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Saving the Space: How Free Speech Zones on College Campuses Advance Free Speech Values

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"The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

– *Justice Arthur J. Goldberg*[1]

INTRODUCTION

On March 2nd, 2019, President Donald Trump announced his intention to issue an executive order that would force colleges to "guarantee" free speech rights for their students.[2] On March 21st, the President did in fact issue an order to this effect.[3] While there is likely no meaningful legal effect to the order, in that it only holds schools to standards to which they were already held,[4] it is

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1. Cox v. Louisiana, 379 U.S. 536, 554 (1965).

2. Michael D. Shear, *Trump Says He Will Sign Free Speech Order for College Campuses*, N.Y. TIMES (Mar. 2, 2019), https://www.nytimes.com/2019/03/02/us/politics/trump-free-speech-colleges.html [https://perma.cc/Q53Q-HAYU].

3. Susan Svrluga, *Trump Signs Executive Order on Free Speech on College Campuses*, WASH. POST (Mar. 21, 2019), https://www.washingtonpost.com/education/2019/03/21/trump-expected-sign-executive-order-free-speech/?utm_term=.ec25bc47c1f9 [https://perma.cc/KMD5-TZMF].

4. *See* Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER ED (Mar. 22, 2019), https://www.insidehighered.com/news/2019/

nevertheless an indication of a popular point of contention: that college students, especially conservatives, are being stripped of their free speech rights on campuses across the nation.[5] While the merits of such a claim are up for debate,[6] there are other issues involving free speech on campus that have nothing to do with school administrators.

University campuses have been the sites for many pitched political battles in the past few years. In February of 2017, "provocateur" Milo Yiannopoulos was invited to speak at the University of California, Berkeley, by the school's College Republicans.[7] However, Yiannopoulos was unable to go through with his speech because the event was disrupted by violent protestors.[8] Fires were set, windows were broken, and supporters were attacked; all told, the school incurred over $100,000 in property damage.[9]

In March of the same year, controversial author Charles Murray was invited to speak at Middlebury College in Vermont.[10] Murray is known for co-writing the 1994 book *The Bell Curve*, which argues in part that the class structure in America is predominately shaped by IQ rather than other factors such as

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03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk [https://perma.cc/P5MX-3QT2].

5. Osita Nwanevu, *Trump's Free-Speech Executive Order and the Right's Fixation on Campus Politics*, NEW YORKER (Mar. 22, 2019, 2:18 PM), https://www.newyorker.com/news/current/trumps-free-speech-executive-order-and-the-rights-fixation-with-campus-politics [https://perma.cc/W5H5-2FTM].

6. For a brief, reasoned discussion of free speech issues from an opponent of speech regulation, see Robert Shibley, *Is There a Free Speech "Crisis" on Campus?*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Aug. 13, 2018), https://www.thefire.org/is-there-a-free-speech-crisis-on-campus/ [https://perma.cc/LF77-RBFZ].

7. Madison Park and Kyung Lah, *Berkeley Protests of Yiannopoulos Caused $100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 PM), https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html [https://perma.cc/J9HD-DZTV].

8. *Id.*

9. *Id.*

10. Middlebury is a private university. This paper will focus solely on public universities for purposes of a constitutional discussion; this example is provided to show another instance of violence sparked by the identity and ideas of a speaker on a college campus.

education, upbringing, or socioeconomic status of one's family.[11] That argument is considered controversial, because if class structures are determined almost entirely by one's intelligence, and class structures are sharply divided along racial lines in the United States, then it necessarily follows that Murray believes some races are naturally "smarter" than others.[12] After disruptions by students in the crowd, Murray had to be escorted to another room to deliver his speech via live stream.[13] At the conclusion of the event, Murray and Middlebury professor Allison Stanger were heckled, trapped, and physically assaulted by protestors outside of the venue.[14]

Perhaps the most infamous of these selected events is the "Unite the Right" rally which took place in Charlottesville, Virginia in August of 2017. Although the more notorious events took place on Saturday, August 12th, the events which concern this paper took place the prior evening on the campus of the University of Virginia.[15] Supporters of the rally met on the university's campus, ignited tiki torches, and marched across campus where they

11. *Charles Murray*, AM. ENTERPRISE INST., https://www.aei.org/scholar/charles-murray/ (last visited Sept. 26, 2019); Natalie Goodnow, *'The Bell Curve' 20 Years Later: A Q&A with Charles Murray*, AM. ENTERPRISE INST. (Oct. 16, 2014, 1:57 PM) https://www.aei.org/publication/bell-curve-20-years-later-qa-charles-murray/.

12. Goodnow, *supra* note 11. Murray claims to be "agnostic" about whether intelligence is a result of genetics, environment, or some combination of both, but showed his true colors when he said "[w]e're not talking about another 20 years before the purely environmental position is discredited, but probably less than a decade. What happens when a linchpin of political correctness becomes scientifically untenable? It should be interesting to watch. I confess to a problem with *schadenfreude*." *Id.*

13. Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO (May 28, 2017), https://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195 [https://perma.cc/E2MB-VUET]; Sasha Goldstein, *'Mob' Attacks Middlebury Prof and Controversial Speaker Charles Murray*, SEVEN DAYS VT. (Mar. 4, 2017, 11:57 AM), https://www.sevendaysvt.com/OffMessage/archives/2017/03/03/mob-attacks-middlebury-prof-and-controversial-speaker-charles-murray [https://perma.cc/Y5S2-SRY9].

14. Goldstein, *supra* note 13.

15. Michael Bragg, *Sullivan: UVa Expected Friday March, but Details Changed*, DAILY PROGRESS (Aug. 15, 2017), https://www.dailyprogress.com/news/local/sullivan-uva-expected-friday-march-but-details-changed/article_4da25544-8224-11e7-b698-2ba29675c95d.html [https://perma.cc/4347-RTGH].

eventually clashed with counter-protestors at the Thomas Jefferson statue.[16] University security took a rather hands-off approach to the situation, despite being aware of the group's intent to come to campus and use torches (although they were misled about exactly where on campus the group would be).[17]

What could these schools have done to prevent violence from erupting on their campuses? One easy answer jumps out immediately: disallow controversial speakers and groups from coming to campus. Of course, for public universities, that would violate current First Amendment jurisprudence as it would be a content-based prior restraint on speech.[18] The next easy answer, then, is disallow *all* outside speakers and groups from coming to campus. Better yet, just disallow all speaking events and demonstrations in general, so that there is no opportunity for a crowd to get worked up and violent. The problem for public universities is that their administrators are state actors, meaning they are subject to the commands of the Constitution.[19] However, not all publicly owned property is always accessible to the public, nor for all purposes. In fact, quite the opposite: accessibility to government property is managed in a way so that the government can fulfill the purposes for which said property was set aside in the first place.[20] This concept has been embodied in the "public forum doctrine" of First Amendment jurisprudence.

One way that schools have sought to effectively manage speech on their campus is to establish "free speech zones." A "free speech zone" (or area) is a place on a college campus, typically an open, outdoor space, that is set aside by the university as a place for speech and other expression.[21] Although dubbed "free speech zones," a university may still subject speech and expression in these

16. *Id.*

17. HUNTON & WILLIAMS LLP, INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 1, 116–119 (2017), https://www.policefoundation.org/wp-content/uploads/2017/12/Charlottesville-Critical-Incident-Review-2017.pdf [https://perma.cc/A66D-H8EQ].

18. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130, 134 (1992).

19. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

20. Adderley v. Florida, 385 U.S. 39, 47–48 (1966).

21. *See* Jennifer R. Huddleston, Note, *Free Speech in the Age of Political Correctness: Removing Free Speech Zones on College Campuses to Encourage Civil Discourse*, 8 ALA. C.R. & C.L.L. REV. 279, 280–81 (2017).

areas to time, place, and manner restrictions.[22] These "zones" are controversial for a number of reasons. Calling an area a "free speech zone" but nevertheless subjecting speech in said area to a variety of restrictions seems like the kind of doublespeak that would have George Orwell turning in his grave. Opponents of these zones contend that they are used not to set aside areas for students to express themselves, but rather to restrict speech and expressive rights in all other parts of campus outside of the free speech zone.[23] Opponents also claim that universities are meant to be places for students to have their ideas challenged, and if administrators continue to implement policies which restrict student speech, then students will be too sheltered and will not know how to confront uncomfortable or even dangerous ideas.[24] Another concern lies with allowing university administrators to allocate the use of those areas, as they are generally perceived as being friendly only to left-leaning ideas.[25] Some commenters have asserted that free speech zones are unconstitutional period.[26]

This Comment will argue that free speech zones on college campuses can be legally created by university administrators so long as they are implemented within the existing constitutional framework. On the other hand, it will argue that if a university implements a free speech zone policy that severely limits speech and expression in other open, outdoor areas of campus, that policy runs afoul of the Constitution. It will also demonstrate that free speech zones, if managed properly, can help advance the important goals of promoting vigorous debate, ensuring students are exposed

22. *See* Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 115, 117 (2018).

23. *See, e.g.*, Ronald Bailey, *Speakers Cornered*, REASON (Feb. 5, 2004), http://reason.com/archives/2004/02/05/speakers-cornered [https://perma.cc/JR9H-DDHS].

24. *See* Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/ [https://perma.cc/9TQT-KHQ7].

25. *See* Scott Jaschik, *Professors and Politics: What the Research Says*, INSIDE HIGHER ED, (Feb. 27, 2017), https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means [https://perma.cc/335L-T64V].

26. *See* Hutchens & Fernandez, *supra*, note 22, at 105; Huddleston, *supra*, note 21, at 281–82.

to a diverse range of ideas, and protecting students and speakers from violent backlash. Following this Introduction, Part I will provide the current legal framework that governs public university campuses and restrictions of speech and expression thereon, along with an example of a well-crafted spatial expression regulation. Part II will discuss how properly implemented free speech zones are more protective of free expression and capable of advancing First Amendment rationales than critics suggest. Ultimately, this Comment stands for the idea that given the realities of speaker practices, political polarization, and campus life, campus administrators are left with a difficult choice regarding expression on their campuses, and that free speech zones and other spatial policies are a viable solution resting between the alternatives of limiting speech to the greatest extent possible or standing aside while disorder reigns.

I. THE PUBLIC FORUM DOCTRINE AND UNIVERSITY CAMPUSES

A. *Origins of the Doctrine*

Although the right to free speech and expression is considered one of the most important ideals of American society, the current understanding of freedom of speech on government owned property has not always been the dominant view. In the late nineteenth century, the United States Supreme Court (the Court) in *Davis v. Massachusetts* cemented the view that the government as property owner and manager had every right to "absolutely or conditionally . . . forbid public speaking" on said property.[27] Within just a few decades, however, critical societal attitudes about property which previously justified such a holding began to change.[28] By 1939, the Court in *Hague v. Committee for Industrial Organization* pivoted from allowing a legislature to "absolutely or conditionally" prohibit speech on public property to not allowing the government to forbid certain groups from engaging in the same type of activity that was otherwise permitted in a given place.[29] Despite being a two-justice

27. Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

28. *See* David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 COMM. L. & POL'Y 383, 396-401 (2011).

29. *See* 307 U.S. 496, 505–06 (1939) (Roberts, J., plurality opinion); *see also* Allen, *supra* note 28, at 400–01.

plurality opinion, one can find the quote which became the basis of the modern public forum doctrine in *Hague*, where Justice Owen Roberts declared "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[30]

Interestingly, *Hague* did not have occasion to overturn *Davis*.[31] The property at issue in *Davis*, the Boston Common, "was absolutely under the control of the legislature" with regulations aimed at many activities (not just ones concerning civil rights) to ensure "enjoyment in parks."[32] Thus, the plaintiff had no right to use the property except as permitted.[33] On the other hand, the policy at issue in *Hague*, which forbid labor union members from holding meetings in outdoor spaces, was directed *only* at the exchange of ideas and did not have the purpose of maintaining the peace or otherwise ensuring certain uses for specific public places; thus, it could not withstand the constitutional challenge.[34] Although it seems like the town could simply have limited access to the public places to ensure "comfort or convenience in the use of streets or parks," Justice Roberts implied that even if maintaining order was the purpose of the town's permitting scheme, the labor union could still have held its meetings in the same manner and the same place when he noted that the union members were at all relevant times "acting in an orderly and peaceful manner."[35] The *Hague* decision can thus be seen as the progenerate of the idea that in certain places, the government *must* allow access to the public for expressive conduct.[36]

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30. *Hague*, 307 U.S. at 515. Justice Roberts went on to add that these kinds of uses have "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* For an insightful explanation of how the Court could have concluded as it did in *Davis* considering Justice Roberts' strong language used just forty years later, see Allen, *supra* note 28, at 388–399.

31. *Hague*, 307 U.S. at 515.

32. *Id.* at 514–15 (internal quotation marks omitted).

33. *Id.* at 515.

34. *See id.* at 516.

35. *See id.* at 504–05, 515–16.

36. This has been called the "guaranteed access" rationale of public fora. *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1214 (19th

The decision in *Hague* was not based solely on the fact that the union members could not have their rights to speech and expression abridged under the guise of maintaining public spaces, but was also partially founded on the fact that permits were needed to use the streets or parks for expressive conduct and such permits could be granted or denied on the "mere opinion" of the town's Director of Safety.[37] That part of the ruling was reaffirmed a decade later in *Niemotko v. Maryland*, where the Court found that a town "practice" which vested "all authority to grant permits" for using the park at issue in city administrators was invalid on its face for failing to articulate a "narrowly drawn, reasonable and definite standard for the officials to follow."[38] The thinking behind the prohibition against unbridled discretion—that such discretion essentially amounts to a "prior restraint on . . . speech" because of its potential to be arbitrarily wielded[39]—is part of the basis for another rationale of the public forum doctrine: "equal access."[40]

B. *Current Framework*

To begin the discussion of the legal framework within which state entities must act, it is important to keep in mind the kinds of speech which are afforded no constitutional protection. University administrators will, of course, want to minimize or eliminate these kinds of speech and may do so without controversy as they are already outside of the Constitution's protections. The first kind of unprotected speech is "fighting words," or face-to-face words which are likely to elicit a violent response from a reasonable person.[41] Another category of unprotected speech is incitement, or speech which has the purpose of and is likely to elicit a violent or otherwise lawless response from the listener.[42] Lastly, the Court has noted that student-on-student harassment in an educational setting is prohibited by Title IX when it is "so severe, pervasive, and objectively offensive" that it effectively prevents the victim from

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ed. 2016); *see also* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13–19 (1965).

37. *Hague*, 307 U.S. at 516.
38. 340 U.S. 268, 271–72 (1951) (internal quotation marks omitted).
39. *See id.* at 271.
40. *See* SULLIVAN & FELDMAN, *supra* note 36, at 1214.
41. Chaplinksy v. New Hampshire, 315 U.S. 568, 573–74 (1942).
42. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

obtaining equal access to an educational opportunity.[43] It is important to note, however, that one-off comments, even those targeting a member of a protected group, will not qualify as "harassment."[44] Rather, there must be a "systemic effect" on the victim in regards to inhibiting his or her access to an educational program or opportunity.[45]

The public forum doctrine dictates in what ways campus administrators may regulate otherwise protected forms of speech. The Court first laid out a comprehensive scheme for forum analysis in *Perry Education Association v. Perry Local Educators' Association*.[46] The Court does an analysis of the forum to determine in which category of forum it fits; the first of these categories is traditional public fora, which are those places that have "by long tradition," or "immemorially" been used for assembly and expression.[47] Speech in these fora may only be limited with content neutral time, manner, and place restrictions which are narrowly tailored to serve a significant government interest while leaving available "ample alternative channels of communication."[48] Importantly, "the government may not prohibit all communicative activity" in traditional public fora.[49] Traditional public fora are the very embodiment of the idea that in some places, the government is required to "guarantee access" for its citizens to gather, debate, and otherwise express themselves.[50]

The next category of public forum is the designated public forum, which is a place that the government "has opened for use by the public as a place for expressive activity."[51] Once the area has been opened for expressive activity, the government must hold said venue open for all who wish to use it as long as it is still open to expressive conduct, subject to the same constitutional requirements as traditional public fora.[52] The key to the designated forum is that

43. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999).
44. *Id.* at 651–52.
45. *See id.* at 652–53.
46. 460 U.S. 37 (1983).
47. *Id.* at 45.
48. *Id.*
49. *Id.*
50. *See* SULLIVAN & FELDMAN, *supra* note 36, at 1214.
51. *Perry Educ. Ass'n*, 460 U.S. at 45.
52. *Id.* at 45–46.

it actually must be *designated* as a place for expressive conduct, in contrast with traditional fora which exist merely as a result of their physical characteristics.[53] There are two "sub-sets" of designated fora. The labelling of the different forum types within the doctrine has been the subject of some confusion and inconsistency.[54] For clarity's sake, this Comment will speak in terms of "designated" and "limited" public fora. The former is when a public place is opened for all kinds of expressive conduct.[55] A limited public forum, on the other hand, is one that has been designated as a public forum, but only as to certain uses, such as use by certain groups of people, certain kinds of activity, or the discussion of certain topics.[56] As for restrictions on the limited variety of public fora, the government may impose reasonable, content-neutral restrictions.[57] Both designated and limited public fora can be understood as coming from the "equal access" rationale of the public forum doctrine in dictating that once the government has opened a place to expression, or certain kinds of expression, anyone may come to engage in said types of expression in those places regardless of their viewpoint.[58]

Lastly is the "nonpublic" forum, or a property which is owned by the government that is not for expressive conduct and has not been designated for expressive conduct.[59] The rules regarding this category of government property recognize the fact that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[60] The government operates a wide variety of properties, so this is a sensible rule which grants the government the authority to ensure its property is used

53. *See id.*

54. *See* Bowman v. White, 444 F.3d 967, 975–76 (8th Cir. 2006) (discussing how different courts at different times have used the same label to mean different forum types, or different labels to mean the same forum type).

55. Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661, 679 n.11 (2010).

56. *Id.* (citing Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)); *Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

57. *Christian Legal Soc'y*, 561 U.S. at 679 n.11.

58. *See* SULLIVAN & FELDMAN, *supra* note 36, at 1214.

59. *Perry Educ. Ass'n*, 460 U.S. at 46.

60. *Id.* (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)) (internal quotation omitted).

for the purposes for which it was initially set aside.[61] The government can enforce content neutral time, manner, and place restrictions as necessary to ensure this goal, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[62]

In *Widmar v. Vincent*, decided before *Perry*, the Court had occasion to discuss public fora specifically in the public university context. It was noted that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[63] When the Court used the term "public forum," it almost certainly meant "traditional public forum," as evidenced by the fact that the Court referred to this category simply as "public forum" in *Perry*.[64] In the same footnote, however, the Court explained that although students are entitled to their First Amendment rights on campus, the school context is not to be ignored.[65] So, although different physical locations on a public university campus may *look* like a traditional public forum, they "differ[] in significant respects" from these fora because the property on which they reside is dedicated for the purpose of education.[66] Thus, university officials can impose "reasonable regulations" on speech and expression on their campuses which are "compatible" with furthering their educational mission.[67] School administrators may also differentiate between students and non-students in deciding whether and when to grant access to campus facilities.[68] This differentiation of allowed users based on group membership was explained in *Perry* to be a way of creating a limited public forum.[69]

61. Adderley v. Florida, 385 U.S. 39, 47 (1966).
62. *Perry Educ. Ass'n*, 460 U.S. at 46.
63. Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981).
64. *See Perry Educ. Ass'n*, 460 U.S. at 45; *Widmar*, 454 U.S. at 267 n.5.
65. *See Widmar*, 454 U.S. at 267 n.5.
66. *Id.*
67. *Id.*
68. *Id.*
69. *See Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

C. *Constitutionally Permissible Free Speech Zones*

Based on the public forum framework, school administrators are afforded especially wide latitude in designating spaces on their campus as different types of public fora. Any regulations on campus speech seemingly only need to be "reasonable" and "compatible with [the school's educational mission]."[70] That requirement is a far cry from the strict scrutiny required for traditional public fora. At first blush, it might seem that since university campuses have specifically been differentiated from traditional public fora, and traditional public fora are the only kinds serving the "guaranteed access" rationale of the public forum doctrine, that a school administrator could simply bar all expressive conduct on its campus.[71] This, after all, would be granting "equal access" (or non-access) to all people in a content neutral manner. However, it would be hard to find one who agrees that a flat ban on speech and expressive conduct on campus is either "reasonable" or "compatible" with the mission of education.[72]

An excellent example of a free speech zone-like policy[73] is the policy concerning outdoor areas at the University of Virginia. The detailed and comprehensive policy provides that students, student groups, and university employees may "utilize outdoor University property for public speaking or distribution of literature, so long as they do not impede normal operations or obstruct pedestrian or vehicular traffic."[74] Non-students may use the outdoor spaces so long as they reserve a given space at least one week in advance (but

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70. *Widmar*, 454 U.S. at 267 n.5.

71. *See Perry Educ. Ass'n*, 460 U.S. at 45–46.

72. *See id.* at 46; *Widmar*, 454 U.S. at 267 n.5. This proposition is leaving aside outliers such as the Virginia Military Institute (VMI), a military-style academy, which almost certainly *does* have an academic interest in suppressing student expression. *See Regimental System*, VA. MIL. INST., https://www.vmi.edu/cadet-life/cadet-leadership-and-development/regimental-system/ [https://perma.cc/N5XX-HSQ3] (last visited Sept. 15, 2019). The stated proposition applies to other run-of-the-mill public colleges and universities which do not have military-grade discipline as part of their core academic mission.

73. That is, it is not called a free speech zone, but mirrors in many ways the kinds of policies decried by critics.

74. *PRM-017: Use of University Facilities or Property and Limits on Direct Solicitation and Advertising*, U. VA. (Aug. 16, 2019), https://uvapolicy.virginia.edu/policy/PRM-017 [https://perma.cc/HZ8J-V99K].

not more than four weeks), with reservations being "allocated on a space-available basis with priority given to student groups/organizations and [students and employees]."[75] The policy prohibits people from disrupting invited speakers or their listeners.[76] Advertising, sales, and solicitation are prohibited, except for student groups raising funds, which is only permitted in some of the outdoor spaces.[77] When a speaker reserves one of the outdoor areas, they are allocated a two-hour block; non-students are limited to one two-hour block per week and once a non-student has one outdoor space reserved, no other outdoor spaces may be reserved by non-students during that two hour timeslot.[78] Each outdoor space has a maximum number of people for which it may be reserved.[79] Notably, the policy does not attempt to regulate expression in any outdoor space besides those expressly subject to the policy.

What the above-detailed policy represents is a set of rules that provides an advantage to both speakers and administrators in instances of controversial speakers. Take, for example, the "Unite the Right" rally and how the events on the University of Virginia's campus may have played out differently with this policy in place. If the rally-goers wanted to express themselves on campus, they would simply have needed to reserve a relevant space at least one week in advance, something that would have been relatively easy given the rally had been planned for that weekend some time in advance.[80] They could have then arrived on campus and proceeded to their reserved space and engaged in (subject to other campus rules, such as the open-flame policy[81]) whatever sort of expression they so desired, so long as they did not pass into the realm of unprotected speech. The policy would protect the rally-goers, since any opponents who attempted to interrupt them would be subject to discipline by the school. The advance notice provided to the

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. HUNTON & WILLIAMS LLP, *supra* note 17, at 110.
81. *SEC-032: Open Burn and Open Flame Operations at the University of Virginia*, U. VA. (Sept. 13, 2017), http://uvapolicy.virginia.edu/policy/SEC-032 [https://perma.cc/JV73-SJBG].

University would have allowed for the campus police to oversee the event.

In this rose-colored version of events, administrators would be at least satiated by being apprised of the rally-goers' arrival well in advance. Perhaps they would face backlash for allowing the presence of such a hateful group on campus, but they could defend the decision by saying that the speakers complied with the University policies, and that the University was fulfilling its commitment to supporting free expression. If things did not go so swimmingly, the University could take recursive action. If the speakers flouted, for example, the open-flame policy, or marched across campus (i.e., outside of their reserved space), then the University could declare the assembly "unlawful" and order the arrest or removal from campus of the rally-goers.[82] If there were too many rowdy or violent counter-protestors for campus police to handle, they could reschedule or relocate the event perhaps to an area of campus more easily secured, such as an auditorium.[83]

This section has covered how a university can create a free speech zone within the bounds of the Constitution. While it is fairly clear that that can be done as a legal matter, it is less clear at this point that doing so is good policy. It is important to keep the legal framework in mind when examining whether it is wise for a university to take steps similar to those taken by the University of Virginia in crafting spatial expression policies.

II. HOW FREE SPEECH ZONES ADVANCE FIRST AMENDMENT RATIONALES

A. *First Amendment Rationales*

The First Amendment is at once a great contribution to individual liberties and something of a puzzle. The text (relevant

82. *See* HUNTON & WILLIAMS LLP, *supra* note 17, at 120.

83. In the fall of 2017, Milo Yiannopoulos returned to U.C. Berkeley where he demanded to speak in a wide-open outdoor space, but university officials wanted to move him inside because of the fear of a repeat of his first visit; Yiannopoulos refused, but was at least relocated to a less-open outdoor space which was more easily secured, where he delivered his speech more or less without incident. Andrew Marantz, *Fighting Words: How Social-Media Trolls Turned U.C. Berkeley into a Free-Speech Circus*, NEW YORKER (July 2, 2018), https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus [https://perma.cc/MWB2-WDVP].

to this discussion) merely provides that "Congress shall make no law . . . abridging the freedom of speech."[84] Although one who reads these words might understandably think that Congress cannot make *any* law which would "abridge" freedom of speech in any way, they would be decidedly wrong. Nobody could contend that the First Amendment absolutely prohibits limitations on speech. Just what the government may do in terms of "abridging" speech has been the subject of considerable debate. Arguments for or against regulations on speech and expression are generally grounded in three rationales: the "marketplace of ideas" theory, the need for democratic self-government, and the promotion of individual autonomy.[85]

The marketplace of ideas theory is perhaps of most concern to the debate about speech regulations on campus. As the Supreme Court itself noted, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[86] The thinking goes that ideas will "compete" with one another, and the truth, embodied in the "better" ideas, will carry the day by "winning" the support of the marketplace listeners. Much of modern-day marketplace theory can be attributed to John Stuart Mill, who posited that both "truth" and "falsehoods" are valuable in the marketplace, because the latter can steer people to the truth by being exposed for what it is and being soundly defeated by the former.[87] Accepting that assumption as true, the marketplace must be free of government regulation so that it can be as wide-open as possible to allow for all ideas to come and compete within.

The guarantee of free speech is also explained by the need of the people to govern themselves in a democracy. This rationale implies that "political speech" or speech of "public concern" is more valuable than other forms of speech and should be afforded greater protection. The importance of self-government perhaps best explains the Court's decision in *New York Times v. Sullivan*, where it "consider[ed] this case against the background of a profound national commitment to the principle that debate on public issues

84. U.S. CONST. amend. I.

85. SULLIVAN & FELDMAN, *supra* note 36, at 935.

86. Healy v. James, 408 U.S. 169, 180–81 (1972).

87. *See* SULLIVAN & FELDMAN, *supra* note 36, at 935–36 (discussing JOHN STUART MILL, ON LIBERTY (1859)).

should be uninhibited, robust, and wide-open."[88] The self-government theory explains the Court's strong desire to protect *political* speech, which it does by making such speech immune from incurring civil liability (which would be a form of state action inhibiting said speech). Thus, the rationale of *Sullivan* demonstrates that the first two free speech arguments can overlap considerably in that the "marketplace" is held open and free of restrictions *especially* for "political speech." One can therefore glean that there is a sense that political speech is more valuable to the marketplace and thus attempts to keep it out of the marketplace are suspect. Interestingly, affording protection for political speech because of its assigned higher value can be characterized as a "regulation" on the marketplace, in that courts ensure that non-political speech may not "win" over political speech.[89]

Lastly, and of significant concern to the college setting, is the notion that freedom of speech ensures the people expressive and cognitive autonomy. As Justice Brandeis declared in his resonant and stirring concurrence in *Whitney v. California*, the founders "valued liberty both as an end and as a means," and that "the final end of the state was to make men free to develop their faculties."[90] The autonomy rationale almost speaks for itself in that there is just something fulfilling about being able to think and act for oneself; indeed, there is almost no end to the theme of autonomy and the self-fulfillment that accompanies liberty in literature,[91] film,[92] and music,[93] all of which tend to reflect what humans hold dear to their hearts. The importance of *dissent* in and of itself can be explained entirely by the autonomy theory, in that we find it important to

88. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

89. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 264–66 (1992).

90. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

91. *See, e.g.*, RAY BRADBURY, FAHRENHEIT 451 (1953); GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

92. *See, e.g.*, BRAVEHEART (Icon Productions & The Ladd Company 1995); THE MATRIX (Warner Bros. 1999).

93. *See, e.g.*, BEASTIE BOYS, *(You Gotta) Fight for Your Right (to Party!)*, *on* LICENSED TO ILL (Def Jam Records 1986); RAGE AGAINST THE MACHINE, *Killing in the Name*, *on* RAGE AGAINST THE MACHINE (Sony Music Entertainment Inc. 1992).

allow people to be contrarians if they so desire, even if it is just for the sake of their individual liberty.[94] Dissent, of course, plays an important role in self-government, and when dissent is of a political nature, it will be assigned a higher value even if it is unpopular. The protection of dissent and other unpopular ideas is at the heart of the famous (and perhaps even cliché) quote, "I disapprove of what you say, but I will defend to the death your right to say it,"[95] oft employed by those opposed to what they perceive to be some stifling of speech.

One more rationale which plays a part in explaining constitutional protection for free speech is the general distrust of government.[96] That rationale scrutinizes both the government's ability to regulate speech and its motivation to do so.[97] That is, the government lacks the ability to adequately and effectively regulate speech in a way that is sufficient to serve the previously discussed rationales to the maximum extent possible while not limiting what should be protected speech.[98] The government, especially in a democracy, also has a motivation to stifle the speech of its political opponents whether to protect its own policies from criticism or to simply punish dissenters; this author wishes that the latter concern could be described as cynical rather than realistic.[99] There are, however, ways of checking this concern without disallowing the government from partaking in any sort of speech regulation whatsoever.

B. *Competing Interest: Academic Freedom*

On one side of the scale in the debate of student free speech on college campuses is the academic freedom of school administrators. One might reasonably ask: How can "academic freedom" be used to regulate the actions of students and campus visitors *outside* of the classroom? This would be getting at an important point: when

94. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

95. S.G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1906) (internal quotation marks omitted).

96. SULLIVAN & FELDMAN, *supra* note 36, at 939–40 (quoting FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (Cambridge Univ. Press 1982)).

97. *Id.* (quoting SCHAUER, *supra* note 96, at 81).

98. *See id.*

99. *Id.* at 940.

examining actions which could be characterized in one way or another as restrictions on student speech imposed by school administrators, current jurisprudence calls for more deference to the administrator the more connected the restriction is to a classroom purpose, and more protection for speech the more attenuated the speech is from the classroom.

This sliding scale can be gleaned from the Court's decision in *Tinker v. Des Moines Independent Community School District*, wherein it stated that for "school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[100] The Court went further to say that, specifically outside the classroom setting, students "may express [their] opinions, even on controversial subjects . . . if [they] do so without 'materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."[101] Thus, high school students who wore black armbands to school to express their disapproval of the Vietnam war could not be punished for such expression.[102]

On the other end of the scale is *Hazelwood School District v. Kuhlmeier*, which involved the suppression of student written articles in a high school newspaper which was printed as part of a journalism class's curriculum.[103] The articles were removed from the regularly scheduled publication of the paper because they discussed the experience of some pregnant students and the impact of divorce on some students at the school.[104] The Court upheld the decision to delete these articles because they were merely "exercising editorial control over the style and content" of student speech in a way that was "reasonably related to legitimate pedagogical concerns," such as the danger of breaching the anonymity of pregnant students and concern for the material being

100. 393 U.S. 503, 509 (1969).
101. *Id.* at 512–13 (quoting Burnside v. Byars, 353 F.2d 744, 749 (5th Cir. 1966)).
102. *Id.* at 514.
103. 484 U.S. 260, 262–64 (1988).
104. *Id.* at 263–64.

inappropriate for younger students.[105] This latter standard affords much less protection to student speech than the *Tinker* standard based on the differing contexts (i.e., speech not materially related to the classroom and speech that is part and parcel of a journalism course).[106]

Those two cases involved high school students whereas this discussion is concerned with college students, who have (by and large) reached the age of majority by the time they set foot on campus as students. The debate regarding free speech zones is centered around speech outside of the classroom. Taken together, these two facts mean that college administrators have fewer legitimate reasons to regulate speech since they lose such justifications as those related to the age of students and pedagogical purposes used to justify the regulation in *Hazelwood*.[107] That does not mean that college administrators have *no* reason to regulate the happenings on their campus; however, their reasons are necessarily limited outside of the classroom context, which should ameliorate concern of overbearing restrictions.[108] While colleges can hardly be said to act *in loco parentis* for their students anymore,[109] what happens outside the classroom can certainly play a large part in a college's educational mission. School sponsorship and control of clubs, athletics, speakers, and other events are clear evidence that colleges have legitimate educational interests in a variety of activity outside of the classroom.[110] Schools often even have educational goals related to student housing.[111]

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105. *Id.* at 273–75.

106. *See id.* at 272–73.

107. *Id.* at 274–75.

108. *But see* discussion of VMI, *supra* note 72.

109. *See generally* Z.W. Taylor, *In Loco Parentis and the 21st Century U.S. Institution of Higher Education* (Sept. 27, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256516 [https://perma.cc/4AVS-ELRE].

110. *See, e.g.*, *University of Rhode Island Mission & Vision Statements*, U.R.I., http://www.gorhody.com/information/mission_statement [https://perma.cc/C6XX-NLSE] (last visited Apr. 6, 2019) (expressing the mission statement for the University of Rhode Island's athletic department, which includes "nationally recognized for creating champions in the classroom, in competition, and in life").

111. *See, e.g.*, *Living and Learning Communities*, U.R.I., https://web.uri.edu/housing/living-and-learning-communities/ [https://perma.cc/24KA-LE3Q] (last visited Apr. 6, 2019) (explaining the now-popular "living

Once it is accepted that college administrators have educational interests in a way that is virtually all-encompassing on campus—and even off campus for their students participating in school-sponsored activities such as athletics—then a desire to regulate speech in open, outdoor areas on campus becomes more understandable. Many goals could be articulated to support such regulation. To begin with, a school can provide an area that is guaranteed to be held open for expression (that is, they are "regulating" other conduct in this area by giving preference to expression). Requiring students to give advance notice of use of the area can facilitate orderly use by ensuring various people or groups do not attempt to use the area simultaneously if their uses would clash with one another. Such notice would also allow the school to prepare for uses which may attract negative attention from other students, perhaps in the form of a "heckler's veto" or other harassment, and ensure the students using the zone are not so impeded.

C. *Criticisms of Free Speech Zones*

Free speech zones have proved to be rather unpopular. They have drawn so much negative attention that some state legislatures have gone so far as to enact laws prohibiting schools from creating them.[112] There are two main arguments that have been advanced against the use of free speech zones. The first is that free speech zones are used in an effort to limit student expression to certain areas of a campus while disallowing most forms of expression in other open, outdoor spaces on campus.[113] While it is true that colleges have attempted to do this to some degree in tandem with the establishment of free speech zones,[114] the kind of free speech

and learning communities," where students are placed for on-campus housing based on their academic interests or program of study).

112. *See, e.g.*, COLO. REV. STAT. ANN. § 23-5-144 (West 2017); VA. CODE ANN. § 23.1-401.1 (West 2018). There is likely no meaningful legal effect to these laws since they do not define what exactly a "free speech zone" is.

113. *Free Speech Zones on America's Campuses*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 19, 2013), https://www.thefire.org/infographic-free-speech-zones-on-americas-campuses-2/ [https://perma.cc/8BHE-XB78].

114. In *Roberts v. Haragan*, defendant Texas Tech University argued that the entirety of its campus besides its established free speech zones were limited public fora so that any speech restrictions would be subject merely to a reasonableness standard. *See* 346 F. Supp. 2d 853, 862 (N.D. Tex. 2004). The

zone advocated for in this article would not make an attempt at any sort of Draconian limits on student expression. Further, First Amendment jurisprudence already protects against unreasonable limits on speech on government property based on the property's designated use, so attempts to ban all expression outside of a designated free speech zone are almost certainly unconstitutional.[115] The second argument is that free speech zones represent an unwise restriction on student speech that will necessarily limit an open and productive student discourse.[116] Critics argue that free speech zones and other attempts to regulate student speech are incompatible with the idea that "universities are meant to be 'bastions of free thought' which prepare students for life in the larger society."[117] However, as discussed below, a well-crafted free speech zone policy is not inconsistent with that goal.

D. *A Constitutional Free Speech Zone Advances First Amendment Rationales*

When a free speech zone is created in the right way with the right goals in mind, it can advance all three free speech rationales discussed above (marketplace theory, self-government, and autonomy) while limiting the concerns related to government speech regulations.

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school did not, however, make the free speech zone the *exclusive* area for speech and expression on campus as some have claimed. *Id.* at 856–57 (explaining that the plaintiff was prospectively going to be allowed to give a speech and distribute literature outside of the school's free speech zone). *But see* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 278–79 (2009) (discussing *Haragan* and stating the court "did not ultimately reach the question whether the limitation of the [plaintiff's] expression to the [free speech] gazebo area was unconstitutionally restrictive," presumably because the plaintiff was not limited to expressing himself in the free speech area).

115. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also* Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 500 (2005) (discussing that incompatibility of speech with the purpose of a forum is a prerequisite to regulating speech in the forum).

116. *See* Huddleston, *supra* note 21, at 281.

117. *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 504 (2009).

1. Criticisms of Speech Regulations Over-Rely on Marketplace Theory

Returning to the criticisms of free speech zones outlined above, it is clear that such critiques rely only on the marketplace theory when arguing that free speech zones do not serve the goals of the First Amendment. As one commenter put it when expressly decrying the current cultural attitude towards campus speech, "more Americans must learn to conceptualize the university campus as a true marketplace of ideas."[118] However, forcing universities to be a "true marketplace of ideas" is certainly not something that is constitutionally required.

The "true" marketplace would mean a complete lack of government control, which is viewed as ideal from a libertarian perspective. However, this completely unregulated marketplace does not guarantee the furtherance of the self-government and autonomy rationales of the First Amendment. One author, in critiquing marketplace-centered free speech theories, writes that "[t]he crucial assumption in [marketplace] theory is that the protection of autonomy will produce a public debate that will be . . . 'uninhibited, robust, and wide-open.'"[119] It is important to note that "autonomy" in the preceding quote is referring to general liberty to exercise freedom of expression, so it is a different breed of "autonomy" than what is referred to when discussing the autonomy rationale. Thus, there is no distinction between the author saying that the most libertarian approach to free speech "prohibits government regulation" or that it "affords maximum protection of autonomy." As another commenter writes, "[m]arkets are generally good things, both for ordinary products and for speech. But when the legal creation of a market has harmful consequences for free expression—and it sometimes does—then we must reevaluate it in light of free speech principles."[120] Since there is nothing that requires a "true marketplace" approach to the First Amendment, regulations which promote the self-government and autonomy rationales should not only be permitted, but encouraged.

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118. *Id.* at 542.

119. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986).

120. Sunstein, *supra* note 89, at 277.

2. Adjusting the Market to Promote Self-Government and Autonomy

Under the public forum doctrine, there is already the idea of "guaranteed access" to a platform in certain outdoor spaces as embodied by traditional public fora. That guarantees that those spaces are "marketplaces" that will be held open by the government for expression. There are not traditional public fora on college campuses. However, the creation of a free speech zone can create a designated public forum for students. Even the staunchest opponents of free speech zones would agree that setting aside an area for expression is a good thing; where the key point of contention seems to lie is to what extent time, place, and manner regulations may restrict the use of the areas. So, while the designation of an area as one for expression is good in that it creates a "marketplace" for speech, how can (and should) that marketplace be regulated to ensure that it serves First Amendment rationales to the greatest extent possible?

From the outset, the designation of a space as a free speech zone is valuable for students because venues on a college campus are many students' primary and perhaps only place to meaningfully express themselves for most of the year.[121] In this way, outdoor spaces on a college campus can be viewed as a limited resource for the students, and there is nothing that compels a university to set aside an area for expression. Of course, if there is some open, outdoor area subject to no meaningful regulations, students *could* use it to express themselves, but then nothing would preclude a frisbee game from breaking out around a group of students engaging in expression. If a school does set aside an area for expressive purposes, then speech gets preferential treatment in this space over other uses. That provides students the closest thing possible to "guaranteed access" while ensuring schools can simultaneously meet their educational goals.

A free speech zone promotes the First Amendment value of self-government by providing a forum in which expression is given

121. This situates students differently from non-students, who are presumed (often erroneously) to have access to a variety of channels of communicating. *See* ZICK, *supra* note 114, at 57 (discussing how courts generally treat public places as "fungible" in considering alternative channels in light of spatial restrictions on speech).

preference to other uses. It also allows administrators to give preference to political expression, thus affording students an excellent opportunity to participate in the democratic process. Cultural forces against certain kinds of speech can be strong, and free speech zones can be used to ensure students expressing unpopular ideas are not forced out of open areas or shouted down while trying to express themselves therein. Diversity of thought is important to self-government, and counter-speech is one of the more effective ways of defeating bad or harmful ideas.[122] Free speech zones can be used to facilitate an effective discourse on given topics, perhaps by arranging uses or events which take differing viewpoints on the same topic close in proximity in time to one another.

Autonomy is served simply by giving students of all kinds ample opportunity to express themselves in a public place. Without a free speech zone, students may be limited in the ways they could do so while on campus. Most university students are in the middle of young adulthood, an important time in life for developing one's sense of self. Opening a free speech zone not only affords students a place to self-realize in a variety of ways, but by doing so, the school is putting its express approval on engagement in political speech. That could encourage students to develop a sense of civic responsibility by using and observing others use free speech areas to express themselves about matters of public concern.

There is an alternative way to give students "guaranteed access" to a place to speak on college campuses to consider; it could be done by forcing schools to treat their open, outdoor spaces like traditional public fora. One court has taken That approach. In *Roberts v. Haragan*, the United States District Court for the Northern District of Texas held that a university must treat any areas that, outside of a college campus, would be considered traditional public fora (such as park-like areas and sidewalks) as traditional public fora *for its students*.[123] Notwithstanding the issue that this holding deviates from the current state of the public forum doctrine, the decision has other problems in reference to student speech. The first is that such areas—when treated as traditional public fora—are just open, outdoor spaces, meaning that

122. *See* Majeed, *supra* note 117, at 517–19.

123. *See* 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004).

a university need not give any sort of preference to speech or expressive conduct therein. Second, nothing requires a university to maintain the space in a way that gives it the physical characteristics of other traditional public fora; a school could easily change a park-like area into something else and thus evade the precepts of this theory.[124]

In addition, the approach in *Roberts v. Haragan* is inferior to the approach advocated for here because free speech zones ensure that the "marketplace" is not dominated by certain groups, individuals, or viewpoints. That is, a university that enforces a free speech zone policy in accordance with the principles discussed in this Comment will be able to provide a form of reinforcement for unpopular ideas that might otherwise be kept out of the marketplace altogether. As one (decidedly unpopular) idea-holder explained, "[t]he fact is, people with weird beliefs are never going to win, because there's not anything to back them up."[125] Some of the regulations that a university can impose include those which limit use of the zones to a maximum number of hours in a given week or month. When a university is on advance notice that a person or group wants to use the space for expressive purposes, it can provide "back up" by ensuring ahead of time that the space is open for them. Such regulations are especially useful for unpopular topics or viewpoints, which otherwise might be marginalized without some reinforcement by school administrators to keep time and space open for them.

3. Free Speech Zones Allow for Adequate Academic Freedom

Not only are free speech zones conducive to students' speech rights, but they also allow for a healthy amount of academic freedom in deciding how exactly to administer the zones. As mentioned above, it could be advantageous to an academic interest in comprehensive debate on public issues to situate planned speakers near each other in time. Conceivably, if an administrator

124. *See* ZICK, *supra* note 114, at 199–205 (discussing the grim trend of privatization of public places that "demotes" traditional public fora into private spaces where owners have a nearly unlimited right of exclusion).

125. DAVID K. SHIPLER, FREEDOM OF SPEECH: MIGHTIER THAN THE SWORD 66 (2015) (internal quotation marks omitted) (quoting Dan Kleinman, owner of a website which, somewhat ironically, advocated for the removal of controversial books from libraries because of concerns that schoolchildren might read them).

notes two students or groups that wish to express themselves from different viewpoints on the same topic, they might even invite the users to partake in a debate with one another. It would also be valuable to a school's educational mission to give preference to free speech zone users who wish to express themselves on political topics, which in turn serves First Amendment rationales as well. Administrators are best situated to ensure the fair and orderly allocation of uses of their own facilities, and a space on campus for expression can and should be no different.

Many educational interests go hand in hand with the First Amendment rationales discussed in the previous subsection. Educators have an interest in promoting self-government and encouraging students to exercise their autonomy to express themselves. These goals are best served, especially in reference to the limited number of open, outdoor spaces on college campuses, by designating a space specifically for expression and implementing rules which guarantee a fair and orderly allocation of the uses thereof. A school has an interest in having some notice of the intended uses of its facilities, and when it does have such notice, it can ensure such intended use is fulfilled. This is no different from what universities already do with other facilities such as athletic fields and auditoriums; while it is probably fine to use such facilities when no one else is around, when someone reserves them ahead of time, they ought to be held open by the school for those that reserved them.

4. Concern Regarding Government Regulation of Speech

Nobody can be blamed for being skeptical of any government agent overseeing the way in which citizens express themselves. However, free speech zones are content-neutral regulations of expression. One still might be concerned, however, about a disproportionate effect on certain kinds of content, or worse, certain kinds of viewpoints.[126] That is, some regulations that are on their face content neutral may nevertheless have an impact which weighs heavier on some viewpoint or content, perhaps by prohibiting all speech on billboards in a town when all of the billboards are used by political activists working towards some

126. *See* Langhauser, *supra* note 115, at 494 (calling viewpoint-based restrictions more "pernicious" than content-based restrictions).

unpopular goal.[127] It is not terribly hard to imagine, then, that on a college campus, placing restrictions on speech might lead to a disproportionate effect on conservative speech at the hands of the largely-liberal university bureaucracy.

These concerns are ameliorated by several factors. A well-crafted free speech zone policy should have well-defined rules about the permissible manner and time for use. That will eliminate the danger that administrators might ban some users with whom they disagree because of the violation of some ill-defined rule.[128] The Supreme Court has also already made clear that speech regulations which vest too much discretion in a government agent are not permissible.[129] Indeed, all administrators need do to serve their own interest is reserve the right to reschedule planned uses to different times because of conflicts or other educational interests; if an administrator reserves the right to cancel a planned use or to reschedule a desired use to any time with short notice, then such a policy would already run afoul of the constitution.[130] Administrators should also post schedules of planned uses publicly so that all can see how the site is used. The observation of a healthy amount of transparency can also work against concerns of viewpoint discrimination.

5. Free Speech Zones Will Not Unduly Restrict Speech in Other Outdoor Areas

It is important to make it clear how free speech zones affect students' rights in other outdoor spaces on campus. To reiterate, a school designating a space or spaces as free speech zones does *not* mean that students lose their expressive rights on other outdoor spaces on campus.[131] As discussed above, any regulations that schools try to impose on the areas other than the free speech zones would be subject to a reasonableness standard, which of course must be content and viewpoint neutral.[132] So, a school conceivably

127. *See* Sunstein, *supra* note 89, at 295–96.

128. *See* Majeed, *supra* note 117, at 499 (discussing how campus speech codes are problematic because of their vagueness).

129. *See supra* notes 37–40 and accompanying text.

130. *See supra* notes 37–40 and accompanying text.

131. *See supra* Section I.C.

132. *See supra* notes 51–58 and accompanying text.

could limit expression in a variety of ways around its campus, but it is crucial to understand that the school's power in this regard has *nothing to do with free speech zones*. That is, schools already have this ability with or without a free speech zone on its campus.

Although it should go without saying, any school that wishes to designate areas as free speech zones should be reasonable in where they locate them. If a free speech zone is located in a barren part of campus, it will not do to serve any free speech rationales. Putting a free speech zone in an unreasonable place on campus may even present a legal problem for a school. Take, for example, a group of students that wishes to show their support for a political candidate with signs, songs, and the distribution of literature on the campus quad where they could reach a large audience of student passersby, but are informed by administration that such activity can only be done in the free speech zone. This particular free speech zone, however, is located in the nether regions of campus. That situation may pose one in which the administration has not provided adequate "alternative channels" for the students.[133] If the free speech zone were incorporated into the campus quad in this example, then there would be no problem for these students, so long as no other group had reserved the space or they had reserved it themselves.

CONCLUSION

There is nothing inherently unconstitutional or otherwise negative about free speech zones. In light of the public forum doctrine and the fact that areas on university campuses have not been classified as traditional public fora, policies that set aside open, outdoor areas thereon should be applauded rather than criticized. One can understand the concern, but the "marketplace of ideas" is not the only First Amendment rationale at play. Further, university administrators have an interest in regulating activity that takes place on their campus. In so regulating, administrators can craft a free speech zone policy that ensures all its students who desire to express themselves have the opportunity to do so in an orderly, organized, fair, and safe way. This will ensure that young adults across the country are afforded a chance

133. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

to take part in discussions of public matters, which is vital to a democracy, while also allowing them to exercise their autonomy in other ways that they see fit without disrupting the normal operations of campus nor interfering with other students' ability to do the same. A well-crafted policy should also be transparent about how it intends to allocate time and space, as well as how it *actually* does so (such as by contemporaneously reporting requests for facility use and schedules) to ensure that administrators do not overstep their bounds and work against the First Amendment rationales that their policy is intended to serve.

Finally, it is important to recall the exigencies of such policies to begin with, which are illustrated by the examples of controversial and hateful speakers and violent counter-protestors that have caused so many problems on university campuses. Schools should not be required to stand by and hold their gates open as an unregulated "marketplace of ideas." Indeed, they must be allowed to create common-sense regulation to defend themselves against such disaster. Many administrators probably desire to take all steps necessary to keep such events off their campus entirely, even if it means prohibiting as much speech as constitutionally permitted. Free speech zones represent a compromise between these two polarized choices that fairly balances the interests of university administrators and adamant dissenters alike.