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Promising the First Amendment: (De)Regulating Speech in Higher Education

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Abstract

The war between Hamas and Israel has caused havoc in higher education. Amid student unrest, alumni pressure, congressional hearings, civil rights investigations, and student lawsuits, universities stand at a crossroads. The current situation, in which most private universities unevenly regulate student speech under ambiguous student codes, is not sustainable politically or legally. A tsunami of litigation and regulatory actions has already begun. One increasingly favored response is for private universities to more vigorously enforce existing codes or expand their scope. An alternative is for private universities to deregulate student expression and commit by contract to the First Amendment. This paper argues for the latter approach largely on pragmatic grounds. In essence, our argument is grounded in the realities of university organizational behavior which make it difficult for universities to enforce speech codes in a manner that complies with their regulatory and contractual obligations. Ambiguous codes, informal process, and political homogeneity among decision-makers inevitably results in inconsistent regulation of speech. These problems can be mitigated by committing to the First Amendment, which would both clarify and constrain university speech regulations by incorporating a large body of caselaw, some of which bears directly on higher education. Such clarity would limit the scope of university action, provide a basis for legally required consistency, and be more readily amenable to external review by courts and federal regulators. Experience with the First Amendment in public universities suggests that such a commitment will not have deleterious consequences for campus life.

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INTRODUCTION

The brutal conflict between Hamas and Israel has led to havoc in higher education.[1] The atmosphere on college campuses, especially between pro-Israel and pro-Palestinian students, is one of palpable tension.[2] The tension between lawmakers and university administrators is at least as high. At high profile hearings held in the fall of 2023, the presidents of Harvard, MIT and Penn stood accused of tolerating antisemitic speech that would not have been tolerated against other identity groups. Lawmakers, armed with examples and hypotheticals sought to reveal the universities' inconsistent and, for some, hypocritical treatment of student speech.[3] The university presidents struggled to explain why they punished or denigrated some types of speech but not others, and at times they invoked the First Amendment or its principles.[4] Private lawsuits and federal investigations followed. Two of the three presidents resigned under pressure after the hearings. Public confidence in universities is presently at historic lows.[5]

The current situation, highlighted by the congressional hearings, in which private schools inconsistently regulate student speech, is not sustainable politically or legally. Public universities, attended by almost three-quarters of college students,[6] are state actors bound by the First Amendment.[7] Public university obligations with respect to student speech are, as a result,

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[1] *See, e.g.*, Stephen Carter, *College Is All About Curiosity. And That Requires Free Speech*, N.Y. TIMES MAG. (Jan. 24, 2024), https://www.nytimes.com/2024/01/24/magazine/college-free-speech.html ("I have served happily as a professor at Yale for most of my adult life, but in my four-plus decades at the mast, I have never seen campuses roiled as they're roiling today.").

[2] *See, e.g.*, Theo Baker, *The War at Stanford*, THE ATLANTIC (Mar. 26, 2024), https://www.theatlantic.com/ideas/archive/2024/03/stanford-israel-gaza-hamas/677864/ [perma.cc/7BHP-4ADE] (detailing tensions on Stanford campus including the use of racially charged language against Jewish students).

[3] *See, e.g., Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the H. Comm. on Educ. & the Workforce,* 118th Cong. 15-16 (2023) (statement of Rep. Tim Walberg, Member, H. Comm. on Educ. & the Workforce) (pointing to Harvard's lack of defense for a professor who claimed sex is biological); *id.* at 21 (2023) (statement of Rep. Elise Stefanik, Member, H. Comm. on Educ. & the Workforce) (pointing to Harvard's rescinding admission for offensive social media posts); *id.* at 43 (2023) (statement of Rep. Kevin Kiley, Member, H. Comm. on Educ. & the Workforce) (pointing to Harvard's "dead last" place in Foundation for Individual Rights campus speech rankings).

[4] *See, e.g., id.* at 55-56 (back and forth discussion between Congressperson Elise Stefanik and the university presidents on whether calling for genocide would violate the universities' codes of conduct).

[5] Jessica Blake, *American Confidence in Higher Ed Hits Historic Low*, INSIDE HIGHER ED (July 11, 2023), https://www.insidehighered.com/news/business/financial-health/2023/07/11/american-confidence-higher-ed-hits-historic-low [perma.cc/6YNX-YE34].

[6] Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Jan. 10, 2024), https://educationdata.org/college-enrollment-statistics#:~:text=73.0%25%20of%20college%20students%20at,time%20equivalent%20(FTE)%20students [perma.cc/95QS-N362]. For full-time enrollees, the public percentage is significantly lower at 61%. *Id.*

[7] *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972) (public colleges and universities); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (public schools).

clear and non-negotiable. Private universities are not so constrained. They may enact speech codes that restrict and punish speech that would be protected by the First Amendment. They are, however, bound both by the antidiscrimination mandates of Titles VI and IX—which require universities that accept federal money to be neutral with respect to race, national origin, and sex—and by their own voluntary contractual promises of viewpoint neutrality.

Private universities thus stand at a crossroads. They may ramp up enforcement of their existing speech codes and punish all problematic speech—without regard to speaker or viewpoint. Or they may in effect deregulate speech and commit to the First Amendment—thereby creating an external and enforceable standard of speech. Under pressure, universities are choosing to expand their regulation of speech. At later hearings in 2024, featuring the Presidents of Columbia University, Northwestern University, UCLA and Rutgers University, both lawmakers and university presidents seemed to back away from commitments to free speech.[8] Republican and Democratic lawmakers demanded greater university speech regulation, including the expulsion of antisemites from campus.[9] University presidents have reacted by condemning specific speech as hateful,[10] universities have amended their conduct codes,[11] and a handful of schools have derecognized Students for Justice in Palestine and other groups.[12]

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[8] *Calling for Accountability: Stopping Antisemitic College Chaos: Hearing Before the H. Comm. on Educ. & the Workforce,* 118th Cong. 4 (2024) (statement of Rep. Robert Scott, Ranking Member, H. Comm. on Educ. & the Workforce) ("But again, in painting with a broad brush, the [Republican] majority has attempted to remove any distinction between hate speech and genuine political protest.").

[9] *See, e.g., Columbia in Crisis: Columbia University's Response to Antisemitism: Hearing Before the H. Comm. on Educ. & the Workforce,* 118th Cong. 14 (2024) (statement of Rep. Tim Walberg, Member, H. Comm. on Educ. & the Workforce) (asking for removal of Columbia professor who allegedly discriminated against Jewish students); *id.* at 17 (exchange between Congressperson Elise Stefanik and Columbia University President Minouche Shafik regarding disciplinary action against a Columbia University law professor); *Calling for Accountability: Stopping Antisemitic College Chaos: Hearing Before the H. Comm. on Educ. & the Workforce,* 118th Cong. 29 (2024) (statement of Rep. Bob Good, Member, H. Comm. on Educ. & the Workforce) (asking Rutgers University President Johnathon Holloway if "it's appropriate for Rutgers to continue to fund" a center whose director made allegedly antisemitic statements).

[10] Michael Schill, *Announcing New Committee on Preventing Antisemitism and Hate*, NW. UNIV. (Nov. 13, 2023), https://www.northwestern.edu/leadership-notes/2023/announcing-new-committee-on-preventing-antisemitism-and-hate.html [perma.cc/D88V-E5NR] (asking students not to fly Hamas flags or say "From the River to the Sea…"); Olivia Alafriz, *Harvard President Condemns Pro-Palestinian Slogan*, POLITICO (Nov. 9, 2023), https://www.politico.com/news/2023/11/09/harvard-president-condemns-pro-palestinian-slogan-00126419.

[11] Jessica Blake, *College Leaders Crack Down on Student Protests*, INSIDE HIGHER ED (Feb. 19, 2024), https://www.insidehighered.com/news/students/free-speech/2024/02/19/college-leaders-crack-down-student-protests?utm_campaign=IHESocialEditorial&utm_content=college_leaders_crack_dow&utm_medium=Social&utm_source=facebook [perma.cc/VK4G-PF6G]; Penelope Jennings, *Breaking: AU Bans Protests Inside University Buildings*, THE EAGLE (Jan. 25, 2024), https://www.theeagleonline.com/article/2024/01/breaking-au-bans-protests-inside-university-buildings [perma.cc/GMA4-WAEJ] (reporting numerous actions including limiting protests and that "[a]nyone displaying posters that do not 'promote inclusivity' will be subject to general disciplinary action").

[12] *See, e.g.*, Gerald Rosberg, *Statement from Gerald Rosberg, Chair of the Special Committee on Campus Safety*, COLUM. NEWS (Nov. 10, 2023), https://news.columbia.edu/news/statement-gerald-rosberg-chair-special-committee-campus-safety. *See also*

This essay urges private universities to instead deregulate student speech and explicitly commit to the First Amendment. The argument is pragmatic, based on the realities of university organizational behavior rather than a claim of the benefits of free expression. Political homogeneity, contradictory policies crafted by different constituencies, and agency problems in the university disciplinary process unconstrained by precedent or traditional rules of evidence, make it unlikely that universities can enforce speech codes that comply with their regulatory and contractual obligations. Committing to the First Amendment will clarify and constrain university disciplinary processes by incorporating a large body of caselaw, some of which bears directly on higher education, thus making consistency across cases more likely and providing the grounds for external review by courts and federal regulators. Committing to the First Amendment is, in other words, the best way for private universities to assure that their treatment of student speech complies with their legal obligations of nondiscrimination and neutrality..

There are risks from a First Amendment commitment. A First Amendment commitment means that, apart from time, place, and manner restrictions, speech can only be punished when it crosses lines into threats or harassment in accordance with long-standing and well-developed First Amendment jurisprudence. A First Amendment commitment thus permits uncivil, offensive and even hateful speech.[13] Concerns about campus chaos resulting, however, are overstated. A First Amendment commitment has not destroyed public universities nor led to a free-for-all on public campuses. Rather, a First Amendment commitment may defuse tensions by removing the university as arbiter and enforcer of acceptable viewpoints.

This essay only addresses non-classroom student expression. The classroom must be structured for learning through lecture and guided discussion. The classroom is not a free speech zone.[14] The instructor and university administration have broad powers to regulate what is taught

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Columbia in Crisis: Columbia University's Response to Antisemitism: Hearing Before the H. Comm. on Educ. & the Workforce, 118th Cong. 36 (2024) (statement of Rep. Ilhan Omar, Member, H. Comm. on Educ. & the Workforce) (claiming Columbia University "investigators harassed, intimidated Palestinian students at their homes demanding to see students' private text messages and sent threatening emails to the leaders of those pro-Palestinian groups").

[13] *See generally* Cass R. Sunstein, *Free Speech On Campus? Thirty-Seven Questions (and Almost As Many Answers)* (Jan. 3, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4674320 [https://perma.cc/D96R-2B9F](discussing in detail specific examples of speech that would likely fall under the protection of a First Amendment commitment by universities).

[14] Two leading Supreme Court cases on regulation of classroom speech are from the secondary education context. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that schools may regulate speech that is disruptive or "involves substantial disorder or invasion of the rights of others." *Id.* at 513. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court allowed restrictions on the school-funded student newspaper articles' discussion of sex and pregnancy as related to "legitimate pedagogical concerns." *Id*. at 273-74. The logic of *Hazelwood* and *Tinker* has been extended to the college context in classroom speech cases. *See* Pompeo v. Bd. of Regents, 852 F.3d 973 (10th Cir. 2017) (allowing a professor to require a student to redraft a paper to tone down or remove her criticisms of lesbians); Brown v. Li, 308 F.3d 939 (9th Cir. 2002) (discussing the limited rights of classroom expression, noting that a professor may control discussions and writings to keep them "germane to a particular *academic* assignment," grade the work according to the professor's judgement, and even compel students "to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees . . . ."). Erwin Chemerinsky & Howard Gillman conclude that there are two speech zones on public campuses, including a "professional" zone encompassing "core educational and research environments," in which speech is limited. FREE SPEECH ON CAMPUS 77 (2017). Outside of that zone, the First Amendment standard applies. *Id. See also* Healy v. James, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First

and how it is taught in the classroom through reasonable time, place and manner restrictions.[15] Likewise, instructors, who typically have strong speech protections, must teach the subject assigned and even public universities have expansive authority to regulate curriculum.[16]

The essay proceeds as follows. Part I describes the legal basis for private universities' student speech obligations by first analyzing the contractual promises universities make in their student handbooks and other writings and next discussing the statutory requirements imposed on universities by Title VI of the Civil Rights Act of 1964 (Title VI) and Title IX of the Education Amendments Act of 1972 (Title IX). Part II explores why universities have such a hard time enforcing speech and civility codes in a way that satisfies their legal obligations and explains why committing to the First Amendment mitigates these problems. Part III considers the problems and challenges that remain even under a First Amendment standard. The paper concludes with practical suggestions for universities, regulators and Congress for encouraging and implementing this shift by private universities.

I. THE LAW OF PRIVATE UNIVERSITY SPEECH OBLIGATIONS

There is a complex nexus of regulations and institutional arrangements that explicitly and implicitly govern universities, including accreditation organizations, federal anti-discrimination laws, state laws, private contract, market pressures from tuition, and internal governance provided by boards and committees with varying levels of alumni, faculty, and student involvement. Public universities as state actors face an additional overlay of federal and state constitutional constraints that govern their conduct, including constraints on their disciplinary procedures and their regulation of student speech. This part describes the contractual and statutory obligations that constrain both private and public universities in their treatment of student speech.

A. Contractual Constraints on Speech Regulation

Until the 1960s, both public and private universities were largely able to govern campus without much fear of legal intervention thanks to two legal doctrines.[17] First, courts in some states applied the *in loco parentis* doctrine to the university-student relationship, giving

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Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"); Widmar v. Vincent, 454 U.S. 263, 268-69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.").

[15] The power to regulate classroom speech is not unlimited. *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 304 (3d Cir. 2008) (striking down a university's Title IX policy as overbroad and chilling to classroom speech because "the policy's use of 'hostile,' 'offensive,' and 'gender-motivated' is, on its face, sufficiently broad and subjective that they 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone'" (quoting the Title IX policy)).

[16] *See* Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (holding that the First Amendment "does not place restrictions on a public university's ability to control its curriculum").

[17] *See* ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 7 (1999) (concluding that before 1960 "a university was rarely, if ever, subject to a lawsuit"); Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From* In Loco Parentis *to Bystander to Facilitator*, 23 J.C. & U.L. 755 (1997).

universities broad authority to discipline students.[18] Second, courts at times applied an abstention doctrine to university-student disputes, on the grounds that courts were ill-equipped to scrutinize the complex academic world.[19] Little distinction was made between public and private universities in these matters.

Over time, both doctrines lost their force as judicial deference to universities weakened. When states gradually reduced the age of majority from 21 to 18 beginning in the 1960s, the *in loco parentis* doctrine could no longer ground the university-student relationship.[20] Though it is hard to pinpoint a precise date for the shift, it is clear that by the 1990s the university-student relationship was widely accepted by courts as essentially contractual.[21] The move to a contractual basis for the university-student relationship was inexorable. College students are rarely minors, and there is without question an exchange between the parties. Students pay tuition, often borrowing to do so, and universities in exchange promise to provide an opportunity to acquire skills and a formal credential in a regulated environment.[22]

The move to contract did not open a flood gate of litigation. Courts continued to decline to review universities' grading schemes or whether universities provided an adequate education

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[18] *See* AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION 37-38 (2009); BICKEL & LAKE, *supra* note 13, at 7 (describing the pre-1960 world in which university principles were emphasized as opposed to the post-1960 world, emphasizing student freedom).

[19] *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251, 323 (1989) (surveying the doctrine and collecting cases). A leading case in this regard is *Connelly v. Univ. of Vt.*, 244 F. Supp. 156 (D. Vt. 1965), in which the court held that the question of "was a student in fact delinquent in his studies" was in general "not a matter for judicial review," instead limiting the analysis of an expulsion to whether it was in bad faith or pretextual.

[20] *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979) (declining to apply *in loco parentis* explaining regulation of student life on and off campus "has become limited" due to rights demanded by students and the "taking place almost simultaneously with legislation and case law lowering the age of majority, produc[ing] fundamental changes in our society"). But even under *in loco parentis*, contract principles were still referenced. *See* Koblitz v. W. Rsrv. Univ., 21 Ohio C.C. 144, 155 (1901) (holding that a student "contracts to submit" to reasonable discipline while university promises not to "impose on him penalties which he is no wise merits"); Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) ("A college or university may prescribe requirements for admission and rules for the conduct of its students, and one who enters as a student impliedly agrees to conform to such rules of government.").

[21] *See* WILLIAM A. KAPLAN ET AL., THE LAW OF HIGHER EDUCATION 372 (6th ed. 2019) (summarizing cases and concluding that the university-student relationship is basically contractual). *See, e.g.*, Shaffer v. George Washington Univ., 27 F.4th 754, 763 (D.C. Cir. 2022); Gociman v. Loyola Univ. of Chi., 41 F.4th 873, 883 (7th Cir. 2022); Doe v. Univ. of Scis., 961 F.3d 203, 211 (3d Cir. 2020); Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998); Basch v. George Washington Univ., 370 A.2d 1364, 1366 (D.C. 1977) (per curiam) (considering as a general rule "that the relationship between a university and its students is contractual in nature"); Zumbrun v. Univ. of S. Cal., 25 Cal. App. 3d 1, 10 (Ct. App. 1972) ("The basic legal relation between a student and a private university or college is contractual in nature . . . ."). *But see* Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 239 (4th Cir. 2021) (finding no Virginia state law to support a theory of an implied contract theory); Doe v. White, 859 F. App'x 76, 77-78 (9th Cir. 2021) (noting the California Supreme Court has never categorically embraced a contractual characterization of the student-university relationship); Mittra v. Univ. of Med. & Dentistry of N.J., 719 A.2d 693, 694 (N.J. Super. App. Div. 1998) ("[T]he relationship between the university and its students should not be analyzed in purely contractual terms.").

[22] *See* Max M. Schanzenbach & Kimberly Yuracko, *What is the University-Student Contract?* 65 ARIZ. L. REV. 965, 970-981 (describing different models of higher education, surveying handbook and mission statements, and concluding that the human capital model of skill acquisition broadly defined best describe the basis of the university-student contract).

by invoking the so-called "educational malpractice" doctrine.[23] Likewise, courts showed substantial deference to university judgments regarding academic standards.[24] Nonetheless, courts in most jurisdictions were willing to enforce sufficiently definite university promises, particularly in cases involving adherence to procedures set forth in handbooks and disciplinary codes.[25]

Many universities avoid definite promises and consequently determining the terms of the university-student contract has proven challenging. First, the contract usually does not exist in one place. Courts sift through a variety of writings, including student handbooks, tuition agreements, acceptance letters, university webpages, course catalogs, and the like.[26] Student handbooks provide the most comprehensive written statement of the university-student relationship, and a majority of jurisdictions treat at least some statements within handbooks as enforceable promises.[27] Often, the handbook is a single document; other times the "handbook"

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[23] *See, e.g.*, Vurimindi v. Fuqua Sch. of Bus., 435 F. App'x 129, 133 (3d Cir. 2011) (refusing to find actionable the university's "desire to provide the 'highest quality education'" as a binding contractual term); *see also* Ryan v. Temple Univ., 535 F. Supp. 3d 356, 363 (E.D. Pa. 2021) (stating the same); *Gociman*, 41 F.4th at 882 ("[d]eciding whether the university contractually promised to provide students an in-person educational experience, and whether the university breached that promise," does not implicate the challenges of evaluating quality of education that education malpractice claims pose).

[24] A leading early case in this regard is *Connelly v. University of Vermont*, 244 F. Supp. 156, 159 (D. Vt. 1965), in which the court held that the question of "was [the] student in fact delinquent in his studies?"—in general was "not a matter for judicial review," instead limiting the analysis of an expulsion to whether it was in bad faith or pretextual. *See also* Bd. of Curators of the Univ. of Mo. v. Horowitz; 435 U.S. 78, 92 (1978) ("Courts are particularly ill equipped to evaluate academic performance.") Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgement."); Russell v. Salve Regina Coll., 890 F. 2d 484, 489 (1st Cir. 1989) ("Under the circumstances, the 'unique' position of the College as educator becomes less compelling. . . . The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action.").

[25] *See, e.g.*, Doherty v. S. Coll. of Optometry, 862 F.2d 570, 577 (6th Cir. 1988) (noting that the student-university relationship may be contractual in nature but "courts have adopted different standards of review when educators' decisions are based upon disciplinary versus academic criteria—applying a more intrusive analysis of the former and a far more deferential examination of the latter").

[26] *See, e.g.*, King v. Baylor Univ., 46 F.4th 344 (5th Cir. 2022) (reversing a district court's dismissal of a student covid tuition lawsuit on the grounds that "educational services" could not be further interpreted due to an integration clause in a tuition agreement and remanding to the district court with instructions to interpret the phrase "in light of the circumstances surrounding the contract" including the student handbook); Levin v. Bd. of Regents of the Univ. of Colo., 2021 Colo. Dist. LEXIS 365 (2021). Almost all cases we have reviewed discuss the handbook in light of intent, definiteness, or disclaimers, leaving aside parol evidence issues. We found only one case wherein an appeals court accepted that a tuition agreement was a full statement of the parties' contract. *See* Zwiker v. Lake Superior State Univ., 986 N.W.2d 427 (Mich. Ct. App. 2022) (finding that the tuition agreement's merger and integration clauses precluded the use of handbooks and other "parol" evidence because the tuition agreements were not "obviously incomplete"). *See also* Hannibal-Fisher v. Grand Canyon Univ., 523 F. Supp. 3d 1087 (D. Ariz. 2021) (refusing to find an implied contract for in-person instruction where "the Enrollment Agreement constitutes an express contract on the same subject matter").

[27] *See* KAPLAN, *supra* note 17, at 365 (surveying the litigation landscape and concluding that "courts are increasingly inclined to view the student handbook or college catalog as a contract, either express or implied"). *See also* Havlik v. Johnson & Wales Univ., 509 F.3d 25, 34 (1st Cir. 2007) ("The relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook."); Dean v. Chamberlain Univ., LLC, No. 21-3821, 2022 WL

is comprised of various policies found across multiple webpages. Sometimes the handbook cross-references other policies which may or may not be treated as fully incorporated. Even within a university, these sources are not always consistent with each other when it comes to the scope of permissible student expression.

Second, there are many statements that are vague or not reasonably understood to be promises, and which may not themselves establish legal rights—though they may inform the interpretation of more definitive promises that are contractually binding. Distinguishing the former from the latter is not always easy. Indeed, courts often sharply disagree about what is an enforceable promise in the university-student relationship. For example, in the COVID-19 pandemic lawsuits over remote learning, some courts found that the promise of in-person instruction was obvious,[28] while others held that representations of in-person instruction were either too uncertain to constitute a contractual promise or that no such promise was made.[29] In reviewing student disciplinary procedures, courts have generally avoided holding universities to every specific promise made regarding procedure, but they have been somewhat more willing

2168812, at *3 (6th Cir. June 16, 2022) (defining terms of a student-university contract by reference to "the college or university's catalog, handbook, and/or other guidelines supplied to students"); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 242 (D. Vt. 1994) (construing the terms of the student-university contractual relationship pursuant to enumerated terms in the college's handbook). *Cf.* Shaffer v. George Washington Univ., 27 F.4th 754, 763 (D.C. Cir. 2022) (stating that "the mere fact that the bulletin contain[s] language . . . is not enough to support a finding that the language amounted to a contractual obligation"); Basch v. George Washington Univ., 370 A.2d 1364, 1368 (D.C. 1977) ("[a]t best, . . . words [that] express[[] an expectancy" regarding future conduct are not "a promise susceptible of enforcement").

[28] *See, e.g.*, Rynasko v. N.Y. Univ., 63 F.4th 186 (2d Cir. 2023) (student plausibly alleges an implied contract between NYU and its students to deliver an in-person student experience); Qureshi v. Am. Univ., No. 20-CV-1141 (CRC), 2023 WL 2387811 (D.D.C. Mar. 7, 2023) (holding that plaintiffs' complaint adequately alleges representations made by American that a reasonable person would have understood to bind it "to providing in-person education in exchange for retaining Plaintiffs' entire tuition payments for traditional on-campus degree programs"); Gociman v. Loyola Univ. of Chi., 41 F.4th 873 (7th Cir. 2022) (recognizing a possibility of an implied contract promising in-person instruction and access to on-campus facilities in its online registral portal and course catalog); Hiatt v. Brigham Young Univ., 512 F. Supp. 3d 1180, 1186-87 (D. Utah 2021); Little v. Grand Canyon Univ., 516 F. Supp. 3d 958 (D. Ariz. 2021); Nguyen v. Stephens Inst., 529 F. Supp. 3d 1047 (N.D. Cal. 2021); Williams v. Corp. of Mercer Univ., 542 F. Supp. 3d 1366 (M.D. Ga. 2021); Gibson v. Lynn Univ., Inc., 504 F. Supp. 3d 1335, 1339 (S.D. Fla. 2020); Metzner v. Quinnipiac Univ., 528 F. Supp. 3d 15, 21 (D. Conn. 2021) (denying a motion to dismiss a contract claim after finding sufficient evidence of in-person instruction from numerous university writings); *see also* Schanzenbach & Yuracko, *supra* note **Error! Bookmark not defined.**, at 992-995 (analyzing litigation over university Covid closures against a background of the human capital model of higher education and concluding that students had valid claims for recovery, particularly under a restitution theory).

[29] *See, e.g.,* In re Univ. of Miami COVID-19 Tuition & Fee Refund Litig., 649 F. Supp. 3d 1245, 1253 (S.D. Fla. 2022) (despite recognizing the possibility of an in-person contract existing, the plaintiffs here did not meet their burden to sustain their claims); Polley v. Nw. Univ., 560 F. Supp. 3d 1197, 1208 (N.D. Ill. 2021) (dismissing a contract claim and finding the university's writings promised "an education generally . . . and not a specific contractual promise of location"); Abuelhawa v. Santa Clara Univ., No. 20-CV-04045-LHK, 2021 WL 5584759 (N.D. Cal. Nov. 29, 2021) (concluding the plaintiffs did not present a "definite, specific, or explicit" promise of on-campus instruction); *See also* Student "C" v. Anne Arundel Cnty. Cmty. Coll., 513 F. Supp. 3d 658, 664 (D. Md. 2021); Oyoque v. Depaul Univ., No. 20 C 3431, 2021 WL 1837399, at *2 (N.D. Ill. May 7, 2021) (declining to consider promotional materials or other publications as "amount[ing] to evidence of a contractually enforceable promise to provide an in-person education").

to enforce the spirit of the handbook--typically requiring some floor of procedural fairness, though varying by jurisdiction.[30] Moreover, some universities disclaim student handbooks and other writings as contract, in principle leaving the entire university-student contract to background default rules.[31]

In the absence of an explicit promise covering the issue at hand, a contract still exists but courts must determine what default provisions to supply. There has been little consistency here. For example, in the Covid remote learning cases, courts differed sharply over whether there were implicit promises of in-person instruction.[32] More surprisingly, a district court recently held that there was no implied promise in the university-student contract not to sex traffic students or allow rampant sexual harassment.[33]

Given this background, it is not surprising that university promises regarding student speech protections vary widely and are often unclear. FIRE's assessment of student conduct codes concluded that as of 2023, almost two-thirds of universities had codes that were ambiguous or somewhat restrictive regarding speech, while slightly more than 20 percent maintained explicitly restrictive speech codes and 12 percent had few restrictions.[34]

One source of ambiguity and restriction flows from the fact that private universities often promise to protect speech but then define speech more narrowly than does the First Amendment. Take for example the vexing question of when speech crosses over to prohibited harassment or violence. Under First Amendment jurisprudence, these concepts are fairly well-defined and narrow.[35] However, universities not bound by the First Amendment are free to adopt expansive definitions of prohibited conduct. For example, universities have punished silence as discrimination[36] and offered mandatory trainings that state that "cisheterosexism" and "fatphobia" are violence.[37] Trainings on what constitutes antisemitism are also being developed,

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[30] *See e.g.*, Rollins v. Cardinal Stritch Univ., 626 N.W.2d 464, 471 (Minn. Ct. App. 2001) (holding that a student handbook "did not constitute a contract between the school and the student that required strict compliance with every provision").

[31] *See* Schanzenbach & Yuracko, *infra* note 22 at 980 (finding that 10 out of 50 universities sampled had explicit disclaimers of contract in their student handbooks, while an additional 10 reserved absolute rights to alter or amend the handbook).

[32] *See* cases cited, *supra* note 23.

[33] *See* Richardson v. Nw. Univ., No. 1:21-CV-00522, 2023 WL 6197447 (N.D. Ill. Sept. 21, 2023) (holding that Northwestern University did not implicitly promise its cheerleaders protections against groping, harassment and sexual touching by alumni donors but allowing a statutory sex trafficking claim to proceed).

[34] *Spotlight on Speech Codes 2023*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/research-learn/spotlight-speech-codes-2023 (last visited Aug. 1, 2024) [perma.cc/5CQ9-XZ9F]

[35] *See supra* Part III(D).

[36] *See* Elizabeth Redden, *Georgetown Professor Fired for Statements about Black Students*, INSIDE HIGHER ED (Mar. 11, 2021) (discussing Georgetown University placing a professor "on administrative leave pending an investigation" for allegedly failing to speak against discriminatory statements of another professor on an inadvertently recorded zoom session).

[37] *See* Abigail Anthony, *Harvard Tells Students Using Wrong Pronouns Constitutes Abuse*, WASH. FREE BEACON (Sept. 14, 2022), https://freebeacon.com/campus/harvard-tells-students-using-wrong-pronouns-constitutes-abuse/ (detailing Harvard's anti-discrimination training modules) [perma.cc/88RJ-AEGZ].

with some university presidents suggesting that such speech will be prohibited.[38] Thus, private universities can endorse free speech in the abstract, but then create a broader definition of unprotected speech than the First Amendment. Indeed, even universities that endorse free speech in their student handbook may undercut such protections or raise ambiguity about their scope by warning students at orientation or mandatory trainings that some viewpoints are violent or discriminatory or by adopting conduct codes that profess the same.

A closer look at the speech policies of six elite universities--University of Chicago, Stanford, Penn, Harvard, MIT and Northwestern—demonstrates both this variation and ambiguity. We have chosen these universities because the last four were the subject of the infamous 2023-2024 congressional hearings. We have added the University of Chicago because of its long-standing and unusually strong commitment to freedom of speech and Stanford University because it had the First Amendment imposed upon it by California law. These handbooks demonstrate a broad spectrum of university speech commitments with significant ambiguities.

1. The University of Chicago

Chicago's statement on Freedom of Expression follows the First Amendment standard without using the words "First Amendment." The statement was drafted by the Committee on Freedom of Expression in 2014, chaired by First Amendment scholar Geoffrey Stone.[39] Chicago's student handbook cross references and quotes the statement as well, thereby incorporating it by reference.[40] The core of Chicago's statement starts with a strong endorsement of freedom of speech, committing the University "to free and open inquiry in all matters" and guaranteeing "all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn."[41] Though it does not explicitly incorporate the First Amendment, Chicago's statement limits speech restrictions to "narrow exceptions" of speech not protected by the First Amendment (e.g., defamatory speech, harassing speech) and "reasonabl[e] regulat[ion] [of] the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University."[42] There is an explicit rejection of an enforceable civility standard.[43]

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[38] *Calling for Accountability: Stopping Antisemitic College Chaos: Hearing Before the H. Comm. on Educ. & the Workforce,* 118th Cong. 37 (2024) (Statement of President Michael Schill) ("Anything that calls for the death and destruction of Jewish people whether here or abroad is a code of conduct violation and the code of conduct will be investigated and there's a variety of disciplinary possibilities that will follow from that."); *id.* at 47-48 (UCLA Chancellor Block stating that if students can be identified, they would be disciplined for language such as "burn Tel Aviv").

[39] Geoffrey R. Stone et al., *Report of the Committee on Freedom of Expression*, UNIV. OF CHI. (Jan. 2015), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [perma.cc/3WQV-2LH8]

[40] *University Policies & Regulations*, UNIV. OF CHI., https://studentmanual.uchicago.edu/student-life-conduct/university-disciplinary-systems/disciplinary-system-for-disruptive-conduct/ (last visited Aug. 1, 2024) [perma.cc/5RLW-YQD9].

[41] Stone, *supra* note 29.

[42] *Id.*

[43] *Id.* ("Although the University greatly values civility, . . . concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.").

2. Stanford University

Stanford's expression guidelines are similar to Chicago's and are required under California's so-called Leonard Law, which requires private universities to incorporate First Amendment expression standards.[44] Stanford's free speech guidelines provide: "As a protected constitutional right, speech may not be subject to discipline unless that speech rises to a legal standard of being **unprotected** (emphasis in original)."[45]

Stanford, like many schools, has a system through which students may report incidents of bias or discrimination, even if they are only words. Stanford's handbook clarifies that Stanford's bias reporting system, is a purely non-judicial process careful to protect free expression.[46] The bias reporting website explains that "most bias incidents on campus fall under the definition of free speech" and only such speech that would constitute a "hate crime" loses protection.[47] It further prominently quotes First Amendment scholar Erwin Chemerinsky stating that "[e]very effort by the government to regulate hate speech has been declared unconstitutional."[48]

3. The University of Pennsylvania

By contrast, Penn's handbook does not commit to the First Amendment either explicitly or implicitly. In its "Code of Student Conduct" section, Penn's handbook contains a description of the "Rights of Student Citizenship" and a description of the "Responsibilities of Student Citizenship." Students have a right, the handbook explains, to "access…and participate" in university activities; "to freedom of thought and expression," to freedom from "discrimination on the basis of race, color, gender, sexual orientation, religion, national or ethnic origin, age,

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[44] Cal. Educ. Code § 94367. Stanford at first glance seems to have an enforceable civility standard under which students "are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University" as part of Stanford's Fundamental Standard. STANFORD UNIV. 2022 APPROACHING STANFORD: A HANDBOOK FOR ENTERING STUDENTS, CLASS OF 2026 AND TRANSFERS 20, *available at* https://view.publitas.com/stanford-undergrad/approaching-stanford-handbook-2022/page/ (last visited Aug. 1, 2024) []. But the Fundamental Standard is clearly delimited by the Stanford's speech policy. Stanford Office of Community Standards, *The Fundamental Standard*, STAN. UNIV., https://communitystandards.stanford.edu/policies-guidance/fundamental-standard (last visited Aug. 1, 2024) [perma.cc/HP5T-MHKQ].

[45] Stanford Office of Community Standards, *Freedom of Speech & the Fundamental Standard*, STAN. UNIV., https://communitystandards.stanford.edu/resources/additional-resources/freedom-speech-fundamental-standard (last visited Aug. 1, 2024) [perma.cc/G869-AMJR].

[46] STANFORD UNIV. 2022 APPROACHING STANFORD: A HANDBOOK FOR ENTERING STUDENTS, CLASS OF 2026 AND TRANSFERS 23, *available at* https://view.publitas.com/stanford-undergrad/approaching-stanford-handbook-2022/page/ (last visited Aug. 1, 2024).

[47] Stanford Protected Identity Harm Reporting, *Free Speech & Inclusion*, STAN. UNIV., https://protectedidentityharm.stanford.edu/about-process/free-speech-inclusion (last visited Aug. 1, 2024) [perma.cc/EE9K-UMJY]. Nonetheless, some faculty have expressed concerns that the Protected Identity Harm reporting system was stifling to free speech. Douglas Belkin, *Stanford Faculty Say Anonymous Student Bias Reports Threaten Free Speech*, WALL ST. J. (Feb. 23, 2023), https://www.wsj.com/articles/stanford-faculty-moves-to-stop-students-from-reporting-bias-anonymously-cbac78ed.

[48] Stanford Protected Identity Harm Reporting, *Free Speech & Inclusion*, STAN. UNIV., https://protectedidentityharm.stanford.edu/about-process/free-speech-inclusion (last visited Aug. 1, 2024) [perma.cc/L5VC-LCMH].

disability, or status as a disabled or Vietnam Era veteran."[49] Students have a corresponding responsibility "[t]o refrain from conduct towards other students that infringes upon the Rights of Student Citizenship." After stating the University's own condemnation of "hate speech, epithets, and racial, ethnic, sexual and religious slurs," the handbook goes on to explain that "the content of student speech or expression is not by itself a basis for disciplinary action." Notwithstanding the former, in the very next sentence, the handbook notes that, "[s]tudent speech may be subject to discipline when it violates applicable laws or University regulations or policies (emphasis added)."[50] What is not spelled out is when, if ever, Penn's regulations or policies are violated by speech leaving unclear whether such policies in fact hew to the First Amendment.

Thirty-one pages later, in a statement titled "Guidelines on Open Expression"[51] the handbook again emphasizes its protection of speech. The Guidelines provide that "[t]he freedom to experiment, to present and examine alternative data and theories; the freedom to hear, express, and debate various views; and the freedom to voice criticism of existing practices and values are fundamental rights that must be upheld and practiced by the University in a free society."[52] Importantly, the Guidelines also explain that "[i]n case of conflict between the principles of the Guidelines on Open Expression and other University policies, the principles of the Guidelines shall take precedence."[53] On its face, this creates an interpretive rule in favor of free expression.

During the congressional hearings, then Penn president Elizabeth Magill stated several times that Penn's speech regulations follow the First Amendment.[54] This was seemingly confirmed on a Penn website page entitled "Free Speech FAQs" in which Penn committed to the First Amendment, by specific reference to it[55] and a commitment to neutrality.[56] Penn explains:

> Hate speech is very hard to define in a way that would allow institutions to address it. Even if we could define [hate speech], we could not prevent or punish hate speech, because it is protected under the First Amendment. While as a private institution we are not subject to the First Amendment, the University's policies have embraced these values….We can address classroom speech and behaviors that disrupt learning, but what our community members say in public spaces, including those spaces that are part of our

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[49] UNIV. OF PA. 2022–2023 PENNBOOK 39, *available at* https://catalog.upenn.edu/pdf/2022-2023-pennbook.pdf (last visited Aug. 1, 2024) [perma.cc/Q9CK-K4X6].

[50] *Id.* In the same vein, students are to refrain from: "stealing, damaging, defacing, or misusing the property or facilities of the University or of others." *Id.*

[51] *Id.* at 71.

[52] *Id.*

[53] *Id.*

[54] CQ Roll Call Staff, *Transcript: What Harvard, MIT and Penn Presidents Said at Antisemitism Hearing*, ROLL CALL (Dec. 23, 2023), https://rollcall.com/2023/12/13/transcript-what-harvard-mit-and-penn-presidents-said-at-antisemitism-hearing/ [https://perma.cc/2PAB-65PQ]. We count six separate times that President Magill asserted that Penn has committed to the First Amendment by referencing U.S. Constitutional principles of free expression. *Id.* ("So our long standing open[] expression guidelines follow the Constitution."). Interestingly, this was a claim not made by the Presidents of Harvard and MIT. *Id.*

[55] Sigal Ben-Porath, *Free Speech FAQs*, UNIV. OF PA. (Oct. 28, 2023), https://supporting-our-community.upenn.edu/free-speech-faqs ("While as a private institution we are not subject to the First Amendment, the University's policies have embraced these values.") [perma.cc/5BS9-FEWG].

[56] *Id.* ("The University has neutral rules about acceptable speech . . . .").

> campus, is only subject to discipline if the inflammatory speech intentionally and effectively provokes a crowd to immediately carry out violent and unlawful action. [57]

How binding these FAQs are on the University, however, is highly uncertain. The FAQs reference Penn's student handbook, but the handbook does not incorporate or reference the FAQs. Indeed, the FAQs appear to post-date the 2023 handbook and were apparently put up a few weeks after Hamas's attack on Israel.[58] Even though the FAQs say Hate Speech is not punishable, the FAQs cross-reference the student handbook's convoluted guidance on speech that violates university policies, and that handbook guidance cross-references university discrimination policies, which arguably prohibit hate speech. The hate speech clarification in the FAQs could arguably override all other policies or create promissory estoppel, but the ambiguity remains. Moreover, Professor Claire Finkelstein, a member of Penn's Open Expression Committee and chair of the law school's academic freedom committee, directly contradicted President Magill's First Amendment claim, writing that in her experience, "Penn has never actually followed the First Amendment, even to a close approximation."[59] We agree with Professor Finkelstein on this point.

Standing alone, the FAQs are unlikely to be contractually binding at present due to a lack of reciprocity, and whether they will be read as implicitly incorporated into the student handbook's Guidelines on Open Expression for the following year or whether they will bind Penn via promissory estoppel is also uncertain. Based on some jurisdictions' interpretations of university-student contracts, a court could easily hold that the promise in an FAQ was too indefinite to enforce and that the handbook alone governs. Looking at the handbook alone, a court could easily find equivocation in Penn's commitment to free expression, and there is no explicit commitment to the First Amendment. It is simply not clear under Penn's policy if on campus chants of "from the river to the sea, Palestine will be free" or "glory to our martyrs" is protected, and it is likely that a court would defer to the university's interpretation.[60]

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[57] *Id.*

[58] The FAQ website says it was last edited on October 28, 2023. Based on the WayBack Machine, it appears this FAQ was posted about this time. *WayBac Machine*, INTERNET ARCHIVE, https://web.archive.org/web/20230815000000*/https://supporting-our-community.upenn.edu/free-speech-faqs (last visited Aug. 1, 2024) (stating the first appearance of the FAQ as November 3, 2023) [perma.cc/82UP-DLWD].

[59] Claire O. Finkelstein, *Opinion: To Fight Antisemitism on Campuses, We Must Restrict Speech*, WASH. POST (Dec. 10, 2023), https://www.washingtonpost.com/opinions/2023/12/10/university-pennsylvania-president-magill-resigns-antisemitism-speech/.

[60] As further point of fact, Penn's leaked disciplinary letter on controversial law Professor Amy Wax proves instructive. While there were allegations that Professor Wax targeted individual students and revealed confidential information, which would not be protected speech, some of the committee's findings rested on opinion and factual assertions made by Professor Wax outside of the classroom that would clearly fall within the protection of the First Amendment. The committee reviewing her conduct deemed these First Amendment protected statements "inequitable" and "discriminatory" and with inadequate scholarly support. The committee specifically declined to apply a First Amendment standard, and the Penn Faculty Handbook's provisions on free speech are practically identical to that of the Penn's student handbook. *See* UNIV. OF PA. 2022-2023 HANDBOOK FOR FACULTY AND ACADEMIC ADMINISTRATORS 114-115, *available at* https://catalog.upenn.edu/pdf/2022-2023-facultyhandbook.pdf (last visited Aug. 1, 2024) [perma.cc/K5VH-V7BP].

4. Harvard

Harvard's student handbook, like Penn's, does not explicitly adopt the First Amendment, though it too states policies and commitments that map on to First Amendment principles. Harvard explicitly prohibits harassment noting: "It is implicit in the language of the Statement on Rights and Responsibilities that intense personal harassment of such a character as to amount to grave disrespect for the dignity of others be regarded as an unacceptable violation of the personal rights on which the University is based."[61] Yet it also makes clear that the category of unprotected harassment is narrow and confined. Indeed, the handbook counsels students: "It is important to note here that speech not specifically directed against individuals in a harassing way may be protected by traditional safeguards of free speech, even though the comments may cause considerable discomfort or concern to others in the community."[62] Harvard stops short in this sentence of explicitly promising to protect all speech that is within the First Amendment's ambit, though the handbook's next sentence comes close to such a commitment. Harvard explains that while it will not "punish" offensive speech, "[t]he College still takes such incidents seriously and will try, when appropriate, to mediate and help students involved to resolve the situations in an informal way."[63]

Harvard's most explicit statement of allegiance to the First Amendment is in the Faculty of Arts and Sciences' Free Speech Guidelines adopted in 1990. The Guidelines provide: "It is expected that when there is a need to weigh the right of freedom of expression against other rights, the balance will be struck after a careful review of all relevant facts and will be consistent with established First Amendment standards."[64] A court is unlikely to find the Guidelines to be a binding promise to students. The Guidelines are referenced in the Handbook in a section titled, "Faculty Resolutions," but they are not incorporated into the Handbook or referenced in the substantive portions of the Handbook detailing speech protections. Moreover, it is not clear that the Guidelines extend to schools beyond the school of Arts and Sciences, or to constituencies beyond faculty. Frankly, a generous reader of the Harvard handbook is left unsure of why the Free Speech Guidelines are referenced at all. More troubling, Harvard has an anti-bias training that cautions students against speech that is offensive to a large number of identities and equates such speech with violence and abuse.[65]

5. Northwestern

Northwestern's student handbook gestures toward free speech but does not fully commit itself. In a section entitled "Demonstration Policy," the Handbook explains that Northwestern "welcomes the expression of ideas, including viewpoints that may be considered unorthodox or unpopular" and says that the University "encourages freedom of speech, freedom

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[61] HARV. UNIV. 2023-2024 STUDENT HANDBOOK 53, *available at* https://handbook.college.harvard.edu/sites/projects.iq.harvard.edu/files/collegehandbook/files/harvard_college_student_handbook_2023-2024.pdf (last visited Aug. 1, 2024) [perma.cc/79XX-4RTK].

[62] *Id.* at 51.

[63] *Id.*

[64] Harvard University Faculty of Arts and Sciences, *Free Speech Guidelines*, HARV. UNIV. (Feb. 13, 1990 & May 15, 1990), https://wiki.harvard.edu/confluence/display/secfas/Office+of+the+Secretary+Home?utm_source=aws&utm_medium=secfas&utm_campaign=redirect_analysis&preview=/168134221/217232971/FS%20Guidelines%2C%201990.pdf [perma.cc/RQ9J-U979].

[65] *See infra* note 38.

of inquiry, freedom of dissent, and freedom to demonstrate in a peaceful fashion."[66] Further, "[n]o community member may prevent or obstruct . . . the speech or other expression of another community member, except that Northwestern Police or other University officials may act consistent with this Policy to ensure the speech . . . is consistent with the guidelines in this Policy."[67] The guidelines in the Policy outline reasonable time, place and manner restrictions on speech but does not to commit to them as a sole limit on student expression.

Moreover, Northwestern, like other schools, has a bias reporting system that at least arguably undercuts its already ambiguous protection of student speech. Sixty pages after its handbook expression of welcome for unpopular ideas, the student handbook outlines its bias reporting process that mandates witnesses or victims of bias to report it to the university.[68] The handbook defines a bias incident as "an act of conduct, speech, or expression to which a bias motive related to the incident is evident as a contributing factor."[69] Confusingly, the handbook explains that "[b]ias also attends to the ways in which power and privilege have differential impact on individuals involved based on their identity groups membership."[70] Arguably, Northwestern has taken the position that it is easier for the speech of some groups to be "biased" because it recognizes the role of "power" and "privilege" in understanding "bias." The Handbook then tells students that the bias response system is a way for "students to report identity-based concerns that arise when interacting with a member of the Northwestern community."[71] However, the Bias Incident Response Team (BIRT), which explicitly can be triggered by complaints about speech and expression, is "non-punitive" and instead "centers community, resources, and education within its process."[72]

Yet BIRT is just the first step and punishment is not clearly off the table. Northwestern's handbook next explains that in cases "where an additional response is required by *university policy*, law, or *requested by the reporter*" (emphasis added), BIRT will route the report to the appropriate resource including "the Office of Civil Rights and Title IX Compliance, the relevant School, College or student affairs dean's office, or to Human Resources."[73] Without clear protections for speech elsewhere in the handbook, these referrals raise the specter of a disciplinary process. Northwestern itself recognizes this tension on a page on its Student Affairs website titled "Campus Inclusion & Community." In a section on "Academic Freedom/Freedom of Speech" Northwestern explains that it "is committed to the ideals of academic freedom and freedom of speech—to providing a learning environment that encourages a robust, stimulating, and thought-provoking exchange of ideas. Our commitment to addressing bias incidents is not intended to stifle these freedoms, nor will it be permitted to do so."[74] How this commitment is

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[66] NW. UNIV. 2023-2024 STUDENT HANDBOOK 29, *available at* https://www.northwestern.edu/communitystandards/student-handbook/final-23-24-student-handbook.pdf (last visited Aug. 1, 2024) [perma.cc/7MMS-Z2VG].

[67] *Id.* at 30.

[68] *Id.* at 94 ("[T]he University expects all community members who witness or experience an act of bias, hate, discrimination, or harassment to report these incidents to the University.").

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Northwestern Policies Overview: Academic Freedom/Freedom of Speech*, NW. UNIV., https://www.northwestern.edu/inclusion/respectnu/nu-policies-overview.html#:~:text=Academic%20Freedom%2FFreedom%20of%20Speech,thought%2Dprovoking%20exchange%20of%20ideas (last visited Aug. 1, 2024) [perma.cc/D27P-CFVH].

operationalized is not stated. Similar to Penn, Northwestern has stronger speech protections outside its handbook than within and the extent to which they will bind the university in legal proceedings is therefore unclear.

6. MIT

MIT's student handbook barely gestures toward speech protection. It recognizes that "[f]reedom of expression is essential to the mission of a university"[75] but declines to provide specific protections for it. Instead, the handbook outlines a civility code recognizing that speech, while sometimes valuable, may sometimes cause "unreasonable and disruptive offense."[76] Rather than engaging in line drawing and explaining what speech will and will not be protected, the handbook encourages community members to make wise and thoughtful decisions so as to "avoid putting these essential elements of our university to a balancing test." Indeed, the Handbook explicitly shuns legal standards and discussion of student rights telling students "[i]t is usually easier to deal with issues of free expression and harassment when members of the community think in terms of interests rather than rights. It may be 'legal' to do many things that are not in one's interests or in the interests of members of a diverse community."[77]

The MIT Handbook then tells students how they should behave both as speakers and as listeners. Those whose speech offends others are told they "should consider immediately stopping the offense and apologizing" while those who are offended are encouraged to "consider speaking up promptly and in a civil fashion."[78] Students are told that when dealing with difficult issues around speech they "may find it useful to think about the interests on all sides as well as the rights."[79] In short, the MIT handbook tells students the considerations they should bear in mind when making or responding to potentially offensive speech but promises nothing from the university in terms of its commitment to or protection of student speech.

7. Overview

The following chart provides a graphic summary of the speech policies of the six schools just discussed. Given the clarity of the University of Chicago's and Stanford's statements on speech, we believe that they have contractually committed themselves to a First Amendment standard.[80] Harvard's language, while not as explicit as Chicago's and Stanford's,

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[75] MASS. INST OF TECH. 2023-2024 MIND AND HAND BOOK 36, *available at* https://handbook.mit.edu/sites/default/files/images/2023-2024%20Mind%20And%20Hand%20Book%20PDF%20Copy.pdf (last visited Aug. 1, 2024) [perma.cc/E5PJ-XB35].

[76] *Id.*

[77] *Id.*

[78] *Id.* at 17.

[79] *Id.* at 17.

[80] Chicago disclaims its handbook as a contract. *University Policies & Regulations*, UNIV. OF CHI., https://studentmanual.uchicago.edu (last visited Aug. 1, 2024) ("The contents of this manual do not create a contract between any individual and the University. The contents of the manual are subject to change from time to time at the sole discretion of the University, and from time to time updated information may be distributed regarding policy and regulation changes.") [perma.cc/Y3LB-XQ29]. But the University of Chicago does not just make reference to its Freedom of Expression policy in the handbook, but features it prominently on the University website. "This statement reflects the long-standing and distinctive values of the University of Chicago and affirms the importance of maintaining and, indeed, celebrating those values for the future." *See* Stone, *supra* note 29. Making such a prominent commitment, and selling University of Chicago as a "distinctive" product in this regard, almost certainly constitutes a contract and is not disclaimed anywhere else by the University of Chicago as a promise.

should also be interpreted as a contractual commitment to First Amendment protections. Penn's speech promise in its handbook is more equivocal, yet Penn arguably should be bound via promissory estoppel stemming from the strong public statements of its President and its university published FAQs. Under the classic statement of promissory estoppel, a promise "which the promisor should reasonably expect to induce action or forbearance on the part of the promisee" is binding if "injustice can be avoided only by enforcement of the promise."[81] Penn's explicit public statements committing to First Amendment speech standards should certainly be reasonably expected to induce reliance. Along similar lines, the promises set forth by the President of Penn at the Congressional hearings and the FAQ published online may be sufficient to constitute a waiver by Penn of any right to sanction First Amendment protected speech.[82]

MIT and Northwestern promise almost nothing enforceable regarding speech in their handbooks. We predict that most courts assessing punished student speech at MIT or Northwestern would require a fair process and reasonable consequences, perhaps with an additional requirement that students were on some notice regarding the potential for their speech to be sanctioned, but that neither school would otherwise be stopped from punishing speech that would be protected under the First Amendment. Moreover, formal sanctions are not needed to suppress speech, but process, if poorly regulated, can be the punishment. Vague promises, a disciplinary system that encourages or, in Northwestern's case, arguably mandates "bias" reporting,[83] and procedures that are poorly specified and must be adhered to only for substantial compliance, permit informal punishment of student speech through process or threat of process without the need for formal sanctions.

[81] RESTATEMENT (SECOND) CONTRACTS § 90 (AM. L. INST. 1981).

[82] The distinction between promissory estoppel and waiver is not precise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (AM. L. INST. 1981) ("'Waiver' is often inexactly defined as 'the voluntary relinquishment of a known right.' When the waiver is reinforced by reliance, enforcement is often said to rest on 'estoppel'. . . . reliance on a waiver or promise as to the future is sometimes said to create a 'promissory estoppel.'"). The analysis of promissory estoppel and waiver is complicated, however, by the fact that Penn is enforcing rights and responsibilities in a community context. By waiving enforcement of a code of conduct, it is possible that Penn is not creating the environment promised to other students.

[83] *See infra* note 68 ("[T]he University expects all community members who witness or experience an act of bias, hate, discrimination, or harassment to report these incidents to the University.").

Assessment of University Speech Policies

		Hate Speech Punished?	Discriminatory Speech Punished?	Statement valuing free expression?	Commits to Viewpoint Neutrality?
First Amendment	**U. of Chicago**	No	No	Strong	Strong
	Stanford	No	No	Strong	Strong
	Penn (FAQ)	No	Possibly	Strong	Strong
Language Tracking First Amendment	**Penn (Handbook)**	Not Clear	Possibly	Strong	Weak
	Harvard	Not Addressed	Possibly	Strong	Weak
Civility Code/Hate Speech Ban	**Northwestern**	Possibly	Possibly	Moderate	No
	MIT	Yes	Yes	Weak	No

Beyond the six case studies, we assessed the speech policies of the top 25 private universities as ranked by U.S. News & World Report in 2023 for a commitment to the First Amendment or the Chicago principles. The California schools are covered by the Leonard Law (Stanford, Cal Tech, and USC) and necessarily therefore commit to the First Amendment. In addition, two other schools (Washington University and Carnegie Mellon) directly reference the First Amendment as their standard for student expression.[84] The University of Chicago's "Chicago Principles," which track the First Amendment, are adopted or referenced approvingly in university documents by four additional universities, at times using virtually identical

[84] Both Washington University and Carnegie Mellon University arguably commit to the First Amendment explicitly. *See* Washington Univ., *Statement of Principle Regarding Freedom of Expression* (Sept. 6, 2016) (following "the Chicago principles" but explicitly taking "First Amendment principles as the baseline of its conduct pertaining to speech . . . ."); Carnegie Mellon Univ., *The Final Report of the Commission on Academic Freedom and Freedom of Expression* 10, https://www.cmu.edu/leadership/assets/pdf/affoe_final-report-102422.pdf (last visited Aug. 1, 2024) ("Although a private institution, the university has extended broad First Amendment free speech protections to members of our community when on our campus or in connection with university activities, which would provide protection to speech on a wide range of issues, including matters of general public concern as well as academic issues."). In the FIRE rankings, University of Chicago and Carnegie Mellon were the only elite private universities to receive an "above average" ranking. *2024 College Free Speech Rankings*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://rankings.thefire.org/rank (last visited Aug. 1, 2024). Washington University received an "average" ranking. *See id.* at 51. But some schools that endorsed the Chicago principles, such as Princeton, Columbia, and Georgetown, continue to score at the bottom. *See id.* at 55-56.

language, and Yale adopted a similar statement in the 1970s.[85] The schools with First Amendment or Chicago principles endorsements also commit themselves explicitly to content neutral regulations, as does at least one other university, Cornell University, which neither adopts the First Amendment nor the Chicago principles.[86] Neutrality promises alone, however, do not equate to a First Amendment commitment.[87] For the remaining schools, speech protection is far less clear cut.

Ambiguous and even internally inconsistent speech policies more likely reflect organizational complexity than nefarious strategy. Universities governance is complex and not hierarchical. It is likely that different constituencies are writing different policies.[88] For example, Harvard's Arts and Sciences faculty adopted a speech statement referenced in the handbook but did not write the student handbook. University discrimination policies are often written with input from university counsel and diversity, equity, and inclusion offices. Conduct codes, procedures, and orientation materials may come from an office of student life or equivalent. Universities often maintain a separate Title IX office which writes Title IX policies, and bias response policies are implemented by a bias response office or office for civil rights. These groups, with different agendas and missions, create a hodgepodge of policies.[89] Unless

[85] These are Columbia, Princeton, Vanderbilt, and Johns Hopkins, who adopted their policy statements in 2015 or 2016. Dates of adoption and links to sources are available here (Google Doc prepared by authors). Yale has an expression policy from 1975 that has strong free speech provisions and is referenced in its student regulations. *See generally* Yale Univ., *Report of the Committee on Freedom of Expression at Yale* (1975), https://secretary.yale.edu/report-committee-freedom-expression-yale; Yale Coll. Undergraduate Regulations, *Free Expression 2023–2024*, https://catalog.yale.edu/undergraduate-regulations/policies/free-expression/ (last visited Aug. 1, 2024).

[86] *See* Cornell Univ., *Interim Expressive Activity Policy* (Mar. 11, 2024), https://policy.cornell.edu/policy-library/interim-expressive-activity-policy.

[87] For example, in Cornell's Interim Expressive Activity Policy, Cornell promises content-neutral regulation of campus events but also provides that "[i]n rare cases, Cornell, in its sole discretion, may disallow or prohibit activities" based on factors including disruption and security costs, something associated particularly with having conservative speakers on campus. Cornell Univ., *Interim Expressive Activity Policy* (Mar. 11, 2024), https://policy.cornell.edu/policy-library/interim-expressive-activity-policy. Thus, while on paper committing to neutrality, Cornell opens the door to a Heckler's veto. *See supra* Part III(A).

[88] *See* Morton O. Schapiro, *The New Face of Campus Unrest*, WALL ST. J. (Mar. 18, 2015), https://www.wsj.com/articles/morton-schapiro-the-new-face-of-campus-unrest-1426720308 (describing conflicting advice and standards across administrative units regarding regulating student speech).

[89] For example, Johns Hopkins University adopts the language of the Chicago Principles and references the First Amendment in its Statement of Academic Freedom. Johns Hopkins Univ., *Academic Freedom at Johns Hopkins* (2017), https://provost.jhu.edu/wp-content/uploads/2017/08/AcademicFreedomatJohnsHopkins.pdf. Nonetheless, Johns Hopkins provides that "microaggressions" may result in discipline and "[i]n responding to complaints, the University considers the circumstances and works to assess the balance between eliminating discrimination and harassment while protecting freedom of expression." *See* Johns Hopkins Univ. Off. of Institutional Equity, *DHPP FAQs*, https://oie.jhu.edu/discrimination-and-harassment/discrimination-and-harassment-faqs/ (last visited Aug. 1, 2024). While perhaps not as confusing as Penn's handbook, Johns Hopkins's policies open the door to a broader definition of harassment or discrimination than that provided by the First Amendment. Washington University likewise dilutes its free speech commitment with a promise that students have a "right to be free from fear of intimidation, physical and/or emotional harm." Wash. Univ., *Rights and Responsibilities of Resident Students*, https://wustl.edu/about/compliance-policies/governance/rights-responsibilities-resident-students/ (last visited Aug. 1, 2024).

universities have a clear and overriding commitment to free speech that preempts other policies, ambiguity is inevitable.

B. Statutory Constraints

In the 1960's, the university-student relationship became constrained by statute as well as contract. Universities that accept federal funds also accept federal statutory constraints, including prohibitions on discrimination based on race and sex. Title VI of the Civil Rights Act of 1964 prohibits disparate treatment based on race, color, and national origin, and Title IX of the Education Amendments of 1972 prohibits disparate treatment based on sex. These statutes, which do not directly address speech issues, nonetheless limit the ways in which universities can structure and enforce student speech codes.

1. Title VI

Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[90] In Students for Fair Admissions v. President and Fellows of Harvard College, the Supreme Court affirmed precedent and held that Title VI was coterminous with the Equal Protection Clause, effectively importing equal protection jurisprudence into Title VI.[91] The Court emphasized the Equal Protection Clause's commitment to neutrality admonishing that the prohibition on race discrimination "applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application. For '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'"'[92] It is common on college campuses these days to hear students and faculty distinguish between "punching up" and "punching down," with punching up permissible or even laudatory. Title VI makes no such distinction.

Although Title VI does not explicitly prohibit discrimination based on religion, likely to protect religious universities, it has long been interpreted as prohibiting some forms of discrimination targeting individuals because of their religion and ethnicity. In 2004, the Department of Education took the position in a "Dear Colleague" letter that discrimination or harassment based on a commingling of religion and national origin was actionable under Title VI.[93] Both the Trump and the Biden administrations expressly interpreted Title VI as

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[90] 42 U.S.C. § 2000d.

[91] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 198 n.2 (2023) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." (citing Gratz v. Bollinger, 539 U.S. 244 (2003)). *See also* Grutter v. Bollinger, 539 U.S. 306, 342-44 (2003) ("Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J.))).

[92] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023). *See also* Dear Colleague Letter: Addressing Discrimination Against Jewish Students from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (May 25, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/antisemitism-dcl.pdf ("Title VI protects all students, including students who are or are perceived to be Jewish, from discrimination based on race, color, or national origin.").

[93] Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges from Kenneth L. Marcus, Deputy Assistant Sec'y for Enf't, U.S. Dep. of Educ. Off. for Civ. Rts. (Sept. 13,

encompassing antisemitism. In December 2019, President Trump issued an executive order, "Combating Anti-Semitism," which stated that "[i]t shall be the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI."[94] In 2023, the Biden Administration affirmed the Trump order.[95] Though no court has thus far addressed these Title VI executive orders, we predict based on Title VI's underlying purpose and prevailing public sentiment that courts would side with the administrations regarding Title VI's coverage of antisemitism and would likewise hold Title VI to encompass disparate treatment of Muslims at secular schools.

Title VI imposes both negative and positive obligations on schools. Schools must refrain from discriminating among students based on race, national origin or ethnicity. Universities may not treat conduct differently depending on the race or ethnicity of any affected party. For example, schools could face liability or regulatory action if they punish pro-Palestinian students for engaging in conduct—perhaps posting unauthorized leaflets or

2004), https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html. The letter was a response to harassment and discrimination suffered by students in the aftermath of the September 11, 2001 attack and committed that OCR would aggressively "investigate[] alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students." *Id.*

[94] Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019). The Order also endorsed the definition of anti-Semitism adopted by the International Holocaust Remembrance Alliance on May 26, 2016, providing: "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities." *Id.* The Order also directs agencies charged with enforcing Title VI to consider the "Contemporary Examples of Anti-Semitism" identified by the IHRA. Examples of antisemitism provided by IHRA include:

1. "Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor," and
2. "Holding Jews collectively responsible for actions of the state of Israel."

Working Definition of Antisemitism, INT'L HOLOCAUST REMEMBRANCE ALL., https://holocaustremembrance.com/resources/working-definition-antisemitism (last visited Aug. 1, 2024).

[95] U.S. Dep't of Educ. Off. for Civ. Rts., *Fact Sheet: Protecting Students from Discrimination Based on Shared Ancestry or Ethnic Characteristics*, U.S. DEP'T OF EDUC. (Jan. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf. In a "Fact Sheet" issued by the Department of Education's Office for Civil Rights in January 2023, the Biden Administration affirmed Title VI's application to antisemitism. The Fact Sheet explained: "Title VI's protection from race, color, or national origin discrimination extends to students who experience discrimination, including harassment, based on their actual or perceived: i) shared ancestry or ethnic characteristics; or ii) citizenship or residency in a country with a dominant religion or distinct religious identity." The Biden Administration affirmed its commitment to the Fact Sheet and to using Title VI to combat antisemitism in two subsequent Dear Colleague letters. *See* Dear Colleague Letter: Addressing Discrimination Against Jewish Students from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (May 25, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/antisemitism-dcl.pdf; Dear Colleague Letter: Discrimination, including Harassment, Based on Shared Ancestry or Ethnic Characteristics from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (November 7, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf.

disrupting classes—if the school has not punished students who engaged in similar conduct on behalf of Black student organizations or causes.[96]

The same holds true for speech. Within protected categories, university speech codes must be both neutral on their face and neutral in their enforcement. Schools may not treat speech differently because of the race or ethnicity of speaker or target. For example, a university code that states that "privileged" racial groups receive less expressive freedom would be illegal on its face. Moreover, a facially neutral code cannot be enforced more rigorously against privileged groups.[97]

Title VI also imposes a positive obligation on schools to prohibit and prevent harassment based on protected characteristics. Pure speech may rise to the level of harassment, and hence be prohibited, but the bar is high. The requirements for speech to be actionable as harassment under Title VI mirror the requirements for actionable harassment under Title VII of the Civil Rights Act of 1964. Speech rises to the level of actionable harassment only when it is (1) unwelcome; (2) based on shared ancestry or ethnic characteristics: (3) is subjectively and objectively offensive; and (4) is "so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity."[98]

In other words, under Title VI schools must prohibit and punish some speech—that which harasses community members because of their race or ethnicity. To the extent private schools further regulate speech—including speech that would be protected by the First Amendment— Title VI requires that they do so in a way that is neutral with regard to the race or ethnicity of the speaker and listener.

The obligations of Title VI are substantial and the potential costs to universities that violate the law significant. Title VI's most powerful enforcement mechanism is the termination of federal funding. The original implementing regulations for Title VI included a pinpoint provision providing that in case of statutory violation, an enforcing agency could only terminate

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[96] Susan Svrluga, *Princeton Protestors Occupy President's Office, Demand 'Racist' Woodrow Wilson's Name be Removed*, WASH. POST (Nov. 18, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/18/princeton-protesters-occupy-presidents-office-demand-racist-woodrow-wilsons-name-be-removed/#; https://paw.princeton.edu/article/occupying-nassau-hall.

[97] But universities are not statutorily constrained from limiting free expression or unevenly enforcing codes that are not based on prohibited classifications. Religious institutions sometimes require students to abide by a statement of belief and a religiously informed code of conduct, and such contracts are generally permitted. *See* Carr v. St. John's University, New York, 231 N.Y.S.2d 410 (N.Y. App. Div. 1962), *affirmed*, 187 N.E.2d 18 (N.Y. 1962) (upholding the dismissal of four students in violation of the following University regulation: "in conformity with the ideals of Christian education and conduct, the university reserves the right to dismiss a student at any time on whatever grounds the university judges advisable"); *see also* Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky. Ct. App. 1979); In re Prince of Peace Christian Sch., No. 05-20-00680-CV, 2020 WL 5651656 (Tex. App. Sept. 23, 2020).

[98] *See* Dear Colleague Letter: Discrimination, including Harassment, Based on Shared Ancestry or Ethnic Characteristics from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (Nov. 7, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf. Moreover, as the November 7, 2023 Dear Colleague Letter makes clear, Title VI's prohibition on harassment extends to students who experience harassment "based on their actual or perceived: i) shared ancestry or ethnic characteristics; or ii) citizenship or residency in a country with a dominant religion or distinct religious identity." *Id. See also* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 631 (1999) (defining harassment as conduct 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").

funding "to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."[99] However, over a veto by President Ronald Reagan, Congress enacted the Civil Rights Restoration Act of 1988 which held that with respect to Title VI as well as Title IX "program or activity" meant "all operations." The result was to ratchet up the threat of enforcement making all federal funding received by a university subject to termination if there were discrimination by any unit.[100]

The Department of Education's Office for Civil Rights (OCR) is responsible for ensuring compliance with Title VI by all public K-12 schools as well as colleges and universities, whether public or private, that receive federal financial assistance. The Agency has issued extensive guidance on Title VI's requirements in light of the Supreme Court's Fair Admissions decision[101] and in the aftermath of the Israel-Hamas war and subsequent protests on college campuses.[102] These Letters and Fact Sheets do not have formal interpretive authority because they have not been approved by the President, as required by the implementing regulations.[103]

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[99] 42 U.S.C. § 2000d-1.

[100] 20 U.S.C.A §§ 1681-1686; *see* The Civil Rights Restoration Act of 1988, 134 Cong. Rec. S2765 (daily ed. Mar. 22, 1988) (vote of 73-24); 134 Cong. Rec. H1071-72 (daily ed. Mar. 22, 1988) (vote of 299-133); *see also* Alexander Volokh, *The First Amendment Right to Affirmative Action*, SSRN (Feb. 15, 2024); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991). The Civil Rights Restoration Act overrode the Supreme Court's decision in *Grove City College v. Bell* in which the Court held that a college was subject to Title IX if any of its students received federal financial aid, yet the enforcement provision of Title IX—allowing for the termination of funds--applied not to the college as a whole but only to the financial aid program. Grove City Coll. v. Bell, 465 U.S. 555 (1984). There are, however, significant procedural hurdles an agency must satisfy before terminating federal funds are extensive. Agencies are required to seek voluntary compliance, to provide an opportunity for a hearing and to make an express finding on the record of a failure to comply.42 U.S.C. § 2000d-1. Agencies seeking to terminate funds must also file a full written report with the relevant house and senate committees and of course their decision can be challenged in court. *Id.*

[101] *See* Dear Colleague Letter: Race and School Programming from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (Aug. 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230824.pdf; Dear Colleague Letter: *Students for Fair Admissions* Decision from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. & Kristen Clarke, Assistant Att'y Gen. (Aug. 14, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf; *Questions and Answers Regarding the Supreme Court's Decision in* Students for Fair Admissions, Inc. v. Harvard College & University of North Carolina, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. & U.S. DEP'T OF JUST. (Aug. 14, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf; *Fact Sheet: Diversity & Inclusion Activities Under Title VI*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. (Jan. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf.

[102] Dear Colleague Letter: Discrimination, including Harassment, Based on Shared Ancestry or Ethnic Characteristics from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (Nov. 7, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf; *see also Fact Sheet: Protecting Students from Discrimination Based on Shared Ancestry or Ethnic Characteristics*, U.S. DEP'T OF EDUC. OFF. OF CIV. RTS. (Jan. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf.; Dear Colleague Letter: Addressing Discrimination Against Jewish Students from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep. of Educ. Off. for Civ. Rts. (May 25, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/antisemitism-dcl.pdf.

[103] 42 U.S.C. § 2999d-1 (providing: "No such rule, regulation, or order shall become effective unless and until approved by the President").

Nonetheless they provide clear notice to schools about OCR's interpretations and its willingness to enforce Title VI. Indeed, OCR has numerous investigations pending for possible discrimination based on shared ancestry or ethnicity.[104]

Despite active administrative enforcement, it is perhaps not surprising that termination of funds is a rarely executed sanction. Indeed, not since the 1960's in response to schools' refusal to desegregate, has the federal government terminated school funding in response to Title VI violations.[105] Both the threat of termination of funds and the reputational costs of being investigated provide strong incentive for schools to negotiate and settle with OCR. Moreover, the regulatory risk, which is cumbersome for both sides and potentially existential for universities, is further buttressed by the possibility of private litigation.[106]

2. Title IX

Title IX of the Education Amendments of 1972 tracks Title VI in language and structure.[107] Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[108] The Department of Education interprets Title IX to prohibit discriminatory treatment, sexual violence and sexual harassment.[109]

Like Title VI, Title IX authorizes federal agencies to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance."[110] The rules and regulations issued by OCR over the last twelve years have been politically fraught and controversial—shifting standards of proof, procedural protections and scope of coverage. What is constant, however, is that schools may not treat speech different depending on the sex of the speaker or target and must prohibit speech that rises to the level of harassment.

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[104] *See, e.g.*, *List of Open Title VI Shared Ancestry Investigations*, U.S. DEP'T OF EDUC. OFF. OF CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/sharedancestry-list.html (last visited Apr. 23, 2024).

[105] *See* Emma Brown, *Yes, the feds could pull North Carolina's education funding for violating transgender civil rights*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/education/wp/2016/05/09/yes-the-feds-could-pull-north-carolinas-education-funding-for-violating-transgender-civil-rights/ (describing withholding of federal funds in the 1960s from school districts that refused desegregation); Katherine Knott, *Will the Feds Strip Colleges' Funds Over Anti-Jewish, Muslim Bias?*, INSIDE HIGHER ED (Nov. 20, 2023), https://www.insidehighered.com/news/government/student-aid-policy/2023/11/20/pulling-colleges-federal-funds-would-be-nuclear ("The Education Department's Office for Civil Rights rarely terminates a college's access to federal financial aid and hasn't done so in decades. . . . The office typically focuses on compliance, not enforcement, and tends to use its threat of withholding dollars as leverage to get colleges to agree to remedies . . . .").

[106] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979) (speaking approvingly of a private right of action); Bossier Par. Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967).

[107] *See Title IX Legal Manual*, CIV. RTS. DIV., U.S. DEP'T OF JUST. (2001), https://www.justice.gov/crt/title-ix#Introduction.

[108] 20 U.S.C. § 1681.

[109] *Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC. https://www.2.ed.gov/policy/rights/guid/ocr/sexoverview.html (last visited Aug. 1, 2024).

[110] 20 U.S.C. § 1682.

Enforcement of Title IX tracks that of Title VI. OCR investigates and seeks voluntary resolution of complaints alleging sex discrimination and it does so, as was the case with Title VI, under the threat of the termination of federal funds. The threat alone has been sufficient to get schools to settle with OCR, and OCR has never terminated funding pursuant to a Title IX violation.[111] The Supreme Court has also recognized private rights of action seeking either injunctive relief or damages to remedy intentional discrimination under Title IX.[112]

The struggles over enforcement of Title IX, involving a back and forth between administrations, exemplifies the differences in procedures used across and within universities. In 2011, the Obama Administration issued informal guidance to schools on Title IX advising them that they were required to use a preponderance of the evidence standard to resolve complaints of sex discrimination and to respond to student-on-student sexual misconduct even if it took place off campus and outside a school's education program or activity.[113] The letter also "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing."[114] The Trump Department of Education rescinded the 2011 letter and enacted notice-and-comment regulations that barred the "single investigator model," and required live hearings, cross examination of parties, and presumption of innocence.[115] The Biden Administration largely restored the Obama era policies through its own rulemaking in April 2024.[116]

C. Summary

Private universities are not bound by the First Amendment, but they are bound to enforce their own promises regarding student speech in a way that complies with the antidiscrimination and neutrality demands of Title VI and Title IX. University speech codes, often ambiguous in word and inconsistent in application, provide fertile ground for lawsuits and regulatory enforcement actions. And the stakes are high--financially, politically and in terms of public opinion. The critical question then is what should private universities do? Should they ramp up speech regulation in order to ensure that speech codes are being enforced neutrally or should they deregulate speech and commit explicitly to First Amendment principles. The next part

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[111] *See* Tyler Coward, *Continuing a Pattern and Practice of Unconstitutional Diktats, OCR now Requires Schools to "Promote Diversity" to Comply with Antidiscrimination Laws*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (June 8, 2023), https://www.thefire.org/news/continuing-pattern-and-practice-unconstitutional-diktats-ocr-now-requires-schools-promote.

[112] *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (finding private right of action under Title IX for injunctive relief); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 n.8 (finding private right of action under Title IX for damages).

[113] Dear Colleague Letter: Sexual Violence from Russlynn Ali, Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ. Off. of Civ. Rts. (Apr. 4, 2011), https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html.

[114] *See id.*

[115] *See* 34 C.F.R. § 106 (2020); *See also* Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 6, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

[116] *See* Katherine Knott, *New Title IX Rules Are Out. Here's What You Need to Know*, INSIDE HIGHER ED (Apr. 19, 2024), https://www.insidehighered.com/news/government/2024/04/19/biden-administration-finalizes-title-ix-overhaul. The regulations are to go into effect August, 1, 2024. *See* 34 C.F.R. § 106 (2024).

addresses this question by considering the theoretical and pragmatic implications of each approach.

II. SPEECH CODES OR THE FIRST AMENDMENT?

A raft of campus hate-speech incidents in the 1990s, often directed at Black students, led to widespread adoption of speech codes prohibiting offensive language and the use of epithets on and off campus.[117] For the most part, these codes were later walked back under public scrutiny or, in the case of public universities, struck down.[118] In response, speech codes were replaced by more ambiguous university speech statements previously discussed,[119] often supplemented with bias reporting systems.[120] In the aftermath of the October 7, 2023 attacks by Hamas on Israel and Israel's response, and widespread allegations of antisemitism on college campuses, universities are being pushed again to punish offensive speech with new or strengthened speech codes.

This part begins in Section A by discussing the normative arguments for and against university speech codes. We do not take a general position against speech codes on philosophical grounds. Instead, we see benefits in contractual freedom, experimentation, and student choice. Section B explains our practical objections to speech codes. Given the organizational realities of the modern secular university, they are unlikely to enforce speech codes in a manner compliant with statutory and contractual obligations. Section C shows how a First Amendment commitment ameliorates many of the operational problems raised by speech codes by introducing an ascertainable standard and limiting the scope of university action.

A. Normative Arguments over Campus Speech Codes

The normative case for the First Amendment—namely that free speech is required to protect the individual, preserve democracy, and aid in the discovery of truth—has been made, expanded and repeated since our nation's founding. Moreover, the Supreme Court has on several occasions singled out higher education as a context wherein free expression, sometimes styled

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[117] *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 82 (2017) (stating that 350 schools adopted speech codes but "[e]very court to consider such a code declared it unconstitutional"); *see also* PEN AMERICA, AND CAMPUS FOR ALL: DIVERSITY, INCLUSION AND FREEDOM OF SPEECH AT U.S. UNIVERSITIES 10 (2016) (discussing a dozen cases in which codes were found unconstitutional at public universities). Leading critical race theory scholars advocated the implementation of speech codes and assisted in drafting some model codes.

[118] Stanford's attempt at a speech code, even though arguably designed to avoid treading on Constitutionally protected speech, was struck down by a trial court and that decision not appealed by Stanford. *See* Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 3 (Cal. Super. Ct. Feb. 27, 1995) (holding that the anti-harassment restrictions of Stanford's code went beyond the "fighting words" exception of the First Amendment and that the code constituted content-based speech discrimination and rejecting Stanford's claims that the Leonard Law was itself unconstitutional); Gerhard Casper, President, Stanford Univ., Statement to Faculty Senate on *Corry v Stanford Univ.* (Mar. 9, 1995), https://web.stanford.edu/dept/pres-provost/president/speeches/950309corry.html. The case also lacks precedential value.

[119] *See Spotlight on Speech Codes 2023*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/research-learn/spotlight-speech-codes-2023 (last visited Aug. 1, 2024) (finding that a majority of universities moved from having explicit speech protections in 2012 to more nuanced codes recently).

[120] *See supra* Part 3(B) (discussing bias reporting systems).

as academic freedom, is foundational.[121] In particular, the Court has emphasized that the university's mission of discovering and imparting knowledge presupposes a broad zone of expression.[122] Many scholars have likewise emphasized the need for the university to be a free speech zone.[123]

In contrast, some scholars have argued that limits on speech in the university context will increase access to human capital acquisition without harming valuable speech. After all, hateful speech contributes little to the search for truth and negatively impacts the learning environment, particularly for students whose identities are targeted.[124] Moreover, teaching, indeed demanding, civil discourse on controversial issues seems squarely within the university's traditional ambit.

Prompted by the latest campus unrest, Professor Danielle Allen of Harvard and Professor Claire Finkelstein of Penn both wrote editorials in favor of speech codes, arguing that universities have focused too much on free expression. Professor Allen argues that speech that would be harassment if targeted at an individual should also be disciplined if used more generally.[125] She would limit regulation to speech that could effectively cause a hostile environment and would encompass some currently popular slogans, including "from the river to the sea."[126] Allen argues that doing so corrects "moral errors," and moral education is a proper part of a university's mission.[127] Professor Finkelstein argues that the campus environment would be better if some speech, though First Amendment protected, were nonetheless off limits. She calls for "reasoned dialog" over "intemperate slogans."[128]

We are sympathetic, at least in theory, to the argument that universities ought to have the contractual freedom, conditional on sufficient notice to students, to adopt a range of

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[121] *See e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print…[but also] the freedom of the entire university community."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (expunging a professor's contempt for refusal to answer questions from a prosecutor regarding his teaching and holding that "[t]eachers and students must always remain free to inquire, to study and to evaluate" on First Amendment and due process grounds).

[122] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (holding that "academic freedom" is "a special concern of the First Amendment . . . . The classroom is peculiarly the 'marketplace of ideas.'").

[123] *See, e.g.,* Eugene Volokh, *Free Speech Rules, Free Speech Culture, and Legal Education*, 51 HOFSTRA L. REV. 629, 631 (2023) (arguing in the context of legal education "that creating a culture of free speech and openness to contrary ideas at law schools—including on the most controversial of topics—is vital not just for democratic self-government, the search for truth, self-expression, and the like, but also for effectively training future lawyers.").

[124] *See, e.g.,* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 452 (arguing that racist speech and epithets do not contribute to dialogue and endorsing campus speech codes).

[125] Danielle Allen, Opinion, *We've Lost Our Way on Campus. Here's How We Can Find Our Way Back*, WASH. POST (Dec. 10, 2023), https://www.washingtonpost.com/opinions/2023/12/10/antisemitism-campus-culture-harvard-penn-mit-hearing-path-forward/ (arguing that the university should address such behaviors in steps e.g., by first issuing a warning and trying to educate the students about the consequences of their speech).

[126] *See id.*

[127] Claire O. Finkelstein, *To Fight Antisemitism on Campuses, We Must Restrict Speech*, WASH. POST (Dec. 10, 2023), https://www.washingtonpost.com/opinions/2023/12/10/university-pennsylvania-president-magill-resigns-antisemitism-speech/.

[128] *Id.*

approaches to student speech. Universities have different missions and serve different types of students. Religious and military institutions, for example, often limit speech and freedoms enjoyed by other college students—yet these institutions clearly provide their students with an excellent education. Our objection to speech codes is practical. Given the present realities of American higher education, we believe that most private secular universities will be unable to enforce speech codes consistent with their contractual and statutory obligations of viewpoint and identity group neutrality.

B. Practical Challenges of Campus Speech Codes

Legally permissible implementation of campus speech codes requires even-handed enforcement and a campus judicial apparatus suited to fair, dispassionate decision making and proportionate punishments when issues of race and sex are raised. These requirements are not easily met. Indeed, several factors—some endemic to the nature of speech codes and others a function of current university structure and politics—make legal enforcement of speech codes particularly unlikely.

First, speech or civility codes, as demonstrated in Part I, tend to lack clarity. Codes could provide greater clarity than they currently do. For example, Stanford's conduct code promulgated in the 1990s (though invalidated under the Leonard Law) made a well-considered attempt at distinguishing between harassing speech and protected speech.[129] The University of Michigan's code, also invalidated,[130] provided vignettes of permissible and impermissible speech.[131] But such detailed codes are not the norm.[132] If anything, the norm within higher education is toward more flexible and less detailed codes.[133] Lack of detail is not necessarily strategic behavior meant to cloud enforcement. Some discretion is probably essential for codes to serve their core purpose. Unless they simply provide a list of proscribed words, civility and speech codes will necessarily rely on some fairly broad standards and discretionary guidelines. It is difficult, after all, to articulate what speech crosses a line ex ante, especially without precedent as a guide. Words, moreover, can also change meanings over time, and the impact and import of slogans are often contextual. For example, "globalize the intifada" and "from the river

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[129] *See* Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 3 (Cal. Super. Ct. Feb. 27, 1995) (holding that the anti-harassment restrictions of Stanford's code went beyond the "fighting words" exception of the First Amendment and that the code constituted content-based speech discrimination and rejecting Stanford's claims that the Leonard Law was itself unconstitutional). Stanford decided not to appeal the order. *See* Gerhard Casper, President, Stanford Univ., Statement to Faculty Senate on *Corry v Stanford Univ.* (Mar. 9, 1995), https://web.stanford.edu/dept/pres-provost/president/speeches/950309corry.html. The case, however, is not binding precedent. *See* CAL. R. CT. 8.1105, 8.1115. However, it has been relied on as good law by Stanford and other California schools. *See, e.g.*, Letter from Jenny S. Martinez, Richard E. Lang Professor of Law and Dean, Stanford Law Sch., to SLS Community (Mar. 22, 2023), https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf.

[130] Doe v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

[131] *Id.* at 856.

[132] *See, e.g.*, Edward N. Stoner & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004) (recommending less detailed, more flexible codes); Edward N. Stoner & Kathy L. Cerminara, *Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code*, 17 J.C. & U.L. 89 (1990) (likewise recommending less detail and more flexibility).

[133] *See*, *e.g.*, Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 934-36 (2016) (discussing guidance of government and non-government organizations on Title IX procedures).

to the sea, Palestine will be free," have been declared antisemitic phrases or dogwhistles at some schools when used in protests of the Israel-Hamas war.[134]

Second, the campus adjudicative process is often opaque and lacking in procedural protections typical of civil litigation. As discussed, the procedural issues attendant to university adjudications have been the focus of much litigation, particularly in the context of Title IX's regulation of conduct. Without legal mandate, it is probably not cost justified, or perhaps even feasible, for universities to maintain adjudicative systems that track the procedural protections of courts—for example, transcribed hearings, opportunities for cross-examination, and representation of the accused. Informality is a great cost saver. Certainly, some process is required by the university-student contract, but how much is unclear. Some circuit courts have required minimum standards when suspension or expulsion are possible, with the strongest standards being set forth by the Sixth Circuit.[135] Other courts largely hold universities to the terms of their handbooks and policy statements as long as they are sufficiently definite and clear, which they are often not.[136] Both across and even within universities there is considerable variation in how disciplinary cases are administratively processed and adjudicated.[137] Such

[134] *See, e.g., Calling for Accountability: Stopping Antisemitic College Chaos: Hearing Before the H. Committee on Education & the Workforce,* 118th Cong. 47 (2024) (Northwestern President Michael Schill agreeing that "from the river to the sea" is an antisemitic dog whistle, but ULCA President Gene Block claiming that "many people do not" see the phrase as antisemitic).

[135] *See* Faparusi v. Case W. Rsrv. Univ., 711 F. App'x 269, 277 (6th Cir. 2017) ("In confronting challenges to private school disciplinary proceedings, the appropriate question is [] 'whether the proceedings fell within the range of reasonable expectations of one reading the relevant rules, an objective reasonableness standard.'"); *see also* Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 601, 603 (D. Mass. 2016) (holding that Brandeis University had a "contractual obligation to follow the rules it set forth in the Handbook" and holding that Brandeis University had to follow "basic and fundamental components of due process of law"); Boehm v. Univ. of Pa. Sch. Of Veterinary Med., 573 A.2d 575 (Pa. Super. Ct. 1990) ("[W]here a private university or college establishes procedures for the suspension or expulsion of its students, substantial compliance with those established procedures must be had before a student can be suspended or expelled."). *Contra* Schaer v. Brandeis Univ., 735 N.E.2d 373 (Mass. 2000) (affirming dismissal for failure to state a claim despite alleged procedural errors in student suspension matter).

[136] *See e.g.*, Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016); Doe v. Trustees of the Univ. of Pennsylvania, 270 F. Supp. 3d 799, 815 (E.D. Pa. 2017) (holding "that Plaintiff cannot state a cognizable breach of contract claim based upon the alleged general unfairness of the disciplinary proceedings," while permitting other claims for breach of contract based on specific provisions of the Student Disciplinary Procedures).

[137] Harvard's school by school disciplinary process has been heavily criticized and is now being revised. *See* Cam Kettles & Neil H. Shah, *After Criticism, Harvard Will Standardize Fact-Finding Process for Disciplinary Cases, Harvard Crimson* (July 18, 2024), https://www.thecrimson.com/article/2024/7/19/harvard-rights-and-responsibilities-disciplinary-process/ (describing Harvard's attempt to "standardize fact-finding procedures for disciplinary cases across the University after facing fierce blowback when students who participated in the pro-Palestine encampment faced different disciplinary charges depending on which school they attended"); Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 934 (2016) (discussing how Harvard Law School, out of concerns about procedural fairness, adopted a different standard of proof and processes than the rest of Harvard University for Title IX cases, including rights of cross-examination and counsel). Diversity across schools is significant. One survey of top schools found that 60 percent did not give the accused the right to cross-examine accusers. *Spotlight on Due Process 2017*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/sites/default/files/2019/08/29110208/spotlight-on-due-process-2017.pdf (last visited Aug. 1, 2024) (stating that of the top 53 colleges, 60% did not provide accused students with a "meaningful opportunity to cross-examine witnesses"). Groups of law professors at Cornell, Penn, and

procedural informality provides fertile ground for decision maker bias and inconsistent outcomes based on participants' group identities.

Third, and relatedly, several elements common in campus adjudicative processes work against consistency across cases. Decisions on violations and punishments do not require adherence to precedent, adjudicative bodies change composition over time, and standards are sometimes rewritten to account for evolving norms. Student codes of conduct often allow for a wide range of possible penalties—everything from a reprimand to expulsion—with little guidance to accused students and others about which punishments are likely for which offenses.[138] Moreover, university administrative processes, even if conducted in good faith, are often shrouded in secrecy, thus providing scant guidance and ineffective precedent.[139] These features may be an expected part of informal adjudication of subjective standards on a limited budget, but they work against regulatory and contractual neutrality obligations.

Finally and most importantly, the composition of the bodies conducting disciplinary reviews and issuing judgments tend to be a mix of administrators, faculty, and students with ideologically homogenous viewpoints. University faculty are much more left-leaning than the general public. Surveys have long documented a leftward tilt in the academy, with some finding that fewer than 10% of faculty self-identify as conservative.[140] Such surveys miss some nuance. For example, the hard sciences, business, and economics are much more ideologically diverse than other social sciences and the humanities.[141] Schools in northeast are by far the most liberal, as are liberal arts colleges generally. In one survey of liberal arts college faculty, the overall ratio of Democrats to Republicans (by party registration) was roughly 13 to 1, and in several disciplines (anthropology, communications, sociology) the skew was such that most students

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Harvard have raised objections to what they see as to the serious procedural failings of their schools' Title IX processes. *See* Brief for Cornell Law School Professors as Amici Curiae Supporting Petitioner-Appellant John Doe at 4, Doe v. Cornell Univ., 80 N.Y.S.3d 695 (N.Y. App. Div. 2018) (No. 526013); Open Letter from Members of the Penn Law School Faculty 1 (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf; Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html#:~:text=Among%20our%20many%20concerns%20are,Title%20IX%20law%20or%20regulation.

[138] *See, e.g.*, Michelle N. Amponsah, Joyce E. Kim & Tilly R. Robinson, *Harvard Reverses Decision to Suspend 5 Pro-Palestine Protesters Following Faculty Council Appeal*, HARV. CRIMSON (July 10, 2024), https://www.thecrimson.com/article/2024/4/5/faculty-council-new-members/ (describing the reversal of disciplinary measures against pro-Palestinian demonstrators after the Harvard Administrative Board, the initial adjudicative body, rendered its decision resulting from pressure from Harvard's Faculty of Arts and Sciences nineteen-member elected Faculty Council).

[139] *See* United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002) (holding that "university disciplinary records were 'educational records' as that term is defined in the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and that releasing such records and the personally identifiable information contained therein constitutes a violation of the FERPA").

[140] *See also* John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170 (2005) (finding that political contributions of law professors at elite schools between 1990 and 2002 were 5 to 1 Democrat to Republican with ratios at some schools much higher).

[141] *See, e.g.*, Neil Gross & Solon Simmons, *The Social and Political Views of American College and University Professors*, *in* PROFESSORS AND THEIR POLITICS, 19-49 (Neil Gross and Solon Simmons ed., 2014) (finding that the ideology of the professoriate is strongly skewed left).

could complete the majors and not encounter a single registered Republican.[142] Moreover, conservatives tend to be disproportionately among the older faculty.[143] In short, the political skew of faculty is both undeniable and likely increasing.

But the faculty is not the only relevant group for speech code enforcement. Depending on the school, disciplinary decision-making bodies may consist mostly of administrators and students. University administrators are even more ideologically imbalanced than faculty or students.[144] Students are more ideologically diverse than faculty,[145] but students who serve on disciplinary committees are not likely to be a random draw from the student body and may be unwilling to publicly express dissenting views.[146] The possibility that students will not publicly vote their true feelings was laid bare when the student council at Dartmouth voted thirteen to two (with three abstentions) in a public vote of no confidence in the Dartmouth President after her forcible removal of an encampment in 2024. In a later secret ballot, the council voted nine to eight (with two abstentions) against the no confidence motion.[147] After that, a private vote open to the student body was nearly evenly split on the matter, 52 percent in favor of a censure, 48 percent against, with 60 percent student turnout.[148] Nonetheless, at some schools for some offenses, students control much of the disciplinary process and may engage in nullification of certain aspects of the code posing a grave risk for universities tasked with equal enforcement.[149]

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[142] Mitchell Langbert, Anthony J. Quain & Daniel B. Klein, *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 ECON J. WATCH 422 (Sept. 2016).

[143] Mitchell Langbert, *Homogeneous: The Political Affiliations of Elite Liberal Arts College Faculty*, 31 ACAD. QUESTIONS 186, 190 fig.1 (2018).

[144] Samuel J. Abrams, *Think Professors are Liberal? Try School Administrators*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/opinion/liberal-college-administrators.html (finding in a nationally representative sample of roughly 900 "student-facing" administrators that "liberal staff members outnumber their conservative counterparts by the astonishing ratio of 12-to-one" versus the same methodology's finding that the ratio among faculty was 6-to-1).

[145] The 2024 FIRE survey of 45,000 college students at over 200 American universities found that 48% of students self-identified as politically left-of-center while 19% of students self-identified as politically right-of-center. See *2024 College Free Speech Rankings*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://rankings.thefire.org/rank (last visited Aug. 1, 2024).

[146] The 2024 FIRE survey found that 53 percent of students reported that they would be "very uncomfortable" or "somewhat uncomfortable" expressing their views on a controversial political topic to other students in a public space on campus. In addition, levels of discomfort were higher for political conservatives than for political liberals. Fifty-four percent of "strong republicans" reported being "somewhat" or "very" uncomfortable to share their opinion on a controversial political topic during a class discussion as compared to 43 percent of students identifying as "strong democrats." *See 2024 College Free Speech Rankings*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://rankings.thefire.org/rank (last visited Aug. 1, 2024).

[147] Annabelle Zhang, *DSG Fails Vote of No Confidence in College Leadership*, THE DARTMOUTH (May 7, 2024), https://www.thedartmouth.com/article/2024/05/dsg-fails-vote-of-no-confidence-in-college-leadership.

[148] Valley News, *Dartmouth President's Leadership Divides Students; 'No Confidence' Narrowly Passes*, VTDIGGER (May 17, 2024), https://vtdigger.org/2024/05/17/dartmouth-presidents-leadership-divides-students-no-confidence-narrowly-passes/.

[149] Hiram Chodosh, President of Claremont McKenna College, said that universities have "trouble enforcing their own disciplinary processes" contrasting the University of Chicago's faculty-centered process with "a lot of schools have turned that disciplinary process over to students and you can predict that I mean sometimes peer review is excessively harsh and sometimes or more often it's excessively permissive that if you have a serious violation of policy and it students deciding whether to suspend or

Social science research suggests that viewpoint diversity is critical to impartial group decision-making.[150] The most relevant comparable deliberative body for our purposes is the jury. It is well-established based on random variations in the jury pool that racial representation on juries affects outcomes for minority defendants.[151] Indeed, just having one Black juror seems to make an enormous difference in racial disparities in convictions.[152] But the evidence is not just limited to race. Diverse perspectives, including expertise and political opinions, have been shown to be relevant in tempering juror biases and ensuring more impartial treatment of the accused. As a recent article surveying the literature concluded:

> A key strength of the jury is its ability to draw on the different experiences, perceptions, and values of the jury members, using that diversity of backgrounds and beliefs to provide countervailing perspectives. Thus, it is the jury, rather than individual jurors, that emerges as the impartial decision-maker…. Thus far, the evidence on the efficacy of anti-bias instructions has not yet emerged. As a result, ensuring heterogeneity in the composition of juries is currently our most dependable way to control bias. [153]

Biases are likely even more pronounced among those serving in adjudicative capacities in higher education than they are among jurors. There is no voir dire to remove those with fixed prejudices, there are no tailored jury instructions, and the rules of evidence are lax. Review panels at universities are not designed to be made up of representative groups of students, faculty, and administrators. Indeed, under some university processes, there may be no panel at all but only one initial decision-maker, which has been permitted under Title IX. The investigator, at some schools, may serve on the original panel, and the appellate panel may include members of the lower panel.[154]

The university disciplinary process—with its informality, discretion and secrecy—combined with the ideological homogeneity of decision-makers makes even-handed and hence lawful enforcement of student speech codes unlikely. The fundamental problem is that university conduct committees are implementing ambiguous codes of conduct without strong procedural protections or the guidance of precedent in the teeth of statutes and other promises that require neutrality on important topics. The adjudicating agents face little blowback for poor or biased

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expel that you're going to see very few suspensions or expulsions and this is really important because if universities and colleges can't self-enforce." Heterodox Acad., *(Livestream) University Presidents Discuss Open Inquiry & Institutional Neutrality #HxA2024*, YOUTUBE (June 7, 2024), https://www.youtube.com/watch?v=0x9KYtpVr9E.

[150] *See, e.g.*, José Duarte et al., *Political Diversity will Improve Social Psychological Science*, 38 BEHAVIORAL & BRAIN SCIENCES (July 2014) (detailing various biases from homogenous opinion groups, including confirmation bias and group think).

[151] *See, e.g.*, Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 QUARTERLY J. ECON. 1017, 1048-50 (May 2012) (using an experimental design based on a randomly drawn jury pool to conclude that having one black member of the jury completely reduces the racial disparity in conviction rates).

[152] *See id.*

[153] Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 952 (2023).

[154] The Biden regulations of April 2024 specifically allowed schools to go back to the single investigator model where a single person could make a complaint, serve as investigator, and issue a judgment in a case. *See* 34 C.F.R. § 106.45(b)(2) (2024).

decisions. Should a lawsuit result, the agents are unlikely to be personally liable, rather the university is on the hook. The lack of ideological diversity on campus exacerbates the problem.

In theory, universities could engage in structural reforms to address the problems identified here. Conduct committees could be chosen explicitly with an eye to ideological diversity, decisions could have precedential value, and more procedural protections could be given. Speech codes might be narrowed and made more specific—perhaps identifying specific phrases as forbidden and leaving all else protected. A standing committee could engage in ongoing identification of words and phrases that would be prohibited. But implementing such reforms would be contentious and costly. Committing to the First Amendment is simpler.

C. The Prudential Case for the First Amendment

In a frank op-ed in the Wall Street Journal, former Northwestern President Morton Schapiro lamented the bind in which university presidents find themselves when faced with high-profile cases of offensive expression.[155] The law is often unclear, and "don't expect to find agreement among your senior administrators," including university counsel, whose interests in disciplining student expression "seldom align."[156] Our analysis supports Schapiro's observations, but he fails to diagnose the root of the problem. University presidents are not victims of circumstance. Rather, universities have created a system that is opaque, maximizes discretion, encourages complaints, and has few mechanisms that promote consistency. Their job would be easier and students would be better served if universities committed to a First Amendment standard that provides clarity, consistency, and external review.

Committing to the First Amendment provides greater clarity regarding the scope of protected speech than is possible under a university speech code. As discussed previously, university speech codes are often vague and the outcomes of disciplinary proceedings secret, making it difficult for students and adjudicative bodies to understand the boundaries and parameters of university codes. First Amendment caselaw, by contrast, is robust and accessible providing clearer guidance for administrators and students about the scope of protected speech.

Committing to the first Amendment makes consistency across cases more likely. From a legal perspective, the main risk to universities of speech codes flows from their inconsistent and ideologically driven application. The First Amendment mitigates this risk in the first instance by simply shrinking the class of cases plausibly subject to university sanction. Specific types of individualized harm would have to be shown. With less speech plausibly subject to punishment than under more expansive speech codes, there are fewer opportunities for administrative bias, inconsistency and mistake. For the cases that remain, the richness of judicial precedent makes inconsistent administrative decision making less likely.

Committing to the First Amendment increases the likelihood of judicial oversight, an important check on university bias and inconsistency. Courts often shy away from interpreting claims based on handbook or disciplinary code provisions on the grounds that the promises are too vague and discretionary to be contractually enforceable.[157] A commitment by private universities to adopt First Amendment principles would be sufficiently clear and concrete to be

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[155] Morton O. Schapiro, *The New Face of Campus Unrest*, WALL ST. J. (Mar. 18, 2015), https://www.wsj.com/articles/morton-schapiro-the-new-face-of-campus-unrest-1426720308.

[156] *Id.*

[157] *See, e.g.*, G. v. Fay Sch., 931 F.3d 1 (1st Cir. 2019); Tibbetts v. Yale Corp., 47 F. App'x 648 (4th Cir. 2002); Wu v. Ma, 2023 WL 6318831 (D. Mass. Sept. 28, 2023); Ruegsegger v. W. NM Univ. Bd. of Regents, 154 P.3d 681 (N.M. Ct. App. 2006).

contractually binding. Courts regularly decide First Amendment cases in the context of public higher education, and there would be no reason for them to shy away from interpreting similar commitments made by private universities. It is possible that opening up more university decisions to judicial review via a clear commitment will generate more litigation. However, with the advantage of a large body of First Amendment precedent, a well-counseled institution will have an easier time predicting what cases they will win or lose. The ambiguous standards now prevailing create significant legal uncertainty, possibly resulting in higher litigation costs than would obtain under a straightforward First Amendment commitment.

Committing to the First Amendment is unlikely to increase campus chaos. Under the First Amendment, the university may reasonably impose time, place, and manner restrictions on speech. Universities can create protest zones with full First Amendment protections while establishing rules of decorum and engagement with regard to outside speakers and for classrooms. These permissible restrictions are sufficient to protect university operations even in the face of intense student protests.

Indeed, there is no evidence that recent campus protests have resulted in greater chaos at public universities that must follow the First Amendment relative to their private sector counterparts with speech codes.[158] In the 2024 FIRE free-speech rankings, public universities dominate the top 50 schools for freedom of student expression (46 out of 50), and private schools comprise the great majority of the bottom ranked schools.[159] Though one can undoubtedly quibble with the methodology, there is likely some signal value in such a ranking. Public universities are largely not shirking their First Amendment obligations, and yet are also not facing more disruptions at the moment than public universities.

A First Amendment commitment may actually defuse campus tensions by decreasing punitive partisanship. At schools that commit to First Amendment principles, students cannot as easily engage the university's disciplinary apparatus against those whose speech they find offensive. Students who are unable to appeal to university disciplinary processes to silence and punish those with whom they disagree may instead come to engage with them. The result, one could hope, would be more wholesome and robust debate on campus. Relatedly, a First Amendment commitment would prevent politically motivated and divisive efforts to suppress or require certain types of scholarship and rhetoric, including critical race theory or antiracism teaching. Consider, for example, discussions of "whiteness," "western colonialism," or "white settler colonialism." Such words are part of an important scholarly discourse, but they cannot easily be permitted under current law while limiting other racialized speech.[160]

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[158] *See* Robert Kelchen & Marc Novicoff, *Are Gaza Protests Happening Mostly at Elite Colleges?*, WASH. MONTHLY (June 23, 2024), https://washingtonmonthly.com/2024/06/23/are-gaza-protests-happening-mostly-at-elite-colleges/ (using a database on public protests and disruptions and finding a clear pattern that both encampments are protests "are overwhelmingly an elite college phenomenon" not a public-private distinction).

[159] *2024 College Free Speech Rankings*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://rankings.thefire.org/rank (last visited Aug. 1, 2024).

[160] Under current Supreme Court precedent, permitting such speech while sanctioning critiques of other societies or races is a straightforward a violation of Title VI. Indeed, a district court recently held that such speech, when included in mandatory employee training, stated sufficient grounds to allege a hostile work environment at Penn State University. *See* de Piero v. Pa. State Univ., No. 23-2281, slip op. (E.D. Penn Jan. 11, 2024).

Moreover, a First Amendment commitment does not bar a university from punishing conduct more severely based on a hateful motive. The Court's jurisprudence on hate crimes would permit a university committed to the First Amendment to, for example, punish cross burning more severely than other forms of pyrotechnic vandalism because of the message of group hate conveyed by the former.[161] Likewise, a university could expel a student who spray paints a racial epithet, but only reprimand a student whose graffiti's message was not hateful but merely a stupid prank.[162] In other words, speech or ideas that would be protected if expressed alone, may nonetheless, and without First Amendment issue, amplify the punishment attached to otherwise prohibited conduct.

III. CHALLENGES UNDER A FIRST AMENDMENT COMMITMENT

Committing to the First Amendment simplifies university administration over student expression, but close cases and difficult issues remain. This Part identifies and analyzes four challenges that would arise or be exacerbated by a First Amendment commitment: (A) the costs of protecting speech from a heckler's veto; (B) the permissibility of university bias reporting systems, (C) the use of process as punishment; and (D) the need to distinguish between protected speech and harassment. This Part argues that to the extent there are additional burdens, they do not outweigh the benefits that flow from a First Amendment commitment. Moreover, none of these challenges would be greater for private universities than public universities, which have long managed these issues.

A. Heckler's Veto and Public Forums

The First Amendment prohibits the government from restricting otherwise lawful expression on the grounds that the expression may provoke an illegal response, a so-called heckler's veto.[163] For public universities, this means they must protect and safeguard the controversial speech of their own students as well as that of external speakers invited to campus by student groups. Given the political uniformity of many campus environments, there is particular value added from external speakers and student associations. On many college campuses, the best chance for heterodox viewpoints to be heard comes from protecting the rights

[161] *See* Virginia v. Black, 538 U.S. 343, 360-63 (2003) (reasoning that a state may choose to prohibit only those forms of intimidation that are most likely to cause the greatest harm).

[162] *See* Virginia v. Black, 538 U.S. 343, 360-63 (2003) (in the context of an anti-cross burning statute reasoning that a state may choose to prohibit only those forms of intimidation that are most likely to cause the greatest harm); Wisconsin v. Mitchell, 508 U.S. 476, 480, 485 (1993) (holding that while "abstract beliefs" cannot be a grounds for enhanced punishments, enhancements can be based on the underlying hateful motive of a crime, for which speech or expression was evidence); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").

[163] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 131 n.1, 142 (1966) (holding that the state "may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights" of First Amendment expression); Erwin Chemerinsky, *UC Irvin's Free Speech Debate*, L.A. TIMES (Feb. 18, 2010), https://www.latimes.com/archives/la-xpm-2010-feb-18-la-oe-chemerinsky18-2010feb18-story.html (describing the arrests and discipline of students who disrupted a speech by the Israeli Ambassador as proper and an "easy case" of protecting First Amendment speech).

of students to bring in controversial speakers, stage debates, and advertise views, while punishing faculty and those who disrupt speech.

The costs of protecting controversial speech can be high. In one year, Berkeley spent almost $4 million on extra security for just a few outside speakers brought in by conservative campus groups. By contrast, some private universities bar speakers from campus on the grounds that they are unwilling to bear the costs of containing the reaction to them.[164] If a private university committed to the First Amendment, they would no longer be able to use the potential for disruption as grounds for barring speech. A practical question is whether it is financially reasonable and feasible for private universities, many smaller than large public institutions and often lacking their own police forces, to absorb these costs.

There are, however, two reasons why these costs are mitigated in the private university context, even under a First Amendment commitment. First, private universities have more leeway than public schools to engage in discipline as a form of self-help because suspension or expulsion does not deprive students of a state benefit.[165] Orientations that educate students on speech and conduct, warnings when conduct is disruptive, combined with the threat and actual imposition of reasonable sanctions, should be adequate to deter or swiftly end student disruptions. The problem of student speech disruptions is, in part, a choice of the university and one that private universities have more control over than public universities. Private universities that face regular and costly campus disruptions have elected for a disciplinary system that fails to deter.

Second, private universities are not subject to the public forum doctrine and consequently have a greater ability to close their campuses and evict unauthorized persons for trespassing. To summarize this rather complicated doctrine, government cannot restrict speech in traditional or government-designated public forums except via content-neutral time, place and manner restrictions.[166] For this reason, restricting attendance at public university events or banning outside demonstrations on campus is not always straightforward.[167] By contrast, a

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[164] Marwa Eltagouri, *DePaul University Turns Down Conservative Speaker, Citing Security Concerns*, CHI. TRIB. (June 10, 2018), https://www.chicagotribune.com/2016/08/03/depaul-university-turns-down-conservative-speaker-citing-security-concerns/ (reporting on private DePaul University's decision to bar conservative speaker Ben Shapiro from campus solely on the grounds that his presence would be too disruptive).

[165] *See* Kathryn Palmer, *Punishments Rise as Student Protests Escalate*, INSIDE HIGHER ED (Apr. 14, 2024), https://www.insidehighered.com/news/students/free-speech/2024/04/15/punishments-rise-student-protests-escalate (discussing arrests, suspensions, and expulsions of students for disrupting campus life at Pomona College and Vanderbilt University); Miriam Waldvogel, *In Preemptive Move, U. Says Encampment Protestors Will Likely Be Arrested and Barred from Campus*, DAILY PRINCETONIAN (Apr. 25, 2024), https://www.dailyprincetonian.com/article/2024/04/princeton-news-adpol-gaza-preemptive-encampment-protestor-arrest-ban-from-campus.

[166] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (treating designated public forum the same as a traditional public forum).

[167] In 2017, the University of Virginia was caught up in the infamous Unite the Right rally, which involved explicit racist rhetoric and public demonstrations. Several were later indicted for intimidating conduct. Associated Press in Charlottesville, Virginia, *White Nationalists Who Carried Torches in Charlottesville in 2017 Indicted*, THE GUARDIAN (Apr. 19, 2023), https://www.theguardian.com/us-news/2023/apr/19/charlottesville-white-nationalist-torch-marchers-indicted. As of April 2024, the cases have not been resolved. Later, off-campus, one counter demonstrator was killed and dozens injured when a right-wing fanatic drove his car into them. Joe Heim et al., *One Dead As Car Strikes Crowds Amid Protests of White Nationalist Gathering in Charlottesville; Two Police Die in Helicopter Crash*, WASH.

private university's contractual commitment to the First Amendment is with its students, not with the public at large. Private universities easily can (and have) closed their campuses to outsiders when there are concerns over violence and disruptions.[168] And they can do so without violating a First Amendment commitment to their students. In short, private universities have more tools to mitigate the costs associated with controversial protected speech than do public universities.

B. Bias reporting systems

After the demise of campus speech codes in the late 1990s and early 2000s, universities began to adopt systems of "bias incident reporting," as arguably a less intrusive substitute for speech codes. [169] These systems take different shapes with seemingly different priorities. Stanford's bias reporting system is aimed at helping the student reporting the bias and is explicitly non-punitive.[170] Under earlier versions of the system, the alleged perpetrator of bias was contacted and informed that their actions or words were perceived as biased, but in 2023 Stanford announced that the university would no longer contact the party who was the subject of the complaint.[171] By contrast, Northwestern's bias reporting system focuses on the alleged perpetrator of bias and can result in further investigation at the option of the reporter or the investigator, which could ultimately lead to sanctions.[172] Moreover, Northwestern's system explicitly takes into account "privilege" and "power," suggesting that accused individuals who are members of majority or overrepresented groups will face extra scrutiny. This feature of Northwestern's bias reporting system likely violates Title VI. Other bias reporting systems have been subject to scathing criticism on the grounds that they encourage students to monitor each other and punish ideological dissidents. Second Circuit Judge Jose Cabranes, in a law review editorial, decried Yale's bias reporting policy as "a system of surveillance and anonymous reporting, designed, in part, to track and punish behaviors that deviate from various campus orthodoxies."[173]

POST (Aug. 13, 2017), https://www.washingtonpost.com/local/fights-in-advance-of-saturday-protest-in-charlottesville/2017/08/12/155fb636-7f13-11e7-83c7-5bd5460f0d7e_story.html. But this had little to do with UVA as a public forum.

[168] *See* Ginger Adams Otis, *Columbia University Closes Campuses to Public Ahead of Protests*, WALL ST. J. (Oct. 14, 2023), https://www.wsj.com/livecoverage/israel-hamas-war-gaza-strip/card/columbia-university-closes-campuses-to-public-ahead-of-protests-MHT4WNQPoedlhQzmsxM8.

[169] GREG LUKIANOFF & JONATHAN HAIDT, CODDLING OF THE AMERICAN MIND 202-206 (2018) (detailing how bias reporting systems began to emerge in the 2000s toward the end of the first wave of campus speech codes in the 1990s).

[170] Emelyn dela Peña & Mona Hicks, *A Renewed Commitment to Helping Students Harmed by Bias-Related Incidents*, Stanford Report (Oct. 12, 2021), https://news.stanford.edu/stories/2021/10/renewed-commitment-helping-students-harmed-bias-related-incidents.

[171] Douglas Belkin, *Stanford Faculty Say Anonymous Student Bias Reports Threaten Free Speech*, WALL ST. J. (Feb. 23, 2023), https://www.wsj.com/articles/stanford-faculty-moves-to-stop-students-from-reporting-bias-anonymously-cbac78ed. Haley Gluhanich, *VICTORY: Stanford Adopts FIRE Recommendation, Will No Longer Notify Students Accused of Engaging in Protected Speech*, THE FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Apr. 18, 2023), https://www.thefire.org/news/victory-stanford-adopts-fire-recommendation-will-no-longer-notify-students-accused-engaging.

[172] *See supra* text accompanying notes 54-61.

[173] José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL. REV. INTER ALIA 345, 346 (2017).

For public schools, the Constitutionality of bias reporting systems is currently hotly contested. The Supreme Court granted cert recently in a case challenging Virginia Tech's bias reporting system, but the system was abandoned by Virginia Tech during the litigation, and the Supreme Court remanded the case back to the circuit court to be dismissed as moot.[174] Justice Thomas's dissent to the remand (joined by Justice Alito) emphasized the prevalence of such systems[175] and the circuit split on the substantive issue of whether bias systems chilled speech.[176] He also made it clear that he viewed Virginia Tech's system as "stifling students' speech."[177] Other public universities, in response to similar litigation pressure, have, like Virginia Tech, altered or abandoned their bias reporting systems.[178]

Private schools that commit to First Amendment principles would face the same uncertainty about and potential legal challenge to their bias reporting systems. Importantly, they would also face the same incentives that public schools have to structure such systems so as to avoid the concerns raised by Judge Cabranes and Justice Thomas. They would be forced, in other words, to ensure that bias reporting systems are not used to effectively re-establish speech codes inconsistent with schools' contractual commitment to the First Amendment.

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[174] Speech First, Inc. v. Sands, 144 S. Ct. 675 (2024).

[175] *Id.* (Thomas, J., dissenting) ("Speech First estimates that over 450 universities have similar bias-reporting schemes.").

[176] *Id. Compare* Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1124 (11th Cir. 2022), *and* Speech First, Inc. v. Fenves, 979 F.3d 319, 338 (5th Cir. 2020), *and* Speech First, Inc. v. Schlissel, 939 F.3d 756, 765 (6th Cir. 2019), *with* Speech First, Inc. v. Sands 69 F.4th 184, 197 (4th Cir. 2023), *cert. granted, judgment vacated*, 144 S. Ct. 675 (2024), *and* Speech First, Inc. v. Killeen, 968 F.3d 628, 644 (7th Cir. 2020).

[177] Speech First, Inc. v. Sands, 144 S. Ct. 675, 676 (2024) (Thomas, J., dissenting).

[178] Speech First, a pro-free speech organization, has brought several cases (together with students) in federal court arguing that the systems are designed to chill speech. For an overview of pending litigation and recent settlements, see *Lawsuits*, SPEECH FIRST, https://speechfirst.org/university-lawsuits/ (last visited Aug. 1, 2024). Most recently, Speech First settled with Oklahoma State University, which as part of the settlement agreed to disband its bias incidents response team. Agreement and Release, Speech First, Inc. v. Okla. State Univ., No. 5:23CV00029 (W.D. Okla. 2024), ECF No. 55, *available at* https://speechfirst.org/wp-content/uploads/2024/04/OSU-SF-Settlement-Agreement-.pdf. In response to this litigation pressure, some universities have often dropped or altered their policies. These schools then argue that, as a result of their policy alterations, Speech First lacked standing. So far, circuit courts issued opinions in five cases involving bias reporting systems, largely on the issue of standing. Four circuit courts reversed lower court decisions that Speech First lacked standing disregarding the policy changes made by universities as irrelevant since the policies could be brought back. *See* Speech First, Inc. v. Shrum, 92 F.4th 947 (10th Cir. 2024) (holding that anonymous students have standing); Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022) (holding that students retained standing even though the bias reporting system was disbanded); Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020) (holding that students retained standing even though the bias reporting system was disbanded); Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019) (holding that students retained standing even though the bias reporting system was disbanded). By contrast, at least two circuits have rebuffed standing, though in part on substantive grounds. *See* Speech First, Inc. v. Killeen, 968 F.3d 628, 644 (7th Cir. 2020) (holding that plaintiffs failed to "demonstrate that any of its members face a credible threat of any enforcement . . . or that BART's or BIP's responses to reports of bias-motivated incidents have an objective chilling effect."); Abbott v. Pastides, 900 F.3d 160, 179 (4th Cir. 2018) (holding that plaintiff failed to establish a credible fear of enforcement to confer standing for its Bias Policy claim because speaking to the bias response team was entirely voluntary).

C. Process as Punishment

All universities must maintain disciplinary systems to punish illegal conduct and ensure consistent treatment of complaints. Yet the stress and intrusion of an investigatory process may chill student speech even if formal discipline is never imposed. Universities whether legally bound by or voluntarily committed to the First Amendment must ensure that their disciplinary processes do not themselves become a form of speech suppression.

Professor Laura Kipnis wrote compellingly about process as punishment in her book, *Unwanted Advances: Sexual Paranoia Comes to Campus*.[179] In 2015, two students filed a Title IX complaint against Kipnis because of an op ed she published in the Chronicle of Higher Education critiquing various aspects of Title IX and campus regulations on sexual conduct and speech in general.[180] Although she was never formally punished, Kipnis was subjected to a Kafkaesque disciplinary process which she recounts in her book. Kipnis describes how she received an official email containing a bewildering array of Title IX links but not informing her of the exact nature of the charges against her, [181] how her case was assigned to a Kansas City law firm that supplied two lawyers to investigate,[182] how the initial interview was conducted over Skype,[183] during which again no details of claims or charges were provided,[184] how her faculty advocate became himself the subject of a Title IX complaint (seemingly for the offense of being her faculty advocate),[185] and how she was subjected to an hours-long hearing after which a 60 page report was issued (which she could read but not copy or possess) that exonerated her.[186] Title IX complaints against her faculty advocate and (apparently) the President of the university for an op ed he penned in favor of free speech were subsequently dropped by the students.[187]

There is some First Amendment caselaw on process as punishment. In Susan B. Anthony List v. Driehaus, the Supreme Court recognized in dicta that the threat of administrative process alone may be sufficiently chilling to speech to give rise to Article III injury, but the case also relied on the possibility of criminal sanctions attached to the investigation.[188] In Abbott v. Pastides, the Fourth Circuit addressed the question in the context of a public university. Two student organizations held a free-speech event at the University of South Carolina, approved by the administration, in which several displays included examples of problematic speech, including a swastika. Some students who observed the event complained and a university official asked to meet with "one of the event's student sponsors, to review the complaints and determine whether an investigation was warranted. A few weeks later, [the official] notified [the student

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[179] LAURA KIPNIS, UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS (2016).

[180] Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf.

[181] *See* KIPNIS, *supra* note 166, at 127.

[182] *Id.* at 131.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 146.

[186] *Id.*

[187] *Id.* at 146.

[188] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 166 (2014) ("Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution.").

organizer] that there was no cause for investigation and that the matter had been dropped."[189] The court held that the meeting and then dismissal of the complaint within weeks did not constitute chilling conduct because it would not deter a "student of ordinary firmness"[190] from expressing his views and balancing any chilling effect against the university's interests in combating discrimination.[191]

Difficult cases will arise and fact intensive investigations are sometimes necessary. Yet universities must ensure that their substantive commitment to First Amendment protection is not undermined by a disciplinary process that burdens, intimidates and potentially silences those who engage in protected speech. In order to avoid procedural punishment, universities must ensure some form of summary dismissal—ideally overseen by the university counsel's office—for complaints involving clearly protected speech.

D. Harassment v. Protected Speech

The distinction between protected and unprotected speech is often fraught. Sometimes, unprotected speech is relabeled "conduct" as in the case of threats and fighting words—perhaps to make the distinction seem sharper than it is. The most difficult challenge within the speech vs. conduct distinction is determining when speech is unprotected harassment. Universities, whether bound by or voluntarily committed to First Amendment principles, must safeguard protected speech—even if offensive or hateful—while preventing and punishing actionable harassment as required by statute.

In theory, there is no overlap between protected speech and harassment. Titles VI and IX require schools that receive federal funding to prevent and punish harassment based on race, national origin and sex. Speech that is protected by the First Amendment does not, by definition, constitute harassment.[192] Moreover, regulators may not use Title VI or Title IX to require universities, whether public or private, to punish protected speech.[193]

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[189] Abbott v. Pastides, 900 F.3d 160, 163 (4th Cir. 2018).

[190] *Id.* at 169 (quoting Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011)).

[191] *Id.* at 179. This use of process as punishment is not isolated or unusual. *See* Megan Rosevear, *Jewish Professor Fully Exonerated After Removal for Saying 'Hamas are Murderers*,*'* THE COLLEGE FIX (July 5, 2024) (describing case of USC professor John Strauss who was banned for teaching on campus and subjected to a 7-month investigation for engaging in clearly protected speech before being exonerated).

[192] *See, e.g.,* Eugene Volokh & Will Creely, *The Trouble with Congress or College Presidents Policing Free Speech on Campuses*, L.A. TIMES (Dec. 10, 2023), https://www.latimes.com/opinion/story/2023-12-10/antisemitism-campus-speech-penn-president-liz-magill-resigns-harvard-mit (discussing how abstract calls for violence differ from those directed at an individual); Nadine Strossen & Pamela Paresky, *Even Antisemites Deserve Free Speech*, THE FREE PRESS (Oct. 18, 2023) (arguing, before the hearings, that contexts in which antisemitic speech would be sanctioned are narrow).

[193] Public universities may not interpret or enforce Title IV's and Title IX's mandates so broadly as to punish speech protected by the First Amendment. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) ("'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, '[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)). The First Amendment prohibits the government from requiring private actors to suppress First Amendment protected speech, and consequently Titles VI and IX cannot be interpreted to require private universities to suppress First Amendment protected speech. *See* Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024) (holding

In practice, line drawing between harassment and protected speech can be difficult. Indeed, the presidents of Harvard, Penn and MIT struggled mightily during the Congressional hearings in Fall 2023 to answer questions about whether abstract calls for genocide or intifada constituted protected speech or actionable harassment. As many observers noted, they were legally correct to say it depended on context.[194] Calls for "intifada" or "from the river to the sea" made at rallies or in an op ed are almost certainly protected speech, general calls for a genocide of Jews may not be, and speech directed against a particular person done in a threatening manner are almost certainly unprotected.[195]

Line drawing is made even more difficult when done under the threat of politically motivated or unprincipled agency enforcement. In a recent settlement with the University of Michigan over campus protests, for example, OCR made seemingly contradictory pronouncements regarding the First Amendment and the University's obligation to prevent a hostile environment. The OCR enforcement letter first states, uncontroversially: "While the University may not discipline speakers for protected speech, the University retains a Title VI legal obligation to take other steps as necessary to ensure that no hostile environment based on shared ancestry persists."[196] The enforcement letter then (strangely) cites clearly protected speech such as general chants of "from the river to the sea" and "Fuck education, Nazi liberation" as possibly creating a hostile environment.[197] Given constitutional limitations, it is not clear what meaningful "other steps" the OCR wants. The referenced speech is protected and may not be disciplined or silenced by a public university, or a private one committed to First Amendment principles. Indeed, in 1988 the University of Michigan, in response to some vile racial incidents on campus that included actual threats,[198] attempted to implement a speech code, but that code was struck down by a district court the next year.[199] Michigan is left in the unenviable position

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that a state regulator "could not wield her power…to threaten enforcement actions against [ ] regulated entities in order to punish or suppress the NRA's gun-promotion advocacy"); Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 67 (1963) (holding that the "threat of invoking legal sanctions and other means of coercion" against a third party "to achieve the suppression" of permissible speech violates the First Amendment). OCR guidance has long been in agreement. Dear Colleague Letter: First Amendment from Gerald A. Reynolds, Assistant Sec'y, U.S. Dep. of Educ. Off. for Civ. Rts. (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html (clarifying that First Amendment protected speech does not constitute harassment despite the fact that some private universities "have interpreted OCR's [and Title VI and IX's] prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race, or other classifications").

[194] *See infra* note 201.

[195] See generally Cass R. Sunstein, *Free Speech On Campus? Thirty-Seven Questions (and Almost As Many Answers)* (Jan. 3, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4674320.

[196] Letter from Brian Gandt, Reg'l Program Manager, U.S. Dep. of Educ. Off. for Civ. Rts., to Kelly Cruz, Assoc. Gen. Couns., Univ. of Mich. (June 17, 2024), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15242066-a.pdf.

[197] *Id.*

[198] Indeed, in 1988 the University of Michigan, in response to some vile racial incidents on campus that included actual threats, attempted to implement a civility code, but the speech code was struck down by a district court the next year. Doe v. Univ. of Mich., 721 F. Supp. 852, 854 (E.D. Mich. 1989) (citing slurs and a flyer circulated on campus declaring "open season" on Black people).

[199] Perhaps for this reason, the OCR enforcement agreement mainly requires further record keeping, monitoring, and training, but did not require a substantive revision of the University's policies concerning student expression or disciplinary action against specific speech. University of Michigan, Resolution Agreement, OCR Complaint Number 15-24-2066 and 15-24-2128 (June 14, 2024),

of facing possible legal challenge if it follows OCR's directive and sanctions legally protected speech or challenging the OCR order in court itself.

Without doubt, universities bound by or voluntarily committed to First Amendment principles face difficult line drawing and potentially costly enforcement choices. For public universities, there is no alternative. They are required to navigate the line between protected speech and harassment. For private universities, there is an alternative, but it is likely to be worse. Private universities can enforce speech codes and punish much more offensive speech. They must, however, do so neutrally without regard to the race, sex, or ethnicity of the speaker or target. For the reasons discussed in Part II, navigating substantive speech restrictions and imposing them neutrally, is likely to be even more difficult and involve greater legal exposure for private universities than following the First Amendment. Moreover, private universities will be in a stronger position to deflect and defend against OCR interference if they commit to the First Amendment and punish only unprotected speech.

IV. CONCLUSION

The fundamental problem identified in this essay is that university conduct committees are implementing ambiguous codes, with contradictory policies written by different units, without strong procedural protections or the guidance of precedent. The adjudicating agents face little blowback for poor or biased decisions. Should a lawsuit result, the decision makers are unlikely to be personally liable or face internal sanction, rather the university is on the hook. Given this situation, the agents enforcing conduct codes will be sorely tempted to enact, consciously or subconsciously, their own opinions on the value of the speech at issue, rather than apply an objective standard. The lack of ideological diversity on campus exacerbates these problems, and the specter of the process itself as a form of punishment hangs heavy on dissident speakers. Reforming the system to comply with university legal obligations would be difficult. Defining wrongful speech under a restrictive code is necessarily vague, and adding more process is expensive. This essay's claim is that these organizational behavior challenges are endemic, but they can be ameliorated by the adoption of an external and well-defined standard, buttressed by precedent and norms, and already in effect at public schools: the First Amendment.

We have written this paper with several audiences in mind. First, we write for universities themselves. Faculty and students should push their own universities to commit to the First Amendment. We hope too that university administrators and counsel will consider, perhaps more seriously than they have to date, the legal risks associated with the uneven enforcement of more substantive speech codes. For universities, we propose model language to be included as a clear and enforceable promise in the student handbook or equivalent as follows:

> No student or student organization shall be subject to discipline for expression that falls within the protection of the First Amendment of the United States Constitution. The regulation of student speech at the University shall be limited as that of a public institution under similar circumstances, and the University shall have the same affirmative duties regarding student expression as that of a public institution, except the University shall not be a public forum to those not members of the University community. To the extent anything in

https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15242066-b.pdf [https://perma.cc/M3BX-FXQ8].

> the regulations, guidelines, trainings, or any other materials provided by the University are contrary to this promise, they are hereby nullified.

Second, we write for courts. Universities stifling speech through ambiguous codes and easily manipulated disciplinary apparatuses should not get the benefit of the doubt under traditional contract law. Ambiguous promises regarding student speech should be resolved against the drafter and informed by the custom and practice of the industry. Given that state schools educate a majority of college students, there is a strong case that courts should enforce a First Amendment standard as a contractual default. Universities that reject freedom of expression should be required to do so explicitly and with reasonable detail, while acknowledging the neutrality obligations of Titles VI and IX if they take federal funds.

Third, we write for regulators. The Department of Education's Office of Civil Rights (OCR) is charged with enforcement of Titles VI and IX. Enforcement actions often end in settlements. For a school found to be enforcing its speech code in a discriminatory manner, OCR could require as part of a consent decree that the school commit to First Amendment principles as a condition for maintaining Title VI and Title IX funds. Under such a consent decree, both the OCR as a regulatory enforcement action and students in a private right of action would have standing to enforce the promise.

Finally, we write for federal and state lawmakers. Congress or state legislatures could pass a statute modeled on California's Leonard Law requiring non-sectarian institutions of higher education that take federal or state funds to commit to a First Amendment standard of speech for students. This approach has proven workable and not highly controversial in California. Such a law would protect students from biased administrative decision-making while shielding university administrators from political pressures—both from those within and outside the university—to engage in discriminatory enforcement.

As a matter of theory, we believe that freedom of contract benefits students and that universities should be permitted to adopt a robust civility or speech code, a statement of faith or even a statement of prohibited speech, as long as they provide sufficient notice to students. Our argument that private universities should commit to the First Amendment is prudential, reflecting our deep skepticism that highly ideologically homogeneous universities can enforce inevitably ambiguous speech codes in ways consistent with their regulatory and contractual obligations of neutrality. This skepticism is well-founded. The Congressional hearings of 2023-24 exposed the ambiguity, inconsistency and ideological bias in university treatment of student speech. Private lawsuits have followed as well as heightened regulatory oversight and enforcement. Universities are likely to face even greater pressure in the event of a future Republican administration. Committing to First Amendment principles is then as much about self-protection and sound governance as it is about student expression.