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RETURN OF THE CAMPUS SPEECH WARS

*Thomas Healy**

FREE SPEECH ON CAMPUS. By *Erwin Chemerinsky* and *Howard Gillman*. New Haven and London: Yale University Press. 2017. Pp. xi, 159. \$26.

INTRODUCTION

The campus speech wars are on again. They flare up every few decades, both symptom and symbol of some larger political and cultural battle. During the first and second Red Scares, they were marked by efforts to root out communist professors. In the 1960s, they revolved around student protests over racial inequality and the Vietnam War, and in the 1990s they were a response to the rise of political correctness. This time, the wars are being waged primarily over hateful and offensive speech. Some students and faculty have sought to eliminate such speech, or at least insulate students from its effects, arguing that colleges must work harder to create an inclusive environment for an increasingly diverse population. Critics have pushed back, labeling students today “snowflakes” and claiming that censorship and intimidation have replaced intellectual inquiry and reasoned discussion.

Venturing into this debate are Erwin Chemerinsky¹ and Howard Gillman,² two academics with dueling sympathies. On the one hand, both are constitutional scholars with a deep commitment to free speech and academic freedom. On the other hand, both are also university administrators with an equally strong commitment to diversity and the well-being of their students. They thus find themselves agreeing, and disagreeing, with both sides of the debate. As they put it in the preface to their book, *Free Speech on Campus*, “[W]e believe that both sides are right—and wrong. They are right in that both equality of educational opportunity and freedom of speech are essential for colleges and universities. But they are wrong in thinking that one of these objectives can be pursued to the exclusion of the other” (p. x). Their goal, the authors explain, is to show how both objectives can be fulfilled.

Based on this framing of their book, one might expect Chemerinsky and Gillman to stake out some middle ground on the issue of free speech, to reaf-

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1. Dean, Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law.

2. Chancellor, University of California, Irvine.

firm its importance but suggest ways in which it is, or should be, modified on college campuses. Instead, they adopt what might fairly be called a maximalist position, arguing that “all ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel” (p. 19). They also embrace the proposition that all members of the academic community must have the freedom “to use campus grounds for the broad expression of ideas, even if those ideas are expressed in ways that run contrary to the norms of professional conduct” (p. 76). And they disapprove of any attempt to block or disinvite controversial speakers, insisting that universities must display “a spirit of tolerance” (p. 70) and a “willingness . . . to embrace and defend the unfettered exchange of ideas” (p. 69).

Such statements will gratify the campus critics, but Chemerinsky and Gillman also offer words of support for the so-called “snowflakes.” For starters, they urge critics not to mock students for the compassion and empathy they show for vulnerable classmates (pp. 18–19). Doing so not only undermines the cause of free speech, they suggest, but ignores the extent to which the students’ motivations are admirable (p. 18). The authors also emphasize various exceptions to the First Amendment, noting that universities can punish certain types of particularly harmful speech, such as true threats and harassment, and can impose content-neutral regulations of the time, place, and manner of speech (p. 20). Finally, Chemerinsky and Gillman argue that campus leaders can promote inclusiveness and a welcoming environment through their own words, “proclaiming the type of community they seek and condemning speech that is inconsistent with it” (p. 20).

It is a fine line the authors are attempting to walk, and they are sometimes more successful than others. But it is refreshing to read an analysis of the current situation that takes seriously the interests on both sides and attempts to reconcile them. It is also encouraging to think that the authors of this thoughtful book are in a position to implement the strategies they propose.

This Review has three parts. In Part I, I consider a preliminary question, which is whether free speech is really under attack on campus. Chemerinsky and Gillman believe that it is, but the evidence they offer to support this belief is underwhelming. In Part II, I analyze Chemerinsky and Gillman’s argument that speech on campus should be protected to the same degree as elsewhere in society and contrast it with the position of Professor Robert Post, who argues that First Amendment principles have little application in the university setting. Finally, in Part III, I consider the strategies Chemerinsky and Gillman offer for promoting a supportive and inclusive environment without unduly restricting free speech rights.

I. A CRISIS ON CAMPUS?

Anyone reading the news over the past few years would get the strong impression that free speech is under siege on college campuses. The *Atlantic* magazine has published a series of articles with headlines such as “The Cod-

dling of the American Mind,”³ “The New Intolerance of Student Activism,”⁴ and “The Glaring Evidence that Free Speech Is Threatened on Campus.”⁵ *New York Times* columnist Frank Bruni has lamented what he sees as “a dangerous ideological conformity in too much of higher education,”⁶ and Yale Law Professor Stephen Carter has argued that “the true harbinger of an authoritarian future lives not in the White House but in the groves of academe.”⁷ Perhaps most damning, First Amendment lawyer Floyd Abrams has declared that the single greatest threat facing free speech today “come[s] from a minority of students, who strenuously—and, I think it fair to say, contemptuously—disapprove of the views of speakers whose view of the world is different from theirs and who seek to prevent those views from being heard.”⁸

Chemerinsky and Gillman largely accept this narrative. Their opening chapter is titled “The New Censorship,” and they spend much of it describing recent incidents in which students or faculty members were disciplined for speech (pp. 1–9). They discuss the University of Tulsa student who was suspended because his husband posted personal attacks about two professors and another student on Facebook;⁹ the two fraternity members at the University of Oklahoma who were expelled for leading their brothers in a racist

3. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [https://perma.cc/TF6E-YUCT].

4. Conor Friedersdorf, *The New Intolerance of Student Activism*, ATLANTIC (Nov. 9, 2015), <https://www.theatlantic.com/politics/archive/2015/11/the-new-intolerance-of-student-activism-at-yale/414810/> [https://perma.cc/8WHB-TKJA].

5. Conor Friedersdorf, *The Glaring Evidence that Free Speech Is Threatened on Campus*, ATLANTIC (Mar. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/> [https://perma.cc/U9UY-MJVE].

6. Frank Bruni, *The Dangerous Safety of College*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/opinion/sunday/the-dangerous-safety-of-college.html> (on file with the *Michigan Law Review*).

7. Stephen L. Carter, *The Ideology Behind Intolerant College Students*, BLOOMBERG (Mar. 6, 2017, 3:09 PM), <https://www.bloomberg.com/view/articles/2017-03-06/the-ideology-behind-intolerant-college-students> (on file with the *Michigan Law Review*). For other examples of media coverage of free speech on college campuses, see Catherine Rampell, Opinion, *Free Speech Is Flunking Out on College Campuses*, WASH. POST (Oct. 22, 2015), https://www.washingtonpost.com/opinions/free-speech-is-flunking-out-on-college-campuses/2015/10/22/124e7cd2-78f5-11e5-b9c1-f03c48c96ac2_story.html [https://perma.cc/9795-FAWS], and Opinion, *Yale’s Little Robespierres*, WALL STREET J. (Nov. 9, 2015, 7:31 PM), <https://www.wsj.com/articles/yales-little-robespierres-1447115476> (on file with the *Michigan Law Review*).

8. Ronald K.L. Collins, *Guest Contributor — Floyd Abrams, “Liberty is Liberty,”* CONCURRING OPINIONS (Mar. 18, 2015), <https://concurringopinions.com/archives/2015/03/guest-contributor-floyd-abrams-liberty-is-liberty.html> [https://perma.cc/RXN6-AJ76].

9. Pp. 1–2; Samantha Vicent, *Former University of Tulsa Student Sues After Suspension for Alleged Social Media Harassment*, TULSA WORLD (Jan. 19, 2016), https://www.tulsaworld.com/former-university-of-tulsa-student-sues-after-suspension-for-social/article_ff3a23be-b00e-553b-9e16-cb93236ce497.html [https://perma.cc/JTF4-BSF5].

chant on a bus (p. 3); the Colorado College student who was suspended for responding to the social media tag #blackwomenmatter with the comment, “They matter, they’re just not hot” (p. 7); the University of Oregon law professor who was placed on administrative leave for wearing blackface at a Halloween party attended by faculty and students;¹⁰ the UCLA fraternity and sorority that were suspended after cohosting a “Kanye Western” party where guests dressed as Kanye West and Kim Kardashian (p. 5); and the Texas Christian University student who was disciplined for posting racist and anti-Muslim messages on social media.¹¹

They also discuss several cases in which students and faculty members were targeted but not formally punished for their speech, including the investigation Northwestern University initiated against Professor Laura Kipnis after she wrote an article criticizing campus attitudes about sex (pp. 2–3); the backlash against a Yale University lecturer and residential master who sent an email to students defending offensive Halloween costumes (pp. 5–6); and the outcry expressed by students and administrators over pro-Trump messages (such as “Fuck Mexicans” and “Build that Wall”) written in chalk on the sidewalks of several university campuses.¹²

Many of the incidents Chemerinsky and Gillman describe are disturbing, but whether they add up to a free speech crisis is unclear. For one thing, seven of the thirteen incidents they recount occurred at private universities, where the First Amendment is inapplicable. And although Chemerinsky and Gillman argue that public and private universities should be equally committed to the principle of free speech (p. xi), the fact that private schools sometimes depart from rules that do not formally apply to them does not necessarily signal a crisis. In addition, several of the incidents they describe appear less egregious upon closer examination. For instance, the University of Tulsa student was disciplined under a school policy prohibiting harassment,¹³ which Chemerinsky and Gillman agree is not protected on campus (pp. 118–23). The backlash against the Yale lecturer stemmed in part from the fact that she was a residential master whose job was to support students,

10. P. 8; see Susan Svrluga, *Law Professor Placed on Leave After Wearing Blackface to a Party*, WASH. POST (Nov. 3, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/11/03/law-professor-placed-on-leave-after-wearing-blackface-to-a-party/> [<https://perma.cc/7XN7-DDAK>].

11. Pp. 4–5; see Jeff Mosier, *TCU and Student, 19, Are in Free Speech Fight over Controversial Tweets*, DALL. NEWS (July 31, 2015), <https://www.dallasnews.com/news/news/2015/07/31/tcu-and-student-19-are-in-free-speech-fight-over-controversial-tweets> [<https://perma.cc/D6YP-Z72D>].

12. P. 7; see Katie Rogers, *Pro-Trump Chalk Messages Cause Conflicts on College Campuses*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/02/us/pro-trump-chalk-messages-cause-conflicts-on-college-campuses.html> (on file with the *Michigan Law Review*).

13. Vicent, *supra* note 9.

not agitate them.¹⁴ And the outcry over the pro-Trump messages did not lead to any action against the students who had written them.¹⁵

Of course, the incidents Chemerinsky and Gillman describe are not the only examples of free speech being targeted on campus. There was the violent protest at Berkeley in anticipation of an appearance by Milo Yiannopoulos in 2017 and the student mob that shut down a talk by Charles Murray at Middlebury College the same year.¹⁶ In addition, the Foundation for Individual Rights in Education has documented numerous allegations of censorship by students and faculty in recent years.¹⁷ These allegations bolster the claim of a crisis on campus, but anecdotal evidence has its limits. Without fully investigating each case, it is impossible to know whether the allegations are true and, if they are, whether they constitute a violation of free speech rules.¹⁸ There is also the problem of scale. A list of several dozen potential First Amendment violations is certainly troubling. But when one considers that there are approximately 4,700 colleges and over twenty million students in the country, it becomes harder to label it a crisis.¹⁹

Another way to gauge the status of free speech on campus is to consider student attitudes toward it. Chemerinsky and Gillman do this in two ways. First, they describe their personal experiences teaching an undergraduate

14. See Katy Waldman, *Yale Students Erupt in Anger over Administrators Caring More About Free Speech than Safe Spaces*, SLATE: SLATEST (Nov. 7, 2015, 5:50 PM), http://www.slate.com/blogs/the_slatest/2015/11/07/yale_students_protest_over_racial_insensitivity_and_free_speech.html [<https://perma.cc/S45T-MU2T>].

15. See Rogers, *supra* note 12.

16. Alex Morey, *Violent Middlebury Protesters Injure Professor, Force Invited Speaker to Flee Lecture Hall*, FIRE (Mar. 3, 2017), <https://www.thefire.org/violent-protesters-at-middlebury-force-invited-speaker-to-flee-lecture-hall-injure-professor/> [<https://perma.cc/NDW2-ZSJW>]; *Statement on Violent Protest at University of California, Berkeley*, FIRE (Feb. 1, 2017), <https://www.thefire.org/fire-statement-on-violent-protest-at-university-of-california-berkeley/> [<https://perma.cc/DP5P-NFK6>].

17. For a running list of these allegations, see *Free Speech*, FIRE, <https://www.thefire.org/category/cases/free-speech/>.

18. To take just one recent allegation, the Foundation's website includes an incident in which campus police at Binghamton University informed students who were posting fliers on display cases and in bathrooms that they were violating campus policy, which apparently requires fliers to be posted on established bulletin boards. *Binghamton University Campus Police Surveil Students and Threaten Prosecution over Anti-Racism Flyers*, FIRE (May 21, 2018), <https://www.thefire.org/binghamton-university-campus-police-surveil-students-and-threaten-prosecution-over-anti-racism-flyers/> [<https://perma.cc/2SFW-AYAL>]; Sasha Hupka, *Student Could Be Arrested After Hanging Posters Criticizing BU Administration, Police Say*, PIPE DREAM (Mar. 28, 2018), <https://www.bupipedream.com/news/93559/student-could-be-arrested-after-hanging-posters-in-udc-police-say/> [<https://perma.cc/U5W9-DARH>]. The incident is presented as a violation of the First Amendment, but a policy that limits the posting of fliers to designated areas is not necessarily unconstitutional. Assuming the policy is content neutral and meets the test for time, place, or manner regulations, it would be upheld.

19. *Fast Facts: Educational Institutions*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=84> [<https://perma.cc/X4LT-P947>]; *Fast Facts: Enrollment*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=98> [<https://perma.cc/5LDJ-M7NK>].

seminar to fifteen freshmen at the University of California, Irvine in 2016 (pp. 9–12). According to the authors, they began each class by polling the students about some campus free speech controversy, such as the racist fraternity chant at the University of Oklahoma (p. 9). To their dismay, the students overwhelmingly—and in some cases unanimously—approved of the punishments, expressing more concern for the well-being of those targeted by hateful speech than for freedom of expression.²⁰ Again, this is troubling, but it is hard to draw firm conclusions from a sample size of fifteen. It is also worth noting that all the students in the seminar were freshmen (p. 9). The fact that a group of eighteen-year-olds was more worried about hurt feelings than abstract principles is not terribly surprising. Nor is it surprising that, as Chemerinsky and Gillman report, the students had little understanding of the history of free speech or its role in advancing the cause of equality (p. 10). Presumably, that is why they took the course—to learn about these things.

Chemerinsky and Gillman also cite two national surveys. The first, a 2015 poll by Yale University’s William F. Buckley Jr. Program, reported that 72 percent of college students support disciplinary action against “any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive.”²¹ The second, a Pew Research poll from the same year, reported that 40 percent of millennials thought government should be able to limit speech offensive to minority groups.²² Both of these polls were widely publicized and caused much hand-wringing.²³ But other polls have been more encouraging. A 2017 poll, also

20. See pp. 9–11.

21. P. 9 (quoting *Survey: Half of U.S. College Students “Intimidated” When Sharing Views*, BUCKLEY PROGRAM (Oct. 26, 2015), <https://www.buckleyprogram.com/news-c18lp/igaxo0n420/SURVEY-Half-of-US-College-Students-Intimidated-When-Sharing-Views> [<https://perma.cc/Z332-HM7B>]).

22. See pp. 12, 164 n.30 (citing Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RES. CTR. (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/> [<https://perma.cc/B46K-A59Y>]).

23. Another survey that caused a stir in the media purported to show that 19 percent of college students support the use of violence to silence offensive speech. See John Villasenor, *Views Among College Students Regarding the First Amendment: Results from a New Survey*, BROOKINGS (Sept. 18, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/> [<https://perma.cc/2K5F-DWRE>]. It was later revealed that this survey was an online questionnaire funded by the Charles Koch Foundation and put together by an electrical engineering professor who had no experience with public polling. Lois Beckett, *‘Junk Science’: Experts Cast Doubt on Widely Cited College Free Speech Survey*, GUARDIAN (Sept. 22, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/22/college-free-speech-violence-survey-junk-science> [<https://perma.cc/C2ZX-4CUW>]. Unlike reputable polling, the questionnaire was not based on a random sample, but could be answered by anyone identifying as a college student. *Id.* It thus had had no statistical validity. In the words of the former president of the American Association of Public Opinion Polling, the results were “malpractice” and “junk science” and “should never have appeared in the press.” *Id.* Chemerinsky and Gillman do not cite this sur-

taken by the Buckley Program at Yale, showed that 72 percent of Yale students oppose campus speech codes.²⁴ A 2016 Gallup-Knight Foundation survey reported that 78 percent of students think it is more important for colleges to have an open learning environment where students are exposed to all types of speech than to have a positive learning environment where offensive and biased speech is prohibited.²⁵ And the General Social Survey, a poll that has been taken for nearly fifty years, shows that people aged eighteen to thirty-four are more likely to support free speech than every other age group.²⁶ The General Social Survey also shows that each generation of young people, including the current generation, has been more tolerant of offensive speech than its predecessors.²⁷ Such results have led several observers to question the prevailing narrative.²⁸ In the words of one political scientist, “[I]t is difficult to see any evidence of a generational crisis.”²⁹

vey, but it is one example of how conservative critics of liberal college students have attempted to promote the narrative of a free speech crisis on campus.

24. See MCLAUGHLIN & ASSOCIATES, YALE UNDERGRADUATE SURVEY 6 (2017), http://media.wix.com/ugd/b0cbbd_e42210c8d8a7490888dd88c441ecd310.pdf [<https://perma.cc/4LUC-6CML>].

25. GALLUP, FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS 12 (2016), https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf [<https://perma.cc/TS67-ZNZN>] [hereinafter GALLUP 2016]. The percentage of students preferring an open learning environment dropped to 70 percent in the 2017 version of this survey. GALLUP, FREE EXPRESSION ON CAMPUS: WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES 9 (2017), https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/248/original/Knight_Foundation_Free_Expression_on_Campus_2017.pdf [<https://perma.cc/FRW9-9YQG>]. Given that the survey has only been conducted twice, it’s hard to say whether or not this is evidence of a trend. It’s also worth noting that a different version of the same question asked in the 2017 survey showed a higher percentage of students (82 percent) preferring an open environment. *Id.* at 9 n.4. In addition, the percentage of students preferring an open environment was higher than the percentage of adults who felt the same way (66 percent in 2016). GALLUP 2016, *supra* at 3.

26. Jeffrey Adam Sachs, *The ‘Campus Free Speech Crisis’ Is a Myth. Here Are the Facts.*, WASH. POST: MONKEY CAGE (Mar. 16, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/16/the-campus-free-speech-crisis-is-a-myth-here-are-the-facts/?noredirect=on&utm_term=.60b1d5acb530 [<https://perma.cc/GVQ7-5KB8>].

27. See *id.* There is a robust debate about the implications of the General Social Survey. Compare Jeffrey Adam Sachs, *There Is No Campus Free Speech Crisis: A Close Look at the Evidence*, NISKANEN CTR. (Apr. 27, 2018), <https://niskanencenter.org/blog/there-is-no-campus-free-speech-crisis-a-close-look-at-the-evidence> [<https://perma.cc/2XPU-RX8X>], with Sean Stevens & Jonathan Haidt, *The Skeptics Are Wrong Part 1: Attitudes About Free Speech on Campus Are Changing*, HETERODOX ACAD. (Mar. 19, 2018), <https://heterodoxacademy.org/skeptics-are-wrong-about-campus-speech> [<https://perma.cc/GTF3-C534>].

28. See Michael Hiltzik, *Are College Campuses Growing More Intolerant of Free Speech? The Numbers Say No*, L.A. TIMES (Mar. 13, 2017, 10:15 AM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-campus-speech-20170313-story.html> (on file with the *Michigan Law Review*); Sachs, *supra* note 27; Jesse Singal, *What if College Students Have the Same Views on Free Speech as Everyone Else?*, N.Y. MAG.: DAILY INTELLIGENCER (May 5, 2017), <http://nymag.com/daily/intelligencer/2017/05/college-students-free-speech.html> [<https://perma.cc/PDR9-N57H>]; Matthew Yglesias, *Everything We Think About the Political*

My point here is not to suggest that everything is fine on college campuses. Nor am I attempting to excuse those intrusions on free speech that have occurred; any violation of the First Amendment is cause for concern. But it is important to be careful how we characterize the state of free speech on campus. Colleges—and college students—are easy targets that often become pawns in the larger culture wars. Critics have used the narrative of a free speech crisis to call for action that would undermine universities, ranging from budget cuts³⁰ to so-called “free speech” legislation that would actually make it more difficult for students to engage in protests.³¹ Given the stakes involved, we should be hesitant to make sweeping claims about the intolerance of today’s students without a firm empirical basis for doing so.

II. THE SCOPE OF SPEECH RIGHTS ON CAMPUS

Regardless of whether there is a crisis on campus, important questions are being raised about the scope of free speech rights for students, faculty members, and outside speakers. And in the twenty years since the publication of Robert O’Neil’s excellent *Free Speech in the College Community*,³² there has been no book-length study of the topic by serious scholars. Chemerinsky and Gillman’s book is therefore much needed. But how persuasive is their case for maximum free speech rights on campus? Answering this question will be easier if we distinguish the free speech rights of three different groups: faculty, students, and outside speakers. Chemerinsky and Gillman do not divide their analysis in this way, but they say enough about each group to provide a starting point for discussion.

A. Student Speech

As indicated above, Chemerinsky and Gillman argue that “campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge” (pp. 19–20). This view stands in stark contrast to that of Robert Post, who argues that First

Correctness Debate Is Wrong, VOX (Mar. 12, 2018, 8:00 AM), <https://www.vox.com/policy-and-politics/2018/3/12/17100496/political-correctness-data> [<https://perma.cc/AQ3T-BCBD>].

29. See Sachs, *supra* note 27.

30. See e.g., Stanley Kurtz, *Federal Funding and Campus Speech: A Proposal*, NAT’L REV. (Feb. 21, 2017, 2:54 PM), <https://www.nationalreview.com/corner/federal-funding-and-campus-free-speech-proposal/> [<https://perma.cc/W436-TLND>].

31. See Michael Hiltzik, *How a Right-Wing Group’s Proposed ‘Free Speech’ Law Aims to Undermine Free Speech on Campus*, L.A. TIMES (May 30, 2018, 11:10 AM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-free-speech-20180530-story.html> [<https://perma.cc/UBX6-Z4J8>].

32. ROBERT M. O’NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 1 (1997).

Amendment principles are largely inapplicable on college campuses.³³ According to Post, the purpose of the First Amendment is to protect speech that contributes to public discourse and self-government.³⁴ “But speech within universities does not serve this purpose,” he writes.³⁵ “It serves the purpose of education, which requires an entirely different framework of speech regulation”³⁶

Although they start from a different presumption, Chemerinsky and Gillman are not quite as far apart from Post as they might seem. The reason is that Chemerinsky and Gillman qualify their view by agreeing that universities can regulate student speech in the classroom (pp. 125–28). This echoes Post, who argues that the educational mission of the university allows it to engage in content discrimination that would not be allowed in other contexts.³⁷ For instance, universities can limit student discussion to the subject matter of the course.³⁸ They can also insist on a certain level of professional decorum and respect.³⁹ And they can require students to express themselves in the form of answering questions and taking tests.⁴⁰ The authors and Post also agree that universities can evaluate the quality of faculty scholarship according to the standards of the given discipline.⁴¹

Where Chemerinsky and Gillman part ways from Post is in their treatment of speech outside the classroom. Here, Chemerinsky and Gillman’s position is truly maximalist. In their view, campuses should be thought of as having two different zones of free speech:

[A] *professional zone*, which protects the expression of ideas but imposes an obligation of responsible discourse and responsible conduct in formal educational and scholarly settings; and a larger *free speech zone*, which exists outside scholarly and administrative settings and where the only restrictions are those of society at large. Members of the campus community may say things in the free speech zones that they would not be allowed to say in the core educational and research environment. (p. 77)

Chemerinsky and Gillman purport to be describing the current state of First Amendment law, not merely stating what they would like the law to be.⁴² So what is the basis for their claim that student and faculty speech outside the professional zone is subject only to the restrictions that apply to so-

33. Robert Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106, 112 (Lee C. Bollinger & Geoffrey R. Stone eds., 2018).

34. *See id.* at 108.

35. *Id.* at 112.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 112–13.

40. *Id.* at 112.

41. P. 131–35; Post, *supra* note 33, at 116–17.

42. *See* p. 53.

ciety at large? They are not entirely clear on this point. In some passages, they suggest that this understanding emerged from the Berkeley Free Speech Movement of the 1960s, in which students demanded—and ultimately secured—permission to use common spaces on the Berkeley campus to engage in political activity and protest (pp. 74–78). The Free Speech Movement, they write, “established the principle that students and faculty have the right to express themselves on a broad range of topics, and have the right to use campus grounds for personal and political expression” (p. 126). The Berkeley protests were undoubtedly an important moment in the history of the First Amendment, and they did usher in a more liberal attitude about campus speech. But there was no judicial resolution to the students’ claims; Berkeley officials simply gave in to their demands (after a protracted stand-off).⁴³ As a result, the Free Speech Movement is not *legal* authority for the right of faculty and students to speak freely outside the classroom.

In other passages, Chemerinsky and Gillman cite case law that might be viewed as supporting their claim. For instance, they discuss *Keyishian v. Board of Regents*,⁴⁴ a 1967 case in which the Supreme Court struck down a university requirement that faculty members disclose their membership in the Communist Party.⁴⁵ They also cite to several lower court decisions invalidating speech codes that were adopted on university campuses in the 1990s (pp. 97–103). But none of these cases fully support their claim about the scope of campus speech. *Keyishian* held that faculty members could not be punished for mere membership in a subversive organization.⁴⁶ And many of the decisions striking down campus speech codes did so on grounds of vagueness and overbreadth.⁴⁷ At least one circuit court decision did invoke the principle of content neutrality, thus supporting the idea that universities cannot punish student speech based on its viewpoint.⁴⁸ But whether that decision rules out all campus speech regulations is unclear. It is possible that a more narrowly tailored regulation designed specifically to protect the educational opportunity of other students would survive. In addition, none of the speech code decisions addressed whether students have the right to use campus grounds for personal and political expression.

43. E.g., Richard Gonzales, *Berkeley's Fight for Free Speech Fired Up Student Protest Movement*, NPR (Oct. 5, 2014, 7:57 AM), <https://www.npr.org/2014/10/05/353849567/when-political-speech-was-banned-at-berkeley> (on file with the *Michigan Law Review*) (“The confrontation proved too much for the university, and the university faculty voted to end all restrictions on political activity.”).

44. 385 U.S. 589 (1967).

45. P. 80; *Keyishian*, 385 U.S. at 592.

46. *Keyishian*, 385 U.S. at 609–10.

47. E.g., *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1179–80 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866–67 (E.D. Mich. 1989).

48. See, e.g., *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) (invalidating university’s punishment of fraternity for sexist skit because the university “should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint”).

One area of First Amendment law that Chemerinsky and Gillman do not consider is the public forum doctrine. This is surprising given that many campus speech cases have been decided under this framework.⁴⁹ In applying the public forum doctrine, the first question is how the government property at issue should be categorized.⁵⁰ Most of the outside spaces on a university campus consist of sidewalks, streets, and quadrangles, so one might think they would be categorized as traditional public fora. But there are several reasons to doubt this conclusion. First, if these spaces were categorized as traditional public fora, they would have to be open not only for student and faculty speech but also for the speech of the general public—a result that defies common sense.⁵¹ Second, the Supreme Court has rejected the position that all sidewalks necessarily fall into the category of the traditional public forum. In *Greer v. Spock*, the Court denied a claim of access to a military base even though the base contained sidewalks, streets, and parks.⁵² And in *United States v. Kokinda*, a plurality of the Court agreed that a sidewalk leading from a parking lot to the entrance of a post office was not a traditional public forum.⁵³ In explaining this conclusion, Justice O'Connor wrote that "[t]he mere physical characteristics of the property cannot dictate forum analysis."⁵⁴

The Supreme Court has not yet specifically ruled whether the sidewalks and other common spaces on a university campus are traditional public fora, but some circuit courts have ruled that they are not. In *Bowman v. White*, the Eighth Circuit rejected the claim that the sidewalks, streets, and park-like areas of a university campus were traditional public fora.⁵⁵ Noting that a university's purpose is not to "provide a forum for all persons to talk about all topics at all times" but to educate students, the court concluded that "streets, sidewalks, and other open areas that might otherwise be traditional public fora may be treated differently when they fall within the boundaries of the University's vast campus."⁵⁶ The Fifth Circuit appears to agree. In *Brister v. Faulkner*, it held that a university sidewalk bordering a public sidewalk qualified as a traditional public forum because there was nothing to indicate where the public sidewalk ended and the university campus began.⁵⁷ As a re-

49. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION 1999–1205* (5th ed. 2013).

50. See *id.* at 1200.

51. See *id.* at 1201.

52. 424 U.S. 828, 835–36 (1976).

53. 497 U.S. 720, 727–28 (1990) (plurality opinion).

54. *Kokinda*, 497 U.S. at 727.

55. 444 F.3d 967, 978–79 (8th Cir. 2006).

56. *Bowman*, 444 F.3d at 978; see also *Roberts v. Haragan*, 346 F. Supp. 2d 853, 860–63 (N.D. Tex. 2004); *State v. Spingola*, 736 N.E.2d 48, 53 (Ohio 1999) (holding that the "College Green" at Ohio University is not a traditional public forum because "it does not possess the characteristics inherent in" such a forum).

57. 214 F.3d 675, 683 (5th Cir. 2000).

sult, the court concluded, “members of the public cannot be certain when they have entered the university’s enclave.”⁵⁸ The strong implication of the court’s reasoning was that, as long as there is a clear demarcation between public sidewalks and a university campus, the sidewalks on campus are not traditional public fora.

A more plausible argument is that the outdoor spaces on a university campus are designated public fora. At most universities, administrators allow students to use quads, plazas, sidewalks, and other outdoor spaces for expressive activities, suggesting an intent to open up these spaces for expressive purposes. In addition, there is nothing about the outdoor spaces of most campuses that would be incompatible with a designated public forum. Therefore, one could make a strong argument that most outdoor spaces on campus are designated public fora.⁵⁹ The Supreme Court has not directly addressed the question, but its decision in *Widmar v. Vincent* supports this conclusion.⁶⁰ In that case, the Court held that a state university could not exclude a student group from using campus facilities that had been opened to other student groups.⁶¹ Although the university was under no obligation to open its facilities to any student group, once it made the choice to do so it was subject to the rules governing a traditional public forum. As Justice Powell wrote, “The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”⁶²

Widmar doesn’t answer all questions about student speech outside the classroom. In particular, it doesn’t make clear which spaces on campus should be considered designated public fora. What about dormitories? Sports fields? Libraries? The answer in any particular case will depend on the answers to two questions: Have university officials demonstrated an intent to open up these spaces for student and faculty expression? And are the spaces compatible with expression? If the answer to these two questions is yes, the university has created a designated public forum in which speech is subject only to reasonable time, place, or manner regulations.

What if the answer is no? Robert Post argues that a college campus is not a public forum and that administrators therefore have wide latitude in the regulation of student speech.⁶³ Post does not make clear exactly how far ad-

58. *Brister*, 214 F.3d at 682.

59. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (holding that a designated public forum is created when governmental policy and nature of the property suggest an intent to open a nontraditional forum to public discourse).

60. 454 U.S. 263 (1981).

61. *Widmar*, 454 U.S. at 263.

62. *Id.* at 267–68; cf. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that school district that permitted community groups to use school facilities after hours for social, civic, and recreational purposes could not exclude religious organization from using facilities for discussion of child rearing and family issues from a religious perspective).

63. See Post, *supra* note 33, at 118–19.

ministrators can go. At certain points, he suggests that the First Amendment is entirely inapplicable to campus speech because the purpose of such speech is not to contribute to public discourse and self-government but to further the school's educational mission.⁶⁴ At other times, he seems to accept that speech outside the classroom might be entitled to some protection, especially when the connection between the speech and the university's educational mission is tenuous.⁶⁵ But in general, he appears to believe that content discrimination of student speech, even outside the classroom, does not implicate the First Amendment.⁶⁶

This is a review of Chemerinsky and Gillman's book, not Post's views, so I will not analyze his argument at length. But I will offer a few thoughts. First, although the case law may not fully support the maximalist view of Chemerinsky and Gillman, it seems more consistent with their position than with Post's. In particular, the cases striking down campus speech codes in the 1990s are hard to square with the idea that First Amendment principles are inapplicable to campus speech.⁶⁷ More fundamentally, it is unclear why Post thinks campus speech does not serve the purpose of self-government. When students in the classroom discuss the causes of the Civil War, the merits of laissez-faire economics, or the pros and cons of various healthcare systems, they are exchanging and forming views that will influence their participation in our democracy. The same is true outside the classroom when students engage in informal discussions and debates, write articles for the student newspaper, produce student plays, or engage in political activism. Such speech may take place on campus, yet it clearly contributes to a public discourse that extends beyond campus.

Perhaps what Post means is not that speech on campus *cannot* contribute to self-government. Perhaps he means only that speech on campus is not *intended* to contribute to self-government because a university's mission is to educate students. Whether the mission of universities is that narrow is open to debate.⁶⁸ But even if Post is right about a university's mission, that would be a reason for balancing the educational mission against the interest in free speech, not for declaring First Amendment principles entirely inapplicable. Otherwise, government institutions could simply define their mission so as to exempt themselves from the requirements of the Constitution. Consider a case like *Tinker v. Des Moines Independent Community School*

64. *Id.* at 112.

65. *See id.* at 119.

66. For instance, he argues that students can be punished for marching through campus shouting an offensive slogan "because the relationship—the *entire relationship*—between a university and its students is governed by the goal of education." Robert C. Post, *There Is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017, 11:33 AM), <https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests> [<https://perma.cc/73LG-ES3Z>].

67. *See supra* notes 47–48 and accompanying text.

68. *See, e.g.*, Jack Meacham & Jerry G. Gaff, *Learning Goals in Mission Statements: Implications for Educational Leadership*, LIBERAL EDUC., Winter 2006, at 6, 9.

District.⁶⁹ If Post were correct, the school system in that case could simply have defined its purpose as the education of students and disclaimed any intent to contribute to public discourse. But the Court recognized that student speech *can* contribute to public discourse and thus balanced the interest in free speech against the school's interest in avoiding material disruptions to the learning environment.⁷⁰ Post offers no reason to approach speech on college campuses any differently. Yes, the educational mission of universities should be taken into account when evaluating the free speech rights of students (and faculty). But that mission should not be invoked to render First Amendment principles entirely inapplicable.

B. *Faculty Speech*

When it comes to the free speech rights of faculty members, Chemerinsky and Gillman take the same approach they do with student speech, distinguishing the speech faculty members engage in as teachers and researchers from the speech they engage in outside this professional zone. As teachers and researchers, the authors note, faculty members are entitled to a degree of academic freedom (p. 65). Thus, they cannot be punished for the academic choices they make in the classroom or the results they advocate in their research. At the same time, faculty members are constrained by the function the university is meant to serve. Because universities are designed to develop knowledge and educate students, faculty members can be punished if they fail to further these goals. Thus, a political scientist who spends each class talking about sports or music could be punished for his speech. The same is true if a faculty member uses abusive or profane language in the classroom because part of the university's purpose is to instill a sense of professionalism and mutual respect in students. Finally, faculty members can be denied tenure or promotion if they fail to meet expectations of competence within their field. Thus, a university could refuse tenure to an astronomer who writes a paper claiming that the sun revolves around the earth or to a history professor who teaches that the Holocaust did not occur.

The issue becomes more complicated when the speech takes place outside this professional zone. As the American Association of University Professors (AAUP) Statement of Principles on Academic Freedom and Tenure notes, faculty members should be accorded the freedom of other citizens to speak on issues of public concern.⁷¹ The AAUP also states that "a faculty member's expression of opinion as a citizen cannot constitute grounds for

69. 393 U.S. 503, 514 (1969) (holding that school system could not punish students who engaged in political speech at school because the speech did not pose a material disruption).

70. *Tinker*, 393 U.S. at 512–14.

71. See AM. ASS'N UNIV. PROFESSORS, REPORTS AND PUBLICATIONS: 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (2015), <https://aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [<https://perma.cc/C8FP-QZCE>].

dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position."⁷²

Chemerinsky and Gillman say they would go further than this. In their view, a university should never be permitted to declare a faculty member unfit based on his or her statements alone (pp. 79–80). Citing the long history of professors who have been punished for controversial views, they argue that it is simply too dangerous to base disciplinary action on speech alone (pp. 79–80). "Statements by a faculty member may give rise to an inquiry," they write, "but a finding of unfitness cannot be based solely on a person's controversial or offensive statements or views" (p. 80).

Chemerinsky and Gillman make an important point about the dangers of using outside speech to impugn a faculty member's fitness. And as a matter of policy, universities should be cautious before doing so. But as a matter of First Amendment law, their claim is questionable. As support, they cite *Keyishian*, the 1967 case in which the Supreme Court struck down a university requirement that faculty members certify that they were not members of the Communist Party.⁷³ But although the Court in *Keyishian* emphasized that academic freedom is "a special concern of the First Amendment,"⁷⁴ it did not suggest that statements by a faculty member could never be the basis for a finding of unfitness. It held instead that the university's requirement was both vague and overbroad because mere membership in an organization without intent to further its unlawful aims could not be a basis for punishment.⁷⁵

To see why the authors' claim goes too far, imagine a law professor who states publicly and repeatedly that he believes members of a minority racial group are intellectually inferior and not worth training to be lawyers. Given that one of the duties of professors is to teach, it is hard to see how such a professor could be fit for the job. Chemerinsky and Gillman suggest we should look past the professor's comments and focus primarily on what he does in the classroom (p. 80). But even if the professor appeared to treat every student in the class equally, his comments would still have an impact on the ability of minority students to learn. As researchers have shown, members of a minority group who have been stigmatized are more likely to conform to negative stereotypes when those stereotypes are made salient.⁷⁶ This phenomenon, known as stereotype threat, has been demonstrated in numerous contexts and is particularly problematic when the stereotype relates to

72. *Id.*

73. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

74. *Id.* at 603.

75. *Id.* at 599–604, 605–10.

76. See generally Mara Cadinu et al., *Why Do Women Underperform Under Stereotype Threat? Evidence of the Role of Negative Thinking*, 16 *PSYCHOL. SCI.* 572 (2005); Steven J. Spencer et al., *Stereotype Threat*, 67 *ANN. REV. PSYCHOL.* 415 (2016); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 797, 797–811 (1995).

the intellectual abilities of minority groups.⁷⁷ A professor who has explicitly disparaged the intelligence of a racial minority is likely to make those stereotypes salient. Therefore, that professor is in no position to effectively teach and evaluate his students.

Instead of categorically protecting the outside speech of faculty members, a better approach is to apply the ordinary rules of the public employee speech doctrine. This requires asking first whether the speech addresses an issue of public concern and then balancing the faculty member's interest in addressing that issue against the university's interest in the effective functioning of its offices.⁷⁸ Indeed, that is the approach most lower courts have taken.⁷⁹

The Supreme Court has not yet definitively stated whether the public employee speech doctrine applies to faculty members. And there is at least one part of the doctrine that *should not* apply—the rule of *Garcetti v. Ceballos*, which held that there is no First Amendment protection for speech that public employees engage in as part of their “official duties.”⁸⁰ If *Garcetti* applied to the speech of faculty members, it would permit universities to dictate the content of their scholarship and teaching, seriously undermining the principle of academic freedom. The justices seemed to recognize this in *Garcetti* itself. Justice Kennedy, who wrote the majority opinion, acknowledged that faculty speech may implicate “additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”⁸¹ For that reason, he stated, the Court’s opinion did not address whether its analysis “would apply in the same manner to a case involving speech related to scholarship or teaching.”⁸² Justice Souter, who dissented in *Garcetti*, expressed his hope that “today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”⁸³ Lower courts have taken their cues from these statements, holding the rule of *Garcetti* inapplicable to faculty speech.⁸⁴

77. See Joshua Aronson, *Stereotype Threat: Contending and Coping with Unnerving Expectations*, in IMPROVING ACADEMIC ACHIEVEMENT: IMPACT OF PSYCHOLOGICAL FACTORS ON EDUCATION 279 (Joshua Aronson ed., 2002) (discussing the effect of stereotype threat on students).

78. See KAPLIN & LEE, *supra* note 49, at 693–95 (discussing the analytical framework developed by the Court in *Pickering* and *Connick*, cases involving the speech rights of public employees).

79. See *id.* at 693 (“When faculty members at public institutions assert First Amendment free speech claims, these claims are usually subject to a line of U.S. Supreme Court cases applicable to all public employees: the *Pickering-Connick* line.”).

80. 547 U.S. 410 (2006).

81. *Garcetti*, 547 U.S. at 425.

82. *Id.*

83. *Id.* at 438 (Souter, J., dissenting) (quoting *id.* at 421 (majority opinion)).

84. See, e.g., *Demers v. Austin*, 746 F.3d 402, 405 (9th Cir. 2014) (holding that the speech of a public university professor is governed by *Pickering-Connick* instead of *Garcetti*);

C. Outside Speakers

Perhaps the most contested free speech issue on campus today revolves around outside speakers. Some of the most disturbing incidents that have occurred in recent years—including the incidents at Berkeley and Middlebury—stemmed from invitations to outside speakers with provocative views.⁸⁵ Surprisingly, Chemerinsky and Gillman do not spend much time addressing outside speakers. They make clear that they object to the no-platforming movement, which attempts to deny controversial or offensive speakers a platform to speak (pp. 71–73). But they do not fully address the constitutional issues this movement raises.

The first point to make is that unless a college campus is deemed to be a traditional public forum (which, as noted above, is unlikely),⁸⁶ outside speakers have no constitutional right to speak on campus. Just as the government can deny outside speakers the use of courthouses, jails, police departments, and a host of other government-owned facilities, it can deny them the use of university grounds and buildings. Even if the common spaces of a university are treated as designated public fora for student and faculty expression, outside speakers can still be excluded, since a designated public forum can be set aside for a particular class of speakers as long as the exclusion is not based on viewpoint.⁸⁷

Given that outside speakers have no constitutional right to speak on campus, the question becomes whether students have a First Amendment right to invite them to campus. The answer to that question turns on whether university administrators have created a designated public forum that en-

Adams v. Trs. of the Univ. of N.C.—Wilmington, 640 F.3d 550, 564 (4th Cir. 2011) (declining to apply *Garcetti* to the academic work of a public university professor); Lee v. York Cty. Sch. Div., 484 F.3d 687, 697 n.11 (4th Cir. 2007) (applying the *Pickering-Connick* standard to conduct involving a public school teacher because the Court had not yet explicitly decided whether the *Garcetti* analysis applied to speech related to teaching).

85. See, e.g., Javier Panzar & Alene Tchekmedyian, *9 Arrested as Protesters Gather at UC Berkeley for Talk by Conservative Speaker Ben Shapiro*, L.A. TIMES (Sept. 15, 2017, 7:35 AM), <http://www.latimes.com/local/california/la-me-berkeley-protest-shapiro-20170914-htmlstory.html> [<https://perma.cc/6T2K-29QR>]; Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html> (on file with the *Michigan Law Review*).

86. See *supra* notes 49–62 and accompanying text.

87. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (“[I]n determining whether the . . . exclusion of a class of speech is legitimate, we have observed a distinction between . . . content discrimination, which may be permissible . . . [and] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (“Although a speaker may be excluded . . . if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”).

ables students to do so.⁸⁸ On many campuses, they have.⁸⁹ By allocating student fees to recognized student groups for a variety of educational activities, including the invitation of outside speakers, many universities have created a designated public forum and cannot block the invitation of particular speakers based on their viewpoint.⁹⁰

But universities are not required by the First Amendment to create such a forum. A university could decide, consistent with the First Amendment, not to permit any outside speakers on campus.⁹¹ It could decide that its educational mission is fully satisfied by the courses it offers and additional lectures given by its own faculty.⁹² Of course, a university that invited no outside speakers would be a boring place, and students might choose not to attend. But if university administrators concluded there was nothing to gain by inviting outside speakers to campus, the First Amendment would not stand in their way.

If a university does want outside speakers but wants to retain some control over the process, it has two options. First, administrators can choose the speakers themselves or appoint a faculty committee to make the selections. Alternatively, a university can allow student groups to invite outside speakers, but define the forum so as to limit the choices available. For instance, administrators can specify that any outside speaker must address a topic taught as part of the university's curriculum. Thus, a school lacking a linguistics department could block the invitation of a linguist (to discuss linguistics) on the grounds that the speaker would not further the university's educational mission. A university could also specify that speakers must possess academic competence in the topic they are invited to discuss. So a school could block a student group's invitation to the basketball player Kyrie Irving to discuss the question of whether the earth is flat or round.⁹³ Deciding whether a potential speaker possesses academic competence will not always be easy. Some might argue that Charles Murray lacks competence because his work is not peer reviewed and is flawed, while others might say those flaws are within the realm of normal academic disagreement. But as long as a

88. See *Rosenberger*, 515 U.S. at 828–30 (stating that a university may not “discriminate against speech on the basis of its viewpoint” once it has opened a designated forum).

89. See *supra* note 59 and accompanying text.

90. See *Rosenberger*, 515 U.S. at 833–37 (holding that a student activities fund used to subsidize the expressive activities of student groups was a designated public forum).

91. See *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

92. See *id.* (noting that a university has the “authority to impose reasonable regulations compatible” with its educational mission and need not “grant free access to all of its grounds or buildings”).

93. Irving has repeatedly expressed the view that the earth is flat. Whether or not he is serious is unclear. See Matt Bonesteel, *Flat-Earther Kyrie Irving Says He Just Wants Everyone ‘To Do Their Own Research’ (on Instagram)*, WASH. POST (Jan. 12, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/01/12/flat-earther-kyrie-irving-says-he-just-wants-everyone-to-do-their-own-research-on-instagram/> [<https://perma.cc/P8TJ-P9S7>].

university does not use judgments about competence as a cover for viewpoint discrimination, the First Amendment is not violated.

III. THE OTHER SIDE OF THE EQUATION: EDUCATIONAL OPPORTUNITY

With the rules of campus speech elucidated, it is clear what universities cannot do. But what can they do to protect the educational environment so that all students have an opportunity to learn? Although Chemerinsky and Gillman have less to say about this than about the issue of free speech, they are not completely without ideas.

First, universities can impose reasonable time, place, and manner regulations on both faculty and student speech (pp. 127–29). Thus, it would not violate the First Amendment if a university prohibited students from shouting through a bullhorn outside a class that was in session or from defacing campus property with spray paint. As long as the restriction is content neutral, furthers a substantial government interest, and leaves open adequate alternative avenues of communication, it is constitutional.⁹⁴

In addition, student speech can be punished if it falls into one of several categories of particularly harmful speech, such as fighting words, true threats, defamation, incitement, or harassment (pp. 46, 116–23). This last category is particularly relevant, since it is likely to be invoked more frequently than the others.⁹⁵ As defined by the Supreme Court, harassment consists of speech targeted at an individual that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”⁹⁶ Thus, the authors conclude, the fraternity members at Oklahoma who chanted racist epithets on a private bus could not be punished.⁹⁷ But if they chanted the same thing to African-American students entering a classroom, they could be (p. 121).

What about trigger warnings and safe spaces? Chemerinsky and Gillman approve of the use of trigger warnings for potentially upsetting material (pp. 136–37). As they indicate, many professors have been doing something similar to this for many years (pp. 136–37). But they object to a university requiring the use of trigger warnings, arguing that doing so would undermine academic freedom by forcing some professors “to change their course

94. See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–48 (1981).

95. See pp. 118–23 (discussing how universities apply broad interpretations of the harassment exception to punish campus speech).

96. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). The Court has not expressly held that university officials can punish harassment without violating the First Amendment, but its decision in *Davis* strongly implies that they can. See *id.* at 667 (Kennedy, J., dissenting).

97. P. 121; see Manny Fernandez & Richard Pérez-Peña, *As Two Oklahoma Students Are Expelled for Racist Chant, Sigma Alpha Epsilon Vows Wider Inquiry*, N.Y. TIMES (Mar. 10, 2015), <https://www.nytimes.com/2015/03/11/us/university-of-oklahoma-sigma-alpha-epsilon-racist-fraternity-video.html> (on file with the *Michigan Law Review*).

assignments” or “characterize [the] material in a way that does not reflect their views of it” (p. 137). As for safe spaces, the authors support the idea of students coming together in affinity groups to share their thoughts and experiences (p. 139). But they disapprove of any effort to make the classroom a safe space from challenging ideas (pp. 139–40). In their view, classrooms should be made safe for the expression of all views, not for the feelings of those who might be offended by those views (p. 140).

These positions are not surprising given the authors’ commitment to free speech. But it sometimes seems as though they think students are merely objecting to offensive ideas. At one point, they report having “heard of many instances of students walking out of class when other students say things they disagree with, and then demanding protection from the threat of having to listen to such views” (pp. 14–15). At another point, they claim that students are demanding a “safe space for those who consider themselves harmed when they are exposed to views with which they disagree” (p. 72). This may be what the authors are hearing, but it is not my understanding of the situation. I hear students saying not that they want to be protected from offense but that they do not want their basic humanity attacked or called into question. As I read the situation, minority students are pushing back against what they feel is a perception that they do not belong. If I am right, the students’ requests for trigger warnings and safe spaces are not about offense. They are about feeling personally attacked. And that seems like a harm worth guarding against.

Finally, Chemerinsky and Gillman argue that university officials can use their own voices to push back against views that are antithetical to the values of the institution (pp. 146–50). This is sound advice. The problem, as they acknowledge, is that it creates a dilemma. The more university officials speak out in response to controversial speakers, the more they will be expected to speak out.⁹⁸ Having used their position in the past to condemn a speaker’s views, they will face pressure to do so in the future or risk not taking the subsequent speaker as seriously. There is also a concern that the bully pulpit of the president’s office will cast a pall of silence over the campus. As Chemerinsky and Gillman put it, “Frequent and persistent pronouncements by college or university leaders on the various views expressed within the community risk creating a campus orthodoxy of opinion, and it is the primary responsibility of campus officials to ensure that no such orthodoxy is established” (p. 149).

CONCLUSION

The latest round of the campus speech wars is unlikely to be the last. Because of their role in educating the next generation, colleges will always be a flashpoint in the larger cultural and social battles, and there will always be some tension between the demands of free speech and the demands of equal

98. See p. 149.

opportunity. Unlike many contemporary observers, Chemerinsky and Gillman resist the temptation to elevate one of these values above the other. Instead, they make a compelling case that both values are worth preserving and that neither should be sacrificed for the other. They also help to elucidate the free speech principles that apply on campus, showing how the speech of students and faculty members is dependent upon the context in which it occurs. Their embrace of a maximalist position is not always supported by the case law, and they are sometimes too dismissive of the possibility that more narrowly drawn speech regulations might be constitutional. But the authors make an important contribution to our understanding of campus speech, so that when the next round of the speech wars begin, the rules of engagement will be clear.

