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## The Modern University Campus: An Unsafe Space for the Student Press?

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## THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS?

*Patrick O. Malone\**

*Freedom of speech, guaranteed in the First Amendment, is among the most highly regarded and vigorously defended constitutional protections. Despite this revered foundational tenet, the freedom of the university student press is in jeopardy of succumbing to unwarranted censorship. This is due to the misconception that the First Amendment only protects speech deemed inoffensive to all segments of the student body. As student campus publications have increasingly been forced to turn to universities for funding, university administrators and student governments have used the power of the purse to usurp editorial control of content from students in an effort to rid their campuses of speech that may be perceived as harassing, inflammatory, or insensitive.*

*Schools have curbed editorial freedom against an unsettled legal backdrop, as courts have afforded varying degrees of First Amendment protection to printed speech on university campuses where a publication receives funding from the school. Additionally, universities have been left with the unenviable task of interpreting and implementing confusing, ambiguous, and sometimes conflicting federal court opinions, Title IX guidance documents, and federal and state statutes, and in notable examples, universities have failed to balance the student publication's rights of free speech and press with their own institutional interests.*

*This Note summarizes how courts have interpreted the First Amendment's application to student publications on university campuses. It then considers the evolution of Title IX and how it has affected students' First Amendment rights. Additionally, it acknowledges the interests at stake on the part of student publications and broader campus communities. Ultimately, this Note argues that the Department of Education should issue updated guidance that ensures adequate First Amendment protections for students and their publications. It also proposes steps that actors can take on university campuses to support this effort.*

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#### INTRODUCTION

The front-page story of the November 4, 2015, issue of the *Daily Bull*, a Michigan Technological University (MTU) student paper, chronicled a night out of one of its students, Wendan Brayward.<sup>1</sup> It recounted how Wendan, an MTU student, was the target of “unwelcome[] sexual contact from members of the opposite sex” at an off-campus house party.<sup>2</sup> The article described how, immediately after Wendan arrived at the party, a female partygoer whom he had never met lasciviously fondled his buttocks.<sup>3</sup> Wendan supposedly considered filing a complaint but quickly reconsidered, despite feeling violated.<sup>4</sup> Wendan claimed that he was the object of persistent lecherous attention that night and, in several instances, was subject to “interactions of a sexual nature,” both with strangers and female friends whom he previously believed to be platonic acquaintances.<sup>5</sup> The student publication detailed how, although Wendan arrived at the party with a group of friends, his peers looked on impassively instead of intervening during the series of increasingly forceful public encounters.<sup>6</sup> It also described Wendan’s level of intoxication<sup>7</sup> and how, despite knowing that Wendan was too intoxicated to exercise good judgment, Wendan’s roommate left him with a female partygoer who promised she would take care of him.<sup>8</sup> Finally, the story stated that while leaving the party, Wendan’s roommate witnessed Wendan and the female student purportedly engaging in sex in a car parked outside.<sup>9</sup> The story quoted Wendan as stating that, despite his repeated victimization, he looked back on the night with “feelings of complacency.”<sup>10</sup>

The story sparked uproar among university administrators.<sup>11</sup> Why? Not because multiple students had apparently harassed and sexually assaulted a

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1. See Rico Bastian, *Sexually Harassed Man Pretty Okay with Situation*, DAILY BULL (Nov. 4, 2015), [https://s3.amazonaws.com/media.spl/1168\\_daily\\_bull\\_vol66\\_no22o.pdf](https://s3.amazonaws.com/media.spl/1168_daily_bull_vol66_no22o.pdf) [<https://perma.cc/QRP8-GLZ3>].

2. See *id.*

3. See *id.* (“‘Almost as soon as I got to the party, someone copped a feel of my butt,’ Brayward said.”).

4. See *id.* (“‘I mean, the girl was stacked,” Wendan recalled).

5. See *id.* Brayward allegedly commented about his friend, “‘I felt really uncomfortable with her forcing this change in our relationship. She’s a real good kisser though, so I’d say her and I are still cool.” *Id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.* (describing how Wendan’s roommate recalled hearing Wendan “yelling ‘WHOOOOOO!’ from a rocking car in the parking lot”).

10. See *id.*

11. Madeline Will, *Student Satire Publication Lost Funding, Put on Probation After Article on Sexual Harassment*, STUDENT PRESS L. CTR. (Dec. 15, 2015), <http://www.splc.org/>

classmate.<sup>12</sup> The story, in fact, was obviously fictional.<sup>13</sup> The *Daily Bull*, an infamous campus satirical publication that frequently penned provocative humor articles, ran the piece under the headline “Sexually Harassed Man Pretty Okay with Situation,” just below the publication’s disclaimer.<sup>14</sup> The article, which further described how Wendan only felt truly violated when a female student whom he considered to be physically unattractive propositioned him, was published alongside a recurring satirical feature that listed indicators of a woman’s sexual interest.<sup>15</sup> The paper’s editorial staff maintained that they published the piece to highlight the popular beliefs that male sexual assault is not a serious issue and that males will accept sexual harassment as long as it is at the hands of a physically attractive person.<sup>16</sup>

The university’s vice president for student affairs recognized the article’s satirical nature but believed “there are people out there that do take it literally.”<sup>17</sup> As a result, within a month, the university’s student government voted to slash the publication’s funding.<sup>18</sup> The school also sanctioned the paper, requiring its staff members to complete Title IX training on sexual discrimination.<sup>19</sup> The university administrator said that the university was legally required to act under Title IX, even if such action violated the First Amendment, because he believed that constitutional rights do not supersede Title IX.<sup>20</sup> “Title IX is a federal compliance policy,” he asserted, and “[t]hose policies supersede anything else.”<sup>21</sup>

Student print media has long maintained a presence at American universities. For at least two centuries,<sup>22</sup> the number of student-published newspapers on campuses across the United States has grown dramatically,

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article/2015/12/student-satire-publication-lost-funding-put-on-probation-after-article-on-sexual-harassment [https://perma.cc/4GZZ-AXTF].

12. *See id.*

13. *See id.*

14. *See* Bastian, *supra* note 1. The disclaimer at the top of each issue reads: “Just because it’s printed, doesn’t make it true.” *See id.*

15. *See id.*

16. *See* Will, *supra* note 11.

17. *Tech Censures Satire Sheet*, DAILY MINING GAZETTE (Dec. 4, 2015), <http://content.mininggazette.com/?p=549703/Tech-censures-satire-sheet.html> [https://perma.cc/YR M6-R8AY].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. The *Dartmouth*, the student newspaper of Dartmouth College, founded in 1799, is the oldest student newspaper. *See History*, DARTMOUTH, <http://www.thedartmouth.com/page/history> [https://perma.cc/8UG3-K2UX]; *see also* Terry L. Hapney & Charles J. Russo, *Student Newspapers at Public Colleges and Universities: Lessons from the United States*, 14 EDUC. L.J. 114, 114 n.1 (2013). Because the *Dartmouth* originally published as the *Dartmouth Gazette*, this title remains the topic of some debate, and other student newspapers have claimed the title of “oldest,” subject to various qualifications, such as the *Harvard Crimson* (“oldest continuously published daily”), the *Cornell Daily Sun* (“oldest, continuously independent published college daily”), the *Miami Student* (“oldest university newspaper”), and the *Yale Daily News* (“oldest college daily”). *See* Dan Reimold, *America’s Oldest College Newspaper?: At Least 8 Papers Claim the Title (Sort Of)*, C. MEDIA MATTERS (Sept. 18, 2013), <http://www.collegemedia matters.com/2013/09/18/americas-oldest-college-newspaper-at-least-8-papers-claim-the-title-sort-of/> [https://perma.cc/D4M4-DN7C].

reaching an estimated 1,600.<sup>23</sup> As student print media has increased in number, it has also expanded in variety, with student-produced humor magazines,<sup>24</sup> opinion periodicals,<sup>25</sup> and other print journals<sup>26</sup> becoming ubiquitous on college campuses and in some cases rising to national reputation.<sup>27</sup>

In recent years, universities have taken an active role in regulating published student speech.<sup>28</sup> Pressure to do so has come from several sources. First, the Department of Education's Office for Civil Rights (OCR) expanded its definition of harassment in its 2011 Title IX guidance.<sup>29</sup> Thus, editorial content can be limited because the school deems it harassing. Second, in addition to OCR's expanded definition, universities adopted their own prohibitions on speech that the universities' administrations deem harassing or otherwise impermissible.<sup>30</sup> Third, universities and student government associations have implemented broad prohibitions on speech, including written communication, in the name of creating more inclusive campus environments or eradicating speech they deem harassing, hateful, or offensive.<sup>31</sup> Recently, the response of several universities and student governments to student newspaper content that has offended some students has raised questions about whether, on the modern university campus, student media can maintain its independence. In the backdrop of these developments is the unsettled question of what protections the Constitution affords student publications on university campuses today.<sup>32</sup>

Part I of this Note describes the current role of student publications on college campuses, including the constitutional and statutory protections afforded to published student speech. This part also discusses federal and university regulations that restrict what these publications may print. Part II surveys the competing concerns regarding maintaining an uninhibited press on campus. It also describes recent controversies that have emerged on college campuses when these interests have come into tension. Ultimately,

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23. Nancy Vogt, *Like Rest of the News Industry, Campus Papers Reach for New Strategies*, PEW RES. CTR. (Dec. 9, 2013), <http://www.pewresearch.org/fact-tank/2013/12/09/like-rest-of-the-news-industry-campus-papers-reach-for-new-strategies/> [https://perma.cc/HC9G-XP8P].

24. *See, e.g.*, Jenny Rogers, *College Humor Magazines Get the Last Laugh*, N.Y. REV. MAGAZINES (May 10, 2012), <http://nyrm.org/?p=104> (mentioning the *Harvard Lampoon* and the *Yale Record*, among others) [https://perma.cc/MW43-LRV8].

25. *See generally* JAMES PANERO & STEFAN BECK, *THE DARTMOUTH REVIEW PLEADS INNOCENT: TWENTY-FIVE YEARS OF BEING THREATENED, IMPUGNED, VANDALIZED, SUED, SUSPENDED, AND BITTEN AT THE IVY LEAGUE'S MOST CONTROVERSIAL CONSERVATIVE NEWSPAPER* (2006).

26. *See, e.g.*, Edwin McDowell, *Publishing: Starting Out in the Little Magazines*, N.Y. TIMES (Mar. 18, 1983), <http://www.nytimes.com/1983/03/18/books/publishing-starting-out-in-the-little-magazines.html> (describing Northwestern University's *TriQuarterly* as "perhaps the preeminent journal for literary fiction") [https://perma.cc/WY3N-UNVS].

27. *See id.*

28. *See infra* Part II.B.

29. *See infra* Part I.C.1.

30. *See infra* Part I.C.1.

31. *See infra* Part II.C.2.

32. *See infra* Part I.B.1.

this Note argues that the actions of the federal government and universities threaten the independence of student publications on college campuses. Part III proposes that the federal agencies tasked with administering Title IX reissue guidance to provide a distinct and more accurate definition of harassing speech. Further, it urges student publications and university campuses to adopt practices that afford student publications independence.

#### I. THE RIGHTS AND CONSTRAINTS OF STUDENT PUBLICATIONS ON UNIVERSITY CAMPUSES

Student publications are subject to unique constraints and protections. Part I.A provides an overview of how student publications are funded in the college and university setting. Funding procedures influence a publication's ability to operate independently from its host university. Next, Part I.B describes free speech protections the First Amendment provides to student publications. Then, Part I.C discusses the primary restrictions that schools have placed on speech published in student publications.

##### A. *Funding the Student Paper*

Student publications are generally distributed free of charge on college campuses and therefore often face unique funding challenges.<sup>33</sup> With no sales revenue to cover the cost of production, many student-produced publications rely on their universities for financial support.<sup>34</sup> To provide this funding, colleges predominantly charge each enrollee a mandatory “student activity fee” that it adds on to tuition.<sup>35</sup> The university's student government usually has discretion to allocate the pool of student activity fees among student organizations on campus.<sup>36</sup>

Alternatively, some student publications—including many of the largest and most well-established student newspapers—maintain complete financial independence from their host institutions.<sup>37</sup> These publications finance their operations through alternative revenue streams such as advertising, subscription fees, and fundraising.<sup>38</sup> Student publications often advertise the

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33. See Lisa Bohman, *Freedom of the Press: How University Newspapers Have Fared in the Face of Challenges from Students, Administrators, Advertisers, and State Legislatures*, 2005 BYU EDUC. & L.J. 231, 231.

34. See Allie Grasgreen, *Who Will Pay for the Paper?*, INSIDE HIGHER ED (Apr. 26, 2013), <https://www.insidehighered.com/news/2013/04/26/college-newspapers-turn-student-fees-funding> [https://perma.cc/U6QB-JCMU].

35. See Mark X. Ryan, Note, *The First Amendment on Campus: The Rights of the Student Press v. the Rights of the Students*, 14 J.C. & U.L. 505, 516 n.76 (1988).

36. *Id.*

37. See Karen Houppert, *Georgetown University's Hoya Newspaper, a Microcosm of Campus Journalism*, WASH. POST (Apr. 10, 2011), [https://www.washingtonpost.com/lifestyle/magazine/georgetown-universitys-hoya-newspaper-a-microcosm-of-campus-journalism/2011/03/20/AFt7BpvC\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/georgetown-universitys-hoya-newspaper-a-microcosm-of-campus-journalism/2011/03/20/AFt7BpvC_story.html) (“[F]inancially independent college papers appear to be confined mainly to the Ivies and a handful of large universities . . . .”) [https://perma.cc/X3DB-4JGE].

38. *Id.*

fact that they are financially self-sustaining, a designation that can signal greater editorial independence to readers.<sup>39</sup>

Although some student publications initially defied the trends afflicting print media nationally—such as plummeting advertising revenue and rising print costs—these economic realities have recently arrived on university campuses.<sup>40</sup> To cope, some of these publications have slashed costs by scaling back on print circulation, while others have launched digital subscriptions or increasingly looked to alumni support.<sup>41</sup> Others have turned to their universities for financial support.<sup>42</sup> Relying on universities for funding exacerbates the conflict that exists on college campuses between student editorial independence and university control; it opens publications up to a wider array of disciplinary measures that a school can impose if it disagrees with controversial or offensive content or viewpoints, including funding revocation or the threat thereof.<sup>43</sup>

### B. Protections for the Student Press

Student publications derive protections from both the U.S. Constitution and from statute. Part I.B.1 and Part I.B.2 examine the rights that courts and states have afforded student publications, respectively.

#### 1. Constitutional Protections of Student Speech

The First Amendment protects student speech at public universities.<sup>44</sup> Because it is well settled that the First Amendment applies to states<sup>45</sup>—and thus extends to state-run institutions—public schools may not infringe upon students' free speech rights. Thus, the ability of public institutions to regulate student speech is constrained.

However, the Supreme Court has not clearly defined a specific level of First Amendment protection for published student speech in the university setting. The legal doctrine that attempts to define the scope of protected university student speech and the contours of permissible administrative

39. *See id.*

40. *See* Jennifer Preston, *Black and White and in the Red: Student Newspapers Scurry to Make Ends Meet*, N.Y. TIMES (Oct. 31, 2013), <http://www.nytimes.com/2013/11/03/education/edlife/student-newspapers-scurry-to-make-ends-meet.html> (“When print advertising revenue fell 9 percent for commercial newspapers in 2007, college newspapers enjoyed a 15 percent increase. But the student media landscape has been shaken in the last two years by plummeting revenues and changing reading patterns.”) [<https://perma.cc/L5C7-SAHA>].

41. *See* Vogt, *supra* note 23.

42. *See* Grasgreen, *supra* note 34; Bailey Otto, *Student Newspapers Weigh Trading Independence for Financial Support*, ST. LOUIS POST-DISPATCH (June 23, 2014), [http://www.stltoday.com/news/local/education/student-newspapers-weigh-trading-independence-for-financial-support/article\\_29150c79-624f-5527-9fa1-505faa3e5b5b.html](http://www.stltoday.com/news/local/education/student-newspapers-weigh-trading-independence-for-financial-support/article_29150c79-624f-5527-9fa1-505faa3e5b5b.html) [<https://perma.cc/H4QN-4YJQ>].

43. *See* Otto, *supra* note 42 (“The fear of losing an independent voice is common among college newspapers as more are subsidized by their universities.”).

44. *See* *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 671 (1973).

45. *See, e.g.,* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).



disciplinary action is largely based on student speech protections in the primary and secondary school context.<sup>46</sup>

*a. Free Speech in Primary and Secondary School*

*Tinker v. Des Moines Independent Community School District*<sup>47</sup> marked the U.S. Supreme Court's first major decision addressing the First Amendment's application to public schools.<sup>48</sup> In *Tinker*, a public school district suspended a group of students for wearing black armbands in protest of the Vietnam War, in violation of school district policy.<sup>49</sup> The *Tinker* Court held that the suspension violated the First Amendment.<sup>50</sup> It recognized that First Amendment protections extend to student speech in public schools<sup>51</sup> and that "pure speech"—speech that is divorced from misbehavior or disruptive conduct—is traditionally afforded the most robust constitutional protections.<sup>52</sup> The Court, however, qualified its reasoning; students' First Amendment rights are not identical to those of individuals outside the school setting, because they are subject to the "special characteristics of the school environment."<sup>53</sup> Thus, if a school can show that student speech "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that it actually caused "disturbances or disorders on the school premises" then, perhaps, the school can regulate the speech.<sup>54</sup>

Nearly two decades later, the Court revisited the First Amendment's application to the school environment.<sup>55</sup> In *Bethel School District v. Fraser*,<sup>56</sup> the Court found that a school may permissibly regulate a student's "vulgar and lewd speech" in the school environment and upheld a public high school's suspension of a student for using a sexual metaphor in a speech at a school assembly.<sup>57</sup> In doing so, the Court emphasized the aims of the American public school system in engendering citizenship and civility in its students, as well as the concerns of parents and teachers in shielding students from crude and offensive behavior.<sup>58</sup>

The *Fraser* Court distinguished the "vulgar and lewd" speech in that case from the speech at issue in *Tinker*,<sup>59</sup> explaining that the divergent nature of the two kinds of speech—the political expression in *Tinker* and the sexually

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46. See Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 28–29 (2008).

47. 393 U.S. 503 (1969).

48. *Id.*

49. *Id.* at 504.

50. *Id.* at 514.

51. See *id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

52. *Id.* at 508.

53. *Id.* at 506.

54. *Id.* at 514.

55. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

56. 478 U.S. 675 (1986).

57. *Id.* at 685.

58. *Id.* at 681–84.

59. *Id.* at 681–83.

explicit speech in *Fraser*—merited different levels of protection.<sup>60</sup> It also distinguished political and personal student speech, like in *Tinker*, from student speech made during an official school activity.<sup>61</sup> The Court reasoned further that the school should have been able to discipline the student to separate itself from his speech and send a message to other students that such behavior was inconsistent with the school’s mission.<sup>62</sup>

*b. Hazelwood: The Court Weighs In on Student Newspapers*

In 1988, the Supreme Court again revisited speech in public schools, this time directly addressing student newspapers.<sup>63</sup> In *Hazelwood School District v. Kuhlmeier*,<sup>64</sup> the Court for the first time decided whether the First Amendment guards students’ editorial control of school newspapers.<sup>65</sup> In *Hazelwood*, students in a high school journalism class authored a newspaper as part of the class’s curriculum.<sup>66</sup> The school funded and published the newspaper.<sup>67</sup> Three students alleged that school administrators violated their First Amendment rights by removing two stories—one about pregnant students at the school and one about divorce—from a published issue before it went to print.<sup>68</sup> The school’s principal believed that the stories were inappropriate for the student body.<sup>69</sup>

The *Hazelwood* Court reconciled *Tinker* and *Fraser* by reaffirming that the First Amendment applies in public schools.<sup>70</sup> It found that, although students “cannot be punished merely for expressing their personal views on the school premises—whether ‘in the cafeteria, or on the playing field, or on the campus during the authorized hours,’” the First Amendment rights of students are not “coextensive” with those of adults outside of school.<sup>71</sup> As a result, a school “need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”<sup>72</sup>

The *Hazelwood* Court’s analysis focused largely on the medium through which the student speech was expressed—a school-funded newspaper

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60. *Id.* at 685 (“Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”).

61. *See id.* at 680.

62. *Id.* at 685–86 (“[I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”).

63. *Id.*

64. 484 U.S. 260 (1988).

65. *Id.*

66. *Id.* at 262.

67. *Id.*

68. *Id.* at 263.

69. *Id.*

70. *Id.* at 266–67.

71. *Id.* at 266 (first quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969); then quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

72. *Id.* (citation omitted) (quoting *Fraser*, 478 U.S. at 685).

published as part of a class curriculum—rather than the substance of the student speech.<sup>73</sup> The Court first considered whether the school newspaper was a *public forum* before determining what First Amendment protections applied.<sup>74</sup> It found that school officials had not created a public forum by publishing the newspaper because the school had limited contributions to class members subject to the teacher’s editorial control.<sup>75</sup> Because the newspaper was not a public forum, the Court distinguished the speech at issue from that in *Tinker*.<sup>76</sup> *Tinker* addressed the question of whether the First Amendment requires schools to passively tolerate student expression on school premises.<sup>77</sup> *Hazelwood*, on the other hand, addressed whether, in a curricular setting, a principal or teacher has the authority to edit the content of a school-sponsored paper that “the public might reasonably perceive to bear the imprimatur of the school.”<sup>78</sup> It found that when a school must lend its name and resources to the dissemination of the student speech, the school has not created a public forum, and thus restrictions on speech need only be reasonable to be constitutionally permissible.<sup>79</sup>

Although the Court in *Tinker*, *Frasier*, and *Hazelwood* outlined application of the First Amendment in elementary school and high school settings, it never addressed how these cases apply to student newspapers at universities. Indeed, in an oft-cited *Hazelwood* footnote, the Court noted that it “need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”<sup>80</sup>

### c. Student Speech on College Campuses

The Supreme Court has decided five cases regarding the First Amendment rights of students on college campuses. The first of these decisions recognized the unique role that freedom of expression plays at universities<sup>81</sup> and declared that First Amendment protections are in full force on the public

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73. See Louis M. Benedict, *The First Amendment and College Student Newspapers: Applying Hazelwood to Colleges and Universities*, 33 J.C. & U.L. 245, 276 (2007).

74. *Hazelwood*, 484 U.S. at 267. A public forum is an area such as a park or street that has been traditionally reserved for free expression such that restricting speech there is only permissible if it serves a compelling state interest. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

75. *Hazelwood*, 484 U.S. at 268.

76. *Id.* at 270–71.

77. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

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

79. *Id.* at 276.

80. *Id.* at 274 n.7.

81. See *Healy v. James*, 408 U.S. 169, 180–81 (1972) (“[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

university campus.<sup>82</sup> In *Healy v. James*,<sup>83</sup> the Court held that a university president could not decline a student group official recognition and the associated benefits based on the organization's views, no matter how abhorrent the university found them to be.<sup>84</sup> When it comes to First Amendment protections for school speech, the Court distinguished "between advocacy, which is entitled to full protection, and action, which is not,"<sup>85</sup> and found that a school may regulate activities only where they "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."<sup>86</sup>

Two Supreme Court decisions regarding free speech in the university context involved student newspapers. In the first of these cases, *Papish v. Board of Curators of the University of Missouri*,<sup>87</sup> the Court held that a public university's suspension of a student for distributing a newspaper containing "forms of indecent speech" was unconstitutional.<sup>88</sup> The newspaper featured a cartoon that depicted police officers raping the Statue of Liberty and also contained an article headlined "Motherfucker Acquitted."<sup>89</sup> The Court referenced *Tinker* only for the proposition that First Amendment rights apply in the school setting and found that *Healy* prohibited a school from censoring a student paper solely because its content was indecent.<sup>90</sup> Because the cartoon and headline were not obscene, the Court determined that it amounted to protected speech and that the university's actions violated the First Amendment.<sup>91</sup> Critically, although the university's business office authorized the sale of the paper on campus, the Court noted that the school did not fund the newspaper.<sup>92</sup>

The Court decided a second case involving a campus newspaper, *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>93</sup> where a

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82. *Id.* at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

83. 408 U.S. 169 (1972).

84. *Id.* at 187.

85. *Id.* at 192.

86. *Id.* at 189.

87. 410 U.S. 667 (1973).

88. *Id.* at 667.

89. *Id.* at 667–68.

90. *Id.* at 670.

91. *Id.* at 671.

92. *Id.* at 667. The Supreme Court subsequently found that when a university allows student groups to use university facilities, the university cannot prohibit one student group from doing the same based on its religious affiliation. *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981). A university does not "confer any imprimatur" of approval on the practices of any one group using university resources, especially where there is a diverse range of student groups doing so. *Id.* at 274. A restriction on such participation is invalid without a compelling purpose. *Id.* at 277. The Court affirmed "the continuing validity of cases . . . that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Id.*

93. 515 U.S. 819 (1995).

student journal relied on student activity fees to fund its operations.<sup>94</sup> A registered student organization publishing a journal that advocated Christian viewpoints submitted its printing expenses to the student council, which the student council denied because it determined that the group was a “religious organization” that was ineligible for funding under the university’s guidelines.<sup>95</sup> In finding the school’s denial of funding to be unconstitutional, the Court classified the pool of student activity fees as a limited public forum, even though the pool of money did not represent a tangible space.<sup>96</sup> The Court analogized the university’s pool of activity fees to property reserved for a specific purpose, which allowed the university to lawfully set boundaries on which groups could access it.<sup>97</sup> However, in designating the use of such a forum, the Court found that a university can exclude discussion of certain content to preserve the forum’s limited nature, but the school cannot discriminate on the basis of *viewpoint* when the subject matter is “otherwise within the forum’s limitations.”<sup>98</sup> The Court held that the university violated the group’s First Amendment rights because “the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”<sup>99</sup> Thus, under *Rosenberger*, a student council’s denial of student activity fees for a student publication because of the publication’s editorial bent, where the university does not prohibit the subject matter, amounts to unconstitutional viewpoint discrimination.<sup>100</sup>

*d. Uncertain Application to the Modern Student Publication*

Despite more rulings in favor of students in the university setting than in the secondary school setting, the Supreme Court has never explicitly held that published speech on the university campus receives a higher level of

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94. *See id.* at 825. In *Rosenberger*, registered student groups submitted expenses incurred from outside contractors to the student council for approval and subsequent payment using the university’s pool of student activity fees. *Id.*

95. *Id.* at 826.

96. *Id.* at 829.

97. *Id.*

98. *Id.* at 830.

99. *Id.* at 831.

100. After *Rosenberger*, the Court held that a university may impose a mandatory student activity fee on all students, even when those fees may be directed to student organizations that espouse views that a student may find offensive or objectionable. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232–33 (2000). The Court decided *Southworth* after its earlier decisions in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which established that the state could not compel state bar association members and teachers’ union members, respectively, to fund the ideological speech of those organizations where it was not “germane” to the organization’s mission. *See Keller*, 496 U.S. at 13–14; *Abood*, 431 U.S. at 235–36. *Southworth* distinguished mandatory university student activities fees, recognizing universities’ significant interest in encouraging their students’ exposure to a diverse range of extracurricular interests and found that the university’s allocation of funds in a viewpoint-neutral manner rendered the scheme permissible under the First Amendment. *See Southworth*, 529 U.S. at 232–33.

protection.<sup>101</sup> For example, the *Hazelwood* Court distinguished the newspaper in that case from the one in *Papish* not because it was a high school paper as opposed to a college paper but rather because the school sponsored the *Hazelwood* newspaper, which was part of the class curriculum—unlike the independent newspaper in *Papish*.<sup>102</sup> Further, in deciding First Amendment cases at the university level, the Court has often cited *Tinker* both for the proposition that the First Amendment applies in the education context and for the proposition that free speech rights can be curtailed in the school setting given the “special characteristics of the school environment.”<sup>103</sup>

Courts of appeals have afforded university student newspapers varying levels of First Amendment protection and have disagreed about whether *Hazelwood* empowers college administrators to exercise the same extensive editorial control of extracurricular college publications that the *Hazelwood* Court permitted the school to do for a high school paper published as part of a class.<sup>104</sup> For instance, while the First Circuit has found that *Hazelwood* “is not applicable to college newspapers,”<sup>105</sup> the Seventh Circuit recently found that even though high school and college students differ in age, “there is no sharp difference between high school and college papers,” and it applied *Hazelwood*’s “legitimate pedagogical reasons” standard to a university’s efforts to block publication of school-subsidized, extracurricular student newspaper.<sup>106</sup> The Supreme Court later declined to review the Seventh Circuit’s decision.<sup>107</sup> Thus, when university administrators act to restrict or sanction published student speech, they do so against an unsettled constitutional backdrop.

## 2. Statutory Protections for Student Newspapers

Some states have expanded speech rights for college student journalists, providing them with additional protection beyond the Supreme Court’s First Amendment doctrine.<sup>108</sup> California became the first state to adopt statutory protections for student journalists in response to the increase in restrictions

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101. See Sarabyn, *supra* note 46, at 41.

102. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n.3 (1988); Sarabyn, *supra* note 46, at 42.

103. See Sarabyn, *supra* note 46, 43 n.80 (explaining that the Court has cited *Tinker* for this proposition in “three of the five university-student speech cases”: *Widmar v. Vincent*, 454 U.S. 263 (1981), *Papish v. Bd. of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973), and *Healy v. James*, 408 U.S. 169 (1972)).

104. Compare *Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989), with *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc).

105. *Student Gov’t Ass’n*, 868 F.2d at 480 n.6.

106. *Hosty*, 412 F.3d at 735, 737.

107. *Hosty v. Carter*, 546 U.S. 1169 (2006).

108. Holly Epstein Ojalvo, *Student Journalism: A Guide to Rights and Responsibilities*, N.Y. TIMES: LEARNING NETWORK (Aug. 22, 2011 2:28 PM), [http://learning.blogs.nytimes.com/2011/08/22/student-journalism-a-guide-to-rights-and-responsibilities/?\\_r=0](http://learning.blogs.nytimes.com/2011/08/22/student-journalism-a-guide-to-rights-and-responsibilities/?_r=0) (noting that “*Hazelwood* is a floor and not a ceiling,” and describing states’ protections for student journalists) [<https://perma.cc/YD5H-R2MK>].

that universities imposed on student speech.<sup>109</sup> California's legislation broadly prohibits public universities from disciplining students on the basis of speech that the First Amendment would otherwise protect *off campus*.<sup>110</sup>

California stood alone in affording university student journalists statutory protections until the Seventh Circuit's decision in *Hosty v. Carter*,<sup>111</sup> which prompted several states to pass statutes that largely repudiated that court's application of *Hazelwood* to university campuses.<sup>112</sup> Additionally, an active campaign is underway in several states advocating model legislation that provides additional protections for high school and university student journalists.<sup>113</sup> As of March 2017, four states in addition to California—Oregon,<sup>114</sup> Illinois,<sup>115</sup> North Dakota,<sup>116</sup> and Maryland<sup>117</sup>—have passed

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109. CAL. EDUC. CODE § 66301 (West 2009) (“Neither the Regents of the University of California, the Trustees of the California State University, the governing board of a community college district, nor an administrator of any campus of those institutions, shall make or enforce a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution.”).

110. *Id.*

111. 412 F.3d 731 (7th Cir. 2005) (en banc); *see also supra* notes 106–07 and accompanying text.

112. *See, e.g.*, Tracey Loew, *Student Journalists' Right to Expression Expanded*, USA TODAY (July 11, 2007), [http://usatoday30.usatoday.com/news/education/2007-07-10-student-newspapers\\_N.htm](http://usatoday30.usatoday.com/news/education/2007-07-10-student-newspapers_N.htm) (noting that the adoption of a bill protecting student journalists in Oregon was signed into law after tighter administrator control of student publications following *Hosty*) [<https://perma.cc/U2VB-9JTW>]; *see also* Meg McSherry Breslin, *Student-Press Freedom Act OKd*, CHI. TRIB. (June 8, 2007), [http://articles.chicagotribune.com/2007-06-08/news/0706070826\\_1\\_student-journalists-college-journalists-student-paper](http://articles.chicagotribune.com/2007-06-08/news/0706070826_1_student-journalists-college-journalists-student-paper) (describing Illinois's “College Campus Press Act” as being partially motivated by *Hosty*) [<https://perma.cc/BA3D-BWXX>].

113. Jonathan Peters, *How a New Campaign Is Trying to Strengthen the Rights of Student Journalists*, COLUM. JOURNALISM REV. (Feb. 19, 2016), [http://www.cjr.org/united\\_states\\_project/new\\_voices\\_campaign.php](http://www.cjr.org/united_states_project/new_voices_campaign.php) [<https://perma.cc/FTL5-3DAU>].

114. OR. REV. STAT. ANN. § 350.260 (West 2016). Oregon's law grants student journalists at public universities the sole ability to “determin[e] the news, opinion, feature and advertising content of school-sponsored media” and authorizes a “student media adviser” appointed by the school to “teach[] professional standards of English and journalism to the student journalists.” *Id.* The statute does not protect students where the content of an article is illegal or libelous or can be disciplined under the Supreme Court's standard articulated in *Tinker*. *Id.*

115. 110 ILL. COMP. STAT. ANN. 13/1 (West 2016). The statute designated “[a]ll campus media produced primarily by students at a State-sponsored institution of higher learning” as “public forum[s]” that are not subject to prior review by the university prior to publication. *Id.* 13/10. Like the Oregon statute, the Illinois statute gives college student editors the responsibility for determining the content of their publications. The statute allows a “collegiate media adviser” to teach the standards of journalism and specifies that a school cannot retaliate against this advisor or otherwise discipline him or her based on the publication's content. *Id.* 13/15.

116. N.D. CENT. CODE ANN. § 15.1-19-25 (West 2015). The statute similarly provides student journalists with the discretion to make editorial and content decisions, “regardless of whether the media is supported financially by the school district,” and provides exceptions to protection where content is libelous or violates law or can be otherwise disciplined under the Court's standard in *Tinker*. *Id.*

117. MD. CODE ANN., EDUC. § 15-119 (West 2016). Maryland's statute, which took effect on October 1, 2016, prohibits faculty advisors and administrators from exercising editorial control of student media, even where it is supported financially by the school, and prohibits

legislation or regulatory rules extending statutory protection to university journalists.<sup>118</sup> California's protection of student speech remains unique because, unlike similar laws passed in other states, it is not limited to public universities. It extends protections to students at private universities as well.<sup>119</sup>

### C. Restrictions on Student Speech

Unlike the broader American press, publications on university campuses are subject to additional regulations that may in some cases restrict speech. These restrictions include federal regulations under Title IX imposed on all institutions receiving federal funding and policies that universities adopt to implement Title IX. Additionally, universities have adopted other non-Title IX policies that affect student press rights.

#### 1. Federal Regulation of Student Speech

Every public and private college or university that receives federal funding must comply with, among other federal civil rights laws, Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.<sup>120</sup> Title VI prohibits colleges from discriminating against or denying any person benefits on the basis of "race, color, or national origin."<sup>121</sup> Title IX extends the same prohibitions to sex-based discrimination.<sup>122</sup> The Department of Education and the Department of Justice jointly and independently enforce these statutes.<sup>123</sup>

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disciplining student journalists except where an article is libelous, constitutes an unwarranted invasion of privacy, violates state or federal law, or incites violence. *Id.*

118. See Frank LoMonte, *Viewpoint: Student Newspapers Are Struggling with Their First Amendment Rights*, USA TODAY (Feb. 1, 2017), <http://college.usatoday.com/2017/02/01/college-newspapers-free-speech/> [https://perma.cc/54Y5-Y8J8].

119. CAL. EDUC. CODE § 94367 (West 2009) (extending the protections of CAL. EDUC. CODE § 66301 to "private postsecondary educational institution[s]"). The statute provides a private right of action for students. *Id.*

120. 20 U.S.C. § 1681 (2012); 42 U.S.C. § 2000d. Colleges receiving federal funding must also comply with the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975, both enforced by the Department of Education and which prohibit disability-based and age discrimination, respectively. *About OCR*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Oct. 15, 2015) [https://perma.cc/F3N2-K7RG]. These statutes fall outside the scope of this Note.

121. 42 U.S.C. § 2000d. There is a paucity of case law concerning universities' institutional liability for peer harassment on the basis of race under Title VI. 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, 412–14 (2009). However, Title VI cases have borrowed heavily from Title IX jurisprudence because of the close relation between the two statutes. *Id.* at 413–14. Therefore, although this Note's discussion of federal regulations that constrain student speech is largely dedicated to Title IX, it is likely also applicable to Title VI harassment.

122. 20 U.S.C. § 1681.

123. See *Index: Policy Guidance*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> (last modified Jan. 12, 2017) [https://perma.cc/2FND-8C98].



a. *The Department of Education's Title IX Guidance*

OCR has the task of enforcing Title VI and Title IX.<sup>124</sup> The agency does so by investigating student complaints and initiating “compliance reviews.”<sup>125</sup> Although Title IX traditionally has been perceived to address gender inequality in collegiate athletics, the law obligates universities to address a much wider range of behavior, including some forms of student speech.<sup>126</sup> To clarify how OCR interprets the obligations of universities under federal law, the agency periodically issues “Dear Colleague” letters, or administrative guidance documents.<sup>127</sup> Over time, the agency’s interpretation of conduct that constitutes harassment under Title IX has encompassed a broader range of student speech.

Several OCR pronouncements have been particularly significant in defining Title IX’s regulation of student speech. In guidance that OCR issued in 1997, the agency declared that “[s]exual harassment of students is a form of prohibited sex discrimination,” which the agency defined as including “verbal . . . conduct of a sexual nature.”<sup>128</sup> Notably, however, OCR’s guidance cautioned that the First Amendment may affect a determination of harassment “if the alleged harassment involves issues of speech or expression.”<sup>129</sup> The 1997 guidance cited *Tinker*’s famous dicta, affirming that students and teachers do not shed their First Amendment rights “at the schoolhouse gate,”<sup>130</sup> and it explicitly noted that such protections extend to student newspapers.<sup>131</sup> The purpose of Title IX, OCR further explained, is “to protect students from sex discrimination, not to regulate the content of speech.”<sup>132</sup> It emphasized that Title IX does not require schools to prohibit

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124. *About OCR*, *supra* note 120.

125. *Id.*

126. See Susan DuMont, Comment, *Campus Safety v. Freedom of Speech: An Evaluation of University Responses to Problematic Speech on Anonymous Social Media*, 11 J. BUS. & TECH. L. 239 (2016).

127. See *Sex Discrimination, Frequently Asked Questions*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> (last modified Jan. 24, 2017) [<https://perma.cc/9PD9-8BHU>].

128. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997) [hereinafter 1997 OCR Guidance].

129. *Id.* The preamble to the 1997 Sexual Harassment Guidance observed, “Many commenters asked OCR to provide additional guidance regarding the interplay of academic freedom and free speech rights with Title IX’s prohibition of sexual harassment.” *Id.* at 12,035. The agency eschewed a bright-line rule that would either “tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose” or alternatively “state that classroom speech simply can never be the basis for a sexual harassment complaint.” *Id.* OCR instead provided examples that described when the First Amendment would prohibit schools from disciplining student speech. *Id.* at 12,045–46.

130. *Id.* at 12,051 n.99 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

131. *Id.* at 12,045.

132. *Id.*

speech that may be offensive or derogatory, although a school could denounce those views or allow competing views to be heard.<sup>133</sup>

OCR revised this sexual harassment guidance in 2001.<sup>134</sup> The updated guidance closely resembled the 1997 document but specifically addressed whether two cases the Supreme Court decided in the intervening years—*Gebser v. Lago Vista Independent School District*<sup>135</sup> and *Davis v. Monroe County Board of Education*,<sup>136</sup>—applied to colleges and universities. *Gebser* and *Davis* established that for a school to be civilly liable for harassment under Title IX, a plaintiff must show the school had *actual notice* of the harassment and acted with *deliberate indifference*.<sup>137</sup> The Court found that this requirement for civil liability was analogous to the requirements that OCR prescribed in its Title IX guidance.<sup>138</sup>

OCR's 2001 guidance thus largely amounted to a reiteration of its 1997 guidance, with a few exceptions. It clarified that the Court's decisions in *Gebser* and *Davis* were limited to private actions for monetary damages but that OCR's requirements for school action in response to sexual harassment complaints were largely consistent with these decisions anyway.<sup>139</sup> For the first time, however, the guidance mentioned that schools must respond to gender-based harassment—that is, “harassment . . . based on sex or sex-stereotyping, but not involving conduct of a sexual nature”—if the conduct denies or limits a student's ability to participate in or benefit from the educational program.<sup>140</sup> The 2001 guidance again included and affirmed the First Amendment safeguards that the 1997 guidance afforded to student speech.<sup>141</sup>

In 2003, OCR responded to concerns that its position on Title IX enforcement might constrain protected speech. In a Dear Colleague letter exclusively dedicated to clarifying the crossroads of the First Amendment

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133. *See id.* (“[T]he offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.”).

134. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter 2001 OCR GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/8VGR-HQPZ>].

135. 524 U.S. 274 (1998).

136. 526 U.S. 629 (1999).

137. *See Gebser*, 524 U.S. at 290–91 (“[T]he response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. . . . That framework finds a rough parallel in the standard of deliberate indifference.”).

138. *See id.*

139. *See* 2001 OCR GUIDANCE, *supra* note 134, at v (“[T]he definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition found in the proposed guidance.”).

140. *Id.* at 3 (“Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.”).

141. *Id.* at 22–23.

and OCR's previously issued guidance, the agency emphatically declared "that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution."<sup>142</sup> OCR acknowledged that "[s]ome colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications" and clarified that, to rise to the level of harassment, the conduct must be so serious that it "den[ies] or limit[s] a student's ability to participate in or benefit from the educational program."<sup>143</sup> The letter stated that schools should apply an objective standard to determine whether the conduct rose to such a level.<sup>144</sup>

OCR also addressed private universities specifically, cautioning that their administrators should not interpret OCR regulations to apply with greater force on their campuses merely because constitutional protections do not apply there.<sup>145</sup> The Dear Colleague letter stated that the First Amendment's limitations on OCR's regulations apply uniformly to public and private colleges.<sup>146</sup> Thus, OCR does not require a private university to restrict more speech than a public university.<sup>147</sup> Therefore, when schools choose to implement more restrictive policies, they do so at their own discretion—not at the direction of OCR.<sup>148</sup>

OCR supplemented its 2001 guidance with another Dear Colleague letter in 2011.<sup>149</sup> The 2011 guidance largely addressed sexual violence on campus, which falls under the agency's definition of sexual harassment.<sup>150</sup> This guidance affirmed that Title IX policies prohibiting sexual violence on campus include pure speech.<sup>151</sup> By grouping verbal and sexually violent conduct together, OCR made its procedural requirements applicable to complaints pleading either kind of allegation.<sup>152</sup> OCR mandated that schools evaluate Title IX complaints under a "preponderance of the evidence" standard, rejecting the more exacting "clear and convincing" standard that some schools had adopted.<sup>153</sup> Thus, Title IX proscribes and sanctions conduct that is "more likely than not" to be harassment.<sup>154</sup> Absent from OCR's letter was any mention of how its new procedures and standard of

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142. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2003) [hereinafter 2003 DEAR COLLEAGUE LETTER], <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<https://perma.cc/77ZF-NW4A>].

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See *id.*

149. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011) [hereinafter 2011 DEAR COLLEAGUE LETTER], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/W27Z-FJXL>].

150. *Id.*

151. See *id.* at 3.

152. See *id.* at 6–14; see also *id.* at 6 ("These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination.").

153. See *id.* at 10–11.

154. See *id.* at 11.

proof may affect constitutionally protected student speech.<sup>155</sup> Further, the 2011 letter requires universities to take interim steps immediately after a party files a complaint and before the school commences a full investigation to “ensure the . . . well-being of the complainant and the school community.”<sup>156</sup>

It took OCR three years to address the First Amendment concerns raised in its 2011 Dear Colleague letter.<sup>157</sup> In April 2014, OCR released a document entitled “Questions and Answers on Title IX and Sexual Violence,” in which the agency explained its reasoning for not including an acknowledgement of students’ First Amendment rights.<sup>158</sup> In addressing how schools should respond to sexual harassment complaints while still complying with the First Amendment, the agency stated that its regulations do not restrict expression that is constitutionally protected and that its previous First Amendment guidance remained in effect.<sup>159</sup>

*b. The Department of Justice’s Position*

Most recently, the Department of Justice (DOJ) articulated what speech it considers to be sexual harassment under Title IX, as well as what procedures universities must adopt to respond to reports of sexual harassment.<sup>160</sup> In April 2016, the DOJ released a findings report following a compliance review of the University of New Mexico’s handling of student reports of sexual assault and harassment.<sup>161</sup> In its report, the DOJ defined the legal standard for sexual harassment as “unwelcome conduct of a sexual nature and can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual

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155. *Id.*

156. *Id.* at 10.

157. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter 2014 Q&A], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/2DAX-FHFH>].

158. *Id.* The 2014 Q&A document posed and answered 52 questions. One question was dedicated to the First Amendment. *See id.* at 43–44.

159. *Id.* Although OCR stated that it did not reissue First Amendment guidance in its 2011 Dear Colleague letter, because that letter addressed sexual violence, the American Association of University Professors notes that this was not the case, since the letter addressed sexual harassment more broadly, including pure-speech harassment. *See* AM. ASS’N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 77 (2016), <https://www.aaup.org/file/TitleIXreport.pdf> [<https://perma.cc/H8CF-TNHA>].

160. *See* Letter from Shaheena Simons, Chief, Educ. Opportunities Section, U.S. Dep’t of Justice, & Damon Martinez, U.S. Att’y, D.N.M., to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), <https://www.justice.gov/opa/file/843901/download> [<https://perma.cc/GKBB-JJM7>]. The Department of Justice previously issued a joint findings letter with the Department of Education following an investigation of the University of Montana, in which it stated that the policies and procedures it detailed to address sexual harassment should serve as a “blueprint” for American universities. *See* Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Justice, & Gary Jackson, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont. (May 9, 2013), <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> [<https://perma.cc/5ATM-CX5M>].

161. Letter from Shaheena Simons, *supra* note 160.

assault or acts of sexual violence.”<sup>162</sup> The DOJ further stated that sexual harassment is prohibited when it is “sufficiently serious to interfere with or limit a student’s ability to participate in or benefit from the school’s program, i.e. creates a hostile environment.”<sup>163</sup>

The DOJ’s letter is significant for two reasons. First, the DOJ pronounced that it would use same legal standard that the Department of Education uses for sex-based harassment; it thus followed OCR’s guidance from 2001, 2011, and 2014.<sup>164</sup> Second, the DOJ distinguished the legal concepts of “sexual harassment” and “hostile environment.”<sup>165</sup> The report explains that to trigger a school’s obligation to investigate, a claimant may make an allegation of sexual harassment but does not need to allege that the harassment created a hostile environment.<sup>166</sup> Once a student or employee reports such conduct, the burden shifts to the school to investigate whether the harassment created a hostile environment.<sup>167</sup> The report notes that a school’s delay or inappropriate response to a complaint may be sufficient to constitute a hostile environment.<sup>168</sup>

Thus, in adopting OCR’s guidance as a legal standard, the DOJ requires schools to investigate every allegation of unwelcome conduct of a sexual nature—including speech—regardless of whether the claimant alleges that the conduct created a hostile environment.<sup>169</sup> This is true even when the person who is a victim of the allegedly harassing speech does not make the complaint herself.<sup>170</sup> Thus, to avoid risking an investigation, student publications may curb potentially controversial speech.

## 2. University Codes of Conduct

To comply with Title IX, the Department of Education’s 2011 guidance requires universities to adopt policies that prohibit harassment.<sup>171</sup> Universities often implement policies that prohibit speech considered harassing as part of codes of conduct published in student handbooks.<sup>172</sup>

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162. *Id.* at 5.

163. *Id.*

164. *See id.* at 5 n.4 (“For consistency in federal administrative compliance reviews, the Department follows the legal standards established by the Department of Education’s Office of Civil Rights in the Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties and its subsequent interpretive documents: the Dear Colleague Letter on Sexual Violence and ‘Questions and Answers on Title IX and Sexual Violence.’” (citations omitted)).

165. *Id.* at 9 (“Hostile environment is not part of the definition of sexual harassment, nor is it required for ‘unwanted conduct of a sexual nature’ to be deemed sexual harassment.”).

166. *See id.* at 9–10.

167. *Id.*

168. *Id.* at 6.

169. *See id.* at 6, 9–10.

170. *Id.* at 6 n.5 (“[A] school must respond to complaints of alleged sexual harassment whether it learns of the harassment from the person subjected to the harassment, a third party, or an alternative source of information, e.g. a news report.”).

171. *See* 2011 DEAR COLLEAGUE LETTER, *supra* note 149, at 6, 17–18.

172. *See, e.g., Discrimination and Harassment*, IOWA ST. U. POL’Y LIBR., <http://www.policy.iastate.edu/policy/discrimination#Defined> (last updated Dec. 14, 2016), [<https://perma.cc/38P8-2QX7>].

Some universities have fully adopted the Department of Education's definition of harassment and therefore only prohibit speech that is expressly proscribed under Title IX.<sup>173</sup>

Other universities, however, have defined sexual harassment more broadly than Title IX and have, in some cases, listed examples of speech they prohibit.<sup>174</sup> For example, the University of Kansas, a public university, defines sexual harassment as written or verbal speech that is "unwelcome" and "based on sex or gender stereotypes" that creates a "hostile or offensive working or educational environment."<sup>175</sup> The university's list of examples of sexual harassment includes "unwanted jokes," "sharing sexual anecdotes," and "staring in a sexually suggestive or offensive manner."<sup>176</sup> Some university speech prohibitions extend even beyond what the university categorizes as harassment and ban obscene or uncivil speech.<sup>177</sup>

In some instances, courts have struck down university policies that restrict student speech. Courts have invalidated university policies where they are facially overbroad<sup>178</sup> and where they directly prohibit protected speech.<sup>179</sup>

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173. See, e.g., MONT. BD. OF REGENTS OF HIGHER EDUC., POLICY AND PROCEDURES MANUAL (2012), <https://mus.edu/borpol/bor500/507.pdf> [<https://perma.cc/6DF2-HUJ8>].

174. See, e.g., *Sexual Harassment (Including Sexual Violence)*, U. KAN., <https://sexualharassment.ku.edu/> (last visited Mar. 25, 2017) [<https://perma.cc/3ACY-4THB>].

175. *Id.*

176. *Id.*

177. See FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2017, at 13–17 (2017) [hereinafter FIRE 2017], [https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR\\_2017\\_Full-Cover\\_Revised.pdf](https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf) [<https://perma.cc/C8YS-4DC4>]; see also *Student Code of Conduct*, BOISE ST. U., <https://deanofstudents.boisestate.edu/scp-codeofconduct/scp-codeofconduct-section4> (last visited Mar. 25, 2017) (prohibiting behavior "that a reasonable person would find offensive such as lewd, indecent, obscene, or profane actions") [<https://perma.cc/EJ9Z-2PHQ>].

178. See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995). The court struck down as overbroad a university's racial and ethnic harassment policy that prohibited

any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.

*Id.* at 1182 (alterations in original); see also *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 236 (3d Cir. 2010) (striking down two provisions of the university's code for being facially overbroad).

179. See *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008) (distinguishing the extent to which a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school before analyzing the university's policy for overbreadth); see also Alexis Snyder, Comment, *Damned If You Don't . . . Damned If You Do?: Creating Effective, Constitutionally Permissible University Sexual Harassment Policies*, 114 PENN ST. L. REV. 367, 377 (2009) (noting that although the *DeJohn* Court could have simply struck down the university's sexual harassment policy upon finding that just one provision was overbroad, the court noted that several of its provisions prohibited protected speech).

Despite reprimand from the courts, a significant number of public universities still maintain such restrictive school policies.<sup>180</sup>

## II. IS THE INDEPENDENCE OF THE STUDENT PRESS THREATENED?

University restrictions on student speech have spurred debate as to whether they wrongly constrain student newspaper content. Part II.A outlines competing interests on university campuses. Next, Part II.B discusses recent events and controversies that shed light on the current debate. Then, Part II.C discusses reforms that scholars have proposed aimed at better protecting student speech on university campuses.

### A. *The Interests at Stake*

The free operation of student publications implicates a number of interests. Although universities may not infringe on protected speech, they also have an obligation to rid their campuses of harassing speech. This tension is at the heart of the debate regarding what level of regulation is appropriate to accomplish these two goals.

#### 1. The Marketplace of Ideas

American universities have long been recognized as “marketplace[s] of ideas,” with academic freedom as a tenet central to their unique character.<sup>181</sup> Freedom of speech is an essential liberty that universities must protect so that they may serve this institutional purpose.<sup>182</sup> Consequently, some scholars argue that restrictions on speech in the university environment represent the gravest threat to the First Amendment.<sup>183</sup> Further, unlike in the primary and

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180. See FIRE 2017, *supra* note 177, at 7. In a survey of the policies of 345 four-year public institutions, FIRE found that 33.9 percent maintained a policy that facially and unambiguously infringing on student expression, for example by prohibiting “offensive speech,” down from 79 percent nine years ago. *Id.* at 5–7.

181. See *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

182. See Bhavana Sontakay, *College and University Regulation of Racist Speech: Does Regulation Violate the First Amendment?*, 95 DICK. L. REV. 235, 255 (1990) (“In an environment that has been virtually unregulated, it is draconian to place limits on a right as fundamental as the freedom to speak. In a university atmosphere, this right should be the most sacred of all the rights conferred on students by virtue of their enrollment.”); see also Leonor Vivanco & Dawn Rhodes, *U. of C. Tells Incoming Freshmen It Does Not Support ‘Trigger Warnings’ or ‘Safe Spaces.’* CHI. TRIB. (Aug. 25, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-university-of-chicago-safe-spaces-letter-met-20160825-story.html> [<https://perma.cc/Q6VS-QE52>].

183. See Jacob Gershman, *Floyd Abrams: College Campuses Pose ‘Greatest Threat’ to Free Speech*, WALL ST. J.: L. BLOG (Mar. 18, 2015, 6:41 PM), <http://blogs.wsj.com/law/2015/03/18/floyd-abrams-college-campuses-pose-greatest-threat-to-free-speech/> [<https://perma.cc/EYU6-TDEE>]; see also Loretta A. Preska, *Tyranny of the Arrogant, Ignorant, and Intolerant: The Liberal Movement to Undermine Free Speech*, 31 TOURO L. REV. 221, 226 (2015) (“In censoring unpopular viewpoints, [universities] rob the marketplace of ideas of its

secondary school contexts, university students voluntarily attend school and are overwhelmingly legal adults, which should compel courts and universities to recognize the fullest extent of First Amendment protections.<sup>184</sup>

Student publications uniquely contribute to the exchange of ideas on a university campus.<sup>185</sup> They inform their readers about campus news and events and stories of local and national importance.<sup>186</sup> Through editorial and opinion pages, they provide a forum for student and faculty debate.<sup>187</sup> They also serve an important democratic function by playing an investigative role: they expose malfeasance and serve as an independent check on a university's administration.<sup>188</sup> Student publications additionally are "training ground[s]" for future professional journalists.<sup>189</sup> Scholars who argue in favor of free speech advocate changes to Title IX guidance and university polices that better protect the rights of students on campus and ensure that student publications are able to carry out their essential purposes.<sup>190</sup>

## 2. Fostering an Inclusive Educational Environment

In recent decades, the demographics of American universities have changed.<sup>191</sup> In 1976, white students made up 84 percent of the American college population.<sup>192</sup> By 2013, that number dropped to 59 percent as enrollment among minority groups steadily climbed.<sup>193</sup> Today, women account for 57.9 percent of college students, up from 47.2 percent in 1976.<sup>194</sup>

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substance and consequently silence the critical debating practice that our Founding Fathers routinely turned to in ironing out the nation's most complex issues.").

184. See Sarabyn, *supra* note 46, at 84 ("The Twenty-Sixth Amendment provides a textual and historical basis for drawing the line where that diminishment must end. Applying the Twenty-Sixth Amendment and its subsequent legal history to the Constitution produces a bright line rule prohibiting the diminishment of rights for those over the age of seventeen. This, in turn, creates a bright line rule between secondary school and the university for the purpose of free speech.").

185. See *Joint Statement on Rights and Freedoms of Students*, AAUP BULL., June 1968, at 258, 260 ("Student publications and the student press are a valuable aid in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on the campus. They are a means of bringing student concerns to the attention of the faculty and the institutional authorities and of formulating student opinion on various issues on the campus and in the world at large.").

186. See Hapney & Russo, *supra* note 22, at 116.

187. *Id.*

188. *Id.*

189. *Id.*

190. See *infra* Part II.C.

191. See PEN AMERICA, AND CAMPUS FOR ALL: DIVERSITY, INCLUSION, AND FREEDOM OF SPEECH AT U.S. UNIVERSITIES 12–13 (2016), [https://pen.org/sites/default/files/PEN\\_campus\\_report\\_final\\_online\\_2.pdf](https://pen.org/sites/default/files/PEN_campus_report_final_online_2.pdf) [<https://perma.cc/LMR5-RHSW>].

192. See *id.* at 12.

193. See *id.* Between 1973 and 2013, Hispanic student enrollment increased from 4 percent to 16 percent, African American enrollment rose from 10 percent to 15 percent, and Asian/Pacific Islander enrollment rose from 2 percent to 6 percent. *Id.*

194. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT., [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_303.10.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_303.10.asp) (last visited Mar. 25, 2017) [<https://perma.cc/89K7-GZZT>].



Many universities have also increasingly made efforts to recruit lesbian, gay, bisexual, and transgender (LGBT) students.<sup>195</sup>

These changes have coincided with a shift in opinion about free speech.<sup>196</sup> Although students generally find free speech to be an important issue according to recent surveys, a sizeable portion favor restricting speech when it is offensive.<sup>197</sup> While just 16 percent of students said that freedom of speech should be more limited on a college campus, many students favored restrictions on campus speech.<sup>198</sup> Seventy-two percent of students support disciplinary action against any student or professor who uses offensive language.<sup>199</sup> Additionally, 63 percent favor their professors' use of trigger warnings,<sup>200</sup> and 51 percent of students endorse the adoption of "speech codes."<sup>201</sup>

### 3. Eradicating Harassment on Campus

Both students and universities have an interest in preventing harassment. Sexual harassment, especially peer-to-peer harassment, remains a problem on many campuses today.<sup>202</sup> The physical and emotional impact of harassment is significant and can interfere with a student's education, as well

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195. See PEN AMERICA, *supra* note 191, at 12; see also Timothy Pratt, *Colleges See Gay Students as Growth Market*, TIME (Sept. 2, 2014), <http://time.com/3211813/lgbt-gay-colleges-resources/> [<https://perma.cc/7WRA-MKHD>].

196. See PEN AMERICA, *supra* note 191, at 13.

197. See *id.* (noting that recent studies surveying student's opinions on campus speech, including the study conducted for the William F. Buckley, Jr. Program at Yale and the Knight Foundation study, produce some inconsistencies and raise some methodological questions but nonetheless show notable results).

198. Press Release, The William F. Buckley, Jr. Program at Yale, Almost Half (49%) of U.S. College Students "Intimidated" by Professors When Sharing Differing Beliefs: Survey (Oct. 26, 2015) [hereinafter William F. Buckley, Jr. Program Press Release], <http://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey/> [<https://perma.cc/Z7RU-B543>].

199. *Id.*

200. *Id.* Trigger warnings are alerts that some professors convey to their students to caution them about upcoming sensitive course material or discussion. See Dugan Arnett, *Academia Wrestles Anew with How Freely Words Can Flow*, BOS. GLOBE (Sept. 7, 2016), <https://www.bostonglobe.com/lifestyle/style/2016/09/06/even-trigger-warning-debate-rages-few-colleges-take-stance/B8Qop2q1J7xSNP1vEg1cqI/story.html> [<https://perma.cc/8BA2-6Y5K>].

201. William F. Buckley, Jr. Program Press Release, *supra* note 198.

202. Nearly half of students reported being a victim of sexual harassment since being enrolled in college, according to one survey. See DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015), <http://i2.cdn.turner.com/cnn/2015/images/09/23/report.on.the.aau.campus.climate.survey.on.sexual.assault.and.sexual.misconduct.pdf> [<https://perma.cc/6PZB-CLN7>]. However, the study defined sexual harassment broadly, for example, by including behavior such as "[making] sexual remarks or [telling] jokes or stories that were insulting or offensive" as sexual harassment. See *id.* at 29.

as cause other long-term effects.<sup>203</sup> Similarly, harassment based on race and national origin occurs on college campuses today.<sup>204</sup>

#### 4. Institutional University Interests

Universities have their own interests that affect freedom of speech on campus. First, they require order on campus.<sup>205</sup> Failing to discipline student speech when it rises to the level of harassment may risk interfering with students' education or otherwise create a hostile or disruptive environment.<sup>206</sup>

Additionally, a university has an interest in preserving its reputation—one of the most influential factors in attracting applicants and donors.<sup>207</sup> Because many universities fund student publications that may also bear the university's name, universities may seek to control published content if students or the public reasonably believe the publication “bear[s] the imprimatur of the school.”<sup>208</sup> Some scholars have further noted the increasing “corporatization” of the university, whereby colleges treat students as customers or clients.<sup>209</sup> In adopting corporate organizational models to compete for students, universities increasingly view student media as part of the institution's brand and thus may seek to prevent student publications from publishing controversial content that may offend prospective students or otherwise portray the university poorly.<sup>210</sup>

203. Jennifer Kirby Tanney, *A Back Door to Individual Title IX Liability?: The Implications of Fitzgerald v. Barnstable School Committee on the Liability of Teachers and Administrators for Peer-to-Peer Harassment*, 26 WIS. J.L. GENDER & SOC'Y 23, 28–29 (2011).

204. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SECURING EQUAL EDUCATIONAL OPPORTUNITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 9 (2016), <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> (indicating 198 complaints of racial harassment in 2016) [<https://perma.cc/7GXB-G699>]; see also Caitlin Dickerson, *Postelection Harassment, Case by Case*, N.Y. TIMES (Nov. 23, 2016), <http://www.nytimes.com/2016/11/23/us/post-trump-how-people-explain-bias-based-attacks.html> [<https://perma.cc/E3MU-YCB5>].

205. See *Goss v. Lopez*, 419 U.S. 565, 580 (1975); Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2305 (2016).

206. See Safko, *supra* note 205, at 2305.

207. See *id.* However, some schools have also experienced pushback from alumni donors who have sometimes curbed donations in response to what they perceive as a politically correct campus culture. See, e.g., Anemona Hartocollis, *College Students Protest, Alumni's Fondness Fades and Checks Shrink*, N.Y. TIMES (Aug. 4, 2016), [https://www.nytimes.com/2016/08/05/us/college-protests-alumni-donations.html?\\_r=0](https://www.nytimes.com/2016/08/05/us/college-protests-alumni-donations.html?_r=0) [<https://perma.cc/2VHC-TGCN>]; Richard Pérez-Peña et al., *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. TIMES (Aug. 26, 2016), [http://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html?\\_r=0](http://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html?_r=0) [<https://perma.cc/HR6X-N2W5>].

208. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 281 (1988).

209. See Jordan J. Titus, *Pedagogy on Trial: When Academic Freedom and Education Consumerism Collide*, 38 J.C. & U.L. 107, 162–63 (2011); Fredrik DeBoer, *Why We Should Fear University, Inc.*, N.Y. TIMES (Sept. 9, 2015), [https://www.nytimes.com/2015/09/13/magazine/why-we-should-fear-university-inc.html?\\_r=0](https://www.nytimes.com/2015/09/13/magazine/why-we-should-fear-university-inc.html?_r=0) [<https://perma.cc/U8AB-QQD4>].

210. Kasia Kovacs, *Student Press Under Pressure*, INSIDE HIGHER ED (Dec. 1, 2016), <https://www.insidehighered.com/news/2016/12/01/student-reporters-face-retaliation-university-administrators-new-report-says> [<https://perma.cc/E3S6-YPXN>].

### B. Recent Controversies

Several recent events involving student publications on university campuses demonstrate the tension between students' free speech rights and universities' interests in protecting the student body from harassing or otherwise offensive speech. These incidents highlight disciplinary action that schools have taken under the color of Title IX and through their own policies.

#### 1. Title IX Disciplinary Action

Recently, college administrators and students have invoked Title IX to sanction published student speech, pitting the school's interests against students' free speech rights. For example, in April 2013, the University of Alaska Fairbanks, a public university, launched an inquiry into its student newspaper, the *Sun Star*.<sup>211</sup> The university commenced the investigation after the paper, which was funded by both advertising revenue and student activity fees, published a satirical article in its April Fools' Day issue about the university's plans to build a "vagina-shaped" building on campus.<sup>212</sup> A university professor filed a formal written complaint with the school's Office of Diversity and Equal Opportunity, alleging that many faculty members found the article objectionable and that the satirical piece "reproduce[d] the 'rape culture' that trivializes the forced and non-consensual display and penetration of women's bodies."<sup>213</sup> The university determined the article's content did not merit disciplinary action.<sup>214</sup> The same professor subsequently appealed the finding and filed a Title IX complaint against the university for failure to investigate, alleging that the article's "sexual jokes, graphic displays of women's genitals, and use of sexual slang create[d] a hostile environment because it comprises sexual harassment."<sup>215</sup>

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211. See Sam Friedman, *Appeal Seeks Re-Examination of Sexual Harassment Complaints Against UAF Student Newspaper*, FAIRBANKS DAILY NEWS-MINER (Nov. 11, 2013), [http://www.newsminer.com/news/local\\_news/appeal-seeks-re-examination-of-sexual-harassment-complaints-against-uaf/article\\_82c9309e-4ab0-11e3-b059-0019bb30f31a.html](http://www.newsminer.com/news/local_news/appeal-seeks-re-examination-of-sexual-harassment-complaints-against-uaf/article_82c9309e-4ab0-11e3-b059-0019bb30f31a.html) [<https://perma.cc/WF3C-GGXU>].

212. See Lakeidra Chavis, *On Silence and Accountability*, SUN STAR (Sept. 10, 2013), <http://www.uafsunstar.com/on-silence-and-accountability/> [<https://perma.cc/9WYG-H46R>]. The *Sun Star* published its April Fools' Day edition as the *Fun Star* amid popular mocking of "giant penis buildings" on campus. *Id.* The issue also included a screenshot of a vagina-inspired building from the 1998 PG-13 Robin Williams movie, *Patch Adams*. See Press Release, Found. for Individual Rights in Educ., Victory: Free Press Vindicated at University of Alaska Fairbanks (Feb. 11, 2014), <https://www.thefire.org/victory-free-press-vindicated-at-university-of-alaska-fairbanks/> [<https://perma.cc/Z7PW-LYUD>].

213. See Samantha Sunne, *University of Alaska Fairbanks Student Newspaper Under Investigation Following Sexual Harassment Claims*, STUDENT PRESS L. CTR. (Nov. 26, 2013, 5:33 PM), <http://www.splc.org/article/2013/11/university-of-alaska-fairbanks-student-newspaper-under-investigation-following-sexual-harassment-cla?id=2641.#> [<https://perma.cc/C9H4-USRE>].

214. See Rex Santus, *Articles in University of Alaska Fairbanks' Student Newspaper Were Not Sexual Harassment, Outside Review Finds*, STUDENT PRESS L. CTR. (Feb. 18, 2014, 4:34 PM), <http://www.splc.org/article/2014/02/articles-in-university-of-alaska-fairbanks-student-newspaper-were-not-sexual-harassment-outside-revi?id=2672> [<https://perma.cc/C5K A-X3XH>].

215. See *id.*

Pursuant to OCR's 2011 Dear Colleague letter, the university was obligated to commence a Title IX investigation, despite its earlier finding, because the professor's allegations amounted to a prima facie case for harassment and failure to investigate.<sup>216</sup> During the course of the investigation, the university's faculty senate sent a letter to the *Sun Star*, asking the paper to permanently remove the satirical article from its website.<sup>217</sup> The Office of Diversity and Equal Opportunity and the faculty senate conducted a months-long investigation and concluded that the article did not violate Title IX. The university subsequently dismissed each of the professor's claims.<sup>218</sup> The complainant professor appealed the ruling.<sup>219</sup> Several months later, an outside review affirmed that the First Amendment protected the *Sun Star*'s articles, and the expiration of a final opportunity to appeal rendered the decision final.<sup>220</sup> Although the school found the paper and its student writers were fully acting within their constitutional rights, it still burdened them with a months-long inquiry, which included the university's dean advising the paper's editor not to take classes with certain professors.<sup>221</sup> This example is illustrative of the different interests at stake in conflicts regarding potentially harassing speech.<sup>222</sup>

The American Association of University Professors (AAUP)<sup>223</sup> argues that OCR's failure to distinguish speech and conduct in Title IX guidance threatens constitutionally protected speech.<sup>224</sup> Although the AAUP typically focuses on professors' rights on college campuses, the group addressed how Title IX and resultant university policies infringed on students' free speech rights in a recent report.<sup>225</sup>

Specifically, the AAUP argues that, over the past decade, OCR has failed to strike an appropriate balance between preventing sexual harassment and protecting speech and academic freedom essential to the academic

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216. Letter from Brian Rogers, Chancellor, Univ. of Alaska Fairbanks, to Found. for Individual Rights in Educ. (Feb. 4, 2014), [http://s3.amazonaws.com/cdn.getsnetworks.com/spl/pdf/UAF\\_letter\\_to\\_FIRE.pdf](http://s3.amazonaws.com/cdn.getsnetworks.com/spl/pdf/UAF_letter_to_FIRE.pdf) [https://perma.cc/M3K5-YCFT].

217. See Chavis, *supra* note 212.

218. See Friedman, *supra* note 211.

219. *Id.*

220. Weston Morrow, *Appeal Finds in Favor of UAF Student Newspaper in Sexual Harassment Case*, FAIRBANKS DAILY NEWS-MINER (Feb. 12, 2014), [http://www.newsminer.com/news/local\\_news/appeal-finds-in-favor-of-uaf-student-newspaper-in-sexual/article\\_0a41fa3e-93c1-11e3-8937-0017a43b2370.html](http://www.newsminer.com/news/local_news/appeal-finds-in-favor-of-uaf-student-newspaper-in-sexual/article_0a41fa3e-93c1-11e3-8937-0017a43b2370.html) [https://perma.cc/NH23-GX5V]. An independent investigator commented that "[t]he bottom line is that Title IX allows a range of expression and conduct that some people will find offensive, but is nevertheless considered healthy for society, particularly in a public University and equally so where freedom of the press is involved." *Id.*

221. See Chavis, *supra* note 212.

222. See *supra* notes 11–21 and accompanying text.

223. "The AAUP is a nonprofit membership association of faculty and other academic professionals." *About the AAUP*, AM. ASS'N OF U. PROFESSORS, <https://www.aaup.org/about-aaup> (last visited Mar. 25, 2017) [https://perma.cc/XG6T-GEWF].

224. See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 159, at 69–70 ("As currently interpreted, sexual harassment consists not only of sexual misconduct but also of speech that creates a 'hostile environment.' When speech and conduct are conflated, however, the constitutional and academic freedom protections normally afforded speech are endangered.").

225. See *id.* at 70.

environment.<sup>226</sup> The AAUP notes that OCR's initial guidance on sexual harassment specifically addressed First Amendment concerns by confirming that universities should not construe OCR's guidance to mandate policies that infringe on protected speech.<sup>227</sup> However, the AAUP noted that since OCR's 2011 Dear Colleague letter, the agency has failed to provide an adequate statement reaffirming free speech protections, which leaves uncertain what speech protections—if any—apply in a school's investigation of hostile environment claims.<sup>228</sup> This ambiguity creates a risk of universities overreaching when they pursue disciplinary action they believe Title IX mandates, threatening free speech rights on campuses.<sup>229</sup>

## 2. Ad Hoc Disciplinary Measures

The AAUP argues that Title IX's failure to recognize the institutional realities of the university environment and its imposition of severe consequences for noncompliance have motivated universities to adopt policies and codes of conduct to the detriment of their educational missions.<sup>230</sup> However, not all universities that have taken disciplinary action against student newspapers have invoked Title IX as a means for doing so.

The University of Wisconsin-Superior similarly investigated its student newspaper, the *Promethean*,<sup>231</sup> after publication of its April Fools' Day issue in 2016.<sup>232</sup> The issue, intended to poke fun at "absurdity in the news,"<sup>233</sup> included one satirical article about the small size of the university's Jewish population, as well as an article about pickup lines.<sup>234</sup> A graduate student

226. *See id.* at 75–76 (“To what extent can speech be subject to the same regulations as assault, as has been increasingly the case in recent years? What are the consequences of such an equation in a college or university setting, where a careful balance must be struck between an interest in preventing or punishing hostile-environment sexual harassment and an interest in protecting academic freedom, free speech, shared governance, and due process? How can students’ and employees’ equal rights and safety be protected without violating their rights of academic freedom or free speech? These questions were considered central to Title IX enforcement in the last decades of the twentieth century but have been pushed to the side at least since 2011.”).

227. *See id.* at 76–77.

228. *See id.* at 77 (“[W]e believe that the 2011 ‘Dear Colleague’ letter should have made clear that rights of free speech and academic freedom continue to apply in cases that do not involve assault, including those complaints alleging a hostile environment.”).

229. *See id.*

230. *See id.* at 84.

231. Although the *Promethean* is funded by student activity fees, ad revenue funds its April Fools' Day edition. Lisa Kaczke, *UWS Student Paper's April Fools' Day Issue Draws Backlash*, DULUTH NEWS TRIB. (Apr. 15, 2016), <http://www.duluthnewstribune.com/news/education/4011002-uws-student-papers-april-fools-day-issue-draws-backlash> [https://perma.cc/PR9J-UBG9].

232. *Id.*

233. *Id.*

234. *See* Kaitlin DeWulf, *Student Newspaper Stands by Its April Fools' Day Edition Despite University Investigation and Community Backlash*, STUDENT PRESS L. CTR. (Apr. 20, 2016), <http://www.splc.org/article/2016/04/uws-april-fools> [https://perma.cc/49JT-BQ7P]. The article, titled “Area Jewish Man Doesn’t Know How the F--- He Got Here,” included an anti-Semitic name and was authored by the paper’s editor-in-chief, who is Jewish. *See* Kaczke, *supra* note 231. The issue also contained various fictional stories, such as the university’s

filed a formal complaint, alleging that the newspaper did not clearly mark the edition as satire and that she felt intimidated when the editorial board refused to meet with her.<sup>235</sup> She protested that “[o]ffending people in protected classes in the name of satire is not free from consequences, nor should it ever be.”<sup>236</sup> The university subsequently condemned the issue and launched an investigation.<sup>237</sup> After the paper threatened litigation, the university closed the investigation one week later.<sup>238</sup>

At SUNY Buffalo State, the university’s student government association froze funding for the student newspaper, the *Record*,<sup>239</sup> after the paper published its 2015 April Fools’ Day issue.<sup>240</sup> The student government’s vice president contacted the paper’s staff on the day of publication, calling the satire “a very serious matter” because some students and faculty believed that “some of the topics discussed . . . were offensive to members of Buffalo State and the surrounding community.”<sup>241</sup> The student government, which holds the power to allocate fees, also demanded that the *Record* remove all copies of its paper from campus newsstands.<sup>242</sup> After reconsideration, the student government later agreed to reinstate the paper’s funding, explaining that the “removal of the ‘April Fools’ edition of the paper was called in order to protect our students from feeling uncomfortable.”<sup>243</sup>

Other student publications have resorted to litigation. The *Koala*, an “often controversial, raunchy humor magazine” at the University of San Diego,<sup>244</sup> published an article about the university opening a “dangerous space,” an apparent satirization of the safe space movement.<sup>245</sup> The article included

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plans to relaunch its defunct football team and alumnus Arnold Schwarzenegger returning to teach a class. *See id.*

235. *See id.*

236. *Id.*

237. *See* Lisa Kaczke, *UWS Closes Investigation into April Fools’ Day Issue of Student Paper*, DULUTH NEWS TRIB. (Apr. 22, 2016), <http://www.duluthnewstribune.com/news/4016207-uws-closes-investigation-april-fools-day-issue-student-paper> [<https://perma.cc/EX-P8-6SV7>].

238. *See id.*

239. The *Record* is published twenty times per year and is funded exclusively through mandatory student activity fees. *See About the Record*, RECORD, <http://buffstatercord.com/about/> (last visited Mar. 25, 2017) [<https://perma.cc/E4SP-QM8Q>].

240. Dale Anderson, *Buffalo State Newspaper’s April Fool’s Edition Stirs Controversy on Campus*, BUFF. NEWS (Apr. 2, 2015), <http://buffalonews.com/2015/04/02/buffalo-state-newspapers-april-fools-edition-stirs-controversy-on-campus/> [<https://perma.cc/2B2Q-FQ38>]. The paper’s annual humor issue, dubbed the *Wreckard*, included satirical articles such as the university’s president authorizing drone strikes on campus and a state ban on snacking. *See id.*

241. *USG Freezes Record Budget over April Fools Issue*, RECORD (Apr. 2, 2015), <http://buffstatercord.com/4942/news/usg-freezes-record-budget-over-april-fools-issue/> [<https://perma.cc/EPB6-Q8MS>].

242. *See* Anderson, *supra* note 240.

243. United Students Government at Buffalo State, FACEBOOK (Apr. 2, 2015), <https://www.facebook.com/usgbuffstate/posts/745872422193490> [<https://perma.cc/3HCH-8W3Q>].

244. The publication bills itself as “The Worst in Collegiate Journalism Since 1982!” *See* KOALA, <https://thekoala.org/> (last visited Mar. 25, 2017) [<https://perma.cc/63CV-FWS5>].

245. *UCSD Unveils New Dangerous Space on Campus*, KOALA (Nov. 16, 2015), <http://thekoala.org/2015/11/16/ucsd-unveils-new-dangerous-space-on-campus/> [<https://perma.cc/ACU3-B7VD>].

reference to racial slurs and other offensive racist references.<sup>246</sup> Two days after the *Koala* published the piece, the university's student counsel voted to cut funding to the *Koala* and all student publications on campus that received student activity fees.<sup>247</sup> The same day, the university's administration issued a statement denouncing the *Koala* and noting that its financial support had not come directly from the university.<sup>248</sup> The university's administration maintained that the revocation of student activity fees was coincidental despite the timing, while others questioned this position.<sup>249</sup>

The American Civil Liberties Union (ACLU) filed a complaint on behalf of the *Koala* seeking a preliminary and permanent injunction to prohibit the university from revoking student activities funds and from infringing on the *Koala*'s editors' First Amendment right to free speech and freedom to publish.<sup>250</sup> The complaint alleged that the university violated the First Amendment when it retaliated against the paper based on its editorial viewpoint by stripping the student press of funding while continuing to fund other speech on campus.<sup>251</sup> The court denied the *Koala* injunctive relief in part on procedural grounds<sup>252</sup> but addressed the merits of the argument anyway.

The court found that the student government's pool of funds for student print publications was a limited public forum.<sup>253</sup> Further, because the student government eliminated student activity fees for all student publications—not just the *Koala*—the court found that revocation of funding was “content and viewpoint neutral within the meaning of *Rosenberger*.”<sup>254</sup> It additionally found the *Koala*'s claims regarding the motivation of the student government's revocation of funds for all printed student publications were

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246. Gary Warth, *UCSD Student Leaders Criticized for Cutting Media Funds*, SAN DIEGO UNION-TRIB. (Dec. 7, 2015), <http://www.sandiegouniontribune.com/news/education/sdut-ucsd-students-koala-cuts-2015dec07-story.html> [<https://perma.cc/HBF4-WFT6>].

247. *See id.*

248. Press Release, UC San Diego, Statement Denouncing Koala Publication from UC San Diego Administration (Nov. 18, 2015), [http://ucsdnews.ucsd.edu/pressrelease/statement\\_denouncing\\_koala\\_publication\\_from\\_uc\\_san\\_diego\\_administration](http://ucsdnews.ucsd.edu/pressrelease/statement_denouncing_koala_publication_from_uc_san_diego_administration) (“We, the UC San Diego administration, strongly denounce the Koala publication and the offensive and hurtful language it chooses to publish. The Koala is profoundly repugnant, repulsive, attacking and cruel. The UC San Diego administration does not provide any financial support for the Koala, and we call on all students, faculty, staff and community members to join us in condemning this publication and other hurtful acts.”) [<https://perma.cc/JG99-QE7A>].

249. *See* Warth, *supra* note 246.

250. Complaint, *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2016 WL 6441470 (S.D. Cal. Nov. 1, 2016).

251. *Id.*; Press Release, UC San Diego, *supra* note 248 (“The UC San Diego administration does not provide any financial support for the Koala . . .”).

252. *See Koala*, 2016 WL 6441470, at \*3. The court did not grant the the *Koala*'s claim for injunctive relief in federal court because it sought funding from the state, and under the Eleventh Amendment, “non-consenting States or their agencies may not be sued by private individuals in federal court.” *Id.*

253. *See id.* at \*5. The *Koala* argued that the relevant forum was the student government's rules and practice for funding student organizations. *Id.*

254. *Id.* at \*6.

deficient.<sup>255</sup> The court noted that because the *Koala* also publishes online, there was no showing that the elimination of funding for its print publication played a large role in preventing dissemination of its message.<sup>256</sup>

Although the ACLU amended its complaint, arguing that the court conflated its First Amendment claims and failed to address the allegation that the student government discriminated specifically against the student press,<sup>257</sup> the court subsequently dismissed each of the *Koala*'s claims without leave to amend.<sup>258</sup> In doing so, the court again classified the student activities fees dedicated to student print publications—not funding for student groups generally—as the relevant forum.<sup>259</sup> The court reasoned that revoking funds for all student print publications was therefore content and viewpoint neutral, and because the regulation applied to each of the forum's speakers, it was therefore reasonable.<sup>260</sup> The court found that it would not strike down a content-neutral regulation on the basis of motive even if the school's public denouncements of the *Koala* and the timing of the funding revocation suggested discrimination or retaliation.<sup>261</sup>

Although the ACLU is considering an appeal of the court's order, the university's student-run publications still remain without funding.<sup>262</sup>

### C. Proposals for Reform

Scholars and commentators have noted that the actions of universities and student governments, coupled with recent Title IX guidance, create tension with the free speech rights of student publications. Accordingly, some of these observers have proposed recommendations to protect the student press against such unwarranted interference. These recommendations have been directed at courts, state legislatures, OCR, and universities.

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255. *Id.* (“Plaintiff fails to cite legal authorities where the motivation, and not the conduct, of some government actors (the Senate of Associated Students) is determinative on First Amendment issues in context of a limited public forum.”).

256. *Id.* at \*6 n.2 (“The court notes that the vast majority of the authorities cited by the parties predate the so-called digital revolution. Publication, once exclusively within the realm of print media, is now also communicated digitally on-line and on social media sites. In the present case, there is no evidence to suggest that The Koala was impacted in any manner in its digital publications. Further, the evidentiary record submitted by the parties does not focus on print media versus digital media. There is no showing that print media (total printing budget for Plaintiff in Fall 2015, \$634, and Winter 2015, \$453) plays a significant role in disseminating Plaintiff's message to a computer-literate student body.”).

257. See Matthew Zamudio, *Court Grants UCSD Motion to Dismiss Koala Injunction*, UCSD GUARDIAN (Nov. 7, 2016), <http://ucsdguardian.org/2016/11/07/court-grants-ucsd-motion-to-dismiss-koala-injunction/> (“The court completely ignores the Koala's argument that the A.S. Council treated the press differently than other forms of media . . . . The judge appears to have confused ‘freedom of the press’ with ‘freedom of speech,’ and treated them as one and the same, when they're actually distinct claims.”) [<https://perma.cc/C94D-7Q7L>].

258. *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 WL 784183 (S.D. Cal. Feb. 28, 2017).

259. See *id.* at \*5–6.

260. See *id.*

261. *Id.*

262. See Gary Warth, *Judge Dismisses Koala Publication Lawsuit Against UCSD*, SAN DIEGO UNION-TRIB. (Mar. 6, 2017), <http://www.sandiegouniontribune.com/news/education/sd-me-koala-lawsuit-20170306-story.html> [<https://perma.cc/9J22-84N7>].



### 1. Constitutional and Statutory Reforms

Scholars have noted that the Supreme Court's failure to provide sufficient guidance about which First Amendment standard applies to student publications on campuses today has led to a federal circuit court split.<sup>263</sup> Because of this disagreement, student publications are afforded disparate levels of First Amendment protection depending on their geographic location.<sup>264</sup> Commentators have called on the Supreme Court to clarify this standard.<sup>265</sup> In particular, some argue that the Court should recognize that the vast majority of college students are of age, and, therefore, the Court should look to its own jurisprudence that has distinguished the often limited constitutional rights afforded to children from the full constitutional rights of legal adults.<sup>266</sup> These scholars advocate for the Supreme Court to issue a clear decision recognizing that university students are afforded the full First Amendment rights of adult citizens<sup>267</sup> and, in the case of university student publications, reject *Hazelwood's* application.<sup>268</sup> The Court's failure to clarify this issue compels student publications to self-censor in the face of uncertainty, ultimately limiting academic freedom and curbing the marketplace of ideas that university campuses should strive to create.<sup>269</sup>

In light of the Court's apparent reluctance to settle the debate, other scholars advocate for the continued adoption of state statutes as a means of preventing the application of the limited free speech rights of *Hazelwood* to the school environment.<sup>270</sup> These scholars point to the statutes' effectiveness in promoting student journalists' coverage of controversial topics and news that may be critical of a school's administration.<sup>271</sup> The Student Press Law Center, a not-for-profit organization that advocates for the rights of student journalists, has spearheaded this campaign, successfully introducing model legislation in dozens of states.<sup>272</sup>

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263. See Sarabyn, *supra* note 46, at 44; see also Daniel A. Applegate, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. L. REV. 247, 250 (2005); Michael O. Finnigan, Jr., *Extra! Extra! Read All About It!: Censorship at State Universities: Hosty v. Carter*, 74 U. CIN. L. REV. 1477, 1479 (2006).

264. See Sarabyn, *supra* note 46, at 44.

265. See *id.*

266. *Id.* at 92.

267. *Id.*

268. See Applegate, *supra* note 263, at 249; Finnigan, *supra* note 263, at 1492.

269. Frank D. LoMonte, "The Key Word Is Student": *Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 306–07 (2013).

270. See, e.g., Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89 (2013).

271. *Id.* at 153.

272. See *Who We Are and What We Do*, NEW VOICES USA, <http://newvoicesus.com/> (last visited Mar. 25, 2017) [<https://perma.cc/SFN5-2HH9>].

## 2. Reissuance of Title IX Guidance

The AAUP and PEN America, a literary and human rights organization, endorse a number of reforms to current Title IX guidance.<sup>273</sup> First, they suggest that OCR reaffirm its 2001 Revised Sexual Harassment Guidance and 2003 Dear Colleague letter, which both make clear that universities' efforts to enforce Title IX should not infringe on protected speech.<sup>274</sup> They argue that the absence of any express mention of academic freedom and free speech in OCR's sweeping 2011 guidance appears to have diminished the importance of protecting free speech.<sup>275</sup> Because this guidance applied to both physical sexual assault and sexual harassment, including pure speech, they urge OCR to acknowledge the constitutionally protected interests at stake.<sup>276</sup>

The AAUP further proposes that OCR update its guidance to distinguish sexual assault and speech-based sexual harassment.<sup>277</sup> In its most recent guidance, OCR used the term "sexual harassment" to describe both violent sexual assault, such as forcible rape, and pure speech such as "unwelcome [verbal] conduct of a sexual nature."<sup>278</sup> The AAUP proposes that OCR adopt its 2001 guidance as the standard for determining whether conduct rises to the level of harassment under Title IX.<sup>279</sup>

Procedurally, the AAUP proposes that allegations of sexual harassment should be assessed under a "clear and convincing" standard of evidence rather than a "preponderance of the evidence" standard that OCR currently mandates.<sup>280</sup> AAUP and PEN America also argue that OCR should further work with universities to develop tailored programs to respond to allegations of sexual harassment, rather than forcing a one-size-fits-all approach.<sup>281</sup> Other scholars have pointed to schools' clear infringement of students' constitutionally protected free speech rights and have advocated that OCR adopt the objective *Davis* standard to evaluate claims of sexual harassment, minimizing uncertainty for universities and providing them with a clearer legal standard to tackle sexual harassment on campus.<sup>282</sup>

## 3. Campus Reforms from Administrators and Professors

The AAUP and PEN America argue that there is no inherent tension between adopting policies that effectively address sexual harassment on

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273. PEN America's proposals for revisions to Title IX largely consist of endorsements of the AAUP's recommendations in its 2016 report. See PEN AMERICA, *supra* note 191, at 74.

274. See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 159, at 94–95; see also PEN AMERICA, *supra* note 191, at 74.

275. See *supra* note 157 and accompanying text; see also AM. ASS'N OF UNIV. PROFESSORS, *supra* note 159, at 94–95.

276. See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 159, at 94–95.

277. See *id.*

278. *Id.* at 77.

279. *Id.* at 94–95.

280. *Id.* at 95.

281. *Id.*

282. See Majeed, *supra* note 121, at 458.

campus while restoring protections for free speech.<sup>283</sup> PEN America further proposes that groups on campuses should advocate that free speech is a principle that transcends political ideology, and the organization emphasizes that education on campus about civility and sensitive topics is key.<sup>284</sup>

### III. THE NEED FOR ADDITIONAL STUDENT PRESS PROTECTIONS IN LIGHT OF RECENT FEDERAL GUIDANCE AND CAMPUS CONTROVERSIES

Amid an unsettled legal backdrop and well-publicized instances of restriction of student speech on college campuses, federal agencies should reform their policies to protect student publications and preserve the university's important function as a marketplace of ideas. As such, this part argues that reform is necessary to ensure that students' First Amendment rights are adequately protected. Part III.A calls for a revision to Title IX guidance. Then, Part III.B discusses the state's role in making reforms that protect students from university overreach. Finally, Part III.C urges reform at the campus level, as students can take steps to protect their own freedom of expression on their college and university campuses.

#### A. *Revising Title IX Guidance*

Current agency interpretations of Title IX present a serious threat to free press on university campuses. While well intentioned, OCR's 2011 guidance, as well as the DOJ's more recent standard, should be revised to better ensure students' First Amendment rights receive due protection.

#### 1. Bifurcate the Definition of Sexual Harassment

First, OCR and the DOJ should implement the AAUP's proposal to distinguish speech-based harassment from sexual assault instead of grouping them both under sexual harassment.<sup>285</sup> Separating sexual harassment into these two distinct categories does not (nor should it) diminish the seriousness of the issue of sexual harassment on college campuses.<sup>286</sup> While universities must be held accountable, university responses to allegations of harassment based solely on speech create unique First Amendment concerns, unlike in cases of physical sexual assault.<sup>287</sup> This exceptional constitutional dilemma necessitates Title IX guidance that addresses pure-speech harassment separately from physical sexual harassment. Doing so ensures that schools can work toward eliminating harassment from their campuses without blatantly running afoul of students' First Amendment rights.

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283. See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 159, at 92; see also PEN AMERICA, *supra* note 191, at 71 ("There is no contradiction between advocating for more stringent measures to address sexual harassment and assault on campus, on the one hand, and on the other, insisting on measures to restore proper protections for free speech.").

284. PEN AMERICA, *supra* note 191, at 72.

285. See *supra* notes 277–79 and accompanying text.

286. See *supra* notes 202–04 and accompanying text.

287. See *supra* note 276 and accompanying text.

## 2. Adopt the *Davis* Standard for Pure-Speech Peer Harassment

OCR should require schools to assess claims of sexual harassment under the *Davis* standard articulated in OCR's 2001 guidance.<sup>288</sup> Under the most recent guidance from OCR and the DOJ, virtually any content published in a student paper could be the subject of a Title IX complaint. For instance, a student could lodge a complaint with his university's Title IX coordinator after reading a critical review of a campus production of *The Vagina Monologues*<sup>289</sup>—which would likely contain speech of a sexual nature that is unwelcome to some. A university's administration would be obliged to respond to the complaint by conducting an investigation because failure to do so could result in a hostile environment determination based on the university's inaction, potentially leading to draconian consequences such as loss of federal funds.<sup>290</sup>

By contrast, OCR's adoption of the *Davis* standard as the basis for Title IX liability introduces an objective criterion by which to evaluate a student's claim.<sup>291</sup> Evaluating claims under a "reasonable person" standard, rather than compelling universities to investigate all claims where an individual student takes subjective offense to a statement, would serve as a tool to vet claims at the outset and prevent expenditure of unnecessary resources, while at the same time provide an additional level of protection for students' free speech rights.

## 3. Clarify Circumstances Under Which Universities Must Take Interim Action Before Adjudicating a Harassment Complaint

Further, OCR's guidance should modify the circumstances under which it mandates that universities take interim action between the filing of a complaint and a final determination. Under the present guidance, OCR mandates that universities take action immediately following the filing of a complaint to stop the alleged harassment.<sup>292</sup> Where a complaining student requests that the university take interim measures to stop the alleged harassment, OCR should require universities to evaluate such requests according to standards observed for a claimant seeking preliminary injunctive relief: the school should require the student to show that "he is likely to succeed on the merits" and "that he is likely to suffer irreparable

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288. See *supra* notes 136–37, 282 and accompanying text.

289. See *The Vagina Monologues*, EVEENSLER, <http://www.eveensler.org/plays/the-vagina-monologues/> (last visited Mar. 25, 2017) [<https://perma.cc/88DF-SA6Q>]; see also Susan Svrluga, *Women's College Theater Group Cancels 'Vagina Monologues' Amid Concerns That It Could Offend Transgender People*, WASH. POST (Jan. 16, 2015), [https://www.washingtonpost.com/news/grade-point/wp/2015/01/16/womens-college-theater-group-cancels-vagina-monologues-because-its-offensive-to-women-who-dont-have-one/?utm\\_term=.da23bfd85622](https://www.washingtonpost.com/news/grade-point/wp/2015/01/16/womens-college-theater-group-cancels-vagina-monologues-because-its-offensive-to-women-who-dont-have-one/?utm_term=.da23bfd85622) [<https://perma.cc/C2EX-9GQ3>].

290. See *supra* note 120 and accompanying text.

291. See *supra* note 137 and accompanying text.

292. See *supra* note 156 and accompanying text.

harm in the absence of preliminary relief.”<sup>293</sup> In the case of an allegation of physical sexual assault, for example, it may more often be necessary for the university to take immediate interim action to separate the accuser and the accused to prevent irreparable harm. However, in the case of allegedly harassing printed speech, there is likely less of a threat of imminent or irreparable harm. Further, a university’s interim measures in the case of a student publication would likely involve complete censorship of such speech. Because the current standard does not provide enough protection for printed speech, and implementation of the preliminary injunction standard would not prevent schools from taking interim action where it is truly necessary, OCR should revise its guidance accordingly.

#### 4. Issue Specific Guidance Defining Protected Speech

OCR should include an acknowledgement of the constitutionally protected speech rights of student publications in any updated guidance. Advocates of student speech and other scholars proposed that OCR reissue its 2003 guidance, which states that Title IX is not intended to restrict “any expressive activities protected under the U.S. Constitution.”<sup>294</sup> Simply reiterating this guidance does not go far enough, however. This is largely because the Supreme Court has not defined a clear standard for assessing which “expressive activities” the Constitution protects on college campuses. Further, since the issuance of OCR’s First Amendment guidance in 2003, the circuit split on this issue has widened.<sup>295</sup> It has produced a spectrum where at one end, the free speech protections afforded to student publications are robust, and at the other, they are virtually nonexistent.<sup>296</sup> Consequently, any update to OCR guidance should include specific examples of what can and should amount to harassment in published student speech to avoid ambiguity that has compelled universities to act whenever speech is found by some to be offensive.

#### *B. Campus Reforms*

Universities and students who write for campus publications are in the best position to initiate reforms to meaningfully protect students’ First Amendment rights and to gain editorial independence.

##### 1. Bylaw Amendments for Student Publications

Student publications should take steps on their own to preserve editorial independence amid pressures from federal agencies and university administrators. The ultimate means of attaining such independence is to maintain financial independence so that financial backlash does not jeopardize a college publication’s ability to publish. Indeed, financial

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293. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

294. *See supra* notes 142, 273–75 and accompanying text.

295. *See supra* notes 104–06.

296. *See supra* notes 101–07.

independence has afforded student publications the greatest force of First Amendment protection in the past.<sup>297</sup>

The shifting dynamics of the media landscape provide student publications with an unprecedented opportunity to break free of financial reliance on their host universities. Despite the industry-wide drop in advertising sales, the ability of publications to publish online and spread news through social media has permitted university newspapers to cut their print production runs and significantly decrease their operating cost while still distributing their publications far and wide across campus.<sup>298</sup> Student publications therefore should prioritize financial independence and take advantage of newfound opportunities to do so.

The reality remains, however, that as many student publications adapt to this changing landscape, they will continue to rely on student activity fees to finance part of their operations. Others rely on in-kind support from their host institutions—such as through use of university facilities and resources like offices, newsstands, and faculty advisors—which often requires the university’s student government to recognize the student publication as an official campus organization.<sup>299</sup> Courts have subjected student publications receiving such support to the First Amendment forum analysis; if a publication receives funding, the court is likely to classify the publication, along with the pool of student activities fees, as a limited public forum where the university can more freely enact restrictions if they are not based on viewpoint.<sup>300</sup>

Just as at least one state has classified all public university student newspapers as “public forums,” student publications without such statutory protection should attempt to designate themselves as “public forums” to receive greater protection.<sup>301</sup> To do so, student publications should amend their bylaws to include language similar to the following:

*This publication is designated as a public forum for the university campus. As such, we welcome the submission of news items, opinions, letters, and other writings from the university community for publication, subject to the editorial calendar and editorial guidelines.*

Adopting such language may help designate the publication as a public forum because it emphasizes that the university itself does not control the content of the publication and that the publication does not limit its content to exclusively what its own writers produce. However, the addition of the second safe harbor sentence would not commit the newspaper to publishing every submission that it receives. Just like student journalists who are members of and contribute to the publication regularly, submissions could be published subject to the time and manner restrictions that the editorial board promulgates.

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297. *See supra* notes 88–92.

298. *See supra* note 40.

299. *See supra* notes 40–42.

300. *See supra* notes 73–78, 97–99, 253–55.

301. *See supra* note 115.

## 2. Bylaw Amendments for Student Governments

Because of the unique character of the student press and the necessity of its independence on university campuses, university student governments should adopt resolutions requiring a supermajority vote to decrease funding to student media on campus. They should additionally adopt resolutions designating all student media organizations and its pool of student activities fees as public forums. Some university student governments have defunded or significantly decreased funding for student newspapers based on their publication of controversial content or discussion of sensitive topics, offering thinly veiled justifications for doing so, such as a broader reevaluation of campus spending, while others have defunded all student publications to minimize the potential for a First Amendment violation.<sup>302</sup> Requiring a supermajority vote and designating publications and activities fees as public forums would show a true commitment to intellectual engagement and discussion of sex, gender, race, and other sensitive and significant societal issues that are essential components of a university education.

Finally, student publications should challenge university disciplinary action wherever necessary. Free speech advocacy organizations such as the Foundation for Individual Rights in Education (FIRE), have successfully won challenges to universities policies, while the ACLU has also helped student publications litigate disciplinary action and funding revocation.<sup>303</sup>

### *C. The Urgent Need for State Legislative Action in Light of Improbable Judicial Resolution*

While the nation's highest court has indicated that judicial resolution is unlikely, many state legislatures have prudently acted by passing legislation that offers greater safeguards for student publications.<sup>304</sup> The "New Voices" model legislation addresses several important aspects of student publication independence. First, states that have adopted this model make clear that full editorial control of student media on college campuses is the domain of student journalists.<sup>305</sup> Further, this legislation also defines the role of the paper's faculty advisor.<sup>306</sup> Considering the widely reported trend of universities removing or penalizing faculty advisors as a form of disciplinary action against student publications<sup>307</sup> and the unlikelihood that a court would address this issue because of the employer-employee relationship, any legislation must include measures that protect the role of the faculty advisor.

## CONCLUSION

Colleges, universities, and student government associations have overreached in the name of ridding their campuses from harassing printed

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302. See *supra* notes 247, 249 and accompanying text.

303. See *supra* notes 238, 250 and accompanying text.

304. See *supra* Part I.B.2; see also notes 271-72 and accompanying text.

305. See *supra* notes 114-18.

306. See *supra* notes 114-15.

307. See *supra* note 118.

speech, thereby threatening the First Amendment rights of students on campus. Through retaliatory action against student newspapers, such as the denial of school funding, schools have curbed students' free speech rights and undermined the long-protected marketplace of ideas that make up college and university campuses. To protect free speech rights, the Department of Education should issue new guidance that clarifies the definition of harassment instead of further compelling schools to violate the constitutional rights of their students. Additionally, given the First Amendment protections unique to student newspapers, schools and student government associations should grant these student publications their own distinctions and protection so that these publications cannot be silenced when they publish content that some interpret as controversial or offensive. Student publications should make further efforts to designate themselves as forums with greater constitutional protection to slow the erosion of the First Amendment on college and university campuses.