DIFFERENT STROKES FOR DIFFERENT FOLKS: ACADEMIC FREEDOM, CIVILITY, AND EDUCATIONAL DIVERSITY AMONG PRIVATE COLLEGES AND UNIVERSITIES

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Does academic freedom require institutions of higher learning, both public and private, to apply the First Amendment rules applicable to public forums to analogous places on campus, as several prominent commentators contend? On this view, to avoid violating academic freedom, every college and university in the United States must allow highly uncivil speech in these areas, such as "Fuck War!" or "God Hates Fags."

This Article argues that such an interpretation of the dictates of academic freedom would seriously undermine the diversity of educational experiences available to students, a feature of American higher education long recognized as one of its great strengths. The Article contends that a policy maintaining basic civility norms in campus open spaces, including in free speech areas, doesn't violate academic freedom if implemented by viewpoint-neutral rules enforced in an educationally-oriented, ideologically evenhanded manner.

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INTRODUCTION

An antiwar protestor has a First Amendment right to conclude a speech in a public park by proclaiming "Fuck War!,"[1] just as an opponent of same-sex marriage has such a right to hold up a sign on a street corner proclaiming that "God Hates Fags."[2] Because the First Amendment restricts only governmental entities,[3] private colleges and universities are not bound by the First Amendment. Nonetheless, Dean Erwin Chemerinsky and Chancellor Howard Gillman insist that academic freedom requires all private institutions of higher learning in the United States to apply the First Amendment rule against content discrimination applicable

[1] *See* Cohen v. California, 403 US 15, 16 (1971).

[2] Snyder v. Phelps, 562 U.S. 443, 448 (2011).

[3] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.").

to traditional public forums such as municipal parks and streets to similar places on campus,[4] settings that they refer to as within the campus "free speech" as opposed to its "professional" zone."[5] In this Article, I will challenge this bold claim.

I want to underscore at the outset the limited nature of my disagreement with Chemerinsky and Gillman on which this article focuses. The article does not directly take issue with these eminent scholars to the extent they contend that, as a matter of preferable academic and free speech policy, all private colleges and universities should adopt the First Amendment rule against content discrimination applicable to public forums to govern the campus free speech zone.[6] Nor does it

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[4] ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 113 (2017).

[5] *Id.* at 77, 113. Chemerinsky and Gillman conceptualize the free speech zone as a default category containing everything that does not come within the professional zone. *Id.* at 77. They therefore do not spell out the places or activities that constitute the free speech zone. I assume though that this zone includes not only free speech areas, that is, places on campus that function, by formal designation or otherwise, as places for campus protests, demonstrations, speeches and similar types of expression, but also encompasses more generally locations often referred to as campus "open spaces," such as streets, sidewalks, plazas and greens. *See, e.g.*, *Guide to Free Speech on Campus*, FIRE, https://perma.cc/7CD3-BR3P ("On the modern public campus, many of the open spaces between buildings and many public squares scattered throughout the campus should be considered public forums."). I further assume that the free speech zone includes covered spaces such as amphitheaters, and even closed spaces such as classrooms, when they serve, for instance, as areas for expression by invited outside speakers or for ideological or political programs hosted by student organizations. For more on Chemerinsky and Gillman's division of campus into a professional and free speech zone, see *infra* text accompanying notes 36–38.

[6] With respect to this broader policy question, The Foundation for Individual Rights and Expression (FIRE) takes the position that "[i]f a private college advertises itself as a place where free speech is esteemed and protected—as most of them do—then it should be held to the same standard as a public institution." *Private Universities*, FIRE, https://perma.cc/M37N-J6J6. In FIRE's view, the First Amendment requires public institutions of higher learning to apply to analogous places on campus the rule against content discrimination, especially viewpoint discrimination, governing traditional public forums. *See Guide to Free Speech on Campus*, FIRE, *supra* note 5. Consistent with the view expressed in this article, however, FIRE stresses that "if a private college wishes to place a particular set of moral, philosophical, or religious teachings above a commitment to free expression, it has every right to do so" if it states this position "clearly and publicly." In which case, an institution has "considerably more leeway in imposing its views on students." *Private Universities*, FIRE, *supra*. Many colleges and universities, both private and public, have adopted the Chicago Principles of Free Expression. *See, e.g.*, *Free Expression*, UNIV. CHI., https://perma.cc/8CHA-SK6C. Although not expressly stating that the First Amendment rule against content discrimination governing public forums should apply campus open spaces, the Chicago Principles are certainly susceptible to such an

have any quarrel with individual private colleges and universities choosing to adopt the First Amendment rule against content discrimination to govern campus open spaces.[7] Rather, the article focuses on Chemerinsky and Gillman's contention that principles of *academic freedom* require all institutions of higher learning to adopt this rule.[8] Violation of academic freedom is a more serious transgression than merely failing to follow preferable academic policy. And unlike adoption of a suboptimal academic policy, a violation of academic freedom can result in censure by the American Association of University Professors (AAUP).[9] For this reason, if Chemerinsky and Gillman's claim regarding the strictures of academic freedom were widely accepted, it would significantly, and in my view unduly, decrease the diversity of educational experiences available to students. This article will therefore closely examine this claim.

Part I of this article describes the First Amendment rule against content discrimination applicable to traditional public forums such as city parks and streets, a rule that prohibits the imposition of even minimal civility norms such as forbidding the use of profanity or insulting epithets. Part II summarizes Chemerinsky and Gillman's argument that to comport with academic freedom, all American institutions

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interpretation. Supporting this interpretation, Professor Geoffrey Stone, the primary author of the Chicago Principles, interprets the Principles to mean that in places on campus analogous to public forums "private universities should *presumptively* follow the basic principles of First Amendment jurisprudence" governing public forums but "can offer more protection to speech in these areas than the First Amendment provides to speech in public forums." E-mail from Geoffrey Stone to James Weinstein (Sept. 17, 2022) (on file with author). Also, in accord with Chemerinsky and Gillman's views, Stone believes that to comport with academic freedom private institutions of higher learning should adopt this First Amendment jurisprudence. *Id.*

[7] Indeed, I think this may often be the preferable policy for large urban universities with open campuses. *See infra* note 136.

[8] Issues of academic freedom aside, this article does implicitly reject even as a policy argument the view that the First Amendment rule against content discrimination applicable to traditional public forums should govern similar places "at *every* institution of higher education, public and private." CHEMERINSKY & GILLMAN, *supra* note 4, at 53 (emphasis added). *See also* Stone E-mail, *supra* note 6. Adoption of such a uniform, one-size-fits-all standard by every American college and university would reduce the diversity of campus experiences available to students, which has been properly acclaimed as one of the great strengths of the American system of higher education. See *infra* notes 1411 and 1422 and accompanying text.

[9] *See What Is Censure*, AAUP, https://perma.cc/2GVV-D3BH.

of higher learning must apply this rule to similar places on campus. Part III discusses the four dimensions of American academic freedom and identifies freedom of extramural expression as the element implicated by imposition of civility norms in campus open spaces. Finally, Part IV argues that if even-handedly enforced by educationally-oriented rather than by punitive sanctions, imposition of minimal civility norms such as prohibiting the use of profanity and insulting epithets in campus open spaces, including free speech areas, does not violate the freedom of extramural speech. The Article concludes by noting the wide array of educational experiences currently offered by private colleges and universities, a benefit that would be diminished if the free speech zones of all of these institutions were governed by the First Amendment rule against content discrimination applicable to traditional public forums.[10]

I. First Amendment Doctrine Applicable to Public Forums

A. The Rule Against Content Discrimination

The central feature of modern First Amendment doctrine is its intense hostility to content discrimination. As the United States Supreme Court has explained: "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] Content-based regulations come in different varieties, some worse than others from a First Amendment standpoint. The most "egregious" form of content discrimination are laws that discriminate on the basis of viewpoint.[12] Viewpoint-discriminatory laws, to quote the Supreme Court's cumbersome phrase, are laws based on "the specific motivating ideology or the opinion or perspective of the

[10] In a recent article, Professor Ben Trachtenberg argues that Chemerinsky and Gillman's position that all private institutions of higher learning should adopt First Amendment standards for speech regulation would unduly limit the diversity of educational experiences long offered in American higher education. *See* Ben Trachtenberg, *Private Universities and the First Amendment*, 2018 J. DISP. RESOL. 71, 85. Trachtenberg does not, however, address their claim that academic freedom requires adoption these standards for campus open spaces.

[11] United States v. Stevens, 559 U.S. 460, 468 (2010) (cleaned up).

[12] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). *See also* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (referring to "the bedrock First Amendment principle that the government cannot discriminate against ideas that offend" (internal quotation marks removed); *id.* at 2302 (Alito, J., concurring) ("Viewpoint discrimination is poison to a free society.").

speaker."[13] A law that prohibited anyone from saying that abortion is murder or that Blacks are genetically inferior to Whites would be considered viewpoint based. Viewpoint-based laws, however, do not exhaust the category of content regulation, which also includes laws that regulate the subject matter of speech.[14] A law prohibiting speakers in a public park from discussing abortion, whether in favor of or against abortion rights, though not viewpoint based is nonetheless content based. Significantly for our inquiry, the rule against content discrimination extends beyond laws disfavoring particular viewpoints or subjects and encompasses bans on the modes of speech, such as the use of profanity or insulting epithets.[15]

B. Limits on the Rule Against Content Discrimination

The rule against content discrimination, while exceedingly strong, is not absolute. As the Supreme Court has explained, the First Amendment permits content regulation in a few "narrowly limited classes of speech," including "obscenity, incitement, and fighting words."[16] For speech not falling within these exceptions, regulation of its content is subject to "the most exacting scrutiny."[17] As has been aptly noted, such "strict scrutiny" is as "ordinarily the kiss of death,"[18] resulting in the "near-automatic condemnation" of the restriction.[19] Unless "directed to the person

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[13] *Rosenberger*, 515 U.S. at 829.

[14] *See, e.g.*, Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 169 (2015) ("Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.").

[15] See *supra* text accompanying notes 1 and 2. *See also* Texas v. Johnson, 491 U.S. 397 (1989) (upholding the First Amendment right of an antiwar protestor to burn the American flag).

[16] Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 791 (2011) (cleaned up). For a more expansive list of exceptions, see United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) (listing "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent").

[17] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

[18] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 380 (1995) (Scalia, J. dissenting).

[19] United States v. Alvarez, 567 U.S. 709, 731 (2012) (Breyer, J., concurring); *See also* Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015) (noting that "it is the rare case" in which a speech regulation survives strict scrutiny). In contrast, content-neutral laws, such as those that regulate the

of the hearer,"[20] thereby constituting fighting words, use of insulting epithets—even viciously bigoted ones—as part of a political protest are not among the "historic and traditional categories of speech long familiar to the bar"[21] falling outside of the scope of First Amendment protection. For while many mistakenly believe that "hate speech" is among these forlorn categories of expression,[22] the Supreme Court has made clear that this is not the case.[23]

Not only is the rule against content discrimination not absolute, neither is it unbounded in scope. It does not apply, for instance, to the courtroom,[24] in public

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time, place, or manner of the speech, are subject to "intermediate" scrutiny, *see* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 186 (1997), and are usually upheld. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[20] Cohen v. California, 403 U.S. 15, 20 (1971) (quoting Cantwell v. Connecticut, 310 U. S. 296, 310 (1940)).

[21] United States v. Stevens, 559 U.S. 460, 468 (2010) (citations and internal quotations omitted).

[22] Lauren Carroll, *CNN's Chris Cuomo: First Amendment Doesn't Cover Hate Speech*, POLITIFACT (May 7, 2015), https://perma.cc/WLV8-D5HB.

[23] *See* Virginia v. Black, 538 U.S. 343, (2003) (O'Connor, J., joined by Rehnquist, C.J., and Stevens, Scalia, and Breyer, JJ.) (distinguishing cross-burning directed to a particular individual constituting a true threat unprotected by the First Amendment, *id.* at 357, from cross burnings at Ku Klux Klan rallies, which are "potent symbols of shared group identity and ideology," *id.* at 356, and thus constitute "core political speech" fully protected by the First Amendment.); *id*. at 365; *id*. at 381 (Souter, J., joined by Kennedy and Ginsburg, JJ.) (explaining that even when constituting a threat, a burning cross contains an "ideological message of white Protestant supremacy" and thus singling out the symbol for proscription violates the First Amendment. *See also* Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'") (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). More generally, hate speech bans are viewpoint-based laws, and thus are especially disfavored under contemporary First Amendment doctrine. See *supra* text accompanying note 12.

[24] Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005) (explaining that, within the confines of the courtroom, "we regularly countenance the application of even viewpoint-discriminatory restrictions on speech."); Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991) (explaining that "it is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.").

schools,[25] the government workplace,[26] or to non-public forums such as polling places.[27] But while the precise contours of the rule are contentious and uncertain,[28] there is no doubt that it applies to speech in traditional public forums such as municipal parks or streets.[29] It should be noted, however, that contrary to Chemerinsky and Gillman's confident assertion, whether the rule against content discrimination applies to open spaces at public colleges and universities is a complex issue about which the Supreme Court has sent mixed messages.[30] And while most lower

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[25] Bethel Sch. Dist. v. Frazer, 478 U.S. 675, 685 (1986) (holding that public school officials have the authority to impose sanctions on students for "vulgar and lewd speech" which "would undermine the school's basic educational mission.").

[26] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes").

[27] Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) ("[O]ur decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums").

[28] *See* James Weinstein, *The Federal Cyberstalking Statute, Content Discrimination and the First Amendment*, 54 U.C. DAVIS L. REV. 2553, 2559–69 (2021).

[29] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (emphasizing that "a content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny."). It should also be noted that with respect to speech by faculty at public colleges and universities, special First Amendment rules for public employees, not the First Amendment rules applicable to public forums, would apply even to speech in campus open spaces. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that, in First Amendment challenges by public employees against discipline by their employers, courts must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). *See also* Connick v. Myers, 461 U.S. 138, 147 (1983) (holding that "absent the most unusual circumstance," the First Amendment provides no protection against discipline of a public employees by their employers when the employee "speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."); Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (holding that even with respect to expression on matters of public concern, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities," but reserving judgment as to whether this rule applied to "academic scholarship or classroom instruction."). *Id.* at 425.

[30] *Compare* Healy v. James, 408 U.S 169, 180 (1972) (stating that the Court's precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.") *with* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) ("A university's mission is education, and decisions of

courts "conclude that a street-like or park-like area on a college campus" is not a traditional public forum, "the case law remains uncertain and provides little in the way of clear standards or guidelines for adjudicating location-based free speech disputes."[31]

Having sketched out the First Amendment rule against content discrimination applicable to municipal streets and parks, I now turn to Chemerinsky and Gillman's argument that academic freedom requires the application of this rule to similar places at all American institutions of higher learning, private as well as public.

II. Chemerinsky and Gillman's Argument

In Chemerinsky and Gillman's view, academic freedom requires private institutions of higher learning to adopt the First Amendment rule against content discrimination governing traditional public forums.[32] "If universities and colleges were merely places where professional academics and students were committed to entering into the world of professional inquiry and discovery," it would, they

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this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."). For an argument that special First Amendment rules promoting the university's mission of education and creation of knowledge, not general First Amendment rules such as the rule against content discrimination governing the traditional public forum, apply throughout the public university, including in campus open spaces, see Robert C. Post, *The Classic First Amendment Under Stress: Freedom of the Speech and the University*, *in* THE FREE SPEECH CENTURY 106 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

[31] Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1965 (2017). Consistent with Chemerinsky and Gillman's view, some lower courts have found that campus open spaces are designated public forums to which the rule against content discrimination governing traditional public forums applies. *See, e.g.*, Bowman v. White, 444 F.3d 967 (8th Cir. 2006) (finding that "the streets, sidewalks, and open areas located inside and directly adjacent to the campus," *id.* at 977, are unlimited designated public forums, *id.* at 979, governed by the same strict limitations applicable to traditional public forums, *id.* at 976.). Other courts, in contrast, have held that campus open spaces are limited public forums to which the rule against content discrimination applicable to traditional public forums does not apply. *See, e.g.*, Keister v. Bell, 29 F.4th 1239 (11th Cir. 2022) (holding that an internal campus sidewalk is a limited public forum, *id.* at 1256, where "regulations on speech must be only reasonable and viewpoint neutral," *id.* at 1252). Accordingly, in claiming that academic freedom requires that the rule against content discrimination governing traditional public forums applies to all campus open spaces, Chemerinsky and Gillman may be requiring greater protection for free speech than the First Amendment requires for public institutions of higher learning.

[32] CHEMERINSKY & GILLMAN, *supra* note 4, at 113.

acknowledge, "be easy to establish norms of expression that protected ideas but also insisted on the respectful and professional exchange of positions."[33] "But," they observe, "campuses are not only that."[34] Rather, "[o]verlaid on top of this idea is a more general view that campuses should be open spaces, including for the noncivilized and nonscholarly expression of ideas."[35] They thus conceive of campuses as divided into two different zones: "*a professional zone*, which protects the expression of ideas but imposes an obligation of responsible discourse and responsible conduct in formal educational and scholarly settings,[36] and a larger *free speech zone*, which exists outside of scholarly and administrative settings,"[37] which include campus open spaces such as streets, sidewalks, plazas and lawns, among other settings.[38]

In the free speech zone, Chemerinsky and Gillman insist that "campuses—public and private" must protect ideas "expressed in ways that run contrary to the norms of professional conduct that apply within classrooms, scholarly gatherings, and department meetings."[39] Here, "professional educational standards" are inapplicable "in order to allow for a more raucous place for expression . . . ."[40] On their view, in these places the only permissible restrictions on speech are those permitted by the First Amendment rule against content discrimination governing speech in "society at large,"[41] including in traditional public forums.[42] As discussed above,[43] under this strict standard, government may not enforce even minimal civility norms, including restrictions on profanity or insulting epithets.[44] Although acknowledging that the First Amendment does not restrict the activities of private

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[33] *Id.* at 74.

[34] *Id.*

[35] *Id.* at 74–75.

[36] *Id.* at 77.

[37] *Id.*

[38] *See supra* note 5.

[39] *Id.* at 76–77.

[40] *Id.* at 113.

[41] *Id.* at 77.

[42] *Id.* at 75. *See also id.* at 113.

[43] See *supra* note 15 and accompanying text.

[44] *See* CHEMERINSKY & GILLMAN, *supra* note 4, at 141 ("There is an enormous difference between advocating norms of civility of expression . . . and by enforcing these norms by censorship or punishment."). *See also infra* note 75.

institutions of higher learning, Chemerinsky and Gillman insist that to comport with academic freedom, private colleges and universities must adopt these First Amendment rules to govern campus open spaces.[45]

To evaluate this claim, I now discuss the basic tenets of American academic freedom and identify the dimension of that freedom implicated by imposition of civility norms in campus free speech areas.

III. Academic Freedom and Civility Norms

Academic freedom in the United States is a professional norm[46] developed to protect and promote the university's core mission to create and transmit knowledge.[47] The foundational document articulating and defending the concept of academic freedom in this country is the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure.*[48]

A. The Four Dimensions of American Academic Freedom

The 1940 *Statement* divides academic freedom into four elements:

Teaching: freedom to discuss all relevant matters in the classroom;

Research: freedom to explore all avenues of scholarship, research, and creative expression and to publish the results of such work;

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[45] *Id.* at 76–80.

[46] As such, it does not by itself create any legal rights. Nonetheless, statements in documents such as college and university mission statements, faculty handbooks, and collective bargaining agreements promising academic freedom can create contractual obligations. *See, e.g.*, McAdams v. Marquette Univ., 914 N.W.2d 708, 712 (2018) (holding that "the University breached its contract with Dr. McAdams when it suspended him for engaging in activity protected by the contract's guarantee of academic freedom.").

[47] *See, e.g.*, YALE COLL. FAC., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (Jan. 8, 1975), https://perma.cc/4GYE-A49V ("The primary function of a university is to discover and disseminate knowledge by means of research and teaching."); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 13 (2018) ("At heart, the mission of the university is to produce and disseminate knowledge."); MATTHEW W. FINKIN & ROBERT POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 7 (2009) ("The profession's claim to academic freedom is grounded firmly in a substantive account of the purposes of higher education and the special conditions necessary for faculty to fulfill these purposes.").

[48] AAUP POLICY DOCUMENTS & REPORTS 3–4 (B. Robert Kreiser ed., 10th ed. 2006).

Intramural speech:[49] freedom from institutional censorship or discipline when speaking or writing as participants in the governance of an educational institution; and

Extramural speech: freedom from institutional censorship or discipline when speaking or writing as citizens.[50]

The *1940 Statement* refers to academic freedom of "teachers." However, the *1967 Joint Statement on Rights and Freedoms of Students* explains that "as members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth."[51] The *1967 Statement* notes that "[i]nstitutional procedures for achieving these purposes may vary from campus to campus," but insists that all institutions of higher education should respect at least "minimal standards of academic freedom of students."[52] This includes the freedom "to examine and discuss all questions of interest to them and to express opinions publicly and privately" and "to support causes by orderly means that do not disrupt the regular and essential operations of the institution."[53] However, "what exactly constitutes students' academic freedom . . . is an area of ongoing uncertainty and debate."[54] Although undergraduates are not eligible to file complaints with the AAUP against their institutions for violation of academic freedom or any other reason,[55] and although the qualifier

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[49] The 1940 *Statement* does not in so many words refer to "freedom of intramural expression"; rather, this dimension of academic freedom derives from the Statement's reference to teachers as "officers of an educational institution."

[50] *Academic Freedom: FAQs on Academic Freedom*, AAUP, https://perma.cc/99DX-YE3X. The *1940 Statement* has been endorsed by more than 250 American scholarly and educational associations and is the basis for language in about three quarters of faculty handbooks and collective bargaining agreements at four-year institutions with a tenure system. *Id.*

[51] *1967 Joint Statement on Rights and Freedoms of Students*, *in* AAUP POLICY DOCUMENTS & REPORTS 273, *supra* note 48.

[52] *Id.*

[53] *Id.* at 275.

[54] *Academic Freedom of Students and Professors, and Political Discrimination*, AAUP, https://perma.cc/2SMN-XJCB.

[55] *See Committee A Procedures*, AAUP, https://www.aaup.org/our-programs/academic-freedom/committee-procedures (stating that "any member of the academic profession is entitled to invoke our services"). *See also Informal Glossary of AAUP Terms and Abbreviations*, AAUP, https://perma.cc/NN3N-AWJJ (stating that active membership in the organization is limited to those who hold "a professional position of teacher, researcher, graduate student, or related professional appointment . . . .").

"minimal" to describe student academic freedom suggests that they are entitled to a less robust form of academic freedom than are faculty,[56] I will assume for purposes of this Article that, at least with respect to freedom of extramural expression, students have the same academic freedom as faculty.[57]

B. Identifying the Aspect of Academic Freedom Implicated by Enforcing Civility Norms in Campus Open Spaces

Chemerinsky and Gillman do not make a sustained argument for their claim that academic freedom requires private institutions of higher learning to apply the First Amendment rule against content discrimination to their campus free speech zone. Indeed, their cursory contention does not expressly state which of the four elements of academic freedom requires these institutions to adopt these rules.[58] Despite this lack of specification, however, the two core aspects of academic freedom—freedom of research and publication and freedom of teaching—can be quickly eliminated as contenders.

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[56] See *supra* text accompanying note 52.

[57] *See 1967 Statement*, *supra* note 51. Under the heading "Off-Campus Freedom of Students," the *1967 Statement* provides:

> College and university students are both citizens and members of the academic community. As citizens, students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership. Faculty members and administration officials should ensure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus. *Id.* at 276 (emphasis added).

[58] They quote the provisions of the *1940 Statement* encompassing all four elements of academic freedom. CHEMERINSKY & GILLMAN, *supra* note 4, at 77–78. They do, however, go on to discuss a 1970 "update" to the *Statement* "in the wake of the [Berkeley] Free Speech Movement," which "included a new footnote saying that 'teachers are citizens and should be accorded the freedom of citizens' and 'a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates a faculty member's unfitness for his or her position.'" *Id.* at 79 (quoting *1940 Statement*, *supra* note 48). It might be inferred from this discussion that it is freedom of extramural expression that they believe is violated by the failure of private colleges and universities to adopt general free speech principles to govern the campus free speech zone.

1. Freedom of research and publication and freedom of teaching

To begin with, neither research nor teaching normally occurs in campus open spaces. And even when teaching or research do occur there—for instance, a researcher conducting a survey on a campus sidewalk or an instructor taking advantage of a sunny day to teach her class outside in a courtyard—these activities would, despite their physical location, still be within what Chemerinsky and Gillman call the campus professional zone where they acknowledge it is appropriate to impose "an obligation of responsible discourse and responsible conduct. . . ."[59] Just because a class is taught in a campus open space does not give the instructor or students license to dispense with the civility norms appropriate to the classroom. Nor may an academic investigator ignore professional norms, including those requiring civility, just because research is conducted on a campus sidewalk or even in the campus free speech area.[60] The same considerations apply to intramural expression.

2. Freedom of intramural expression

Intramural expression customarily occurs in what Chemerinsky and Gillman call the campus professional zone, usually in faculty or committee meetings or in written correspondence to colleagues and administrators. For this reason, as with classroom discussions, civility norms are routinely and uncontroversially imposed on intramural speech. Suppose that at a law school faculty meeting, a professor refers to a committee report on a proposed course on sexual orientation and the law as a "sack of shit," and calls the proposed course "fag studies." In response, the Dean rules the speaker out of order and admonishes him that any further gross breaches of civility will result in exclusion from faculty meetings for the rest of the semester. Plainly, the Dean has not impeded the ability of this faculty member "to participate effectively in [institutional] governance" by speaking "truthfully and

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[59] CHEMERINSKY & GILLMAN, *supra* note 4, at 77.

[60] Thus, a sociology professor conducting an ethnographic study of a campus free speech area would not just because of this location be relieved of conditions that the college's institutional review board may have imposed on the study. By the same token, the physical location of the study does not permit the investigator to address students being interviewed in a disrespectful manner. To be sure, conditions imposed by institutional review boards can sometimes raise First Amendment concerns. *See* James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 519–42 (2007). But this is not just because the study happens to occur in a physical location on campus usually associated with its free speech rather than its professional zone.

factually" about institutional issues,[61] and thus has not violated the professor's freedom of intramural expression. The same would be true if the dean reprimanded the professor for making these criticisms in a group email to the law faculty and students, warning him that he will lose access to this email group for the rest of the semester if he again engages in such a gross violation of civility norms.[62]

This leaves extramural expression as the basis for Chemerinsky and Gillman's claim that academic freedom requires private colleges and universities to adopt First Amendment public forum rules to govern the campus free speech zone.[63]

3. Freedom of Extramural Expression

As has been aptly observed, "[t]he most theoretically problematic aspect of academic freedom is extramural expression."[64] By definition, such expression involves academics speaking not in their professional capacity but rather "in their

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[61] *Academic Freedom: FAQs on Academic Freedom*, *supra* note 50.

[62] In contrast, if this foulmouthed professor had used this same language on his personal blog or on social media to criticize the adoption of this course by the law school, he would be speaking not in an institutional capacity but as a citizen on a matter of public concern. He would thus be engaged in extramural rather than intramural expression. *See* AAUP, ACADEMIC FREEDOM AND TENURE: THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN 1, 11 (2015), https://perma.cc/QE2U-E6H4 ("[T]he primary characteristics of extramural speech are that such speech is addressed to 'the larger community' and that it is concerned with 'social, political, economic, or other interest'" (quoting AAUP, PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI V. CEBALLOS* 67, 88 (2009), https://perma.cc/5K99-2FWM)). The same would likely be true if he made these comments in his university's free speech area. (As argued below in Part IV, however, the use of such language in a campus free speech area could be prohibited by a policy banning the use of profanity and insulting epithets in that location; and even in the absence of such a policy, the use of such a vicious epithet might arguably be outside the protection of extramural expression, thereby subjecting the professor to discipline. See *infra* text accompanying note 83.)

[63] As noted in note 58, *supra*, this seems to be the basis of Chemerinsky and Gillman's claim that failure to adopt First Amendment public forum rules to govern the campus "free speech zone" violates academic freedom.

[64] FINKIN & POST, *supra* note 47, at 127. *See also Academic Freedom: FAQs on Academic Freedom*, *supra* note 50 (referring to freedom of extramural expression as "arguably the most controversial and most challenged aspect of academic freedom . . .").

capacity as citizens"[65] and therefore "does not necessarily relate to disciplinary expertise."[66] As such, unlike research and publication of its results, freedom of teaching, or even expression related to institutional decisions, the connection between extramural expression and the core purpose of the university to create and disseminate knowledge is not obvious.

Three justifications have been advanced for including extramural speech within the protection of academic freedom. The first is that it is often difficult to distinguish between statements within a faculty member's expertise and those beyond such expertise.[67] One problem with this rationale is that it is often not at all difficult to do so, as when a professor of medieval literature opines on vaccine policy. But even more problematically, this rationale suggests that the entire category of extramural speech is "superfluous because it is entirely indistinguishable from freedom of research." Moreover, this justification implies that "professional standards of care and rigor ought to apply to extramural speech."[68]

A second rationale posits that acceding to pressure by wealthy donors and powerful alumni to fire faculty for controversial speech unrelated to their discipline will make it more difficult to refuse to dismiss faculty for expression related to their research.[69] On this view, however, extramural expression is not a distinct aspect of academic freedom but rather one based in "institutional expedience and prudence."[70]

A third and the most satisfying rationale for including extramural speech as an aspect of academic freedom is "prophylactic protection for freedom of research and freedom of teaching" by "maintaining conditions conducive to the performance of essential faculty tasks."[71] As Professor Keith Whittington explains:

> If higher education institutions were to construct a regime to monitor social media for professors making controversial statements or adopt the view that professors

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[65] *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *in* AAUP POLICY DOCUMENTS & REPORTS 291, *supra* note 48.

[66] *Academic Freedom: FAQs on Academic Freedom*, *supra* note 50.

[67] FINKIN & POST, *supra* note 47, at 133.

[68] *Id.* at 135.

[69] *Id.* at 137.

[70] *Id.* at 139.

[71] *Id.* at 140

> could be dismissed if students or alumni objected to statements that a professor made in public, the practical scope of free inquiry on campus would be diminished.[72]

Expression on matters of public concern in a free speech area by faculty and students would qualify as extramural expression. As Professor William Van Alstyne, a former president of the AAUP, long ago explained: "The phrase 'extramural' is used figuratively in reference to statements made outside of the employment relationship" and that therefore it is "perfectly clear that the place where the statement is made, whether on or off campus, is not per se determinative of the question whether the teacher is speaking as a private citizen . . . ."[73]

IV. Enforcing Minimal Civility Norms in Campus Free Speech Areas Does Not Necessarily Violate Freedom of Extramural Expression

We are now in a position to evaluate Chemerinsky and Gillman's claim that to comport with academic freedom, private colleges and universities must adopt for the campus free speech zone the First Amendment rule against content discrimination applicable to public forums. As discussed above,[74] the rule prohibits the enforcement of even the most minimal of civility norms such as those prohibiting the use of profanity and insulting epithets.[75]

A. The New College Lawn Policy

To help evaluate this claim, let's consider the case of New College, a small, recently-founded private (and imaginary) institution of higher learning in rural New England.[76] The free speech area at New College is called The Lawn, a grassy area in

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[72] Keith E. Whittington, *Academic Freedom and the Scope of Protections for Extramural Speech*, AAUP (2019), https://perma.cc/AC9U-YD52.

[73] William Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 846 n.18.

[74] See *supra* note 15 and accompanying text.

[75] *See* CHEMERINSKY & GILLMAN, *supra* note 4, at 110 (arguing that campus bans on "epithets . . . like 'nigger' and faggot'" unduly risks the suppression of "unpopular ideas and views"). *See also id.* at 61 (stating that "profane and abusive language that would be protected [by the First Amendment] in society in general can be prohibited in educational spaces on campus," thereby implying that such language cannot be prohibited in the campus "free speech zone").

[76] I have intentionally not specified whether New College is a secular or a religious institution. To advance their religious mission, some religious institutions of higher learning may want to prohibit the use of profanity and insulting epithets throughout campus. Few, if any, contemporary secular private institutions ban the use of profanity or insulting epithets (unless they constitute hate speech) in free speech areas. But in light of the egregious lack of civility currently plaguing public

front of the school's administration building. The College's founding faculty and administration have decided to limit access to The Lawn to members of the university community, namely students, faculty, and employees of New College and, during limited times and days, to outside speakers sponsored by a member of the university community. The Lawn is primarily used by students, and sometimes by faculty and staff, to express views on college matters, such as whether to have a varsity football program or to protest tuition increases, as well as on matters of public concern, such as abortion, gay and trans rights, and the Black Lives Matter movement. New College's mission statement declares that it is dedicated to the free expression and exploration of ideas in the classroom and beyond, including controversial perspectives or ideas that many might find disturbing or offensive. It also declares that the College is especially dedicated to "maintaining, promoting and inculcating civil discourse."

To effectuate its civil discourse mission, New College's faculty and administration have adopted a policy governing speech on the Lawn prohibiting the use of profanity or insulting epithets. Profanity is defined as "socially offensive use of language consisting of cursing, cussing, swearing, or expletives."[77] "Insulting epithets" are defined as "opprobrious or abusive words used to describe a person or group of persons (commonly known as 'name calling')."[78] With regard to an alleged violation by a student, the Lawn Administrator, who is required by the Policy to be a member of the faculty, must meet in person with the student to discuss the purpose and goals of the Lawn Policy and to suggest ways that the student could have expressed their views without the use of profanity or insulting epithets. A first viola-

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discourse in the United States, I want to defend the position that secular private colleges and universities too can consistent with academic freedom impose at least minimal civility norms in campus open spaces, including free speech areas.

[77] An interpretative guideline states that it is "language that you would avoid using, for instance, in front of children, in a job interview, when speaking on a radio broadcast, or in a classroom discussion."

[78] An interpretative guideline states that these are "words which, if used to refer to someone in a face-to-face encounter with that person, would constitute 'fighting words,' that is, words that might tend to provoke a violent reaction to the person addressed or tend to inflict psychic injury on that person." The guideline emphasizes, however, that the prohibition applies to any use of the words to describe a person or group of persons, not just use in face-to-face encounters.

tion of the Policy will result in the speaker being given a warning by the Lawn Administrator.[79] For a second violation, the offender will be barred from the Lawn for 30 days, with a third violation entailing loss of Lawn privileges for the remainder of the academic year. Anyone speaking on the Lawn after losing Lawn privileges will be subject to discipline, which in the case of a student might involve suspension from the College.

Assume that a New College physics professor gives a short talk on the Lawn blaming the Biden Administration for the high rate of inflation. After the professor finishes speaking, a group of five students and two professors chant "Fuck Joe Biden!" The Lawn Administrator charges the chanters with violating the Lawn Policy's ban on profanity. After a hearing before the Lawn Committee, the protestors are found to have violated the Policy. Five of the protestors are first-time offenders and are given a warning; two others, a student and a faculty member, each have one previous violation and are banned from the Lawn for 30 days.

Next, let's consider an application of the Lawn Policy involving the use of insulting epithets. Suppose that in protesting a new state law forbidding discrimination on the basis of sexual orientation in places of public accommodation, two New College students, an undergraduate and a graduate student with teaching duties, carry signs on the Lawn proclaiming that "God Hates Fags!" After the counseling session and a hearing, both are found to have violated the Lawn Policy. Since both have two previous violations, they are barred from speaking on the Lawn for the three months remaining in the academic year.

Has New College violated the academic freedom of these protestors? Careful analysis shows that it has not.

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[79] The Lawn Administrator must send written notice to anyone charged with violating the Lawn Policy. The alleged offender has a right to a hearing with the Lawn Committee, consisting of three faculty members, one graduate student and one undergraduate, at which the alleged offender can argue that the impugned expression did not violate the Policy. In order uphold an Administrator's charge, the Committee must find by a majority vote that the expression violated the Policy, with the burden of proof resting with the Administrator to prove the violation.

B. The New College Policy Is Consistent with the AAUP Statements on Extramural Speech and Civility

1. AAUP Statements and Reports

A rigid reading of the AAUP statements on extramural speech and civility might suggest that New College has violated the protestors' freedom of extramural expression. A more nuanced analysis, however, reveals that the Policy is consistent with these statements.

In 1970, the AAUP issued the following interpretation of the *1940 Statement* regarding the freedom of extramural expression: "The controlling principle is that a faculty member's expression of opinions as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position."[80] And the organization has made clear that this high bar for discipline applies to even those opinions expressed in an uncivil manner.[81] Whatever might be thought of the propriety of the profane chant about President Biden, it does not "clearly demonstrate" that the faculty who joined the chant are "unfit for [their] position," or that the students who did so are unfit to be students at New College.[82] In contrast, it is at least arguable that use of the epithet "fag" by the graduate student with teaching duties does clearly demonstrate such unfitness.[83] New

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[80] *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, *in* AAUP POLICY DOCUMENTS & REPORTS 6, *supra* note 48 (quoting *Committee A Statement on Extramural Utterances*, *id.* at 32). Note that while the *1970 Interpretative Comments* refer specifically to protection against "dismissal," the *1940 Statement* provides more broadly that when faculty "speak or write as citizens, they should be free from institutional *censorship or discipline*" (emphasis added). *1940 Statement*, *supra* note 48, at 3. It should also be noted that the *1940 Statement* explains that the "special position [of faculty] in the community imposes special obligations," and, therefore, that "they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution." *Id.* at 4. Although the *1970 Interpretative Comments* make clear that failure to observe these "special obligations" are not by themselves sufficient cause for discipline, these obligations nonetheless continue to exist as a hortatory matter. *See* ACADEMIC FREEDOM AND TENURE: THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, *supra* note 62, at 12.

[81] *Civility*, AAUP, https://perma.cc/RT32-YUYM.

[82] The AAUP's *1967 Joint Statement on Rights and Freedoms of Students* provides that students "are subject to the obligations that accrue to them by virtue" of their membership in the academic community. *See supra* note 57.

[83] Gay and lesbian students who hear this rant, or even hear about it, might reasonably doubt

College, however, does not claim that the use of such language rendered the speakers unfit to continue in their positions at the institution, but only that such expression violated the Lawn Policy.

For two reasons, New College's failure to show that the use of the impugned language "clearly demonstrates" that those found in violation of the Lawn Policy are "unfit[] for [their] position" does not mean that the sanctions imposed upon the students and teachers violate academic freedom. To begin with, New College is not seeking "dismissal"[84] or to impose any other form of discipline on the violators. Rather, it is vindicating its special mission of maintaining, promoting and inculcating civil discourse by imposing educationally-oriented sanctions for violations of the Lawn Policy. In addition, it is one thing to claim that academic freedom protects the academic freedom of a professor or a student to use profanity or insulting epithets when engaging in extramural speech on platforms or in settings that allow such expression. It quite another matter to insist that academic freedom requires institutions of higher learning to permit such uncivil expression on their campus.

Although the location of speech "is not per se determinative" of whether it qualifies as extramural expression,[85] this does not mean that whether the speech occurs on or off campus is irrelevant to determining whether the expression is protected by academic freedom. With a mission that specifically emphasizes civil discourse, New College has an especially weighty educational interest in maintaining basic civility norms throughout campus. As has been aptly observed, "[i]n theory, at least, a university is . . . an institution where individuals learn to express themselves in acceptable, civil terms [and] learn the self-restraint necessary to the functioning of a civilized society."[86] This interest is qualitatively different from, and

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whether an instructor who uses such language to refer to homosexuals will treat them fairly in classroom discussions or in grading their work. *See* ACADEMIC FREEDOM AND TENURE: THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, *supra* note 62, at 13 ("Of course, concerns raised by extramural speech *can* relate to that faculty member's fitness.").

[84] See *supra* note 80 and accompanying text.

[85] See *supra* text accompanying note 73.

[86] Papish v. Board of Curators, 410 U.S. 667, 672 (1973) (Burger, C.J., dissenting). Keith Whittington, a prominent advocate for rigorous protection of free speech on campus, aptly notes that "[d]emands for 'civility' and 'good order' can become tools to censor and suppress." WHITTINGTON, *supra* note 47, at 97. At the same time, he recognizes that civility and good order are "also important values in society in general and in a university in particular [where] the ultimate goal . . . is to foster an environment in which competing perspectives can be laid bare, hear and assessed."

quantitively greater than, imposing such norms on off-campus professorial or student extramural expression.[87]

I have been unable to find an AAUP statement that addresses the distinction between off-campus and on-campus extramural speech that I have drawn. There is, though, an AAUP Investigative Report involving profanity and insulting epithets used as part of on-campus extramural expression.[88] The Report, however, focuses on the egregious academic due process violations at issue in that case and does not decide whether termination of the instructor for using such expression violated academic freedom. Still, the case is worth discussing.

In August 2017, Courtney Lawton, a University of Nebraska graduate student with a part-time position as a lecturer in the English department, noticed a recruiting table set up by Turning Point USA, a controversial conservative organization "best known for the Professor Watchlist website, the stated mission of which is to expose and document college professors who discriminate against conservative students and advance leftist propaganda in the classroom."[89] The recruiting table was staffed by Kaitlyn Mullen, an University of Nebraska undergraduate. According to Lawton's own account of her protest of Turning Point USA's recruitment effort:

> I said 'Hi, Faschie Barbie' as I walked by [the recruiting table]. [Mullen] laughed. . . . I went up to my office to make a sign to protest Turning Point USA with my own materials. The sign read, 'Just say NO! to NEOFASCISTS.' I then went down to stand in front of the [recruiting] table with my sign. First I stood with my sign in front of the table, maybe a meter in front of the table. I started chanting 'No KKK! No Neo-

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Id. "Civility," he continues, "breeds dialog, mutual respect, and ultimately the productive exchange of ideas." *Id.* at 98.

[87] *Cf.* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2031, 2043–47 (2021) (in holding that public high school's discipline of a student for posting on Snapchat "Fuck school fuck softball fuck cheer fuck everything" violated the First Amendment, the Court explained that the strength of "the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community . . . is weakened considerably by the fact that [the student] spoke outside the school on her own time.").

[88] AAUP, ACADEMIC FREEDOM AND TENURE: UNIVERSITY OF NEBRASKA–LINCOLN (2018), https://perma.cc/2LGX-RV73.

[89] *Id.* at 2 (cleaned up).

> Fascist USA!' [Mullen] came out from behind the table and started taking my photograph and filming me as I chanted. I believe that she did this to intimidate me. I flipped her off.[90]

Later, Lawton called Mullen "a neofascist Becky" and shouted, "Fuck Charlie Kirk [the founder of Turning Point USA]."[91]

A few hours after the protest had ended, a conservative student news outlet posted the video taken by Mullen, which resulted in a "media storm," including threats to Lawton and calls for her dismissal.[92] Three days later, on August 28, the president of the University system tweeted that Lawton's behavior was "unprofessional" and "not in keeping with the standards of conduct."[93] On September 5, citing "security reasons," the executive vice-chancellor of the University notified Lawton that she was relieved, with pay, of her teaching duties, but assuring her that the suspension was not disciplinary.[94] The next day, the executive vice-chancellor sent Lawton a letter of reprimand.[95]

The letter stated that classroom instructors have "special responsibilities in regard to students on our campus" and that "your behavior toward [Mullen] was outside the bounds of what we expect for classroom instructors" in that "the way you expressed your views was disrespectful" and was "experienced by the student as 'silencing.'"[96] The letter concluded by stating that Lawton should "[c]onsider this a warning" but that "further incidents" that fail to "meet the duties of academic responsibility" will jeopardize "your employment relationship with the university."[97] Although Lawton had received an email from the campus police on the same day she was suspended from teaching that stated there were "no imminent safety

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[90] *Id.* (ellipses removed). The protest was joined by other faculty as well as students. An associate professor of English participating in the protest, but at a distance from both Lawton and Mullen, informed Lawton that Mullen had begun to cry and suggested to Lawton and a student participating in the demonstration that they "should 'tone down' the protest." *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 3.

[96] *Id.*

[97] *Id.*

concerns at this time,"[98] the suspension continued for the nine months remaining on her employment contract.[99]

Correctly characterizing this long-term suspension of Lawton's teaching duties as a dismissal,[100] the Report focused on the academic due process violation resulting from Lawton's dismissal without a hearing.[101] It also discussed the pretextual nature of the security reasons that the University offered for the dismissal[102] and the political pressure that it found influenced the University to dismiss Lawton.[103]

In addition to discussing these due process concerns, the Report noted that in protesting Turning Point USA's recruitment efforts, Lawton was engaging in "extramural speech" in her "capacity as a citizen" and that "the conclusion that the administration dismissed Ms. Lawton for reasons associated with the political content of her speech is difficult to avoid."[104] Accordingly, the Report concluded that the "administration's failure to provide Ms. Lawton with the requisite protections of academic due process, *in which the applicability of principles of academic responsibility could have been evaluated*, leaves this conclusion unrebutted."[105] As the italicized language conveys, the Report acknowledged that Lawton's protest may have been in conflict with her professional responsibility as a university instructor and therefore not protected by academic freedom.[106] It is also significant that unlike the

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[98] *Id*. at 2–3.

[99] *Id*. at 4.

[100] *Id*. at 7–8, 10.

[101] *Id*. at 6–7.

[102] *Id*.

[103] *Id*. at 9–10.

[104] *Id*. at 10.

[105] *Id*. (emphasis added).

[106] I agree with the Report that whether Lawton's protest was consistent with her professional responsibility as an instructor is an issue that should have been evaluated at a dismissal hearing. Specifically, the hearing could have determined whether by conducting her protest in such close proximity to the recruiting table, Lawton intentionally engaged in "suppression" of Mullen's expression as the University administration claimed. *Id*. at 9. It was this alleged "blocking of the table," rather than any of Lawton's expression, that the University administration claimed constituted professional misconduct. *Id.* It is worth noting though that some of the expression that Lawton directed to Mullen may have constituted "fighting words," expression unprotected by the First Amendment even in a public forum. See *supra* text accompanying note 16.

New College scenario, this case did not involve a university with a special emphasis on civility instantiated by a policy expressly prohibiting specific types of uncivil expression.

2. The Lawn Policy is consistent with AAUP policy

The AAUP is right, in my view, that widespread punishment of extramural expression would undermine the conditions for free inquiry essential to the creation and transmission of knowledge.[107] I also agree that the conditions for free inquiry would likely be impaired even if a university's "regime to monitor social media"[108] and other off-campus extramural expression were limited to breaches of civility such as the use of profanity and insulting epithets. New College, however, does not seek to impose civility norms on extramural expression generally. Rather, its prohibition is limited to expression occurring on its premises, a place where breaches of civility uniquely have the potential to undermine its distinct educational mission to maintain, promote and inculcate civil discourse.

Significantly, unlike viewpoint-based[109] campus hate speech codes that ban expression demeaning people on the basis of race, sex, religion or sexual orientation, the Lawn Policy is viewpoint-neutral.[110] Rather than targeting disfavored ideas, the Policy is a restriction on "offensiveness in *the mode of communication* . . . apart from any particular message or idea."[111] As such, if administered in an ideologically

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[107] For a contrary view, see ERIC BARENDT, ACADEMIC FREEDOM AND THE LAW 274 (2010).

[108] Whittington, *supra* note 72.

[109] See *supra* notes 12 and 23 and accompanying text.

[110] I agree with Chemerinsky and Gillman that hate speech codes "inescapably ban the expression of unpopular ideas and views," CHEMERINSKY & GELLMAN, *supra* note 4, at 110, and for this reason believe that, unlike provisions such as the Lawn Policy, hate speech codes risk impairing the conditions for the free inquiry essential to the university's core mission of the creation and transmission of knowledge. As discussed *supra* note 10, I share Trachtenberg's criticism of Chemerinsky and Gillman's position that the First Amendment rule against content discrimination applicable to traditional public forums should govern the open places at private institutions of higher learning. However, in accord with my longstanding opposition to campus hate speech bans, *see* James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 184 (1991), I part company with Trachtenberg regarding the propriety of campus hate speech codes even at private colleges and universities. *See* Trachtenberg, *supra* note 10, at 76–81.

[111] Iancu v. Brunetti, 139 S. Ct. 2294, 2310 (2019) (Sotomayor, J., concurring in part and dissenting in part) (emphasis added). *Iancu* involved a facial challenge to a provision of the Lanham Act prohibiting the registration of "immoral or scandalous" trademarks by the owner of a clothing

neutral way, the Policy will not significantly diminish "the practical scope of free inquiry"[112] essential to the creation and transmission of knowledge.

To be clear, I am not contending the Policy will result in *no* negative effect on freedom of expression. For one, as I have previously written, while restrictions on offensive modes of expression allow speakers "to convey 'something like . . . the propositional content' of the view [they want] to express,"[113] these restrictions "can sometimes substantially impair the precise idea [speakers] want to convey."[114]

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line using the trademark "FUCT" who was denied federal trademark registration. *Id.* at 2297 (brackets deleted). Justice Elena Kagan's majority opinion held that the challenged provision discriminated on the basis of viewpoint in violation of the First Amendment. *Id.* at 2297. In so holding, the Court rejected the Government's argument that the challenged provision could properly be construed to apply only to "marks that are 'vulgar'—meaning 'lewd,' 'sexually explicit or profane.'" *Id.* at 2301 (quoting Brief for Petitioner at 27, 30). The Court added, however, that it expressed no opinion on "a statute limited to lewd, sexually explicit, or profane marks." *Id.* at 9 n.*. Similarly, Justice Samuel Alito emphasized that the decision "does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas." *Id.* at 2303 (Alito, J., concurring). Alito, though, added that "[t]he particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea . . . ." Chief Justice Roberts wrote that, contrary to the majority's holding, the term "scandalous" could be properly be read narrowly "to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar or profane." *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part). So construed, the provision in Roberts' view comported with the First Amendment. *Id.* at 2303–04. Justice Breyer agreed the Court "should interpret the word 'scandalous' in the present statute to refer only to certain highly 'vulgar' or 'obscene' modes of expression." *Id.* at 2304 (Breyer, J., concurring in part and dissenting in part). Breyer found that with this construction the provision would not violate the First Amendment. *Id.* at 2306. Similarly, Justice Sotomayor thought that "[a]dopting a narrow construction of the word 'scandalous'—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality." *Id.* at 2313 (Sotomayor, J., concurring in part and dissenting in part). Refusing federal registration to obscene, vulgar or profane trademarks presents different free speech issues than banning profanity in the free speech area of a private university. Still, *Iancu* teaches that restrictions on offensive modes of speech such as bans on profanity are not nearly as inimical to free speech values as are viewpoint-based restrictions.

[112] See *supra* text accompanying note 72.

[113] James Weinstein, *Viewpoint Discrimination, Hate Speech, and Political Legitimacy*, 32 CONST. COMMENT. 715, 747–49 (2017) (quoting Jeremy Waldron, *Hate Speech and Political Legitimacy*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 329, 335 (Michael Herz & Peter Molnar eds., 2012)).

[114] *Id.* at 147 n.26. At the same time, I disagree with commentators who contend that regulation

There was, for instance, no close synonym not involving the use of profanity that the anti-war protestor in *Cohen v. California*[115] could have substituted for the terse statement "Fuck the Draft" emblazoned on his jacket.[116] Effects on the expression of ideas aside, as the Court in *Cohen* also noted, "words are often chosen as much for their emotive as their cognitive force."[117] In addition, an inherent problem with imposing civility norms on expression is that terms such as "profanity" and "insulting epithets" are difficult, if not impossible, to define with precision. As a result, there will inevitably be some "chilling effect" on expression not meant to be prohibited by the Lawn Policy. Uncertainty about what is forbidden thus might lead to self-censorship of expression not prohibited by the Policy, including the expression of offensive ideas.

Still, if fairly and reasonably enforced, the Lawn Policy will not likely significantly impair the conditions on campus necessary for the creation and transmission of knowledge. To begin with, the uncertainty as to precisely what language is banned, while significant, is not extensive. At one time, profanity, like fighting words and libel, was deemed to be a category of speech wholly without First Amendment protection.[118] Although *Cohen* extended First Amendment protection to the use of profanity in public discourse, including in traditional public forums, the use of profanity remains subject to restrictions on broadcast radio and television[119] as well as in government-managed settings such as K-12 public schools,[120]

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of the manner of expression inevitably interferes with a speaker's ability to convey ideas. *Id.*

[115] 403 U.S. 15 (1971).

[116] *Id.* at 16. As has been aptly observed, "profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message—without the profanity, the message is not quite the same." Iancu v. Brunetti, 139 S. Ct. 2294, 2315 (2019) (Sotomayor, J., concurring in part and dissenting in part).

[117] 403 U.S. at 26.

[118] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[119] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[120] Frazer v. Bethel Sch. Dist., 478 U.S. 675 (1986). Several lower court decisions have also found the use of profanity unprotected in the college classroom. *See, e.g.*, Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

courtrooms,[121] and the government workplace.[122] Moreover, non-governmental entities such as churches, private schools, and athletic and social clubs commonly prohibit profanity.[123] As a result, most people have a pretty good idea of what is prohibited by a sign that says "No Profanity."[124]

The ban on insulting epithets presents a somewhat greater vagueness problem. For one, in today's political environment, the social norm against using such epithets in public speech is weaker than the norm against using profanity in that context. One is much more likely to hear a politician refer to a political opponent with an insulting epithet than with profanity. While both Donald Trump and Hillary Clinton generally avoid using profanity in public, Trump is notorious for his use of insulting epithets[125] and Clinton infamously referred to some of Trump's supporters as "deplorables."[126] In addition, a particular term can be insulting or not, depending on the identity of the referent. For instance, calling the Campus Republicans "a bunch of racists and fascists" is an insult, but referring to a member of the American Nazi Party by these same terms is not. The Lawn Policy addresses these problems by specifying that to come within the prohibition on use of insulting epithets, the language used would have to constitute "fighting words" if it had been used to address the person referred to in a face-to-face encounter with that person. While the definition of "fighting words" is itself not free from uncertainty, it is a juridical category that has long operated in American free speech jurisprudence with tolerable certainty even when enforced by criminal sanctions. We are, after all,

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[121] *See, e.g.*, Steven Kreytak, *Judge Reduces Punishment for Lawyer Who Used Profanity in Court,* AUSTIN AM.-STATESMAN (Aug. 13, 2013), https://perma.cc/7XCL-P5FM.

[122] *See, e.g.*, Brenner v. Brown, 36 F.3d 18, 20 (7th Cir. 1994).

[123] *See, e.g.*, BRIDGEPORT COUNTRY CLUB RULES AND PROCEDURES, https://perma.cc/87VM-45VD ("Profanity, discourteous conduct and inappropriate behavior on the BCC Grounds will not be tolerated and may be subject to expulsion from the Club upon a majority vote of the Board of Directors.").

[124] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2311 (2019) (Sotomayor, J., concurring in part and dissenting in part) (noting that of all the categories of speech protecting public sensibility "'swear words'" are perhaps the most "'capable of specific articulation'" (quoting Leslie Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1417 (2001))).

[125] *List of Nicknames Used by Donald Trump*, WIKIPEDIA, https://perma.cc/TNT8-XWZZ.

[126] Amy Chozick, *Hillary Clinton Calls Many Trump Backers 'Deplorables,' and G.O.P. Pounces*, N.Y. TIMES (Sept. 10, 2016).

taught as early as kindergarten not to engage in "name calling" with our fellow students.

College and university instructors commonly maintain civility norms in the classroom, including bans on the use of profanity and insulting epithets. And though instructors typically do not attempt to define what is forbidden, or prior to the issue arising even announce a prohibition on the use of such language, most students have a fairly good idea of what language is inappropriate for the classroom. In my 35 years of teaching controversial and emotionally-charged constitutional law topics, including on occasion to undergraduates, I only rarely have had to reprove a student for a breach of the implicit classroom civility norms, such as for using profanity to refer to the Supreme Court or one of its decision, or for using an insulting epithet to refer to a Justice or a politician. This suggests that with the advantage of definitions and guidelines, New College students should have a tolerably clear idea of what is prohibited by the ban on profanity and insulting epithets.

The unstructured format of a campus free speech area, it is true, means that imposition of civility norms in such areas has a greater potential to interfere with the atmosphere of free inquiry essential to the creation and transmission of knowledge than do imposition of civility norms on the structured discussion typical of the classroom. This difference requires that, unlike in the classroom, the limitation on uncivil speech in free speech areas be expressly defined. It does not mean, however, that even with definitions of prohibited language and accompanying guidelines, imperfect though they may be, imposition of minimal civility norms in free speech areas will inevitably undermine the conditions for free inquiry on campus essential to the creation and transmission of knowledge.

Unlike the "chilling effect" of criminal sanctions[127] or even civil penalties,[128] the non-punitive, educationally-oriented nature of the Lawn Policy will minimize self-censorship of the exposition of ideas.[129] Each alleged violation by a student triggers

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[127] *See* Reno v. ACLU, 521 U.S. 844, 871–72 (1997) (noting that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images" and that the "increased deterrent effect of vague regulations" poses "greater First Amendment concerns than those implicated by the civil regulation.").

[128] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998) (stating that "'prohibitory and stigmatizing effect' of a "'quasi-criminal' ordinance [is] relevant to the vagueness analysis" (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982))).

[129] *See Nat'l Endowment for the Arts*, 524 U.S. at 589 (in rejecting the claim that a federal law

a counselling session on the importance of civil discourse served by the Policy, with the only sanctions under the Policy limited to a loss of Lawn Privileges for a period of time for repeat offenses.[130] To adapt Justice Breyer's apt observation about the minimal First Amendment harm worked by a provision denying federal registration to "vulgar or obscene" trademarks, the Lawn Policy "risks some harm" to freedom of expression "but not very much."[131]

A much greater threat than self-censorship to free expression, and hence to academic freedom, posed by the uncertainty of the Lawn Policy is ideologically-biased enforcement. As John Stuart Mill long ago recognized, uncivil language challenging the status quo will likely be considered more offensive than the same uncouth expression used to support those in power.[132] Given the sharp leftward tilt in the ideological makeup of faculty, students and administrators in higher education today,[133] there is reason for concern that prohibition on the use of profanity and insulting epithets might be selectively enforced against those expressing conservative views.[134] Despite its non-punitive, educationally-focused sanctions, enforcement of the Policy in an ideologically discriminatory manner might create, or at

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requiring the National Endowment of the Arts to take "decency and respect" into consideration when awarding grants is unconstitutionality vague, the Court notes that "[t]he terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns.").

[130] The only disciplinary sanction that can be imposed under the Policy is for speaking on the Lawn after losing Lawn privileges. Significantly, this sanction is content neutral in that it is applicable to any speech on the Lawn for someone who has lost Lawn privileges. A policy with more draconian sanctions, such as suspension from college for a first offense, would be more likely to interfere with the expression of ideas and thus argaubly might impair a campus environment assuring the free inquiry essential to the creation and dissemination of knowledge.

[131] Iancu v. Brunetti, 139 S. Ct. 2294, 2307 (2019) (Breyer, J., concurring in part and dissenting in part).

[132] JOHN STUART MILL, ON LIBERTY 51–52 (Batoche Books 2001) (1859).

[133] Samuel J. Abrams & Amna Khalid, *Are Colleges and Universities Too Liberal? What the Research Says About the Political Composition of Campuses and Campus Climate*, AEI (Oct. 21, 2020), https://perma.cc/2ZST-6WQU.

[134] Supporting this concern is a recent study by FIRE that analyzed "targeting" of scholars in higher education during 2021. *See* Komi German & Sean Stevens, *Scholars Under Fire: 2021 Year in Review*, FIRE (2021), https://perma.cc/YVM6-6MQC. With respect to public institutions "targeting" was defined as "efforts to investigate, penalize, or otherwise professionally sanction a scholar for engaging in constitutionally protected forms of speech." With respect to private institutions,

least contribute to,[135] a campus atmosphere inimical to the free inquiry essential to the creation and dissemination of knowledge.

The possibility of ideologically-biased enforcement, though real, is nonetheless insufficient warrant to conclude that such selective enforcement will inevitably occur, and if it does, to an extent that compromises the College's core mission of the creation and transmission of knowledge. Before the Policy is condemned as having such a baneful effect on free inquiry on campus, the New College administration—and administrators at real-life private institutions of higher learning who want to impose similar policies in campus free speech areas—should be given a chance to enforce the Policy in a reasonable, ideologically even-handed way.

CONCLUSION

Private colleges and universities that emphasize civility have an important educational interest in inculcating civility norms throughout campus. If administered in an educationally-oriented, ideologically-neutral manner, policies requiring speakers to observe minimal civility norms in campus open space, including free speech areas, do not violate academic freedom. I want to make clear, though, that this conclusion does not mean that I believe that enforcing civility in these areas is the preferable policy for all, or even most, private institutions of higher learning.[136]

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targeting included cases in which "the school's actions violate its own explicit promises" regarding free speech. The study found that "two-thirds of targeting incidents were initiated by individuals or groups to the left of the scholar (76 incidents; 68%), whereas less than one-third (33 incidents; 30%) came from the right of the scholar." *Id*. In expressing this concern about the possibility of ideologically-biased enforcement, I am in no way suggesting that those on the left are more prone than those on the right to engage in ideological discrimination. Rather, consistent with Mill's observations, it is unfortunately all too common, particularly in these times of political polarization and tribalism, to more readily condemn as transgressive expression with which one profoundly disagrees than expression with which one is in sympathy.

[135] Such ideologically-biased enforcement might have a particularly detrimental effect on the creation and transmission of knowledge if conditions conducive for critical inquiry on campus were already compromised by censorious incidents.

[136] First Amendment constraints aside, I have at my own institution, Arizona State University, consistently supported as matter of preferable free speech and academic policy application of the First Amendment rule against content discrimination, including its prohibition on the imposition of civility norms, in campus open spaces such as sidewalks and in Cady Mall, the large free speech area on ASU's main campus. I take the same position with regard to free speech at large private urban universities. This would also be my inclination if I were on the faculty at most small private colleges. If, however, such an institution had a special mission to maintain and inculcate civility, I

Just as colleges or universities with a strong emphasis on civility might want to adopt something like the Lawn Policy, institutions dedicated to maximizing free speech and inquiry might want to avoid even the minimal inhibition of expression of ideas that would result from such a policy.

Expression of ideas aside, some institutions of higher learning might want to provide places for emotional outlet that vituperative expression provides.[137] Others might not want to expend the resources required to enforce civility norms in its free speech areas. Particularly for large, open, urban universities, the administrative time and energy required to enforce these norms, and to do so in an even-handed way, would be considerable. But even a small, relatively isolated college might prefer the no-holds-barred approach to expression in campus open areas for which Chemerinsky and Gillman advocate.

My disagreement with these eminent scholars is not with the overall theme of their excellent book that free inquiry is essential to the creation and transmission of knowledge and to training students in habits of critical inquiry.[138] Nor is it with their warning that such open inquiry is today in peril at many American colleges and universities.[139] Rather, my dissent is to their insistence that to comport with academic freedom, *all* institutions of higher learning, be they public or private, must adopt the First Amendment rule against content regulation applicable to public parks and streets, including the suspension of even the most minimal of civility norms.[140]

One of the great strengths of American higher education is the diversity of educational experiences available to students with respect to the size and setting of institutions, their curricular emphasis, and even the option of religious affiliation.[141] "Part of the wonder of higher education in America" is the existence, for

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would be open to imposition of minimal, viewpoint-neutral civility norms such as provided the Lawn Policy, so long as I had confidence that the prohibition would be applied in a reasonable, ideologically-neutral way.

[137] *See* Cohen v. California, 403 U.S. 15, 26 (1971).

[138] CHEMERINSKY & GILLMAN, *supra* note 4, at 65–81.

[139] *Id.* at 1–21.

[140] *Id.* at 20, 113.

[141] *See, e.g.*, MICHAEL S. HARRIS, DEFINING INSTITUTIONAL DIVERSITY 1, 3 (2009) ("A range of institutional types, from community colleges to liberal arts colleges, research universities, historically Black colleges, and proprietary colleges, exist within the U.S. system. . . . Institutional diversity

instance, of "important differences between Caltech and Sarah Lawrence, between Swarthmore College and Liberty University, between Princeton University and the University of Texas, between Spelman College and the University of West Florida."[142] This beneficial diversity of educational experiences will best be served if, along with schools that value and encourage maximally robust expression of ideas, there are also campuses where civility is emphasized and inculcated. As Professor Ben Trachtenberg aptly observes in similarly rejecting Chemerinsky and Gillman's procrustean call for applying general First Amendment standards to private universities: "Different universities will draw lines differently, and in a big country with thousands of colleges, we should not fear diversity of campus [free speech] policy. Let students have choices."[143]

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represents one of the great and unique features of the American higher education system and serves as an influential foundation of the system's historical success."); Christopher C. Morphew, *Conceptualizing Change in the Institutional Diversity of U.S. Colleges and Universities*, 80 J. HIGHER EDUC. 243, 243 (2009) ("Institutional diversity, or the existence of many different kinds of colleges and universities within a specific higher education system, has long been recognized as a positive and unique attribute of the U.S. higher education system."); *The U.S. Educational System*, EDUCATIONUSA, https://perma.cc/5ECK-YEMA ("One of the most attractive features of the U.S. higher education system is the flexibility it provides through the number and diversity of institution types it encompasses. This diversity offers students options to specialize in a variety of academic disciplines and even gain employment training.").

[142] WHITTINGTON, *supra* note 47, at 13.

[143] Trachtenberg, *supra* note 10, at 85. *Cf.* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998):

> When considering the legitimacy of legislative curbs on private communal diversity, enacted in the name of a completely uninhibited, free marketplace of expression as the exclusive model for all speech relationships, we would do well to heed the general remarks of Derek Bok: "Regulation can also harm the educational process by imposing uniform rules that chip away at the diversity so important to our system of higher learning. Progress in education depends on constant experimentation carried on through the innumerable trials and errors of many separate colleges and universities." *Id.* at 1631 (quoting DEREK BOK, BEYOND THE IVORY TOWER 42 (1982) (quotation marks added)).