

## Protecting the Silence of Speech: Academic Safe Spaces, the Free Speech Critique, and the Solution of Free Association

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# PROTECTING THE SILENCE OF SPEECH: ACADEMIC SAFE SPACES, THE FREE SPEECH CRITIQUE, AND THE SOLUTION OF FREE ASSOCIATION

Trevor N. Ward\*

## INTRODUCTION

Safe Space policies in higher education have captured the attention of modern commentators.<sup>1</sup> Critics of academic Safe Spaces argue that such policies limit the free expression of ideas and negatively impact students' abilities to learn.<sup>2</sup> Proponents of Safe Spaces, however, argue that these policies restrict harmful speech, effectively protecting the interests of minority students.<sup>3</sup> At issue in this national debate is the impact of speech; essentially, commentators have created a normative

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<sup>1</sup> See, e.g., Judith Shulevitz, *In College and Hiding from Scary Ideas*, N.Y. TIMES (Mar. 21, 2015), <http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html> (discussing the modern Safe Space debate); see also Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1362–63 (2002) (recognizing the debate among academics about Safe Spaces in academia); Stuart M. Israel, *Letters, Etc.—Judge Avern Cohn: Journalism and Awards, 1976–2015*, 95 MICH. B.J. 54 (2016) (review of a collection of articles by Judge Cohn) (acknowledging a modern tension between Safe Space policies and the First Amendment).

<sup>2</sup> See Alex Morey, *Journalism Professor: 'College Is Not a Safe Space,'* FIRE (Dec. 3, 2015), <https://www.thefire.org/journalism-professor-college-is-not-a-safe-space/> [<https://perma.cc/MF5F-8M58>]; 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>.

<sup>3</sup> See Morton Schapiro, *I'm Northwestern's President. Here's Why Safe Spaces for Students Are Important.*, WASH. POST (Jan. 15, 2016), [https://www.washingtonpost.com/opinions/how-to-create-inclusive-campus-communities-first-create-safe-places/2016/01/15/069f3a66-bb94-11e5-829c-26ffb874a18d\\_story.html?utm\\_term=.8c784afb86d2](https://www.washingtonpost.com/opinions/how-to-create-inclusive-campus-communities-first-create-safe-places/2016/01/15/069f3a66-bb94-11e5-829c-26ffb874a18d_story.html?utm_term=.8c784afb86d2) [<https://perma.cc/PY2D-AKF3>]; Valerie Strauss, *So You Like the University of Chicago's Rejection of 'Safe Spaces' for Students? Consider This.*, WASH. POST (Aug. 30, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/08/30/so-you-like-the-university-of-chicagos-rejection-of-safe-spaces-for-students-consider-this/> [<https://perma.cc/5YV6-VCRC>].

dichotomy around the ideals of free speech and expression. Proponents, on the one hand, believe that limiting harmful speech promotes inclusion and, therefore, academic success for minority students.<sup>4</sup> Critics, on the other hand, view the limitation of speech as an affront to the free expression of ideas, therefore harming education.<sup>5</sup> Yet, despite their differing conclusions, both sides of this debate generally agree that the issues of Safe Space policies implicate students' speech and expression interests.<sup>6</sup>

It is unsurprising that the Safe Space debate has been characterized in the verbiage of free speech. After all, the United States has a robust social and legal culture embracing free expression in the marketplace of ideas.<sup>7</sup> Moreover, the political and philosophical foundations of any democratic society necessitate the free and open dialogue of the citizenry.<sup>8</sup> Further, as many commentators note, free speech and expression are particularly implicated in higher education because of the supposed academic value of open dialogue; and, even proponents of Safe Spaces concede that the university system is principally based on the free exchange of ideas between students, faculty, and staff.<sup>9</sup>

Limiting the Safe Space debate to a discussion of free speech, however, is detrimental to the very right the debate implicates. Consider the effect on free speech if

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<sup>4</sup> See *supra* note 3 and accompanying text.

<sup>5</sup> See *supra* notes 1–2 and accompanying text.

<sup>6</sup> See Sophie Downes, *Trigger Warnings, Safe Spaces, and Free Speech, Too*, N.Y. TIMES (Sept. 10, 2016), <http://www.nytimes.com/2016/09/11/opinion/trigger-warnings-safe-spaces-and-free-speech-too.html> (discussing the free speech implications of Safe Spaces); see also *supra* notes 2–3 and accompanying text.

<sup>7</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (reasoning that libel laws did not protect public officials to the same degree as private persons because of the inherent value of political speech); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24–28 (1960) (positing that free speech permits self-governance, a cornerstone of American society); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596–611 (1982) (discussing the value of speech in American civil society and governance).

<sup>8</sup> Corey Brettschneider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059, 1059 (2014) (“Liberalism demands robust rights to free expression. In American jurisprudence, the liberal state is bound by one of the world’s strictest rules protecting free speech . . .”).

<sup>9</sup> See Matt Ford, *President Obama on Political Correctness*, ATLANTIC (Sept. 14, 2015, 10:13 PM), <http://www.theatlantic.com/notes/2015/09/president-obama-on-political-correctness/405328/> [<https://perma.cc/M5BV-YYXC>] (indicating that President Barack Obama recognizes the necessity of free speech in education); Strauss, *supra* note 3; Robert J. Zimmer, *Free Speech Is the Basis of a True Education*, WALL ST. J. (Aug. 26, 2016), <http://www.wsj.com/articles/free-speech-is-the-basis-of-a-true-education-1472164801> [<https://web.archive.org/web/20171110122457/https://www.wsj.com/articles/free-speech-is-the-basis-of-a-true-education-1472164801>] (arguing that free speech is necessary for higher education).

the proponents of Safe Space policies prevail. To prevail, proponents of Safe Spaces must show—either normatively or constitutionally—that the right to be free from harmful speech is *greater* than the rights of the speaker.<sup>10</sup> If successful, proponents of Safe Spaces will effectively dilute expression and speech on college campuses. Alternatively, if the critics of Safe Spaces prevail, then the interests of minorities—that is, their interest in being free from potentially harmful speech—must give in to the majoritarian interests of speaking.<sup>11</sup>

By focusing their rhetoric on speech and expression, each side of the debate risks diluting free expression; or, in the alternative, subjecting minority students to potentially harmful speech. Additionally, using speech as the cornerstone of the Safe Space debate risks damaging the free speech doctrine, as well as endangers the well-established normative qualities of free expression in higher education.<sup>12</sup>

To avoid the risks detailed above, I argue that the interests protected by Safe Spaces can be adequately protected by existing intimate and expressive association doctrine.<sup>13</sup> And that, by shifting the conversation from restricting speech based on the state's interest of inclusion and minority rights, to the private associational interests of groups, both free speech and free association doctrines are bolstered.<sup>14</sup>

Viewing the Safe Space debate as a dichotomy between free association and free speech has several positive effects. First, it spares the doctrine of free speech from unnecessary attack and criticism from those that favor Safe Spaces.<sup>15</sup> Second, the interests of those in the Safe Space are better accounted for through their free, intimate and expressive associational interests,<sup>16</sup> since their ability to associate with certain persons, thoughts, and ideas is protected under the umbrella of free association.<sup>17</sup>

While Safe Space policies take several forms,<sup>18</sup> the Organizational Safe Space model<sup>19</sup> provides the best conduit to frame this debate in the proper associational-speech dichotomy.<sup>20</sup> Therefore, I suggest that universities should adopt the Organizational Safe Space model,<sup>21</sup> and that the debate concerning such Safe Spaces should transition from one about restricting free speech, to one concerned about the associational rights of the Safe Space members.

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<sup>10</sup> See discussion *infra* Sections IV.A–B.

<sup>11</sup> See discussion *infra* Section IV.B.

<sup>12</sup> See *supra* note 9 and accompanying text.

<sup>13</sup> See discussion *infra* Parts III–IV.

<sup>14</sup> See discussion *infra* Parts III–IV.

<sup>15</sup> See discussion *infra* Parts III–IV.

<sup>16</sup> See discussion *infra* Parts III–IV.

<sup>17</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing that “the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment”).

<sup>18</sup> See discussion *infra* Sections I.B–D.

<sup>19</sup> I explain the intricacies of this model in Section I.D.3.

<sup>20</sup> See discussion *infra* Section IV.C.

<sup>21</sup> See discussion *infra* Sections III.C, IV.C.

As indicated, this Note aims to pivot the discussion of academic Safe Spaces from restrictions on speech to the protection of associational rights.<sup>22</sup> Instead of focusing solely on free speech and expression, I aim to demonstrate that Safe Space members' associational rights can be used to defend against the harmful expression of the majority.<sup>23</sup> Not only will such a focus bolster intimate associational rights, it will also serve to protect the robust nature of free speech and expression in academia. More than this, by altering the debate, I hope to positively impact the general discussion of Safe Spaces. At present, Safe Spaces are viewed as an institution with the main purpose of restricting rights (namely, free speech rights).<sup>24</sup> By shifting the debate, Safe Spaces can be normatively viewed as an institution protecting and promoting rights (in this case, associational interests).

Because this Note concerns the constitutional implications of Safe Space policies, and the interplay between the free speech and association doctrines, the focus of this Note is on state-run Safe Space policies. While many modern workplaces are adopting Safe Space policies,<sup>25</sup> the clear majority of Safe Spaces have developed in higher education.<sup>26</sup> Therefore, this Note is limited to analyzing the Safe Space policies of state universities.

Additionally, I will avoid a normative discussion of Safe Spaces. As the national debate informs, Safe Spaces are a difficult issue.<sup>27</sup> The interests of the various groups are compelling;<sup>28</sup> and I do not, here, aim to argue for or against either side of the debate. I recognize that the proponents and opponents of Safe Spaces have strong interests in the outcome of this national debate.<sup>29</sup> With that in mind, I hope I have written this Note with sensitivity and an understanding of those passions. To be sure, it is also not my aim to comment on the overarching philosophical themes, or the qualitative impact of, Safe Space policies. Rather, my goal is merely to analyze university Safe

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<sup>22</sup> See discussion *infra* Part IV.

<sup>23</sup> See discussion *infra* Part IV.

<sup>24</sup> See, e.g., Mae Kuykendall & Charles Adside III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1077–78 (2014); see also *supra* notes 9–10 and accompanying text; discussion *infra* Sections IV.A–B.

<sup>25</sup> See, e.g., NICOLE C. RAEBURN, CHANGING CORPORATE AMERICA FROM INSIDE OUT: LESBIAN AND GAY WORKPLACE RIGHTS 208–10 (2004) (discussing the advent of Safe Spaces in the workplace); see also Ellen McGirt, *Top Diversity Exec Tells How He Creates a 'Safe Space' at Work*, FORTUNE (Sept. 13, 2016), <http://fortune.com/2016/09/13/diversity-safe-spaces-workplace/> [<http://perma.cc/6U96-YMN6>].

<sup>26</sup> See discussion *infra* Section I.D.

<sup>27</sup> See *supra* notes 1–6 and accompanying text; see also discussion *infra* Section III.C (discussing the positive, normative attributes of both Safe Space policies and the Free Speech critique).

<sup>28</sup> See discussion *infra* Part III.

<sup>29</sup> See generally discussion *infra* Part III.

Spaces and the doctrines of free speech and free association. Based on that analysis, I hope to reconcile students' free speech rights with university Safe Space policies.

To that end, Part I of this Note will review the history and development of Safe Spaces in the mid-twentieth century.<sup>30</sup> Specifically, Part I will highlight the genesis of Safe Spaces in academia and their role in higher education.<sup>31</sup> From here, I will posit that there are three principle forms of Safe Spaces which deserve attention: Traditional Safe Spaces, Campus-Wide Safe Zones, and Organizational Safe Spaces.<sup>32</sup> In Part II of this Note, I will discuss the constitutional doctrines of free speech and association, laying the proper analytical framework of the subsequent sections.<sup>33</sup> Part III will review the normative value in reconciling the so-called free-speech critique<sup>34</sup> with Safe Space policies.<sup>35</sup> In Part IV of this Note, I will apply the doctrines of free speech and association to the three principle forms of Safe Spaces.<sup>36</sup> There, I will conclude that the Organizational Safe Space Model is the best form of Safe Space policy for reconciling the free speech critique with Safe Spaces.<sup>37</sup> Lastly, I will address some of the notable criticisms of my approach, and dismiss the concerns of these criticisms.<sup>38</sup>

#### I. HISTORY AND DEVELOPMENT OF SAFE SPACES: FROM LITERAL SAFE ZONES TO ACADEMIC POLICY

Safe Spaces are a relatively novel phenomenon in Western society; the earliest manifestation of American Safe Spaces can be traced to the mid-1950s.<sup>39</sup> Because of their novelty, a proper analysis of modern Safe Space policies necessitates a brief review of their development.

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<sup>30</sup> See discussion *infra* Section I.A.

<sup>31</sup> See discussion *infra* Section I.B.

<sup>32</sup> See discussion *infra* Section I.C.

<sup>33</sup> See discussion *infra* Part II.

<sup>34</sup> The Free Speech Critique references the argument against Safe Spaces based on either constitutional or normative free speech grounds. This critique is discussed in greater detail in Part III.

<sup>35</sup> See discussion *infra* Part III.

<sup>36</sup> See discussion *infra* Part IV.

<sup>37</sup> See discussion *infra* Section IV.C.

<sup>38</sup> See discussion *infra* Part V.

<sup>39</sup> MOIRA RACHEL KENNEY, MAPPING GAY L.A.: THE INTERSECTION OF PLACE AND POLITICS 24–25 (2001); Christina Paxson, *Brown University President: A Safe Space for Freedom of Expression*, WASH. POST (Sept. 5, 2016), [https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-don-t-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62\\_story.html?utm\\_term=.1b33a12f218c](https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-don-t-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62_story.html?utm_term=.1b33a12f218c) [<https://perma.cc/869D-QHFD>]; Ben Zimmer, *Roots of the 'Safe Space' Controversy; The Battle over 'Safe Spaces' for Marginalized People Derives Partly from Some Publications of the 1970s*, WALL. ST. J. (Nov. 13, 2015), <http://www.wsj.com/articles/roots-of-the-safe-space-controversy-1447429433> [<https://perma.cc/XV3H-Y9V8>] (indicating that the term Safe Space first appeared as part of the feminist movement).

*A. The Gender-Rights Movements<sup>40</sup>: Developing Safe Zones to Protect the Movement and Its Members*

Most commentators contend that Safe Spaces began with the American feminist movement of the mid-twentieth century.<sup>41</sup> According to this common narrative, feminists adopted the idea of Safe Spaces to protect women from abusive relationships, as well as to provide a zone of comfort for members of the movement to openly discuss their collective oppression.<sup>42</sup> Historically, such spaces took the form of physical safe houses or shelters.<sup>43</sup>

Thereafter, Safe Spaces were “extended to denote spaces where violence and harassment against the lesbian, gay, bisexual, transgender and queer community would not be tolerated.”<sup>44</sup> Specifically, the gay-rights movement utilized geographic areas in municipalities to create physical zones of safety.<sup>45</sup> These areas were friendly to members of the LGBT<sup>46</sup> community, and ensured that the members would not be harassed by the majority population.<sup>47</sup>

As the gender-rights movements garnered success, widespread social violence and harassment of gender minorities decreased.<sup>48</sup> Resulting, the gender-rights movements turned their attention to the workplace and academia.<sup>49</sup> Because of the general success and appeal of Safe Space policies during the early years of the movements, the gender-rights’ leadership adapted Safe Spaces to apply to the workplace.<sup>50</sup> These Safe Spaces were used by gender minorities to express their collective struggle and discuss individualized incidents of discrimination.<sup>51</sup> Workplace Safe Spaces were also used as a buffer between gender minorities and the majority-dominated professional world.<sup>52</sup>

<sup>40</sup> “Gender Rights Movement,” as referenced in this Note, will refer to the feminist and the gay-rights movements collectively.

<sup>41</sup> See *supra* note 39 and accompanying text.

<sup>42</sup> KENNEY, *supra* note 39, at 23–25.

<sup>43</sup> See *id.* at 23–24 (“[S]afe space[s] impl[y] a certain license to speak and act freely . . . not only a physical space but also a space created by the coming together of women searching for community.”).

<sup>44</sup> Paxson, *supra* note 39.

<sup>45</sup> CHRISTINA B. HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE* 81–83 (2013) (discussing changing neighborhoods and the advent of “safe street patrols”).

<sup>46</sup> While understanding the ever-changing consciousness of sexual identity, I use “LGBT” to reference all sexual minorities. My use of this colloquial acronym is not intended to be exclusionary. Rather, I use the abbreviation because of its widespread acceptance in colloquial language.

<sup>47</sup> See HANHARDT, *supra* note 45, at 81–83; Paxson, *supra* note 39.

<sup>48</sup> See, e.g., RAEBURN, *supra* note 25, at 5–11 (discussing the movement against, and gradual decrease in, employment discrimination against LGBT Americans).

<sup>49</sup> *Id.* at 1–11.

<sup>50</sup> See, e.g., *id.* at 208–10.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

### B. Safe Spaces in Academia

As detailed above, the original Safe Space was a literal safe zone, used to provide physical protection to the membership.<sup>53</sup> Over time, however, gender minorities began to receive basic societal protections; because of this, minorities garnered enhanced physical safety, protected by some institutional barriers.<sup>54</sup> Resulting, the gender-rights movements focused their attention on equality in higher educational institutions.<sup>55</sup> It was at this point that Safe Spaces extended to the higher education arena.<sup>56</sup> In its earliest manifestation, Safe Spaces were physical zones—offices, dormitories, or other physical location at the university “where students from marginalized groups [could] come together to feel comfortable discussing their experiences and just being themselves.”<sup>57</sup>

While Safe Spaces were developed to protect the interests of gender minorities, recent social developments have led to the inclusion of racial minorities as well.<sup>58</sup> In fact, most modern definitions of Safe Spaces provide that the zone of safety is open to all minorities, whether they be sexual, gender, racial, or other.<sup>59</sup>

### C. Defining Safe Spaces

Analyzing the constitutional implications of Safe Space policies requires a concrete definition of Safe Spaces themselves. However, defining Safe Space policies is no easy task.<sup>60</sup> One reason for this difficulty is that Safe Spaces incongruently evolved from the gay-rights and feminist movements of the mid-twentieth century.<sup>61</sup> Therefore, the precise development of the Safe Space cannot be squarely traced to one singular movement or ideology.<sup>62</sup> As a result, it is difficult to track the evolution

<sup>53</sup> See *supra* notes 41–47 and accompanying text.

<sup>54</sup> See *supra* notes 48–52 and accompanying text.

<sup>55</sup> See, e.g., Zimmer, *supra* note 39.

<sup>56</sup> See, e.g., Katherine Ho, *Tackling the Term: What Is a Safe Space?*, HARV. POL. REV. (Jan. 30, 2017), <http://harvardpolitics.com/harvard/what-is-a-safe-space/> [<https://perma.cc/948A-PKRF>] (explaining the differences between traditional, “emotional” safe spaces and “academic safe spaces”); Paxson, *supra* note 39.

<sup>57</sup> See Paxson, *supra* note 39.

<sup>58</sup> See, e.g., Crenshaw, *supra* note 1, at 1362–63; Paxson, *supra* note 39; Schapiro, *supra* note 3.

<sup>59</sup> See, e.g., *Expect Respect: What to Report*, U. MICH. STUDENT LIFE, <https://expectrespects.umich.edu/what-report> [<https://perma.cc/4FJN-Q7N5>] (last visited Dec. 4, 2017) (providing a mechanism for students to report speech targeting their “race, color, creed, religion, national origin, gender identity and expression, sexual orientation, ancestry, age, marital status, handicap or Vietnam-era veteran status”).

<sup>60</sup> See, e.g., Ho, *supra* note 56 (“[B]ecause the term ‘safe space’ is used interchangeably to refer to . . . very different ideas, the concepts themselves become conflated. People begin to have bloated and unclear understandings of how academic spaces should be considered ‘safe.’”).

<sup>61</sup> See, e.g., Paxson, *supra* note 39 (recognizing that the term “Safe Space” emerged from the women’s movement, and was later adopted by the gay-rights movement).

<sup>62</sup> See discussion *supra* Section I.A.



of the Safe Space, the ideology supporting its existence, as well as the practical manifestation of these policies.<sup>63</sup>

Second, Safe Spaces have numerous colloquial and academic definitions.<sup>64</sup> For some, the term Safe Space refers to any general policy that restricts speech at higher educational institutions.<sup>65</sup> Others take a more limited approach, defining the Safe Space as a single space, meant to provide resources to minority students.<sup>66</sup> Still others view Safe Spaces as literal safe zones: physical locations where minority persons can be free from stigma, harassment, and violent assault.<sup>67</sup> Last, institutions themselves implement a diverse array of Safe Space policies, ranging from Campus-Wide Safe Zones, to mere administrative offices dedicated to diverse students.<sup>68</sup>

Despite these difficulties, commentators, academics, and university administrators have attempted to specifically define Safe Space policies. Judith Shulevitz, a journalist for the *New York Times*, defined Safe Spaces as the “innocuous gatherings of like-minded people who agree to refrain from ridicule, criticism or what they term microaggressions.”<sup>69</sup> The president of Brown University took a similar approach in defining Safe Spaces as “places where students from marginalized groups can come together to feel comfortable discussing their experiences and just being themselves.”<sup>70</sup>

A more specific definition was proffered by the Georgia Institute of Technology in a 2007 federal case. In an opinion resolving pretrial motions, the trial court indicated that Georgia Tech’s Safe Space policy was instituted as

a way for people supportive of [LGBT] concerns to identify themselves to the campus and to help gay or questioning students, faculty, and staff. The Office of Diversity Programs works with

<sup>63</sup> See discussion *supra* Section I.A.

<sup>64</sup> See Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2018 (2017) (“The concept of safe spaces may be the hardest to define of the various [politically correct] practices . . . . The phrase has a relatively long and evolving history and continues to fluctuate in meaning. It has been used to denote everything from locations where people voluntarily agree to speak openly and without judgment to one another, to places populated by persons who share similar views on social justice issues and are hostile to opposing views, to areas formally or informally designated as meeting spaces for persons from marginalized groups.” (internal citations omitted)); Paxson, *supra* note 39.

<sup>65</sup> See *supra* note 2 and accompanying text.

<sup>66</sup> Paxson, *supra* note 39.

<sup>67</sup> See Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 187 (2010) (“A ‘safe space’ is created when individuals believe that they are not being judged, their opinions are respected, they are physically safe, and they can trust the people around them. For some, a safe space is a form of resistance and a place where individuals can recreate and solidify their definition of self, which can often be challenged by various life experiences.”); see also Schapiro, *supra* note 3.

<sup>68</sup> See discussion *infra* Section I.D.

<sup>69</sup> Shulevitz, *supra* note 1.

<sup>70</sup> Paxson, *supra* note 39.

a student coordinator to administer this program . . . . The program's overarching goal is to educate the public and provide a safe atmosphere and open environments for people who have questions about gender and sexuality, whether in their own lives, in the lives of family and friends, or in the wider culture.<sup>71</sup>

As the aforesaid examples illustrate, Safe Space policies take various forms; and coming to a singular, specific definition of a Safe Space is difficult. However, there are certain aspects that most definitions of Safe Spaces incorporate. One such aspect is that the Safe Space is a place—either physical or metaphysical in nature—where individuals come together to gain some form of security.<sup>72</sup> Another aspect of the Safe Space is that its members are typically minorities (sexual minorities, gender minorities, racial minorities, etc.).<sup>73</sup> A third, consistent factor of the Safe Space is that it acts to limit offensive or harmful ideas from infiltrating its membership;<sup>74</sup> ideas that are typically promulgated by the majority.<sup>75</sup> Considering these factors, Safe Spaces can be broadly defined as follows: any space where there is a coming together of persons, with the purpose of excluding any expression which the membership finds harmful. A policy promulgating a Safe Space, therefore, is any policy which limits some speech or expression (typically the speech offered by the majority) to promote the interests of the Safe Space members (typically the minority).

#### *D. Modern Manifestation of Safe Spaces in Academia*

Because of their prevalence in modern academia, institutions of higher education have implemented various types of Safe Space policies. Since every university has an individualized culture with specific institutional needs,<sup>76</sup> there is a wide variance in the types of policies adopted by universities.<sup>77</sup> Despite this variety, there are three general forms of Safe Space policies worthy of note: Traditional Safe Spaces, Campus-Wide Safe Zones, and Organizational Safe Spaces.<sup>78</sup>

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<sup>71</sup> Sklar v. Clough, No. 1:06-CV-0627-JOF, 2007 WL 2049698, at \*3 (N.D. Ga. July 6, 2007) (citation omitted).

<sup>72</sup> See *supra* notes 53–57, 64–68 and accompanying text; see also discussion *supra* Section I.B.

<sup>73</sup> See, e.g., Harris, *supra* note 67, at 188; Paxson, *supra* note 39. See generally HANHARDT, *supra* note 45.

<sup>74</sup> See, e.g., Ho, *supra* note 56; Paxson, *supra* note 39; Schapiro, *supra* note 3; Shulevitz, *supra* note 1.

<sup>75</sup> See, e.g., Ho, *supra* note 56; Paxson, *supra* note 39; Schapiro, *supra* note 3; Shulevitz, *supra* note 1.

<sup>76</sup> Barbara Sporn, *Managing University Culture: An Analysis of the Relationship Between Institutional Culture and Management Approaches*, 32 J. HIGHER EDUC. 41, 42 (1996) (discussing the varying cultures of different universities).

<sup>77</sup> *Id.* at 57–58.

<sup>78</sup> See discussion *infra* Sections I.D.1–3.

## 1. Traditional Safe Spaces

The Traditional<sup>79</sup> Safe Space policy is a policy which designates a specific area of the school as a Safe Space.<sup>80</sup> In modern academia, this physical area is typically an administrative office dedicated to minority students.<sup>81</sup> These Safe Spaces act as a physical meeting area, where interested students can gather and engage in discussion about various topics without fear of judgment or prejudice.<sup>82</sup> Often all students are permitted in, and in many circumstances encouraged to visit, the Safe Space.<sup>83</sup> Generally, however, all students are discouraged from voicing opinions which could be offensive or harmful to a minority.<sup>84</sup> Ad-hoc safe spaces have also been created in this form. For instance, at some universities without an official Safe Space office, individual staff and faculty members will receive training, and thereafter declare their office a Safe Space.<sup>85</sup>

## 2. Campus-Wide Safe Zones

Although the Traditional Safe Space is confined to an office or other physical location on a college campus, some universities take a broader approach to Safe Space policies: Campus-Wide Safe Zones. Such policies aim to make the entire campus—or a significant part thereof—a Safe Space.<sup>86</sup> This type of Safe Space can manifest

<sup>79</sup> Because most original academic Safe Space policies took this form, I call such policies “traditional.” These spaces also utilize a physical zone, akin to the original Safe Spaces of the gender-rights movement.

<sup>80</sup> See, e.g., *LGBTQ Safe Space*, U. CHI.: LBGTQ STUDENT LIFE, <http://lgbtq.uchicago.edu/page/safe-space> [<https://perma.cc/TH99-BQPX>] (last visited Dec. 4, 2017); see also *Safe Space Training*, SANTA CLARA U.: RAINBOW RESOURCE CTR., <https://www.scu.edu/oml/rrc/safe-space-training/> [<https://perma.cc/BJ32-AD6M>] (last visited Dec. 4, 2017).

<sup>81</sup> See *LGBTQ Safe Space*, *supra* note 80; *Safe Space Training*, *supra* note 80 (describing signs which demarcate safe spaces).

<sup>82</sup> See Neelesh Moorthy, *Sanford Safe Space to Debut this Fall Amidst University of Chicago Controversy*, DUKE CHRON. (Aug. 25, 2016), <http://www.dukechronicle.com/article/2016/08/sanford-safe-space-to-debut-this-fall-admins-weigh-in-on-university-of-chicago-controversy> [<https://perma.cc/34HG-ULMB>] (discussing the Sanford School of Public Policy’s Safe Space as a “physical ‘safe space’” where students can go to “heal” (emphasis added)).

<sup>83</sup> See, e.g., *LGBTQ Safe Space*, *supra* note 80 (indicating that the university safe space program works to shape a “[u]niversity[ ] culture that is accepting of *all people*, regardless of sexual orientation, gender identity/expression, or *any other difference*” (emphasis added)).

<sup>84</sup> Cf. *Safe Space Training*, *supra* note 80 (indicating Santa Clara University strives to maintain a respectful environment, but provides safe spaces to address harassment of minority groups).

<sup>85</sup> See *id.*

<sup>86</sup> See, e.g., *LSU LGBTQ+ Project and Safe Space: Mission*, LA. ST. U., [http://www.lsu.edu/diversity/safespace/about\\_us/mission.php](http://www.lsu.edu/diversity/safespace/about_us/mission.php) [<https://perma.cc/RJ3H-DG9T>] (last visited Dec. 4, 2017) (stating that LSU’s Safe Space Program “works to make LSU a safer place for all students”).

itself in a multitude of different ways. For instance, some universities have created policies which declare that the entire campus is a safe zone.<sup>87</sup> This means that academic classrooms, recreational facilities, and living areas are Safe Spaces, and that students must limit their speech on all areas of campus.<sup>88</sup> In the most extreme cases, such policies impose blanket restrictions on expression, which usually ban any offensive speech.<sup>89</sup> Some of these policies make exceptions for classroom speech;<sup>90</sup> however, “trigger warnings” may be required.<sup>91</sup> A far less intrusive campus-wide policy merely designates safe zones throughout a campus.<sup>92</sup> These safe zones range from residential dormitories and recreational facilities, to dining halls; the extent of the speech restrictions, as well as their application to various campus buildings, varies widely from university to university.<sup>93</sup>

There are several aspects of the aforementioned policies which are relevant to note. First, the campus-wide policies referenced above are typically adjoined with

<sup>87</sup> See, e.g., *Inclusion Working Group*, COLO. MESA U., <http://www.coloradomesa.edu/student-services/diversity-and-health/campus-diversity.html> [<https://perma.cc/5AXN-A7YP>] (last visited Dec. 4, 2017) (“Together, [we work] to ensure that the CMU campus is an environment free from discrimination and fostering a climate that is supportive of all.”).

<sup>88</sup> Cf. Deanna M. Garrett, *Silenced Voices: Hate Speech Codes on Campus*, U. VT., <https://www.uvm.edu/~vtconn/?Page=v20/garrett.html> [<https://perma.cc/U93N-ZJFL>] (last modified July 29, 2002) (discussing, in part, historical campus-wide speech restrictions on various college campuses, and their impact on free expression); 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, 33–35 (2008) (discussing universities’ broad restrictions on free speech, often targeting harassment or other degrading speech).

<sup>89</sup> See Garrett, *supra* note 88.

<sup>90</sup> See Zena Hitz, *What Is a Safe Space? The Mind of a Student Able to Think Critically.*, WASH. POST (Sept. 14, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/09/14/what-is-a-safe-space-the-mind-of-a-student-able-to-think-critically/?utm\\_term=.7858eba32165](https://www.washingtonpost.com/news/grade-point/wp/2016/09/14/what-is-a-safe-space-the-mind-of-a-student-able-to-think-critically/?utm_term=.7858eba32165) [<https://perma.cc/5GTZ-PVKA>]; see also, e.g., Anya Kamenetz, *Half of Professions in NPR Ed Survey Have Used ‘Trigger Warnings’*, NPR (Sept. 7, 2016, 4:39 PM), <http://www.npr.org/sections/ed/2016/09/07/492979242/half-of-professors-in-npr-ed-survey-have-used-trigger-warnings> [<https://web.archive.org/web/20171027191452/https://www.npr.org/sections/ed/2016/09/07/492979242/half-of-professors-in-npr-ed-survey-have-used-trigger-warnings>].

<sup>91</sup> Samantha Harris, *Mandatory Trigger Warnings, Part Two*, FIRE (Sept. 1, 2016), <https://www.thefire.org/mandatory-trigger-warnings-part-two/> [<https://perma.cc/NTA9-EUB3>] (discussing university-mandated trigger warnings required by federal law and school policy).

<sup>92</sup> As used in this Note, a safe zone indicates any area on campus that is designated as a Safe Space. This is distinct from the Traditional Safe Space, because safe zones typically encompass a greater geographic area than a singular office.

<sup>93</sup> See, e.g., Emily DeRuy, *The Fine Line Between Safe Space and Segregation*, ATLANTIC (Aug. 17, 2016), <https://www.theatlantic.com/education/archive/2016/08/finding-the-line-between-safe-space-and-segregation/496289/> [<https://perma.cc/FS25-YH4C>] (discussing a trend in higher education, where colleges have created minority-exclusive housing); Schapiro, *supra* note 3.

“Free Speech Zones.”<sup>94</sup> These zones provide an avenue for students to express ideas that would otherwise be banned by the Safe Space policies.<sup>95</sup> Second, while some public universities have created campus-wide safe zones,<sup>96</sup> many have elected to institute less intrusive policies.<sup>97</sup> Third, some high schools experimented with an alternate campus-wide policy in the late twentieth century. Beginning with the Harvey Milk High School in 1985, these high schools were created as separate schools, solely reserved for gender minorities.<sup>98</sup> However, as some have noted, these policies were seen as a modern manifestation of separate-but-equal.<sup>99</sup> Given that these schools have not become commonplace in secondary education, there is little reason to think that they will be adopted by institutions of higher learning today.<sup>100</sup>

The least intrusive campus-wide policies are ones in which the university merely encourages students, staff, and faculty to create “safe places” for students upon their request. A 2012 University of Toledo program, for example, “encourage[d] ‘faculty, staff and graduate assistants and resident advisers to open their space as a Safe Place for Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning . . . individuals.’”<sup>101</sup>

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<sup>94</sup> See Sarabyn, *supra* note 88, at 33 (“[Free Speech Zone] policies limit student speech and protest to small, often remote areas of campus, effectively rendering the rest of campus a ‘no speech zone.’” (citation omitted)).

<sup>95</sup> See *id.* at 33–35. Some scholars have postulated that all campuses with free speech zones—even with no overarching Safe Space policy—unconstitutionally limits the free speech rights of students. See generally *id.* To be sure, I do not make that contention in this Note. Further, it should be noted that, in order for a Safe Space to exist, a university must make a clear policy promulgating a Safe Space; it is insufficient that a university merely has a “free speech zone.”

<sup>96</sup> *Safe Zone Transgender*, PENN. ST. STUDENT AFF., <https://studentaffairs.psu.edu/lgbtqa/safezone.shtml> [<https://perma.cc/899P-XERB>] (last visited Dec. 4, 2017).

<sup>97</sup> Private colleges are far more likely to institute campus-wide speech restrictions, especially if the university has an ideological or technical component. See Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 176–81 (2010).

<sup>98</sup> See Randy Hedlund, *Segregation by Any Other Name: Harvey Milk High School*, 33 J.L. & EDUC. 425, 425–27 (2004).

<sup>99</sup> As Hedlund opines, separate schooling for gender minorities carries similar stigma and other problems that the Court addressed in *Brown v. Board of Education*. Hedlund, *supra* note 98, at 426–27. *Contra* Thomas A. Mayes, *Separate Public High Schools for Sexual Minority Students and the Limits of the Brown Analogy*, 35 J.L. & EDUC. 339 (2006) (critiquing Hedlund, *supra* note 98, and the analogy to *Brown v. Board of Education*, 347 U.S. 483 (1954)).

<sup>100</sup> *Contra Themed Living Communities: Hali Scholars Living Learning Community*, CAL. ST. U. L.A. HOUSING & RESIDENCE LIFE, <http://www.calstatela.edu/housing/themed-living-communities> [<https://perma.cc/U8U2-YY5Y>] (last visited Dec. 4, 2017) (indicating that the university offers housing “designed to enhance the residential experience for students who are a part of or interested in issues regarding the Black community living on campus by offering the opportunity to connect with faculty and peers, and engage in programs that focus on academic success, cultural awareness and civic engagement”).

<sup>101</sup> *Dixon v. Univ. of Toledo*, 702 F.3d 269, 277 (6th Cir. 2012) (citation omitted); see also *LGBTQ+ Student Services: Safe Space Program*, CLEV. ST. U., <https://www.csuohio>

### 3. Organizational Safe Spaces

Most state universities sanction the existence of registered student organizations (RSO).<sup>102</sup> While such organizations are controlled and monitored by the university,<sup>103</sup> the students have the power to implement various administrative policies through a charter, constitution, by-laws, or other governing document.<sup>104</sup> Pursuant to this power, some organizations at various universities have created Safe Space policies.<sup>105</sup> While some organizations, such as local chapters of LGBT Allies, may be mandated to implement such policies by their national or state organizations,<sup>106</sup> others can develop Safe Space policies of their own volition.<sup>107</sup>

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.edu/studentlife/safe-space-program [https://perma.cc/PUK7-YX9V] (last visited Dec. 4, 2017) (indicating that Cleveland University's student Safe Space program allows LGBTQ students to recognize community members who can provide support).

<sup>102</sup> The colloquial term for on-campus student organizations differs from institution to institution. For ease, I use the term: "registered student organization" or "RSO." *See, e.g., Registered Student Organizations*, SAGINAW VALLEY ST. U., <http://www.svsu.edu/officeofstudentlife/connect/> [https://perma.cc/CUF7-D2S5] (last visited Dec. 4, 2017) ("RSOs are registered student organizations that are formed with a common objective."); *see also Student Organizations & Activities/Financial Accounts*, MICH. ST. U., <http://studentlife.msu.edu/student-organizations-activities> [https://perma.cc/4JVV-HSSA] (last visited Dec. 4, 2017).

<sup>103</sup> *See, e.g., Annual Registration*, HARV. C.: OFF. STUDENT LIFE, <http://osl.fas.harvard.edu/annual-registration> [https://perma.cc/J9TB-VKSC] (last visited Dec. 4, 2017) ("Each year, at the start of the fall term, student organizations register with the Office of Student Involvement to continue their recognition by the College and exercise the privileges afforded to them by virtue of their recognition."); *see also Student Organizations: University Recognition*, STAN. U.: STUDENT ACTIVITIES & LEADERSHIP, <https://sal.stanford.edu/policies/student-organizations> [https://perma.cc/PE5D-XRW6] (last visited Dec. 4, 2017) ("Student organizations wishing to operate in the name of Stanford, use Stanford space or receive funds from the university . . . must be recognized by the university through Student Activities and Leadership, annually. . . . The purpose of any recognized student group must be consistent with the goals and standards of the university.");

<sup>104</sup> *See Start a New Student Organization*, STAN. U.: STUDENT ACTIVITIES & LEADERSHIP, <https://sal.stanford.edu/get-involved/start-new-student-organization> [https://perma.cc/3HS8-8F9Z] (last visited Dec. 4, 2017) (requiring new student organizations to draft a governing document).

<sup>105</sup> *See, e.g., Constitution*, HOKIEPRIDE VA. TECH., [http://www.hokiepride.org.vt.edu/static/documents/HokiePRIDE\\_Constitution.pdf](http://www.hokiepride.org.vt.edu/static/documents/HokiePRIDE_Constitution.pdf) [https://perma.cc/WK2M-LQPF] (last visited Dec. 4, 2017) (describing HokiePRIDE's mission to create a safe space for people of all sexualities); *LGBT Resource Center Affiliated Student Organizations*, U. ILL. OFF. INCLUSION & INTERCULTURAL REL., <https://oiir.illinois.edu/lgbt-resource-center/affiliated-student-organizations> [https://perma.cc/CAH7-38VD] (last visited Dec. 4, 2017).

<sup>106</sup> *See, e.g., Establishing an Allies/Safe Zone Program*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/establishing-an-allies-safe-zone-program> [https://perma.cc/KW6A-A55B] (last visited Dec. 4, 2017) (discussing the specifics of creating LGBT and allies programs with safe spaces).

<sup>107</sup> *See, e.g., LGBT Resource Center Affiliated Student Organizations*, *supra* note 105.

What is most relevant to note about RSOs is that they often exhibit many of the characteristics necessary to satisfy either intimate or expressive associations.<sup>108</sup> As a result, they are afforded certain constitutional protections.<sup>109</sup> Such protections may include the right to discriminate against certain individuals and restrict some forms of expression.<sup>110</sup> As will be discussed in Part IV, because Organizational Safe Spaces are most likely to receive associational rights,<sup>111</sup> the Safe Space policies these organizations adopt will not directly infringe on the free speech interests of the majority.<sup>112</sup>

## II. OVERVIEW OF THE RELEVANT CONSTITUTIONAL DOCTRINES

To understand how Organizational Safe Spaces are constitutionally superior to both Traditional Safe Spaces and Campus-Wide Safe Zones, it is necessary to briefly discuss the free speech and association doctrines. Below, I will summarize the relevant free speech law, intimate and expressive association doctrines, as well as the application of these doctrines in higher education.

### A. Free Speech and Expression

Free speech rights in the United States are a cornerstone of our social and political systems.<sup>113</sup> As discussed in the Introduction, the normative qualities of free speech and expression are important, not only to American political and civil life, but to the educational system as well.<sup>114</sup> To protect against intrusions of free expression, constitutional jurisprudence has, over time, solidified a robust right to freely express oneself.<sup>115</sup> Below is a brief overview of the modern, free speech doctrine.

#### 1. Unprotected Speech

Despite many of the robust protections afforded to speech in the United States,<sup>116</sup> some speech is nevertheless unprotected by the Constitution.<sup>117</sup> The quintessential ruling discussing this limitation was the Supreme Court's decision in *Brandenburg v. Ohio*.<sup>118</sup> In that case, the Supreme Court held that if speech incites imminent lawless

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<sup>108</sup> See discussion *infra* Section IV.C.

<sup>109</sup> See discussion *infra* Section III.C.

<sup>110</sup> See discussion *infra* Section III.C.

<sup>111</sup> See discussion *infra* Section IV.C.

<sup>112</sup> See discussion *infra* Section IV.C.

<sup>113</sup> See, e.g., MEIKLEJOHN, *supra* note 7, at 24–28; Redish, *supra* note 7, at 596–611.

<sup>114</sup> See *supra* notes 7–9 and accompanying text.

<sup>115</sup> See discussion *infra* Sections II.B–C.

<sup>116</sup> See *infra* notes 121–40 and accompanying text.

<sup>117</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (recognizing that advocacy directed at inciting “imminent lawless action” is not constitutionally protected).

<sup>118</sup> *Id.*

action, it is not protected under the First Amendment.<sup>119</sup> The Supreme Court has likewise held that various other forms of speech are not protected by free speech principles.<sup>120</sup>

## 2. Content-Based Regulations of Speech

Other than expression falling into the limited category of unprotected speech, all other forms of verbal or written speech are protected by the First Amendment.<sup>121</sup> This is not to say, however, that the state is always barred from regulating the speech of its citizens.<sup>122</sup> To be sure, if speech-related regulations fulfill certain requirements, they may be held constitutional.<sup>123</sup> For example, the Court has held in some cases that regulations on expression that are content-neutral<sup>124</sup> need only satisfy a rational basis inquiry.<sup>125</sup>

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<sup>119</sup> *See id.*

<sup>120</sup> *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–73 (1942) (stating that some forms of speech, including “fighting words”—words that are expressed to incite hatred or violence from the audience—lewd speech, and malicious libel are not protected by the First Amendment).

<sup>121</sup> *See* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 564–67 (2006) (discussing the forms of unprotected speech, and indicating the relatively “libertarian” jurisprudence concerning any other forms of speech).

<sup>122</sup> *See generally* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

<sup>123</sup> *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 703–05 (2011); *see also* Kagan, *supra* note 122, at 443–44.

<sup>124</sup> For a regulation to be content-neutral, it must not discriminate on the basis of viewpoint or subject matter. *See, e.g.,* *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (describing neutral speech regulations as regulations which serve purposes “unrelated to the content of expression” and are “justified without reference to the content of the regulated speech” (citations omitted)); Kelly P. Welch, Note, *Graffiti and the Constitution: A First Amendment Analysis of the Los Angeles Tagging Crew Injunction*, 85 S. CAL. L. REV. 205, 219–20 (2011). Viewpoint neutrality means that the speech being regulated is not restricted based on the speaker’s view of the subject (e.g., restricting anti-abortion speech would be a viewpoint regulation). *See* Blocher, *supra* note 123, at 703–07. Subject matter neutrality means that the speech being restricted is not regulated based on the subject of the speech (e.g., restricting all speech on abortion topics, regardless of the viewpoint would be a subject matter regulation). *See* Lauren N. Follett, Note, *Taming the Paparazzi in the “Wild West”: A Look at California’s 2009 Amendment to the Anti-Paparazzi Act and a Call for Increased Privacy Protections for Celebrity Children*, 84 S. CAL. L. REV. 201, 231 (2010); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333–35 (2006).

<sup>125</sup> *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50 (1987). In the simplest terms, a rational basis inquiry asks whether the regulation is rationally related to a legitimate government interest. *Id.* Generally, however, if a regulation is not content-neutral, then it must pass a strict scrutiny analysis. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81



### 3. Symbolic Speech

Further, other forms of expression—besides merely verbal and written speech—are protected by the First Amendment.<sup>126</sup> For instance, when the state regulates conduct, the regulations must be content-neutral: that is, the regulations cannot be administered against conduct with the *purpose* of restricting speech.<sup>127</sup> Further, expressive conduct is protected under the First Amendment if that conduct is intended to convey a particularized message, and there is a high degree of likelihood that the message will be understood by the intended audience.<sup>128</sup> However, unlike the verbal and written word, expressive conduct receives a lower standard of protection.<sup>129</sup>

### 4. Time, Place, and Manner Regulations

Although general prohibitions of speech are prohibited by the First Amendment, regulations that regulate when, where, and/or how speech takes place are permissible. Specifically Time, Place, and Manner regulations are those restrictions of speech that effectively regulate the pragmatic components of one's expression; the Supreme Court noted in *Cox v. Louisiana*<sup>130</sup> that individuals cannot constitutionally demand that they choose when, where, and how<sup>131</sup> they express themselves because of the risk it would pose to the general public.<sup>132</sup> Like all restrictions of speech, judicial scrutiny requires that Time, Place, and Manner regulations be content-neutral.<sup>133</sup> But

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NOTRE DAME L. REV. 1347, 1363–67 (2006). Strict scrutiny requires (1) that the state have a compelling interest to regulate the speech; (2) that the regulation be narrowly tailored to that interest; and (3) that the regulation be the least restrictive means of furthering that interest. *Id.* at 1363, 1365 n.62.

<sup>126</sup> See *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (reasoning that the private display of a flag was protected expression); see also Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1844–85 (1997) (providing an overview of the Symbolic Speech Doctrine).

<sup>127</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag burning is a type of speech protected by the First Amendment).

<sup>128</sup> See *Spence*, 418 U.S. at 404 (stating that expressive conduct is protected under the First Amendment, if the conduct is particular in nature, and intended to convey some message). See generally *United States v. O'Brien*, 391 U.S. 367 (1968) (reasoning that expressive conduct is protected by the First Amendment).

<sup>129</sup> Specifically, the regulation employed by the state must be narrowly tailored to an important, rather than substantial, state interest. See *O'Brien*, 391 U.S. at 376–77.

<sup>130</sup> 379 U.S. 536 (1965).

<sup>131</sup> See Neal Ternes, Note, *Everywhere a Sign: ESPN College GameDay and the First Amendment*, 17 TEX. REV. ENT. & SPORTS L. 159, 163–64 (2016) (discussing “university-created time, place, and manner restrictions on speech,” such as “free speech zones,” as being “successfully challenged several times”).

<sup>132</sup> *Cox*, 379 U.S. at 554–55; see also Ternes, *supra* note 131, at 163–64.

<sup>133</sup> See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803–05 (1984); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (“The

even if a law is content-neutral, it must nevertheless fulfill intermediate scrutiny.<sup>134</sup> This means that the regulation must be narrowly tailored to serve an important state interest.<sup>135</sup> While a seemingly strict test, the state is provided considerable leeway when it comes to what qualifies as an important state interest.<sup>136</sup> And, to be sure, the state's interests can be as meager as community aesthetics.<sup>137</sup>

This type of regulation is the most relevant set of speech restrictions for this Note, because universities generally justify their speech regulations through Time, Place, and Manner.<sup>138</sup> To be sure, universities are afforded significant leeway when restricting speech<sup>139</sup> because courts have consistently held that university interests—such as public safety and educational success—qualify as important state interests.<sup>140</sup>

### B. Free Association

Today, Americans also enjoy a robust set of associational rights.<sup>141</sup> Associational rights can be defined as either intimate or expressive; and both intimate and

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State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral . . .”).

<sup>134</sup> See *Taxpayers for Vincent*, 466 U.S. at 805; see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010) (reasoning that, under intermediate scrutiny, a content-neutral restriction is valid if it advances an important government interest unrelated to the suppression of speech).

<sup>135</sup> See *Taxpayers for Vincent*, 466 U.S. at 804–05; *Humanitarian Law Project*, 561 U.S. at 26–27.

<sup>136</sup> See *Taxpayers for Vincent*, 466 U.S. at 804–05; see also *Humanitarian Law Project*, 561 U.S. at 25–28.

<sup>137</sup> See *Taxpayers for Vincent*, 466 U.S. at 789, 805, 817 (holding that the aesthetic interests of the city, alone, were an important state interest).

<sup>138</sup> See Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 279–89 (2004) (discussing a string of federal appellate and Supreme Court cases applying the time, place, and manner doctrine to campus free speech zones); see also, e.g., *Code of Student Conduct 2017–18*, SAGINAW VALLEY ST. U., <http://www.svsu.edu/studentconductprograms/codeofstudentconduct/> [<https://perma.cc/SB7J-WVVK>] (last visited Dec. 4, 2017) (permitting assemblage and expression, as long as they are “held in such a place and manner so that the public peace of the campus is maintained”).

<sup>139</sup> See Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 EDUC. LAW REP. 339 (2003) (discussing free and regulated speech on college campuses, and the ability for public colleges to restrict students' speech rights).

<sup>140</sup> See Clay Calvert & Robert D. Richards, *Lighting a FIRE on College Campuses: An Inside Perspective on Free Speech, Public Policy & Higher Education*, 3 GEO. J.L. & PUB. POL'Y 205, 205–06, 220–21 (2005) (discussing the prevalence of time, place, and manner restrictions on college campuses).

<sup>141</sup> See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 980–82 (2011).

expressive associations implicate special constitutional protections.<sup>142</sup> Intimate associations exist when individuals associate with other persons for the purpose of expanding personal relationships.<sup>143</sup> Justice William Brennan articulated that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>144</sup> The general question courts must answer to determine whether an organization is intimate is whether the organization is “sufficiently personal or private to warrant constitutional protection.”<sup>145</sup> Alternatively, expressive associations exist when individuals join into associations to further some constitutionally protected expression, such as religious practice or political petition.<sup>146</sup>

The Supreme Court has further held that, when the two above forms of associations mold together—to form an intimate, expressive association—the association itself receives the highest level of constitutional protection: strict scrutiny.<sup>147</sup> To determine if an association qualifies as both intimate and expressive, a court must independently determine whether an association is: (1) intimate; and (2) expressive.<sup>148</sup>

To qualify as an intimate association, an organization must satisfy a non-exhaustive set of factors.<sup>149</sup> Justice Stevens articulated in *Boy Scouts of America v.*

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<sup>142</sup> See *id.* at 987 (indicating that in *Roberts v. United States Jaycees*, the Supreme Court distinguished between “a right of intimate association, rooted in the Court’s privacy jurisprudence, and [expressive association, rooted in the] First Amendment right of association for the purposes of engaging in activities protected by the First Amendment”); Louis Norvell, *Constitutional Law: Defining the Boundaries of Protected Intimate Associations*, 50 FLA. L. REV. 233 (1998) (discussing the basic protections afforded to intimate associations).

<sup>143</sup> See Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 277 (2006) (“[T]he choice to enter into some types of intimate associations, including marriage, family relationships, and other close personal relationships, is an essential liberty that is central to constitutional protections of individual freedom.”).

<sup>144</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

<sup>145</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987); see *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 646–47 (2000).

<sup>146</sup> *Roberts*, 468 U.S. at 618 (stating that “the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion”).

<sup>147</sup> See *Dale*, 530 U.S. at 646–56 (discussing the expressive and intimate nature of the Boy Scouts of America, and their ability to discriminate based on sexual orientation to preserve the expressive values of “morally straight” conduct); see also *Roberts*, 468 U.S. at 610 (discussing the expressive associational right). The Court’s logic for this heightened level of protection is that intimately expressive associations naturally implicate both the privacy right to intimate association, as well as the First Amendment expressive right of “express[ing] a belief” in something. *Dale*, 530 U.S. at 646–56.

<sup>148</sup> See *Dale*, 530 U.S. at 647–49; *Rotary Club*, 481 U.S. at 545–46.

<sup>149</sup> See *Rotary Club*, 481 U.S. at 546.

*Dale*<sup>150</sup> that “[t]hrough the precise scope of the right to intimate association is unclear, ‘we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship’ to determine whether a group is sufficiently personal to warrant . . . constitutional protection” as an intimate association.<sup>151</sup> If an organization is sufficiently intimate, courts then ask whether the organization’s purpose—in whole or in part—is to express some constitutionally protected right.<sup>152</sup> If so, then the organization qualifies as an intimate, expressive association.<sup>153</sup>

### C. *The Relationship Between Free Speech and Free Association*

As Professor Bhagwat informs, “[m]odern law tends to treat the associational right as subsidiary to free speech and tends to assume that the primary purpose of association is to facilitate speech.”<sup>154</sup> This conclusion comes from a long history of Supreme Court jurisprudence, which demonstrates the need for associations to mask their associational privileges with other First Amendment rights.<sup>155</sup> Because of this, associations seeking protection typically demonstrate that their associational purpose is to fulfill some other, First Amendment right (such as free expression).<sup>156</sup> Along this line, it is likewise well-established that an intimate association may restrict its own membership’s speech, and regulate its members’ expressive conduct to fulfill its expressive interests.<sup>157</sup>

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<sup>150</sup> 530 U.S. 640 (2000).

<sup>151</sup> *Id.* at 698 n.26 (Stevens, J., dissenting) (quoting *Rotary Club*, 481 U.S. at 546).

<sup>152</sup> *See id.* at 646–56; *see also* Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 644–45 (2002) (analyzing the case, and explaining the Expressive Association Doctrine).

<sup>153</sup> *See, e.g.*, Troum, *supra* note 152, at 644–52.

<sup>154</sup> Bhagwat, *supra* note 141, at 1029; *see, e.g.*, *Dale*, 530 U.S. at 648 (stating that to ascertain whether the Boy Scout’s associational rights were protected by the First Amendment, the Court must determine if they engage in protected expression).

<sup>155</sup> The First Amendment does not enumerate a specific right to association. *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”). However, the Supreme Court has recognized a right to privacy (intimate association) and a right to associate for the purpose of expression (expressive association). *See supra* notes 142–54 and accompanying text. Because of this historic development, the Court often treats the Association Doctrine as merely a doctrine to serve other constitutional interests, such as free expression. *See generally* John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010) (discussing, in part, the development of intimate and expressive association, and how the Court treats these doctrines as subsidiary to other constitutional interests).

<sup>156</sup> *See* Bhagwat, *supra* note 141, at 999–1002. *See generally Dale*, 530 U.S. 640.

<sup>157</sup> *See generally Dale*, 530 U.S. 640 (holding that the Boy Scouts of America could limit its membership based on sexual orientation, and limit its members’ expression to “morally

*D. Public Universities and the Application of Constitutional Law*

State universities are agents of the state, and can be sued for injunctive relief if they violate the constitutional rights of others.<sup>158</sup> However, places of education are afforded significant deference to protect the educational interests of the state.<sup>159</sup> The Court has recognized that the academic interests of universities often trump the constitutional interests of the students.<sup>160</sup> Because of this, it is relevant to note some of the deference provided to universities in restricting speech and association.

1. Free Speech on University Campuses and the Academic Safe Space

As noted, universities restrict many forms of speech. Specifically, universities tend to justify their restrictions based in large part on Time, Place, and Manner.<sup>161</sup> As discussed in a previous section, Time, Place and Manner regulations are granted significant leeway by the courts.<sup>162</sup> The state's interest in maintaining safety, increasing aesthetic beauty, and promoting the educational interests of the students provides universities with ample state interests to pass intermediate scrutiny for some speech restrictions.<sup>163</sup>

However, it is unlikely that Time, Place, and Manner restrictions would satisfy constitutional muster as applied to Safe Space policies. The requisite inquiry for a Time, Place, and Manner regulation is whether the speech restriction is content neutral.<sup>164</sup> Since Safe Spaces necessarily restrict certain types of content, Safe Space policies would fail this initial inquiry.<sup>165</sup>

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straight" conduct); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629–31 (1984) (indicating the possibility for a private association to limit its members' composition).

<sup>158</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972) (holding that "state colleges and universities are not enclaves immune from the sweep of the First Amendment").

<sup>159</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (noting that the court has repeatedly emphasized the need to affirm the authority of school officials, consistent with constitutional safeguards); Calvert & Richards, *supra* note 140, at 205–06.

<sup>160</sup> See *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 685–87, 693–97 (2010); *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

<sup>161</sup> See *Davis*, *supra* note 138, at 279–84.

<sup>162</sup> See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25–28 (2010); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984).

<sup>163</sup> See, e.g., *Christian Legal Soc'y*, 561 U.S. at 679–87; see also discussion *supra* Section II.A.

<sup>164</sup> See, e.g., *Christian Legal Soc'y*, 561 U.S. at 679–87; see also discussion *supra* Section II.A.

<sup>165</sup> This is not to say, however, that Safe Spaces would not pass the requisite strict scrutiny inquiry. See discussion *infra* Part IV.

## 2. Free Association on University Campuses

The pinnacle case defining the limits of Free Association at public universities is *Christian Legal Society v. Martinez*.<sup>166</sup> In *Christian Legal Society*, the Supreme Court held that state universities could regulate the associational membership of students, despite the intimate and expressive rights asserted by the group.<sup>167</sup> Specifically, the Court determined that the state's interest in limiting discrimination was compelling enough to regulate students' intimate and expressive associational rights.<sup>168</sup> Since *Christian Legal Society*, the Court has not taken up another university free association case. As such, it is likely that the standards set by *Christian Legal Society* will continue to impact RSOs at public universities for the foreseeable future.

### III. NORMATIVE ATTRIBUTES OF ACADEMIC SAFE SPACES AND THE FREE SPEECH CRITIQUE

Before applying the free speech and associational doctrines to the three forms of Safe Space policies overviewed in Part I, it is necessary to lay forth the normative assertions of the Free Speech Critique and Safe Space policies. As I indicated in the Introduction, this Note does not compare the normative qualities of the free speech critique with those of Safe Spaces.<sup>169</sup> However, this Note's principle aim is to reconcile the Free Speech Critique with Safe Space policies in order to safeguard the interests of each. The natural question derived from this thesis, then, is why should we attempt to safeguard either of the aforementioned interests? To answer this question, this section will briefly detail the positive, normative qualities of both Safe Space policies and free expression in academia.

#### A. The Value of Academic Safe Spaces

First, it has been postulated that Safe Spaces create a healthy learning environment for minorities.<sup>170</sup> Minorities often feel at risk of being targeted by majority

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<sup>166</sup> 561 U.S. 661 (2010); see David Brown, *Hey! Universities! Leave Them Kids Alone! Christian Legal Society v. Martinez and Conditioning Equal Access to a University's Student Organization Forum*, 116 PENN ST. L. REV. 163 (2011) (discussing the effects of the *Christian Legal Society* decision on associational rights of students at public universities); see also Melanie Crouch, *The Public University's Right to Prohibit Discrimination*, 53 HOUS. L. REV. 1369 (2016) (analyzing the ability of state universities to regulate student associational rights to promote inclusion).

<sup>167</sup> See 561 U.S. at 669.

<sup>168</sup> *Id.* at 690, 694. It is relevant to note that the decision in *Christian Legal Society* was based on the state's interest in inclusivity. *Id.* Therefore, as applied to organizations that exclude individuals based on non-inclusive speech, a university would likely not be able to assert the same interest. This would affect the institution's constitutional ability to regulate inclusive associations.

<sup>169</sup> See *supra* Introduction.

<sup>170</sup> See, e.g., Paxson, *supra* note 39; Schapiro, *supra* note 3.

students.<sup>171</sup> This can result in minority students being cut-off in their education, or feeling incapable of contributing to their learning environment.<sup>172</sup> Safe Spaces help rectify these issues by providing minority students with an avenue to express themselves, and confront many of the personal, intimate issues they face.<sup>173</sup> Second, Safe Spaces allow minority students an avenue to express their specific concerns about campus life.<sup>174</sup> Third, many proponents argue that Safe Spaces promote inclusivity.<sup>175</sup> As the Court has continually recognized since its decision in *Regents of the University of California v. Bakke*,<sup>176</sup> universities have a compelling state interest in the inclusivity of minority students.<sup>177</sup> Additionally, Safe Spaces can protect minority students from feeling as though they are the sole representative of their class.<sup>178</sup>

It is also relevant to note that, on top of the normative attributes referenced above, the LGBT community has a long history of using Safe Spaces.<sup>179</sup> This history has created a symbolic attachment<sup>180</sup>: for the LGBT community, Safe Spaces are a part of not only their movement's success, but also of their collective resistance against majority oppression.<sup>181</sup> And, whatever may be said about the normative attributes of Safe Spaces, certainly the LGBT movement itself has a significant interest in preserving the institution of the Safe Space.<sup>182</sup>

### B. The Free Speech Critique

Although it is not seriously contested that Safe Spaces provide some normative good,<sup>183</sup> it is likewise not seriously contested that Safe Space policies tend to restrict speech.<sup>184</sup> As noted in the Introduction, the Safe Space debate has been routinely

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<sup>171</sup> See, e.g., Paxson, *supra* note 39; Schapiro, *supra* note 3.

<sup>172</sup> See, e.g., Schapiro, *supra* note 3; see also *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003) (discussing the importance of having a “critical mass” of minority students in higher education).

<sup>173</sup> See, e.g., Schapiro, *supra* note 3.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> 438 U.S. 265 (1978).

<sup>177</sup> See generally *id.*; *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (discussing the Court's acknowledgment of the contribution diversity makes to higher education).

<sup>178</sup> See, e.g., Schapiro, *supra* note 3. The Supreme Court recognized in *Grutter* that universities have an interest in insuring that minority students are not the sole representatives of their class. *Grutter v. Bollinger*, 539 U.S. 306, 329–38 (2003).

<sup>179</sup> See generally HANHARDT, *supra* note 45.

<sup>180</sup> See *id.* at 30–31.

<sup>181</sup> See generally *id.*

<sup>182</sup> See generally, e.g., *id.*

<sup>183</sup> See, e.g., Strauss, *supra* note 3. But see, e.g., Morey, *supra* note 2.

<sup>184</sup> See Paxson, *supra* note 39 (indicating safe spaces are areas where students can be free of harassing speech).

characterized in terms of free speech and speech restrictions.<sup>185</sup> And even proponents of Safe Spaces must concede that Safe Space policies inherently restrict some forms of speech.<sup>186</sup> Acting on this recognition—as well as on the well-recognized normative value of speech in the United States—critics have established the Free Speech Critique of Safe Spaces. The Free Speech Critique has two basic components. First, opponents of Safe Spaces argue that some—if not all—Safe Space policies violate constitutionally protected speech.<sup>187</sup> Second, opponents use the Free Speech Critique as a normative buffer against Safe Spaces, indicating that speech is too important to sacrifice, even in light of societal discrimination.<sup>188</sup> This is especially implicated when it comes to education.<sup>189</sup>

In sum, the first major concern for the Free Speech Critique is that Safe Space policies, as promulgated by state institutions, can breach the Constitution's guarantee of free speech.<sup>190</sup> Secondly, even if the speech restrictions promulgated by Safe Space policies do not breach the First Amendment, they nevertheless violate the normative foundations of free speech and expression.<sup>191</sup> This is especially so when the free expression of ideas in education is implicated.<sup>192</sup>

### C. Solving the Safe Space Debate with Free Association

Congressman Jamie Raskin, an American University constitutional law professor, stated during a lecture that “[w]e all want maximum freedom of expression, [but] . . . [o]n the other hand, we all want the maximum of personal respect. The problem is that one person's exercise of free speech may look a lot like disrespect to somebody else.”<sup>193</sup> In essence, Raskin's lecture sought to explain the normative

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<sup>185</sup> See *supra* notes 1–7 and accompanying text. This is not to say, however, that other critiques of Safe Spaces are without merit. Some scholars, for instance, critique Safe Spaces as “identity apartheid,” essentially condemning Safe Spaces as negatively effecting the very goals of inclusion. See Kuykendall & Adside, *supra* note 24, at 1076–81 (discussing the potential harmful effects of Safe Spaces on the principles of inclusion). While alternative critiques have merit, the vast majority of critics focus on the Free Speech Critique and, given the practical limitations of this Note, I focus my attention there.

<sup>186</sup> See Garrett, *supra* note 88; Schapiro, *supra* note 3. Additionally, it would be difficult for proponents of Safe Spaces to argue that some kinds of speech are not restricted. Nearly every colloquial and academic definition of Safe Space policies involves the restriction of some expression. See discussion *supra* Sections I.B–D.

<sup>187</sup> See, e.g., Cliff Maloney, Jr., *Colleges Have No Right to Limit Students' Free Speech*, TIME (Oct. 13, 2016), <https://time.com/4530197/college-free-speechzone/> [<https://perma.cc/7DL3-HKP6>].

<sup>188</sup> See, e.g., *id.* To be sure, this second component avoids the constitutional inquiry entirely.

<sup>189</sup> See *supra* notes 1–3 and accompanying text.

<sup>190</sup> See *supra* notes 1–7 and accompanying text.

<sup>191</sup> See *supra* notes 1–7 and accompanying text.

<sup>192</sup> See *supra* notes 1–9 and accompanying text.

<sup>193</sup> *Safe Spaces and Free Speech on Campus*, AM. U. (Sept. 26, 2016), <http://www>



conflict between the academic interest in free expression, and the personal interests of Safe Space policies.<sup>194</sup>

As has been discussed throughout this Note, there is an immense value placed on both campus free speech and Safe Space policies.<sup>195</sup> Despite their values, these two sets of arguments directly conflict with the interests of one another.<sup>196</sup> The question is, now, whether there is a proper way to reconcile the values asserted by both Safe Spaces and the Free Speech Critique. As indicated in Sections II.B–C, intimate association doctrine provides an avenue for some organizations to restrict the speech of their membership without violating free speech doctrine.<sup>197</sup>

By categorizing certain RSOs as Safe Spaces, such organizations can constitutionally and normatively restrict the speech and conduct of their members by utilizing free association principles.<sup>198</sup> This defense of Safe Spaces inherently shifts the debate away from discussions about isolated speech restrictions to a debate about the proper balance between associational and speech rights. Apart from the constitutional considerations, altering the debate’s rhetoric has numerous normative advantages for the parties in this debate.

As will be demonstrated in Part IV, applying the free speech doctrine to Safe Spaces indicates that the Traditional Safe Space and Campus-Wide Safe Zone policies fail on multiple normative and constitutional grounds. However, Organizational Safe Spaces do not succumb to either free speech constitutional challenges or the normative component of the Free Speech Critique. To be sure, the robust rights guaranteed to organizations under the free association doctrine—as well as the associational doctrine’s ability to permit organizations to safeguard against offensive speech—adequately protect Safe Spaces from constitutional, normative, and practical attacks.

#### IV. STATE UNIVERSITY SAFE SPACES: A CONSTITUTIONAL INQUIRY

It has been argued throughout this Note that the normative claims of both Safe Space proponents and the Free Speech critics have considerable merit,<sup>199</sup> and that, without proper resolution, both stand to significantly suffer at the success of the other.<sup>200</sup> To resolve this issue, I have asserted that the best way to reconcile the Safe Space debate is to protect Safe Spaces through the intimate, expressive association doctrine.<sup>201</sup> In this way, the free speech doctrine is safe guarded from both normative

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.american.edu/cas/news/Jamie-Raskin-and-Political-Correctness.cfm [https://perma.cc/577G-VC9E].

<sup>194</sup> *Id.*

<sup>195</sup> See Pérez-Peña et al., *supra* note 2; Schapiro, *supra* note 3.

<sup>196</sup> See, e.g., *Safe Spaces and Free Speech on Campus*, *supra* note 193.

<sup>197</sup> See discussion *supra* Sections II.B–C.

<sup>198</sup> See *supra* notes 103–13, 154–57 and accompanying text.

<sup>199</sup> See discussion *supra* Introduction, Part III.

<sup>200</sup> See discussion *supra* Introduction, Part III.

<sup>201</sup> See discussion *supra* Section III.C.

and constitutional attacks by proponents of Safe Space policies.<sup>202</sup> And further, this resolution will protect Safe Space policies from constitutional attacks by a long-lasting and robust free speech doctrine.<sup>203</sup>

The following section analyzes the three principle forms of Safe Space Policies. I contend that, while the Traditional Safe Space and Campus-Wide Safe Zone have notable normative attributes, the policies cannot survive free speech challenges. Further, I will argue that these policies cannot avail themselves of associational protections, since they lack an intimate structure. Last, I assert that, while Organizational Safe Spaces may contradict some normative free speech ideals, these Safe Spaces are protected from constitutional and normative challenges because of their associational qualities.

#### *A. The Traditional Safe Space*

Recall that the Traditional Safe Space manifests in a single, physical location, such as an administrative office.<sup>204</sup> Inside this Safe Space, students are discouraged from discussing certain topics which may be harmful to minority students.<sup>205</sup> Because certain topics—especially those deemed harmful to minorities—are prohibited, a challenged Traditional Safe Space policy will likely be deemed a content-based restriction of speech, since the Safe Space discriminates on what speakers may or may not express.<sup>206</sup>

To be sure, a court could find that the state's interests in inclusion and educational rights of minorities satisfy the requisite compelling state interest, thereby passing constitutional muster. In fact, if the university has any substantial or compelling interest at all, it is certainly the interest of promoting inclusivity.<sup>207</sup> However, this justification is subject to the same normative criticisms discussed in Section III.B.<sup>208</sup> And, because of its conflict with the normative aspects of the Free Speech Critique, the Traditional Safe Space should be dismissed as a viable solution to this debate even if it were deemed constitutional.

Additionally, this model does not guarantee intimate associate rights for the membership, because a traditional safe space is open to all students and faculty at

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<sup>202</sup> See discussion *supra* Section III.C.

<sup>203</sup> See discussion *supra* Section III.C.

<sup>204</sup> See, e.g., *LGBTQ Safe Space*, *supra* note 80; Moorthy, *supra* note 82.

<sup>205</sup> See, e.g., Schapiro, *supra* note 3 (describing the purpose of safe spaces for minority students who desire to avoid harassment or find comfort).

<sup>206</sup> Therefore, the university cannot justify Traditional Safe Space restrictions as a Time, Place, and Manner regulation. See *supra* notes 138–42 and accompanying text; cf. Blocher, *supra* note 123, at 703–07 (discussing viewpoint neutrality and the invalidity of government discrimination against particular viewpoints).

<sup>207</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003).

<sup>208</sup> See discussion *supra* Section III.B.

a given university.<sup>209</sup> This means that the “organization” would have a large, fluid membership. As such, neither the selectivity nor size requirements under the *Rotary Club* standard would be met.<sup>210</sup>

### *B. The Campus-Wide Safe Zones*

While Campus-Wide Safe Zones take many forms, all such policies act to restrict content-based speech.<sup>211</sup> Naturally, this submits these Safe Space policies to heightened constitutional review.<sup>212</sup> Additionally, these restrictions differ from other Safe Space policies because they cannot be effectively defended as Time, Place, and Manner restrictions. This is because speakers in this model are, in all places and times, barred from speaking certain things.<sup>213</sup> Hence, such restrictions would likely be subject to strict scrutiny.<sup>214</sup> And, much like the Traditional Safe Space, Campus-Wide Safe Zones would likely fail constitutional muster.

But, even if the regulation were viewed as a Time, Place, and Manner restriction, the government would have a difficult time showing that the regulation was the least restrictive means of promoting its interest, since these regulations are inherently broad. However, in the limited circumstances when the university implements a policy that is not overly broad, Campus-Wide Safe Zones are nevertheless susceptible to normative free speech concerns. Moreover, since Campus-Wide Safe Zones inherently involve a larger, non-selective populace, it is unlikely that such restrictions could be defended on intimate, expressive associational grounds.<sup>215</sup>

### *C. The Organizational Safe Space Model*

As detailed in Section I.D, the Organizational Safe Space model typically manifests in an independent RSO policy, either through a group bylaw or governing document.<sup>216</sup> These general policies and procedures require that the organization’s

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<sup>209</sup> See, e.g., *LGBTQ Safe Space*, *supra* note 80 (indicating that the university safe space program works to shape a “[u]niversity[ ] culture that is accepting of *all people*, regardless of sexual orientation, gender identity/expression, or *any other difference*” (emphasis added)).

<sup>210</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 646 (2000).

<sup>211</sup> See, e.g., *supra* notes 88–93 and accompanying text.

<sup>212</sup> See, e.g., *United States v. Playboy Entm’t Grp. Inc.*, 529 U.S. 803, 813 (2000) (stating that content-based speech restrictions receive strict scrutiny).

<sup>213</sup> See *supra* notes 88–93 and accompanying text.

<sup>214</sup> *Playboy Entm’t Grp.*, 529 U.S. at 813 (stating that content-based restrictions on speech receive strict scrutiny).

<sup>215</sup> It should be noted that a university may argue that their entire campus community is an intimate association. However, this argument would likely not be successful in light of the *Rotary Club* factors which, at minimum, require a small, selective population with a unitary ideology. See *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

<sup>216</sup> See *Registered Student Organizations*, *supra* note 102; *Start a New Student Organization*, *supra* note 104.

membership observes a Safe Space.<sup>217</sup> In part, this likely means that the organization will restrict members from expressing certain types of speech.<sup>218</sup>

RSOs which restrict the free expression of their membership are entitled to do so, since they are likely intimate organizations.<sup>219</sup> To be sure, RSOs likely satisfy the *Rotary Club* factors, since these organizations have a small size and are selective in their membership recruiting.<sup>220</sup> Moreover, RSOs typically have a narrow, well-defined purpose, which is served through the specific recruitment of its membership.<sup>221</sup> Additionally, not only are many RSOs intimate, many also aim to make socio-political statements through expression.<sup>222</sup> Since such organizations associate to further some other constitutionally protected interest—i.e., political speech—they receive heightened constitutional protection in their ability to regulate their members’ expression.<sup>223</sup>

Additionally, this form of Safe Space policy is not naturally susceptible to immediate free speech concerns—either normatively or constitutionally. As members of volunteer organizations, members are free to come and go as they please. Without a mandate to remain in the organization, members who oppose the speech restriction can exercise their free will to leave the group.<sup>224</sup> To be sure, if certain restrictions are placed on the members’ speech, members displeased with the restriction can leave the organization.<sup>225</sup>

Because Organizational Safe Spaces are likely intimate, expressive associations, they will receive heightened First Amendment protection.<sup>226</sup> Under this protection, RSOs are permitted to discriminate against their membership on the basis of their

<sup>217</sup> See, e.g., *LGBT Resource Center Affiliated Student Organizations*, *supra* note 105.

<sup>218</sup> See *supra* notes 105–07 and accompanying text.

<sup>219</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting) (discussing the factors that the Court uses to determine whether a group is sufficiently personal to be considered an intimate association).

<sup>220</sup> *Id.*; see also discussion *supra* Part III.

<sup>221</sup> See, e.g., *Registered Student Organizations*, *supra* note 102; *Student Organizations & Activities/Financial Accounts*, *supra* note 102 (“RSOs cover a wide range of topics and interest areas . . .”).

<sup>222</sup> See, e.g., *LGBT Resource Center Affiliated Student Organizations*, *supra* note 105.

<sup>223</sup> See, e.g., *Dale*, 530 U.S. at 646–56, 696–97 (“An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue . . . . This is why a different kind of scrutiny must be given to an expressive association claim . . .”).

<sup>224</sup> Leaving the group is also a way for disenfranchised members and free speech advocates to “voice” their concern about the RSO’s policy through the protest of resigning. In this way, the Free Speech advocates are satisfied, because they can voice their concern nonverbally; and, likewise, the Safe Space advocates are satisfied, since the RSO was not subjected to harmful speech.

<sup>225</sup> Cf. Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 564 (2011) (discussing the fact that individuals prevented from discriminating under anti-discrimination laws may simply leave the group).

<sup>226</sup> See *Dale*, 530 U.S. at 646–56.

members' expression during meetings, social events, and gatherings.<sup>227</sup> As such, RSOs can manifest constitutionally enhanced Safe Spaces through intimate, expressive association. Not only does the Safe Space model constitutionally protect Safe Spaces, it also limits the normative concerns in the Free Speech Critique by making Safe Spaces wholly voluntary on one's intimate association.

#### V. ADDRESSING HYPOTHETICAL CRITICISMS

As far as this Author can ascertain, this proposed reconciliation of the Safe Space debate is completely novel. As a result, there are no formal critiques to this Note's principal proposition. The subsequent critiques and rebukes are merely imaginative. And, because the critiques are born of this Author's own biases, the below articulated challenges are not intended to be exhaustive. This Author invites his colleagues to continue research in this field, and to expand this scholarly debate.

##### *A. Student-Run Safe Spaces Will Not Adequately Serve Minority Students at University*

Proponents of Safe Space policies may argue that student-run safe spaces will not adequately serve the interests of minority students, because students are not equipped with adequate resources, experience, or training. In this way, the critique will likely follow some of the due process concerns accompanying student-run hearing panels.<sup>228</sup> However, most student organizations are not solely managed by the students themselves. First, RSOs typically have faculty and/or staff advisors.<sup>229</sup> These advisors monitor the organization, and ensure that it upholds its mission and complies with school policy.<sup>230</sup> Second, universities sanction every RSO on campus.<sup>231</sup> As part of this sanctioning, the university has the ability to punish an organization if it fails to uphold its mission.<sup>232</sup>

Furthermore, this critique assumes that students within these intimate, Safe Space organizations, will not have a strong interest to advance a proper Safe Space policy. It is important to recognize that, as agents of a Safe Space, the members will likely have a self-interest to promote an inclusive space. Last, students at higher

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<sup>227</sup> See *supra* note 157 and accompanying text.

<sup>228</sup> See generally Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN ST. L. REV. 1001 (2016) (discussing the inadequacy of some student and faculty run hearing panels at public universities).

<sup>229</sup> See, e.g., *Advisors*, U. CENT. FLA., <https://osi.ucf.edu/blog/rso-info/advisors/> [<https://perma.cc/3TPC-A6EC>] (last visited Dec. 4, 2017).

<sup>230</sup> See, e.g., *id.*

<sup>231</sup> See, e.g., *Registered Student Organizations*, *supra* note 102; *Start a New Student Organization*, *supra* note 104.

<sup>232</sup> See, e.g., *Code of Student Conduct 2017–18*, *supra* note 138.

educational institutions are often granted significant authority to defend the rights and interests of their fellow students.<sup>233</sup> Therefore, merely because a Safe Space is student-run does not necessarily mean that it will not adequately protect the interests of minority students.

### *B. The RSOs May Not Be Intimate in Nature*

Other critics may contend that RSOs promulgating Safe Spaces are not intimate associations. The critique follows that because most universities have non-discrimination policies,<sup>234</sup> the organization cannot truly be intimate, because it does not meet the “selectivity” factor under the Court’s precedent. However, the Court’s decision in *Christian Legal Society* indicated that the Christian Legal Society was an intimate association;<sup>235</sup> and, the Court did not indicate that the Christian Legal Society lost its associational status merely by adhering to a non-discrimination policy.<sup>236</sup> Additionally, as the Court reasoned in both *Dale* and *Roberts*, an intimate association need not meet every single “intimacy factor” to be considered an intimate association.<sup>237</sup>

### *C. RSOs Cannot Restrict Speech Because They Are an Arm of the State*

One final critique may be that, since RSOs are sanctioned by state universities, they are, in fact, arms of the state. As such, they would not be permitted to regulate student speech on the basis of content. However, RSOs are not mandatory activities for students; in fact, they are completely voluntary.<sup>238</sup> As the Supreme Court has articulated time and again, if citizens submit themselves to constitutional violations—through voluntary involvement or activity—there is no cognizable constitutional claim.<sup>239</sup>

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<sup>233</sup> For instance, most American universities and colleges have student-run unions and governments aimed at protecting the interests and rights of their fellow students. *See, e.g., Our Mission*, HARV. UNDERGRADUATE COUNCIL, <https://uc.fas.harvard.edu/> [<https://perma.cc/BEB4-EK4P>] (last visited Dec. 4, 2017); *Judicial*, U. MICH.: CENT. STUDENT GOV’T, <https://csg.umich.edu/judicial/> [<https://perma.cc/Z2HM-MU9X>] (last visited Dec. 4, 2017). Additionally, some colleges have student-run hearing panels, responsible for adjudicating academic and behavioral misconduct. *See, e.g., Law School Honor Council Bylaws*, WM. & MARY LAW SCH. HONOR COUNCIL, [http://wmpeople.wm.edu/asset/index/lawhonor/lawschoolhonor\\_councilbylaws2016](http://wmpeople.wm.edu/asset/index/lawhonor/lawschoolhonor_councilbylaws2016) [<https://perma.cc/K7JE-V6ZU>] (last visited Dec. 4, 2017).

<sup>234</sup> *See generally* Brown, *supra* note 166 (discussing the use of nondiscrimination policies on college campuses); *see also Student Organizations: University Recognition*, *supra* note 103 (“Membership [in the RSO] must meet the university’s nondiscrimination policy.”).

<sup>235</sup> *See* *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 678–85 (2010) (“Insisting that an organization embrace unwelcome members . . . ‘directly and immediately affects associational rights.’” (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000))).

<sup>236</sup> *See generally id.*

<sup>237</sup> *See supra* notes 145–54 and accompanying text.

<sup>238</sup> *Cf. Student Organizations*, VA. TECH STUDENT ENGAGEMENT & CAMPUS LIFE, [https://campuslife.vt.edu/Student\\_Orgs.html](https://campuslife.vt.edu/Student_Orgs.html) [<https://perma.cc/X93S-ZF7Y>] (last visited Dec. 4, 2017).

<sup>239</sup> *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring) (noting

Further, even if RSOs were considered arms of the state, their interests in preserving inclusivity would likely overcome a free speech challenge.<sup>240</sup>

#### CONCLUSION

This Note has demonstrated the complicated normative and constitutional debate surrounding academic Safe Spaces, and how this debate can negatively impact free speech, as well as the interests of minority students and Safe Space policies.<sup>241</sup> There is little debate that the interests of minority students—which are safeguarded by Safe Space policies—are meritorious.<sup>242</sup> Similarly, the normative and constitutional interests asserted by proponents of the Free Speech Critique are not seriously contested.<sup>243</sup> As Congressman Raskin articulated, the problem with the instant Safe Space debate is that the interests of each side are substantial; and that, further, each side is gravely concerned with the outcome of this debate.<sup>244</sup> To be sure, this grave concern comes from a recognition that the success of one side of this debate necessarily requires the demise of the other.<sup>245</sup> In response to this serious threat, this Note postulated that academic Safe Spaces and students' free speech interests can be safeguarded by analyzing the instant debate through the lens of free association.<sup>246</sup>

By analyzing the three common forms of Safe Space policies, the reconciliatory conclusion drawn in Section III.C is best served through the Organizational Safe Space Model. First, the Organizational Safe Space model provides for the only intimate and expressive associational Safe Space policy of the three types reviewed in this Note.<sup>247</sup> Second, the Organizational Safe Space model clearly justifies restrictions of speech because of the constitutional and normative associational values inherent in RSOs.<sup>248</sup> As a result, I recommend that Safe Space policies should be limited to the Organizational Model. Not only will this silence Safe Space critics, but it will also bolster the normative and constitutional position of Safe Space policies.

Despite the practical appeal of this approach, it is not without criticism. First, leaving the management of Safe Spaces to students may prove inadequate for safeguarding minority students' interests. However, this critique discounts the shared

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that there was no constitutional violation in single-race clubs since one's choice of club is entirely voluntary).

<sup>240</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330–33 (2003) (reasoning that state universities have a compelling interest in diversity); *Christian Legal Soc'y*, 561 U.S. at 690–94 (reasoning that the interest of the public university in limiting discrimination was valid).

<sup>241</sup> See discussion *supra* Introduction, Sections III.B–C.

<sup>242</sup> See, e.g., Schapiro, *supra* note 3; Strauss, *supra* note 3.

<sup>243</sup> See *Safe Spaces and Free Speech on Campus*, *supra* note 193.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See discussion *supra* Section III.C.

<sup>247</sup> See discussion *supra* Section IV.C.

<sup>248</sup> See discussion *supra* Section IV.C.

Safe Space “interests” of students in the same associational organization. Additionally, the administration of student rights is often left to the discretion of student leaders, whether this be in student government or student-run hearing panels.<sup>249</sup> Second, some critics may argue that RSOs are not intimate associations at all. However, this flies directly in the face of the Supreme Court’s decision in *Christian Legal Society*, where the Court reasoned that RSOs could, in fact, possess the expressive qualities necessary to invoke associational rights.<sup>250</sup> Last, other critics may postulate that, even if RSOs are intimate, intimate organizations do not have the right to restrict speech when they are sanctioned by the state. But, while RSOs are sanctioned by the state, they are voluntary in nature; therefore, RSOs are still permitted to restrict the speech of their membership.<sup>251</sup>

While appealing, it may be argued, that the reconciliatory view articulated in this Note is nothing but unfettered, unabashed compromise; a deal struck between two normatively sound positions by an Author choosing cooperation in light of the grave losses associated with the defeat of either side of the debate. If it is the case that the reconciliation argued for in this Note is nothing but a compromise between two normative heavy-weights, it should not be dismissed out of hand. After all, “[t]he Constitution itself, plainly written as it is, the safeguard of our federative compact [is] the offspring of concession and compromise.”<sup>252</sup> Let it be, then, that this normative and constitutional debate of our time be settled as the Founding Fathers settled theirs: a compromise.

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<sup>249</sup> See, e.g., *Judicial*, *supra* note 233.

<sup>250</sup> See 561 U.S. 661, 678–83 (2010) (reasoning that a less restrictive standard of scrutiny still respects a student organization’s expressive association rights).

<sup>251</sup> See *supra* notes 216–27 and accompanying text; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 646–56 (2000) (concluding that forced inclusion in the Boy Scouts of homosexuals against the Boy Scout’s expressed beliefs violated their freedom of expression).

<sup>252</sup> President James Knox Polk, Inaugural Address (Mar. 4, 1845), [http://avalon.law.yale.edu/19th\\_century/polok.asp](http://avalon.law.yale.edu/19th_century/polok.asp) [<https://perma.cc/P65D-4M2E>].