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## Framing Campus Free Expression Conflict Through a Dispute Resolution Optic: Insights For Campus Leaders

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# Framing Campus Free Expression Conflict Through a Dispute Resolution Optic: Insights For Campus Leaders

Robert H. Jerry, II\*

## I. INTRODUCTION

Nearly four decades of active academic study of dispute resolution processes have generated a rich array of insights into conflict management. This reservoir of understanding is more than theory and description; the learning in this field has been applied in numerous settings to produce early resolutions, save time and money, increase satisfaction and compliance, manage community discord, prevent embryonic disputes from escalating into ruinous conflict, and more. This Essay, with campus leaders as its intended audience (*i.e.*, presidents, chancellors, provosts, deans, department chairs, and faculty, staff, and student governance leaders), maintains that acquaintance with constructs familiar to dispute resolution scholars and practitioners can deepen understanding of free expression conflict on college campuses, increase self-awareness and enhance leaders' ability to act consciously and purposively in response to conflict, and help equip campus leaders with useful tools for managing conflict when it arises.<sup>1</sup> This Essay will stress framing, but many constructs in the dispute resolution field illuminate the techniques and skills campus leaders need if they are to manage conflict effectively, whatever may be its source.

## II. INSIGHTS FROM MOORE'S CIRCLE OF CONFLICT

When conflict appears imminent or has erupted, it is important to gather facts and determine, to the extent possible, what is driving the conflict, *i.e.*, from what sources the conflict derives its energy. A useful tool for organizing this inquiry is Christopher Moore's "Circle of Conflict."<sup>2</sup> This construct describes the causes of conflict in any kind of dispute as five slices of a circular pie – data; structure; relationships; values; and interests. These causes can give rise to conflict either individually or in any combination of two or more causes. When a free expression conflict arises on campus, trying to understand the underlying causes can be helpful

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1. For a more general discussion that applies dispute resolution principles and concepts to conflicts that arise on university campuses, see Maria R. Volpe & David Chandler, *Resolving Conflicts in Institutions of Higher Education: Challenges for Pracademics* (CNCR-Hewlett Foundation Seed Grant White Papers, Paper No. 8, 1999), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1007&context=seedgrant>.

2. Christopher W. Moore is a partner in a mediation and conflict resolution consulting and training practice located in Colorado. He introduced the Circle of Conflict construct in his book *The Mediation Process: Practical Strategies for Resolving Conflict*, first published in 1986 and published in its fourth edition in 2014. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (4th ed. 2014).

to identifying an approach for responding to and managing it, hopefully toward resolution.

Each of the causes in the Circle has different implications. *Data (or information) conflicts* occur when information is missing or disagreements exist about what known data means. The starting place to resolve data conflicts is transparency, *i.e.*, getting all of the data out on the table for discussion. Data conflicts can result from rumors and misinformation; thus, transparency and prompt, full circulation of accurate information are important in dealing with data conflicts. *Value conflicts* are grounded in disputants' different beliefs, cultures, religions, heritage, and political orthodoxies. Recognizing that a free speech conflict is value-laden is important, because value-based conflicts are usually among the most difficult kinds of conflicts to resolve. It is usually impossible to persuade disputants to change their values, and appreciating this reality is an important first step to dealing with a conflict. Treating value differences like additional data points – and focusing on getting these points onto the table in a transparent discussion – can be helpful.

*Structure conflicts* are grounded in the ways institutions and relationships are organized. For example, an imbalance of power (*e.g.*, employer versus employee, or administrator versus student) may interfere with what one (or both) of the disputants needs or wants, which leads to conflict. A deadline or time constraint that prevents at least one disputant from fulfilling expectations is another kind of structure conflict. Barriers that set up structure conflicts are common in campus environments. If an assessment of a conflict reveals that it may have resulted from or been enhanced by a lack of communication because of a structural power imbalance (or perceived imbalance), part of the solution could involve setting up information-sharing and communication-enhancing structures to break down that barrier. *Relationship conflicts* is a category that captures the reality of misunderstandings whenever individuals interact. These kinds of conflicts are among the more difficult to resolve because relationship problems frequently become entrenched quickly, and it is difficult to convince disputants to acknowledge how their own behaviors have contributed to a relationship conflict. As any campus leader knows, relationship conflicts are also common on our university campuses.

*Interest conflicts* have their roots in the wants and desires of disputants. Interests can be located in the answers to why a disputant wants a particular outcome. Sometimes disputants have not articulated or even identified what their interests are, so the process of conflict resolution in these instances involves taking some steps to help the disputants articulate their goals and the reasons for those goals. Focusing on underlying interests lays the groundwork for attempting to reconcile competing interests or finding a compromise under which each of the disputants gives up a portion of their interests to order to accommodate a mutually agreeable solution.

Jolie Pillsbury<sup>3</sup> adds a useful sixth category to Moore's Circle – *language conflicts*. This addition recognizes that language conflict is possible whenever words

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3. Jolie B. Pillsbury is the president of a performance consulting company located in Arlington, Virginia.

are used: identical words sometimes have different meanings<sup>4</sup> or are interpreted differently in context;<sup>5</sup> different understandings are often unknown to those using the words;<sup>6</sup> different cultures give words different meanings;<sup>7</sup> and translation challenges exist whenever different languages are used.<sup>8</sup> In addition, behavioral science has long taught that it is human nature for listeners to hear meanings other than those intended by the speaker.<sup>9</sup>

A campus leader who has experienced a significant campus free speech conflict can dissect it by using Moore's Circle to identify the existence, influence, and impact of the various causes of conflict present in the narrative. This is important and useful, but the Circle's greatest value is found in what it reveals about strategies campus leaders might deploy when attempting to manage a free speech dispute. Some of these strategies are listed on the following table, which is organized by reference to the various categories in Moore's Circle.<sup>10</sup>

Type of Conflict	Possible Strategies to Deal with the Conflict
Data	Explicitly raise and acknowledge missing data and points of misunderstanding with respect to available data
	Embrace candor and transparency with respect to how information was acquired and is being defined, used, and interpreted
	Encourage using the best data available and efforts to work collaboratively to get better data

4. A simple illustration is the word "light," which may be used correctly to refer to the weight of an object or to its illumination characteristics. Two speakers referring to how something is "light" may be talking about two completely different ideas without any awareness of the misunderstanding.

5. The statement "you don't understand" may be intended to convey "you heard incorrectly what I said, and the data point needs to be corrected," but may be heard as demeaning the listener's cognitive abilities to comprehend, which is offensive to the listener.

6. See, e.g., *Raffles v. Wichelhaus* [1864], EWHC (Fam) Exch. J19 (contract for sale of cotton to be delivered in Liverpool on the ship *Peerless* arriving from Bombay, but there were two ships arriving from Bombay, one in October and one in December; buyer thought the contract referred to the October ship, and seller thought it referred to the December ship).

7. See, e.g., Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Edgardo Rotman, *The Inherent Problems of Legal Translation: Theoretical Aspects*, 6 IND. INT'L & COMP. L. REV. 187 (1995).

8. See, e.g., Thomas O. Main, *The Word Commons and Foreign Laws*, 46 CORNELL INT'L L. J. 219 (2013) (explaining how legal words when used across geographic, social, and cultural boundaries have limited common meanings); Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics, and Legislation*, 21 CONN. J. INT'L L. 41 (2005) (discussing various complexities involved in translating the French Civil Code); Roderick A. MacDonald, *Legal Bilingualism*, 42 MCGILL L. J. 119 (1997) (discussing the challenges of a bilingual legal order in Canada). One can argue, however, that translation does not depend on the use of two or more languages, but rather occurs in all communication, in the sense that every spoken expression must be deciphered by the listener.

9. See, e.g., James Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197 (1963).

10. This chart is adapted from CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 60-61 (1996) (describing the "Sphere of Conflict"); Jolie Bain Pillsbury, *The Circle of Conflict Adaptation*, RESULTS BASED LEADERSHIP APPLICATIONS (2015), <http://nlc.org/sites/default/files/users/user112/Circle%20of%20Conflict%20Adaptation.pdf>; Sara Rickover, *Analyzing the Causes of Disputes with the Circle of Conflict*, SARA RICKOVER, BEHIND THE CORPORATE VEIL (May 12, 2014), <https://sararickover.wordpress.com/2014/05/12/analyzing-the-causes-of-disputes-with-the-circle-of-conflict/> (last visited Jan. 15, 2018);

	Retain third party, perhaps with expertise, to interpret data and break a data conflict impasse
Values	Use non-judgmental, empathetic listening techniques when value-laden positions are presented
	If possible, redefine the problem in a way that defines or reframes the issue without reference to the value
	Try to identify overarching shared values that provide a basis for further conversation
	When the limits of shared values are reached, seek to forge a shared willingness to accept differences in values
	Seek mutual awareness of the premises and personal experiences that underlie unshared values
Structure	Identify the structural sources of conflict, and discuss roles within the organizational structure, the scope of authority in these roles, and the sources of authority for these roles
	Discuss strategies to reform or adapt the existing structure when the disputants can do so
	Modify physical relationships, locations, and other environmental elements within the structure
	When impossible to reform or adapt the structure, identify who controls the structure and discuss the feasibility of engaging them to make changes (and then undertaking this engagement if change is feasible)
	Where the structure is fixed and unalterable, develop options for new ways to interact within the structure, such as changing roles within the structure or reallocating responsibilities
Relationships	Identify relationship conflicts, determine when and where they occur, and seek shared descriptions of the manners in which these conflicts are presented and manifested
	Explore ways disputants can adjust their relationships to enable different manners of interaction, including different procedures, ground rules, creation of expectation of problem-solving attitudes, etc.
	Clarify perceptions through increased and better quality communications
	Change structure to impede or prevent negative interaction (especially repetitive negative interaction)
	Identify ways to attend to the consequences of relationship conflict through remedy, restoration, apology, acquiescence, and/or forgiveness

Interests	Identify the actual interests underlying disputants' positions, and who the decision makers are for articulating those interests
	Seek to identify standards that enable objective evaluation and measurement of interests
	Where interests overlap, develop options that take advantage of the overlap; search for ways to identify more options
	Where interests compete, develop options that either reconcile the competing interests or can be implemented through reciprocal concessions leading to compromise; identify objective standards for measuring the trade-offs
Language	Identify language differences, encourage reconciliation of different meanings, and propose shared, reliable, and acceptable definitions

### III. POSITIONS AND INTERESTS

The *interests* category in Moore's Circle mentions another important dispute resolution construct: the distinction between *positions* and *interests*. Positions are the stances disputants take and the views they articulate; when taking a position, the disputant describes what is sought and requested, usually accompanied by a statement of rationale for the position (as with, for example, the statement of a legal rule or principle, or an appeal to a social norm or standard, such as equity, fairness, or an ethical ideal). But what a disputant *says* is wanted and desired is not equivalent to the needs, wants, desires, concerns, and/or fears that motivate taking the position.<sup>11</sup> The things the disputant actually cares about and which lead one to assert a position are interests. Positions involve the public assertion of a claim; interests are the needs, wants, desires, concerns, or fears that underlie the claim.

Recognizing the difference is a key to solving problems and resolving disputes. The process of identifying and assessing legal rights is, of course, important, but rights are asserted, and positions are taken based on those assertions, to promote interests. If options are generated and solutions proposed for the purpose of preserving or enhancing interests, a solution is more likely to emerge, and the range of available value-enhancing options may actually increase. Rarely will a disputant admit that a position already taken is wrong and then reach an agreed resolution on the basis of this admission. If, however, an option can be promoted that preserves or enhances the underlying interests (or is perceived to do so), a solution is more likely. In disputes over free expression, it is unrealistic for a campus leader to expect a constituency staking out a position in a conflict to abandon its position, but appeals or proposals based on interests may be more productive. In other words,

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11. One of the first descriptions of the position-interest distinction is found in WILLIAM L. URY, JEANNE M. BRETT, & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 4-8 (1988).

identifying a constituency's interest, and then helping that party understand its interests through non-judgmental discussions, offers the possibility of defusing a conflict.

#### IV. ADVERSARIAL VERSUS COLLABORATIVE NEGOTIATION

Negotiation is an extremely common method of dispute resolution, and the approaches to negotiating a dispute are commonly sorted into adversarial versus collaborative styles.<sup>12</sup> The adversarial approach emphasizes positions based on rights and power, and often proceeds from the premise that a single right (or best) outcome exists that is mutually exclusive from alternative outcomes. The adversarial approach assumes a zero-sum universe, where only winners and losers exist, and no space is available for exploring the possibility of common ground where value-enhancing agreements are possible. The adversarial approach is sometimes described as “distributive,” meaning that the dispute unfolds in a zero-sum universe where a creative search for other options is pointless, and energy and resources must be marshalled toward winning the dispute and defeating opponents. The collaborative style, in contrast, emphasizes the interests of those involved in a dispute, and looks first for solutions that respect, protect, and enhance the interests of all sides. This approach does not presume that it is necessary for someone in the dispute to have its position rejected and to lose, but rather proceeds on the premise that the dispute may not be zero-sum and that “win-win” options may be available. One seeking to problem-solve with this approach gives emphasis to “stepping into the shoes” of disputants and understanding their points of view. Naturally, the collaborative approach is more supportive of relationships, in contrast to the adversarial approach where defeating those who disagree is the goal.

Whether the adversarial or collaborative approach to negotiation is deployed, negotiation (along with interviewing, counseling, and other forms of dispute resolution) stresses the importance of “active listening,”<sup>13</sup> a term that describes a communication skill where the listener concentrates, absorbs, responds, retains, and engages in other behaviors that enhance understanding and help resolve conflict. Active listening is arguably the most important of all communication skills, and it requires a focused, conscious effort to show respect, understanding, attention, and, in many situations, empathy.<sup>14</sup>

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12. For a discussion of the different styles of negotiation, see G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006). Different vocabularies are used to describe this distinction: adversarial vs. problem-solving, value-claiming vs. value-creating, distributive vs. integrative, and expanding the pie vs. dividing the pie are common ways to describe the continuum of negotiation styles.

13. See Neil Hamilton, *Effectiveness Requires Listening: How to Assess and Improve Listening Skills*, 13 FLA. COASTAL L. REV. 145 (2012); Alison Doyle, *Learn about Active Listening Skills with Examples*, THE BALANCE (Jan. 25, 2018), <https://www.thebalance.com/active-listening-skills-with-examples-2059684> (last visited Jan. 26, 2018).

14. See William Ury, *The power of listening* | William Ury | TEDxSanDiego, YOUTUBE (Jan. 7, 2015), <https://www.youtube.com/watch?v=saXfavo1OQo>.

## V. BARRIERS TO RESOLUTION

Robert Mnookin's important 1993 article on barriers to conflict resolution<sup>15</sup> presents a conceptual model of negotiation that explains conflict by reference to barriers that impede and sometimes prevent dispute resolution. For example, when one negotiator possesses information that the other does not have (*i.e.*, when conditions of "information asymmetry" exist), lack of transparency, bluffing, and misdirection can lead to impasse. Another example is the "principal-agent problem," where an individual or constituency is represented by another person or an individual outside the organization, and the agent's behaviors are based on interests of the agent rather than interests of the principal. This situation might manifest itself when, for example, a student group is represented or encouraged by third parties who are promoting their own interests.

One of the most important categories of barriers to resolution are found in the empirically demonstrated cognitive biases that affect human decision making, guide human behavior, all too often lead to and reinforce conflict, and sometimes prevent conflict resolution.<sup>16</sup> Some especially important cognitive biases of which the campus leader seeking to manage conflict should be mindful are: confirmation bias (the tendency to search for, interpret, recall, and favor information that confirms preexisting beliefs); the bandwagon effect (the tendency to believe things because many other people believe the same thing); availability bias (the tendency to base conclusions on a limited sample of recent experiences or on limited information that is unusual or emotionally charged); confidence illusion (the tendency of professionals conscious of their expertise or experience to overestimate their abilities to evaluate situations and/or make good decisions); the continued influence effect (the tendency to believe previously learned information after it is demonstrated to be incorrect); stereotyping (the tendency to assume that an individual member of a group has certain characteristics of the group without knowing information about the individual); partisan perceptions (the tendency to view evidence with a bias in one's own favor or in support of one's own point of view); reactive devaluation (the tendency to discount the accuracy or usefulness of information or to devalue proposals provided by an adversary or someone perceived as an opponent); and satisfaction influence (the tendency to be satisfied with the first explanation of an event to the exclusion of superior explanations that would be discovered if a search for information were continued).

## VI. BACKGROUND LAW AND LEADERSHIP STYLE

Whenever someone engages in problem-solving or dispute resolution activities, that person does so against the background of applicable law, or, as a powerful

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15. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RES. 235 (1993).

16. See generally JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* (2013); Richard Birke, *Neuroscience and Negotiation: What the New Science of Mind May Offer the Practicing Attorney*, 17 DISP. RESOL. MAG. 4 (2011); Jeremy Lack & François Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 33 (2012).



metaphor puts it, in the “shadow of the law.”<sup>17</sup> In other words, when managing free speech conflict, campus leaders cannot ignore the requirements of federal and state constitutions, applicable statutes and judicial precedents, and the rules created by trustees and governing boards that set forth both standards and processes for how universities are to be administered. Occasionally, with respect to governance rules and perhaps even applicable statutes, a campus leader might have the option to defuse a conflict by proposing to work with disputants toward mutually acceptable legal reforms. With respect to applicable constitutional principles and judicial precedents, this option is not, as a practical matter, available.

The applicable law sets the rules of the playing field, but when operating on that field, the position-interest and adversarial-collaborative distinctions discussed earlier all speak to the demeanor, style, and attitude that a campus leader adopts when dealing with free speech conflict. For example, when a campus leader interacts with the leaders of an uninvited, non-university, ultra-right group planning to march to and hold a torch-lit, night-time rally on the campus quadrangle, the firmness and assertiveness usually associated with an adversarial approach<sup>18</sup> may be more appropriate. When dealing with a student organization planning to protest a speaker invited to campus by another student organization, a collaborative style may be more appropriate. In the opinion of this writer, the final chapter in the histories of many presidencies, chancellorships, and other senior campus leaders was not written because the leader necessarily took substantively incorrect or patently unreasonable positions, but instead resulted from the projection of inapt demeanors, styles, and attitudes in the face of crisis without heeding the lessons that can be learned from the academic study of dispute resolution.

## VII. FRAMING

The field of dispute resolution cannot claim the construct of framing as its own; credit for articulation of framing as a theory should probably go to sociologist Erving Goffman, whose 1974 book *Frame Analysis: An Essay on the Organization of Experience*<sup>19</sup> sought to explain how humans organize their perceptions of events and experiences, and how these constructs (the “frames”) in turn guide human behavior and interactions. In essence, framing theory posits that how information is presented to an audience influences how the recipients of the information process it, which influences the meaning attributed to the message. For at least two decades, dispute resolution scholars have used the concept of “framing” to help explain how

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17. This oft-quoted metaphorical phrase became iconic in the dispute resolution field as a result of Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

18. It is important to note that an adherent to the adversarial approach is necessarily nasty, argumentative, or mean-spirited. The adversarial approach means that the dispute is defined as zero-sum, where gains for one negotiator are necessarily losses for the other. One can be adversarial but still be “nice.” Russell Korobkin explains that adversarial negotiation presumes treating a dispute as zero-sum, whereas collaborative negotiation presumes that it is possible to negotiate with an assumption that joint value awaits discovery and allocation in a win-win solution. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L. J. 1789 (2000).

19. See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1986).

negotiation can be used to resolve conflict,<sup>20</sup> but the concept of framing has been applied in a variety of fields, including psychology,<sup>21</sup> finance,<sup>22</sup> journalism,<sup>23</sup> communications,<sup>24</sup> business management,<sup>25</sup> and politics,<sup>26</sup> to name only a few. Storytelling, for example, is an example of framing: “By placing the facts within the context of a narrative with a unifying theme, a specific genre, and persuasive images, all fashioned for a particular audience, a storyteller seeks to convey a particular meaning to that audience.”<sup>27</sup> In fact, this Essay is itself a frame; a perspective for thinking about managing free speech conflict on university campuses is being expressed through a dispute resolution frame. In dealing with conflict, “we create frames to help us understand why the conflict exists, what actions are important to the conflict, why the parties act as they do, and how we should act in response. During the evolution of a conflict, frames act as sieves through which information is gathered and analyzed, positions are determined (including priorities, means, and solutions), and action plans developed. Depending on the context, frames may be used to conceptualize and interpret, or to manipulate and convince.”<sup>28</sup>

Because the contours of free speech law are especially malleable and uncertain, the concept of framing is highly relevant to free speech discourse (as it is to many other legal rules and concepts). Justice William Brennan once referred to “the complex of strands in the web of freedoms which make up free speech,”<sup>29</sup> and judges and scholars have often commented on the challenges presented when applying the First Amendment to free speech and expression disputes.<sup>30</sup> Thus, campus leaders,

20. See, e.g., Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); Linda L. Putnam & Martha Shoemaker, *Changes in Conflict Framing in the News Coverage of an Environmental Conflict*, 2007 J. DISP. RESOL. 167; Marcia Caton Campbell & Jayne Seminare Docherty, *What's in a Frame? (That Which We Call a Rose by any other Name Would Smell as Sweet)*, 87 MARQ. L. REV. 769 (2004). Careful readers have already noted that this essay uses dispute resolution theory as a frame through which campus free speech conflict can be viewed; further, in this portion of the essay, dispute resolution theory's use of framing is itself creating a frame to explicate free speech conflict.

21. See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981).

22. See MICHAEL M. POMPIAN, *Framing Bias*, in BEHAVIORAL FINANCE AND WEALTH MANAGEMENT: HOW TO BUILD INVESTMENT STRATEGIES THAT ACCOUNT FOR INVESTOR BIASES 143 (2012).

23. Pew Research Center: Journalism & Media Staff, *Framing the News*, PEW RESEARCH CENTER: JOURNALISM & MEDIA (July 13, 1998), <http://www.journalism.org/1998/07/13/framing-the-news/> (last visited Jan. 15, 2018).

24. See Dietram A. Scheufele, *Framing as a Theory of Media Effects*, 49 J. OF COMMUNICATION 103 (1999).

25. See GAIL T. FAIRHURST, *THE POWER OF FRAMING: CREATING THE LANGUAGE OF LEADERSHIP* (2d ed. 2011).

26. See Britta C. Brugman, Christian Burgers & Gerald J. Steen, *Recategorizing Political Frames: A Systematic Review of Metaphorical Framing in Experiments on Political Communication*, 41 ANNALS OF THE INT'L COMM. ASS'N 181 (2017), <http://www.tandfonline.com/doi/full/10.1080/23808985.2017.1312481>; Matt Bai, *The Framing Wars*, N.Y. TIMES MAG. (July 17, 2005), [http://www.nytimes.com/2005/07/17/magazine/the-framing-wars.html?\\_r=0](http://www.nytimes.com/2005/07/17/magazine/the-framing-wars.html?_r=0).

27. STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 191 (5th ed. 2015).

28. Sanda Kaufman, Michael Elliott & Deborah Shmueli, *Frames, Framing, and Reframing*, BEYOND INTRACTABILITY (2017), <https://www.beyondintractability.org/essay/framing> (last visited Jan. 14, 2018).

29. *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

30. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (Blackmun, J., referring to “the truly difficult issues involving the First Amendment,” in the context of a challenge to a Tennessee statute prohibiting solicitation of votes and displays of campaign materials within 100 feet of the entrance of a

almost all of whom do not have professional legal training, should take comfort in knowing that they are not alone. The contributions to this Symposium by Professors Post,<sup>31</sup> Wells, and Trachtenberg all underscore the varied, sometimes inconsistent, and invariably complex interpretations of what the right of free speech entails when applied to the infinitely varied fact patterns that can arise on a university campus. Moreover, the narratives presented in this Symposium by campus leaders about experiences on their own campuses provide graphic illustrations of how these complexities impact real events.

That the text of the First Amendment is itself the source of enduring conflict is, perhaps, the most important of this Symposium's lessons for campus leaders seeking guidance on how to resolve First Amendment disputes on their campuses. This is eloquently explained by Professor Chris Wells in her contribution to this Symposium.<sup>32</sup> Professor Jud Campbell writes, "[a]fter a century of academic debate . . . the meanings of speech and press freedoms at the Founding remain remarkably hazy."<sup>33</sup> Multiple positivist theories of the meaning of the First Amendment have their adherents;<sup>34</sup> the most prominent of these constructs, and the one repeatedly favored in U.S. Supreme Court jurisprudence, has its origins in Justice Oliver Wendell Holmes' famous dissent in which he wrote that "the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>35</sup>

The campus leader unfamiliar with the vocabulary of free speech jurisprudence<sup>36</sup> is likely to learn upon a first encounter with a free speech dispute that the rules applicable to public and private institutions are different. As state actors, all public universities are legally bound to protect the constitutional rights of their students, and thus the protections of the First Amendment apply on public campuses. Private universities are not state actors, and because the First Amendment limits only government action, a private university is not bound by the First Amendment unless its governing board adopts rules that make the principles of the First Amendment applicable on the campus. Many private universities have done exactly that. If the question of applicability is settled in the affirmative, the next questions are likely to reveal to the campus leader that seemingly simple, routine questions about

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polling place on election day); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008) (describing question sub judice as "a most difficult question," i.e., balancing students' free speech rights against rights of other students to be secure and left alone); *Hills v. Scottsdale Unified Sch. Dist.* No. 48, 329 F.3d 1044 (9th Cir. 2003) (referring to "the often confusing intersection of First Amendment rights and the delicate balance which must be struck by our public schools in insuring the right to Free Speech but avoiding endorsement of religion in violation of the Establishment Clause").

31. Mizzou Video Production at Academic Support Center, *The First Amendment on Campus Symposium* (Oct. 27, 2017), <https://livestream.com/accounts/13547932/events/7865962>.

32. *Id.*

33. Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L. J. 246, 246 (2017).

34. See, e.g., Alexander Tthesis, *Free Speech Constitutionalism*, 2015 U. Ill. L. Rev. 1015 (examining three normative rationales for free speech in U.S.); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002).

35. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

36. Common concepts and terms of art in the law of free speech under the First Amendment include "time, place, and manner" restrictions, "content-based" versus "content-neutral" restrictions, "traditional public forum," "low-value" versus "high-value" speech, "prior restraint," "public concern," "imminent threat," "fighting words," "government speech," and levels of scrutiny ("strict scrutiny"; "intermediate scrutiny"; "rational-basis scrutiny").

the First Amendment and its boundaries often lack clear, simple, and straightforward answers. Even when advised that a governing, pertinent First Amendment doctrine is well settled, the campus leader may discover, in the context of rapidly unfolding campus events that need an immediate administrative response, that settled principles are challenged or even repudiated by passionate campus constituencies.

The predominant frame for First Amendment discourse on campus is currently what might be described as *libertarian*. This frame, which draws much support from the Supreme Court's current First Amendment jurisprudence, does not assert that government cannot regulate speech in any circumstance, but that restrictions on expression are permitted only in very limited circumstances, *i.e.*, when the restriction is content-neutral and narrowly drawn to accomplish a compelling state purpose. This understanding of the First Amendment is the premise of the University of Chicago's 2015 "Report of the Committee on Freedom of Expression,"<sup>37</sup> which has been embraced verbatim or with some modifications on many campuses,<sup>38</sup> the positions of the Foundation for Individual Rights in Education (known as "FIRE"),<sup>39</sup> statutes enacted by some legislatures,<sup>40</sup> and the writings of scholars such as Dean Chemerinsky.<sup>41</sup> This frame is used to defend the rights of controversial, offensive speakers to appear and speak in public spaces on campuses, rights that yield only when a university's ability to maintain campus safety is incapacitated and untenable. Substantial expense to preserve campus security (*i.e.*, spending hundreds of thousands of dollars) is, under this view, an insufficient rationale to refuse to grant a forum to an offensive speaker.

An alternative frame to explain the First Amendment's application to campus discourse might be described as *mission-centric purposiveness*. Professor Post explains that "universities are not public squares" but are instead "communities" with "values connected to learning, to education, [and] to expansion of knowledge," and that these values guide members of a campus community in "how we act, which includes in how we speak."<sup>42</sup> Under this view, the First Amendment was created

37. *Report of the Committee on Freedom of Expression*, UNIV. OF CHICAGO (2015), <https://freeexpression.uchicago.edu/page/report-committee-freedom-expression> (last visited Jan. 15, 2018).

38. *See, e.g., Commitment to Free Expression*, UNIV. OF MO. (2016), <https://freespeech.missouri.edu/commitment-to-free-expression/> (last visited Jan. 15, 2018); *Rights, Rules, Responsibilities, 1.1.3 Statement on Freedom of Expression*, PRINCETON UNIV. (2015), <http://www.princeton.edu/pub/rrr/part1/index.xml#comp113> (last visited Jan. 15, 2018); *Commitment to Freedom of Expression*, PURDUE UNIV. <http://www.purdue.edu/purdue/about/free-speech.html> (last visited Jan. 15, 2018); *Regent Policy Doc. 4-21: Commitment to Academic Freedom and Freedom of Expression, Policy Statement*, UNIV. OF WIS. <https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/> (last visited Jan. 15, 2018).

39. *See* FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/> (last visited Jan. 15, 2018).

40. *See, e.g.,* Campus Free Expression Act, MO. REV. STAT. §173.1550 (2015); Campus Free Expression Act, UTAH CODE ANN. § 53B-27-203 (2017); Campus Free Speech Protection Act, TENN. CODE ANN. § 49-7-2405 (2018); N.C. GEN. STAT. § 116-300 et seq. (2017) (requirement that Board of Governors of University of North Carolina develop and adopt free expression policy with mandated content); ARIZ. REV. STAT. § 15-1865 (2016) (free speech may not be limited by community college or university in "any area on campus," subject to "reasonable time, place and manner restrictions").

41. *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 20 (2017) ("Our position is absolute: campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge. Although the First Amendment only applies to public universities, all colleges and universities should commit themselves to these values.").

42. Robert Post, *The First Amendment on Campus: Identifying Principles for Best Practices for Managing and Resolving Disputes*, (Oct. 27, 2017) (The video recording of the Symposium is accessible at

“to allow the American people to exercise self-governance,” which does not, in and of itself, speak to what a university is, nor does it constrain mission-purposive regulation of speech within the university, unless we “choose to make it so.”<sup>43</sup>

Under the principles of this frame, campus speech can be regulated in ways that facilitate the education of students, without regard to what the libertarian frame might require. Inside the classroom, this is not seriously questioned (and the libertarian frame would agree to this extent); an instructor can be required to teach particular subjects and designated content, and students are not allowed to say whatever they want about anything they want. Content discrimination is allowed; all ideas are not equal in the classroom, and compelled speech is normal. The classroom is not the same thing as the public square, where offensive speech is protected.<sup>44</sup> A state legislature might declare the outdoor areas of a campus a traditional public forum (and presumably Congress might constitutionally do the same for universities that receive public funds); the libertarian frame would contend that this answer is required without regard to legislative pronouncement. The mission-centric, purposiveness frame accedes to the legislature’s authority to make all open spaces on a university campus a public forum, but rejects the proposition that this result is compelled by the First Amendment. Instead, the community areas of the university extend to all its spaces, and under the *mission-centric purposiveness* frame, the university can regulate this space to fulfill the university’s purpose and mission. Under this frame, the university can authorize students to invite speakers only when the university’s purposes are served; similarly, an offensive speaker does not have a right, even when invited by students, to speak on the university’s premises. Under this frame, a public university is not the equivalent of a public park or plaza, absent a legislative statement declaring that to be so. Thus, under this alternative frame, the First Amendment yields different answers to questions about the bounds of free speech on campus than the libertarian frame.

A third frame for explaining how the First Amendment might be applied to campus discourse can be described as *exception-expansionism*. This frame is advocated by those who favor hate speech codes, despite the fact that they have been struck down consistently in the decided cases,<sup>45</sup> and stringent university regulation of offensive speech targeted at minority, ethnic, and religious groups. This frame, which more closely resembles speech regulation in European democracies,<sup>46</sup> essentially urges that the recognized bases for regulating speech under the First Amendment are drawn too narrowly, and calls for a different balance between the right to utter offensive, hateful, or vulgar speech and the right of individuals to be protected

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the following link: <https://livestream.com/accounts/13547932/events/7865962/videos/165023291>, Part I, 2:19:05.

43. *Id.* at 2:50:10.

44. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created [such as a classroom] may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

45. See, e.g., *Yahoo! Inc. v. La Ligue Contre le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1252 (9th Cir. 2006) (“It is well-settled that a hate speech code which ‘prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses’ is ‘facially unconstitutional,’” citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

46. See Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004); NPR Staff, *Held Dear in U.S., Free Speech Perplexing Abroad*, NPR (Sept. 19, 2012, 5:11 PM) <https://www.npr.org/2012/09/19/161439562/held-dear-in-u-s-free-speech-perplexing-abroad> (last visited Jan. 15 2018).

from such speech in public spaces.<sup>47</sup> This frame embraces the view that equality in the exercise of the rights of citizenship is a fundamental constitutional value, and no right, including the right to free speech, can “encompass invective that implicitly or explicitly denies the equal citizenship of some members of the American community.”<sup>48</sup> In contrast, the libertarian frame urges that while campus leaders can condemn offensive speech, they must protect the right to engage in it.

Dispute resolution principles encourage analysis of underlying interests and motivations, and when this happens with respect to those who advocate this third frame, some different, perhaps unexpected understandings of campus free speech conflict emerge. Consider the case of a student who has been victimized by racial, ethnic, or religious epithets uttered by other students; this student appeals to campus leadership to punish the speakers. Under the prevailing libertarian frame, the random, occasional hateful utterance, while loathsome and offensive, receives First Amendment protection, and none of the traditionally recognized exceptions allowing state regulation is applicable. The libertarian frame explains that exceptions are needed for obscene and libelous speech, fighting words, and speech threatening imminent harm based upon the damage done to society when these kinds of speech are tolerated. When this explanation is processed by an advocate of the third frame, several unwelcome messages are heard: loathsome epithets are not as harmful or repugnant as other types of speech prohibited under the established exceptions; extending protection to those who endure loathsome epithets and the like amounts to the coddling of “campus snowflakes” unprepared for the real world; psychological injuries inflicted by such speech are less authentic than the psychological injuries caused by obscene speech, fighting words, and imminent threats of harm; and these injuries are less important than the economic injuries caused by offensive speech to American business and corporate interests. Adherents to this frame may observe that the business owner who endures libel and slander is not told, like the student who endures the racial epithets, to “suck it up” and counter the offensive speech with more speech. Rather, the resources of the state are used to protect vested economic interests from offensive speech, which stands in stark contradiction to the failure to protect the individual whose right to enjoy equal access to constitutional citizenship is under siege. Thus, an advocate of the third frame will see the competing libertarian frame as imposing a double standard that favors establishment interests. The campus leader whose response to a student objecting to hateful speech is a succinct, unempathetic “this is what the law requires,” without any acknowledgement of the interests or the logic underlying the student’s request for protection of her dignity, will be less effective in dealing with the conflicts that

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47. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431.

48. Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 382 (1995). See also Ulrich Baer, *What ‘Snowflakes’ Get Right About Free Speech*, N.Y. TIMES (Apr. 24, 2017) (“The idea of freedom of speech does not mean a blanket permission to say anything anybody thinks. It means balancing the inherent value of a given view with the obligation to ensure that other members of a given community can participate in discourse as fully recognized members of that community. Free-speech protections – not only but especially in universities, which aim to educate students in how to belong to various communities – should not mean that someone’s humanity, or their right to participate in political speech as political agents, can be freely attacked, demeaned or questioned.”).

accompany the collision of these alternative, competing frames of the First Amendment's content.

### VIII. A CONCLUDING THOUGHT

It is not this Essay's purpose to probe or attempt to reconcile the different ways of framing First Amendment jurisprudence with respect to campus discourse, nor is it to advocate in favor or against any of these frames. Rather, this Essay suggests one single, relatively straightforward insight – that the constructs developed by and used in the field of dispute resolution provide useful tools for analyzing and understanding free speech conflict, and that campus leaders can benefit from reflecting on these constructs. In addition, because the First Amendment does not apply to private universities, leaders at these kinds of institutions, working with their governing boards, have the option to choose which frame shall be used to define the rules of their campus communities. Understanding the dispute resolution constructs discussed in this Essay will better prepare these campus leaders for participation in the discussions accompanying the processes through which these choices are made. For leaders in both public and private universities, active self-reflection about these constructs will help prepare the leaders to exercise their discretion effectually when responding to free speech conflict on campus.