher education context.[207] The contours of legal infants' First Amendment rights differ from those of adults.[208] Special rules that, based on age and maturity, apply in secondary education do not have the same force in higher education.[209] Conversely, constitutional rules apply with the same

[204] See supra notes 144–50 and accompanying text.

[205] See Ziegler, supra note 167, at 604.

[206] As this Note has suggested about higher education, however, some government undertakings place special emphasis on facilitating First Amendment values, which thus might justify greater protection of speakers under hostile speech environment law.

[207] See Adams, supra note 10, at 177.

[208] See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Corbin, supra note 10, at 997–98; Shiffrin, Compelled Association, supra note 159, at 881–82.

[209] Coleman & Alger, supra note 145, at 119; see Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999); DeJohn v. Temple Univ., 537 F.3d 301, 315–16 (3d Cir. 2008); Murakowski v. Univ. of Del., 575 F. Supp. 2d 571, 588 (D. Del. 2008). For

force in higher education as they do to adults in the world at large.[210] The contrast between the two settings is evidenced by the decline of *in loco parentis* in higher education, while analogous concepts remain in secondary education.[211]

Secondary education also differs in kind from higher education: the educational missions are not the same. A central goal in secondary education is the development, promotion, and inculcation of shared civic and cultural values,[212] whereas the point of higher education is to promote critical reasoning, foster discourse, and engage students in the marketplace of ideas.[213] Colleges and universities are supposed to "nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated."[214] Although some secondary schools may contain some of these dynamics some of the time, the difference between secondary and higher education contexts is significant: the former focuses on conformity, inculcating fundamental values, and assimilation,[215] while the latter encourages with critical thinking, debate, and engagement with a variety of ideas and opinions.[216]

Lastly, though both settings contain pervasive levels of state action, the extent of state action is far less in secondary schools be-

instance, when regulating speech on sensitive issues, secondary school administrators can consider the maturity of students, *Kuhlmeier*, 484 U.S. at 272, but regulations in higher education based on offensiveness or political viewpoint are not permissible, see, e.g., Widmar v. Vincent, 454 U.S. 263, 277 & n.5 (1981).

[210] See Healy v. James, 408 U.S. 169, 180 (1972). Of course, age is only one factor that justifies treating the two contexts differently. Some (but not most) secondary students are over eighteen, while some (but not most) college students are under eighteen. Still, that the break between secondary and higher education roughly corresponds to the division between legal minority and legal majority has surely contributed to the disparate legal rules for the two contexts.

[211] See *Davis*, 526 U.S. at 665–68 (Kennedy, J., dissenting); *DeJohn*, 537 F.3d at 315–16; Majeed, supra note 61, at 456.

[212] See Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986); Ambach v. Norwick, 441 U.S. 68, 75–78 (1979); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[213] See Coleman & Alger, supra note 145, at 99, 111; Craddock, supra note 17, at 1086–87; Sherry, supra note 168, at 943; supra note 151 and accompanying text.

[214] Coleman & Alger, supra note 145, at 99; see also supra note 151 and accompanying text.

[215] See *Fraser*, 478 U.S. at 681; *Ambach*, 441 U.S. at 76–78.

[216] Consider, as an example, how the character of a discussion on Christopher Columbus might differ in an eighth-grade civics or history class versus a college-level sociology or anthropology seminar.

cause students go home at the end of the day.[217] College students, in comparison, can go months at a time without leaving the cocoon of state action. For many college students (unlike secondary school students), if they cannot voice their opinion on campus, they will have little opportunity to do so.

2. The Government Workplace

Despite occasional efforts to stretch the analogy between the workplace and the university in order to justify university hate speech regulations under antidiscrimination law,[218] "[t]he university setting is fundamentally different from the workplace."[219] The goals of the workplace, such as the efficient and effective execution of duties, are inherently different from a college's educational (and more existential) mission of developing reasoning, analytical skills, and independent thinking.[220] Also, while government workplaces are bastions of state action, employees return to their private residences at the end of the day (unlike the student returning to his university dorm). The goals and limited temporal and physical scope of the workplace, then, justify not extending the hostile speech environment framework from universities to the workplace absent extreme circumstances.

Perhaps because of these differences, courts have found that the contours of government employees' free speech rights are narrower in the workplace. Courts balance employee speech on matters of public concern with the government's interest in ensuring a well-run workplace.[221] However, speech not on a matter of public concern is not subject to balancing and an employee's First Amendment claim will fail.[222]

In either case, government employers can often restrict employee speech in ways that would be unconstitutional if applied to

[217] See Adams, supra note 10, at 178–79.
[218] E.g., Johnson, supra note 10, at 1863–64.
[219] Craddock, supra note 17, at 1086.
[220] Id. at 1086–87.
[221] See San Diego v. Roe, 543 U.S. 77, 82 (2004); Connick v. Myers, 461 U.S. 138, 142, 150 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
[222] See Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); *Roe*, 543 U.S. at 82–83.

other speakers.[223] *Dambrot v. Central Michigan University*,[224] which involved offensive speech in the university context, nicely illustrates the difference between free speech rights generally and employee speech rights. Dambrot, head coach of Central Michigan's basketball team, implored his student-athletes to play more like "niggers," which Dambrot claimed "connote[d] a person who is fearless, mentally strong and tough" in the context in which he used the word.[225] Once Dambrot's language became widely known, his contract was not renewed, and he filed suit.[226] In rejecting Dambrot's claim, the Sixth Circuit held that, while using the term "nigger" as defined by Dambrot was generally protected speech, the First Amendment did not require a government employer (here, the university) to accept his choice of words.[227]

Dambrot and cases like it demonstrate that employees' speech rights are significantly more constrained than the speech rights of citizens generally. This difference will typically justify the denial of a hostile speech environment claim to government employees. In situations where the First Amendment permits a government employer to terminate an employee for particular speech, it follows naturally that the employee's hostile speech environment claim—that is, the accusation that the employer has violated his rights by being hostile to that very genus of regulable speech—must also fail.

3. Room for Government Speech and Policies

The hostile speech environment claim is not meant to provide a general cause of action against government speech. To be clear, the cause of action is not based on the so-called "Jeffersonian proposition," whereby a citizen's taxes are "compelled support" that, when used in a manner disagreeable to the taxpayer, allegedly violate her freedom of conscience.[228] The hostile speech environment claim draws its justification from the freedom of speech and thought, not

[223] See *Garcetti*, 547 U.S. at 418; *Roe*, 543 U.S. at 80.
[224] 55 F.3d 1177 (6th Cir. 1995).
[225] Id. at 1180.
[226] Id. at 1181.
[227] Id. at 1190.
[228] Schwartzman, supra note 165, at 327. The Supreme Court has typically rejected this argument. Id. at 359.

notions of taxpayer standing and the right to exercise a heckler's veto against any policy with which one disagrees.

Only in extraordinary situations could an everyday citizen bring a hostile speech environment claim because she disagrees with the government's speech or policy, even if the government has gone to great lengths to disperse its message. As hulking and ubiquitous as the government is, its voice is simply not strong enough in the discourse of everyday life to establish the severity or pervasiveness necessary to create a hostile speech environment. There are simply too many alternative viewpoints. Of course, new applications of the hostile speech environment could arise as the state of the world evolves. For instance, one can imagine an Orwellian future in which the government disseminates its messages in an essentially unavoidable manner. That world, however, is not the one in which we presently reside.

Higher education is the arena in which a hostile speech environment claim is currently most needed and feasible.[229] The framework is narrow and circumscribed, but appropriate in colleges and universities because of their unique circumstances: we have adults who maintain vigorous constitutional rights in an environment, permeated by state action, that is supposed to promote the free exchange of ideas but in which there are strong incentives to regulate certain speech.[230] In this environment, the government is allowed to speak, but it cannot speak with the intent or consequence of effectively silencing constitutionally protected views.

What, then, remains of the government's ability to speak in the university setting? There are some illustrative examples. University statements of principle or aspirational goals do not run afoul of the Constitution[231] and would not be a factor in a hostile speech environment analysis, provided that such statements are not pervasively and invasively disseminated. Having and communicating goals is appropriate. Forcing students to assent to such goals, conditioning benefits or privileges on agreement with university principles, or mandating the posting of university policies in essentially private and unavoidable places like bathroom stall doors would run

[229] See supra Part II and Subsection III.A.3.
[230] See supra Part II and Subsection III.A.3.
[231] See Page & Hunnicutt, supra note 18, at 45.

a significant risk of creating a hostile speech environment. Adopting curricula that emphasize other cultures or diversity norms[232] poses no First Amendment problem, and a college's general disassociation from and matter-of-fact statement of disagreement with hate speech is equally permissible.[233]

Events and forums promoting equality and tolerance norms[234] are generally allowable so long as they are not required. Undertakings like diversity job fairs raise no issue, either. Yet if a public institution imposed "mandatory 'multicultural sensitivity-training'" on all new students,[235] hostile speech environment concerns would be raised, although, standing alone, that requirement might not give rise to a cause of action (even if a traditional First Amendment claim might apply).[236] Similar issues would arise if a school imposed counseling requirements on students who espouse hateful views,[237] as such a practice would both chill speakers and broadcast an aura of hostility towards like-minded thinkers and speakers.[238]

Two points are worth reiterating. First, the hostile speech environment framework does not bar government speech per se; it bars "severe or pervasive" government hostility, which at times can include government speech. Second, the hostile speech environment framework does not ban otherwise legitimate regulation of hate speech in the form of, for example, viewpoint-neutral time-place-manner restrictions or sanctions for conduct in conjunction with hate speech.

CONCLUSION

Certain propositions stand on solid ground. First, hate speech is, normatively, undesirable. Second, hate speech is constitutionally protected as a descriptive matter. Third, hate speech is pervasively regulated and disfavored in higher education. The first proposition

[232] See Syring, supra note 10, at 113.
[233] See Coleman & Alger, supra note 145, at 128–29.
[234] See, e.g., Johnson, supra note 10, at 1867.
[235] See Syring, supra note 10, at 113 (noting a requirement at Columbia University, a private institution).
[236] See Corbin, supra note 10, at 1012–15 (relying on the right against compelled listening to underpin the illegality of state-mandated diversity training).
[237] See, e.g., Page & Hunnicutt, supra note 18, at 52; Sarabyn, supra note 101, at 403–04.
[238] See Sarabyn, supra note 101, at 410.

raises moral questions, while propositions two and three together raise legal questions entirely separate from morality.

Perhaps because of the gravitational force of proposition one, the academic literature and legal analysis thus far has consisted of sparring about whether hate speech *should* be constitutionally protected. This Note takes little interest in that debate. Instead, the question driving this Note has been, "If hate speech is constitutionally protected but is being regulated, and we take our Constitution seriously, then what are we to do?" One response to that question might be, "what we are already doing"—that is, that current legal mechanisms suffice to protect speech. This Note shows that, for a variety of reasons, in the realm of higher education such an answer cannot stand if we are truly committed to protecting all constitutionally protected speech, not just speech with which we agree. It remains "no more permissible for government to impose as orthodoxy what most consider enlightened thinking than it is to impose currently unpopular views."[239] As a result, the hostile speech environment claim must step in to do what public colleges and universities frequently have not: protect students' First Amendment rights.

[239] Kamenshine, supra note 167, at 1138.

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