MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 44 | Issue 2 Article 6

2018

The Question of Speech on Private Campuses and the Answer Nobody Wants to Hear

Steven P. Aggergaard
Mitchell Hamline School of Law, Steve.Aggergaard@mitchellhamline.edu

THE QUESTION OF SPEECH ON PRIVATE CAMPUSES AND THE ANSWER NOBODY WANTS TO HEAR

Steven P. Aggergaard†

I. INTRODUCTION

This article considers whether the law can or should protect speech on private college and university campuses. The easy answer is "yes." After all, both public and private institutions are places of learning and inquiry. Therefore, at first, it might make sense for First Amendment-type protections to apply across the board—if not under the United States Constitution, then under state constitutions,

† Assistant Professor of Legal Writing, Mitchell Hamline School of Law; J.D., William Mitchell College of Law; M.S.J., Northwestern University; B.A., Augsburg College. Before joining the law school, the author was a litigation attorney. Before becoming a lawyer, he was a newspaper journalist. The opinions are the author's own.

common law, or statutes. Furthermore, the students who helped the Free Speech Movement spread nationwide in the 1960s and 1970s did not concern themselves much with legal distinctions between public and private,[1] so why should the law?

Using the law to protect speech on private college and university campuses becomes more difficult when considering what it takes to actually litigate a speech claim against a private school. As this article explains, there are several practical barriers to doing so, ranging from the settled status of the state action doctrine[2] to the public policies that courts apply to bar claims that allege "educational malpractice."[3] In addition, some who advocate for First Amendment-type protections for private campuses may not have adequately considered the full scope of private educators. Today, private educators include not only Harvard, Yale, and their regional equivalents, but also for-profit online universities, which provide higher education to a disproportionate number of women and students of color,[4] and sectarian schools, which are constitutionally permitted to regulate speech to fit their interpretations of religious doctrine.[5] There has been little analysis of how speech law would apply, or not apply, to these schools. This article aims to provide such analysis.

Minnesota provides a good analytical backdrop to this issue because it houses one of the nation's largest for-profit online universities,[6] and Minnesota has a wide array of private schools with varying sectarian ties.[7] Minnesota is also where *R.A.V. v. City of St. Paul* arose,[8] which prevents state actors—including those at public

1. *See infra* Part III.A.

2. *Id.*

3. *See* Ross v. Creighton Univ., 957 F.2d 410, 414–16 (7th Cir. 1992).

4. *See infra* Part II.C.

5. Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 145 (2010) ("Private colleges . . . are not state actors, and thus, the First Amendment does not stop them from enacting self-restrictive policies.").

6. *See* Sarah Butrymowicz & Sarah Garland, *For-Profit Universities: By the Numbers*, HECHINGER REPORT (June 2, 2011), http://hechingerreport.org/for-profit-universities-by-the-numbers/; *Contact Us*, CAPELLA UNIVERSITY, http://www.capellaeducation.com/contact/default.aspx (last visited Mar. 20, 2018) (stating Capella University is located in Minnesota).

7. *Minnesota's Private Colleges*, MINNESOTA PRIVATE COLLEGE COUNCIL, https://www.mnprivatecolleges.org/our-colleges (last visited Mar. 20, 2018) (describing all of the private colleges in Minnesota).

8. 505 U.S. 377 (1992).

universities—from enforcing policies that discriminate against viewpoints.[9] Before jerking a knee toward a conclusion that *R.A.V.*'s principles should be extended to regulate private actors at private schools, it is worth considering the viewpoint of Robert A. Viktora (R.A.V.) in light of recent events.

In 1990, R.A.V., age seventeen, burned a cross on the lawn of an African American family in St. Paul's Dayton's Bluff neighborhood.[10] Twenty-seven years later, college-aged men in Charlottesville, Virginia delivered a similar viewpoint—this time with burning torches—on the University of Virginia campus.[11] Because the protest took place on public property, like the City of St. Paul, the University stood virtually powerless to stop it.[12] A private university, whether nonprofit or not, would have been in a different legal position had the white supremacists' rally happened there.[13]

It is a sizable stretch to say anything good came out of Charlottesville, but the hateful display did provide opportunity to consider the question of what role, if any, First Amendment-type speech law can and should play on private property, such as private college and university campuses. Today, at least, the answer to that question might be one that free-speech advocates would rather not hear.

With Charlottesville on the minds of so many, this article begins by discussing the current status of campus speech.[14] It then recounts the state and federal cases and statutes that brought campus speech jurisprudence to its present state.[15] Next, it explores barriers that disallow those cases and statutes from applying to private campus speech.[16] This article concludes with thoughts on how education

9. *Id.* at 378.

10. EDWARD J. CLEARY, BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. CASE 3 (1994).

11. 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.

12. Jack Stripling, *Report Faults U. of Virginia on Response to White-Supremacist Rally*, CHRONICLE HIGHER EDUC. (Sept. 11, 2017), http://www.chronicle.com/article/Report-Faults-U-of-Virginia/241147 ("UVa was predisposed to defend constitutionally protected free speech, as long as violence did not break out.").

13. *See infra* Part III.A.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

about the use of free speech on private campuses is preferable to enacting or enforcing laws regulating the same.[17]

II. WHERE WE ARE: THE STATUS OF CAMPUS SPEECH

A. Current Law and Current Concerns

Although frequently misunderstood, the current law is that the First Amendment's Speech Clause (coupled with the Fourteenth Amendment and 42 U.S.C. § 1983) restricts only the actions of state actors at public colleges and universities.[18] Federal law does not restrain administrators at private universities from infringing on speech any more than it restrains a private employer or homeowner from doing so.[19]

There have been various proposals for filling the First Amendment gap between public and private institutions of higher education. The proposals include treating administrators at private institutions as state actors,[20] using state constitutional or common law to enforce speech-protective provisions in student codes,[21] and enacting statutes to legislatively impose First Amendment principles on private campuses.[22] These ideas are intertwined with the real stories of the students who helped the Free Speech Movement spread to campuses nationwide. Some of that story is told in Part III of this article, which describes the current state of speech on college and university campuses.[23]

The current state of free speech on college and university campuses is not particularly good, and what happened at the University of Virginia in August 2017 helps explain why. It is hard to forget the pictures—those of the steel-jawed men and women who felt empowered to march with torches and chant hideous slogans

17. *See infra* Part V.

18. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS xi (Yale Univ. Press 2017).

19. *See* Erwin Chemerinsky, *More Speech Is Better*, 45 UCLA L. REV. 1635, 1639 (1998).

20. *See, e.g.*, Powe v. Mills, 407 F.2d 73, 79 (2d Cir. 1968).

21. *See, e.g.*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

22. *See, e.g.*, Collegiate Speech Protection Act of 1991, H.R. 1380, 102d Cong. (1991).

23. *See infra* Part III.

such as "Jews will not replace us."[24] For some, it was the latest confirmation of deep-seated hate.[25] For almost everyone else, it was a wake-up call. When describing the torch-bearers, a writer in *GQ Magazine* practically described the stereotype of his audience: "the innocuous polo shirts; the trendy haircuts; the wireframe glasses."[26]

The march should not have been a surprise. Richard Spencer, the head of the white nationalist National Policy Institute, targeted colleges and universities the previous November.[27] Charlottesville "only punctuated a dramatic spike in white supremacist activity on American campuses that has forced a reckoning among competing values: safety, free speech and a commitment to tolerance and diversity."[28] There were fears it would spread; as the 2017–2018 academic year began, administrators at public institutions faced the reality that they had "few legal options in preventing offensive lectures from taking place, especially if a student group is affiliated with the event."[29] A new generation was learning about the power of the First Amendment, but they were also learning about its limits. As a writer in *Teen Vogue* explained, the hands of administrators at public universities "are largely tied, legally speaking, when it comes to First Amendment rights" because "they're legally required to allow for the contentious discourse at the very least."[30]

24. Hawes Spencer & Sheryl Gay Stolbergaug, *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.

25. *See* Chris Gayomali, *Charlottesville and the Face of White Supremacy*, GQ MAG. (Aug. 13, 2017), https://www.gq.com/story/face-of-white-supremacy (describing white supremacy as an "enmeshed power" existing since America's history of slavery).

26. *Id.* (describing how the regular attire and indiscreet disposition of the University of Virginia white supremacists indicates that white supremacists can be anywhere and blend in with the rest of society).

27. Scott Jaschik, *White Power Leader's New Target: Colleges*, INSIDE HIGHER EDUC. (Nov. 28, 2016), https://www.insidehighered.com/news/2016/11/28/white-power-leaders-next-target-college-campuses.

28. Emily Baumgaertner, *After Charlottesville, Colleges Vow to Do Something. But What?*, N.Y. TIMES (Sept. 8, 2017), https://www.nytimes.com/2017/09/08/us/politics/colleges-racism-charlottesville.html.

29. Dana Goldstein, *After Charlottesville Violence, Colleges Brace for More Clashes*, N.Y. TIMES (Aug. 16, 2017), https://www.nytimes.com/2017/08/16/us/after-charlottesville-violence-colleges-brace-for-more-clashes.html.

30. Rachel Jacoby Zoldan, *The Charlottesville Tragedy and White Supremacy: How Colleges and Universities Have Responded*, TEEN VOGUE (Aug. 15, 2017, 4:41 PM),

The same rules do not apply at private colleges and universities, a distinction that a few websites targeting students, such as the Student Press Law Center's website, have tried to explain.[31] But by and large, public institutions have dominated the conversation about free speech on campus.[32] When private campuses are considered, they typically are seen through a public-school lens.[33]

Two books, both titled *Free Speech on Campus* and published as the 2017–2018 school year began, reflect and reinforce the narrative.[34] The first book, by Sigal R. Ben-Porath of the University of Pennsylvania's Graduate School of Education, examined campus speech from an educator's perspective.[35] The second book, published eight weeks later, was co-authored by law professors Erwin Chemerinsky and Howard Gillman.[36] The authors of the second book disclosed in the preface they would not treat private schools differently, even though the law does.[37]

Consistent with the idea the law "should" be the same, students on private and public campuses have voiced viewpoints on topics

http://www.teenvogue.com/story/university-presidents-respond-charlottesville-racism.

31. Kaitlin DeWulf, *A Promise Unkept*, STUDENT PRESS L. CTR. (Dec. 16, 2016, 2:14 PM), http://www.splc.org/article/2016/12/a-promise-unkept.

32. *See, e.g.*, *Free Speech and Public Schools*, CTR. FOR PUB. EDUC. (Apr. 5, 2006), http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Free-speech-and-public-schools.html (discussing freedom of speech issues at public schools at length, then tritely noting that "[p]rivate and parochial schools, however, are not similarly restricted by ideas of individual rights, free speech, and other liberties").

33. Cory A. DeCresenza, Note, *Rethinking the Effect of Public Funding on the State-Actor Status of Private Schools in First Amendment Freedom of Speech Actions*, 59 SYRACUSE L. REV. 471, 473 (2009) ("[S]ome authors have even written that differences between post-secondary public and private schools are fading in the eyes of the public at large."); 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, 1540–41 (1998) (discussing the confusion in First Amendment rights in terms of private and public organizations).

34. *See* SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (Univ. of Penn. Press 2017); CHEMERINSKY & GILLMAN, *supra* note 18.

35. *See* BEN-PORATH, *supra* note 34.

36. *See* CHEMERINSKY & GILLMAN, *supra* note 18.

37. *Id.* at xi ("Throughout this book, we rely on First Amendment law in describing what public universities can and can't do. But we draw no distinction between public and private schools when arguing for what they *should* and *shouldn't* do.").

such as race, gender, GLBT rights, and sexual assault.[38] Many efforts in recent years have been positive, peaceful, and influential. For example, private liberal-arts schools in the Twin Cities have banded together to organize "Take Back the Night" rallies to advocate on issues surrounding rape and other sexual violence.[39] The Minnesota Public Interest Research Group operates on private campuses and advocates for many causes as well.[40]

Unfortunately, the disruptive and destructive efforts receive more attention than those carried out peacefully. For example, in May 2017, the *Washington Post* wrote about how students disrupted a forum at St. Olaf College in Northfield, Minnesota, that had been called to discuss a racist note found on a student's windshield.[41] Earlier that academic year, the *Star Tribune* reported that University of Minnesota students received a "lesson in freedom of speech" when a Minnesota College Republicans' mural was defaced with the words "Build the Wall" and when a month later, the Muslim Students Association's mural was defaced with "ISIS."[42] The previous November, when controversial law professor Moshe Halbertal was shouted down during a speech at the university's law school, a protester who was removed from the event learned the limits of the First Amendment, saying: "I was just chanting, you know. And, you know, in America, we have freedom of speech, and you know, you'd

38. *See, e.g.*, *Free Speech at American Universities Is Under Threat*, ECONOMIST (Oct. 12, 2017), https://www.economist.com/news/united-states/21730156-fears-pandemic-snowflakery-are-overwrought-free-speech-american-universities (discussing various opinions on private and public university campuses).

39. *Take Back the Night a Success!*, MINN. WOMEN'S CONSORTIUM (Oct. 30, 2012), http://www.mnwomen.org/take-bac.

40. MINNESOTA PUBLIC INTEREST RESEARCH GROUP, http://mpirg.org (last visited March 20, 2018).

41. Peter Holley & Lindsey Bever, *A Racist Note Sparked Protests at a Minnesota College. The School Now Says the Message Was Fake.*, WASH. POST (May 10, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/10/a-racist-note-sparked-protests-at-a-minnesota-college-the-school-now-says-the-message-was-fake The note ended up being a hoax. *Id.*

42. Liz Sawyer, *Graffiti Defaces University of Minnesota's Muslim Student Association Sign*, STAR TRIB. (Nov. 3, 2016, 4:19 PM), http://www.startribune.com/graffiti-defaces-u-s-muslim-student-association-sign/399897391; Liz Sawyer, *Vandalism of Pro-Trump Mural Offers Free-Speech Lesson at University of Minnesota*, STAR TRIB. (Oct. 4, 2016, 6:26 PM), http://www.startribune.com/vandalism-of-pro-trump-mural-offers-free-speech-lesson-at-university-of-minnesota/395902471.

think that chanting would be allowed under, you know, the constitution, but apparently not."[43]

"Definitely not" is the appropriate response. Shout-downs are not protected speech, and vandalizing bridge murals is not free speech either.[44] Unfortunately, the incidents in Minnesota were anything but isolated. During the 2016–2017 school year, disrupters heckled speakers at large public universities in Wisconsin, California, and Michigan and private universities, including Georgetown, Columbia, and Northwestern.[45] Speakers on racial issues were shouted down at Middlebury College in Vermont and Claremont McKenna College near Los Angeles.[46] The Middlebury incident, which stemmed from a speech by author Charles Murray,[47] epitomized the state of speech on private campuses. "Conservatives said that the students were intolerant, had engaged in mob mentality and were quashing free speech, while those on the left maintained that the speaker was racist and hateful and had no place on their campus."[48] Hundreds of alumni signed a letter protesting Murray's presence, while the college's president apologized to Murray and accused the disruptive students of violating college policy.[49]

Such incidents prompted Stanley Kurtz, a conservative commentator, to proclaim 2016–2017 the "Year of the

43. Michael McIntee, *Israeli Ethicist Protested at University of Minnesota* at 2:55–3:05, YOUTUBE (Nov. 5, 2015), https://www.youtube.com/watch?v=qav_7eXn5_Y; Maura Lerner, *Protesters Disrupt Israeli Professor's Lecture at University of Minnesota*, STAR TRIB. (Nov. 4, 2015, 11:15 PM), http://www.startribune.com/protesters-disrupt-israeli-professor-s-lecture-at-university-of-minnesota/340437581.

44. *See* Sawyer, *Vandalism of Pro-Trump Mural Offers Free-Speech Lesson at University of Minnesota*, *supra* note 42.

45. Stanley Kurtz, *Year of the Shout-Down: It Was Worse Than You Think*, NAT'L REV. (May 31, 2017, 9:48 AM), http://www.nationalreview.com/corner/448132/year-shout-down-worse-you-think-campus-free-speech (detailing different shout-down events at universities across the country and the possible ramifications of these shout-downs).

46. Howard Blume, *Protesters Disrupt Talk by Pro-Police Author, Sparking Free-Speech Debate at Claremont McKenna College*, L.A. TIMES (Apr. 9, 2017, 10:20 AM), http://www.latimes.com/local/lanow/la-me-ln-macdonald-claremont-speech-disrupted-20170408-story.html; Katharine Q. Seelye, *Protesters Disrupt Speech by "Bell Curve" Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html.

47. Seelye, *supra* note 46.

48. *Id.*

49. *Id.*

Shout-Down."[50] Writing in *The National Review*, Kurtz described "increasing violence by a campus Left that has learned administrators will do nothing to stop it" and criticized administrators for "locking out conservatives and other controversial conservative speakers."[51] Receiving less attention was the backlash against speakers such as Keeanga-Yamahtta Taylor, an assistant professor of African American studies at Princeton University, who "received emails that promised [she] would be lynched, shot and raped" after Fox News aired a thirty-second segment of her criticizing Donald Trump.[52] As she wrote in *The New York Times*, "[w]hat is shocking is that while the right-wing media is wringing its hands about suppressive leftists, openly racist and fascist-sympathizing organizations are recruiting young white people on campuses."[53]

B. Special Rules for Sectarian Schools

Speech advocates across the political spectrum have looked to the law to protect speech on private campuses,[54] but recently, conservatives such as Kurtz have taken the lead. He co-authored model legislation that served as a template for the Wisconsin Campus Free Speech Act, introduced in the spring of 2017 to mandate punishment for students who prevent speech from occurring at the state's public universities.[55] At this writing, at least nine other states have enacted or considered similar legislation.[56]

50. Kurtz, *supra* note 45.

51. *Id.*

52. Keeanga-Yamahtta Taylor, *The "Free Speech" Hypocrisy of Right-Wing Media*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/opinion/the-free-speech-hypocrisy-of-right-wing-media.html.

53. *Id.*

54. Cliff Maloney, Jr., *Colleges Have No Right to Limit Students' Free Speech*, TIME (Oct. 13, 2016), http://time.com/4530197/college-free-speech-zone/ (detailing the national Fight for Free Speech campaign to reform unconstitutional speech codes and abolish free speech zones on college campuses).

55. A.B. 299, 2017 Assemb., 103d Sess. (Wis. 2017); Stanley Kurtz, *Jesse Kremer's Wisconsin Campus Free Speech Act*, NAT'L REV. (May 2, 2017, 10:02 AM), http://www.nationalreview.com/corner/447260/jesse-kremers-wisconsin-campus-free-speech-act-goldwater-proposal.

56. Lauren Camera, *Campus Free Speech Laws Ignite the Country*, U.S. NEWS & WORLD REP. (July 31, 2017, 5:40 PM), https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country (noting that North Carolina, Colorado, Tennessee, Utah, and Virginia have such legislation and

A California legislator took the model legislation a step further by proposing the California Campus Free Speech Act, which would condition "some (but not all) state aid to private colleges and universities on compliance with the Act ([with] an exemption for private religious colleges)."[57] The exemption reflects that under the First Amendment, schools with strong religious ties "can exercise religious freedom on an institutional basis, in the form of self-governance as well as in the ability to obtain exemptions from laws they and their members would otherwise have to obey."[58] Those laws would include the laws of free speech and free association.[59]

For several years, speech about GLBT issues has been a particular target at some, but certainly not all, private colleges and universities. A 2011 story in the *New York Times* chronicled the suspension of a student at North Central University in Minneapolis for distributing flyers that provided information about a gay-support site, efforts by Harding University in Arkansas to block access to an online magazine "featuring personal accounts of the travails of gay students," and Baylor University's refusal to recognize a club opposed to homophobia.[60] As a Baylor spokesperson told the *Times*, "Baylor expects students not to participate in advocacy groups promoting an understanding of sexuality that is contrary to biblical teaching."[61]

More recently, a 2016 article in *The Nation* magazine titled *The Schools Where Free Speech Goes to Die* singled out Baylor University, the University of Dayton, and Notre Dame University for not recognizing "atheist or humanist student organizations"; Liberty University for not recognizing the student Democratic club; and the University of St. Thomas in St. Paul for asking a visiting speaker to sign an agreement to not present or perform "material that is derogatory of the Catholic Church."[62]

California, Illinois, Michigan, Texas, and Wisconsin are considering similar legislative proposals).

57. Stanley Kurtz, *Melissa Melendez's California Campus Free Speech Act*, NAT'L REV. (May 2, 2017, 1:16 PM), http://www.nationalreview.com/corner/447268/melissa-melendezs-california-campus-free-speech-act-goldwater-proposal.

58. Elizabeth J. Hubertz, *Loving the Sinner: Evangelical Colleges and their LGB Students*, 35 QUINNIPIAC L. REV. 147, 160 (2017); *see also infra* Part III.C.

59. *Id.*

60. Erik Eckholm, *Even on Religious Campuses, Students Fight for Gay Identity*, N.Y. TIMES (Apr. 18, 2011), http://www.nytimes.com/2011/04/19/us/19gays.html.

61. *Id.*

62. Katha Pollitt, *The Schools Where Free Speech Goes to Die*, NATION (Jan. 21, 2016),

But the core concern has remained GLBT issues—specifically Title IX, the federal law banning discrimination "on the basis of sex" at colleges and universities that receive federal financial assistance.[63] Some schools fear "their sexual conduct codes might be threatened if Title IX's anti-discrimination provisions were read to include sexual orientation as well as sex and gender identity."[64] "Prior to the Human Rights Campaign's release of a report in December 2015, relatively few knew that religious exemptions to Title IX even existed."[65] The United States Department of Education is "highly deferential to the educational institutions claiming religious exemptions," and the merits have not been litigated.[66] "Virtually no scholarship exists on the subject, even within the abundant and well-developed recent theoretical work on broader questions of religious exemption."[67]

Concerns about the exemptions caused forty Democratic U.S. Senators, led by Democrat Al Franken of Minnesota, to urge the U.S. Department of Education to be more transparent.[68] The Department did so on a website that, as of this writing, contained a "Religious Exemptions Index" with approximately 120 requests between 2009 and 2016.[69] It was impossible to discern how many exemptions the Department has granted because the website provided data only through December 2016 and was identified as "Archived Information," not updated since February 2017.[70]

The advocacy group Campus Pride captured some of the data and incorporated it into a database that, as of September 2017,

https://www.thenation.com/article/the-schools-where-free-speech-goes-to-die/.

63. *Id.*; 20 U.S.C. § 1681(a) (2012).

64. Hubertz, *supra* note 58, at 149.

65. Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 327 (2016).

66. *Id.* at 327–28.

67. *Id.*

68. Letter from Senator Al Franken et al. to John King, Secretary, U.S. Department of Education (May 2, 2016), https://www.franken.senate.gov/files/documents/160502SenateTitleIXLetter.pdf.

69. *Archived Religious Exemptions Index—2009-2016*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html (last visited Mar. 20, 2018).

70. *Id.* After a congressman called for the data to be removed from the internet, its continued availability became uncertain. *See* Letter from Senator James Lankford, Republican of Oklahoma, to Donald Trump, U.S. President (Apr. 13, 2017), https://www.lankford.senate.gov/imo/media/doc/4.13.17%20Religious%20Freedom%20Letter%20to%20POTUS.pdf.

included documentation from several dozen schools that received exemptions.[71] According to the website, Minnesota-based Crown College and University of Northwestern requested and received Title IX exemptions.[72] In their letters to the Department of Education, Crown College requested "freedom to respond to transgender individuals in accordance with its theologically-grounded convictions."[73] Similarly, the University of Northwestern stated the school does not "affirm or support transgender identity or expression" and that "any individual who violates campus standards for biblical living is subject to discipline, including expulsion."[74]

Some school codes restrain speech more explicitly, including when it occurs off-campus—particularly on GLBT issues. In her recent article, *Loving the Sinner: Evangelical Colleges and Their LGB Students*, Elizabeth J. Hubertz singled out provisions at sectarian schools that prohibit "defending or advocating a homosexual lifestyle," "posting statements on social media promoting and celebrating homosexuality, adultery, and fornication etc.," and participating in groups "that promote understandings of sexuality that are contrary to these biblical teachings."[75] Potentially, "a heterosexual student could be guilty of a conduct violation if he or she joined Campus Pride."[76] Although many such provisions would be unconstitutional if enacted at public universities, Hubertz observed that "[p]rivate religious colleges are for the most part free to place whatever restrictions on student speech they deem appropriate to their mission."[77]

Just because restrictions on speech are unconstitutional for public universities does not mean such universities have not tried to regulate speech. Since 2005, the Foundation for Individual Rights in

71. *Shame List: The Absolute Worst Campuses for LGBTQ Youth*, CAMPUS PRIDE, https://www.campuspride.org/shamelist (last visited Mar. 20, 2018).

72. U.S. DEP'T OF EDUC., *supra* note 69.

73. Letter from D. Joel Wiggins, President, Crown College, to Catherine Lhamon, Assistant Secretary, U.S. Department of Education, Office for Civil Rights (May 25, 2016), https://www.campuspride.org/wp-content/uploads/crown-college-request-05252016.pdf.

74. Letter from Alan S. Cureton, President, University of Northwestern, St. Paul, to Catherine Lhamon, Assistant Secretary, U.S. Department of Education, Office for Civil Rights (Feb. 12, 2016), https://campuspride.org/wp-content/uploads/university-of-northwestern-st-paul-request-02122016.pdf.

75. Hubertz, *supra* note 58, at 188.

76. *Id.* at 189.

77. *Id.*

Education, or "FIRE," has featured "speech codes of the month" at both public and private institutions with limited or no sectarian ties.[78] Codes at Southwest Minnesota State University, St. Olaf College, and Macalester College are among those that have been featured.[79] FIRE defines a speech code as a policy "that prohibits expression that would be protected by the First Amendment in society at large."[80] Examples include bans on "offensive language" or "disparaging remarks" and policies that try to restrict protests and demonstrations to "free speech zones."[81]

Some codes restrict speech while including seemingly contradictory provisions promising that the school will protect speech.[82] Student-advocacy groups such as FIRE and the Student Press Law Center view this discrepancy as warranting the use of contract law to hold private schools to the burdens of their bargains.[83] But advocates for individual rights pay little attention to individuals at strongly sectarian schools; the common conception is that every student chooses a school and the restrictions that come with it.[84] However, as Hubertz has demonstrated, some students who desire to speak out face the reality that their parents will only pay tuition at schools where speech is regulated in accordance with the institutions' interpretations of religious doctrine.[85]

78. Samantha Harris, *Speech Code of the Month*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/category/newsdesk/speech-code-of-the-month (last visited Mar. 20, 2018).

79. *Id.*

80. *What Are Speech Codes?*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/spotlight/what-are-speech-codes (last visited Mar. 20, 2018).

81. *Id.*

82. Kaitlin DeWulf, *In Spite of Lip-Service Free Speech Codes, First Amendment Rights Are Tenuous at Private Universities*, STUDENT PRESS L. CTR. (Dec. 16, 2016, 2:14 PM), http://www.splc.org/article/2016/12/a-promise-unkept; *Private Universities*, FOUND. FOR INDIVIDUAL RIGHTS. IN EDUC., https://www.thefire.org/spotlight/public-and-private-universities (last visited Mar. 20, 2018) [hereinafter *Private Universities*].

83. *See* DeWulf, *supra* note 82; *Private Universities*, *supra* note 82.

84. Eric Posner, *Universities Are Right—and Within Their Rights—to Crack Down on Speech and Behavior*, SLATE (Feb. 12, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/university_speech_codes_students_are_children_who_must_be_protected.html ("As long as universities are free to choose whatever rules they want, students with different views can sort themselves into universities with different rules.").

85. Hubertz, *supra* note 58, at 173–75.

C. Profiting from an Online Revolution

Advocates for extending speech law to private campuses have also overlooked the role that for-profit online educators play, particularly in providing higher education to women and students of color.[86] Two of the largest such schools, Capella University and Walden University, are Minnesota-based and reflect this trend. As of December 31, 2016, Capella's student body was 77% female and 51% students of color.[87] Walden's demographic data was comparable.[88] Walden awarded 682 doctorates to African American students between 2011 and 2015, "nearly twice the number awarded by second-place Howard University, a historically black university in Washington, D.C. Every other university lags far behind."[89]

Walden and Capella were among thirty for-profit online educators that Congress scrutinized in 2010–2012, schools a Senate committee report acknowledged as having "an important role to play in higher education" and creating "a 'new American majority' of non-traditional students."[90] Between 2001 and 2010, Capella's enrollment grew more than tenfold from 3,759 students to 38,634.[91] Walden's growth rate more than doubled that of even Capella, growing from 2,082 students in fall 2001 to 47,456 students in 2010.[92] By 2015, the combined enrollment of Capella and Walden outpaced *all* of Minnesota's other private colleges, universities, career schools,

86. GUILBERT C. HENTSCHKE, VICENTE M. LECHUGA & WILLIAM G. TIERNEY, FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION, PERFORMANCE, AND PLACE IN HIGHER EDUCATION 11–12 (Guilbert C. Hentschke et al. eds., 2010) (explaining that for-profit colleges and universities have provided "the labor market with a relatively high share of people of color").

87. *Capella University Fact Sheet*, CAPELLA UNIV. (July 26, 2017), https://www.capella.edu/content/dam/capella/PDF/FactSheet.pdf.

88. *Walden Total Student Population and Demographics, Including Undergraduate and Graduate*, WALDEN UNIV. (2015), https://www.waldenu.edu/-/media/Walden/files/about-walden/data/students/total-student-population-and-demographics-v-2.pdf.

89. Jeffrey Mervis, *Online University Leads United States in Awarding Doctorates to Blacks*, SCIENCE (Feb. 17, 2017), http://www.sciencemag.org/news/2017/02/online-university-leads-united-states-awarding-doctorates-blacks.

90. HEALTH, EDUC., LABOR, & PENSIONS COMM., U.S. SENATE, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (2012).

91. *Id.* at pt. II.

92. *Id.*

and graduate and professional schools in growth by more than 2,000 students.[93]

The growth of for-profit online education comes at a sensitive time for both brick-and-mortar institutions and the future of free speech on college and university campuses. Tolerance for unpopular expression was lessening even before Charlottesville. The Higher Education Research Institute found that more than 70% of the incoming freshmen in the fall of 2015 agreed their schools "should prohibit racist/sexist speech on campus," and around 43% agreed that colleges and universities had the "right to ban extreme speakers from campus."[94] A Gallup poll in March 2016 found that 69% of students believed colleges and universities should restrict "slurs and other language on campus that is intentionally offensive to certain groups."[95] Similarly, 63% of students favored policies that ban students from wearing costumes "that stereotype certain racial or ethnic groups," and 28% believed students should be permitted to ban reporters from protests.[96] The survey noted no discernable differences between public and private institutions.[97] Indeed, none of the polls noted discernable differences between public and private institutions, which is not overly surprising given that the students who built the Free Speech Movement did not distinguish much between public and private campuses either.[98]

III. HOW WE GOT THERE: THE PERILOUS PATH FROM CHICKASAW TO ST. PAUL TO CHARLOTTESVILLE

A. The Evolution of the State Action Doctrine

A workable starting point for examining the Free Speech Movement's spread to private campuses could be University of

93. OFFICE OF HIGHER EDUC., ENROLLMENT AT A GLANCE (2016).

94. Kevin Eagan et al., *The American Freshman: National Norms Fall 2015*, COOP. INST. RESEARCH PROGRAM 47 (2016), www.heri.ucla.edu/monographs/TheAmerican Freshman2015.pdf.

95. *Free Expression on Campus: A Survey of U.S. College Students and U.S. Adults*, GALLUP 13 (2016), http://www.knightfoundation.org/media/uploads/publication pdfs/FreeSpeech_campus.pdf.

96. *Id.* at 13–14.

97. *See generally id.* (noting the statistical differences between public and private institutions).

98. *Id.* ("Students at private (80%) and public institutions (77%) differ little in their preference for an open college environment.").

California-Berkeley, the public campus where the movement began in 1964.[99] But to adequately consider how sectarian schools and for-profit online educators fit into the mix, a better starting point is the private company town of Chickasaw, Alabama, where Grace Marsh was arrested on Christmas Eve in 1943 for distributing literature consistent with her Jehovah's Witness faith.[100]

Gulf Shipbuilding Corporation owned Chickasaw and had a town code that banned solicitation without a permit.[101] Ms. Marsh was convicted of trespassing.[102] In 1946, her case reached the United States Supreme Court, which held that her individual right to distribute literature enjoyed a "preferred position" under the First Amendment.[103] To the Supreme Court, Chickasaw's private ownership was immaterial because Chickasaw served a "public function" and had "all the characteristics of any other American town."[104]

Marsh v. Alabama helped frame questions that would arise on private campuses in the decades to come. For example, when might an individual's right to speak freely assume a preferred position that supersedes that of the private institution?[105] Are campus codes legal when they implicate speech?[106] Do private colleges and universities serve a "public function"?[107] When might their administrators be considered state actors?[108]

A form of the last question arose during the Civil Rights Era in the context of whether private institutions could choose students based on race. Some courts said yes, and others said no.[109] In 1964,

99. CHEMERINSKY & GILLMAN, *supra* note 18, at 74–78.

100. Marsh v. Alabama, 326 U.S. 501 (1946); Marsh v. State, 21 So. 2d 558, 560 (Ala. Ct. App. 1945).

101. *Marsh*, 326 U.S. at 503.

102. *Id.* at 516.

103. *Id.* at 509.

104. *Id.* at 502–03, 506–07.

105. *See id.* at 509.

106. *See* Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1381 (2000) (describing a campus speech code that sparked student protests at Berkeley).

107. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (holding that a private school educating maladjusted high school students serves a public function, but not one that was an "*exclusive* prerogative of the State").

108. Powe v. Mills, 407 F.2d 73, 82–83 (2d Cir. 1968).

109. *Compare* Guillory v. Admins. of Tulane Univ., 212 F. Supp. 674, 687 (E.D. La. 1962) (finding a private university is not a state actor), *with* Hammond v. Univ. of Tampa, 344 F.2d 951, 951 (5th Cir. 1965) (finding a private university is a state

student concerns about race and race-based discrimination issues coalesced with concerns over military activities in Vietnam to famously start the Free Speech Movement at the University of California-Berkeley campus.[110]

The catalyst for the movement was a campus code that regulated speech and curtailed recruitment by political organizations, a restriction that prompted students to protest in favor of the right to protest.[111] Their nonviolent occupation of Sproul Hall at Berkeley resulted in the "largest mass arrest in California history" and "forever altered activism at U.S. colleges."[112] It also drew the attention of Ronald Reagan, then a candidate for California governor, who vowed to "clean up the mess at Berkeley."[113] Reagan was elected, "empowering a national conservative movement"[114] that embraced the sorts of campus codes that FIRE, Stanley Kurtz, other conservatives, and some civil libertarians oppose today.[115]

The Free Speech Movement was not limited to public campuses like Berkeley. At Harvard University in 1966, protesters shouted

actor).

110. *See* Richard Gonzales, *Berkeley's Fight for Free Speech Fired up Student Protest Movement*, NPR (Oct. 5, 2014, 7:57 AM), http://www.npr.org/2014/10/05/353849567/when-political-speech-was-banned-at-berkeley; *see also* Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1525 (2009) (explaining how "unrest broke out at Berkeley and other U.C. campuses over free speech, civil rights, and the Vietnam War"); Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS L. REV. 39, 43 (1999) ("The modern campus free-speech movement was born in 1964 at the University of California (Berkeley).").

111. *See* Cho & Westley, *supra* note 106, at 1381.

112. John Woodrow Cox, *Berkeley Gave Birth to the Free Speech Movement in the 1960s. Now, Conservatives Are Demanding It Include Them.*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/04/20/berkeley-gave-birth-to-the-free-speech-movement-in-the-1960s-now-conservatives-are-demanding-it-include-them; David Margolick, *After 30 Years, Return to Berkeley*, N.Y. TIMES (Dec. 5, 1994), http://www.nytimes.com/1994/12/05/us/after-30-years-return-to-berkeley.html.

113. Larry Gordon, *Graying Activists Return to Berkeley to Mark '64 Free Speech Protests*, L.A. TIMES (Sept. 27, 2014), http://www.latimes.com/local/education/la-me-berkeley-free-speech-20140928-story.html; CHEMERINSKY & GILLMAN, *supra* note 18, at 76.

114. Gordon, *supra* note 113.

115. *Id.* ("[A] video of Reagan's 1966 campaign speech [shows him] advocating that protesters should be 'taken by the scruff of the neck and thrown out of the university once and for all.'").

down Defense Secretary Robert McNamara.[116] At Columbia University in 1968, students occupied Hamilton Hall to protest the university's involvement with weapons research and the school's plans for a gymnasium with potentially segregated entrances.[117] In 1970, students gathered at Macalester College in St. Paul, Minnesota, to develop a "People's Peace Treaty" that called for an end to the Vietnam War.[118] The activism came at a confusing legal time. *Marsh v. Alabama* was good law, and in 1968 the Supreme Court extended its scope by holding in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* that union members had a right to picket their employer in a privately-owned shopping mall.[119]

Six months after *Amalgamated Food*, the Second Circuit considered whether a private university's administrators were state actors when they punished students for speaking out against the war and racism in *Powe v. Mills*.[120] The case arose when students at Alfred University, a private school in western New York, were disciplined for disrupting an R.O.T.C. ceremony on the university's football field during Parents Day.[121] Seven students were sanctioned under the university's "Policy on Demonstrations."[122] The policy proclaimed that "[t]he University cherishes the right of individual students or student groups to dissent and to demonstrate," but warned that "responsible dissent carries with it a sensitivity for the civil rights of others, and a recognition that other students have a right to dissent from the dissenters."[123]

116. *See* Fox Butterfield, *29 Years Later, McNamara Is Given a Warmer Welcome*, N.Y. TIMES (Apr. 27, 1995), http://www.nytimes.com/1995/04/27/us/29-years-later-mcnamara-is-given-warmer-welcome.html.

117. *See* Robin Shulman, *At Columbia, Remembering a Revolution*, WASH. POST (Apr. 27, 2008), http://www.washingtonpost.com/wp-dyn/content/story/2008/04/27/ST2008042700138.html.

118. Randy Furst, *Vietnam War Era Activists Reconvene at Macalester College*, STAR TRIB. (May 4, 2016), http://www.startribune.com/vietnam-war-era-activists-reconvene-at-macalester-college/378033081.

119. 391 U.S. 308, 325 (1968) (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."), *abrogated by* Hudgens v. N.L.R.B., 424 U.S. 507 (1976).

120. 407 F.2d 73 (2d Cir. 1968).

121. *See id.* at 77–78.

122. *Id.* at 79.

123. *Id.* at 85–86.

The state action issue was complicated because four of the students were in the Liberal Arts College, which the New York Legislature "incorporated as a private university in 1857," and three were in the Ceramics College, which the state founded in 1900.[124] The court easily affirmed the suspensions of the Liberal Arts students, holding that "Alfred's football field does not fit the rubric of either *Marsh* or *Logan Valley Plaza*; it was open only to persons connected with the University or licensed by it to participate in or attend athletic contests or other events."[125] But the court held the administrators at the Ceramic College acted under the color of state law because the state founded that college.[126]

With the state action question unsettled, Chief Justice Earl Warren—the architect of the landmark *Brown v. Board of Education* opinion that desegregated schools—retired in June 1969, and Warren Burger began leading the Supreme Court rightward.[127] Meanwhile, the opposition to the Vietnam War was growing. On December 1, 1969, the Selective Service held its first lottery since 1942 to determine who among college-aged men would be drafted for military service the following year.[128] A wave of student activism followed, prompting another "conservative response" in the form of student conduct codes to establish "a standard of decency and respect in the academic community beyond that existing in society at large."[129]

The University of Minnesota adopted its Code of Conduct on July 10, 1970,[130] a fateful date for Minnesota student activism. Late that evening, the "Minnesota 8," several of whom had university ties, entered Minnesota Selective Service offices in Little Falls, Alexandria, and Winona, to destroy draft records.[131] Two were

124. *Id.* at 75.

125. *Id.* at 80.

126. *Id.* at 82–83. The Second Circuit affirmed the students' discipline because they failed to provide notice for the protest as the Policy of Demonstrations required. *Id.* at 84.

127. MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 79–81 (2016).

128. *The Vietnam Lotteries*, SELECTIVE SERVICE SYSTEM, https://www.sss.gov/About/History-And-Records/lotter1 (last visited Mar. 20, 2018).

129. *See* Eule & Varat, *supra* note 33, at 1591 n.234.

130. *Board of Regents Policy*, UNIV. OF MINN. 1, 1 (1970), https://regents.umn.edu/sites/regents.umn.edu/files/policies/Student_Conduct_Code.pdf.

131. United States v. Kroncke, 459 F.2d 697, 698 (8th Cir. 1972); David Hawley,

convicted.[132] On appeal, Eighth Circuit Judge Gerald W. Heaney of Duluth, a "stalwart liberal" who played a key role in desegregation,[133] wrote an opinion affirming the convictions but giving the conscientious objectors every benefit of the doubt. "As legitimate as this technique may be," Judge Heaney explained, "those who use it must risk the possibility that their tactics will be found inappropriate or the governmental action valid. The latter is the case here."[134]

Disruptive and destructive tactics were not limited to public universities. On the night National Guardsmen killed four students at Kent State University in Ohio, a protest that began at St. Louis's private Washington University moved to Air Force and Army R.O.T.C. buildings, where fires were set.[135] Again, the protesters were convicted,[136] and again, Judge Heaney wrote the opinion affirming the convictions,[137] but this time he warned that the Eighth Circuit stood ready "to protect constitutionally guaranteed activities or conduct from interference by either the State or private individuals."[138]

It was unclear whether those "private individuals" could include administrators at private colleges and universities. The question arose again at Washington University when students sued the chancellor, alleging he "refused to prevent the disruption of classes and educational activities by a small group of protesting students."[139] In that context, the district court ruled the chancellor was a state actor because "[e]ducation is a public function."[140] But then in 1972, the Burger-led Supreme Court held in *Lloyd Corp. v. Tanner* that there was no First Amendment right to distribute antiwar literature in a private shopping mall.[141]

"Peace Crimes" Tells Minnesota 8's War Story, MINNPOST (Feb. 21, 2008), https://www.minnpost.com/politics-policy/2008/02/peace-crimes-tells-minnesota-8s-war-story.

132. *Kroncke*, 459 F.2d at 698.

133. Dennis Hevesi, *Gerald W. Heaney, a Judge Who Ruled for the Desegregation of Public Schools, Dies at 92*, N.Y. TIMES (June 22, 2010), http://www.nytimes.com/2010/06/23/us/23heaney.html.

134. *Kroncke*, 459 F.2d at 702.

135. United States v. Mechanic, 454 F.2d 849, 850–51, 850 n.1 (8th Cir. 1971).

136. *Id.* at 851.

137. *Id.* at 857.

138. *Id.* at 852.

139. Belk v. Chancellor of Wash. Univ., 336 F. Supp. 45, 46 (E.D. Mo. 1970).

140. *Id.* at 48.

141. 407 U.S. 551, 570 (1972).

The case did little to quench activism on private campuses. In 1974, protesters shouted down President Richard Nixon's chairman of the Model Cities Task Force at the University of Chicago.[142] When William Shockley brought his theory of African American inferiority to Yale, Harvard, and New York University, he received rude welcomes.[143] "As a result of its Shockley episode, Yale decided to reexamine its attitude toward freedom of speech."[144] A Yale committee studied "free expression, peaceful dissent, mutual respect and tolerance at Yale" and recommended the institution redouble its efforts to protect free speech by imposing "sanctions against disrupters."[145]

As one of the nation's most influential private universities promised to discipline students for disruptive dissent, litigants argued federal law should apply to private colleges and universities that benefited from federal funds. The theory did not fare well in cases involving employment and anti-discrimination claims.[146] In 1973, the Second Circuit held administrators at Brooklyn Law School did not act under color of state law when they expelled two underperforming students who advocated against the Vietnam War and for racial equity.[147]

Still, as the Vietnam War ended, it was unclear whether the First Amendment's free speech principles would apply on private campuses. As late as 1977, the "nebulous character of state action" prompted the Minnesota Supreme Court to hold in *Abbariao v. Hamline University School of Law* that a law student stated a claim when

142. Robert Cassidy, *University Professors Under Attack*, CHICAGO TRIB. (Mar. 26, 1974), http://archives.chicagotribune.com/1974/03/26/page/14/article/academic-racism.

143. Anthony Lewis, *A Report on the Damages to the Right of Free Speech*, N.Y. TIMES (Jan. 26, 1975), http://www.nytimes.com/1975/01/26/archives/a-report-on-the-dangers-to-the-right-of-free-speech.html.

144. *Id.*

145. *Report of the Committee on Freedom of Expression at Yale*, YALE U. (Dec. 23, 1974), http://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale; *see also* CHEMERINSKY & GILLMAN, *supra* note 18, at 156–57.

146. *See, e.g.*, Williams v. Howard Univ., 528 F.2d 658, 660–61 (D.C. Cir. 1976) (rejecting that acceptance of federal funding makes a school's readmission decision a government action); Spark v. Catholic Univ. of Am., 510 F.2d 1277, 1279–83 (D.C. Cir. 1975) (discussing a decision to not provide a raise); Blouin v. Loyola Univ., 506 F.2d 20, 20–22 (5th Cir. 1975) (discussing a decision to not renew a contract); Wahba v. N.Y. Univ., 492 F.2d 96, 97–104 (2d Cir. 1974) (discussing a decision to dismiss a research assistant).

147. Grafton v. Brooklyn Law Sch., 478 F.2d 1137, 1143 (2d Cir. 1973).

he challenged his expulsion as "arbitrary" or "capricious."[148] In 1982, the United States Supreme Court all but resolved the question, holding in *Rendell-Baker v. Kohn* that administrators at a private secondary school—99% publicly funded—were not state actors when retaliating against a teacher for speaking her mind.[149] Thus, the state action doctrine at the federal level became "a bright-line rule that the private institution always wins and the individual fired or disciplined by it for expression always loses."[150] There was no indication the Supreme Court would hold differently when students at private colleges or universities sought the First Amendment's protection, so advocates for extending speech law had to look outside the United States Constitution.

B. The Role of State Law in Filling a First Amendment Gap

As the state action issue was litigated, the Vietnam War became a catalyst in suggesting the use of state law—common law, constitutional law, or a mixture of them—to protect speech on private campuses.[151] Before the war, university discipline was justified on the idea that it was "part of the inculcation of institutional values into the student."[152] Even at public institutions, students "had few or no cognizable due process rights, and even summary expulsion was, in most cases, unchallengeable."[153] Then, students pushed back. From their perspective, permitting universities to discipline students on an *in loco parentis* theory was "nothing more than the justification offered by college administrators when other justifications fail[ed]."[154]

A movement toward protecting students' due process rights originated in 1971 when the Twenty-Sixth Amendment lowered the voting age to eighteen, reflecting the view that the draft age should

148. 258 N.W.2d 108, 111–12 (Minn. 1977).

149. Rendell-Baker v. Kohn, 457 U.S. 830, 832, 842–43 (1982).

150. Chemerinsky, *supra* note 19, at 1639.

151. *See* T*he Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 27, 50–52 (2008); Sarabyn, *supra* note 5.

152. Andrew R. Kloster, *Student and Professorial Causes of Action Against Non-University Actors*, 23 GEO. MASON U. CIV. RTS. L.J. 143, 147 nn.27–29 (2013).

153. *Id.* at 147–48.

154. Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 141 (1974).

match the voting age.[155] Eighteen became the age of majority, and "as colleges became managed more like businesses, courts deemed the relationship between student and university as contractual in nature."[156] The law was murky. Although California courts recognized that a college or university's written materials can become part of a contract,[157] many other courts held a student "contracts away his right to due process."[158] Other courts were developing a due process cause of action based on the theory that students, even at private schools, had property interests in their educations.[159] Still other courts were creatively melding constitutional and common law. For example, the Minnesota Supreme Court in *Abbariao v. Hamline University School of Law* noted that "[t]he requirements imposed by the common law on private universities parallel those imposed by the due process clause on public universities."[160]

Then, state constitutions received a boost. Frustrated by the Supreme Court's shift from protecting individual rights, in 1977, Justice William Brennan published a *Harvard Law Review* article in which he urged states to apply the "font of individual liberties" in state constitutions to protect rights, including speech rights.[161] There was and is a textual basis for doing so. Although the First Amendment (coupled with the Fourteenth Amendment and 42 U.S.C. § 1983) reaches only state actors, the speech clauses in state constitutions "have a more affirmative cast" and do not explicitly reference state action.[162]

The Minnesota Constitution's free speech clause is typical of this "affirmative cast." It states that "[t]he liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."[163] The California Constitution's provision is

155. *See* Kloster, *supra* note 152, at 147–48.

156. *Id.*

157. Zumbrun v. Univ. of S. Cal., 25 Cal. App. 3d 1, 10 (1972).

158. *See Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 154, at 143.

159. *See id.* at 145–50.

160. 258 N.W.2d 108, 113 (Minn. 1977). New York's highest court was among the courts to apply *Abbariao* favorably. *See* Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1305 (N.Y. 1980).

161. Brennan, *supra* note 21, at 491, 502.

162. Eule & Varat, *supra* note 33, at 1564.

163. MINN. CONST. art. I, § 3.

similar.[164] In *Robins v. Pruneyard Shopping Center*, the California Supreme Court invoked the California Constitution's provision to affirm the rights of high school students "to solicit signatures for a petition to be sent to the White House in Washington."[165] After the United States Supreme Court affirmed the holding,[166] courts in at least five states applied state constitutions to protect speech rights in shopping malls, irrespective of state action, while most states, including Minnesota, did not.[167]

Private colleges and universities were a different story. Supreme courts in Pennsylvania and New Jersey applied their state constitutions to protect speech at private schools—at least at political events open to the public. The Pennsylvania case arose at Muhlenberg College in Allentown, Pennsylvania, during a speech by then-FBI Director Clarence Kelley.[168] The Pennsylvania Supreme Court reversed the nonstudent protesters' trespassing convictions, explaining that Muhlenberg "permitted the public to walk its campus freely," held the event "in an area of the college normally open to the public," and provided a forum for a "controversial public figure."[169] The New Jersey Supreme Court's rationale was similar when it reversed the conviction of a nonstudent who sold political materials at Princeton University.[170] The court focused on the "central purposes" of Princeton as articulated in the university's documentation, which described free inquiry and free expression as "indispensable" to the university's central purposes.[171]

Meanwhile, courts narrowed the parameters of contract law. Although many courts were affirming the general idea that students could assert contract claims against schools, by 1992, many courts were barring claims that alleged "educational malpractice."[172] Courts cited public policy considerations, including "the lack of a

164. CAL. CONST. art. I, § 2 ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.").

165. 592 P.2d 341, 342 (Cal. 1979).

166. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 75 (1980).

167. Steven P. Aggergaard, *Religion, Speech, and the Minnesota Constitution: State-Based Protections Amid First Amendment Instabilities*, 32 WM. MITCHELL L. REV. 719, 731 nn.64–65 (2006) (citing State v. Wicklund, 589 N.W.2d 793 (Minn. 1999)).

168. Commonwealth v. Tate, 432 A.2d 1382, 1383–84 (Pa. 1981).

169. *Id.* at 1390–91.

170. State v. Schmid, 423 A.2d 615, 616, 630–31 (N.J. 1980).

171. *Id.* at 630–31.

172. Ross v. Creighton Univ., 957 F.2d 410, 414–16 (7th Cir. 1992).

satisfactory standard of care by which to evaluate an educator," difficulties in determining damages, students' differing attitudes toward education, a potential "flood of litigation," and fears that courts would micromanage higher education.[173] To overcome the bar, a student had to "point to an identifiable contractual promise that the defendant [college or university] failed to honor."[174]

The use of contract law received a boost in 1998 when professor Charles Kors and litigator Harvey Silvergate published *The Shadow University: The Betrayal of Liberty on America's Campuses*, which took aim at "verbal behavior" provisions in campus codes.[175] The authors found restrictions at the University of Minnesota so egregious that "Minnesota really should have its own chapter."[176] Kors and Silvergate described "lesser known nonconstitutional avenues" for protecting speech on campuses, including contract law, but acknowledged "the outcome of litigation against a college may be uncertain."[177]

An "overwhelming response" to the book prompted Kors and Silvergate to form the Foundation for Individual Rights in Education, or FIRE.[178] Advocates at FIRE have concluded that contract law "offers the best solution" to protect speech on private campuses because it "can protect the liberal ideal of universities as free speech institutions without sacrificing the right of private association."[179]

A year after *The Shadow University* was published, the Minnesota Court of Appeals adopted the educational malpractice bar in *Alsides v. Brown Institute Ltd.*[180] In that case, the court held that a claim against a school based on failure to provide "specifically promised educational services" is actionable, but one requiring "comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies" is not.[181] *Alsides*

173. *Id.* at 414 (internal quotations omitted).

174. *Id.* at 416–17.

175. ALAN CHARLES KORS & HARVEY A. SILVERGATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 147 (The Free Press 1998).

176. *Id.* at 174–78.

177. *Id.* at 339, 345, 354.

178. *Mission*, FOUND. FOR INDIV. RTS. IN EDUC., https://www.thefire.org/about-us/mission (last visited Mar. 20, 2018).

179. Sarabyn, *supra* note 5, at 146.

180. 592 N.W.2d 468, 475 (Minn. Ct. App. 1999).

181. *Id.* at 472–73.

"corresponded with the great weight of authority in this country."[182] By 2013, roughly two-thirds of the states recognized some sort of common law claim under which students could sue their schools, but the claims were generally subject to the educational malpractice bar.[183] By 2017, the question of whether contract law could or would protect speech on private campuses still remained, in the words of Kors and Silvergate, "uncertain."[184]

C. From Stage Right, Enter the Statutes

In *The Shadow University,* Kors and Silvergate discussed legislative efforts to extend First Amendment protections to campuses.[185] By the late 1990s, there had been two such efforts—one federal[186] and one in California.[187] Both efforts were sponsored by legislators from the side of the political aisle that once favored speech-restrictive codes during the Vietnam War and Civil Rights Era.[188] On the other side of the aisle, progressives were embracing the sorts of codes they loved to hate a generation earlier.[189]

To understand the ideological shift, a good starting point is not a college or university, but instead the Dayton's Bluff neighborhood of St. Paul where, on June 21, 1990, Robert A. Viktora (R.A.V.) pieced together a cross from broken chair legs and burned it on the front yard of an African American family.[190] Prosecutors in juvenile court chose not to charge Viktora with a conduct-based crime, such as terroristic threats.[191] Their tool was St. Paul's Bias-Motivated Crime Ordinance, which made it a misdemeanor to use an object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[192]

182. Elizabeth A. Emerson, Comment, *Rejecting Disgruntled Students' Claims: A Modern Educational Theory*, 26 WM. MITCHELL L. REV. 839, 860 (2000).

183. Kloster, *supra* note 152, at 148–50 & nn. 32, 34–37.

184. KORS & SILVERGATE, *supra* note 175, at 351–54.

185. *Id.*

186. Collegiate Speech Protection Act of 1991, H.R. 1380, 102d Cong. (1991).

187. ANN. CAL. EDUC. CODE § 94367(c) (West 2009).

188. *See* Eule & Varat, *supra* note 33, at 1591–92.

189. FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 1, 26 (1993).

190. CLEARY, *supra* note 10, at 3–4, 8.

191. *Id.* at 10.

192. *Id.*; *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 379–81 (1992).

By its plain language, the ordinance criminalized only certain categories of speech, and its constitutionality was challenged. As *R.A.V.* worked through Minnesota courts,[193] passions ran high on college and university campuses—private campuses included. Student commentator Evan G.S. Siegel set the scene in a 1990 law review comment:

> The same hostilities and conflicts that contribute to agitation on the campuses of the nation's public universities also tear at the social fabric of private universities in the United States. On campuses from coast to coast—from Dartmouth College to Stanford University—discordance and mutual suspicion recently have characterized the nature of relations between whites and persons of color, men and women, and people of differing sexual orientations. Those tensions, often amplified on some highly politicized campuses, reflect the same social rifts afflicting contemporary American society as a whole.[194]

As Siegel explained, "[n]ot since the 1960s have colleges and universities witnessed this kind of emotionally charged atmosphere—one that invariably has spawned a resurgence of heated debate in the campus dailies, political protests, speak-outs, and sit-ins."[195] Hundreds of public and private colleges and universities adopted student conduct codes, some of which directly implicated the right to speak freely.[196]

It was a time "when the term political correctness first came into popular use and . . . campus communities, politicians, and the public at large grappled with issues ranging from campus hate-speech codes to social taboos regarding race and gender."[197] Civil libertarians fixated not on specific speech content but on the broader danger of authorizing the government to restrict speech, a danger judges also

193. CLEARY, *supra* note 190, at 36–39, 56–59.

194. Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1378–79 (1990).

195. *Id.* at 1355–56.

196. *See* Jon Gould, *The Triumph of Hate Speech Regulation: Why Gender Wins but Race Loses in America*, 6 MICH. J. GENDER & L. 153, 158 (1999); Steven R. Glaser, *Sticks and Stones May Break My Bones, but Words Can Never Hurt Me: Regulating Speech on University Campuses*, 76 MARQ. L. REV. 265, 267 (1992); Eule & Varat, *supra* note 33, at 1590–91; CHEMERINSKY & GILLMAN, *supra* note 18, at 82.

197. Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1992 (2017).

took seriously.[198] "It did not take long after the rise of speech codes on campuses nationwide for plaintiffs to begin successfully challenging their constitutionality in court."[199] In 1989, the University of Michigan's speech code became among the first to be invalidated.[200] The University of Wisconsin's "Design for Diversity" was struck down in 1991.[201] "Between 1989 and 1995, every court that examined a university speech code found the code unconstitutional."[202]

Codes at private colleges and universities stood on different legal footing.[203] The code at Brown University resembled the St. Paul ordinance by authorizing the discipline of students who engaged in "inappropriate, abusive, threatening or demeaning actions based on race, religion, gender, handicap, ethnicity, national origin or sexual orientation."[204] Applying the code in 1991, Brown expelled Douglas Hann, a varsity football player, for shouting "anti-black, anti-Semitic and antihomosexual remarks" in a campus courtyard.[205] "I think it is, of course, a case of free speech," Hann told the *New York Times* shortly thereafter.[206]

To a constitutional lawyer, Hann was wrong because administrators at Brown University were not state actors and the Rhode Island courts could not apply the state constitution's speech clause to restrain private actors.[207] But to Henry Hyde, a Republican Congressman from Illinois, Hann was right. Hyde saw speech codes

198. *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 488–93 (2009).

199. *Id.* at 488.

200. Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); Majeed, *supra* note 198, at 488–89.

201. UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. System, 774 F. Supp. 1163 (E.D. Wis. 1991); Majeed, *supra* note 198, at 149.

202. CHEMERINSKY & GILLMAN, *supra* note 18, at 100–01.

203. Majeed, *supra* note 198, at 490 (identifying Stanford University's code as "the first (and to date only)" code to be judicially invalidated, but under the "Leonard Law").

204. *Student at Brown Is Expelled Under a Rule Barring "Hate Speech,"* N.Y. TIMES (Feb. 12, 1991), http://www.nytimes.com/1991/02/12/us/student-at-brown-is-expelled-under-a-rule-barring-hate-speech.html.

205. *Id.*

206. *Id.*

207. *Cf.* Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982) (explaining that constitutional protection of free speech applies to government acts, "not to acts of private persons or entities").

"as abhorrent at private institutions as they are at public ones."[208] Hyde denounced Brown and proposed the Collegiate Speech Protection Act of 1991 to specifically extend the First Amendment's speech clause to any "postsecondary educational institution" and to provide injunctive and declaratory relief as well as recovery of a prevailing plaintiff's attorney fees.[209]

The bill received support "across the political spectrum, from Barney Frank to Newt Gingrich"[210] and from the American Civil Liberties Union.[211] But there was a catch. Hyde's bill exempted "an educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of such organization."[212] Hyde's bill effectively put sectarian institutions in the "preferred position" that would apply to an individual like Grace Marsh on the private streets of Chickasaw.[213]

In 1992, Bill Leonard, a Republican Senator from California, proposed state legislation resembling the Collegiate Speech Protection Act, which like Hyde's bill, targeted speech codes, exempted religious institutions, and received broad support, ranging from the ACLU to College Republicans.[214] Unlike Hyde's bill, which died in committee, Leonard's bill "eventually won over nearly everyone," passed both state houses almost unanimously, and was signed into law in September 1992, complete with the exemption for "a private postsecondary educational institution that is controlled by a religious organization."[215]

208. Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1493 (1991).

209. Collegiate Speech Protection Act of 1991, H.R. 1380, 102d Cong. (1991); Janet Bass, *Hyde, ACLU Join to Protect Campus Free Speech Rights*, UNITED PRESS INT'L (Mar. 13, 1991), http://www.upi.com/Archives/1991/03/13/Hyde-ACLU-join-to-protect-campus-free-speech-rights/2967668840400.

210. Eule & Varat, *supra* note 33, at 1594 n.245.

211. Bass, *supra* note 209 ("Hyde and the American Civil Liberties Union said they feel the First Amendment should apply to private schools."); KORS & SILVERGATE, *supra* note 175, at 351 ("Hyde . . . joined with the American Civil Liberties Union . . . to introduce the Collegiate Speech Protection Act of 1991.").

212. H.R. 1380, 102d Cong. (1991).

213. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946).

214. Eule & Varat, *supra* note 33, at 1591–92, 1594 n.245, 1597.

215. *Id.* at 1592, 1594 n.245; CAL. EDUC. CODE § 94367(c) (West 2009). The California Court of Appeal has affirmed the Leonard Law's constitutionality on the grounds that it does not infringe the constitutional right to petition for redress of

The code at Stanford University, an institution not controlled by a religious organization, "was the first victim of the Leonard Law."[216] The code, adopted two years before the law's enactment, also resembled St. Paul's ordinance because it specified instances when use of racial epithets "would be viewed as harassment by personal vilification."[217] Civil libertarian and columnist Nat Hentoff praised the ruling as giving "encouragement to students at private universities around the country."[218] He predicted that "Stanford's defeat is likely to affect private and public colleges in other states."[219]

Stanford president Gerhard Casper, a law professor himself and a former editor of *The Supreme Court Review*,[220] was puzzled by the California trial court's ruling. "I thought the First Amendment freedom of speech and freedom of association is about the pursuit of ideas," he stated at the time.[221] "Stanford, a private university, had the idea that its academic goals would be better served if students never used gutter epithets against fellow students. The California legislature apparently did not like such ideas, for it prohibited private secular universities and colleges from establishing their own standards of civil discourse."[222] Casper was among the few to explain that nonsectarian private universities were being treated differently than sectarian ones. "Religious institutions alone can claim First Amendment protection in this regard," he stated.[223] "The San Francisco Examiner called my position a 'laughable convolution,'" Casper lamented.[224] "I guess the Examiner must be right."[225]

grievances and "creates *statutory* free speech rights for students of private postsecondary educational institutions." Yu v. Univ. of La Verne, 126 Cal. Rptr. 3d 763, 772 (2011).

216. Eule & Varat, *supra* note 33, at 1595 (explaining the effect of the Leonard Law on Stanford's policy on free express and discriminatory harassment).

217. Press Release, Stanford University News Service, Statement on Corry vs. Stanford University President Gerhard Casper, Stanford University Faculty Senate (Mar. 9, 1995), http://news.stanford.edu/pr/95/950309Arc5331.html.

218. Nat Hentoff, *Chilling Codes*, WASH. POST (Mar. 25, 1995), https://www.washingtonpost.com/archive/opinions/1995/03/25/chilling-codes/bb194209-31dc-488f-a6df-146cfe7dca06.

219. *Id.*

220. *Gerhard Casper: President Emeritus of Stanford University*, STAN. U., https://gcasper.stanford.edu (last visited Mar. 20, 2018).

221. Stanford University News Service, *supra* note 217.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

By the time of Casper's criticism in the San Francisco press, the United States Supreme Court had issued its opinion in *R.A.V.*, and it left Minnesota's capital city and much of the nation puzzled and angry.[226] All nine Justices agreed St. Paul's ordinance was facially unconstitutional, but they differed sharply on why.[227] Writing for a five-member majority, Justice Antonin Scalia explained that by singling out "specified disfavored topics," the City Council had engaged in content-based and viewpoint discrimination that failed to satisfy strict scrutiny.[228] "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible," Scalia wrote. "But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[229]

Four Justices, including Harry Blackmun, who grew up with Chief Justice Burger blocks from where the cross-burning occurred,[230] believed St. Paul's ordinance was unconstitutionally overbroad.[231] "Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment," Justice Byron White wrote.[232] "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[233]

Still, the result was clear. *R.A.V.* restricted state actors from enforcing codes that regulated expression based on viewpoint.[234] The Minnesota case "created a Catch-22" because public campus codes that punished "fighting words in general" would be invalidated as "too broad and vague," while codes that focused on certain categories of words covered "too little" speech.[235] *R.A.V.* effectively invalidated similar campus speech codes at public universities.[236]

226. CLEARY, *supra* note 190, at 200–01.
227. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
228. *Id.* at 391–93.
229. *Id.* at 396.
230. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 5–6 (2005).
231. *R.A.V.*, 505 U.S. at 413–14 (White, J., concurring).
232. *Id.* at 413.
233. *Id.* at 414.
234. *Id.* at 413–14.
235. CHEMERINSKY & GILLMAN, *supra* note 18, at 95.
236. *See* Eule & Varat, *supra* note 33, at 1591 n.232; Kitrosser, *supra* note 197, at 2005–06. *See generally* KORS & SILVERGATE, *supra* note 175, at 47 (stating that the majority of colleges have "verbal behavior" requirements in their codes).

Consistent with the reality that public and private schools often are lumped together for free-speech purposes, R.A.V.'s effects were felt even at private institutions, including Drake University in Des Moines and Macalester College in St. Paul.[237] But legally speaking, *R.A.V.* solidified a First Amendment wall between public and private institutions.[238]

The internet and proliferation of social media helped strengthen the legal separation. Even speech occurring off-campus was at risk and subject to differential treatment.[239] For example, after a Regent University law student was disciplined for posting a YouTube screen grab of university president Pat Robertson "flipping the bird," the student's First Amendment lawsuit was dismissed in 2009 on a motion for summary judgment.[240] In stark contrast, after a University of Minnesota Mortuary Sciences student was disciplined for writing Facebook posts about her experience working with a cadaver, her First Amendment-based claim received a hearing before the Minnesota Supreme Court in 2012.[241]

The differential treatment did not deter activists at private colleges and universities from speaking out—or, as explained in Part II, from attempting to prevent others from doing so. Activism at private institutions helped prompt Stanley Kurtz to proclaim 2016–2017 the "year of the shout-down," and California legislator Melissa Melendez to propose the California Campus Free Speech Act.[242] The bill drew comment about the "'great irony' that California, the birthplace of the Free Speech Movement at UC Berkeley in the 1960s

237. *See* Kitrosser, *supra* note 197, at 2006, 2010.

238. In 1998, Congress amended the Higher Education Act to articulate the "sense of Congress" that both public and private institution students' "participation in protected speech or protected association" should not affect their participation in educational programs. *See* 20 U.S.C. § 1011a(a)(1). The statute contains an exception for "any constitutionally protected religious liberty, freedom, expression, or association." 20 U.S.C. § 1011a(a)(2)(F) (2012). In addition, "it appears clear as a matter of law that the Higher Education Act does not provide any express or implied private rights of action for violations of its provisions." Key v. Robertson, 626 F. Supp. 2d 566, 580 (E.D. Va. 2009) (citing 20 U.S.C. § 1011a).

239. *See* CHEMERINSKY & GILLMAN, *supra* note 18, at 95; Eule & Varat, *supra* note 33, at 1591 n.232; Kitrosser, *supra* note 197, at 2005–06, 2010; KORS & SILVERGATE, *supra* note 175, at 47.

240. *Key*, 626 F. Supp. 2d at 570.

241. *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 511 (Minn. 2012).

242. *See supra* Part II; Kurtz, *supra* note 45.

and 1970, is now facing scrutiny over how students can express themselves on campus."[243]

Melendez's act is the most notable development in campus speech as this article is being published. The legislation conditioned funding to colleges and universities, including private ones, on whether they "develop and adopt a policy on free expression" and form "a Committee on Free Expression."[244] The bill contained a familiar exception for schools that claim application of the statute would be inconsistent with "religious tenets of that organization."[245]

Meanwhile, as the 2017–2018 school year began, administrators at public colleges and universities feared the message of hate at the University of Virginia would spread to other public campuses and that a cross-burning case with its origins in the Dayton's Bluff neighborhood of St. Paul would prevent state actors from doing much about it.[246]

IV. WHY EXTENDING SPEECH LAW WILL NOT WORK: PRACTICAL BARRIERS

California Republicans are far from alone in seeking lawful ways to protect speech on private campuses. As explained in Part III, even Justice Brennan suggested a constitutional solution, albeit a state constitutional one.[247] FIRE and the Student Press Law Center pin hopes on contract law.[248] Meanwhile, the idea lingers that federal courts might declare private-school administrators to be state actors.[249] This Part explains why it is false hope to expect the law to protect or regulate speech on private campuses.

243. Melanie Mason, *Frustrated with Campus Discourse Limits, California Republicans Take on "Free Speech Zones,"* L.A. TIMES (May 24, 2017), http://www.latimes.com/politics/la-pol-sac-free-speech-zones-20170524story.html.

244. Cal. Leg. ACA 14, Reg. Sess. (Cal. 2007), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180ACA14.

245. *Id.*

246. *See, e.g.*, Riley Snyder, *UNR Can't Expel or Fire White Nationalist Student Photographed at Charlottesville Demonstration*, NEV. INDEP. (Aug. 15, 2017), https://thenevadaindependent.com/preview?post_type=article&p=9743&preview=true&preview_id=9743.

247. *See* Brennan, *supra* note 21.

248. *See* DeWulf, *supra* note 82.

249. *Cf.* Eule & Varat, *supra* note 33, at 1595 (demonstrating how private, non-religious institutions like Stanford are already vulnerable to scrutiny under the Leonard Law).

A. The State Action Doctrine is Too Settled

From Harvard to St. Olaf to Claremont McKenna College, it is apparent that "[r]emarkably few, other than lawyers," care much about the state action doctrine.[250] To be sure, "most academics, and indeed just about everyone else, share the general intuition that there is not much of a difference between public and private universities on a day-to-day basis."[251]

The recent publications of the books *Free Speech on Campus* reflect and reinforce this reality. Although neither book specifically advocates for the First Amendment to protect speech on private campuses, both are infused with the idea that free-speech principles "should" apply there. As Professor Ben-Porath wrote: "It is easy to agree that the First Amendment provides historic, legal, and political contexts that should be respected and protected."[252] As Professors Chemerinsky and Gillman put it: "Although the First Amendment applies only to public universities, *all* colleges and universities should commit themselves to these values."[253]

As early as 1989, Chemerinsky was articulating that public and private schools both "perform an essential public function" and therefore "should be obligated to follow the United States Constitution."[254] He suggested the remedy was "to declare that private schools perform an essential public function and must comply with the Constitution."[255] He voiced similar views in a 1998 essay, *More Speech Is Better*, explaining "government-imposed orthodoxy on private institutions often is a good thing," as with laws prohibiting race and gender discrimination.[256]

Brian Steffen, a communications professor at Simpson College in Indianola, Iowa, provided a similar view from an educator's perspective, observing that it is "difficult to argue private higher education does not fulfill a public function in American society."[257]

250. Chemerinsky, *supra* note 19, at 1638.

251. Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1525 (2007).

252. BEN-PORATH, *supra* note 34, at 69.

253. CHEMERINSKY & GILLMAN, *supra* note 18, at 20.

254. Erwin Chemerinsky, *The Constitution and Private Schools*, *in* PUBLIC VALUES, PRIVATE SCHOOLS 275 (Neil L. Devins, ed., 1989).

255. *Id.* at 286.

256. Chemerinsky, *supra* note 19, at 1637.

257. Brian J. Steffen, *Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 157 (2002).

Steffen advocated for "qualified First Amendment protection for student journalists" at private schools[258] and argued that, from a student's perspective, "there are legitimate public policy reasons, including natural justice and fair play, for making constitutional standards obligatory on private colleges and universities."[259] Students at private schools are more likely to receive federal aid than their public-school counterparts,[260] so it is not far-fetched to expect federal law to regulate speech.

But asking a federal court to "declare" that they can regulate speech on private campuses is difficult. A declaration must be supported by precedent, so arguing what the law "should" be will not survive Rule 12, let alone Rule 11.[261] The settled precedent is *Rendell-Baker v. Kohn*, a case in which teachers unsuccessfully asserted First Amendment claims against their private school, which received up to 99% of its revenue from the state to educate struggling students who could not attend public schools.[262] The Supreme Court did not follow the money in that specific case. Instead, it fixated on the nature of education in general, holding that education was not the "*exclusive* prerogative of the State."[263] There is no sign the Supreme Court would feel differently about private postsecondary institutions as a group.

Maybe in a specific circumstance an argument could be made that a private college or university administrator is a state actor. As explained in Part III, during the Vietnam War, the Eighth Circuit stood ready "to protect constitutionally guaranteed activities or conduct from interference by either the State or private individuals,"[264] and the Second Circuit held that administrators at a private university were state actors when they acted on behalf of a

258. *Id.* at 142.

259. Siegel, *supra* note 194, at 1387.

260. *See* Cory A. DeCresenza, *Rethinking the Effect of Public Funding on the State-Actor Status of Private Schools in First Amendment Freedom of Speech Actions*, 59 SYRACUSE L. REV. 471, 474, 482 (2009).

261. *See* Fed. R. Civ. P. 12(b)(6) (explaining dismissal for failure to state a claim); Fed. R. Civ. P. 11(b)(2) (explaining that by filing a document, a lawyer certifies, "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

262. 457 U.S. 830, 832 (1982).

263. *Id.* at 842 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).

264. United States v. Mechanic, 454 F.2d 849, 852 (8th Cir. 1971).

college founded by the state of New York.[265] Today, a plaintiff who alleges private university security guards are state actors on grounds that they also are "sworn police officers" might overcome Rule 12.[266] A public university cannot contract away its free-speech obligations by hosting a controversial event on a private campus any more than a city can exclude all expressive activity at a city park by leasing it to a private actor.[267] Thus, even today, the line between public and private can be fuzzy.

In addition, *Marsh v. Alabama* remains good law[268] and provides some support for extending federal speech law to private campuses.[269] "*Marsh* and the shopping-center cases clearly establish that some private properties fulfill public functions amenable to constitutional protection,"[270] and arguably, private campuses are among them.[271] There also is room to argue that *Marsh* has exceeded its bounds and is infringing the rights of individual students who would like to speak out on their sectarian campuses—or just on Facebook—but risk expulsion if they do so.[272]

Chemerinsky saw federal regulation of private campus speech coming. He warned nearly three decades ago: "Although the state action doctrine may be desirable in preserving a zone of *individual* freedom exempt from government control, there is no reason why an *institution*, such as a private school, should have such immunity."[273] Immunity is effectively what sectarian institutions receive by and through the Title IX exemptions that permit them to maintain and enforce codes that regulate expression on GLBT issues and viewpoints. At private institutions, the Department of Education

265. Powe v. Mills, 407 F.2d 73, 82 (2d Cir. 1968).

266. Dempsey v. Bucknell Univ., No. 4:11-cv-1679, 2012 WL 1569826, at *3–4 (M.D. Pa. May 3, 2012) (denying defendant's motion to dismiss claims).

267. Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park & Rec. Bd., 721 F. Supp. 2d 866, 873 (D. Minn. 2010).

268. Marsh v. Alabama, 326 U.S. 501 (1946). Although *Marsh* has not been cited in a United States Supreme Court majority opinion since 1991, it has not been overruled. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 640 (1991).

269. *Marsh*, 326 U.S. 501 at 278–79.

270. Steffen, *supra* note 257, at 157.

271. *See* Alysa Freeman, *Go to the Mall with My Parents?: A Constitutional Analysis of the Mall of America's Juvenile Curfew*, 102 DICK. L. REV. 481, 488–89, 503–04 (describing how *Marsh* and other mall speech cases have both complemented and been informed by various private campus speech cases).

272. Sarabyn, *supra* note 5, at 147.

273. Chemerinsky, *supra* note 254, at 281.

has facilitated the sort of viewpoint discrimination that *R.A.V.* forbids at public institutions, casting serious doubt on the viability of any branch of the government—regardless of ideology or party control—to regulate speech on private campuses.[274]

The role of for-profit online educators introduces a new twist, one that commentators have not had opportunity to examine. The recent events in Charlottesville demonstrate that sometimes, albeit perhaps rarely, private entities—even for-profit ones—play meaningful roles in the marketplace of ideas and association. For example, before Charlottesville, "the lodging rental company Airbnb quietly booted users who it believed were searching for lodging to attend the rally."[275] Afterward, GoDaddy and Google refused to play host to the white supremacist website The Daily Stormer.[276] Turning for-profit educators into state actors could strip those institutions and their nonsectarian nonprofit cousins of means to tame hate in ways the government cannot.

B. Using State Constitutional or Contract Law Is Practically Impossible

Apart from the state action doctrine is the idea that state law can and should regulate campus speech in ways federal judges cannot. Indeed, "state courts are free to use a more inclusive conception to enforce their state constitutional guarantees."[277] Justice Brennan voiced the same view in his 1977 *Harvard Law Review* article.[278] But to date, only the Pennsylvania and New Jersey supreme courts have used state constitutions to protect speech on private campuses and only in the narrow context of political events held open to the

274. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *see also* Schumacher v. Argosy Educ. Group, Inc., Civ. No. 05-531, 2006 WL 3511795 (D. Minn. Dec. 6, 2006) (denying relief to a student expelled from the university for expressing that a student lounge should have less GLBT materials).

275. Kyle Swenson, *Airbnb Boots White Nationalists Headed to "Unite the Right" Rally in Charlottesville*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/08/airbnb-boots-white-nationalists-headed-to-unite-the-right-rally-in-charlottesville.

276. Katie Mettler & Avi Selk, *GoDaddy—Then Google—Ban Neo-Nazi Site Daily Stormer for Disparaging Charlottesville Victim*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/14/godaddy-bans-neo-nazi-site-daily-stormer-for-disparaging-woman-killed-at-charlottesville-rally.

277. Comment, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 183 (1980).

278. Brennan, *supra* note 21, at 502–03.

public.[279] Subsequently, the Pennsylvania court held the state constitution did not prevent a private shopping mall from excluding all political speech,[280] and it is hard to see how the same rule would not apply at private colleges and universities. The rest of the states simply have not taken Justice Brennan's advice to use state constitutions to protect speech on college campuses.

Efforts to mix constitutional law with the common law offer little help. *Abbariao v. Hamline School of Law*, in which the Minnesota Supreme Court created a cause of action for a student who alleged his expulsion was "arbitrary" or "capricious," remains good law but has been applied narrowly.[281] For example, in *Schumacher v. Argosy Education Group, Inc.*, a federal court rejected an *Abbariao*-based claim of an evangelical Christian who was expelled from his doctor of psychology program after expressing views that a student lounge should have fewer GLBT materials.[282] The student was expelled for failure to show "social awareness and social sensitivity," which the court held was a permissible academic reason to prevent relief under *Abbariao*.[283]

The student also pleaded breach of contract, which the court dismissed under Minnesota's educational malpractice bar.[284] The bar is practically insurmountable when a speech claim is based on contract law, particularly at sectarian colleges and universities where campus codes are entangled with religious doctrine.[285] As a federal court explained when dismissing a claim alleging a college for Christian Scientists failed to honor various promises:

> Were the Court to wade into the issue of how closely Principia College operated within the constructs of the

279. *See* Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); State v. Schmid, 423 A.2d 615 (N.J. 1980).

280. W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co., 515 A.2d 1331, 1333 (Pa. 1986).

281. Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108, 113 (Minn. 1977); *see also* Doe v. Univ. of St. Thomas, 240 F. Supp. 3d 984, 993 (D. Minn. 2017) (citing *Abbariao*, 258 N.W.2d at 112).

282. Civ. No. 05-531, 2006 WL 3511795 (D. Minn. Dec. 6, 2006).

283. *Id.* at *12.

284. *Id.* at *13 ("Accordingly, the Court finds that the alleged specific promises in the Handbook did not create a contract, and Schumacher's claim therefore fails as a matter of law. Thus, the Court dismisses Schumacher's breach of contract claim.").

285. *See, e.g.*, Gillis v. Principia Corp., 111 F. Supp. 3d 978, 983–86 (E.D. Mo. 2015).

> plethora of vague, general, and aspirational 'mission statement-esque' provisions cited by Plaintiff, the Court would be forced to engage—with complete disregard for Missouri law—in an educational malpractice analysis rife with the practical and policy concerns.[286]

Several more practical barriers exist. Because contracts must be read as a whole,[287] a court may not give priority to a speech-friendly provision while blue-penciling out speech-restrictive ones.[288] Contract damages are generally monetary.[289] A student expelled for saying something controversial "would *likely* suffer economic harm arising from lost tuition, room and board, employment offers, and graduate school admissions."[290] But, "likely" is not good enough to withstand summary judgment. Damage claims premised on such "unsupported speculation" will be excluded from evidence.[291] Moreover, requesting non-monetary remedies such as an injunction or an order for specific performance risks asking a court to compel or restrict speech in ways that violate the First Amendment.[292]

Finally, the proliferation of online and for-profit universities makes it practically impossible to use state constitutional law or common law to litigate contract-based speech claims. Students who study online come from many jurisdictions, and although forum-selection and choice-of-law clauses might be enforceable, so

286. *Id.* at 985.

287. *See, e.g.*, Flores v. Am. Seafoods Co., 335 F.3d 904, 910 (9th Cir. 2003) ("[A] written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." (quoting Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999))).

288. *See generally* Bess v. Bothman, 257 N.W.2d 791, 794–95 (Minn. 1977) (defining and criticizing the "blue pencil" doctrine).

289. RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981).

290. Sarabyn, *supra* note 5, at 166 (emphasis added).

291. Andler v. Clear Channel Broad., Inc., 670 F.3d 717, 727 (6th Cir. 2012) ("Departures from actual pre-injury earnings must be justified and cannot be unduly speculative.").

292. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (discussing how compelled speech "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943))); Near v. Minnesota, 283 U.S. 697, 714 (1931) ("[T]he main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments.'" (quoting Commonwealth v. Blanding, 3 Pick. 304, 313–14 (Mass. 1825))).

might mandatory arbitration clauses.[293] Because for-profit corporations might claim reputational interests and fiduciary obligations that surpass those of nonprofit corporations, for-profit universities might choose aggressive responses to student lawsuits, just as Trump University did when asserting a defamation counterclaim in a student's case alleging deceptive trade practices.[294]

Of course, for-profit and online schools have speech codes too,[295] but they have not drawn the ire of advocates at FIRE or much attention from scholars. In her book, *Free Speech on Campus*, Ben-Porath acknowledged that "online communication presents a growing set of challenges," but she focused on social media and took the position that "online speech should be seen as separate from campus speech."[296] The problem with Ben-Porath's approach is that "campuses" are only virtual at online schools, so online speech is the primary—if not exclusive—means of classroom instruction and discussion. Capella's policies not only invite online expression on sensitive topics; they promote it. As a webpage titled "Diversity Makes a Difference at Capella" explains: "Students in a Capella business course may be asked to consider how Ramadan would affect sales of a product. Learners on a counseling track might be urged to think about how their future clients' ethnic backgrounds or sexual orientation might inform their worldview."[297] Using contract law to adjudicate speech claims arising from online class participation on

293. *See, e.g.*, Rosendahl v. Bridgepoint Educ., Inc., No. 11-cv-61, 2012 WL 667049 (S.D. Cal. Feb. 28, 2012) (enforcing the arbitration clause of an executed enrollment agreement).

294. Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013).

295. *Cf. University Policies & Consumer Information*, CAPELLA UNIV., https://www.capella.edu/content/dam/capella/PDF/policies/4.02.02.pdf (last visited Mar. 20, 2018) (forbidding "disrespect," which is defined to include "harassing, threatening, or embarrassing others," posting "racially, religiously, or ethnically offensive" material, and "disruptive conduct" that includes "threatening or belligerent language," "lewd or indecent language or behavior," and "inciting others to engage in disruptive conduct"); *Student Handbook*, WALDEN UNIV., http://catalog.waldenu.edu/content.php?catoid=41&navoid=5129 (last visited Mar. 20, 2018) (forbidding sexual harassment and unwelcomed "conduct or communication" directed toward another person that relates to "race, color, national origin, gender, sexual orientation, religion, age, mental or physical disability, veteran status, marital status, or other protected characteristics").

296. BEN-PORATH, *supra* note 34, at 78.

297. *Diversity Makes a Difference*, CAPELLA UNIV. (Feb. 2, 2016), https://www.capella.edu/blogs/cublog/a-look-at-diversity-at-capella-university/.

culturally-sensitive topics runs head-on into the educational malpractice bar.

Contract claims may be subject to internal university policies that disciplinary decisions are "final" and not subject to a court's review.[298] In 2016, the Third Circuit held that Capella's finality policy "precludes appellate-like review of the merits of Capella's disciplinary decision."[299] A federal court in the District of Oregon made a similar ruling with respect to Walden's internal appellate procedures.[300] The bottom line is that private colleges and universities stand in a starkly different position than public ones, and state law offers little practical help for those who advocate for speech-related legal protections on private campuses.

C. Statutes Are Swallowed by the Sectarian Exception

And then there are statutes that apply to private schools. At the time of this writing, only one such statute exists—California's Leonard Law, enacted in 1992.[301] As explained in Parts II and III, another California statute has been proposed.[302] In his 1998 essay *More Speech is Better*, Chemerinsky voiced general support for speech-protective statutes to apply on private campuses.[303] However, his most recent book, *Free Speech on Campus*, skirted the statutory issue.[304]

Perhaps Chemerinsky ignored the speech-protective statute issue in his recent work because since 1998, the internet has revolutionized higher education in ways that make it highly doubtful that state statutes can meaningfully and fairly protect speech on

298. *See, e.g.*, Reardon v. Allegheny Coll., 926 A.2d 477, 482–83, 482 n.5 (noting the parties' agreement that "[t]he decision of the President is final" is adequate to insulate "'private, internal decisions' of the College" from external review).

299. *See* Mekuns v. Capella Educ. Co., 655 F. App'x 149, 150 (3d Cir. 2016) (addressing student dismissal for breach of University Policy 3.03.06, research misconduct).

300. Gibson v. Walden Univ. LLC, 66 F. Supp. 3d 1322, 1325–26 (D. Or. 2014) (noting the Walden Student Handbook "expressly declaims the formation of a contract").

301. CAL. EDUC. CODE ANN. § 94367 (West, Westlaw through Ch. 859 of 2017 Reg. Sess.).

302. *See* ACA 14, 2017–2018 Reg. Sess. (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180ACA14; *see supra* notes 57, 244–45 and accompanying text.

303. Chemerinsky, *supra* note 19, at 1643–44.

304. *See* CHEMERINSKY & GILLMAN, *supra* note 18.

private campuses. Would California's Leonard Law or the proposed California Campus Free Speech Act[305] apply when a student who is not from the state studies online at a California university? Does the Leonard Law apply when a California resident studies outside the state? Regardless of how such questions are answered, students in different states could end up being treated unequally.

A bigger problem of unequal treatment stems from the sectarian-school exceptions in the Leonard Law and the proposed California Campus Free Speech Act, exceptions that unquestionably would appear in any federal statute resembling Henry Hyde's Collegiate Speech Protection Act.[306] The exceptions enable actors at some private colleges and universities—but only the sectarian ones—to engage in exactly the sort of viewpoint discrimination *R.A.V.* forbids at public schools.[307]

Some proponents for extending speech regulations to private campuses pay little, if any, attention to this unequal treatment. In *The Shadow University*, Kors and Silvergate lambasted nonsectarian universities but said little about sectarian schools other than citing their right "to enforce speech restrictions with bona fide religious purposes."[308] In 2010, a former fellow at FIRE described sectarian schools as "ideological universities" and likened them to "military academies" where "students' reasonable expectations would be that they would have a more limited right to free speech at such an institution."[309]

Another group that advocates for students' rights, the Student Press Law Center, attempted to put a positive spin on the unequal treatment by providing context that sectarian schools provide "each American an amazing diversity of choice to fit their unique interests and passions."[310] A page on the ACLU website titled "Speech on Campus" ignores the speech that occurs on private campuses—even nonsectarian ones—altogether,[311] while another page on the website

305. *See* ACA 14, 2017–2018 Reg. Sess. (Cal. 2017).

306. *See* Collegiate Speech Protection Act of 1991, H.R. 1380, 102d Cong., 1st Sess. (Cal. 1991).

307. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (addressing bias-motivated expression).

308. KORS & SILVERGATE, *supra* note 175, at 352.

309. Sarabyn, *supra* note 5, at 178–81.

310. DeWulf, *supra* note 31.

311. *Speech on Campus*, ACLU.ORG, https://www.aclu.org/other/speech-campus (last visited Mar. 20, 2018).

titled "ACLU Defense of Religious Practice and Expression" explains the organization "vigorously defends the rights of all Americans to practice their religion."[312] Although the ACLU appears not to advocate for individuals' rights to speak freely at sectarian colleges and universities, it defends the rights of individuals to proselytize at public ones.[313]

The authors of the two books, both entitled *Free Speech on Campus*, analyzed colleges and universities broadly in a way that provided an incomplete picture of private education and therefore speech on private campuses. Ben-Porath's suggestion in her book that "there is no need to accommodate religious or ideological objections to accepted knowledge"[314] ignores that the government recognizes not only a need, but a right to such accommodations at sectarian institutions. Chemerinsky and Gillman broadly declare in their book that "censoring ideas" is "never permissible" and "campuses must be open to all ideas and views,"[315] but they do not confront the fact that a sizable portion of private sectarian campuses are not so open. Chemerinsky and Gillman did consider a sectarian-related dilemma, but only in the context of whether a university (presumably a public one) could punish Christian students for expressing the belief that "traditional heterosexual marriage is the only true marriage."[316]

Assuming a Christian student is against gay marriage ignores that plenty of Christian students are *for* gay marriage,[317] would like to say so (even at sectarian institutions), and would like to align themselves with the growing majority of Americans who support gay marriage.[318] Ignoring those students and their schools, as virtually

312. *ACLU Defense of Religious Practice and Expression*, ACLU.ORG, https://www.aclu.org/aclu-defense-religious-practice-and-expression (last visited Mar. 20, 2018).

313. *ACLU Tells Virginia Community College System that Campus Demonstration Policies are Unconstitutional*, ACLUVIRGINIA.ORG (Mar. 24, 2014), https://acluva.org/14911/aclu-tells-virginia-community-college-system-that-campus-demonstration-policies-are-unconstitutional.

314. BEN-PORATH, *supra* note 34, at xx.

315. CHEMERINSKY & GILLMAN, *supra* note 18, at 15, 83, 122–23, 132.

316. *Id.* at 105.

317. *See Christians for Gay Rights*, BROAD BLOGS (Sept. 9, 2011), https://broadblogs.com/2011/09/09/christians-for-gay-rights/ ("[S]ome Christian students were for gay marriage because they had learned how it would help families.").

318. Justin McCarthy, *U.S. Support for Gay Marriage Edges to New High*, GALLUP

every analysis of campus speech has done,[319] is a grave mistake given the increased growth and influence of sectarian institutions in the last few decades. Between 1980 and 2011, enrollment at "religiously affiliated" institutions grew 86%, compared with 60% at public institutions and 35% at "independent nonprofit" private institutions.[320] "The religious identity of many private colleges and universities paled over the twentieth century, but in some settings, especially Catholic ones, the institutions' religious identity gained renewed vigor."[321]

Meanwhile, sectarian institutions have sought and gained approval for speech-restrictive Title IX exemptions, with little scrutiny and apparently no litigation.[322] If a federal speech bill becomes law, it would contain a sectarian exception, and it is false hope to expect courts to interpret and apply such an exception by analyzing the strength of schools' sectarian connections. Courts have struggled with that sort of line-drawing for decades, particularly in Minnesota. In a 1982 decision, *Larson v. Valente*, the United States Supreme Court invalidated a Minnesota statute that required financial disclosures for churches that solicited more than half their funds from nonmembers.[323] The Supreme Court held that the Minnesota law violated the "clearest command of the Establishment

NEWS (May 15, 2017), http://www.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx (stating that sixty-four percent of Americans believe same-sex marriage should be legal).

319. *See, e.g.*, Jeffrey M. Jones, *College Students Oppose Restrictions on Political Speech*, GALLUP NEWS (Apr. 5, 2016), http://www.gallup.com/poll/190451/college-students-oppose-restrictions-political-speech.aspx; Lydia Saad & Jeffrey M. Jones, *More College Students than U.S. Adults Say Free Speech is Secure*, GALLUP NEWS (Apr. 4, 2016), http://www.gallup.com/poll/190442/college-students-adults-say-free-speech-secure.aspx.

320. *See Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d12/tables/dt12_231.asp (last visited Mar. 20, 2018).

321. Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1072 (2000).

322. Scott Jaschik, *Education Dept. Releases Title IX Exemptions, Requests*, INSIDE HIGHER EDUC. (May 2, 2016), https://www.insidehighered.com/quicktakes/2016/05/02/education-dept-releases-title-ix-exemptions-requests; *see also supra* Part II.B.

323. Larson v. Valente, 456 U.S. 228, 255 (1982).

Clause," which is "that one religious denomination cannot be officially preferred over another."[324]

Eight years later, the "command" arose again in Minnesota when a federal district court confronted whether the state violated the Establishment Clause by paying for eleventh- and twelfth-graders to attend eight private colleges and universities with varying sectarian ties.[325] To determine the strength of each school's sectarian connections, the court identified nine "difficult to follow" Supreme Court cases and pieced together a thirty-six-part test for determining whether a college or university is "pervasively sectarian."[326] The resulting published decision, *Minnesota Federation of Teachers v. Nelson*, was not broadly cited and was described by the General Counsel to the National Conference of Catholic Bishops as "cumbersome."[327]

In 1998, the sectarian exemption question surfaced again in *Columbia Union College v. Clarke*, when the Fourth Circuit Court of Appeals confronted whether a college affiliated with the Seventh Day Adventist Church was "pervasively sectarian."[328] The United States Supreme Court denied review, which drew a dissent from Justice Clarence Thomas, who urged the court to "scrap" its "pervasively sectarian" *Agostini* test.[329]

A year later, Justice Thomas wrote for a four-member plurality that all but rejected the *Agostini* test in the context of state funding for a sectarian elementary and secondary school.[330] That case, *Mitchell v. Helms*, was argued in the Supreme Court by Michael W. McConnell, then a professor at the University of Utah College of

324. *Id.* at 255; *see id.* at 244.

325. *See* Minn. Fed'n of Teachers v. Nelson, 740 F. Supp. 694, 696 (D. Minn. 1990).

326. *Id.* at 709, 714 n.3, 718 (noting tests that include whether some classes begin with prayer and whether mandatory theology or religion courses "are taught with a taint of religious indoctrination").

327. Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 667 n.101 (1992).

328. Columbia Union Coll. v. Clarke, 159 F.3d 151, 162–63 (4th Cir. 1998).

329. Columbia Union Coll. v. Clarke, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting); *see* Columbia Union Coll. v. Clarke, 159 F.3d at 157–58 (reaffirming the "*Agostini* directive," which combined the "'effect' and 'entanglement' prongs" of the *Lemon* test into a "single 'effect' inquiry"); *see also* Agostini v. Felton, 521 U.S. 203 (1997).

330. *See* Mitchell v. Helms, 530 U.S. 793, 808, 826–27 (2000) ("In this case, the inquiry under *Agostini*'s purpose and effect test is a narrow one.").

Law, who was appointed to the Tenth Circuit Court of Appeals two years later.[331] In *Colorado Christian University v. Weaver*, Judge McConnell delivered a significant blow to the "pervasively sectarian" test, writing that the state of Colorado violated the Establishment Clause when it denied scholarships to students on grounds that the school they attended was "pervasively sectarian."[332] Judge McConnell's case law authority in *Colorado Christian* included *Columbia Union College*, *Larson*, and the *Mitchell* case he argued in the United States Supreme Court.[333] "The Colorado law seems even more problematic than the Minnesota law invalidated in *Larson*," he wrote.[334] "The Minnesota law at least was framed in terms of secular considerations: how much money was raised internally and how much from outsiders to the institution."[335]

In affirming the flow of state money to Colorado Christian University, the Tenth Circuit panel was untroubled by the school's "Lifestyle Covenant Agreement," which required students to follow "the example of Jesus Christ and the teachings of the Bible."[336] The court described the agreement as regulating "conduct, not belief."[337] However, in her 2017 article, Hubertz singled out Colorado Christian University's code as speech-restrictive because it forbade "defending or advocating a homosexual lifestyle."[338]

Commentary on *Colorado Christian* was mixed.[339] What does seem clear is that the United States Supreme Court appears on the verge of holding that *any* sectarian connection is enough to exempt private schools from a host of federal laws, and a speech statute would be among them. The schools would receive an additional

331. *See id.* at 800; *Michael W. McConnell*, STAN. L. SCH., https://www-cdn.law.stanford.edu/wp-content/uploads/2015/06/McConnell-Michael-CV-7.5.16.pdf.

332. 534 F.3d 1245, 1253 (10th Cir. 2008).

333. *See id.* at 1258–59.

334. *Id.* at 1259.

335. *Id.*

336. *Id.* at 1252.

337. *Id.*

338. Hubertz, *supra* note 58, at 187–88.

339. *Compare* Richard F. Duncan, *The "Clearest Command" of the Establishment Clause: Denominational Preferences, Religious Liberty, and Public Scholarships that Classify Religions*, 55 S.D. L. REV. 390, 410 (2010) (supporting the *Colorado Christian University* holding), *with* Recent Case, *Tenth Circuit Strikes Down Colorado Law Exempting "Pervasively Sectarian" Religious Colleges from State Scholarship Program*, 122 HARV. L. REV. 1255, 1262 (2009) (criticizing the *Colorado Christian University* holding).

shield from the proposed "First Amendment Defense Act," which was a direct response to *Obergefell v. Hodges*,[340] in which the United States Supreme Court affirmed a fundamental right for same-sex couples to marry.[341] As Hubertz explains, "Evangelical colleges are fighting hard against the implications of *Obergefell*."[342] Potentially, under *Burwell v. Hobby Lobby Stores, Inc.*,[343] even a for-profit university, online or otherwise, could try to claim an exemption from a speech statute since the corporation Hobby Lobby could claim a sectarian connection.[344]

At this time, corporations remain a wildcard. As Airbnb, GoDaddy, and Google demonstrated before and after the Charlottesville tragedy, sometimes corporations can and will take stands the government cannot take, not only against white supremacy, [345] but in favor of GLBT rights. "Corporate America's evolution on gay rights appears to have reached a tipping point, one where so many companies have taken a stand on the issue that the risk of speaking out has been superseded by the risk of not doing so."[346]

V. WHAT SHOULD HAPPEN: EDUCATION, NOT LAWS

This article has considered whether the law can or should protect speech on private college and university campuses, as it does

340. 135 S. Ct. 2584 (2015).

341. Jonathan Rauch, *Gay Rights, Religious Liberty, and Nondiscrimination: Can a Train Wreck Be Avoided?*, 2017 U. ILL. L. REV. 1195, 1195, 1195 n.2 (2017) (citing H.R. 2802, 114th Cong. (2015); S. 1598, 114th Cong. (2015)); *see also* Obergefell, 135 S. Ct. at 2607–08.

342. Hubertz, *supra* note 58, at 168.

343. 134 S. Ct. 2751 (2014).

344. *Id.* (affirming for-profit employer's exemption from providing health insurance for procedures and medications the employer found religiously objectionable). "*Hobby Lobby* is a sweeping decision that threatens to turn [the Religious Freedom Restoration Act of 1993] into a law that—instead of protecting religious freedom—allows religious believers to force their faiths on others in a variety of ways." Alex J. Luchenitser, Symposium, *Religious Accommodation in the Age of Civil Rights: A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws,* 9 HARV. L. & POL'Y REV. 63, 63 (2015).

345. *See* Swenson, *supra* note 275; Mettler & Selk; *supra* note 276.

346. Jena McGregor, *Corporate America's Embrace of Gay Rights Has Reached a Stunning Tipping Point*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/04/05/corporate-americas-embrace-of-gay-rights-has-reached-a-stunning-tipping-point.

on public campuses. On the question of whether it *can* do so, the article has explained that the practical barriers are significant. Federal judges will not alter the state action doctrine cavalierly, contract law is a bad fit for enforcing speech-protective provisions in campus codes, and state statutes are unworkable in an era of online and for-profit education.

Regarding whether the law *should* do so, it is a confusing issue that has come at a most confusing and contentious time. There clearly is an appetite and a market for considering the question, evidenced by two books titled *Free Speech on Campus* being published as the 2017–2018 school year began.[347] Unfortunately, the books do not help answer the question because they provide a perspective that all universities are the same[348] when, legally, they most certainly are not.

The authors of *Free Speech on Campus* did not have the opportunity to consider the speech at the University of Virginia, which for much of the nation was a game-changer[349] in the way that R.A.V.'s cross-burning was for much of St. Paul.[350] Under the current law, the public university was relatively powerless when the white supremacists brought their torches. A private university, by contrast, has more legal tools to snuff out hate. Private corporations have earned credibility too, for now at least.[351] If there ever was a time to advocate for the law to regulate speech on private campuses, this is not it.

But this is a good time for reflection across the political spectrum. Progressives would benefit from listening to civil libertarians, who wisely caution against trusting those in power. Progressives would also benefit from acknowledging that sometimes corporations, even for-profit educators, can play positive roles in diversity and speech. Meanwhile, civil libertarians and others who advocate for students' individual rights risk losing credibility by not confronting the government-endorsed viewpoint discrimination that is occurring under Title IX, to the detriment of individual students.

347. *See* BEN-PORATH, *supra* note 34; CHEMERINSKY & GILLMAN, *supra* note 18.

348. *See* BEN-PORATH, *supra* note 34, at 8; CHEMERINSKY & GILLMAN, *supra* note 18, at 113.

349. *Cf.* Stolberg & Rosenthal, *supra* note 11.

350. *See* Cleary, *supra* note 10.

351. *See, e.g.*, McGregor, *supra* note 346 (describing how a swelling tide of corporations have, with public credibility, set the tone for GLBT rights advocacy).

As for social conservatives, they have valid points about the value of minority views and the danger of excluding them. But they, too, ignore that minority views are excluded from some sectarian colleges and universities. Too many social conservatives did too little to prevent the harassment of speakers such as Princeton's Keeanga-Yamahtta Taylor, who faced threats of being "lynched, shot and raped" after Fox News aired thirty seconds of a commencement address in which she criticized, of all people, the President of the United States.[352] As she wrote in the *New York Times:* "When it comes to protecting the speech of people who are most vulnerable to being intimidated into silence—like people of color and gay people—conservatives either are suspiciously quiet or drive further intimidation with wildly negative news coverage."[353]

As for students and student activists in particular, they need to learn the basic lesson that shouting down controversial speakers and defacing a Muslim students' bridge mural with "ISIS" are not speech. They are acts—sometimes criminal ones. On this issue, Chemerinsky and Gillman were spot-on: "There is, of course, no First Amendment right to destroy someone else's property, even if it is done to communicate a message."[354] "There is no First Amendment right to disrupt classes or other campus activities."[355] Plainly, more education about freedom of speech is needed, and not only in law schools or even colleges. As the authors explain, today's traditional-age students constitute "the first generation of students educated, from a young age, not to bully," but they know "little about the history of free speech in the United States" and lack "awareness of how important free speech had been to vulnerable political minorities."[356]

The efforts to increase awareness should focus not only on the First Amendment, but also on the Fourteenth Amendment. By its plain language, the First Amendment limits only "Congress,"[357] and the principles underlying its Speech Clause extend to state and local actors only because the United States Supreme Court decided free speech is embodied by the Fourteenth Amendment's assurance of

352. Taylor, *supra* note 52.
353. *Id.*
354. CHEMERINSKY & GILLMAN, *supra* note 18, at 123.
355. *Id.*
356. *Id.* at 10.
357. U.S. CONST. amend. I.

liberty.[358] Freedom from speech restrictions is a cherished liberty interest, but so is being free from homophobia, sex and gender discrimination, and racial hate. If the pictures from Charlottesville taught us anything, it is that untold numbers of Americans—including apparently white college-aged ones in the racial majority—do not have the foggiest idea what the Fourteenth Amendment stands for.

After Charlottesville, the question of whether the law can or should protect or regulate speech on private colleges and universities became even more difficult. At this writing, the answer is one that free-speech advocates probably do not want to hear. As Simpson College Professor Brian Steffen put it: "A private university, in many respects, more accurately resembles a benevolent dictatorship than it does a democratic community."[359] When the speakers come to campus bearing torches, the dictatorship can be as much a blessing as a curse.

358. Near v. Minnesota, 283 U.S. 697, 707 (1931).
359. Steffen, s*upra* note 257, at 172.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

875 Summit Avenue, Saint Paul, MN 55105

mitchellhamline.edu