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Private Universities and the First Amendment

*Ben Trachtenberg**

ABSTRACT

This Article questions whether private colleges and universities should act as though the First Amendment applies to them in the same way it constrains the policy of public colleges and universities. Specifically, the Article examines the common suggestion—by laypersons, lawyers, and scholars alike—that private universities ought to tolerate offensive, hateful, bigoted speech because the values animating First Amendment jurisprudence are similar to those guiding the decisions of good universities committed to free inquiry and the open exchange of ideas. It then notes that this suggestion, while commonly made, is rarely defended with much rigor or vigor. The Article next marshals arguments in opposition to the suggestion—including evidence that some of the sort of speech protected by the First Amendment at public universities may well hinder free inquiry and inhibit the open exchange of ideas. The Article concludes with the modest claim that if policymakers and scholars want private universities to voluntarily assume onerous free speech obligations imposed by the Constitution on public universities, they should at least consider whether the benefits of such obligations truly outweigh the harms.

* Associate Professor of Law, University of Missouri School of Law. I thank the Center for the Study of Dispute Resolution at the University of Missouri School of Law for organizing the symposium that gave rise to this Article, and I appreciate the editors of the *Journal of Dispute Resolution* making room for my thoughts. This Article would not be possible without the education I have received in hallway conversations from Professors Christina Wells and Bob Jerry, each of whom has been quite generous with time and explanations.

- WALTER: For your information, the Supreme Court has roundly rejected prior restraint!
- DUDE: Come on, Walter, this is not a First Amendment thing, man.¹

I. INTRODUCTION

I believe in America. I prefer democracy to dictatorship, free speech to censorship, and academic freedom to Lysenkoism.² My ancestors left Europe for the United States, and their decisions have proven wise with the passage of time.

I am proud that during the Civil War, Congress and President Lincoln took time to enact the Morrill Act,³ which has done so much to bring the blessings of higher education to the children of Americans without the resources to pay tuition at Yale and Harvard.⁴ I support free inquiry and free expression on campus, and when I chaired the Faculty Council at the University of Missouri, the chancellor and I jointly appointed a committee charged with protecting First Amendment rights at Mizzou.⁵

Having cleared my throat and established my “baseball, motherhood, and apple pie” *bona fides*, I will pose the iconoclastic question at the heart of this Article: Is the First Amendment so wonderful—or, to be more precise, is the Supreme Court’s interpretation of the First Amendment so wonderful—that private universities should willingly assume the precise free speech obligations that public universities must obey?

Perhaps the answer is “No,” unless someone offers a rationale for “Yes” that is more compelling than the arguments currently on offer. But the advocates for adopting First Amendment-like regimes at private universities have not defended their position with much rigor or vigor. Instead, the idea that private universities should willingly act as public universities must act is simply assumed.⁶ This claim, however, is quite radical and should not evade examination. In the nations where the earliest universities developed—Italy, France, the United Kingdom, and Spain—the First Amendment does not apply even to public universities, and they seem to manage. In Germany, home of the University of Heidelberg (founded 1386), hate speech is restricted far more than would be lawful in the United States.⁷

1. THE BIG LEBOWSKI (Polygram Filmed Entertainment & Working Title Films 1998) (discussing regulation of speech by operators of a family restaurant).

2. See Sarah Zielinski, *When the Soviet Union Chose the Wrong Side on Genetics and Evolution*, SMITHSONIAN MAG. (Feb. 1, 2010), <https://www.smithsonianmag.com/science-nature/when-the-soviet-union-chose-the-wrong-side-on-genetics-and-evolution-23179035/> (“Scientists who disagreed with Lysenko’s theories were purged—some were sent to the gulags while others simply disappeared.”).

3. Morrill Act of 1862, 7 U.S.C. § 301.

4. See Christopher P. Loss, *Why the Morrill Land-Grant Colleges Act Still Matters*, CHRON. OF HIGHER EDUC. (July 16, 2012), <https://www.chronicle.com/article/Why-the-Morrill-Act-Still/132877>.

5. See Anna Sutterer, *MU Committee Releases Draft of Free Expression Policy*, COLUM. MISSOURIAN (June 3, 2016), https://www.columbiainmissourian.com/news/higher_education/mu-committee-releases-draft-of-free-expression-policy/article_918b8d8e-29a1-11e6-b68f-c32c4353eecd.html.

6. See, e.g., Frederick M. Lawrence & William K. Marimow, *3 Core Principles Emerge for Free Speech Debates on Campuses*, PHILA. INQUIRER (Oct. 9, 2017), <http://www.philly.com/philly/opinion/commentary/campus-free-speech-yiannopoulos-middlebury-berkeley-first-amendment-20171009.html> (“On our campuses — public and private — free speech is presumed to be protected.”).

7. See Melissa Eddy & Mark Scott, *Delete Hate Speech or Pay Up, Germany Tells Social Media Companies*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html>. The Germans, for some reason, have a fear that Nazis left unchecked could cause trouble.

Perhaps the Italians, French, British, Spanish, and Germans have all adopted illiberal regimes providing inadequate protection to free speech.⁸ As an American booster, I am open to the idea that we have a better system than those of other nations.

Perhaps the First Amendment is so great that not only should it apply to state actors but also to private institutions of higher learning. It could be, for example, that the August 2017 fascist march in Charlottesville, Virginia was so educational that private universities would be foolish to prohibit such activity on their own campuses. If so, proponents of allowing Nazis to march freely across Brandeis's campus—and anti-Mormon bigots at BYU, anti-Catholics at Georgetown, the Klan at Spelman, etc.—should make their case on the merits.

II. THE MOSTLY SILENT ADVANCE OF A RADICAL CLAIM

When the *New York Times* interviewed free speech expert Erwin Chemerinsky about his book “Free Speech on Campus,” no distinction was made between public and private campuses. Chemerinsky states that “the response to hate speech can't be to prohibit and punish it. It's unconstitutional.”⁹ He continues, “[t]he law under the First Amendment is clear: Hate speech is protected speech.”¹⁰ Of course, as a matter of constitutional law, Chemerinsky is correct. But he knows that private universities are not “state actors” for purposes of First Amendment law and generally may suppress hate speech on campus if they choose,¹¹ just as they can suppress other disfavored speech, or deny freedom of association.¹² But *Times* readers not learned in the law might well come away with the impression that it would be “unconstitutional” for Princeton to ban hate speech. As a result, they might believe too that if Princeton students petition their administration for speech rules impermissible at Rutgers,¹³ the students would be advocating unlawful practices.

In his *Times* interview, Chemerinsky does not address the possibility of applying different free speech rules at public and private universities. In their book, however, he and his co-author, Howard Gillman, make clear that although the First

8. For a comparative discussion of the European and American attitudes toward “hate speech,” see generally Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545 (2013).

9. Natalie Shutler & Erwin Chemerinsky, *The Free Speech-Hate Speech Trade-Off*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/opinion/berkeley-dean-erwin-chemerinsky.html>.

10. *See id.*

11. *See* ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS xi (2017) (“We recognize, of course, that the First Amendment applies only to public colleges and universities.”).

12. For example, when Harvard University recently proposed punishing students who belong to certain social organizations despised by Harvard administrators, the correct objection was that the suggested policy was misguided, not that it would violate anyone's constitutional rights. *See* Laura Krantz, *Harvard Panel Recommends Barring Students from Final Clubs*, BOSTON GLOBE (July 12, 2017), <https://www.bostonglobe.com/metro/2017/07/12/harvard-panel-recommends-barring-students-from-final-clubs/3WMRz5vvM0LymgQx6Fa6kJ/story.html> (“The policy applies to all ‘private, exclusionary social organizations’ but the committee acknowledged its main target are seven all-male final clubs . . .”).

13. For purposes of this Article, I am assuming that current First Amendment doctrine indeed imposes requirements (such as content neutrality) upon *public* universities that will sometimes require those universities to host speakers whom administrators might otherwise wish to exclude. For a contrary view, see Robert C. Post, *There Is No 1st Amendment Right To Speak on a College Campus*, VOX (Oct. 25, 2017), <https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests>.

Amendment imposes no legal restrictions on what private universities may do, the authors “draw no distinction between public and private schools when arguing for what they *should* and *shouldn’t* do.”¹⁴ They argue, “Freedom of expression ... should be the same at all institutions of higher education.”¹⁵ Chemerinsky and Gillman should be commended for forthrightly stating their radical claim.¹⁶

Other authors—particularly those chastising liberal college students as intolerant crybabies—are prone to imply that speech restrictions at private universities would offend the Constitution. For example, John Daniel Davidson wrote an article in *The Federalist* that began with references to violent clashes at the University of California at Berkeley and Middlebury College in Vermont.¹⁷ He then reviews Supreme Court precedent related to free speech, as well as calls for speech restrictions at institutions such as Wellesley College.¹⁸ He concludes that teachers and parents have failed “to instill in [today’s collegians] a reverence for the First Amendment” and that the youth of America have learned “to despise the Constitution and the Bill of Rights, the very things that protect their right to protest.” Kids today! Normally, a conservative publication might be expected to support the idea that private entities can set rules on their own land, and customers who don’t like the rules can take their business elsewhere.¹⁹ In the context of university policy toward Nazi marches, however, students seeking to contract for the sort of campus regulations common in Europe are described as having become “the thing they claim to despise most: fascists.”²⁰

Marc Thiessen, a former speechwriter for President George W. Bush and Secretary of Defense Donald Rumsfeld who has written a book defending the “enhanced interrogation techniques” employed by American agents during the Bush administration,²¹ derided students as “snowflakes” with insufficient knowledge of or respect for the First Amendment.²² Like Davidson, Thiessen invokes an incident at Middlebury College to make his point.²³ He also cites a discredited opinion survey as evidence of current students’ foolish hostility toward free speech.²⁴

14. CHEMERINSKY & GILLMAN, *supra* note 11, at xi.

15. *Id.* (“[A]cademic freedom—above all, the ability to express all ideas and viewpoints, no matter how offensive—is necessary at all colleges and universities.”); *see also id.* at 53 (advocating for adoption of “principles of inquiry and academic freedom” that would be “the same” at all universities, “public or private”).

16. As I argue below, however, I believe that even Chemerinsky and Gillman have not adequately defended the claim, particularly in the case of outside speakers. *See infra* Part II.

17. *See* John Daniel Davidson, *Sorry College Kids, There’s No Such Thing As Hate Speech*, THE FEDERALIST (Apr. 20, 2017), <http://thefederalist.com/2017/04/20/sorry-college-kids-theres-no-thing-hate-speech/>.

18. *Id.*

19. *See, e.g.*, Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1206, 1215-17, 1221 (2014) (cataloging conservative opposition to Title II of the Civil Rights Act of 1964 at time of its enactment and much more recently).

20. *Id.* For another author who similarly conflates private and public universities without addressing the issue directly, see Cliff Maloney, Jr., *Colleges Have No Right to Limit Students’ Free Speech*, TIME (Oct. 13, 2016), <http://time.com/4530197/college-free-speech-zone/>.

21. *See generally* MARC THIESSEN, *COURTING DISASTER: HOW THE CIA KEPT AMERICA SAFE AND HOW BARACK OBAMA IS INVITING THE NEXT ATTACK* (2010).

22. *See* Marc A. Thiessen, *Millennials Are Snowflakes: Here’s the Data to Prove It*, NEWSWEEK (Sept. 25, 2017), <http://www.newsweek.com/millennials-are-snowflakes-heres-data-prove-it-670662>.

23. *See id.*

24. *See id.*; Lois Becket, ‘Junk Science’: Experts Cast Doubt on Widely Cited College Free Speech Survey, THE GUARDIAN (Sept. 22, 2017), <https://www.theguardian.com/us-news/2017/sep/22/college->

Senator Charles Grassley of Iowa, who serves as Chairman of the Senate Committee on the Judiciary, held a June 2017 hearing titled “Free Speech 101: The Assault on the First Amendment on College Campuses.”²⁵ In his opening remarks, Grassley assailed the president of Northwestern University—a private institution—for stating that he would permit “on a case-by-case basis” outside speakers whose presence on other campuses had been met with violence.²⁶ After quoting the Northwestern president, Grassley stated, “No. The First Amendment does not permit arbitrary prior restraints on speech by university administrators on a case by case basis.”²⁷ He then floated the idea of legislation allowing “private colleges that accept federal funds [to] be subject to individual private lawsuits when free speech rights ... are violated.”²⁸ The reference to possible legislation implies a recognition by someone in the Senator’s office that under current law, private universities may indeed restrict speakers. Nonetheless, a casual listener might understandably believe that Northwestern has somehow been violating constitutional principles.

Breezy suggestions that private institutions ought to adhere to First Amendment jurisprudence are not limited to polemicists grinding political axes. In a recent *Philadelphia Inquirer* op-ed, Frederick M. Lawrence & William K. Marimow recounted a panel discussion in which they participated concerning “the essential value of unfettered inquiry and debate as the heart of a liberal arts education.”²⁹ Immediately after reiterating “the importance of the First Amendment in a democracy,” they argue, “On our campuses—public and private—free speech is presumed to be protected.”³⁰ Marimow is a media executive, and Lawrence is a civil rights law scholar and former law dean and university president.³¹ They know that the First Amendment does not require private universities to tolerate disfavored campus speech any more than it requires the *Philadelphia Inquirer* to publish op-eds the editors dislike. Yet, somehow, they claim that not only is the First Amendment important to a democracy—tell that to our friends in Ireland, Australia, India, and Israel³²—but also that it ought to apply (in spirit if not in body) to non-state actors.

free-speech-violence-survey-junk-science (“The way the survey results have been presented are ‘malpractice’ and ‘junk science’ and ‘it should never have appeared in the press’, according to Cliff Zukin, a former president of the American Association of Public Opinion Polling[.]”). For additional instances of arguments like those of Davidson and Thiessen, see for example, Peter Beinart, *Milo Yiannopoulos Tested Progressives—and They Failed*, ATLANTIC (Feb. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/02/everyone-has-a-right-to-free-speech-even-milo/515565/>; Ben Shapiro, *College Students vs. Free Speech*, NAT’L REV. (Sept. 20, 2017), <https://www.nationalreview.com/2017/09/first-amendment-serious-trouble/> (“The First Amendment is in serious trouble.”).

25. See *Free Speech 101: The Assault on the First Amendment on College Campuses: Before the Committee on the Judiciary.*, 115th Cong. (2017) (Statement of Sen. Charles Grassley, Chairman of Sen. Comm. On the Judiciary), <https://www.judiciary.senate.gov/meetings/free-speech-101-the-assault-on-the-first-amendment-on-college-campuses>

26. *See id.*

27. *Id.*

28. *Id.*

29. Lawrence & Marimow, *supra* note 6.

30. *Id.*

31. *See id.*

32. I realize that Lawrence and Marimow likely mean something metaphorical when they refer to the importance of the First Amendment—that is, that something *similar to* (but not necessarily identical to) what our First Amendment does is needed in any real democracy. That said, if variations from American doctrines do not invalidate the democratic legitimacy of foreign governments, then perhaps rigid adherence to First Amendment law is not as vital to sound university governance as might be commonly suggested.

III. A FEW QUESTIONS WORTHY OF CONSIDERATION

Before private university trustees and administrators decide to adopt wholesale the legal framework governing speech regulation at public universities, they would be wise to consider a few questions. In particular, they might recall that hosting white supremacist speakers has recently cost public institutions hundreds of thousands of dollars per event, after which they might inquire what costs, both monetary and otherwise, they will assume with their voluntary adoption of First Amendment law. They might also ask whether, in actual practice as opposed to in lofty theoretical rhetoric, hosting white supremacist speakers truly provides any educational value to students—or, for that matter, to anyone else on campus. And they might consider what if any benefits are lost when institutions host vicious hatemongers whom they could freely exclude. Finally, trustees and administrators might briefly review certain arguments about slippery slopes and administrative convenience.

A. *The Price of First Amendment Principles*

According to the University of Florida, an October 2017 visit by white nationalist Richard Spencer cost the institution at least \$500,000 in security expenses.³³ For the same amount of money, the university could have paid the annual salaries of four or five English professors.³⁴ That said, Florida can perhaps count itself lucky. A visit to Berkeley the previous month by Milo Yiannopoulos cost the University of California \$800,000.³⁵ That's more than a year's pay for two chaired professors of law.³⁶ Whatever one thinks of faculty salaries—last I checked, nearly all faculty think the pay at their own institutions is too low—surely any administrator could imagine a fruitful use of \$500,000, and an even more fruitful use of \$800,000. For example, at Berkeley Law, the annual in-state tuition is about \$49,000, meaning that Yiannopoulos's visit cost the equivalent of sixteen one-year full-tuition scholarships, which works out to more than the entire J.D.-program tuition for five students.³⁷

33. See Paige Fry, NEW: State of Emergency Declared Ahead of UF White Nationalist Speech," PALM BEACH POST (Oct. 17, 2017), <http://www.palmbeachpost.com/news/state--regional-govt--politics/new-state-emergency-declared-ahead-white-nationalist-speech/A6AaSLfqyvi-YasB6i3GxEL/new.html>.

34. See STATE OF FLORIDA, STATE PAYROLL, https://www.floridahasarighttoknow.myflorida.com/search_state_payroll (for a searchable database of state employee payroll); see *University of Florida, Department of English Faculty and Staff*, http://www.english.ufl.edu/faculty_staff.html (last visited on Mar. 11, 2018) (for a list of English department faculty).

35. See Emily Deruy, *Milo Yiannopoulos' 15 minutes in Berkeley Cost University \$800,000*, MERCURY NEWS (Sept. 24, 2017), <https://www.mercurynews.com/2017/09/24/update-barricades-ring-sproul-plaza-as-berkeley-braces-for-milo-yiannopoulos/>.

36. Unless you pick two of the most expensive ones. See UNIVERSITY OF CALIFORNIA, COMPENSATION AT THE UNIVERSITY OF CALIFORNIA (Aug. 18, 2017), <http://compensation.universityofcalifornia.edu/payroll2016/> (for a summary, analysis, and database of UC salary data); UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW, FACULTY PROFILES, <https://www.law.berkeley.edu/our-faculty/faculty-profiles/> (last visited Mar. 11, 2018) (for a list of law school faculty).

37. See UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW, FEES & COSTS OF ATTENDANCE, (2018), <https://www.law.berkeley.edu/admissions/jd/financial-aid/fees-cost-of-attendance/>. For out-of-state students, the \$800,000 would cover fifteen years of tuition, meaning five three-year scholarships remains affordable. See *id.*

In addition to imposing monetary costs, hosting white supremacists exposes the campus to violent attacks, such as the attempted murder of protestors seeking to counter Richard Spencer's message in Gainesville.³⁸ During an August 12, 2017 "Unite the Right" protest in Charlottesville, Virginia, a man drove his car into a crowd, killing Heather Heyer, who had been protesting against white supremacy.³⁹ The driver, who also injured nineteen others, has been charged with murder.⁴⁰ During the previous evening, white supremacist marchers entered the University of Virginia campus, shouting bigoted slogans.⁴¹ Several hundred marchers carried torches, and the crowd surrounded a group of counter-protestors that included UVA students.⁴² The university is lucky that the white supremacist marchers did not kill or maim any students that night.

Further, while I hesitate to mention seeming trivialities after recounting a shooting and a vehicular homicide, a full accounting of the costs imposed by white supremacist rallies on campus also includes the hassle it causes. Florida's governor declared a state of emergency in advance of Spencer's arrival in Gainesville.⁴³ When universities close streets and mass police officers on campus, students cannot help but be distracted from their studies.

B. The Cost-Benefit Analysis: What Are the Benefits of Ku Klux Klan Marches at Spelman College?

It is easy to cherry-pick campus speeches and rallies that have gone horribly wrong, causing injuries and even death while creating the risk of still greater mayhem. But fairness demands that one consider the benefits before dismissing the idea that private universities should subject themselves to visits by Richard Spencer, Milo Yiannopoulos, and their fellow travelers. Perhaps the educational value of such events outweighs the costs. Let us imagine, therefore, that Richard Spencer wishes to deliver a speech at Spellman College, a historically black college in Atlanta. Let us imagine too that a Georgia chapter of the Ku Klux Klan wishes to march through the Spellman campus. What benefits might these events offer Spellman students?

38. See Alex Harris, *Three Richard Spencer Supporters Arrested on Charges of Shooting at UF Protesters*, MIAMI HERALD (Oct. 20, 2017), <http://www.miamiherald.com/news/local/crime/article179941551.html> (describing shooting by member of trio that had been "heckling some anti-Spencer protesters with Hitler chants, Nazi salutes and threats").

39. See Jonah Engel Bromwich & Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/james-alex-fields-charlottesville-driver-.html>; see also Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as 'a Strong Woman,'* N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html>.

40. See Bromwich & Blinder, *supra* note 39.

41. See Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html>.

42. See Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

43. See Fry, *supra* note 3.

First, at Spencer's speech, Spellman students could be instructed that "America, at the end of the day, belongs to white men."⁴⁴ That's how Spencer put it during his visit to Texas A&M, where he elaborated as follows: "This country does belong to white people, culturally, politically, socially, everything. We defined what America is."⁴⁵ Perhaps there is some value in hearing such statements uttered out loud.

During the Klan rally, students might see signs with slogans like "Communist not welcome" (perhaps with a Star of David drawn inside the "C" in "Communist")⁴⁶ or "Communism = Judaism,"⁴⁷ which were displayed in Virginia. Depending on campus policies related to fire safety, the students might also see a burning swastika and a burning cross, which were seen at a 2016 "white power" event in Georgia.⁴⁸ They likely would hear chants of slogans such as "Jews will not replace us," "Blood and Soil," and "Hail Trump!"⁴⁹ Although I imagine Spellman students are well aware that some Americans hold the sort of opinions expressed by such slogans, signs, and fiery symbols, the presence of a real-live Klan rally on campus might provide a bracing educational experience. Seeing something first hand is, after all, different than viewing photos online.

Perhaps there would be other benefits associated with visits by Spencer and the Klan to Spellman. I hope the proponents of adopting First Amendment law at private colleges will articulate them,⁵⁰ lest I leave readers with an inadequate assessment. At the University of Chicago, President Robert Zimmer said in a July 2017 speech that if universities stifle free speech in the name of inclusion, students would receive an "inferior and less challenging education" that "fails to prepare students for the challenge of different ideas and the evaluation of their own assumptions."⁵¹ While I personally do not believe that barring the Klan from campus would diminish the quality of education available, Zimmer may disagree, and I would welcome his thoughts on the educational value of allowing crosses and swastikas to be burned on his campus.

44. See Anderson Cooper 360 Degrees (CNN television broadcast Dec. 16, 2016) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1612/12/acd.02.html>).

45. Kasia Kovaacs, *Richard Spencer Quotes: 12 Things White Nationalist Leader Of Alt-Right Movement Has Said About Race, Immigration And Trump*, (Feb. 25, 2017), <http://www.ibtimes.com/richard-spencer-quotes-12-things-white-nationalist-leader-alt-right-movement-has-said-2497495>.

46. See Jamelle Bouie, *The KKK is Not the Real Fear*, SLATE (July 14, 2017), http://www.slate.com/articles/news_and_politics/dispatches/2017/07/photos_from_the_charlottesville_kkk_rally.html.

47. See *Disturbing Photos of the Modern-Day Ku Klux Klan*, CNN, <https://www.cbsnews.com/pictures/the-klx-today/6/> (last visited Mar. 11, 2018) (photo from July 2017 rally in Charlottesville).

48. See *Disturbing Photos of the Modern-Day Ku Klux Klan*, CNN, <https://www.cbsnews.com/pictures/the-klx-today/8/> (last visited Mar. 11, 2018) (photo of Georgia KKK setting cross ablaze, taken in August 2016).

49. See David Neiwart, *When White Nationalists Chant Their Weird Slogans, What do They Mean?*, SOUTHERN POVERTY LAW CENTER (Oct. 10, 2017), <https://www.splcenter.org/hate-watch/2017/10/10/when-white-nationalists-chant-their-weird-slogans-what-do-they-mean>.

50. For a strong defense of campus free speech by a private college president, see Leon Botstein, *Bard President Responds to Critics of Far-Right Figure's Talk*, CHRON. OF HIGHER ED. (Oct. 24, 2017), <https://www.chronicle.com/article/Bard-President-Responds-to/241538> (defending invitation of far-right German politician Marc Jongen to speak at Bard). I would be interested to see if Botstein would apply the same logic to a genuine Klan rally that he applied to a speech by a distasteful elected official with a background in academic philosophy. See also Bret Stephens, *America's Best University President*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/opinion/robert-zimmer-chicago-speech.html> (lauding Chicago's Robert Zimmer for commitment to free speech, albeit without forthright discussion of possible Klan rallies on campus).

51. See Stephens, *supra* note 50.

*C. More on the Cost-Benefit Analysis:
What Benefits Are Lost When Universities Permit Ku Klux Klan Marches?*

When weighing the costs and benefits of campus visits by detested or controversial speakers, debaters often focus on the costs and benefits associated with *allowing* the event. In other words, the costs are measured in some combination of hassle, expense, offense, and risk of violence. And the benefits are measured in some combination of educational value (particularly from speakers who are merely controversial and not leading hate rallies), along with whatever salutary effects grow from exhibiting a strong commitment to free speech, which is seen as its own reward.⁵² In addition to these factors, university leaders may wish to consider the benefits associated with *excluding* certain speakers from their campuses. These benefits are not limited to the mere avoidance of costs such as police overtime. Rather, the university can express its commitment to other principles by refusing to tolerate certain speech on campus, particularly by outside speakers.

For example, if the Klan seeks a permit to march on campus, and the university president denies the permit, her action communicates certain institutional values. Further, the president can make her communication more clear by explaining to the university community precisely why the Klan is not welcome. A letter addressed to students, staff, and faculty might read:

Dear University Community,

Recently the university was asked to grant a permit for a march through campus by the local chapter of the Ku Klux Klan, which had been invited by a student group. I have denied the request.

Although the university is broadly committed to free speech, including the right of students to march on campus and to invite outside guests, those rights are not absolute. In this case, I decided that the educational value of this march was nearly nonexistent. By contrast, the risks to the campus were great. Beyond monetary costs, this event would have created risks to the physical safety of our students and employees.

Even if no one would have been physically hurt, the event would certainly have put some of our students in real fear for their physical safety, and even for their lives. Their sense of this campus as a home at which they may pursue educational growth would have been seriously eroded. Members of marginalized communities, whom this university has not always welcomed in the manner that we now realize is essential to our mission, would have borne the brunt of this harm.

To me, the negligible benefits of the proposed march were vastly outweighed by the costs. I have acted in accordance with the authority given to me by the trustees to safeguard the honor and reputation of the university.

⁵² See, e.g., CHEMERINSKY & GILLMAN, *supra* note 1, at 103-110; see also Lawrence & Marimow, *supra* note 6.

The United States is a large country with many universities. Students who disagree with the values of this institution—who prefer a university that values free speech, even hateful speech of limited educational worth, differently than this university does—are welcome to seek their educations elsewhere. I will be holding a “town hall” next week at which students may ask questions of me and of my staff about this decision, as well as about the university’s efforts more generally to balance our sometimes competing commitments to free expression, campus safety, and the maintenance of a genuinely inclusive campus. I welcome your feedback.

Sincerely yours,

The President

A letter like that would make a powerful statement about the university and the values to which it is dedicated. By adopting a First Amendment-like content neutrality rule, private university administrators surrender an important governance tool.

D. On Slippery Slopes and Administrative Convenience

One can easily imagine an experienced administrator’s rejoinder to the proposed campus-wide letter printed above. “Yes, yes, I could look tough and signal virtue by banning the Klan, but once I get into the speech-banning business, there will be no end of requests. Today it’s the Klan, tomorrow Richard Spencer, and next week Charles Murray. Will I have to exclude Jeff Sessions for his treatment of undocumented immigrants?”⁵³

This is a fair concern. While I am not personally worried about the slippery slope—it seems unlikely that Murray or Sessions will want for platforms anytime soon⁵⁴—the concern about administrative convenience is fair. Despite the concerns raised in the previous subsection, it may prove more trouble than it is worth for university administrators to pick and choose what speakers may visit campus. Some private institutions may choose not to decide.⁵⁵ We should acknowledge, however, that appeals to convenience are a far cry from the arguments about principle that tend to clog the op-ed pages. Once we decide that private universities may reasonably prevent student groups from hosting a campus Klan rally,⁵⁶ we have departed the realm of First Amendment doctrine and entered the land of line drawing. To

53. For similar arguments, see Sun Sentinel Editorial Board, *Slippery Slope: Caving on Free Speech*, SUN SENTINEL (Aug. 23, 2017); see also GREG LUKIANOFF, FREEDOM FROM SPEECH (2014) (“[O]n campus ... the slope is genuinely perilously slick.”); CHEMERINSKY & GILLMAN, *supra* note 11, at 104-06 (discussing difficulty of deciding what speech violates campus codes).

54. See Alex Kotch, *Discrimination 101: How Koch, DeVos families fund hate speech on U.S. college campuses*, SALON (Apr. 20, 2017), https://www.salon.com/2017/04/20/discrimination-101-how-koch-devos-families-fund-hate-speech-on-u-s-college-campuses_partner/ (describing conservative think tank paying for Murray events at various campuses); see also Rebecca R. Ruiz, *Sessions Calls for ‘Recommitment’ to Free Speech on Campus, Diving Into Debate*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/politics/jeff-sessions-campus-free-speech-georgetown.html> (reporting on talk at Georgetown).

55. They still have made a choice. See RUSH, FREEWILL (Mercury Records 1980).

56. I mean here the sort of rally that a public university would not have been able to prohibit.

university presidents seeking to duck this task, I say: This is why we pay you the big money. At many private universities, excluding Spencer and the Klan will be the best institutional policy.⁵⁷ If a president is afraid to do the right thing for his students and institution, he may wish to find another profession.

IV. SOME THOUGHTS ON FRAMING

As debate rages on over campus speech, it may prove valuable to step back briefly to consider the proper framing of the disputes, which are likely to recur in similar forms at many campuses. In the world of conflict resolution—and, in particular, alternative dispute resolution systems—practitioners use the terms “framing” and “reframing” to describe an effort “to help the parties and the dispute resolution professional gain a better understanding of the issues and the parties’ positions, wants, interests and needs.”⁵⁸ A dispute that once seemed intractable—with each side standing on principle—may become soluble when viewed from a different perspective. An example might be:

Original Statement: My pay is unfairly low. It’s outrageous.

Reframed Statement: My pay is far below industry standard for someone with my job.

While the reframed statement is not a panacea—the boss may well argue that the company’s salaries are in line with competition in the area—it will likely be easier to discuss comparative compensation than to argue about more ephemeral concepts of fairness and outrage.

In particular, if a dispute resolution professional realizes that the words used to describe a conflict are distracting from the real issues, a “familiar and frequent use of reframing is to reconstruct a statement to neutralize language by eliminating rhetoric, inflammatory language, partisanship and bias.”⁵⁹ Discussions of campus speech are rife with inflammatory language. Once a commentator accuses students

57. The question of how campus administrators should perform the sort of line drawing for which this Article advocates is, alas, beyond the scope of this Article. I will not impose on the *Journal’s* editors by attempting to shoehorn all my thoughts on this matter into their pages today. For now, I will give one hint: Shared governance is likely to be essential to success. See Ben Trachtenberg, *How Missouri Used Shared Governance to Preserve Free Speech on Campus*, CHRON. OF HIGHER ED. (May 18, 2017), <https://www.chronicle.com/article/How-Missouri-Used-Shared/240099> (“The rules represent the shared wisdom of faculty and administration, as well as the staff who will enforce them and the students they will regulate. With a combination of expertise, patience, and goodwill, we have shown how shared governance is supposed to work — and how free speech can be protected.”); see also Ben Trachtenberg, *The Complexities of Shared Governance and Freedom of Speech*, in LEADING COLLEGES AND UNIVERSITIES (Stephen Joel Trachtenberg, Gerald B. Kauvar & E. Gordon Gee, eds.) (2018).

58. See John M. Livingood, *Reframing and its Uses*, 57 DISP. RESOL. J. 42, 45 (Nov. 2002-Jan. 2003); see also David A. Hoffman, *Colliding Words of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 39; Ann L. MacNaughton, *Cross-Cultural Conflict Resolution: Finding Common Ground in Disputes Involving Value Conflicts*, 33 WILLAMETTE L. REV. 747, 755-56 (1997) (section on “Reframing Values Conflicts into Conflicts Over Competing Interests”); Marcia C. Campbell & Jayne S. 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, 772-81 (2004).

59. See Livingood, *supra* note 58, at 46.

of “becoming ... fascists,”⁶⁰ the opportunity for constructive discussion has disappeared. Similarly, while calling someone’s policy suggestion “unconstitutional”⁶¹ is less incendiary than calling the person a “fascist,” such claims do more to end debate than to invite it. In the private university setting, where the First Amendment has no formal application, references to constitutional law provide no insight about legal obligations. Instead, they serve to cast certain participants in the campus speech regulation debate—generally, liberal students and students from traditionally marginalized groups—as out of step with America and its most cherished freedoms. When these students perceive themselves as being “othered”—depicted as speaking from ignorance or aberrant values—they may sensibly see the larger campus speech debate as a rigged game, in which they are not treated as ends in themselves but rather as means to score cheap political points.

The use of framing in the business world may provide a useful example for university leaders and those who would debate how university leaders should act. In “Using Proactive Law for Competitive Advantage,” George J. Siedela and Helena Haapio discuss how a business can reframe what initially appears to be an annoying legal rule into a potential path to profit.⁶² For example, business executives may resent losing product liability lawsuits after customers misuse products, and they may accordingly resent having to conduct studies of how customers might foreseeably use products in unintended ways.⁶³ Siedela and Haapio explain that “by reframing their legal concern as a business concern, managers can perceive the process of searching for foreseeable uses as a form of marketing research.”⁶⁴ In other words, the company can ask why customers are using the product in unintended (and dangerous) ways, which may reveal that “existing products do not meet their needs,” which then creates a chance “for firms to develop new products to meet those needs.”⁶⁵ Hassle thereby becomes opportunity.

In higher education, we can similarly benefit by turning a legal problem into an educational one. In the private university world, the question is not, “Does the First Amendment require me to tolerate certain speech on campus,” but is instead, “Does tolerating this speech further my institution’s educational mission.” In the overwhelming bulk of cases, the answer will be yes, even when the speech is stupid, offensive, or generally of limited value. The reasons are that saying stupid things (and having one’s stupidity pointed out) is part of growing up, and hearing offensive things is part of life that students must learn to accept. In short, even stupid and offensive speech is often educational. In addition, the freedom to say stupid and offensive things is important if we wish to create and maintain an environment conducive to learning and discovery. Failure often lies in the path toward success. Beyond that, regulating speech is time-consuming and unpleasant, and university administrators will normally be wise to decline the opportunity to police campus expression, even when the law allows it.

60. See *supra* note 20 and accompanying text. Consider also “snowflakes,” see *supra* note 22, and “crybullies,” see Roger Kimball, *The Rise of the College Crybullies*, WALL ST. J. (Nov. 13, 2015), <https://www.wsj.com/articles/the-rise-of-the-college-crybullies-1447458587>.

61. See *supra* notes 9-10 and accompanying text (quoting Professor Chemerinsky); see also *supra* note 27 and accompanying text (quoting Senator Grassley).

62. See George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641, 655 (2010).

63. See *id.*

64. *Id.*

65. *Id.*

“The overwhelming bulk of cases,” however, is not the same as “all cases.” At least to me, there exist cases in which the costs of expression so far outweigh the benefits that university administrators would be better off opting for prohibition. Campus Klan rallies are, for me, straightforward cases. A more difficult case is presented by Holocaust denial. If the pseudo-historian David Irving wishes to speak at Brandeis, for example, he is not offering to educate.⁶⁶ Should any Brandeis professor demean himself by debating such a guest? Reasonable minds may differ about whether private colleges should grant Irving a platform. Perhaps the “marketplace of ideas” should be allowed to do its work. Perhaps Irving is such a charlatan that “debate,” as that word is used at universities, is not his enterprise. Either way, the debate is about educational mission and university policy, not about law.

Even at public universities, framing speech-regulation controversies as debates about education rather than law may prove beneficial. Yes, public institutions must do whatever the Supreme Court says the First Amendment demands. Perfect obedience to law does not, however, eliminate the need for decisions about speech regulations, and these choices must—if they are to be well made—be grounded in the values of the institutions that make them. For example, the First Amendment likely prohibits most content-based discrimination in the regulation of posting, chalking, and the use of sound amplification on campus.⁶⁷ Mizzou cannot permit Republicans to post signs and prohibit Democrats. Nor can the university permit chalked slogans on sidewalks that laud the chancellor while punishing students who chalk critical messages. Yet nothing in the Court’s First Amendment jurisprudence will help Mizzou decide whether to allow sidewalk chalking at all, or whether to permit posting by all comers, or whether to tolerate megaphones. The Constitution does not say whether Auburn University should allow outside persons to rent lecture halls.⁶⁸ These are policy questions, and they require universities to weigh the costs and benefits of various forms of expression. Framing these debates as what they truly are—discussions of how best to run a welcoming university that pursues excellence in teaching and research—should lead at least occasionally to constructive dialogue unavailable when everyone remains focused solely on case law and legal rights.

V. A FEW ARGUMENTS I AM NOT MAKING, AND A RESTATEMENT OF MY CLAIM

Because debate about free speech seems to invite misunderstandings, I will provide here a non-exclusive list of arguments that I am not making.

66. See, e.g., DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 161 (1993) (“Scholars have described Irving as a ‘Hitler partisan wearing blinkers’ and have accused him of distorting evidence and manipulating documents to serve his own purposes.”); see also *Irving v. Penguin Books Ltd.*, [2000 EWHC QB 115, ¶ 13.167] (High Court, Queen’s Bench 2000) (Gray, J.) (finding that Irving deliberately misrepresented historical fact to exonerate Hitler and deny the Holocaust).

67. See generally Christina E. Wells, *The Law of Free Expression in the United States* 9 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 353 (JOURNAL FOR LEGAL SCIENCE & PRACTICE, MASARYK UNIVERSITY, BRNO, CZECH REPUBLIC) (2001).

68. See Stephanie Saul, *Richard Spencer Speech at Auburn U. Greeted by Protests*, N.Y. TIMES (Apr. 18, 2017); see also Complaint at 4, ¶¶ 8-10, *Padgett v. Auburn University*, Case 3:17-cv-00231-WKW-WC (M.D. Ala. Apr. 18, 2017), available at <https://www.courthousenews.com/wp-content/uploads/2017/04/Controversial-speaker-lawsuit.pdf>.

First, I am not arguing that European hate speech codes, or European speech regulation more generally, are wonderful. Nor am I advocating that the United States adopt the speech-regulation regime of Germany, France, or any other foreign nation. Indeed, I am generally convinced that at least some European speech laws that would be barred here by the First Amendment are bad laws that the Europeans would be better off without.⁶⁹ In particular, I am not arguing for criminal punishment in the United States against hate speech currently protected by the First Amendment.

Further, I am not even saying that private universities should rush to punish students for hate speech that would be protected by the First Amendment at public universities.⁷⁰ In many instances, reprehensible speech should inspire education rather than discipline. Particularly when speech is merely hurtful, foolish, annoying, or offensive, universities should default to permissiveness.⁷¹

Instead, I am making a more limited claim: At private universities, First Amendment-like free speech rules can sometimes cause more harm than good. Two examples, one from a private university and one from a public university, illustrate the sort of speech that I think might reasonably lead to student discipline on campuses not constrained by the First Amendment. Robert Post recounts the incident at Yale when male students marched near dormitories with candles, chanting, “No means yes, yes means anal.”⁷² Regardless of whether this speech creates the sort of hostile environment that allows punishment under federal anti-discrimination law, and regardless of whether Mizzou could punish students for doing something similar here, I see no reason for Yale to tolerate it. Yale is not the government, and it cannot send anyone to prison. Slippery-slope arguments about how European hate speech laws lead to the criminalization of dissent have no relevance to what Yale should tolerate. If Yale gets too quick on the student-discipline trigger, students can enroll instead at UConn or, Heaven help them, Princeton.⁷³

Early in their book, Chemerinsky and Gillman recount the incident at which Sigma Alpha Epsilon fraternity brothers enrolled at the University of Oklahoma were caught on video singing a racist song.⁷⁴ University President David Boren expelled two students and suspended the fraternity chapter. Did Boren violate the constitutional rights of the students and the fraternity? I think so.⁷⁵ Does that mean that similar behavior by a University of Tulsa student organization should be immune from institutional discipline? I think not. Students might reasonably prefer

69. See, e.g., Jacob Mchangama, *Europe's Freedom of Speech Fail*, FOREIGN POLICY (July 7, 2016), <http://foreignpolicy.com/2016/07/07/europes-freedom-of-speech-fail/>.

70. See CHEMERINSKY & GILLMAN, *supra* note 11, at 108, 113 (discussing potential harms associated with punishment of disfavored speech).

71. See *id.* at 101, discussing *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (1993) (holding that university engaged in unlawful viewpoint discrimination when punishing student group).

72. See Post, *supra* note 13.

73. The usual joke about Harvard is omitted here because of that institution's own recent “quick-trigger” decisions. See *supra* note 12. Prospective students might well sensibly avoid Harvard if attitudes there toward free association do not change. Nonetheless, persistent bad policy at Harvard does not indicate a shortage of other excellent options.

74. See CHEMERINSKY & GILLMAN, *supra* note 11, at 3.

75. I'm not alone. See Eugene Volokh, *No, It's Not Constitutional for the University of Oklahoma to Expel Students for Racist Speech*, WASHINGTON POST (Mar. 10, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/10/no-a-public-university-may-not-expel-students-for-racist-speech/>.

the sort of university that does not tolerate such bigotry. Given the multitude of state institutions across the land that are constrained by the First Amendment, the existence of some private institutions with alternative speech-regulation policies should not deny anyone the chance to obtain higher education in an environment with minimal censorship. Different universities will draw lines differently, and in a big country with thousands of colleges, we should not fear diversity of campus policy.⁷⁶ Let students have choices.

In celebrating a broad diversity of college environments, I would normally enjoy widespread support from across the political spectrum. For example, at Wheaton College in Illinois, chapel attendance is mandatory for all undergraduate students.⁷⁷ At the University of Missouri, such a requirement would plainly violate the Establishment Clause. Yale University—which is not regulated by the First Amendment with respect to freedom of religion any more than it is with respect to freedom of speech—ended mandatory chapel in 1926.⁷⁸ While Yale has chosen to adopt a *laissez faire* attitude toward its students' religious observance, Wheaton has taken the opposite tack. To me, that diversity is not a problem to be eliminated but is instead a sign of America's bounty of collegiate experiences. Analogies to the First Amendment tell us nothing about how Wheaton should conduct the moral education of its students.⁷⁹

VI. CONCLUSION

The United States boasts thousands of colleges and universities, including the religious and the secular, the large and the small, the public and the private. They offer a staggering variety of curricula and campus atmospheres. For a prospective student, the choices are effectively without limit. Just as Amherst College and the University of Massachusetts need not offer the same courses of study, need not adopt the same attitude toward intercollegiate athletics, and need not treat student organizations in the same way,⁸⁰ they need not regulate campus speech in the same way. The trustees, administrators, and faculty at Amherst—like those at every private college and university—must decide what sort of speech regulations best advance the mission of the institution they cherish and to which they devote their time and attention. At some private institutions, the best results will flow from adopting rules different from those of public institutions governed by the First Amendment.

76. As journalist Matthew Yglesias wryly put it: "It's unfortunate that there's only one college in America so we need to collectively decide on speech norms rather than allowing options." Matthew Yglesias (@mattyglesias), TWITTER (Oct. 21, 2017, 12:59 PM), <https://mobile.twitter.com/mattyglesias/status/921828431104479232>.

77. See WHEATON COLLEGE CHAPEL, <https://www.wheaton.edu/life-at-wheaton/spiritual-life/wheaton-college-chapel/>.

78. See FREDERICK J. STREETS, *PREACHING IN THE NEW MILLENNIUM* 1 (2006).

79. Note too that Wheaton does not provide freedom of expression or freedom of religion to its faculty. See Ruth Graham, "The Professor Wore a Hijab in Solidarity—Then Lost Her Job," *N.Y. TIMES* (Oct. 13, 2016). Whatever one thinks of Wheaton's treatment of Professor Larycia Hawkins, the college did not violate her First Amendment rights.

80. For example, while UMass celebrates Greek life, see OFFICE OF FRATERNITIES AND SORORITIES, <https://www.umass.edu/greek/>, Amherst prohibits students from joining fraternities and sororities. See Tyler Kingkade, *Amherst College Bans Students From Joining Fraternities*, *HUFFINGTON POST* (May 6, 2014), https://www.huffingtonpost.com/2014/05/06/amherst-college-fraternities-ban_n_5275705.html.

Recognizing that possibility is the easy part. Now, institutional leaders must conduct the difficult work of deciding what sort of colleges and universities they wish to lead.