

Winter 2019

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Recommended Citation

Stuart Chinn, *Free Speech Controversies and Consequences on Campus*, 54 *Tulsa L. Rev.* 225 (2019).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol54/iss2/4>

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FREE SPEECH CONTROVERSIES AND CONSEQUENCES ON CAMPUS

Stuart Chinn

ERWIN CHEREMINSKY AND HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (YALE UNIVERSITY PRESS 2017). Pp. 216. HARDCOVER \$26.00.

JOHN PALFREY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* (MIT PRESS 2017). Pp. 192. HARDCOVER \$19.95. PAPERBACK \$16.95.

KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* (PRINCETON UNIVERSITY PRESS 2018). Pp. 232. HARDCOVER \$24.95.

Given the current political and social climate, it is no surprise that the topic of campus free speech has garnered significant recent attention from both academics and public commentators. Aside from the most obvious cause of this attention—a number of high profile and ideologically contentious events on or near university campuses, some with violent consequences¹—other related considerations are also likely at play.

Perhaps most fundamentally, many university campuses strive to create a rather unique type of community in American society, where strangers are thrust together for often extensive interaction in class, in dorms, and elsewhere on campus. Combine this with a relatively entrenched and widespread commitment to cultivating diversity within higher education student bodies, and one might reasonably view college campuses as one of the few sites in American society where a realistic aspiration exists for genuine community-building across lines of race, gender, sexual orientation, gender identity, age, class, and other dimensions of social status. At their best, university campuses may serve as an ideal for American society.

1. The authors of all three books reviewed here helpfully reference a number of recent free speech controversies on university and college campuses. *See* ERWIN CHEREMINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 1–8 (2017); JOHN PALFREY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* 6–8, 23–28 (2017); KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* 148–50 (2018). Full disclosure: one of the events referenced by Chemerinsky and Gillman occurred at my law school, and I signed a public letter written in response to the event. The event and/or the public letter are mentioned in CHEREMINSKY & GILLMAN, at 8, 78, 121–22.

Yet, alongside such aspirations exists another commonality between the two: if American society has long struggled with the question of how to preserve stability and facilitate the creation of commonality in the face of deep plurality, university campuses have struggled with a version of the same problem. Granted, the scope of plurality may be narrower on many university campuses. Yet, the intensity of conflict may also be particularly heightened there given the close and sustained interaction between university community members. Campus free speech controversies are hardly unique to our time.² Still, it is not surprising that a number of high-profile controversies have arisen in recent years. As ideological polarization has grown within American society, it would seem inevitable that those controversies would find their way to university campuses as microcosms of American society itself.

I. GRAPPLING WITH CAMPUS SPEECH PROBLEMS

Entering this space are three extraordinarily timely books that aim to make sense of the preceding questions: Erwin Chemerinsky & Howard Gillman's *Free Speech on Campus*; John Palfrey's *Safe Spaces, Brave Spaces: Diversity and Free Expression in Education*; and Keith Whittington's *Speak Freely: Why Universities Must Defend Free Speech*. I should note at the outset that there is a significant amount of convergence among all three books, which speaks to some of the common virtues they share. First, each book frames the current controversies over campus free speech in a roughly similar way: if one starts with the presumption that free speech on campus is central, and that equality and inclusion are likewise central values, then a question arises as to how universities should proceed when those values are in conflict. In these situations of conflict and tension, the question that arises is one of prioritization. And for all who recognize the importance of free speech, arguably the greatest challenge to asserting its primacy against competing values like equality comes in the form of campus speech that would denigrate, insult, and dehumanize other members of the campus community. In the face of this type of speech, should free speech principles still prevail? Or, might some limits to free speech be defended on the grounds of equality or some other set of values?

Beyond this, all three books recognize that satisfying answers to these questions have to go beyond the narrower question of legal permissibility. Having clarity about likely legal limitations for universities, within the current legal landscape, is no doubt critical for all who care about these issues. However, given that judges and legal rules can always change, the more central questions revolve around the normative-theoretical justifications that can be brought to bear in support of potential solutions and plausible legal rules dealing with these issues. Again, to their credit all three works acknowledge this, as evidenced by the fact that each goes beyond mere legal doctrine in its respective arguments.³ Finally, as already implied, the three books overlap in that they largely share

2. Most recently, scholarly and public discussion about campus hate speech occurred in the 1980s and 1990s. For some key works from that time, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795 (1993).

3. CHEMERINSKY & GILLMAN, *supra* note 1, at xi; PALFREY, *supra* note 1, at 18; WHITTINGTON, *supra* note 1, at 6.

a rather pragmatic spirit: for Chemerinsky & Gillman and Palfrey, especially, there is a clear focus on problem-solving and finding the “best” approaches to shoring up free speech and equality values, while taking into account various institutional considerations and consequences.

Yet if this last point marks a point of convergence, it also signals a point of partial divergence as well. Even if each book is oriented in part to practical problem-solving, there is unsurprisingly no consensus among them as to the best approach in dealing with these issues. This point of relative divergence will thus be the focus of this essay. After briefly commenting on each book, I will critically evaluate their respective approaches to managing the tensions between free speech and other important values on a university campus. Ultimately, I do have greater sympathy for Palfrey’s position, which would press toward a view of giving universities and decision-makers greater flexibility in regulating speech that is both antithetical to the goals of equality, and offers insignificant contributions to the discovery of knowledge or robust interpersonal exchange. This is a view that is admittedly not supported in the constitutional legal doctrine, though it has healthy and sustained support in a significant portion of the secondary literature. I will aim to press these latter points by sketching out a few thoughts in the final Part of this essay.⁴

As a law school dean and a university president, respectively, it is no surprise that Chemerinsky and Gillman have written a book on campus speech problems with an eye to problem-solving. Both clearly have a strong, real-world sense of the types of problems that confront university leaders in the present time. Befitting this experience, both are clear in endorsing the values of equality and inclusion, which enjoy near-unanimous support in the world of higher education.⁵ Yet with respect to the tensions that may arise between these values and free speech, the authors are emphatic in emphasizing what amounts to a default presumption in favor of free speech. As they state,

Our central thesis is that all ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel. But there are steps that campuses can and should take to create inclusive communities where all students feel protected Our position is absolute: campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge.⁶

This strong defense of free speech stems from two key considerations. The first is the necessity of free speech to support the core function of universities to discover and disseminate knowledge, as referenced in the preceding quotation.⁷ The second speaks to a concern about administrative competence: Chemerinsky and Gillman concede that certain types of speech may have more questionable value in the discovery of knowledge, and that in some circumstances, the potential benefit of certain types of speech may be far outweighed by its potential costs. As a result, they take no issue with legal restrictions on racially or sexually harassing speech or true threats.⁸ But beyond these narrow categories

4. *See infra* p. 231.

5. CHEMERINSKY & GILLMAN, *supra* note 1, at x, xi.

6. *Id.* at 19–20.

7. *Id.* at 20, 49–81.

8. *Id.* at 63, 115–16, 121. However, recall the earlier quotation, which references their “absolute” position

of problematic speech, they express concerns about university administrators having the competence to make defensible distinctions between permissible and impermissible speech on campuses. The worry here is the familiar one of the slippery slope, where a university code against “hate speech” might then morph into a burdensome and intellectually stifling demand for conformity in behavior and thought.⁹

Still, as noted above, Chemerinsky and Gillman do not offer an absolutist defense of free speech. They do recognize some limitations on this right including the aforementioned legal restrictions on several categories of speech such as racially and sexually harassing speech. In addition, they recognize that negative consequences for the academic mission might demand the restriction of some forms of speech in the classroom by students, faculty members (bound by professional norms and obligations), and others.¹⁰ Indeed, this ties to one point of emphasis in the book: Chemerinsky and Gillman’s recognition of separate zones within a university where the demands of free speech rights might vary. In the professional zone of the classroom and research, Chemerinsky and Gillman recognize that greater curtailment of free speech rights may be necessary, while in the broader zone of the campus community, stronger free speech rights are warranted.¹¹ Chemerinsky and Gillman thus concede a point that I will subsequently return to: a recognition that academic expertise may provide a compelling justification for limiting the free speech rights of faculty, students, and outside speakers in certain circumstances.

Finally, Chemerinsky and Gillman offer one additional point in support of equality values: they insist, rightly to my mind, that universities need not be neutral when it comes to intolerant and hateful speech. They would defend the free speech rights of racists and bigots on campus, but they would also defend the right of university administrators to take clear and unequivocal stands on these issues.¹² A free speech absolutist might view such actions by university administrators as heavy-handed and potentially chilling of the speech of those on campus who disagree, but Chemerinsky and Gillman see these potential actions by administrators as a valuable and defensible means of supporting other campus community members who might be placed in an especially vulnerable position because of hateful and intolerant speech.

John Palfrey’s *Safe Spaces, Brave Spaces* is likewise a smart intervention on these issues, and similar to Chemerinsky and Gillman, he arrives to these debates armed with the benefit of insights gleaned from being a former law faculty member and the head of a prep school. Like Chemerinsky and Gillman, Palfrey brings a welcome sense of concreteness and practicality to the problems of campus speech. He frames his primary concern quite succinctly: in the context of an educational setting like a university or

in defense of the “expression of ideas.” When juxtaposing these statements to their endorsement of legal restrictions on harassing speech or true threats, one might wonder how they would define an “idea” or a “view” as both (a) distinct from harassing or threatening speech but still (b) incapable of being distinguished from racial epithets, hanging nooses, or cross-burnings—at least some instances of which they would characterize as ideas or views worthy of being protected.

9. *Id.* at 103–08.

10. CHEMERINSKY & GILLMAN, *supra* note 1, at 66–69.

11. *Id.* at 77.

12. *Id.* at 20, 145–50.

college, “[a]t what point may, or must, the tolerant stop tolerating the intolerant?”¹³ He hits many of the same points as Chemerinsky and Gillman (and Whittington as well) in jointly endorsing the importance of free expression and diversity;¹⁴ expressing an anxiety about speech regulations snowballing into illegitimate censorship;¹⁵ endorsing the value of a broad exchange of ideas in educational settings;¹⁶ and endorsing the university experience as a means for students to stretch in being exposed to unfamiliar and even seemingly hostile ideas. Indeed, on the last point, Palfrey argues that universities should provide such “brave spaces” to aid student learning and growth.¹⁷

However, when confronted with the potential costs of hateful and intolerant speech, he arrives at a somewhat different set of conclusions than Chemerinsky and Gillman. Contrary to the latter two authors, Palfrey would endorse restrictions on hateful speech and other forms of expression that would fundamentally undermine the role of the university in aiding student learning and growth.¹⁸ In addition, Palfrey emphasizes that problematic, hateful speech is not equally problematic for everyone in a campus community. Hateful speech tends to be targeted at certain well-defined constituencies—racial minorities, women, LGBTQ students, etc.—so to not restrict such hateful speech would be, in effect, to ask members of these more vulnerable constituencies to pay the costs of a wide-open terrain of free speech that everyone else would be free to enjoy.¹⁹

Palfrey is forthright—and correct, in my view—that his proposal does not align with current legal doctrine, as it relates to public universities. Still his argument is one grounded in the fundamental mission of the university to educate students. So long as students admitted to a public or private university are given advance notice of its views on hate speech or intolerant speech, he would support that university choosing to prohibit such speech within its campus community.²⁰

Finally, though firmly rooted in current events, Keith Whittington provides the most extensive and wide-ranging argument among these three books in a work that makes extensive reference to history and philosophy. If Chemerinsky, Gillman, and Palfrey carry some notes of administrative practicality in their analysis, Whittington provides the most scholarly treatment of these issues. His starting point is an emphatic, and reasonable, assumption that the core goal of a university is the production and dissemination of knowledge.²¹ Free speech and academic freedom are absolutely necessary to this goal.²² Following up on this, Whittington echoes Chemerinsky and Gillman in expressing great worry that university administrators charged with enforcing speech codes might easily cross the line into illegitimate censorship, drawing on some historical discussion in support

13. PALFREY, *supra* note 1, at 3.

14. *Id.* at 8–13.

15. *Id.* at 90–91.

16. *Id.* at 93.

17. *Id.* at 28, 30–32.

18. PALFREY, *supra* note 1, at 17–19, 91–92, 96–106.

19. *Id.* at 16–17, 89. This is a point that has been strongly emphasized by others. *See also* Lawrence, *supra* note 2, at 472–75; Matsuda, *supra* note 2, at 2376.

20. PALFREY, *supra* note 1, 96–106.

21. WHITTINGTON, *supra* note 1, at 13–18.

22. *Id.* at 19, 21–22, 29–30.

of this point.²³

Befitting its intellectual orientation, Whittington's argument is clearly very concerned with the processes of ideological exchange and development. As a result, he—like Chemerinsky and Gillman, at least implicitly—offers an endorsement of the marketplace of ideas metaphor in his defense of free speech. That is, referencing Justice Holmes's famous comments in his dissent in *Abrams v. United States*,²⁴ Whittington subscribes to the notion that the best means of discovering truth or achieving progress is uninhibited debate, where the best ideas will rise to the top. As Holmes's opinion also emphasized, at the heart of this defense of free speech is a reminder for all to maintain some degree of humility in their beliefs. A vigorous marketplace of ideas would remind us all that even when we are certain of the rightness of a view, we could yet be proven wrong.²⁵

Still, like Chemerinsky, Gillman, and Palfrey, Whittington is sensitive to the problems of an absolutist take on free speech. He agrees that harassing and threatening speech should not be protected.²⁶ He is sensitive to and conscientious about the many critiques that have been made about the marketplace of ideas metaphor.²⁷ He would concur with the idea of limiting free speech when it might conflict with academic expertise—the latter itself being a crucial ingredient to a university's ability to produce and disseminate knowledge.²⁸ Finally, Whittington is sensitive to the pull of equality and inclusion values on university campuses.²⁹ He is upfront in conceding the potential harms / limited value of hateful speech, while also recognizing the need for civility in campus communities—even if he would not endorse universities prohibiting the former or requiring the latter.³⁰ However, in the prioritization of these various values at play, Whittington is clear that the production and dissemination of knowledge—with its intimate dependence upon vigorous free speech guarantees—is paramount for the university.³¹

II. HATE SPEECH, STUDENT LEARNING, AND THE ROLE OF THE UNIVERSITY

Taken on their own terms, each book presents a plausible and well-thought-out approach for dealing with the challenges of controversial campus speech. My critiques or concerns stem less from any glaring deficiencies, and more from the inclination to reprioritize some of the considerations insightfully identified in these books.

One could make the case for regulating hateful and intolerant speech by simply refusing to concede the prioritization of free speech values over equality values in certain situations when the two conflict.³² Indeed, as I will discuss later on, I think there are some lines of argument in this vein that are well worth considering. But at least initially, let us

23. *Id.* at 30, 35–36, 52, 87–89, 92, 129–30.

24. 250 U.S. 616, 630 (1919).

25. WHITTINGTON, *supra* note 1, at 44–46.

26. *Id.* at 93.

27. *Id.* at 46.

28. *Id.* at 49.

29. *Id.* at 73.

30. WHITTINGTON, *supra* note 1, at 83, 86–92, 97–98.

31. *Id.* at 178–79.

32. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* 12 (1996); Sunstein, *supra* note 2, at 802, 843.

begin from a less controversial starting point—that the production and dissemination of knowledge is core to the mission of the university. Worth focusing on for the moment is the dissemination of knowledge—component of this assertion. Undoubtedly disseminating knowledge encompasses the typical scholarly activities we are familiar with, like publications, conferences, op-eds, and other forms of engagement with both academic and public audiences. But central within this task of disseminating knowledge is the conveyance of knowledge in the classroom and elsewhere on campus.³³ If this is our starting point, Palfrey’s argument actually points towards an interesting defense of hate speech restrictions that would align with this core goal of the university, which would be *supportive* of the intellectual exchange and growth that is core to the free speech defenses we hear from Chemerinsky, Gillman, and Whittington.

In line with a point that Palfrey raises, perhaps greater consideration is warranted for thinking through what elements are entailed in the task of disseminating knowledge and educating. To his point, even if one were to concede that students’ intellectual development was aided in some small (or large) degree by exposure to hateful, demeaning speech, it is also not hard to imagine that the ability of certain students to learn—particularly the targets of such speech—might be significantly impaired as a result. Again, if the goal in question is the dissemination of knowledge within an intellectual community, is it so obvious that this trade-off in likely consequences—minimal value of hate speech versus potentially significant costs to student learning—clearly presses in favor of allowing hateful speech? It is interesting that while Whittington’s focus on the distinctive mission of the university leads him to a very strong defense of free speech rights, Palfrey begins from a similar premise that leads to a somewhat different conclusion. Namely, one might argue instead that the distinctive mission of the university to educate predominately young learners provides particular reasons for university administrators to be sensitive to the detrimental effects of hateful and intolerant speech upon student learning that may be less compelling outside the campus context.

To be sure, one might question if this trade-off between problematic speech and student capacity to learn is so stark or inevitable. Hence one finds occasional comments by free speech supporters—who are also supportive of inclusion and student welfare—expressing a hope that with more exposure to hateful ideas (and possibly with enough support from the university that stops short of speech regulation) students will eventually toughen up and any cost to their learning will be minimized. Indeed, this is how I would read Chemerinsky and Gillman’s assertion that while “all ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people,” they also believe there are other steps “campuses can and should take to create inclusive communities where all students feel protected.”³⁴ Indeed, Chemerinsky and Gillman’s recommendation for university leaders to speak up forcefully in such controversies can be seen as a means of encouraging this type of student growth. This is an understandable aspiration for vulnerable students, and if we were confident about this aspiration being realized, this would provide a convenient means of essentially having it all—no restrictions on speech short of true threats or harassment, while also enjoying the

33. See, e.g., WHITTINGTON, *supra* note 1, at 15–16.

34. CHEMERINSKY & GILLMAN, *supra* note 1, at 19.

satisfaction of seeing the equal rights of students to learn and acquire knowledge kept intact.

But what if such confidence were not so warranted? Professors and others may have all kinds of aspirations for college students, but the task of instruction and facilitating learning also requires that educators at least partly meet students where they are. With that in mind, some humility may be warranted on the part of commentators or observers who would make guesses as to where the lines may reside between responsibly asking students to stretch and grapple with uncomfortable ideas versus asking vulnerable students to shoulder too much.

After all, as central as intellectual discovery and exchange may be for a university, neither the ideas themselves nor the intellectual exchange are taking place in a vacuum. Ideas are being offered, contested, and challenged in a social context where the processes of learning and engagement are shaped by individuals. It is individuals who make specific arguments, who receive those arguments, who give life to all manner of these debates, and who then have to go on to live together in dorms, classes, and other venues for student life in ways that may be more or less significantly affected by these debates. Thus, it may be one thing to appreciate the broader contributions of intolerant speech for larger system-wide goals and purposes, and quite another to contemplate the effect of that speech on specific individuals and constituencies. As Jeremy Waldron puts it, though with respect to the topic of hate speech more generally:

Maybe we should admire some lawyer who says he hates what the racist says but defends to the death his right to say it, yet this sort of intellectual resilience is not what's at issue. The question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials?³⁵

With this in mind, consider the argument put forth by Owen Fiss that perhaps the larger goals of free speech—aiding democratic self-government, most prominently—might be better served with a role for decision-makers to help curate exchanges of ideas. The aspiration here would be to use the power of curation to ensure that as broad a range of serious arguments are heard; to restrain those speakers who suck up too much time or resources with their speech; or to restrain speakers who offer only speech of lesser value that might also silence or exclude other potential voices in the discussion.³⁶ For a model of what this might look like, one need only think of a typical college class that is small enough to allow for significant student dialogue with the instructor or other students. In this context, we all know that a professor's syllabus and moderation of class discussion serves precisely these goals.

To be sure, none of the books reviewed here disagree with the above points in situations where professors regulate student comments in the classroom, or even when the speech of professors is regulated when it conflicts with professional norms. The more difficult question is whether such moderating norms have a place in the speech of the broader campus—in the speech of students or faculty or other speakers—if such

35. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 33 (2012).

36. FISS, *supra* note 32, at 15–23.

moderation is crucial to ensuring the educational function of the university. Here, Palfrey and I part ways with Chemerinsky, Gillman, and Whittington. Even if our focus were limited to just the core goal of a university to produce and disseminate knowledge, it is not obvious that this goal—and the larger goals of free speech with which it is intimately related—would not be enhanced with some careful and targeted regulation of the most intolerant forms of speech.

III. SLIPPERY SLOPE CONCERNS

At this point, Chemerinsky, Gillman, and Whittington have a powerful counter-argument: the specter of the slippery slope. Can members of the campus community trust the censors? Both books urge proponents of hate speech regulations to approach the issue with humility in at least two respects. First, one should maintain some humility in the face of felt certainty that certain types of speech are of so little value that they can be confidently excluded from the university campus. Second, one should also proceed cautiously if one would pin their hopes for workable speech regulations upon university administrators, who could end up making decisions based upon illegitimate considerations such as angering potential donors, certain star faculty, potential applicants, or federal or state legislators who may affect a university's financial health through appropriations or grants. Indeed, as noted before, the very ideal of the marketplace of ideas is premised upon a call for individuals to exercise humility in their judgments of right and wrong.

This is a powerful argument, and Chemerinsky, Gillman, and Whittington helpfully draw from some recent experiences of college campuses enforcing hate speech codes in the 1990s to buttress their skepticism of more extensive speech regulations on campus.³⁷ Still, it is worth emphasizing some considerations that might give us a little more confidence that a slightly more expansive set of speech acts beyond harassment could plausibly be regulated. First, while any hate speech code would be dependent upon decision-makers making context-sensitive judgments, the fact that racially and sexually harassing speech is regulated both on campus and beyond, suggests that workable standards are far from impossible to imagine. After all, there are legal rules and university policies that draw lines between prohibited harassment and permissible offensive speech—as Chemerinsky and Gillman helpfully clarify³⁸—and this line is defined by context-sensitive considerations. Again, at first glance, it is not clear why developing workable lines to additionally regulate a subset of the most intolerant forms of expression seems impossible.

Even closer to the campus context, however, the very business of academia entails a host of judgment calls about which ideas and speech are worthy of being recognized, whether it be on a class syllabus, in a class discussion, in invited faculty presentations, in invited public speakers, in faculty promotion decisions, and in faculty hiring decisions.³⁹

37. CHEMERINSKY & GILLMAN, *supra* note 1, at 97–107; WHITTINGTON, *supra* note 1, at 88–89.

38. CHEMERINSKY & GILLMAN, *supra* note 1, at 118–23.

39. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE xii, 67 (2012); Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017), <https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests>. For Chemerinsky's reply to this comment by Post, which includes many of the arguments in the book reviewed here, see Erwin Chemerinsky, *Hate Speech is*

Given that academic expertise is premised upon discriminating between ideas—and deeming some ideas to be of marginal to low value—the insistent references to the marketplace of ideas metaphor and the refrain for humility in the context of university campuses strikes this reviewer at least as a little far-fetched. There are all sorts of ways in which the academic enterprise is premised upon a rejection of humility in the face of expertise. Also, there seems to be a fairly strong near-consensus among academics that there is very little of value for the exchange of ideas, or for the growth in collective knowledge, or for student growth, in subjecting a campus community to hanging nooses, individuals dressing in blackface, and the use of epithets deployed as a means of denigrating or insulting (rather than in a research or instructional context).⁴⁰ Given this, the emphatic anxiety over potentially regulating a narrow subset of intolerant speech may seem a little out of proportion.

Again, as noted above, both Chemerinsky and Gillman, and Whittington acknowledge the role of academic expertise in the life of the university. However, both would seemingly cabin this restraining influence to discrete functions of the university such as research and teaching. But one might wonder at the attractiveness of cabining academic expertise in this manner. As Robert Post notes:

The *entire* purpose of a university is to educate and to expand knowledge, and so everything a university does must be justified by reference to these twin purposes. These objectives govern *all* university action, inside and outside the classroom; they are as applicable to nonprofessional speech as they are to student and faculty work.⁴¹

More generally, my main observation here is that some core elements of the academic enterprise—deference to expertise and idea discrimination—sit in tension with Chemerinsky, Gillman’s, and Whittington’s appeal to humility and uncertainty in opposing potential speech regulations. Especially if content and idea evaluation is so central to the academic mission, the prospect of cabining certain *forms* of denigrating and low-value expression seems hardly alien or misaligned with the usual functions of higher educational institutions.

IV. EQUALITY

Finally, we might also interrogate these questions from a somewhat more controversial starting point: by giving greater weight to equality values. Free speech defenders rightly ground their arguments in the First Amendment, but a constitutional commitment to anti-caste or equal citizenship is equally and firmly grounded in the 13th, 14th, and 15th Amendments.⁴² With this in mind, the case for some targeted campus hate speech codes may rest not just in aiding student learning; or in administrative workability;

Protected Free Speech, Even on College Campuses, VOX (Dec. 26, 2017), <https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest>.

40. To quote Waldron again, “racist or religious defamation is not just an idea contributed to a debate. In its published, posted, or pasted-up form, hate speech can become a world-defining activity, and those who promulgate it know very well—this is part of their intention—that the visible world they create is a much harder world for the targets of their hatred to live in.” WALDRON, *supra* note 35, at 74.

41. See POST, *supra* note 39.

42. Sunstein, *supra* note 2, at 795–96, 798–801; Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125–26, 151–60 (1992).

or in aligning with other facets of the academic mission, including academic expertise. The case for regulating campus hate speech may also rest on giving appropriate recognition to the constitutional principle of equal citizenship. I offer no strong opinions here about how such a rationale may fare with respect to regulating hate speech beyond the university context, though clearly an equal citizenship rationale would, by its very terms, reach more broadly. For now, I would suggest that an equal citizenship rationale might have particular force in the educational context, given commonly articulated links by judicial actors and others between education, individual growth, and democratic citizenship.⁴³

In saying this, I am not suggesting that the Reconstruction Amendments should be categorically prioritized over the First Amendment; I am merely suggesting that when the two are in conflict, we should give the former greater weight than staunch defenders of the First Amendment may be inclined to do. Notwithstanding the wise counsel from First Amendment defenders about the value of humility, the Reconstruction Amendments do stand out, of course, as fundamental components of our legal structure. I would hesitate to claim that these Amendments can or should be used to justify the banishment of all inegalitarian thoughts and actions from the polity. But I do think these Amendments plausibly support the regulation of expression that invokes “badges of servitude” and second-class citizenship status that undermine the foundations of equal citizenship.⁴⁴

Conceptualized in this way, the problem of hateful or intolerant speech on campus might begin to take on a slightly different cast, where the potential harms at stake are not just those perpetrated by the state against an individual’s free speech (which is the scenario usually contemplated with the worry about slippery-slope censorship). While state censorship should rightfully be a worry, a focus on equal citizenship alerts us to how the rights at stake with hate speech encompass both rights enjoyed by the individual against violations by the state, *and* rights enjoyed by the individual against violations by other individuals.

This leads to my final point: all three books rightfully note some generational dynamics at play in the current controversies over campus speech. Chemerinsky and Gillman, in particular, discuss at one point their concern that students today may not fully appreciate all components of our free speech tradition, among them the anti-Vietnam War student protests, which were formative events in the lives of the two authors.⁴⁵ They also

43. *See, e.g.,* *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

44. As Fiss states:

Those favoring liberty often refer to the role that free speech played in securing equality during the 1960s, suggesting that free and open debate is a precondition for achieving a true and substantive equality. But certainly the converse may also be true: that a truly democratic politics will not be achieved until conditions of equality have been fully satisfied.

FISS, *supra* note 32, at 12.

45. CHEMERINSKY & GILLMAN, *supra* note 1, at 10–11.

express their admiration for current students too—particularly their sense of empathy for their more vulnerable classmates.⁴⁶ Without a doubt, each generation takes different events as their signposts for key political and moral questions, and those generations who did not live through the anti-Vietnam War protests may indeed be missing an intuitive grasp of certain elements of free speech that an earlier generation may generally find easier to access.

That said, if these protests can be informative for present-day speech debates, there is a sense in which this touchstone for an earlier generation is also limiting as a reference point for present controversies: the exercise of free speech rights by private individuals in the service of protesting governmental actions are, to my mind, quite different than the exercise of free speech rights by private individuals in the service of degrading or dehumanizing other private individuals.⁴⁷ Our approach to free speech rights must also be informed by the context of the present too, and there is little doubt that college students today are living through highly unusual times that really have no ready analogue in at least the past several decades of American history. Our assessment of these issues should take that into account as well. Before too long, this generation will mature into the next class of lawyers and judges, and their perceptions of social harm, social stigma, and the role of the state will be the ones that will nudge our constitutional law toward yet another stage in development—and perhaps a less libertarian-oriented view of free speech.

V. CONCLUSION

In conclusion, these three books are welcome interventions on a question that will no doubt live on to trouble future generations. In agreement with all three books, I do think the key question in campus speech controversies boils down to how best to balance important and sometimes competing values. As I have suggested above, there is something compelling to me about regulating a certain class of deeply intolerant speech, due to both its disproportionate harms upon vulnerable constituencies on college campuses, and its minimal value for the production of knowledge, or the search for the truth, or aiding democratic self-government. The most compelling concern about considering such regulations is the fear that a campus community, and its administrators, are incapable of doing a defensible job in drawing lines of permissibility and impermissibility. However, I would nevertheless prefer that public and private universities grapple with that challenge rather than concede its impossibility, and I would favor seeing constitutional doctrine that provided, rather than denied, public university authorities this latitude.

46. *Id.* at 10.

47. FISS, *supra* note 32, at 21.