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FREEDOM OF THE PRIVATE-UNIVERSITY STUDENT PRESS:

A CONSTITUTIONAL PROPOSAL

BRIAN J. STEFFEN, PH.D.*

It has long been established in First Amendment jurisprudence that the federal Constitution protects the press against state action but not private action. The Constitution not only prevents Congress from passing laws that abridge the freedom of speech,¹ but also protects Americans from the acts of all governmental bodies and officials at the federal and state levels that would abridge the First Amendment's guarantees. Despite tentative steps by the United States Supreme Court from the 1940s through the 1960s to extend First Amendment protection to guard against censorship by private authorities,² the private sector remains largely immune from the free expression commands of the Constitution.

Among those private organizations that need not observe First Amendment rights of free expression are private institutions of higher education, many of which operate some of the largest and most respected journalism programs in the nation.³ While courts

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1. U.S. CONST. amend. I.

2. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court reversed the conviction of a Jehovah's Witness who had been found guilty of trespassing on the property of a privately owned "company town," Chickasaw, Ala., because the town fulfilled a "public function" that required respect of constitutional rights. *Id.* at 507-09. Similarly, the Court ruled in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 314-20 (1968), that owners of privately owned shopping centers also must permit citizens to distribute political literature on their premises, although the Court later backed away from the *Logan Valley Plaza* ruling in *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561-65 (1972), and *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976). *See also infra* notes 102-110 and accompanying text (discussing these rulings in greater detail).

3. Of the ten largest undergraduate journalism programs in the nation in Fall 1998, four were operated at private institutions – Emerson College, Boston University, Syracuse University, and the University of Sacred Heart. Lee B. Becker et al., *Annual Enrollment Report: Number of Students Studying Journalism and Mass Communication at All-Time High*, JOURNALISM AND

have long granted students at public universities virtually the same level of First Amendment protections afforded the commercial press,⁴ judges have balked at providing the same constitutional shield for students and faculty enrolled and working at private schools and universities.⁵

Despite strong philosophical and policy considerations that support granting free speech rights to private university students,⁶ the highest form of press freedom is almost certainly unavailable to student journalists at private institutions of higher education.⁷ According to the Student Press Law Center in Washington, D.C., the answer to whether private-university students have any legal rights to protect them from censorship and punishment by university officials is, at best, a “resounding maybe.”⁸ While much of the speech regulation at private universities relates to “hate speech,” private university administrators have also censored or punished student journalists for publishing information school officials find embarrassing or critical of university philosophies, policies, or administrators. Examples of this censorship in recent years include:

- A student at the College of the Ozarks in Missouri left school after college officials pressured him to shut down *The College Record*, an alternative to the college’s “official” newspaper, *The Outlook*. Even though the student, Pat Nolan, published a disclaimer noting the newspaper had no connection with the school, college officials said they received calls from Nolan’s advertisers who believed Nolan used the school’s name to sell ads.⁹

MASS COMM. EDUC., Autumn 2001, at 28.

4. See generally *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970), *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001).

5. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (holding that a private high school for troubled students need not observe First Amendment rights of a teacher fired for criticizing school officials). See also *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968) (holding that a private university need not provide procedural safeguards for students suspended for protesting the Vietnam War).

6. As an example, officials at American University in Washington, D.C., follow a trend set by many private schools in their *voluntary* recognition of First Amendment rights for their students. Student Press Law Center, *American U. Approves New Freedoms*, STUDENT PRESS LAW CENTER REP., Spring 1998, at 6.

7. See *infra* notes 126-32 and accompanying text (discussing how the U.S. Supreme Court has failed to issue a ruling on the question).

8. Student Press Law Center, *Private Schools and Press Freedom* (1995), available at <http://www.splc.org/legalresearch.asp?id=8> (last visited Oct. 14, 2002).

9. Student Press Law Center, *Unofficial student paper not welcome*, STUDENT PRESS LAW CENTER REP., Spring 1997, at 21-27.

- University officials at Jacksonville University in Florida removed the school newspaper's student editor and faculty adviser after the newspaper, *The Navigator*, published a satirically risqué photograph of a male beauty pageant. The university placed the editor, Angie Koury, on disciplinary probation for publishing the photograph.¹⁰

- The Associated Student Government at Northwestern University, home of one of the nation's most prestigious schools of journalism, withdrew its recognition of the *Northwestern Chronicle* student newspaper. The student government's move resulted in denying free office space to the newspaper that the University provides to other student organizations. The *Chronicle*, noted for its conservative political views, was reinstated as a student organization after actor Charlton Heston, a Northwestern alumnus, joined several faculty members from the Medill School of Journalism publicly in urging university administrators to reverse the student government's decision.¹¹

- Some observers have noted a trend toward censorship of the student press at historically black universities. Pearl L. Stewart, a "roving journalist" for the Black College Communication Association, said "[t]here's a perception by administrators at many black colleges that they are misrepresented and portrayed in a negative light by the mainstream media more often than are white institutions, so they're not inclined to support student newspapers on their campuses that might treat them the same way." *The Chronicle of Higher Education* has focused on censorship at Clark Atlanta University, where officials stripped the student newspaper of funding after the students reported that toxic materials were used in art classes.¹²

Despite judicial resistance to acknowledging constitutional protection of free speech and press at private colleges and universities,¹³ the function of higher education in the United States suggests that such protections should be recognized, to some degree, under the federal Constitution. This is especially important at a time when the student press' liberty—even at public universities—has been the subject of judicial rethinking in one

10. Student Press Law Center, *Editor, adviser removed after printing photos*, STUDENT PRESS LAW CENTER REP., Spring 1997, at 25.

11. Student Press Law Center, *Conservative paper gains recognition*, STUDENT PRESS LAW CENTER REP., Winter 1998-99, at 30.

12. Leo Reisburg, *Student Press at Black Colleges Faces a 'New Wave of Censorship'*, THE CHRONICLE OF HIGHER EDUC., Mar. 3, 2000, at A47.

13. *Powe*, 407 F.2d at 75. See also *Greenya v. George Washington Univ.*, 512 F.2d 556, 561 (D.C. Cir. 1975) (holding that higher education does not trigger state action as regards First and Fourteenth Amendment safeguards).

circuit of the U.S. Court of Appeals.¹⁴ The rights of private-university student journalists have always been considered in comparison with their counterparts at public institutions, and any evisceration of press rights at public universities would doubtlessly embolden officials of at least some private universities to tighten their control over student publications.¹⁵

This article makes the case for a qualified First Amendment protection for student journalists that would balance their rights with the institutional needs and the rights of trustees, alumni, administrators, and other supporters of private institutions.¹⁶ Such a position attempts to strike a balance between those who argue the First Amendment should have no application whatsoever to private colleges and universities¹⁷ and those who would "transport" First and Fourteenth Amendment norms to the private sector requiring the same kind of First Amendment interpretations at private and public universities.¹⁸

This article reaches its conclusion by first considering the current state of First Amendment law as it pertains to student

14. The United States Court of Appeals for the Sixth Circuit has ruled that public university officials may not censor student journalists in an effort to protect the university's image from negative publicity likely to follow publication of a student yearbook of "poor" quality. *Kincaid v. Gibson*, 236 F.3d 342, 345-51 (6th Cir. 2001). *Kincaid* overturned an earlier ruling of a panel of the appeals court that would permit "reasonable" restrictions on student press freedom at the collegiate level. *Id.* at 729.

15. The Student Press Law Center reports that it fielded 321 complaints from university student journalists about censorship by college officials in 1998. The center's record keeping does not differentiate between complaints about censorship at public and private universities. Student Press Law Center, *High School Censorship Increases, 1998 SPLC Legal Requests Indicate*, STUDENT PRESS LAW CENTER REP., Fall 1999, at 3. While this paper and the SPLC document claims of censorship of private university student media, there are no reported court decisions involving constitutional claims of student journalists at private schools.

16. See generally *infra* notes 203-21 and accompanying text.

17. See Randall Kennedy, *Private Universities and the First Amendment*, THE CHRONICLE OF HIGHER EDUC., Sept. 21, 1994, at B1 (providing support for the notion that First Amendment protections should be extended into private universities). See also Julian N. Eule, as completed by Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1547-55 (1998) (arguing that the First Amendment should not apply at private institutions).

18. See Erwin Chemerinsky, *More Speech is Better*, 45 UCLA L. REV. 1635, 1638-39 (1998) (writing in response to essays written by Julian Eule that "the most important insight in Julian's article is that laws transporting First Amendment norms to the private sector interfere with the free speech interests of private entities."). See also Erwin Chemerinsky, *The Constitution and Private Schools*, in PUBLIC VALUES, PRIVATE SCHOOLS, 274-89 (Neil L. Devins, ed., 1989)(noting proponents of transporting First Amendment protection to the private sector).

journalists at private universities.¹⁹ This article compares the press freedoms at public universities with press freedoms at private universities focusing on the diminishing differences between the two. This article then analyzes and criticizes the development of the “state action” doctrine as a means of implicating constitutional values in the actions of theoretically private parties.

Next, this article considers alternatives to federal constitutional protection of press freedoms for private university students.²⁰ Students and faculty may be able to rely on policy arguments; assertions of association; contract and property rights; claims of academic freedom; statutory provisions; and state constitutional provisions to fight censorship and punishment of speech and press activities. However, this article criticizes the shortcomings and legal uncertainties affiliated with these approaches.

Finally, this article proposes and outlines a limited First Amendment right of free press for student journalists at private schools.²¹ The article bases this approach on a Meiklejohnian theory of the First Amendment and argues that that a balancing approach offers advantages to institutions as well as individual students and faculty.

I. CURRENT CONSTITUTIONAL PROTECTIONS FOR PRIVATE UNIVERSITY STUDENT JOURNALISTS

A. *The First Amendment and the Public-University Student Press*

Student journalists at private universities are protected by the same First Amendment provisions as other journalists, student and commercial, when it comes to censorship and punishment by the *state* for speech and press activities. However, as a result of several federal cases arising from the Vietnam era, only student journalists at public universities receive speech protections similar to those of the commercial press from actions by university officials. An early U.S. District Court case on the subject of press freedom for public-university students, *Dickey v. Alabama State Board of Education*,²² illustrates this principle.

Dickey arose from a Troy State University student journalist’s desire to applaud the president of the University of Alabama for supporting the speech rights of radical student groups protesting the Vietnam War.²³ But the policy riled Alabama’s governor and

19. See generally *infra* Section I.

20. See generally *infra* Section II.

21. See generally *infra* Section III.

22. 273 F. Supp. 613 (M.D. Ala. 1967).

23. *Id.* at 616.

some state legislators, and Troy State's president forbade the student newspaper at his institution from publishing the supportive comments.²⁴ The editor of the student newspaper complied but published the word "censored" in the spot where the story would have run.²⁵ For this, the university suspended the student journalist.²⁶ A federal district court ordered him reinstated and followed the rule of *Tinker v. Des Moines Independent Community School District*²⁷ that public-school officials could not abridge the speech and press rights of their students absent a showing that the expression would "materially and substantially interfere with [the] requirements of appropriate discipline in the operation of the school."²⁸

The U.S. Supreme Court first acknowledged the First Amendment rights of public university students in *Healy v. James*,²⁹ a case prompted by Central Connecticut State College's refusal to recognize a local chapter of the Students for a Democratic Society ("SDS").³⁰ The college's president based his refusal on the conclusion that the national SDS followed a philosophy of disruption and violence that conflicted with the college's policy on student rights.³¹ Recognition by the college would have permitted the local chapter to meet in campus buildings and would have provided it access to campus bulletin boards and the school newspaper.³² The Court faulted the college's refusal to recognize the chapter, concluding "state colleges and universities are not enclaves immune from the sweep of the First Amendment."³³ Ruling that university officials should be granted less deference in regulating student speech and press than was granted to secondary-school officials in *Tinker*, the Court in *Healy* found no

[r]oom for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary . . . [t]he vigilant protection of

24. *Id.*

25. *Id.* at 617.

26. *Id.*

27. 393 U.S. 503 (1969).

28. See *Dickey*, 273 F. Supp. at 618 (quoting *Burnside v. Boyars*, 363 F.2d 744 (5th Cir. 1966)). Other federal district courts adopted the *Dickey* rule in quick succession: *Snyder v. Bd. of Tr.*, 286 F. Supp. 927 (N.D. Ill. 1968); *Brooks v. Auburn Univ.*, 296 F. Supp. 188, 192 (M.D. Ala. 1969); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Smith v. Univ. of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Close v. Lederle*, 303 F. Supp. 1109 (D. Mass. 1969); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970).

29. 408 U.S. 169 (1972).

30. *Id.* at 170.

31. *Id.* at 175.

32. *Id.* at 176.

33. *Id.* at 180.

constitutional freedoms is nowhere more vital than in the community of American schools.³⁴

The Court argued it was not breaking new ground in *Healy*, but simply reaffirming the nation's "dedication to safeguarding academic freedom."³⁵ In particular, the Court noted its rulings in *Sweezy v. New Hampshire*³⁶ and *Keyishian v. Board of Regents*³⁷ that established First Amendment protection for academic freedom at public universities. Even on public university campuses, however, the Court recognized limitations on First Amendment rights.³⁸ Consistent with the rule of *Tinker*, the Court found in *Healy* that "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."³⁹ Accordingly, the Court remanded *Healy* for further proceedings to determine the extent to which the local SDS chapter would materially and substantially disrupt the college's educational mission, stating "[w]e do conclude that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees."⁴⁰

A year after *Healy*, the Court explicitly extended First Amendment freedoms to student journalists at public universities in *Papish v. Board Of Curators*.⁴¹ In *Papish*, Missouri University suspended a graduate student, who worked at an underground newspaper affiliated with the SDS, for distributing copies of the publication that included "indecent" language.⁴² Despite the publication's coarse language, the Court ruled that university officials were not justified in disciplining the student stating, "[W]e think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"⁴³

34. *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

35. *Id.* at 180-81.

36. 354 U.S. 234 (1957).

37. 385 U.S. 589 (1967).

38. *Healy*, 408 U.S. at 189.

39. *Id.*

40. *Id.* at 193-94.

41. 410 U.S. 667 (1973).

42. *Id.*

43. *Id.* at 670. (Burger, C.J., dissenting) Chief Justice Burger dissented from the *Papish* ruling, as did Justice Rehnquist, joined by Justice Blackmun. In his dissent, Chief Justice Burger argued:

[I]t is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment;

Both *Healy* and *Papish* had their roots in *Tinker*,⁴⁴ a case arising from silent Vietnam War protests staged at a secondary school in Des Moines, Iowa. However, thirty years of judicial deference to administration decisions to limit student speech at public secondary schools as well as universities has eviscerated *Tinker*'s force. As a high-water mark in the recognition of student speech and press rights, *Tinker* cannot be divorced from the political and social realities of the time in which it was litigated. Neither can the erosion of student rights since that time, as observed by Thomas C. Fischer:

[T]imes did change, and significantly so. The Vietnam War opened political divisions that grew violent. The overblown promises of salvation through education failed to produce the expected return. Recession hit the U.S. economy and it lost hegemony in world markets. We as a people became less enchanted with liberalism and idealism, and became more fiscally and politically conservative. And so did Supreme Court judgments regarding student and teacher rights.⁴⁵

The Supreme Court's 1989 ruling in *Hazelwood School District v. Kuhlmeier*, a case involving free press rights at a public high school, represents the Court's most significant divergence from *Tinker*.⁴⁶ The student press at public universities avoided a similar fate when the Sixth Circuit ruled in *Kincaid v. Gibson*⁴⁷ that *Hazelwood* should not apply at the collegiate level.

The Court in *Hazelwood* found that a public high school principal did not violate the First Amendment by removing two pages of the student newspaper from the publication.⁴⁸ The principal said he acted because he believed that the student reporters failed to exercise the professional standards of journalistic balance and fairness in gathering information for one

rather, it demeans those values.

Id. at 672.

In his dissent, Rehnquist argued *Papish*'s speech was not subject to First Amendment protection because it fell within the "fighting words" exception and could disrupt order at the university:

The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment.

Id. at 677.

44. 393 U.S. 503 (1969).

45. Thomas C. Fischer, "Whatever Happened to Mary Beth Tinker" and Other Sagas in the Academic "Marketplace of Ideas", 23 GOLDEN GATE U. L. REV. 351, 359 (1993).

46. 484 U.S. 260 (1988).

47. *Kincaid*, 236 F.3d at 342.

48. 484 U.S. at 274.

of the stories.⁴⁹ He also believed that the content in another story was inappropriate for underclass high school students.⁵⁰ Ruling in favor of the school district, the Court found that public school districts need not tolerate speech that is inconsistent with their educational missions and that might bear their imprimaturs.⁵¹ As a consequence, the Court concluded school officials should be granted latitude in regulating the content of student newspapers because they are pedagogical tools and not public forums created by government for the discussion of public issues.⁵²

Critics warned that the *Hazelwood* ruling could have dire consequences for the student press at the college level, even though the Court stated in a footnote that it “need not . . . decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”⁵³ Nevertheless, university officials used *Hazelwood* to justify censoring the student press at public universities, at least until the Sixth Circuit’s ruling in *Kincaid v. Gibson*.⁵⁴

Kincaid arose from two constitutional claims by students at Kentucky State University. One challenged a university decision to withhold distribution of the university’s student-produced yearbook, *The Thorobred*, because of the publication’s poor quality.⁵⁵ The other concerned the students’ claim that university officials were attempting to control the student newspaper, *The Thorobred News*, by intimidating student journalists and pressuring its faculty advisor to publish only positive stories about the institution.⁵⁶ Following the Supreme Court’s ruling in *Hazelwood*, the appellate court panel found the yearbook was a nonpublic forum and deferred to the university’s judgment in declining to release it:

It is no doubt reasonable that KSU should seek to maintain its image to potential students, alumni, and the general

49. *Id.* at 263.

50. *Id.*

51. *Hazelwood*, 484 U.S. at 266-67.

52. *Id.* at 267-70.

53. *Id.* at 273-74 n.7.

54. 236 F.3d 342 (6th Cir. 2001).

55. *Kincaid v. Gibson*, 191 F.3d at 723. Officials objected to the theme of the 1992-94 yearbook, to the yearbook editor’s choice to include photos about current events of no immediate connection to the Kentucky State University campus and the lack of captions on many photos. *Id.*

56. *Id.* at 724. Defendant Gibson is alleged to have directed the adviser, Laura Cullen, to prohibit the newspaper from publishing a letter to the editor and to “convince” students to publish more positive news in the newspaper. *Id.* When Cullen refused on First Amendment grounds, she was transferred without notice from her advising position to an unspecified position in the university’s housing office. *Id.*

public. In light of the undisputedly poor quality of the yearbook, it is also reasonable that KSU might cut its losses by refusing to distribute a university publication that might tarnish, rather than enhance, that image.⁵⁷

The Sixth Circuit Court of Appeals in a rehearing, *en banc*, overturned the panel's ruling in 2001, holding that the student media at Kentucky State were limited public forums and that the university had violated Kincaid's First Amendment rights.⁵⁸

In the uncertain legal climate created by the differing rulings among federal district and circuit courts, hundreds of student journalists have reported attempts by university officials to censor and punish student journalists in recent years.⁵⁹ Common methods of restricting the press at public universities include sensitivity-based censorship in the form of speech codes, suppressing critical information about universities and administrators, and restricting advertising content.⁶⁰ This suppressive legal climate at public university gives private college officials further authority to regulate the student media on their campuses. Examining the roots and contemporary function of private higher education in the United States serves as a prelude to an argument that a form of the same constitutional protections available to public university students should protect student journalists at private institutions.

B. *The Nature of Private Higher Education*

Higher education in the United States has its roots in the private sector. Many early American jurists felt privatized education was necessary to maintain the quality of education as well as aristocratic order. Chief Justice John Marshall, writing in *Trustees of Dartmouth College v. Woodward*,⁶¹ distinguished between public education—"a civil institution to be employed in the administration of government"—and the elite private college—"a

57. *Id.* at 729. One judge on the appeals panel dissented and found KSU's yearbook to be a limited public forum. *Id.* at 731 (Cole, J., dissenting). The panel's ruling has been vacated pending an appeal to the Sixth Circuit *en banc* in 2000. *U.S. Court of Appeals throws out its initial decision in censorship case*, STUDENT PRESS LAW CENTER REPORT, Winter 1999-2000, at 4-5.

58. *Kincaid*, 236 F.3d at 346. The full appeals court also concluded that *Hazelwood* was "only marginally" applicable to *Kincaid*. *Id.* at 346 n.5.

59. Thirty percent of the 771 requests for legal help to the Student Press Law Center in 1996 concerned college censorship. *Legal requests from high schools reach record high at SPLC in 1996*, STUDENT PRESS LAW CENTER REP., Fall 1997, at 3. In 1997, thirty two percent of 795 complaints to SPLC concerned censorship. *High School Censorship Calls Soar in 1997*, STUDENT PRESS LAW CENTER REP., Fall 1998, at 3.

60. Greg C. Tenhoff, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511, 512 (1991).

61. 17 U.S. 518 (1819).

private eleemosynary institution.”⁶² Noting this distinction, the Court invalidated a New Hampshire law increasing the Dartmouth College’s board of trustees as a means of promoting greater public oversight over the institution’s operations. Indeed, the Court found that the government did not have an interest in regulating the affairs of private colleges and universities because they “do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant.”⁶³

Chief Justice Marshall’s philosophy has remained a principle of the public-private distinction in higher education for more than 180 years. But even if accepted in 1819, Marshall’s characterization of a neat distinction between public and private education⁶⁴ is significantly blurred today. In many ways, the differences between public and private universities have diminished as public higher education has grown in size and influence. An American system of public higher education developed in the nineteenth century and grew to dominance in the twentieth century, particularly in the years after World War II. Today, a shrinking proportion of all American college students receive their higher education in private universities.⁶⁵ Those who do pursue a private education are likely to receive substantial amounts of federal and state financial aid to help finance their education.⁶⁶

In spite of the costs, millions of prospective students and their parents continue to seek out private education for a number of reasons.⁶⁷ Degrees from elite schools, such as those in the Ivy League, provide perceived economic and professional benefits, which seem to justify the financial investment and academic

62. *Id.* at 640-41. An eleemosynary institution is one “of, relating to, or supported by charity.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY 460 (4th ed. 2001).

63. *Dartmouth College*, 17 U.S. at 647.

64. Robert O’Neil argues that Marshall’s position did not reflect reality, even in 1819. Robert O’Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155, 157 (1970).

65. The U.S. Department of Education says the percentage of all college students pursuing a private liberal arts education has shrunk from about fifty percent in the mid-1960s to one in five currently. Martin VanDerWerff, *The Struggle to Define a Niche for a Liberal-Arts Institution*, THE CHRONICLE OF HIGHER EDUC., Dec. 17, 1999, at A39.

66. The average cost of tuition, room, board and mandatory fees in 2001-2 was \$26,070 at private residential universities, compared to \$11,976 for resident students attending public universities. THE CHRONICLE OF HIGHER EDUC., *Average College Costs, 2001-2002*, available at <http://chronicle.com/free/v48/i10/10a05201.htm> (last visited Oct. 15, 2002).

67. The U.S. Department of Education estimated that 3.2 million students were enrolled in private two- and four-year institutions of higher education in 1999. *Projections of College Enrollment, Degrees Conferred, and High-School Graduates, 1997 to 2008*, THE CHRONICLE OF HIGHER EDUCATION ALMANAC, Aug. 28, 1998, at 19.

competition. Private universities of lesser reputation attract students with a focus on teaching and mentoring, as well as provide numerous and less threatening opportunities in athletic, social, and co-curricular activities.⁶⁸

There is little evidence that prospective students seek out private higher education in order to be insulated from ideas. Yet some commentators argue the First Amendment should not apply at such schools. In the view of some, it is precisely because the institution is *private* that many students and parents seek it out:

Although private institutions have always been more expensive to attend than public institutions, private higher education has been a vital and influential force in American intellectual history. The private school can cater to special interests that a public one often cannot serve because of legal or political constraints. Private education thus draws its strength from the very possibility of doing something different than government cannot do, or creating an institution free to make choices government cannot—even seemingly arbitrary ones — without having to provide a justification that will be examined in a court of law.⁶⁹

Writing more than thirty years ago, Christopher Jencks and David Riesman argued the primary reason students and parents sought out private universities at that time was the schools' emphasis in developing, or deterring, certain kinds of social connections:

Parents may know, for example, that the faculty at the University of Colorado is better than at the University of Denver, and may nonetheless prefer Denver on the grounds that their daughters will be less likely to marry the wrong man at Denver, or that their sons are more likely to make friends who will be useful in later life. Or they may want their children to go to college only with other girls, only with Seventh Day Adventists or only with whites.⁷⁰

In the private university setting, opponents argue, the “marketplace of ideas,” a traditional philosophical justification for freedom of speech,⁷¹ may not be a desirable element. Randall

68. One of the leading attractions of private universities is their relatively small size. In Fall 1996, 1,502 of the 1,633 private, non-profit universities in the United States had enrollments of less than 5,000 students. By comparison, only 927 of 1,645 public universities had enrollments of less than 5,000 students. *Number of Colleges by Enrollment, Fall 1996*, THE CHRONICLE OF HIGHER EDUC. ALMANAC, Aug. 28, 1998, at 18.

69. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 45 (Jossey-Bass Publishers 1995).

70. CHRISTOPHER JENCKS AND DAVID RIESMAN, THE ACADEMIC REVOLUTION 287 (Doubleday 1968).

71. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (dissenting, Holmes wrote “[t]he ultimate good desired is better

Kennedy of the Harvard Law School, writing on the advisability of “hate speech” codes at private institutions, argues, the “lone, distinct [private] scholarly institution” should not even voluntarily abide by the dictates of the First Amendment:

One reason that some institutions are quick to accept the dictates of the First Amendment is that all too frequently educators give little sustained thought to the content and boundaries of their educational mission. They assume that any and every college should be a marketplace of ideas. But I can easily imagine a vibrant, rigorous, intellectually distinguished college whose governing authorities reject such a notion. I have in mind a college whose authorities focus on something else: a core set of values and knowledge that is inculcated and transmitted by a carefully and tightly planned program of instruction.⁷²

While the fact that a private university is a nongovernmental entity doubtlessly appeals to some students and parents,⁷³ most students likely perceive no effective difference between the public and private university with respect to freedom of expression.⁷⁴

reached by free trade in ideas . . . [t]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). *See also* *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (writing “[t]he classroom is peculiarly ‘the marketplace of ideas.’”); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 617-18 (Random House 1970) (describing the function of a university in democratic culture); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 125-47 (Harper 1965) (discussing intellectual freedom and the integrity of universities).

72. Randall Kennedy, *Should Private Universities Voluntarily Bind Themselves to the First Amendment? No!*, *THE CHRONICLE OF HIGHER EDUC.*, Sept. 21, 1994, at B1-B2. The author continued:

The college would include those ideas and people that administrators thought would be helpful in advancing this program and exclude those thought to be distracting. I can easily imagine, that is, a first-rate Catholic or conservative or feminist or socialist university at which the curriculum, hiring of faculty, and rules regarding access to the campus by outsiders were governed by policies aimed at infusing the student body with the college’s overarching religious or ideological commitments.

Id.

73. Many private universities have affiliations with religious faiths, meaning that students and faculty are provided opportunities for religious reflection on their work, but most do not insist on a faith requirement or even mandatory participation in religious worship or other activities to become a member of the student body or faculty. The Roman Catholic Church is among the faiths with the largest number of institutional affiliations with 230 colleges and universities in the United States. Beth McMurtrie, *Bishops Issue New Guidance on Catholic Colleges’ Adherence to Church Teachings*, *THE CHRONICLE OF HIGHER EDUC.*, Oct. 1, 1999, at A18. The United Methodist Church counts 102 colleges and universities, enrolling more than 250,000 students, among its affiliates. *United Methodist-Related Colleges and Universities and Theological Schools*, available at <http://www.gbhem.org/gbhem/colleg.html> (last visited Oct. 15, 2002).

74. Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The*

Beyond institutions requiring students to affirm religious or other beliefs as a condition of matriculation, few students attending private colleges and universities are aware of the institution's overarching ideological commitments. Indeed, few parents or students indicate an aversion to free speech as a reason for selecting and remaining at private universities. Practically speaking, most prospective students are more interested in pursuing an education that will make them marketable in professional and graduate school markets. Put another way, the private nature of the institution is less important to most prospective students than is the institution's ability to provide other academic and social benefits. Among the factors that prospective students take into account in choosing private higher education are the following:

- *Academic factors:* George Dehne & Associates, a consulting firm that tracks enrollment trends for private colleges, says that its surveys of 7,000 prospective college students show the most important factor for students choosing colleges is not the "values" espoused by the institution or its status as a private or public university.⁷⁵ Rather, the firm finds students are interested in colleges that offer major fields of study in which they have interest.⁷⁶

- *Environmental factors:* The Dehne firm finds that small colleges, most of which are private, often struggle in the current environment to attract quality students. Dehne's survey shows prospective students are more interested in attending "universities" than they are "colleges" because of the perception that the former are more urbane.⁷⁷ More than seventy percent of prospects desire to go to school in an urban or suburban environment rather than in the more-isolated areas where the smallest liberal arts schools are located. Such a competitive environment, notes *The Chronicle of Higher Education*, makes for a precarious future for many small, private schools: "[U]nless they have name recognition, a sizable endowment, or especially strong academic offerings, most [small liberal arts] institutions struggle to attract students from outside their regions."⁷⁸

- *Retention factors:* The notion that students seek out private higher education to be exposed to values, which may argue against the unregulated competition of ideas, is not

Regulation of Offensive Speech at Colleges and Universities, 39 EMORY L.J. 1351, 1378-88 (1990).

75. Martin VanDerWerff, *The Precarious Balancing Act at Small Liberal Arts Colleges*, THE CHRONICLE OF HIGHER EDUC., July 30, 1999, at A32-34.

76. *Id.* at A33.

77. *Id.*

78. *Id.* at A34.

supported when one considers the reasons students choose to leave such institutions. Private universities, dependent on tuition revenue for their financial health, have intensified their retention efforts in recent years. Partly due to cost, but also partly due to academic and social factors, students transfer or drop out of private universities after one year at rates ranging from 8.8 percent for students attending elite schools (those that typically accept the top ten percent of high-school graduates) to 27.7 percent among traditional schools (attracting students from the top fifty percent of their classes) to as much as fifty percent for those schools with open enrollment policies.⁷⁹ While academic reasons are obviously a leading cause of student dropouts, personal, social and financial reasons are most often cited as a reason for a student to leave a private university, factors similar to those at public institutions.⁸⁰

- “*Consumer*” factors: Evidence suggests that students choose to enroll and stay at private universities for many of the same personal reasons that they choose consumer products. A combination of costs and personal satisfaction with the benefits of the institution, rather than commitment to institutional values, is crucial in this regard. Betsy O. Barefoot, co-director of research and publication at the University of South Carolina’s National Resource Center for the First-Year Experience, notes the challenges many private universities face in attracting and retaining students: “There’s more of a consumer mentality among students now, and less of a sense of institutional loyalty. Students are more apt to transfer to a place where the grass is greener.”⁸¹

Such evidence shows that most students attending private universities are drawn not by the religious or values-based nature of the education, but rather by the academic and social factors that make the private school much more akin to the public university than Marshall’s 1819 analysis would imply. As a result, traditional arguments differentiating between private and public higher education have less force today than they had during earlier eras. Consequently, one can argue for extending First Amendment protections to private institutions within the “state action” doctrine, which applies constitutional standards to the actions of theoretically private parties.

C. *State Action and Private Universities*

Because prospective students discern little effective difference between private and public institutions of higher learning, many

79. Leo Reisberg, *Colleges Struggle to Keep Would-Be Dropouts Enrolled*, THE CHRONICLE OF HIGHER EDUC., Oct. 8, 1999, at A54.

80. *Id.*

81. *Id.* at A55.

commentators argue students and faculty at private colleges and universities should be brought under the protections of such constitutional provisions as the First Amendment.⁸² Courts have adopted this view in other contexts. While they have often ruled that private colleges must follow federal laws respecting affirmative action, anti-discrimination and other civil rights,⁸³ they traditionally refuse to grant students and faculty at private institutions the same constitutional protections afforded their counterparts at public universities.⁸⁴ The judicial system typically relies on the “state action” doctrine in finding private universities immune from respecting the constitutional protections of free speech and press for its students.

This doctrine, a fundamental principle of constitutional law for more than a century, holds that only the state or a private party closely related to the state may be liable for violating constitutional rights.⁸⁵ The actions of purely private actors need not conform to constitutional standards.⁸⁶ The nature of state action has expanded and contracted at various points in American history, but the doctrine’s primary purposes have remained the same for more than a century: to protect individual freedom by defining zones of private conduct beyond the power of the state to regulate,⁸⁷ and to preserve state sovereignty and, thus, federalism.⁸⁸

The state action doctrine has its roots in the Civil War amendments to the Constitution and had its earliest judicial interpretation in the *Civil Rights Cases*.⁸⁹ Authorized by the Fourteenth Amendment’s provision that Congress shall have the authority to enforce political equality by “appropriate legislation,”⁹⁰ the Civil Rights Act of 1875 guaranteed all Americans the “full and equal enjoyment” of public accommodations such as inns,

82. See generally Chemerinsky, *The Constitution and Private Schools*, in MORE SPEECH IS BETTER, *supra* note 18, at 274-89; Chemerinsky, *supra* note 18, at 1635; O’Neil, *supra* note 64, at 155; Robert C. Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1970); Siegel, *supra* note 74, at 1378-1400; Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171 (1982).

83. ROBERT O’NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 218-39 (1997).

84. See *Powe v. Miles*, 407 F.2d 73, 83 (2d Cir. 1968) (noting that although New York State College of Ceramics is located at Alfred Academy, a private university, it is to be treated as a public school).

85. *Id.*

86. *Civil Rights Cases*, 109 U.S. 3 (1883).

87. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1594 (2d ed. 1991).

88. Chemerinsky, *The Constitution and Private Schools*, *supra* note 18, at 276.

89. *Civil Rights Cases*, 109 U.S. at 3.

90. U.S. CONST. amend. XIV, § 5.

restaurants, theaters and railroads.⁹¹ But the Supreme Court, with Justice Joseph Bradley writing for the majority, invalidated the law for stepping “into the domain of local jurisprudence, and [laying] down rules for the conduct of individuals in society towards each [other], and imposes sanctions for the enforcement of those rules without referring in any manner to any supposed action of the State or its authorities.”⁹² While acknowledging that the Thirteenth Amendment granted Congress power to wipe out “badges and incidents” of slavery, the Court found that a refusal of one private party to do business with another private party was not a vestige of the old order:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.⁹³

Despite the neat public-private distinction Bradley’s opinion suggested, Justice John Marshall Harlan’s dissent⁹⁴ presaged later debates on the nature of private power and the applicability of the Constitution in prohibiting private abridgements of rights. Harlan, who believed exercises of private power could be as oppressive as the actions of the state, argued that the Court’s ruling rested on grounds “entirely too narrow and artificial.”⁹⁵ He wrote:

[In] every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because [they are charged with duties to the public, and are] amenable, in respect of their public duties and functions, to [governmental] regulation.⁹⁶

Because of the close relationship between the operations of at least some private parties and the obligations of the state, Harlan believed constitutional guarantees should protect individuals from individuals and corporations that act under color of state law.⁹⁷

Harlan’s dissent eventually led to the development of a state action doctrine that more clearly recognized the way power is exercised in American society. In later years, courts were willing to find constitutional values implicated in a variety of contexts involving discrimination by private parties against other

91. 18 Stat. 335 (1875).

92. Civil Rights Cases, 109 U.S. at 14.

93. *Id.* at 24-25.

94. *Id.* at 26-62 (Harlan, J., dissenting).

95. *Id.* at 26.

96. *Id.* at 58-59.

97. *Id.* at 36.

individuals. These theories included the “nexus” strand of state action, in which the discriminatory actions of private parties cannot proceed without some involvement by the state;⁹⁸ situations in which private parties exercise powers delegated by the state;⁹⁹ and the dependence of a private party on state funding for a substantial source of its revenues.¹⁰⁰ With regard to private educational institutions, the most promising theory of state action has been in the judicial system’s recognition of a “public function” in the operations of a private organization.

In a First Amendment ruling, *Marsh v. Alabama*,¹⁰¹ the Court adopted Justice Harlan’s view on the importance of the presence of a “public function” in a finding of state action. In *Marsh*, a member of the Jehovah’s Witnesses faith was convicted under a state criminal trespass statute¹⁰² for distributing religious literature on the streets of Chickasaw, Alabama, without permission from the private company that owned title to the town and used it to house and provide services for workers.¹⁰³ The Court concluded that because these facilities primarily benefited the public, they essentially served a public function, and were therefore subject to constitutional mandates.¹⁰⁴ As a result, the private company could not deny individuals their First Amendment rights to distribute literature on the streets of the town.¹⁰⁵

Emboldened by the *Marsh* ruling, labor unions tried, with mixed results, to force private property owners to respect First Amendment rights in the 1960s and 1970s. In the first of the so-called “shopping-center” cases, *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*,¹⁰⁶ the Court extended the rule of *Marsh* to those kinds of private properties after finding that shopping centers were quickly replacing downtown business districts as functional “public squares” for speech and political activity.¹⁰⁷ The *Logan Valley* precedent was short-lived, however. The Justices quickly retreated, ruling four years later in *Lloyd Corp., Ltd. v. Tanner*,¹⁰⁸ that a shopping center could exclude anti-

98. See *Shelley v. Kraemer*, 334 U.S. 1, 16 (1948) (holding that private restrictive covenant amounts to state action when it requires state judiciary for enforcement). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (holding state action implicated in an individual’s request for judicial enforcement of libel verdict against privately owned newspaper).

99. Schubert, *supra* note 79, at 334-48.

100. *Id.* at 341.

101. 326 U.S. 501 (1946).

102. *Id.* at 503-04 (citing 14 ALA. CODE § 426 (1940)).

103. *Id.*

104. *Id.* at 506.

105. *Id.*

106. 391 U.S. 308, 325 (1968).

107. *Id.*

108. 407 U.S. 551, 565-68 (1972).

war protesters whose message was not connected to the purposes of the shopping center.¹⁰⁹ However, in 1976 the Court abandoned *Logan Valley*, ruling in *Hudgens v. NLRB*¹¹⁰ that shopping centers were not engaged in state action and therefore need not respect First Amendment liberties.¹¹¹

Marsh and the shopping-center cases clearly establish that some private properties fulfill public functions amenable to constitutional protection. As public spaces shrank and greater privatization of the venues of public communication took place, so did the opportunities for meaningful dissent from public policies. During the conservative turn of the Court in the 1970s and 1980s, however, the Supreme Court began to chip away at the idea that private interests, which served public functions of any kind, need be bound by the limits of the Constitution. Rulings in the 1990s, however, have left open the possibility that the Court could later expand the “public function” strand of state action analysis to include censorship of the student media at private universities.¹¹²

It is difficult to argue private higher education does not fulfill a public function in American society. Chief Justice Marshall’s views in *Dartmouth College* notwithstanding, the “mixed economy” of public and private higher education is now such that private universities remain so more in name than in reality. Several factors have diminished differences between public and private universities in the late twentieth century. Private schools gradually have become more secularized and more dependent on governmental grants and financial aid. Further, and more

109. *Id.*

110. 424 U.S. 507, 520-21 (1976).

111. *Id.*

112. Rulings during the 1970s and 1980s limited application of the public function doctrine only to private activities engaging in an “exclusive government function.” Accordingly, the Court refused to find a public function in the actions of a variety of private bodies. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-59 (1974) (private utility); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165-66 (1978) (private warehouseman); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) (private high school for troubled students); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (private nursing home); and *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543-44 (1987) (amateur sports governing body). However, in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), the Court held that the controlling test in determining whether a private party’s public function is sufficient to find state action is “whether the action in question involves the performance of a *traditional* function of the government.” *Id.* at 624 (emphasis added). Not only did the Court in *Edmonson* veer from the “exclusivity” test used in its 1970s and 1980s decisions, it also determined that a combination of factors—public function, nexus, state regulation, etc.—could be used to justify an overall finding of state action. *Id.* For a larger treatment of the development of the public function strand of state action analysis, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 385-89 (1997).

importantly, the demand for higher education expanded during the twentieth century to such an extent that it would have been impossible for either the public or private sector to adequately meet it without overcrowding. With regard to public universities, the growth of private development organizations raising hundreds of millions of dollars from alumni and corporate patrons has made those institutions operate in a much more "private" manner than in previous eras.¹¹³ Judge J. Skelley Wright aptly summarized the public function of private higher education in 1962:

Institutions of learning are not things of purely private concern . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. . . . Clearly the administrators of a private college are performing a public function. They do the work of the state, often in place of the state. Does it not follow that they stand in the shoes of the state? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action?¹¹⁴

Nonetheless, most courts have refused to find a sufficient connection between the state and private educational institutions to make First Amendment guarantees binding on private schools.¹¹⁵ *Powe v. Miles*¹¹⁶ illustrates the blurring line between public and private higher education, as well as the steps to which courts will go to protect private university officials in limiting expression on campus. In *Powe* officials at Alfred University in New York suspended seven students for protesting against the Vietnam War during a campus ROTC ceremony.¹¹⁷ Three of the seven suspended students were enrolled in the New York State College of Ceramics, which Alfred operated under contract with the state government.¹¹⁸ The remaining students were liberal arts majors at Alfred, all of whom were unaffiliated with the ceramics school.¹¹⁹ This distinction was crucial in the court's finding that

113. O'Neil, *supra* note 64, at 170-80.

114. *Guillory v. Adm'rs of Tulane Univ.*, 203 F.Supp. 855, 858-59 (E.D. La. 1962).

115. However, courts have had no such difficulty in requiring that private universities abide by federal laws prohibiting discrimination in admissions and hiring "on the basis of race, sex, national origin, religion, handicap or age." See Siegel, *supra* note 74, at 1389 (writing that "with only a few narrow exceptions, private universities which receive federal funds may not discriminate on the basis of race, sex, national origin, religion, handicap, or age."). See also O'NEIL, *supra* note 80, at 227 (noting that private universities are subject to some federal regulation).

116. 407 F.2d 73 (2d Cir. 1968).

117. *Id.* at 78.

118. *Id.* at 79.

119. *Id.*

university officials had violated the constitutional rights of only the ceramics students. The court found no true public function in the operation of the university as regarding liberal arts students.¹²⁰ Neither would it find a sufficient nexus with the state nor a significant dependence on state funding—other than for the ceramics college—to necessitate a finding of state action.¹²¹ While officials at Alfred could choose to observe constitutional guarantees for its liberal arts students, they were under no legal requirement to do so.¹²²

While the Second Circuit in *Powe* addressed the issue, the Supreme Court's major statement on the relationship between private education and the state came in *Rendell-Baker v. Kohn*,¹²³ a 1982 case in which a private secondary school in Massachusetts fired a faculty member for publicly criticizing the school's administration.¹²⁴ Even though the school received up to ninety nine percent of its annual budget from state tax receipts to help educate troubled youths, the Court declined to find state action in the teacher's dismissal. Chief Justice Warren Burger wrote, "[t]hat a private entity performs a function which serves the public does not make its acts state action" unless "the function performed has been traditionally the exclusive prerogative of the State."¹²⁵ Justice Thurgood Marshall, joined in dissent by Justice William Brennan, would have found state action in the school's actions on both a nexus and a public-function theory.¹²⁶ According to Justice Marshall, "[t]he fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action."¹²⁷

Thus, any argument that the First Amendment should apply to private institutions of higher education must contend with a judicial ideology that has become increasingly unwilling to take constitutional issue with the actions of private parties. The bar, however, while set high, is not insurmountable.

One method of analyzing and critiquing the existing "state action" doctrine as it relates to speech is to utilize what Matthew

120. *Id.* at 80.

121. *Id.*

122. *Id.* at 81-82.

123. *Rendell-Baker*, 457 U.S. at 830.

124. *Id.* at 834.

125. *Id.* at 842. The Court has since stepped back from the "exclusivity" requirement in public-function analysis. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (establishing that the controlling test in determining whether a private party's public function is sufficient to find state action is "whether the action in question involves the performance of a traditional function of government.").

126. *Id.* at 840.

127. *Rendell-Baker*, 457 U.S. at 849 (Marshall, J., dissenting).

Bunker has called the “new realist” critique of existing First Amendment jurisprudence.¹²⁸ Named for the legal realists of the New Deal era who used insights into economic and social theory as a means of reshaping conservative judicial ideology and finding support for the economic reforms of the Depression era, the new realists operate under a variety of conceptual and theoretical guises, such as critical legal studies, feminist legal theory, critical race theory, etc.¹²⁹ While these approaches have several significant differences in their approaches to questions of communication law and policy, they all are concerned with the ways private power can be used to silent unpopular or marginalized viewpoints.

Essential ideas in these discourses are that private power can be just as oppressive a censor as the state, and that constitutional values must be applied against this form of power to realize true political and social equality. These approaches are themselves subject to criticism,¹³⁰ but they are helpful as a means of theoretically grounding a broader right of constitutional protection for speech and press on the private university campus.

II. OTHER METHODS OF PROTECTING SPEECH AT PRIVATE SCHOOLS

While free-press advocates have not often found the First Amendment to be a helpful tool in finding protection for student publications on private campuses, other legal arguments have been advanced in support of these claims. This section of the article presents some of these arguments and analyzes why they all suffer from deficiencies in effectively promoting the values of a free press.

A. Policy Considerations

One of the most common arguments in favor of free-press rights on the private campus is rooted in philosophical considerations. As noted by the Student Press Law Center (SPLC), environments supposedly dedicated to free inquiry and often promoted as such in marketing materials should live up to the ways they bill themselves.¹³¹ “Any official censorship of a

128. Matthew D. Bunker, *Constitutional Baselines: First Amendment Theory, State Action and the “New Realism,”* 5 COMM. L. & POL’Y 1 (2000).

129. *Id.* at 3-10.

130. Bunker finds much of the new realist critique problematic and argues that, for actionable state action to be present, government must “act” in concert with the private actor through constitutional, statutory, or common-law authority. *Id.* Further, Bunker argues that an “identifiable, willing speaker” must be suppressed in order to find state action and that courts should avoid balancing the rights of speakers against each other. *Id.* Finally, courts should not become involved in the adjustment of “preference baselines” that would substitute the values of the judiciary for those of the marketplace of ideas. *Id.* at 28-30.

131. Student Press Law Center, *supra* note 8.

newspaper, whether by a private school administrator or a state or local government official seems patently un-American.”¹³² Indeed, few universities willingly admit they regulate speech and press activities on campus, even if they legally retain the right to do so, because of the stigma that naturally attaches to such actions. Zechariah Chafee, Jr., deftly stated a version of the policy argument more than seventy years ago:

Private schools and colleges sometimes desire to take on . . . a military form, and exert autocratic powers over their students and teachers. . . . It is doubtful whether the students, parents, and teachers contemplate such authority as inherent in the nature of an educational institution. Consequently, the ordinary principals of natural justice might well be applied even if the rules of the organization are expressly contrary. . . . It is easy to understand how educational authorities believe that they will secure efficiency and desired standards through the possession of absolute powers. However, an institution which professes to prepare youth for life in a democracy might wisely give them an example of fair play when it is conducting its own affairs.¹³³

SPLC also argues that censorship on the private university campus “retard[s] one of the basic necessities of the learning process—the unfettered free flow of ideas.”¹³⁴ SPLC further maintains that a failure to respect First Amendment values at private institutions—many of which have religious affiliations—endangers the vitality of the amendment’s guarantees of free exercise of religion.¹³⁵

B. Academic Freedom and Contract Rights

Despite these policy considerations, however, private university officials have not hesitated to act as censors when they believe their personal or institutional interests warrant it. As a result, many student journalists have argued that rights of contract and association protect their expressions in the student press.¹³⁶ According to SPLC, private schools that grant freedom-of-expression rights in handbooks, student media charters, or other policies and regulations could be held to those standards by a court.¹³⁷ “[A]ny action contrary to that policy is a breach of

132. *Id.*

133. Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1026-27 (1930).

134. Student Press Law Center, *supra* note 8.

135. *Id.*

136. *Id.*

137. *Id.*

[contract] for which a court could [grant] relief."¹³⁸ However, right-of-contract or academic-freedom arguments are at best tentative solutions to the problem of censorship at private institutions. Many private universities grant students and faculty some form of "academic freedom" without defining the meaning of the term. Further, some commentators argue that academic freedom protects students and faculty only when they are engaging in extramural speech—that is, speech concerning issues and ideas regarding the world *beyond* the campus.¹³⁹ Intramural communication that concerns or criticizes internal university policies or governance is not protected under this view.¹⁴⁰

C. State Constitutional Free-Expression Provisions

In a few states, the best resort may be to the provisions of the state constitution. Forty-two states word their free-expression guarantees in terms broader than that of the federal Constitution.¹⁴¹ Such state constitutions are said to embody "affirmative" rights of speech and press because the provisions make no specific requirement of state action for constitutional values to be implicated.¹⁴²

138. *Id.*

139. *See, e.g.*, ROBERT K. POCH, ACADEMIC FREEDOM IN HIGHER EDUCATION: RIGHTS, RESPONSIBILITIES AND LIMITATIONS 8-9 (1993) (stating that the American Association of University Professors has, since 1915, considered the meaning of academic freedom to be freedom of "extramural utterance and action" in the form of thought, inquiry, discussion and teaching).

140. AAUP has been critical of the amorphous nature of academic-freedom policies at private institutions, particularly church-related institutions. It urges that "limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment [of a new faculty member]." AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 3 (1990).

141. *See Note, Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180-81 n.79 (1980) (listing states granting affirmative rights to free speech). State constitutions with affirmative free-expression provisions are: ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; CAL. CONST. art. I, § 2; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 4; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, para. 5-4; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; IOWA CONST. art. I, § 7; KAN. CONST. (Bill of Rights), § 11; KY. CONST. (Bill of Rights), § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. CONST. (Declaration of Rights), art. 40; MASS. CONST. art. 77; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.H. CONST. pt. I, art. 22; N.J. CONST. art. I, para. 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; N.D. CONST. art. I, § 4-9; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; VT. CONST. ch. I, art. 13; WASH. CONST. art. I, § 5; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

142. Many of the forty-two states word their affirmative guarantees in

The Supreme Court has supported the right of state courts to find more expansive protections of speech and press rights in state constitutions than can be found in the federal Constitution.¹⁴³ In *PruneYard Shopping Center v. Robins*,¹⁴⁴ the Court ruled against the owner of a shopping center who argued that the California Supreme Court's protection of the speech rights of anti-Zionist protesters at his shopping center was a denial of his First and Fifth Amendment rights. Central to the Court's analysis was its finding that the shopping center had opened its doors to pamphleteers in the past and that it was unlikely that shopping-center patrons would identify the message of the pamphleteers with the owner of the shopping center.¹⁴⁵

A few states' constitutions extend speech and press protections to cover abridgement by private parties. Two of those states -- New Jersey and Pennsylvania -- have done so in cases pitting the rights of private colleges against speakers.

New Jersey became the first state to employ its constitutional expression provisions against a private university when its

similar terms. Three state constitutional provisions that have resulted in expansive protection of speech rights against private infringement are as follows:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

CAL. CONST. art. I, § 2(a).

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.J. CONST. art. I, para. 6.

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

PA. CONST. art. I, § 7.

143. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1987).

144. *Id.* at 87.

145. *Id.*

Supreme Court decided *Schmid v. State*,¹⁴⁶ a case pitting Princeton University's right to control the use of its property against the speech rights of a non-student political activist.¹⁴⁷ Chris Schmid was a member of the U.S. Labor Party responsible for distributing political literature in an orderly manner on the Princeton campus.¹⁴⁸ After declining a request to stop, local police arrested Schmid and a local court convicted him on a trespass charge.¹⁴⁹ While the New Jersey Supreme Court declined to find state action and an implication of First Amendment values in Princeton's refusal to permit distribution of political literature on campus,¹⁵⁰ it did find that Schmid's activities were protected within the scope of New Jersey's state constitution.¹⁵¹ The New Jersey court pronounced a three-part test to balance the property rights of the university with the speech rights of the public:

- What is the normal use of private property at issue?
- What is the nature and extent of the public's invitation by the private property owner to use the privately owned facilities?
- What is the compatibility of free-speech interests with the normal uses of the property?¹⁵²

Applying this test, the New Jersey Supreme Court found Princeton's overall mission was to spread ideas among its students and the world beyond the campus.¹⁵³ As a result, Princeton had a lesser interest in censoring speech.¹⁵⁴ Princeton appealed the ruling to the U.S. Supreme Court, but the case was dismissed for lack of jurisdiction following oral arguments because Princeton implemented new policies permitting the distribution of political literature on campus.¹⁵⁵

While *Schmid* distinguishes the private university campus from other private forums for speech and press activities, New Jersey's courts have not been willing to extend its protections to all private post-secondary institutions of higher education. In *State v. Guice*,¹⁵⁶ a New Jersey appellate court upheld the

146. 423 A.2d 615, 616 (N.J. 1980).

147. *Id.*

148. *Id.*

149. *Id.*

150. The New Jersey court specifically refused to find a "public function" on Princeton's campus analogous to the company town at issue in *Marsh v. Alabama*. *Id.* at 624.

151. *Id.* at 626-33.

152. *Id.* at 630.

153. *Id.*

154. *Id.* at 630-31.

155. *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982).

156. 621 A.2d 553 (N.J. Super. Ct. Law Div. 1993).

trespassing conviction of students who had refused to stop distributing political literature on the campus of Hamilton College, a for-profit training school for business and clerical skills. In *Guice*, the court found college officials had not traditionally opened the campus to the public for reasons related to the dissemination of ideas, as was the case in *Schmid*. Accordingly, unlike Princeton, Hamilton officials had not forfeited control over the use of the property.¹⁵⁷

Citing *Schmid* as persuasive authority, the Pennsylvania Supreme Court made Pennsylvania's constitutional guarantees of free speech and press binding on private colleges in *Commonwealth v. Tate*.¹⁵⁸ Police had charged several protesters with defiant trespass when they refused to stop distributing leaflets at Muhlenberg College, at the time hosting a speech by Clarence Kelley, then director of the Federal Bureau of Investigation.¹⁵⁹ As the New Jersey court did in *Schmid*, the Pennsylvania court in *Tate* found Muhlenberg had opened its facilities to free public access, thus implicating state constitutional norms.¹⁶⁰ The college could institute a content-neutral time, place, and manner requirement by forcing protesters to first secure permission before distributing literature on campus, but the court found the college had not articulated any standards by which Tate could seek permission.¹⁶¹

Even though New Jersey and Pennsylvania have applied speech and press rights of individuals against some private parties,¹⁶² ten states have refused to find any broader expression

157. *Id.* at 555.

158. 432 A.2d 1382, 1391 (Pa. 1981).

159. *Id.* at 1384.

160. *Id.* at 1391.

161. *Id.* at 1390. One Pennsylvania justice dissented from the majority and urged his colleagues to conform Pennsylvania law with the federal standard in *Hudgens v. NLRB*. To do otherwise, he wrote, creates confusion for property owners and uncertainty in the law, while "chill[ing] the exercise of property rights." *Id.* at 1391 (Larsen, J., dissenting).

In a later case, *West. Pa. Socialist Workers v. Conn. Gen.*, 515 A.2d 1331 (Pa. 1986), the Pennsylvania Supreme Court indicated that it was the special role of private universities in spreading ideas to the public that required they respect state constitutional norms. The case concerned a trespassing charge filed against political activists who were distributing literature at a shopping mall. The court distinguished the case and *Tate*, noting that "In our view, [*Tate*] demonstrates a *limiting rationale* for applying our constitution's rights of speech and assembly to property private in name but used in fact as a forum for public debate." *Id.* at 1336 (emphasis added).

162. Additionally, California, Colorado, and Washington have used their state constitutions to find a right of free expression on private shopping-center properties. See *Bock v. Westminster Mall Co.* 819 P.2d 55 (Colo. 1991) (holding that Colorado's constitution prevents a private property owner of enclosed shopper center from prohibiting non-violent political speech); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341 (Calif. 1979) (holding that California's

rights in their constitutions than is found in the federal Constitution.¹⁶³ One commentator has referred to such “state-action only” interpretations, similar or identical to that of the federal Constitution, as “uncritical” readings of those state constitutions.¹⁶⁴

Although the Fourteenth Amendment does not embody this conception of state action, state courts are free to use a more inclusive conception to enforce their state constitutional guarantees. Indeed, state courts are the most appropriate judicial institution for this task because both the public interest in general speech and individual property rights are defined exclusively under state law.¹⁶⁵

D. Other Statutory Provisions

Beyond state constitutional provisions, four states have adopted legislation that some have argued protect speech and press rights for speakers and publishers on private property.¹⁶⁶

constitution protects speech reasonably exercised in shopping malls); *Alderwood Assocs. v. Wash. Env'tl. Council*, 635 P.2d 108 (Wash. 1981) (holding that environmentalists may gather in shopping malls).

163. *See Cologne v. Westfarm Assocs.*, 469 A.2d 1201, 1202 (Conn. 1984) (refusing to broaden state constitutional rights of free speech and petition to permit individuals to exercise their rights of free speech on private property without the owner's consent). *See also* *Dept. of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982) (holding that the same scope of protection required under the First Amendment is afforded to the state freedom of expression provision); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 498 (Iowa 1976) (holding that the federal and state provisions provide the same protections); *Freedman v. State*, 197 A.2d 232, 235-36 (Md. 1964); *rev'd on other grounds*, 380 U.S. 51 (1965) (holding that the state constitution violated federal speech protections); *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985) (holding that state free speech protections do not reach to private property); *State v. Cox*, 16 A.2d 508, 516-17 (N.H. 1940) (holding that state and federal free speech protections are substantially similar); *Shad Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985) (holding that free speech protections did not prevent private property owners from instituting no handbill policies); *State v. Felmet*, 273 S.E.2d 708, 711-12 (N.C. 1981) (refusing to broaden state free speech protections to permit individuals to exercise their rights on private property without the owner's consent); *Hunt v. McNair*, 187 S.E.2d 645, 648 (S.C. 1972) (stating that the First Amendment and the state freedom of speech provision are interpreted the same); *Rapid City J. Co. v. Cir. Ct. of Seventh Judicial Cir.*, 283 N.W.2d 563, 568 (S.D. 1979) (stating that state's freedom of speech protections extend no further than federal protections).

164. Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180-81, nn.80-82 (1980).

165. *Id.* at 182-83, nn.89-91.

166. The states are California, CAL. EDUC. CODE § 94367 (West 1993); Connecticut, CONN. GEN. STAT. § 31-51q (1997); Maine, ME. REV. STAT. ANN. TIT. 5 § 4681-82 (West 1990); and Massachusetts, MASS. GEN. LAWS Ch. 12, §§ 11H, 11I (1994).

However, legal challenges to most of these laws have resulted in court rulings that limit their application to private organizations, including private universities.¹⁶⁷ Further, federal legislation designed to extend First Amendment protections to students and faculty at private colleges has either failed to win support in Congress or lacked suitable enforcement provisions that would give aggrieved parties standing to seek judicial relief.¹⁶⁸

Connecticut was the first to approve such legislation at the state level. The Connecticut Free Speech Act of 1983¹⁶⁹ was designed to remedy the “discrepancy” between constitutional protections for governmental whistleblowers and those for private employees who comment on matters of public concern.¹⁷⁰ The act recognizes a private cause of action for damages against “any employer,” private or public, who disciplines or discharges employees for exercising “rights guaranteed by the First Amendment to the United States Constitution” or applicable sections of the Connecticut state constitution.¹⁷¹ In Massachusetts, the state Civil Rights Act of 1979 authorized similar causes of action against “any person or persons, whether or not acting under color of law” interfering “with the exercise or enjoyment” of “rights secured by the Constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth.”¹⁷² Maine’s statute is similar to those in Connecticut and Massachusetts, though it adds a requirement that the denial of constitutional rights be “intentional” in order to be actionable.¹⁷³

167. See *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 904 (1st Cir. 1988)(prohibiting racial discrimination, and not guaranteeing speech rights, was object of state civil rights legislation); *Cotto v. Sikorsky Aircraft Div.*, No. CV93-0349697, 1996 Conn. Super. LEXIS 1355, at *3 (Conn. Super. Ct. May 22, 1996) (holding that speech in private employer’s workplace not protected by First Amendment); *LeBow v. Am. Chem. & Ref. Co., Inc.*, No. 112554, 1994 WL 411331, at *4 (Conn. Super. Ct. July 29, 1994) (holding that Connecticut constitution does not protect speech on private property); *Phelps v. President of Colby College*, 595 A.2d 403 (Me. 1991) (denying relief to private-university students in free-speech case against private university).

168. See *infra* notes 182-89 and accompanying text (discussing the Collegiate Speech Protection Act of 1991 and its ramifications).

169. See sources cited *supra* note 162 (citing state statutes).

170. See Eule & Varat, *supra* note 17, at 1587-88.

171. CONN. CONS. art. I, §§ 3, 4 & 14. Whether the provision would protect students at private universities in Connecticut is uncertain, although many student journalists at private institutions receive modest financial compensation for their work and would arguably come under the heading of “employees.”

172. See sources cited *supra* note 162 (citing California, Connecticut, Maine and Massachusetts statutes). Eule and Varat argue that the legislative intent of the bill’s sponsors did not include protection from censorship at private universities. Eule and Varat, *supra* note 17, at 1581-82 nn. 190-94 and accompanying text.

173. See sources cited *supra* note 162 (citing California, Connecticut, Maine

Nonetheless, courts in all three New England states have hedged on whether the provisions truly extend to censorship by private parties.¹⁷⁴ In Connecticut, one court has twice read the statute as only protecting speech regarding private activities on public property.¹⁷⁵ Further, a federal appeals court in Massachusetts has limited the ability of plaintiffs to use that state's law against private censorship.¹⁷⁶ In a case specifically involving the free-expression rights of students at a private university,¹⁷⁷ the Maine Supreme Court concluded the applicable state law did not intend to create a right of free expression interfering with private relationships.¹⁷⁸

California's so-called "Leonard Law,"¹⁷⁹ named for the state legislator who shepherded the bill through the State Assembly, is the only state law to date specifically intended to protect speech and press rights on private campuses that courts have upheld as constitutional.¹⁸⁰ The statute forbids any educational institution, public or private, from disciplining students for speech and publication that "when engaged in outside of the campus or facility of a private post secondary institution, is protected from governmental restriction" by the federal Constitution.¹⁸¹ The law provides that aggrieved students may seek injunctive and declaratory relief.¹⁸² Exceptions to the law's requirements are made to permit private schools to develop narrowly drawn hate-speech codes and for religious schools at which application of the law "would not be consistent with the religious tenets of the organization."¹⁸³ Supporters have called the legislation a "free-expression Magna Carta for students,"¹⁸⁴ and even critics have labeled it a "bold stroke."¹⁸⁵

and Massachusetts statutes).

174. Eule and Varat, *supra* note 17, at 1587-90 nn. 216-27 and accompanying text.

175. *Cotto v. Sikorsky Aircraft Div.*, No. CV93-0349697, 1996 Conn. Super. LEXIS 1355, at *3 (Conn. Super. Ct. May 22, 1996); *LeBow v. Am. Chem. & Ref. Co., Inc.*, No. 112554, 1994 WL 411331, at *4 (Conn. Super. Ct. July 29, 1994).

176. *Redgrave*, 855 F.2d at 888.

177. *Phelps v. President of Colby College*, 595 A.2d 403 (Me. 1991).

178. *Id.* at 406.

179. CAL. EDUC. CODE § 94367 (West Supp. 1996).

180. *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (holding that private university hate-speech policy is both facially overbroad and underinclusive when measured against First Amendment standards).

181. CAL. EDUC. CODE § 94367(a) (West 1993).

182. *Id.* at § 94367(b) (West 1993).

183. *Id.* at § 94367(c) (West 1993).

184. Nat Hentoff, *Magna Carta for Students*, WASH. POST, Jan. 30, 1993, at A21.

185. Eule and Varat, *supra* note 17, at 1593.

At the federal level, Rep. Henry Hyde of Illinois proposed legislation in 1991 that would have granted injunctive and declaratory relief to students and faculty at some private colleges who believed that campus speech policies infringed on their First Amendment rights.¹⁸⁶ Like California's Leonard Law, the bill would have created an exception for "religious institutions" for which First Amendment standards would be inconsistent with the mission of the college. Responding to critics' claims that such legislation violates the First Amendment rights of private educational institutions to disassociate themselves from messages they find offensive or antithetical to their values, Hyde argued a "right of dissent [would] hardly threaten the school mission or identity, unless they are in tenuous shape to begin with."¹⁸⁷ Unlike the Leonard Law, however, the Hyde legislation never emerged from committee.

In 1998, Congress adopted revisions to the Higher Education Act, indicating its desire that private colleges respect free-expression rights of students and faculty. A "sense of Congress" section of the act¹⁸⁸ provides that "no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association," be punished for expressive activities that would be protected by the First and Fourteenth Amendments at public universities.¹⁸⁹ Private institutions, according to the legislation, should respect those rights "whether or not such [expressive activity] is sponsored or officially sanctioned by the institution."¹⁹⁰ As with most federal legislation affecting colleges and universities, the provision covers only those institutions that "directly or indirectly [receive] financial assistance" under the act.¹⁹¹

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

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

188. 20 U.S.C. § 1011a (2000).

189. *Id.* at § 1011(a).

190. *Id.*

191. *Id.* To conform with the spirit of the Supreme Court's rulings in *Healy* and *Papish* another section of the legislation notes that nothing in the section should be construed:

(1) To discourage the imposition of an official sanction on a student that has willfully participated in the disruption or attempted disruption of a lecture, class, speech, presentation, or performance made or scheduled to be made under the auspices of the institution of higher education; or

(2) To prevent an institution of higher education from taking appropriate and effective action to prevent violations of State liquor laws, to discourage binge drinking and other alcohol abuse, to protect students from sexual harassment including assault and date rape, to prevent hazing, or to regulate unsanitary or unsafe conditions in any student residence.

The legislation, sponsored by Rep. Robert Livingston of Louisiana and Sen. Larry Craig of Idaho, is a welcome step forward for press rights on the private campus. As the SPLC has noted, speech, as defined in the section, “would presumably cover student expression in the pages of a student publication as well as verbal expression. Thus a student editor or columnist could not be punished for writing an article that was unpopular or offensive to school officials.”¹⁹² But, the section represents only recommendations to college officials with no formal penalties for violating its spirit or letter. “However, administrators looking for guidance as to what will make Congress happy (and continue federal support for higher education) might be expected to be sensitive to these requests and make some effort to meet the requirements.”¹⁹³

E. Shortcomings of Alternative Approaches

While some courts and legislative bodies have recognized the importance of free expression on the private college campus, the methods of addressing the legal issues below a constitutional level suffer from several practical and theoretical shortcomings. This section of the article analyzes those shortcomings as a prelude to proposing a balancing approach to applying the First Amendment to private universities.

Most importantly, cobbling together various statutory, policy-based, contractual, common law and state constitutional approaches to protecting press rights leaves a considerable number of students and faculty without legal protection. Even in states whose constitutions appear to provide more protection for speech freedoms than the federal Constitution, state courts have interpreted nearly identical constitutional provisions in widely divergent ways,¹⁹⁴ resulting in a great deal of uncertainty as to what “speech” is or which “speech” should be protected. Even the SPLC, which helps students at private schools explore alternatives to the federal Constitution in protecting their rights, concedes these alternative methods will leave many students fighting an uphill battle at private institutions. The SPLC has noted that “[O]fficial control of student journalists at many private schools remains a legal and practical reality.”¹⁹⁵ While students “who find themselves victims of censorship and prior restraint should not

Id. at § 1011 (b).

192. Press Release by Student Press Law Center, *New Education Act Will Have Major Impact on Campus Media* (Oct. 7, 1998), available at <http://www.splc.org/newsflash.asp?id=82&year=1998> (last visited Oct. 15, 2002).

193. *Id.*

194. *Id.*

195. STUDENT PRESS LAW CENTER, *LAW OF THE STUDENT PRESS* 73 (1994).

give in quietly,” SPLC cannot argue that alternative protections are anything better than “potentially strong” counterarguments to college officials.¹⁹⁶ In short, officials bent on silencing the student press at the private university have wide latitude to accomplish their purposes.

Beyond the practical considerations are the philosophical issues raised by the limits placed on expression. Constitutional law scholar Erwin Chemerinsky, a leading advocate of extending First Amendment protections to students and faculty at private universities, notes that a judicial refusal to apply First Amendment rights in this context signals that expression is somehow less important than rulings applying constitutional standards of affirmative action and anti-discrimination to private universities.¹⁹⁷ Indeed, Chemerinsky has argued that, “Just as private schools should not be allowed to discriminate, nor should they be able to discipline students or teachers in violation of the First Amendment or without procedural due process.”¹⁹⁸ Chemerinsky finds no evidence that speech rights are of less political and social value than the values supported by anti-discrimination laws,¹⁹⁹ nor does he find that imposing the First Amendment on private universities would be of any more of a burden than applying anti-discrimination or affirmative action laws.²⁰⁰

Further, Chemerinsky faults existing doctrine for declaring that the First Amendment rights of institutions should always trump those of individuals. Taking issue with so-called “communitarian” approaches to free speech that theorize that individual expressive rights should give way to those of institutions attempting to inculcate values of tolerance, diversity and civility on campus, Chemerinsky argues that universities are not truly communities in which members equally share responsibilities for maintaining order and social cohesion.²⁰¹

A university the size of the University of Southern California is hardly a community in any meaningful way. If the president of the university orders me fired for my speech activities, it is not likely an exercise of communitarian self-determination, but rather an institution firing a dissident for his speech.²⁰²

Indeed, most private and public universities—if

196. *Id.*

197. *Supra* notes 143-61 and accompanying text.

198. Erwin Chemerinsky, *The Constitution and Private Schools*, *supra* note 18, at 286.

199. *Id.* at 284-86.

200. Chemerinsky, *More Speech is Better*, *supra* note 18, at 1642.

201. *Id.* at 1639.

202. *Id.*

communitarian in any sense at all—are much more hierarchical than more traditional geographical and political communities. A system of tenure and ranking among faculty assures that senior faculty wield more power in institutional decision-making than do junior faculty. Students have little, if any, real power in making decisions regarding the writing and implementation of academic, student life, and institutional development policies that affect their education and life on campus. A private university, in many respects, more accurately resembles a benevolent dictatorship than it does a democratic community. In such an atmosphere, it is easy to see why administrators would wish to silence expression that, in addition to offending members of the “community,” may embarrass the administration, faculty, and wealthy patrons of the institution. It also serves to illustrate how free speech and press serve an important institutional function at private universities.

Chemerinsky further argues that censorship is not the means of fostering community in the private university, nor do communitarian interests dictate institutional concerns should always prevail in determining whether to protect offensive or embarrassing expression. More speech is better than less, he argues, and while private universities do have an interest in expressing their own messages of tolerance and inclusion—messages public institutions likely could not espouse—they should not be permitted to do so by silencing others.²⁰³ Ultimately, Chemerinsky writes, denying First Amendment protections to private-university students tolerates a violation of one of the fundamental values in American political culture.²⁰⁴

Other commentators argue that conceptualizing higher education as an essentially private activity immune from constitutional protection is part of a larger public-private distinction in American law that fails to acknowledge the power imbalances private parties can exercise over individuals in an increasingly privatized American culture. Daphne Barak-Srez critiques the traditional public-private distinction as “really another form of Lochnerism,”²⁰⁵ a reference to the Supreme Court’s ruling in *Lochner v. New York*.²⁰⁶ The Court in *Lochner* invalidated a New York law setting a maximum number of hours that bakers could work because it violated the constitutional right of bakers to make contracts with their employers. Underlying the Court’s reasoning was its belief that individual employees could negotiate terms of employment on equal footing with private employers.

203. *Id.*

204. Chemerinsky, *The Constitution and Private Schools*, *supra* note 18, at 281.

205. Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1186 (1995).

206. 198 U.S. 45 (1905).

The critique of this narrow view of the power of the private sector has reached into Supreme Court jurisprudence only in dissent. For instance, Justice William Brennan argued in dissent in *San Francisco Arts & Athletics v. United States Olympic Committee* that the traditional limitations of the Constitution's reach against private power "would be most imprudent, for it would freeze into law a static conception of government, and our contemporary theory of government action would cease to resemble contemporary experience."²⁰⁷

Given the level of control private universities have over their students' lives, the traditional role of higher education in facilitating the marketplace of ideas, and the public function of higher education in nourishing American society, it is clear a private university is not simply another private actor whose constitutional interests should always prevail in a conflict with others over free-expression. The next section of the article sets out a proposal for recognizing a limited First Amendment right for students at private institutions.

III. CONCLUSION: A PROPOSAL FOR LIMITED FIRST AMENDMENT PROTECTION FOR STUDENT JOURNALISTS AT PRIVATE UNIVERSITIES

Any articulation of a federal First Amendment right for students and faculty at private universities faces several daunting challenges. Not only does such an argument go against existing doctrine, it also admittedly runs against the grain of a conservative judiciary that in recent years has privileged more private behavior as being beyond the reach of the Constitution. One reason for this judicial unwillingness can perhaps be found in the nature of the arguments of free-expression advocates. Many advocates for First Amendment rights on private university campuses argue the right should be as extensive as that granted to students at public institutions.²⁰⁸ Thus we have a divide of propositions on the question; critics of existing doctrine often argue the rights of individuals should be paramount to those of private educational institutions, while supporters argue institutional rights should always prevail.

But the First Amendment is not always an "all or nothing" proposition. While so-called "political" speech is granted the highest possible level of protection from government

207. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 549 n.1 (1987) (Brennan, J., dissenting).

208. See Chemerinsky, *The Constitution and Private Schools*, *supra* note 18, at 286-87 (advocating for extending First Amendment rights to private campuses). See also Siegel, *supra* note 74, at 1387-94 (arguing First Amendment protections be applied to private universities); Schubert, *supra* note 96, at 352 (arguing students at private universities should have First Amendment protections).

interference,²⁰⁹ other forms of speech, most notably “commercial” expression, are granted limited First Amendment rights in recognition of the need to balance the rights of speakers against other important government interests.²¹⁰ Certainly, private institutions of higher education have important interests—such as the articulation of communitarian, political, or religious values—that public institutions cannot hold. Even though American higher education has become more secularized during the past century, private institutions should have latitude to communicate their values to prospective students and parents, donors, alumni and the public. Accordingly, those interests should be considered in the balancing of interests that would accompany a First Amendment claim against a private institution.

Rather than permitting private university officials to censor student media at will, an approach more consistent with the values of higher education and democracy would be to examine the competing interests in a free-expression claim at a private university. Such a balancing approach pits the free-press interests of student journalists against the legitimate pedagogical and philosophical interests underlying the educational missions of private universities. Thus, private university officials should be granted some level of deference in regulating speech and publication that would undermine the legitimate and stated mission of the university.

For example, a sincere desire on the part of university officials to protect marginalized students from personal harassment should be entitled to deference. Limitations on speech and press that flow from an institution’s need to indoctrinate students for religious training should also be entitled to deference. Seminaries, for example, often require subordination of student and faculty opinion to the “received wisdom” of the faith. The balancing advocated here would respect that institutional need

209. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). *N.Y. Times v. Sullivan* is the landmark libel case in which the Supreme Court brought the law of libel under the umbrella of the First Amendment for the purpose of strictly scrutinizing libel claims by public officials. *Id.* Justice Brennan wrote: “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 270.

210. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1973) (holding that government may regulate nonmisleading commercial speech, which includes most advertising, to advance substantial government interests in protecting consumers and promoting accurate advertising and marketing communication). *But see* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (extending protection for truthful commercial speech, holding that government may regulate it only to advance a compelling government interest).

and insulate it from constitutional scrutiny. Indeed, some defenders of expression rights at private universities recognize that an unlimited First Amendment right would clearly prevent some institutions from fulfilling their missions. For example, Hyde and Fishman noted the Collegiate Speech Protection Act would have exempted universities that “have undertaken a unique and special mission to preserve and propagate religious truth and morality in a secular world.”²¹¹ Examples of such institutions exempted from the bill were schools or departments of divinity; universities that required students, faculty, and employees to be members of, or espouse a personal belief in, a religion that controls the institution; or schools explicitly stating in their mission statements a commitment to the doctrines of such a religion.²¹² A central idea in such institutions is that students entering the university understand they are entering an environment in which freedom of speech and press, as conceptualized by the First Amendment, is not applicable.

Most private institutions, however, do not acknowledge or make clear any differences that distinguish their campuses from public universities as far as rights of free expression are concerned. Absent such an acknowledgement or promulgation, private-university officials should not be permitted to silence speech that is “merely unpopular or offensive to the authorities.”²¹³ The scenarios sketched at the beginning of this article all involved attempts by school officials to eliminate embarrassing speech that did not implicate the educational missions or values of the institution. In such instances, the scale should tip in favor of students who seek to inform the public about the workings of the institution.

Helpful to a student journalist’s case would be evidence the university has granted students freedoms similar, if not identical, to those granted to students at public universities. Such evidence could be found by examining mission statements,²¹⁴ matriculation agreements, faculty and student handbooks, student-media

211. Hyde & Fishman, *supra* note 183, at 1498.

212. *Id.* at 1499 (quoting U.S. DEP’T OF HEALTH, EDUCATION AND WELFARE, EXPLANATION OF FORM #639A, at 4 (1977)). As Hyde and Fishman note, the definition of such institutions “is taken almost word for word from Title IX of the Education Amendments of 1972.” *Id.* at 1499, n.146.

213. O’Neil, *supra* note 64, at 192.

214. While mission statements of private institutions vary, many make reference to a spirit of free inquiry on campus that are virtually identical to those found at public institutions. For example, the mission statement of Simpson College, the employer of the author of this paper, bills the institution as supporting a “teaching and learning process [which enables] students . . . to develop critical intellectual skills [by which they may] grow as free, responsible [and] fulfilled individuals in the world of family, work, service and scholarship.” SIMPSON COLLEGE GENERAL CATALOG 6 (2001-2003).

charters or other statements on academic freedom.²¹⁵ Few, if any, universities proclaim a right to censor, or even regulate speech in their promotional materials or policies, leading most students to assume their rights are similar, if not identical, to the rights of students at public universities. Constitutional law should reflect this common understanding.

When journalistic and institutional interests clash, the approach of the New Jersey Supreme Court in *State v. Schmid*²¹⁶ could be modified to provide a method by which the interests of the student press could be balanced against those of the private university. While *Schmid* dealt with the distribution of political leaflets on a private campus, the questions in the *Schmid* inquiry could easily be adapted for use with the student press:

- What is the normal function of free expression on the campus?

Does the institution enshrine values, explicitly or implicitly promoting a spirit of free inquiry and expression? Or are students and faculty admonished to subordinate free-expression interests to other institutional concerns?

- What is the nature and extent of the students' invitation to speak and write freely on campus?

Do college policies and procedures grant students the right to speak and write on matters of institutional concern? The existence of an academic or student-media "bill of rights" would indicate the institution has implied that it will respect the rights of student journalists and others to comment on and dissent from the dominant powers of the institution. The existence of policies to the contrary would indicate that the institution has not desired to abandon, in Kennedy's words, governance "by policies aimed at infusing the student body with the college's overarching religious or ideological commitments."²¹⁷

- What is the compatibility of free-speech interests with the

215. University catalogs and other promotional materials often make reference to student "freedoms" that, at the very least, imply that students will enjoy the same rights as those granted to students at public institutions. For instance, the Simpson College catalog notes:

Simpson seeks to provide a climate of learning in which students may identify and accomplish their own goals within the context of a dynamic academic community. The College's educational programs rest on the conviction that creative self-realization, sensitivity to values and issues, knowledge of our heritage, and a critical awareness of the relationship of the individual to society are best engendered by *freedom with responsibility*.

Id. (emphasis added).

216. 423 A.2d 615 (N.J. 1980).

217. Kennedy, *supra* note 72, at B2.

normal conduct of the university?²¹⁸

As noted in a comparison of the *Schmid* and *Tate* cases above,²¹⁹ not all private universities bill themselves as forums for the unrestrained debate of matters of public interest. A large number of private institutions specialize in training for religious vocations or specific job-related skills. The existence of a marketplace of ideas seems less essential to the conduct of such institutions, and they should be granted more deference in regulating speech on campus than should be non-profit institutions of the liberal arts and science, where the consideration of ideas is central to their missions.

Such a balance helps advance the legitimate pedagogical and philosophical value systems of some private institutions, while granting student journalists much wider discretion in publishing information of public interest but that university officials may easily suppress under the existing doctrine. As an added attraction for private universities, the granting of a First Amendment right of free press for students would absolve those institutions of liability for content in student publications. Whether private universities can be held liable for the publications of student journalists is uncertain. Public universities are generally held not liable because they lack the constitutional authority to review the content of student publications.²²⁰ However, at least one trial court has ruled a private university may well be liable for acts of student organizations over which it “has the power to exercise control,” even if it refuses to exercise such control.²²¹

Such a balance would also advance a Meiklejohnian interpretation of the First Amendment. Named for philosopher Alexander Meiklejohn, who argued for an absolutist interpretation of the First Amendment during post-World War II repression of leftist speakers on campuses and elsewhere, the approach argues

218. *Schmid*, 423 A.2d at 630.

219. *Supra* notes 142-57 and accompanying text.

220. See *Mazart v. State*, 441 N.Y.S.2d 600, 606 (Sup. Ct. 1981) (stating that no principal-agent relationship exists where the principal has no right of control over agent's actions, even when public university grants office space and janitorial services to student newspaper). See also *Milliner v. Turner*, 436 So. 2d 1300, 1302 (La. Ct. App. 1983) (holding that the Constitution only allows the state university to exercise advisory control over the paper and exempts the university from liability).

221. *Wallace v. Weiss*, 372 N.Y.S.2d 416, 422 (Sup. Ct. 1975). The trial court concluded that the nature and extent of the University of Rochester's liability for content of a magazine created by students was a matter for a jury to decide at trial. Indeed, one commentator has argued that vicarious liability should be imposed on private universities for the actionable speech of their students because they are not barred by the First Amendment from censoring student media. See *Tort Liability of a University for Libelous Material in Student Publications*, 71 MICH. L. REV. 1061, 1083 (1973) (explaining when vicarious liability applies to student newspapers).

that the purpose of the First Amendment is to protect speech to ensure the existence of a viable public sphere in which self-government can take place.²²² Initially, the Meiklejohnian theory applied only to speech directly connected to the activities of government, but he eventually developed the theory to encompass four broad classes of speech deserving of the fullest level of First Amendment protection.²²³ One of the four classes was speech that takes place on the college campus.

Education, in all its phases, is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen. Freedom of education is, thus, as we all recognize, a basic postulate in the planning of a free society.²²⁴

Simply put, the private higher educational institution is unlike most other private owners of property. It dedicates itself to enlightening its students, promoting the exchange of ideas among individuals and groups, and providing intellectual forums for the discussion of issues of public concern. In many instances, the general public is invited to participate. Also, an unfettered student press is clearly a crucial element in the pursuit of these goals on a private campus. Indeed, when one combines the factors above with the variety of justifications often provided for finding "state action" in the behavior of private discriminators, First Amendment values come even more into play.²²⁵ While the work product of student journalists often falls short of their professional counterparts in terms of quality and judgment, constitutional values dictate the First Amendment should protect their work at least in some instances.

The important point is that there must be respect for speech and press rights in the absence of a significant and articulated institutional interest. As Chemerinsky put it, "[i]nstitutions still can express their own messages, they just cannot do so by silencing others."²²⁶ This maxim holds true at both public and private universities. As one critic of existing doctrine, Elizabeth Mertz, has argued, "[i]f a scholar [at] a private university proposes

222. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 17 (1948).

223. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.

224. *Id.* at 257. The other classes of speech that Meiklejohn would protect absolutely are philosophy and science, literature and the arts, and public discussion of public issues. *Id.*

225. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 849 (1982) (Marshall, J., dissenting) (arguing in dissent, Justice Thurgood Marshall stated that the presence of a combination of state-action indicia should be sufficient to extend constitutional protections to private actors, even if no one indicator is compelling enough to conclude that state action exists).

226. Chemerinsky, *More Speech is Better*, *supra* note 18, at 1642.

an unconventional but potentially enlightening theory and is censored, our country is no less deprived of enlightenment because a private rather than a public university acted as censor.²²⁷

227. Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 526 (1988).

