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Free Speech at Private Universities

KELLY SARABYN*

I. INTRODUCTION

The vast majority of universities in the United States promote themselves as institutions of free speech and thought, construing censorship as antipathetic to their search for knowledge. Their handbooks and policies declare that students and faculty have the right of free speech,[1] but surprisingly, most of those same colleges also have policies that explicitly restrict speech. University handbooks commonly contain policies that prohibit offensive and uncivil speech, require administrative approval of flyers and publications, or cordon public speech to a small area of the campus.[2] At public colleges, the First Amendment solves the conflict between a university's policies promising free speech and its speech-restrictive policies by rendering the speech-restrictive policies unconstitutional.[3] Private colleges, on the other hand, are not state actors, and thus, the First Amendment does not stop them from enacting speech-restrictive policies.[4]

Congress recently passed an aspirational resolution stating that "an institution of higher education should facilitate the free and open exchange of ideas," but this aspiration does not legally bind private universities—it merely expresses Congress's opinion on what the nation's universities ought to do.[5] In contrast, California's Leonard Law[6] requires that all private, nonsectarian universities follow the dictates of the First

*Justice Robert H. Jackson Fellow, Foundation for Individual Rights in Education. B.A., University of Virginia, 2003; J.D., Yale Law School, 2007. I would like to thank Roderick Bates, Greg Lukianoff, Tim Nuccio, Azhar Majeed, and Will Creeley for their comments on the article.

1. *See*, *e.g.*, Carnegie Mellon University's Policy on Freedom of Expression, http://www.cmu.edu/policies/documents/FreeSpeech (last visited Dec. 13, 2009).

2. *See*, *e.g.*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2009, 20 (2009), *available at* http://www.thefire.org/Fire_speech_codes_report_2009.pdf.

3. *See*, *e.g.*, *id.* at 11.

4. *See*, *e.g.*, *id.*

5. Higher Education Opportunity Act, 20 U.S.C. § 1011a(a)(2)(C) (2006).

6. CAL. EDUC. CODE § 94367 (West 2008).

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Amendment and, therefore, refrain from restricting any speech that would be protected on a public campus.[7]

The Leonard Law solves the conflict between speech-protective and speech-restrictive policies by imposing the principle of free speech on all nonsectarian universities. Though this vindicates the liberal ideal of free speech, it impinges on a different liberal ideal—the right to private association.[8] The Leonard Law prohibits private, nonsectarian universities from designing their programs in a way that restricts free speech in favor of other values of their choosing, which as private institutions, they should presumptively have the right to do.[9] In its aspirational resolution that urged institutions of higher education to allow free speech, Congress also noted, without offering any particular reconciliation, that its endorsement of free speech on university campuses should not be interpreted in a way that infringes on constitutional rights of association.[10]

To address the conflict of policies at private universities, contract law offers the best solution because it can protect the liberal ideal of universities as free speech institutions without sacrificing the right of private association. Courts have grappled with how to adjudicate legal disputes between students and private universities, but most courts that have addressed the issue have, at least in part, relied on a contractual paradigm, with the student handbooks and codes constituting an implied part of that contract.[11]

Further, the interpretation of conflicting policies should be guided by the reasonable expectations of the student. The majority of higher education institutions in America are liberal arts or research colleges,[12]

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7. § 94367.

8. *See*, *e.g*., Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006). In *Rumsfeld*, a coalition of law schools argued that the government's forcing them to accommodate military recruiters on campus violated their right of private expressive association because the military discriminated against homosexuals, a position the schools strongly opposed. *Id.* The Supreme Court held that merely allowing recruiters on campus does not interfere with schools' ability to develop or express their messages. *Id.* at 174–75; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). The Court held the government could not force the Boy Scouts to accept pro-homosexual scout leaders because doing so would interfere with the Boy Scouts' ability to develop and express their message, which was anti-homosexuality. *Id.* at 644.

9. *See generally* Craig B. Anderson, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171, 212–13 (1992) (discussing how the First Amendment typically only applies to state actors, not private institutions).

10. Higher Education Opportunity Act, 20 U.S.C. § 1011a(a)(2)(F) (2006).

11. *See*, *e.g*., Mangla v. Brown Univ., 135 F.3d 80 (1998); Warren v. Drake Univ., 886 F.2d 200 (1989).

12. *See* NAT'L CTR. FOR EDUC. STATISTICS, NUMBER OF EDUCATIONAL INSTITUTIONS BY LEVEL AND CONTROL OF INSTITUTION: SELECTED YEARS, 1980–81 THROUGH 2004–05 (2006), *available at* http://nces.ed.gov/programs/digest/d06/tables/dt06_005.asp.

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which generally foster free speech and thought. This practice arises from the long-standing liberal belief that allowing people to speak, debate, and discuss freely is more conducive to the acquisition of knowledge than top-down censorship.[13] As a result of America's strong commitment to free speech and the widely accepted understanding that institutions of higher education function as society's premier seekers of knowledge, a reasonable student would expect to have the ability to speak freely on a liberal arts or research campus. Thus, when a liberal arts or research college enacts both speech-protective and speech-restrictive policies, courts should interpret the contract as protecting free speech. This solution preserves free speech on most of America's campuses but leaves private universities the option of repudiating that expectation should they choose to clearly and publicly prioritize other values, such as protecting minorities from hate speech.

This article will first demonstrate that the majority of elite private universities advertise their programs prominently as protecting free speech and at the same time maintain policies that restrict their students, donors, and faculty's speech.[14] As a result, students, donors, and faculty reasonably understand that they have entered a particular contractual arrangement with the college but that the college then fails to uphold its contractual obligations. Students, for example, might discover that the college will regulate their speech on campus only after they have declined other offers and paid their tuition. Colleges, therefore, may profit from their duplicity by touting different policies to different interest groups.

The contradictions in college policies collectively impose an even greater harm on society. As the Supreme Court has long recognized, the pursuit of knowledge remaining free and open in institutions of higher education is integral to the nation's progress.[15] The selective censorship of speech on campus impairs this goal. By lacking clear policies, colleges make instigating reform difficult for students and faculty, and this can leave the appearance of a consensus on campus that may not exist.

13. *See*, *e.g*., Healy v. James, 408 U.S. 169, 180–81 (1972).

14. *See*, *e.g*., FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 19.

15. *See*, *e.g*., Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stating that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) (stating that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation").

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Buried policies proscribing hate speech,[16] for example, may not actually have the support of the majority of members in the institution.

This article will then examine the legal options for solving the widespread problem of conflicting speech policies at private colleges, arguing that the contractual framework is the best option, as it recognizes private institutions' right to prioritize values other than free speech and students, donors, and faculty's right to know the structure of the program in which they choose to invest. This vindicates a college's right of free association[17] and the students, donors, and faculty's right to know which rights, if any, they will possess at the institution.

Faced with the legal obligation to clearly state whether their programs restrict speech, most liberal arts and research colleges will probably abandon their speech-restrictive policies and maintain their policies guarantying free speech.[18] However, a limited demand appears to exist for speech-restrictive universities as they reflect an older, values-based conception of the university.[19] The appeal of the contract framework is that it allows for experimentation across institutions, and, as a result, institutions can embrace different priorities as long as those priorities are transparent.

II. CONFLICT OF UNIVERSITY POLICIES

Free speech at the nations' universities has a long lineage.[20] In a 1957 plurality opinion, Chief Justice Warren stated, "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[21] By 1972, the Court had affirmed this line of reasoning, writing,

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16. *See*, *e.g.*, EMORY UNIV., *Equal Opportunity and Discriminatory Harassment Policy* § 1.3.3, *in* POLICIES AND PROCEDURES (2007), *available at* http://www.thefire.org/public/pdfs/a441cd546b42809be47938044300292c.pdf (last visited Dec. 17, 2009).

17. *See* NAACP v. Alabama, 357 U.S. 449 (1958).

18. *See*, *e.g.*, YALE UNIV., *Free Expression, Peaceful Dissent, and Demonstrations*, *in* UNDERGRADUATE REGULATIONS 2009–2010 (2009), *available at* http://www.yale.edu/yalecollege/publications/uregs/expression.html#a.

19. *See infra* text accompanying notes 233–59.

20. *See* AM. ASS'N OF UNIV. PROFESSORS, JOINT STATEMENT OF RIGHTS AND FREEDOMS OF STUDENTS (1967), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm (with interpretative notes); AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), *available at* http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf.

21. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

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"The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[22] More recently, the Court reaffirmed this principle, asserting, "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[23]

Although free speech at American universities has been protected over the years, it has also been suppressed at times. In the past, the devotion to free expression on university campuses was endangered most notably by a fear of communist and other groups that were perceived as undermining traditional American values,[24] but the policies that restrict speech on campuses today are largely explained by other factors. First, out of a concern for minorities, women, and other historically disadvantaged groups' comfort on campus, many universities have enacted regulations banning speech offensive to those groups.[25] Such restrictions follow legal scholarship, arguing that the First Amendment should cease to protect "hate speech."[26] Second, universities increasingly see themselves as businesses needing to attract funds from students, donors, and alumni, and thus, they increasingly seek to manage their images and to avoid even the appearance of controversy or impropriety.[27] To avoid such appearances, universities may use tactics that include restricting public expression to tiny "free-speech zones,"[28] proscribing offensive or unciv-

22. Healy v. James, 408 U.S. 169, 180–81 (1972).

23. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).

24. *See*, *e.g.*, *Healy*, 408 U.S. 169 (prohibiting a college from removing a radical leftist student group from campus); *Sweezy*, 354 U.S. 234 (preventing state legislature from questioning a college professor about his allegedly communist views).

25. *See*, *e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 358 (1991) (arguing colleges have enacted regulations on hate speech to prevent racist incidents).

26. *See*, *e.g.*, Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992) (arguing the First Amendment should not protect hate speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (arguing for hate speech regulation).

27. *See*, *e.g.*, DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION (2003); ERIC GOULD, THE UNIVERSITY IN A CORPORATE CULTURE (2003).

28. *See*, *e.g.*, Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1 (2005) (discussing campus speech zones); Joseph D. Herrold, Note, *Capturing the Dialogue: Free Speech Zones and The "Caging" Of First Amendment Rights*, 54 DRAKE L. REV. 949 (2006) (discussing free-speech zones); Commentary, *It's Called "Free Speech"*, WASH. TIMES, Mar. 23, 2007,

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il speech,[29] and requiring prior approval of flyers, student publications, and protests.[30]

Universities often seek to avoid the negative publicity that can arise from allowing controversial and offensive speech on their campuses, but at the same time, they realize removing free speech guarantees can also attract negative publicity.[31] This may be one reason why so many schools continue to maintain contradictory policies regarding free speech. The Foundation for Individual Rights in Education surveyed the publicly available policies[32] of all 110 private universities on the 2008 U.S. News' rankings of "50 Best Liberal Arts Colleges" and "100 Best National Universities."[33] Seventy of those universities—a full sixty-four percent—promoted their programs as institutions of free speech and thought, while also maintaining policies that clearly and substantially restricted speech.[34] The speech-restrictive policies most frequently prohibited offensive or uncivil speech, particularly when the speech related

at A18 (discussing Georgia Tech's repressive free-speech zone); Editorial, *Restrictions Overreach*, USA TODAY, May 27, 2003 (detailing prevalence of free-speech zones); Susan Kinzie, *U-Md.'s 'Marketplace of Ideas' Not for Everyone, Court Rules*, WASH. POST, Sept. 18, 2005, at C4 (discussing the use of free-speech zones at the University of Maryland); Tamar Lewin, *Suit Challenges a University's Speech Code*, N.Y. TIMES, April 24, 2003, at 25 (covering lawsuit challenging Shippensburg University's free-speech zone); Mary Beth Marklein, *On Campus: Free Speech for You but Not for Me?*, USA TODAY, Nov. 3, 2003, at 01A (covering the use of free-speech zones on campus); Jenna Russell, *UMass's Effort to Control Protests Spurs More Criticism*, BOSTON GLOBE, Feb. 3, 2005, at B4 (use of free-speech zones on campuses across the country, focusing on the University of Massachusetts).

29. *See*, *e.g.*, DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS (2005); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 147 (1998);ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 9 (1997).

30. *See*, *e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (overturning a university's requirement that students acquire a permit at least two business days before engaging in protected speech); Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 577–78 (S.D. Tex. 2003) (overruling permit requirement for student speech as giving too much discretion to university officials); Andy Kroll, *Policy Raises Free Speech Questions*, MICH. DAILY, Feb. 4, 2008 (the University of Michigan considering policy that would require approval to distribute or post any print material).

31. Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 367–68 (2001) (finding college administrators calculate negative publicity arising from regulating speech in their analysis of whether to regulate speech).

32. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2. The actual school policies are also available online. *See* FIRE: Speech Codes, http://thefire.org/spotlight/ (last visited Dec. 20, 2009).

33. *Best Liberal Arts Colleges*, U.S. NEWS & WORLD REPORT, Aug. 27, 2007, at 118, 118–20; *Best National Universities*, U.S. NEWS & WORLD REPORT, Aug. 27, 2007, at 114, 114–16.

34. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 4.

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to historically-disadvantaged groups, such as African-Americans or women.[35]

Columbia University, for example, had a policy stating, "While the University as a private institution is not subject to the constitutional provisions of free speech . . . the University by its nature is dedicated to the free expression of ideas . . . ."[36] This written policy was supported by Columbia's repeated public portrayals of itself as an institution dedicated to free expression.[37] For instance, when a group of students prevented an anti-illegal immigration speaker from giving a lecture by storming the stage, Columbia condemned the students' actions, explaining, "This much is a matter of core principle at Columbia: that freedom to speak, to pursue ideas and to hear and evaluate viewpoints totally objectionable to one's own is an essential value to this university, and indeed, to our civil society."[38]

When Columbia was publicly criticized for inviting Iran's President Mahmoud Ahmadinejad to give a talk at the school, Columbia's President Lee Bollinger responded by issuing a statement. The statement asserted:

> Columbia, as a community dedicated to learning and scholarship, is committed to confronting ideas[,] . . . [and] this will bring us into contact with beliefs many, most or even all of us will find offensive and even odious. We trust our community, including our students, to be fully capable of dealing with these occasions, through the powers of dialogue and reason. . . . [This commitment] arises from a deep faith in the myriad benefits of a long-term process of meeting bad beliefs with better beliefs and hateful words with wiser words. That faith in freedom has always been and remains today our nation's most potent weapon against repressive regimes everywhere in the world.[39]

35. *See generally id.* at 17–20 (discussing harassment as excluded from First Amendment protection).

36. COLUMBIA UNIV., RULES OF UNIVERSITY CONDUCT, XLIV, *available at* http://www.thefire.org/pdfs/2a3813071c96369daaa04d5660987f1c.pdf.

37. *See*, *e.g.*, Elizabeth Redden, *The Complications of Free Speech*, INSIDE HIGHER EDUC., Oct. 18, 2006, http://www.insidehighered.com/news/2006/10/18/columbia.

38. *See id.*

39. Lee Bollinger, *Statement About President Ahmadinejad's Scheduled Appearance*, COLUMBIA NEWS, Sept. 19, 2007, http://www.columbia.edu/cu/news/07/09/ahmadinejad2.html (last visited Dec. 17, 2009).

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This ringing endorsement of free speech at Columbia—one among many—would surely leave prospective students, donors, and faculty with the belief that Columbia provides its community members with the right to speak freely. Not only are the statements unambiguous, the ideal Bollinger articulated forms the bedrock principle of a liberal arts or research college and so conforms to the reasonable expectations potential community members would have of an institution such as Columbia.

Despite Columbia's open endorsement, next to the same written policy that explicitly promised free speech, Columbia listed policies that restrict speech. For example, their harassment policy prohibited, among other things, "verbal or physical conduct of a sexual nature" that has the "purpose or effect" of "creating an intimidating, hostile, demeaning *or* offensive academic or living environment."[40] In a list of examples of what can constitute sexual harassment, Columbia included "love letters, obscene emails" and "sexist jokes or cartoons."[41]

Columbia guaranteed its students that they would confront "offensive and even odious" ideas in its open-community of learning, but at the same time, in its written policies, it prohibited students from creating "offensive academic . . . environment[s]" through their speech.[42] Indeed, Columbia has not hesitated to suppress student speech. In 2006, for example, Columbia suspended the Men's Hockey Club for posting "offensive" recruitment flyers that carried the slogan, "Don't be a pussy."[43]

Colorado College, another private institution that guaranteed its students free speech,[44] similarly punished two students for posting a parody of a Feminist and Women's Studies' flyer.[45] The parody contained facts and quotes revolving around stereotypical masculine references, such as "tough guy wisdom," "chainsaw etiquette," and the shooting range of a

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40. COLUMBIA, UNIV., COLUMBIA UNIVERSITY, EQUAL EDUCATIONAL OPPORTUNITY AND STUDENT NONDISCRIMINATION POLICIES AND PROCEDURES ON DISCRIMINATION AND HARASSMENT 1 (2006), *available at* http://www.thefire.org/pdfs/646c1edd04edbbd1225a26c197e0afcf.pdf [hereinafter STUDENT NONDISCRIMINATION POLICIES] (emphasis added).

41. COLUMBIA UNIV., COLUMBIA UNIVERSITY HEALTH SERVICES, SEXUAL HARASSMENT GENERAL INFORMATION 1 (2008), *available at* http://www.thefire.org/public/pdfs/7395fb23e13914e1fc111f2da7498bd5.pdf.

42. *See* Redden, *supra* note 37; STUDENT NONDISCRIMINATION POLICES, *supra* note 40.

43. Michael O'Keeffe, *'Pussycat' Spat Roars at Columbia*, N.Y. DAILY NEWS, Oct. 8, 2006, *available at* http://www.thefire.org/index.php/article/7353.html.

44. Vincent Carroll, *CC's Free Speech Fears*, Rocky Mountain News (Denver), Apr. 08, 2008, at 27.

45. *Id.*

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sniper rifle;[46] it lacked any element that could be construed as a threat or an obscenity.[47] Nevertheless, the college punished the students because it found the flyer threatening and demeaning.[48]

This occurred despite the fact that Colorado College's written policies guaranteed free speech for its students. Its policies explained that Colorado College is a place where "controversial points of view may be freely expressed," as "[f]reedom of thought and expression is essential to any institution of higher education."[49] Indeed, the policies further stated that "[n]o viewpoint or message may be deemed so hateful that it may not be expressed."[50]

Just like Columbia and sixty-nine other private colleges on the U.S. News' rankings,[51] Colorado College's policies were janus-faced, containing both guarantees of free speech and policies that restrict speech.[52] After guaranteeing free speech, Colorado College's policies prohibited speech that "produces ridicule, embarrassment, harassment, intimidation or other such result."[53]

Such contradictory policies leave students and faculty at private colleges vulnerable to unexpected punishments. They also chill some measure of speech while simultaneously enabling colleges to reap the benefits of portraying themselves as institutions of free speech.

III. CLASH OF LIBERAL IDEALS: FREE SPEECH AND THE RIGHT TO PRIVATE ASSOCIATION

The conflict between speech-protective and speech-restrictive policies occurs at public,[54] as well as private universities. As speech-restrictive

46. See THE MONTHLY BAG, *available at* http://www.thefire.org/pdfs/037438c8219a336c347bcc601d9c229a.pdf, which parodied the Feminist and Gender Studies Interns, THE MONTHLY RAG, *available at* http://www.thefire.org/pdfs/66b48367dce00830b700437a788de2ac.pdf.

47. THE MONTHLY BAG, *supra* note 46.

48. Carroll, *supra* note 44.

49. COLO. COLL., *Anti-Discrimination Policy*, *in* PATHFINDER 1 (2008).

50. *Id.*

51. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 4.

52. *See*, *e.g.*, *id.*; *see also* COLO. COLL., *Student Conduct Policies: Respect: Abusive Behavior*, *in* PATHFINDER 1, 1 (2008), *available at* http://www.thefire.org/pdfs/46bee51f5270ad4d669246aa82c0069c.pdf.

53. COLO. COLL., *supra* note 52, at 1.

54. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 4, fig.3 (stating 77% of public universities have policies restricting speech).

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policies on public campuses violate the First Amendment, however, one side of the equation is void, and thus, the legal conflict disappears at public universities.[55] Some states have attempted to clear up this conflict for private entities—both universities and other organizations—but even these good-faith efforts have unintended consequences.

California enacted its Leonard Law, which requires all nonsectarian private universities to obey the dictates of the First Amendment,[56] thereby imposing the public university solution on private universities. Although the Leonard Law vindicates free speech, it also potentially restricts universities' right to private association.[57] But whether the government can force private organizations to accept members who speak in opposition to the organization's views is unclear.[58]

Stanford University, for example, had a harassment policy that proscribed speech that "is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin . . . ."[59] Students eventually sued Stanford under the Leonard Law for issuing this policy.[60] In response to the suit, Stanford asserted, among other

55. The majority of speech-restrictive policies at public colleges challenged in federal court have been struck down as unconstitutional. *See*, *e.g.*, DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008) (declaring Temple University sexual harassment policy facially unconstitutional); Lopez v. Candaele., CV 09-0995-GHK (FFMx) (C.D. Cal. Sept. 16, 2009), *available at* http://www.telladf.org/UserDocs/LopezMTRdenial.pdf (enjoining enforcement of sexual harassment policy due to overbreadth); Coll. Republicans at San Francisco State Univ. v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding the university's sexual harassment policy unconstitutional because of the requirement that public areas in the university must serve or benefit the university community); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy); Booher v. Bd. of Regents, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy unconstitutional); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (finding the university harassment policy facially unconstitutional); UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

56. CAL. EDUC. CODE § 94367 (West 2008).

57. *See*, *e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that preventing the Boy Scouts from discriminating on the basis of leadership applicants' viewpoint violates the organization's members' right to private association).

58. *See*, *e.g.*, Gay Rights Coal. v. Georgetown Univ., 536 A.2d 1, 24 (D.C. 1987) (holding that requiring Georgetown University to grant recognition to a student club endorsing homosexuality would violate its expressive rights).

59. Corry v. Leland Stanford Jr. Univ., No. 740309, 1 (Cal. Sup. Ct., Feb. 27, 1995), *available at* http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm.

60. *Id.* at 3.

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claims, that the Leonard Law's enjoining Stanford from enforcing its harassment policy would violate Stanford's constitutional rights to free speech, academic freedom, and private association.[61]

A private association's inability to exclude individuals who express beliefs contrary to the association's can interfere with the association's free speech and association rights. The Supreme Court has held that forcing an association to allow individuals bearing a message into an association's parade violates the association's free speech rights because observers will believe the association endorses that message.[62] The Court also has held that forcing an association to accept a leader who holds a belief contrary to its own infringes on the association's right of expressive association because it interferes with its ability to form and express its message.[63] In contrast, the Court also has recognized that not all forced inclusions of members violate a private association's rights. A large private association composed of professionals to engage in acts of charity and to network, for example, had no right to exclude women, as including women did not infringe on the association's purpose or beliefs.[64]

The California court applied these principles when analyzing Stanford's claim that the Leonard Law was unconstitutional.[65] It rejected Stanford's free speech claim, asserting that the Leonard Law "simply does not restrict speech or ideas in any way; [Stanford has] every opportunity to express freely any views . . . . The Leonard Law does not chill the speech and expression of [Stanford], [which] can ardently and effectively express [its] intolerance for intolerance through wholly constitutional means."[66] Furthermore, the court reasoned that Stanford's harassment policy "has nothing to do with any of the four academic freedoms the Supreme Court has established,"[67] as the Leonard Law does not prevent Stanford from controlling its academic coursework, admissions, or residential activity; it only prevents Stanford from proscribing its students' speech on campus.[68]

61. *Id.* at 26–27.
62. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).
63. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000).
64. Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548–49 (1987).
65. *Corry*, No. 740309, at 34.
66. *Id.* at 34.
67. *Id.* at 35.
68. *See id.*

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The court found that Stanford's freedom of association claim failed for similar reasons.[69] Specifically, Stanford is a large institution that allows the public to walk its campus and submit applications for admissions.[70] Outside observers are unlikely to attribute students' private speech to the school, and the school possesses ample opportunity to disclaim such attribution.[71] The court declared that the key question was whether preventing Stanford from regulating its students' speech interferes with Stanford's purpose as an association or its ability to form and express its message.[72]

In response, the court made a judgment about Stanford as an institution and accepted the plaintiff students' argument that "the mission of [Stanford] is to provide its students with a comprehensive liberal arts education in which controversial ideas and presuppositions are subject to academic scrutiny, challenged by others in an effort to expand the critical reasoning skill of its students."[73] As such, Stanford could not plausibly argue that the state's forcing it to allow students to speak controversially on campus will interfere with Stanford's purpose as an association.[74]

In denying Stanford's academic freedom claim, the court assumed that the constitutional right to academic freedom is based on a particular understanding of the academic endeavor. In holding that academic freedom did not extend to Stanford's ability to restrict its students' speech outside the classroom, the court denied constitutional academic freedom protection for colleges that seek to provide a moral education.[75] The court's reasoning in reaching this conclusion was not entirely clear, but it seemed to rest both on the premise that the constitution only protects a university's mission to foster free debate and seek academic, as opposed to ideological truth, and its view that Stanford in particular was an institution that provided a liberal arts education, not an ideological education.[76] This leaves the possibility that the court would have struck a different balance if the university had been an ideological one that sought to provide a moral, as well as critical education. The Leonard

69. *See id.* at 39.
70. *Id.* at 40.
71. *Id.*
72. *Id.* at 41.
73. *Id.* at 37.
74. *See id.* at 38–39.
75. *See id.* at 30.
76. *See id.*

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Law is cognizant of this possibility, as it exempts colleges "that [are] controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization."[77] However, the Leonard Law does not extend this exemption to secular ideological schools, and the California court's treatment of Stanford's claim to partially fit that mold was too brief and failed to fully grapple with the difficult questions it raises.

Similarly, Massachusetts has recognized the difficultly of the freedom of association issue in trying to interpret its Civil Rights Act (MCRA),[78] which prohibits private parties from interfering with other citizens' constitutional rights.[79] In addressing an actress's claim that a private organization canceled her performance because of her unpopular political views—and thus interfered with her right to free speech—the court recognized that resolving her complaint presented a "very complex clash of rights."[80] Namely, preventing the private organization, a symphony orchestra, from expelling performers based on their views could illegitimately force the symphony to speak in a particular way.[81] The court found that "editorial judgments of newspapers, the speech-related activities of private universities, or the aesthetic judgments of artists"[82] are usually protected by the Constitution from state interference and that courts must sustain the "freedom of [such] mediating institutions."[83]

In a later case regarding the same law, a court held that a professor's claim that she was denied tenure at a private college because of her political beliefs could go forward under the MCRA.[84] The court acknowledged, without addressing the issue either way, that the defendant university might "later be able to advance constitutional defenses to [the plaintiff's] claim on the ground that any relief would punish them for their constitutionally protected expression."[85] The defendant's ability to assert constitutional defenses would be in accord with Supreme Court precedent that has recognized that private universities have free speech and expressive association rights that could be infringed by forcing them

77. CAL. EDUC. CODE § 94367 (c) (West 2008).
78. MASS. ANN. LAWS ch. 12, § 11H (2002).
79. ch. 12, § 11H.
80. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 906 (1st Cir. 1988).
81. *Id.* at 906.
82. *Id.*
83. *Id.* at 904.
84. *See* Karetnikova v. Trs. of Emerson Coll., 725 F. Supp. 73 (D.Mass. 1989).
85. *Id.* at 78.

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to accept members whose views they oppose.[86] Forcing the school to accept a professor who has views antithetical to its own could very well violate the school's right to expressive association by preventing it from regulating, forming, and expressing its own message.

The "complex clash of rights"[87] created by trying to impose the First Amendment obligations of public universities on private universities speaks in favor of a solution other than direct regulation. In contrast to direct regulation, contract law can compel private universities to live up to their promises of free speech and ensure that students, faculty, and donors will not be misled when deciding in which institutions to invest, but it also maintains the freedom of private universities to structure their programs as they see fit. It thus eliminates any concerns about private universities' constitutional right of expressive association.

IV. CONTRACT LAW AS THE SOLUTION TO CONTRADICTORY UNIVERSITY POLICIES

A. Contracts and Private Universities

Courts have not settled on a uniform approach to adjudicating disputes between a private university and its students or faculty. The most common approach and the one that provides the best framework for the various interests at stake in a dispute is to view it as a contractual relationship, with the schools' written policies and codes forming the main part of that contract.[88] Further, given that the contract is standardized and written by the university, courts that have adopted such an approach have usually interpreted it in accordance with the reasonable expectations of the student or professor.[89]

86. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (stating private schools have free speech and expressive association rights).

87. *Redgrave*, 855 F.2d at 906.

88. *See*, *e.g.*, Havlik v. Johnson & Wales Univ., 509 F.3d 25, 34–35 (1st Cir. 2007); Amaechi v. Univ. of Ky., No. 02-241-JHM, 2003 U.S. Dist. LEXIS 27231 (E.D. Ky. Sept. 30, 2003); Goodman v. President & Trs. of Bowdoin College, 135 F. Supp. 2d 40, 55 (D.Me. 2001); Dinu v. President & Fellows of Harvard Coll., 56 F. Supp. 2d 129, 130 (D.Mass. 1999); Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972) (stating the relationship between a student and a private university is contractual, with manuals and handbooks forming the terms of the contract); Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382 (Ill. App. Ct. 1993); Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000).

89. *See* Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 38–39 (D.Me. 2005).

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As one court explained, "It is held generally in the United States that 'the basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'"[90] In interpreting that contract and the ambiguities or contradictions within it, another court described the most commonly used method:[91] "The proper standard for interpreting the contractual terms is that of 'reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.'"[92] Additionally, traditional contract law provides that any ambiguities in a standardized contract should be interpreted against the drafter.[93]

Although the majority of courts that have addressed the situation have explicitly adopted the contractual approach at least in part, a minority of courts have strayed from it.[94] Still other courts have avoided defining the legal relationship between a private university and a student.[95] Courts have diverged from the contractual model out of a concern for university autonomy, particularly when disputes that invoke academic judgments are at hand. For example, Illinois recognizes the contractual nature of the relationship between a private university and its students but restricts judicial enforcement of that relationship by preventing courts from second-guessing academic judgments, such as a school's determination of whether a student meets its academic requirements.[96] Similarly, Minnesota allows a student to bring a breach of contract claim

90. Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) (quoting Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972)); *see also* Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 243 (D.Vt. 1994) (stating the school's policies and handbooks compose the terms of the contract); Ctr. Coll. v. Trzop, 127 S.W.3d 562, 568 (Ky. 2003) (finding university did not breach its contractual obligations to a student for failing to provide the student with due process that was not provided for in the school's handbook).

91. *See* Thornton v. Harvard Univ., 2 F. Supp. 2d 89 (D.Mass. 1998).

92. *Id.* at 94 (quoting Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998)); *see also* Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 652–53 (Ct. App. 2007) (applying the reasonable expectations standard).

93. *See* Restatement (Second) of Contracts § 206 (1981) (ambiguities in a standardized agreement interpreted against the drafter).

94. *See*, *e.g.*, Love v. Duke Univ., 776 F. Supp. 1070, 1075 (M.D. N.C. 1991).

95. *See*, *e.g.*, Saliture v. Quinnipiac Univ., No. 3:05cv1956, 2006 U.S. Dist. LEXIS 39326 (D.Conn. June 6, 2006); Schaer v. Brandeis Univ., 735 N.E.2d 373, 378 (Mass. 2000).

96. Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992).

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against a university as long as it does "not involve an inquiry into the nuances of educational processes and theories."[97]

With a few exceptions,[98] courts have not rejected the contractual model wholesale when a relationship between a private university and a student is involved. Instead, they have advocated a relaxed application of the contractual framework, as the judiciary should be "reluctant to interfere" with academic judgments[99] and should understand any contract in light of the "unique educational setting."[100]

Such courts advocate a vague hybrid approach that fails to specify particular legal rules governing the relationship. New York and New Jersey, for example, have referred to the relationship as containing elements of contract, resonating with the law of associations.[101] Additionally, in New York, courts require essential fairness to the student because of the one-sided nature of the relationship.[102]

In *Clayton v. Trustees of Princeton University*, one federal court's interpretation of New Jersey law[103] went further than the New Jersey state court's own interpretation and relied almost exclusively on the law of associations to adjudicate a student's claim against Princeton University.[104] Like other courts that rejected the wholesale contractual model, this decision arose out of a concern for "the unique role of a university and the need to maintain the institution's autonomy . . . ."[105]

The federal court stated that it would use a "balancing test to determine whether Princeton [was] bound by [its] established procedures."[106]

97. Gebremeskel v. Univ. of Minn., No. C9-02-183, 2002 Minn. App. LEXIS 870, at *7 (Minn. Ct. App. July 23, 2002) (quoting Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. Ct. App. 1999)).

98. *See*, *e.g.*, *Love*, 776 F. Supp. at 1075 (rejecting contract model, but noting even if a contract did exist, the plaintiff would lose his claim); Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413, 438 (D.N.J. 1985) (applying law of private associations); Amaya v. Mott Cmty. Coll., No. 186755, 1997 Mich. App. LEXIS 3817 (Mich. Ct. App. Mar. 7, 1997) (rejecting contract model without offering substitute); Maas v. Cornell Univ., 94 N.Y.2d 87, 94 (N.Y. 1999) ("Maas has failed to plead a cognizable breach of contract action. The University nowhere reflected an intent that the provisions of its Code would become terms of a discrete, implied-in-fact agreement . . . .").

99. Raethz v. Aurora Univ., 805 N.E.2d 696, 699 (Ill. App. Ct. 2004).

100. Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 243 (D.Vt. 1994).

101. *See*, *e.g.*, *Clayton*, 608 F. Supp. at 438 (applying law of private associations); Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 660 (N.Y. 1980) (recognizing law of associations as a potential approach to the relationship).

102. *Tedeschi*, 49 N.Y.2d at 660.

103. *See Clayton*, 608 F. Supp. at 438.

104. Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 271–72 (N.J. Super. Ct. App. Div. 1982).

105. *Clayton*, 608 F. Supp. at 438.

106. *Id.* at 436.

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The judge described the balancing test as weighing the university's reasons for abandoning its own written rules against the student's interest in maintaining a record free of official condemnation.[107] As the court found that the university followed its own written procedures in relevant part, the court did not shed light on what type of reasons would justify a university deviating from its own policies.[108]

Implementation of the balancing test and other deviations from the contractual model demonstrate the courts' general reluctance to interfere with a university's ability to pursue its unique societal function. As one court stated, "[P]rivate colleges and universities must be accorded a generous measure of autonomy and self governance if they are to fulfill their paramount role as vehicles of education and enlightenment."[109]

The same reluctance to interfere with the university's autonomy has influenced the judiciary's treatment of public colleges regarding their obligations under the First Amendment's guarantee of free speech[110] and the Fourteenth Amendment's guarantee of due process.[111] Concerning free speech, for example, courts will rarely second-guess a failing grade imposed upon a student's paper, even though it represents an official condemnation of the student's speech.[112] The university cannot assign grades for any speech-based reason whatsoever—such as on the basis of students' off-campus political speech—but courts generally will not question universities' academic judgments of their students.[113]

Deference to the university's academic judgment should not, however, affect the application of the contract model in the university context. University policies rarely guarantee students particular grades or guarantee professors tenure.[114] Instead, university policies establish procedures that insure due process and specify the rights students possess, the rules that govern the extracurricular space on campus, and the offenses

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107. *Id.*

108. *See id.* at 439.

109. State v. Schmid, 423 A.2d 615, 567 (N.J. 1980).

110. *See*, *e.g.*, Martinez v. Univ. of P.R., No. 06-1713, 2006 U.S. Dist. LEXIS 92925, at *10–11 (D.P.R. Dec. 20, 2006); Lovelace v. S. Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986).

111. *See*, *e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 215, 225 (1985) (writing that the courts must show deference to academic judgments).

112. Axson-Flynn v. Johnson, 356 F.3d 1277, 1291 (10th Cir. 2004) (stating professors assigning grades and regulating academic speech is normally not objectionable).

113. *See*, *e.g.*, *Ewing*, 474 U.S. at 225.

114. Colburn v. Trs. of Ind. Univ., 739 F. Supp. 1268, 1292 (S.D. Ind. 1990).

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that merit official condemnation, suspension, and expulsion.[115] Policies also promise the availability of particular degrees or courses, but discerning whether a university dropped a degree it promised would be available hardly requires academic judgment or theory.[116] Thus, the application of contract law rarely requires courts to second-guess a university's academic judgment or enter into the nuances of academic theory. Aversion to contract law on this basis is thus misguided.

Contract law does not require courts to interpret students' and faculty's expectations regarding grades and academic employment as part of a legal contract unless those expectations arise from written or oral policies.[117] Cognizable grade or academic employment claims center on whether the university followed its own stated procedures and guidelines.[118] This may include specified degree requirements, such as the number of courses and a minimum GPA, that prevent the university from denying a student a degree after a student completes all of the stated requirements.[119]

When students or professors lodge academic complaints with no basis in university policy, courts have no contractual basis for interfering.[120] As

115. *See*, *e.g.*, Doe v. Superintendent. of Schs. of Worcester, 653 N.E.2d 1088, 1097 (Mass. 1995).

116. *See*, *e.g.*, Cencor, Inc. v. Tolman, 868 P.2d 396, 400 (Colo. 1994) (recognizing contract claim for school's alleged failure to provide promised computer training); Malone v. Acad. of Court Reporting, 582 N.E.2d 54, 59 (Ohio Ct. App. 1990) (recognizing contract claim for school's alleged failure to uphold its promise of providing an accredited degree in paralegal studies).

117. Massachusetts courts have recognized this framework, writing that, as a result of the need for university autonomy in academic affairs, "in the absence of a violation of a reasonable expectation created by the contract, or arbitrary and capricious conduct by the university, courts are not to intrude into university decision-making." Berkowitz v. President & Fellows of Harvard Coll., 789 N.E.2d 575, 581 (App. Ct. 2003) (internal citations omitted); *see also* Schaer v. Brandeis Univ., 735 N.E.2d 373, 378 (Mass. 2000) (employing contract law to interpret contract terms of student handbook).

118. Lyons v. Salve Regina Coll., 565 F.2d 200, 202 (1st Cir. 1977) (student arguing that contract requires the dean to take the recommendation of the Grades Appeals Committee; court finding the reasonable expectation of the word recommendation is that it is not binding).

119. For example, one court explained, "Plaintiff does not point to a specific promise to, say, provide certain hours of instruction, state-of-the art facilities, one-on-one mentors, or particular courses. Unlike these obligations, [defendant]'s alleged promises about ethical conduct are subject to neither quantification nor objective evaluation." Gally v. Columbia Univ., 22 F. Supp. 2d 199, 207 (S.D.N.Y. 1998) (rejecting claim regarding the school's handling of other students' cheating).

120. A Pennsylvania court, for example, reasoned, "Appellant's brief fails to point to a single provision of the written contract between the university and its students that sets forth the obligations of members of a dissertation committee . . . . [A]ppellant's contention that failure to carry out their duties as committee members cannot stand unless linked to the written policies of the university." Swartley v. Hoffner, 734 A.2d 915, 919 (Pa. Super. Ct. 1999).

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one court explained in the context of a student challenging her failing a course simply because she objected to the instructor's substantive assessment of her performance:

> The educational contract between the student and the educational institution inherently and implicitly adopts the academic standards of the institution—including subjective or judgmental standards.
>
> That, indeed, is a critical element of the student's contractual bargain with the institution: he or she agrees to be judged academically according to the prevailing (or duly established) standards of academic performance. . . . Thus the court enforces the parties [sic] educational bargain by upholding the academic standards set by the academic professionals.[121]

This important point illuminates why courts do not need to refrain from enforcing university contracts to avoid infringing on universities' academic autonomy. Universities rarely provide a contractual basis for objecting to grades that were given based on academic criteria;[122] instead, the contract, if one exists, specifies that professors will assign grades on the basis of their academic judgment.[123] Often universities promise to refrain from making academic decisions based on certain explicit criteria—the race, sex, or religion of the student, for example.[124] Enforcement of such a provision, however, does not require courts to adjudicate academic standards. It simply requires courts to adjudicate, for example, whether a professor assigned a student's grade on the basis of the student's race.

Furthermore, courts' deviation from the contractual model ultimately results in greater interference with a university's institutional autonomy. For example, one federal court's interpretation of New Jersey's law of associations requires universities to establish "procedures for safeguarding" the interest a student has in remaining free from official condemnation and to justify any deviation from those procedures.[125] In using such a model, the court must decide whether the university has provid-

121. Bulloch v. State, 54 Ill. Ct. Cl. 292, 294 (Ct. Cl. 2002).
122. *See*, *e.g.*, Lachtman v. Regents of Univ. of Cal., 70 Cal. Rptr. 3d 147 (Ct. App. 2007).
123. *See*, *e.g.*, *id.*
124. *See*, *e.g.*, Ams. United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 876 (D.C. Kan. 1974).
125. Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413, 439 (D.N.J. 1985).

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ed procedures that are sufficiently fair and whether the university's reasons for deviating from those procedures are sufficient.[126] These judgments, based on unclear normative criteria, interfere with a university's autonomy more than a judgment of whether a university abided by its own policies. Courts that advocate these vague hybrid approaches present an even greater level of potential interference because they leave universities unable to gauge their legal obligations and vulnerable to judicial interference depending on a particular judge's sentiments as to what is fair in the university context.

Under the contractual framework, a private university may establish the policies it deems appropriate as long as it executes them in good faith.[127] In turn, students and faculty can expect the university to abide by its promises as reasonably understood. This strikes the proper balance between the university's right to act without undue judicial interference and students' right to receive their degree if they abide by the university's advertised terms.

B. Disclaimers and Promissory Estoppel

Some colleges have responded to the legal landscape by inserting small print disclaimers into their handbooks and policies.[128] These disclaimers state that the policies do not form a legal contract and that their terms and conditions can be changed unilaterally and at any time by the college.[129] Like most small print, such disclaimers are probably not read by prospective students, faculty, or donors.

Few courts have addressed the validity of disclaimers in this context. Of those that have, the majority have accepted their validity on the basis that the disclaimers make clear that the school did not intend to enter into a legal contract.[130] As one court stated, "A basic requisite of a contract is an intent to be bound, and the catalog's express language negates,

126. *See*, *e.g.*, Univ. Sec. Ins. Co. v. Koefoed, 775 F. Supp. 240, 243–44 (N.D. Ill. 1991).

127. *See*, *e.g.*, Henry v. Del. Law Sch. of Widener Univ., No. Civ. A. 8837, 1998 WL 15897 (Del. Ch. Jan. 12, 1998).

128. *See*, *e.g.*, Smith v. Voorhees College, No. 5:05-1911-RBH-BM, 2007 WL 2822266 (D.S.C. 2007).

129. *See*, *e.g.*, Reynolds v. Sterling Coll., Inc., 750 A.2d 1020, 1022–23 (Vt. 2000).

130. Truell v. Regent Univ. Sch. of Law, No. 2:04cv716, 2006 U.S. Dist. LEXIS 54294, at *18–19 (E.D. Va. July 21, 2006); Davis v. George Mason Univ., 395 F. Supp. 2d 331, 337 (E.D. Va. 2005); Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 663–64 (Ct. App. 2007); Ku v. State, 104 S.W.3d 870, 876 (Tenn. Ct. App. 2002); Law v. William Marsh Rice Univ., 123 S.W.3d 786, 794 (Tex. App. 2003).

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as a matter of law, an inference of such intent on the part of the university."[131] The decision to accept disclaimers as legally valid may leave students and faculty without any legal relief from schools that do not abide by their stated policies.

A fair number of courts have responded more reasonably to inserted disclaimers by providing some form of legal relief when schools violate their promises. Courts afford this relief under three different legal theories. The first theory finds the disclaimers unconscionable and, therefore, void.[132] For example, one school stated that it could change the amount of tuition at any time, even after the student had registered and paid for the semester.[133] The court found this unconscionable, writing, "It is inconceivable that the University could retain carte blanche authority to raise the tuition at any time during the semester for any amount it deems appropriate."[134]

Other courts have found that the disclaimer eliminates the existence of an express contract but not the existence of an implied contract.[135] The problem with allowing disclaimers to void the existence of an implied contract, one court argued, is that "neither the school nor the student would have a remedy" when "non-performance caused damage."[136] The court concluded that even with a disclaimer, an implied contract exists, because despite the disclaimer, a relationship between the private college and the student remains fundamentally contractual in nature.[137] In the student-private college relationship, the college "agrees to provide educational opportunity and confer the appropriate degree in consideration for a student's agreement to successfully complete degree requirements, abide by university guidelines, and pay tuition."[138]

An implied contract, in this context, does not differ greatly from an express contract. To interpret the terms and conditions of the implied contract, courts still turn to a college's handbooks and policies for guid-

131. Eiland v. Wolf, 764 S.W.2d 827, 838 (Tex. App. 1989).
132. Gamble v. Univ. Sys. of N.H., 610 A.2d 357, 361 (N.H. 1992).
133. *Id.*
134. *Id.*
135. *See*, *e.g.*, Southwell v. Univ. of the Incarnate Word, 974 S.W.2d 351 (Tex. App. 1998).
136. *Id.* at 356.
137. *Id.*
138. *Id.*

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ance.[139] Those explicit terms still form the basis for the reasonable expectations of students, faculty, and donors.[140]

Other courts have recognized that promissory estoppel can provide a viable legal claim against colleges that fail to abide by their policies.[141] Promissory estoppel remedies injustices that result from one party's reliance on another party's promises.[142] Rather than require an intent by the college to be legally bound, promissory estoppel only requires that the college "should reasonably have expected to induce the action or forbearance" of the student by making certain promises.[143] The clearer and more prominent the college's promises were, the less likely the college can escape liability by arguing that students did not reasonably rely on those promises in choosing to pay tuition and enroll.[144]

If a school disciplines, suspends, or expels students because, relying on the college's promises of free speech, they engaged in controversial speech, for example, students would likely suffer economic harm arising from lost tuition, room and board, employment offers, and graduate school admissions. Having promised free speech for its students and widely represented itself as guaranteeing free speech, a college should reasonably expect that students will rely on that promise when they decide to speak out on controversial issues. Thus, if the college punishes a student for engaging in such speech, the student should be able to successfully obtain a legal remedy under promissory estoppel or an implied contract theory, even if the college included a small disclaimer buried in its policies.

V. CONTRACT LAW AND THE FUNCTION OF THE UNIVERSITY

The contractual framework—as well as the promissory estoppel claim that rests on the same principles of promise, reliance, and harm—

139. *Id.*; *see also* Atria v. Vanderbilt Univ., 142 F. App'x 246, 255 (6th Cir. 2005) (holding, even with disclaimer, an implied contract exists that is defined in the university's catalogues, handbooks, bulletins, and other policies).

140. *See Southwell*, 974 S.W.2d at 356.

141. Brown v. Columbia Basin Cmty. Coll., No. 18755-1-III, 2001 Wash. App. LEXIS 987, at *21–22 (Wash. Ct. App. May 15, 2001); Hunter v. Diocese of Wilmington, 1987 Del. Ch. LEXIS 468 (Del. Ch. Aug. 4, 1987) (mem).

142. 17A AM. JUR. 2D *Contracts* § 109 (2009).

143. *Atria*, 142 F. App'x at 256 (rejecting student's claim because he failed to show the school's breaking its promises had caused him economic harm).

144. Yano v. City Colls. of Chi., No. 08 C 4492, 2009 U.S. Dist. LEXIS 26812, at *15–17 (N.D. Ill. Mar. 30, 2009) (holding that colleges' promises need to be unambiguous to sustain a promissory estoppel claim).

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enables universities to better serve their traditional societal function. Most top-rated private liberal arts and research universities publicly broadcast their missions as accumulating and spreading knowledge but may then suppress speech in particular instances.[145] The possibility of official punishment for speaking out can chill speech and academic freedom, thereby undermining the university's purpose of seeking knowledge.[146] Adopting the contractual model forces universities to either disavow what they purport to be their fundamental mission or honor that mission even when it becomes temporarily inconvenient to do so. As the enactment of the First Amendment recognizes, institutions may endorse the principle of free speech in theory and yet find that, without any legal accountability, the temptation to suppress speech in any given instant may be too strong to resist.[147]

Not all top-rated private universities seek only knowledge. Some limit the search for knowledge by a moral or religious doctrine.[148] Still others aim to impart vocational or military knowledge.[149] Of the top-rated private liberal arts and research colleges on the US News' rankings, six made clear that they prioritized values over the search for knowledge.[150]

Brigham Young University, for example, which was rated seventy-ninth on the list of top national universities in 2008,[151] made clear that its quest for knowledge did not include questioning or contradicting Mormon religious doctrines.[152] Brigham Young's Honor Code requires community members to "demonstrate in daily living on and off campus those moral virtues encompassed in the gospel of Jesus Christ . . . ."[153] However, the school also states in its publicly-available policies that

145. *See*, *e.g.*, *supra* text accompanying notes 36–43.

146. *See*, *e.g.*, Levin v. Harleston, 770 F. Supp. 895, 899 (S.D.N.Y 1991), *aff'd in part*, *vacated in part*, 966 F.2d 85 (2d Cir. 1992).

147. *See generally* Michael P. Downey, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 684 n.8 (1998) (discussing absolutists' fear that anything less than total freedom of speech at public colleges and universities would impinge First Amendment rights).

148. *See*, *e.g.*, BRIGHAM YOUNG UNIV., *Statement on Academic Freedom at Brigham Young University*, *in* UNDERGRADUATE CATALOG 2001–2002, 1 (2001) [hereinafter *Statement on Academic Freedom at BYU*], *available at* http://www.thefire.org/public/pdfs/ac9354b13a52af2f34320ff47137e0e2.pdf.

149. *See*, *e.g.*, West Point Univ., U.S. Military Academy Mission, http://www.usma.edu/mission.asp (last visited Dec. 22, 2009).

150. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 4.

151. *Best National Universities*, s*upra* note 33, at 116.

152. *See Statement on Academic Freedom at BYU*, *supra* note 148.

153. BRIGHAM YOUNG UNIV., *Honor Code Statement*, *in* UNDERGRADUATE CATALOG 1, 1 (2008), *available at* http://www.thefire.org/pdfs/9b06d8d293013f84430e9cba16135fbe.pdf.

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academic freedom at Brigham Young does not extend to expression that "contradicts or opposes . . . fundamental Church doctrine or policy" or "violates the Honor Code because the expression is dishonest, illegal, unchaste, profane, or unduly disrespectful of others."[154]

Bard College, a nonsectarian college with a liberal ideology,[155] also binds the quest for knowledge with the dictates of its morality. Bard College states in its policies that its "students, faculty, staff and administration stand united in support of an inclusive environment in which freedom of expression is balanced with a respectful standard of dialogue."[156] Accordingly, all members of the community "must be committed to standards of behavior that emphasize caring, civility, and a respect for the personal dignity of others," and any demeaning, discomforting, vulgar, or embarrassing expression is prohibited.[157]

Though their moral ideologies differ, both Brigham Young and Bard College make publicly clear that attending their schools requires students to forego a measure of expressive freedom to live up to the ideologies embraced by the institutions. Private universities that limit their quests for knowledge by predetermined moral ideologies serve a different function than traditional liberal arts and research colleges.[158] They seek to inculcate moral ideologies into community members by prohibiting dissent within the campus community.[159]

The contractual framework allows institutions to adopt and enforce such ideologies. One court, for example, applied the contract model to a student's claim that his theological seminary could not withhold his degree because he openly and unapologetically practiced homosexuality.[160] The court held that the theological seminary made clear in its policies that students needed to firmly commit to the principles of the Christian ministry to graduate from the seminary.[161] As the student had refused to abide by

154. *Statement on Academic Freedom at BYU*, *supra* note 148, at 6–7.

155. *See* CollegeFinder, Bard College, http://www.globalscholar.com/collegefinder/2758-bard-college/ratings-rankings-reviews.aspx (last visited Dec. 22, 2009) (The Princeton Review ranking Bard College student body as the eighth most liberal in the nation).

156. BARD COLL., *Bard College Statement of Commitment to Diversity*, *in* STUDENT HANDBOOK 4, 4 (2008–2009), *available at* http://www.thefire.org/pdfs/3414870dd012c330245c403f765b5c51.pdf.

157. *Id.*

158. *See generally* Brian J. Steffen, *Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 152 (2002) (discussing the desire of ideological institutions to have students abide by ideology).

159. *See supra* text accompanying notes 148–54.

160. Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky. Ct. App. 1979).

161. *Id.* at 13.

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those principles, the seminary could withhold his degree without violating the contract.[162]

The diversity of purpose among American private colleges is certainly a virtue worth protecting. Forcing every college to fit the mold of a truth-seeking institution would violate citizens' right to associate for the purposes of dispensing and acquiring a substantive moral education.[163] It would also undermine the richness of public discourse that comes from having a diversity of higher education institutions.[164] As Professor Alan Charles Kors articulated, having universities that construct themselves as "communities of belief and value" can strengthen the "distinct traditions of belief and value" in American society and, therefore, enable us "to learn from each other at our most coherent and best informed . . . . ."[165]

In contrast, students at world-class research institutions do not learn a pre-established moral good. Instead, they engage in the pursuit of knowledge and improve their ability to think critically and freely.[166] Professor Robert Post termed this type of education a "critical education," as "it rejects the notion of canonical values that are to be reproduced in the young" and finds its "telos" in "the pursuit of truth."[167]

In America, private colleges cover the spectrum from research institutions providing students with a critical education to military academies training students to become soldiers.[168] In interpreting the reasonable expectations of the students, faculty, and donors, courts should rely on the nature of the institution, understanding the college's policies and promises in light of the type of education it provides.

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162. *Id.* at 14–15; *see also* Carr v. St. John's Univ., 231 N.Y.S.2d 410 (N.Y. App. Div. 1962) (holding policies explicitly required students to adopt Christian principles).

163. *See*, *e.g.*, Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 50–51 (2008).

164. *See generally* Brief of Amici Curiae, Katurie E. Smith v. The Univ. of Wash. Sch. of Law, No. 99-35209 (9th Cir. 2000), 26 J. COLL. & UNIV. L. 467 (2000) (discussing the importance of freedom of discourse in higher learning).

165. Alan Charles Kors, *Pluralism and the Catholic University*, FIRST THINGS 11 (Apr. 2002).

166. *See* Brief of Amici Curiae, *supra* note 164.

167. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 323–24 (1991).

168. *See*, *e.g.*, *supra* text accompanying notes 148–50.

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A. Liberal Arts and Research Universities

The majority of top-ranked research and liberal arts colleges do not prioritize other values over the search for knowledge. Yale's policies, for example, lay out its institutional priorities:

> The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary . . . . The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. . . . We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at the time.[169]

As Yale's policies point out, the First Amendment contains the same promise of free expression that Yale and the vast majority of private liberal arts and research colleges guarantee.[170]

While universities like Yale have placed the search for knowledge at the top of their priorities, the Supreme Court seemingly has done the same. It has blended education models other than the traditional one that aims to disseminate knowledge through research and teaching with the more traditional "critical education" model[171] in conceptualizing the purpose of public primary and secondary schools.[172] The espoused models of education include: a "civic education" through which students "learn to express themselves in acceptable, civil terms"[173] and a "democratic education" that seeks to produce "autonomous citizens, capable of fully participating in the rough and tumble world of public discourse."[174]

Regarding the university, however, the Court has limited its depiction of the university's purpose to providing a "critical education."[175] The Court has bluntly expressed the stakes in keeping public universities free

169. Yale Univ., Policies on Expression, http://www.yale.edu/yalecollege/administration/policies/expression/index.html (last visited Dec. 19, 2009).

170. *Id.*

171. Post, *supra* note 167, at 322.

172. *Id.* at 321–22.

173. *Id.* at 320 (citing Papish v. Univ. of Mo. Curators, 410 U.S. 667, 672 (1973) (Burger, C.J., dissenting)).

174. *Id.* at 321.

175. *Id.* at 321–22.

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from any restrictions on speech or thought: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[176] Further, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[177]

The Court's First Amendment jurisprudence characterizes the university as the ultimate marketplace of ideas, the institution in society where speech should be its freest.[178] "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[179] By its very nature, the university must seek a "robust exchange of ideas" and thus house "expansive freedoms of speech and thought."[180]

As the Supreme Court's conception of the public university is the same conception of the university adopted by liberal arts and research colleges, courts should interpret students and faculty member's reasonable expectations of liberal arts and research universities' guarantee of free expression in contract law by reference to the Court's developed jurisprudence regarding public universities' obligation to uphold free speech on campus.[181] Although public and private universities differ in administrations, it is unlikely that student and faculty's reasonable expectations of free speech at a public college differ from their reasonable expectations of a private liberal arts or research college promising free speech and holding itself up as a purveyor of critical education.

At public colleges, courts have found all content or viewpoint-based restrictions on speech outside the classroom to be unconstitutional.[182] In addressing a public university's censorship of an edition of a student's newspaper that the school viewed as offensive, the Supreme Court found that such censorship violated the student's free speech rights, writing

176. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

177. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

178. *Id.*

179. Healy v. James, 408 U.S. 169, 180–81 (1972) (quoting *Keyishian*, 385 U.S. at 603 (1967)).

180. Grutter v. Bollinger, 539 U.S. 306, 329 (2002).

181. *See Keyishian*, 385 U.S. at 603.

182. *See*, *e.g.*, *supra* note 23.

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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.'"[183]

Federal courts have universally struck down school policies that proscribe speech that is uncivil, offensive, sexist or racist,[184] reaffirming the Supreme Court's belief that "the free and unfettered interplay of competing views is essential to the institution's educational mission."[185] To permissibly regulate speech on campus, the speech must fit into one of the categories of obscenity, libel, or fighting words, or a speech restriction must be one that reasonably regulates the time, place, and manner of the speech.[186]

Regarding speech inside the classroom, courts have recognized that certain types of speech restrictions are reasonable if the restrictions are limited to a particular type of "place."[187] A class aims to hone the student's critical thinking and to impart knowledge of a particular discipline. As a matter of pedagogy, the professor may use class time to lecture, requiring students to remain silent.[188] Professors may apply content-based restrictions when they require class discussions to stay on topic,[189] and grades can be assigned on the academic quality of students' written work and comments.[190]

However, within the constraints of reason, academic quality, and subject matter, neither the school nor the professor can punish students for their viewpoints.[191] One federal court overturned a broad anti-harassment policy in part because the student feared punishment for potentially offensive, gender-motivated[192] classroom speech concerning the topic of "sexual differences between male and female mammals," in particular, the "hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference."[193] Another federal court simi-

183. Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670 (1973).
184. *See*, *e.g.*, *supra* text accompanying note 23.
185. Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).
186. *Id.* at 862.
187. *Id.* at 863.
188. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).
189. *See id.*
190. *See* Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004).
191. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
192. *See generally Doe*, 721 F. Supp. at 860 (discussing the lack of protection of offensive speech in the gender context).
193. *Id.*

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larly overturned a broad policy prohibiting "offensive" gender-motivated speech because such a policy would chill "'core' political and religious speech" in classroom discussions of "gender politics and sexual morality."[194]

The school and professor can place sanctions on students for work that fails to meet academic standards but not for students' political or moral viewpoints or the perceived moral or political offensiveness of their academic speech.[195] Out of a respect for academic autonomy and expertise, courts adopt a deferential attitude toward professors when deciding whether a professor assigned a particular grade or sanction for academic reasons.[196] A student challenging a specific grade or punishment resulting from class-related speech—assuming the punishment was not levied under a policy that explicitly proscribes "offensive" speech—would face a relatively high burden in proving that a low grade or academic sanction was issued because of the political or moral viewpoint of the speech rather than its academic quality.[197] As one court stated, "[W]e may override an educator's judgment where the proffered [pedagogical] goal or methodology was a sham pretext for an impermissible ulterior motive" such as disapproval of the "religion or political persuasion" of the speech.[198] But "the Supreme Court has cautioned against federal courts second-guessing the pedagogical legitimacy or efficacy of educators' chosen methodologies," and courts must therefore adopt a deferential attitude toward academic judgments.[199]

This academic deference is the same employed by judges when they interpret contracts between private universities and students.[200] Applying the First Amendment paradigm to liberal arts and research colleges that promise free speech means that students punished for the content of their non-classroom speech should be able to obtain a remedy under contract

194. DeJohn v. Temple Univ., 537 F.3d 301, 317 (3d Cir. 2008).

195. *See supra* text accompanying notes 187–91.

196. *See*, *e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1290 (10th Cir. 2004) (requiring deference to academic judgments of professors); Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002) (stating courts should "defer[] to the university's expertise in defining academic standards and teaching students to meet them"); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.").

197. *See*, *e.g.*, *Axson-Flynn*, 356 F.3d at 1290.

198. *Id.* at 1292–93.

199. *Id.* at 1293 n.14 (italics omitted).

200. *See supra* text accompanying notes 96–97.

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law or, in the case of a contractual disclaimer, under an implied contract or promissory estoppel.

One particular incident illustrates how private university students could be able to obtain a remedy under the courts' First Amendment jurisprudence. Yale has extremely strong guarantees of free speech, adopted by the school in 1975.[201] In 1986, during a Gay and Lesbian Awareness Days (GLAD) Week at the college, a student posted a flyer parodying the event, titling the flyer "Bad Week '86/Bestiality Awareness Days."[202] Though the flyer would qualify as protected speech—non-obscene, non-libelous, and non-threatening—Yale charged the student with "harassment and intimidation against the gay and lesbian community and toward individuals named in the poster."[203]

During the disciplinary proceedings, the student cited Yale's unambiguous policies guaranteeing free speech on campus in his defense.[204] The Yale College Executive Committee nevertheless found the student guilty of harassment and sentenced him to two years' probation.[205] The student then wrote a letter to the Yale President, stating, "Please advise me as to other views that I am also not allowed to criticize, so that I won't unknowingly violate my probation and the standards of Yale University."[206] This request, which went unanswered,[207] reveals the harm that arises if Yale would be allowed to selectively violate its own policy on free speech. First, the student relied on Yale's unrestricted promise of free speech in composing his controversial flyer, and as a direct result, he was found guilty of "harassment and intimidation."[208] This finding would mar his chances at being accepted into a graduate school and procuring employment, as schools and businesses are unlikely to welcome potential employees if their files contain a guilty of harassment verdict. It also means that if the student acquired any other disciplinary infraction, he could be expelled.[209] Thus, the student suffers significantly. Second, Yale still advertises and represents itself as an institution of

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201. *See* Yale Univ., *supra* note 169.

202. Nat Hentoff, Op-Ed., *Guilty—Of Committing Free Speech at Yale*, WASH. POST, June 7, 1986, at A23 [hereinafter *Guilty of Free Speech*].

203. *Id.*

204. *Id.*

205. *Professors Back Yale Student on Free Speech*, N.Y. TIMES, Sept. 27, 1986, § 1, at 41.

206. *Guilty of Free Speech*, *supra* note 202.

207. *Id.*

208. *Id.*

209. Barbara Vobeda, *Punishment Rescinded in Yale Free-Speech Case*, WASH. POST, Oct. 2, 1986, at A9.

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free speech, parading this fundamental value to donors, current and prospective students, faculty, and alumni.[210] As Yale reaps the benefits of its representation, students must face the possibility that Yale will punish them for controversial speech. This inevitably diminishes the quality of discourse on campus, as even without further punishments, students may self-censor to entirely avoid the possibility of punishment.

Not long after the student was punished, Yale inaugurated a new President—a First Amendment expert—who used his inauguration speech to condemn violations of free speech, stating, "To stifle expression because it is obnoxious, erroneous, embarrassing, not instrumental to some political or ideological end is—quite apart from the grotesque invasion of the rights of others—a disastrous reflection on ourselves."[211] At the urging of the Dean of Yale Law School and the Yale professor who authored Yale's free speech policies, the student subsequently appealed the decision, and Yale agreed to rehear the student's case.[212] The Dean of Yale Law School, who had termed Yale's guilty finding as "absolutely dreadful [and] outrageous,"[213] testified at the new hearing that the student's speech was clearly protected under Yale's policies.[214] He later stated that the student's speech "was tasteless, even disgusting, but that's besides the point. Free expression is more important than civility in a university."[215] The professor who authored the free speech policies said that Yale was "known nationwide" for promising free speech, and he "would be very embarrassed if [Yale] violated it."[216]

Without providing an explanation, Yale overturned the student's punishment.[217] Yale probably would not have rescinded the punishment had the media, alumni, and prominent professors not spoken out in defense of the student.[218] But had the punishment stood, the student should have available to him the same legal remedy a student at the local public college would have: an injunction overturning the guilty finding or an order

210. *See* Yale Univ., *supra* note 169.

211. Edward B. Fiske, *Schmidt, Inaugurated at Yale, Appeals for Campus Freedom*, N.Y. TIMES, Sept. 21, 1986, § 1, at 1.

212. Nat Hentoff, Editorial, *It's Still a Star Chamber at Yale*, WASH. POST, Oct. 25, 1986, at A23 [hereinafter *Star Chamber*].

213. *Guilty of Free Speech*, *supra* note 202.

214. Vobeda, *supra* note 209.

215. *Professors Back Yale Student on Free Speech*, *supra* note 205.

216. Vobeda, *supra* note 209; *Star Chamber*, *supra* note 212.

217. *Star Chamber*, *supra* note 212.

218. *See id.*

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of damages to compensate for him his lost opportunities,[219] These remedies could be achieved through the application of contract law.

B. Quasi-Ideological and Technical Universities

Some universities have an official position on certain ideological questions but do not require students and faculty to endorse that ideological position.[220] In discussing a suit claiming that giving federal money to religious universities violated the Establishment Clause, the Supreme Court recognized the important distinction between universities that endorse and promote a particular religious stance and universities that impose that stance on all its members.[221] The Court wrote that the universities in the case, though religious, "were characterized by an atmosphere of academic freedom rather than religious indoctrination."[222] Such universities are significantly different in nature than a religious university that "imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion."[223]

Universities that endorse an ideological view, whether religious or not, but do not generally require its members to endorse the view require a thorough examination when interpreting their polices for the purposes of enforcing a free expression provision of their policies. Unlike a traditional liberal arts or research institution, the reasonable expectations of students, faculty, and donors may be less forcefully in favor of academic freedom and free speech. On the other hand, unlike religious universities that require their members to endorse or embody religious tenets, reasonable expectations would not assume that speech would be restricted either.

Georgetown University, for example, described itself as a Catholic university that "seeks to open its arms, in the fullest sense of ecumenism, to those of all beliefs and all races."[224] In a case addressing Georgetown's

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219. *See*, *e.g*., Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

220. *See*, *e.g*., Gay Rights Coal. v. Georgetown Univ., 536 A.2d 1, 7–8 (D.C. 1987) (discussing Georgetown University's establishment as a Roman Catholic institution but its relatively minor impact as to other ideological views).

221. Tilton v. Richardson, 403 U.S. 672, 681–82 (1971).

222. *Id.*

223. *Id.* at 682.

224. *Gay Rights Coal*., 536 A.2d at 8 (quoting Georgetown's Undergraduate bulletin at the time).

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free exercise claim, a court noted that Georgetown had a limited religious nature, writing, "Religious belief plays no role in admissions, graduation, class attendance, participation in sports or other student activities, or eligibility for financial aid, placement facilities, awards or honors programs."[225] The court also noted Georgetown's President's comment that "education remains principally a secular business, and the university is a secular entity with a clear secular job to do. The Church, however, can deeply influence how that secular job is done."[226]

Georgetown's policies still reflect this limited religious nature. Though the school endorses Catholicism, it does not expect students or faculty to do the same.[227] The policies state that all members of the university community "enjoy the right to freedom of speech and expression" and "[a] university is many things but central to its being is discourse, discussion, debate: the untrammeled expression of ideas and information."[228] Furthermore, "[a]cademic freedom is essential to teaching and research," and it "requires free inquiry, free expression, [and] intellectual honesty."[229] Given the limited religious nature of an institution like Georgetown, these clear promises of free speech—not restricted by any religious dictates—should be upheld as part of a valid contract.[230]

Technical colleges similarly require close study of the school's policies and promises to determine whether a promise of free speech was curtailed or open-ended.[231] The reasonable expectations of students

225. *Id.* at 7.

226. *Id.* at 8.

227. GEORGETOWN UNIV., *Faculty Policies and Procedures*, *in* FACULTY HANDBOOK, *available at* http://www1.georgetown.edu/facultyhandbook/toc/section3/ [hereinafter *Faculty Policies and Procedures*]; *see* also GEORGETOWN UNIV., STUDENT AFFAIRS AND RELATED POLICIES, *available at* http://www.thefire.org/public/pdfs/550d2add8f11b92b2ec3dffef52f3e81.pdf [hereinafter STUDENT AFFAIRS AND RELATED POLICIES].

228. STUDENT AFFAIRS AND RELATED POLICIES, *supra* note 227.

229. *Faculty Policies and Procedures*, *supra note* 227.

230. It is particularly notable that the speech codes Georgetown does have elsewhere in its policies are not religious restrictions, but the same restrictions that most secular liberal arts and research colleges impose—prohibitions, for example, on "verbal conduct … of a sexual nature" that "[have] the purpose or effect of interfering with an individual's work or educational performance, or of creating an intimidating, hostile, or offensive environment for work or learning." STUDENT AFFAIRS AND RELATED POLICIES, *supra* note 227.

231. *See*, *e.g*., MIDLANDS TECHNICAL COLL., *Freedom of Speech and Assembly*, *in* STUDENT CODE, *reprinted in* MIDLANDS TECHNICAL COLL., STUDENT HANDBOOK, app. I, at 62, *available at* http://www.midlandstech.edu/Handbook_Planner/Handbook_09-10/200910_Student_Handbook.pdf.

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attending a technical college, which is focused much less on the accumulation of knowledge and much more on the acquisition of a particular career skill,[232] would not justify an assumption of unbridled free speech. At the same time, students would not expect to lack the ability to speak freely. As a result, the policies and promises should be interpreted at face value, and any conflicts must be interpreted in light of a holistic examination of the school's presentations.

C. Ideological Universities and Military Academies

In contrast to quasi-ideological universities, ideological universities are wholly ideological. Instead of the school simply endorsing an ideological view, an ideological school requires university members to personally endorse an ideology and live up to the dictates of the ideology through their behavior.[233] An ideological university may seek new truths within the confines of its ideology, but its first and paramount purpose is to create an ideological community.[234] Such a community serves to instill a predetermined ideological worldview in its students and to enable university members to study and think within the confines of certain unquestionable ideological beliefs.[235] Within those confines, the school may offer faculty and students a more limited academic freedom.

Students entering ideological universities would likely reasonably expect that their speech would be restricted by the school's ideology. Regent University, for example, grants students the "right of inquiry" but explicitly states in the same section, "Exercising academic freedom requires a responsibility to truth and scholarly integrity as well as a complete honesty and loyalty to the Mission Statement, the Standard of Personal Conduct and the Student Honor Code."[236] These latter documents make clear that Regent provides an "education from a biblical

232. *See*, *e.g.*, Northland Cmty. & Technical Coll., General Education Philosophy, http://www.northlandcollege.edu/programs/career/ (last visited Dec. 19, 2009) ("The Career and Technical programs at Northland College are designed for the student who is planning to complete a degree, diploma, or certificate in two years or less, as well as prepare a student for immediate entry-level employment.").

233. *See*, *e.g.*, Regent Univ., The Honor Code, *available at* https://www.regent.edu/acad/undergrad/pdf/TheHonorCode.pdf.

234. *See id.*

235. *Id.*

236. Regent Univ., Student Handbook, http://www.regent.edu/admin/stusrv/student_handbook.cfm#responsibilities_privileges [hereinafter Regent Univ. Student Handbook] (last visited Aug. 12, 2009).

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perspective"[237] and that a student must "live his or her life accountable to God," act in a "Christ-like and professional manner," and "maintain an exemplary and involved lifestyle, including regular church attendance . . . ."[238] Accordingly, students' free speech and right of inquiry is limited by a belief in God and the dictates of the Bible.

For example, Adam Key, a student at Regent University, took a frame from a video of Regent's Chancellor Pat Robertson in which Robertson was "scratching his face with his middle finger. However, when the video clip was paused at [that] frame, it appeared that Robertson was 'flipping the bird' at his viewing audience."[239] Key then posted this image on the popular social networking site Facebook.[240] A Regent administrator "asked [Key] to remove the image from his Facebook account because it violated the Regent Standard of Personal Conduct's prohibition against profane or obscene behavior."[241] Key obliged but then posted the image on a Regent listserv.[242]

Regent initiated disciplinary charges against Key for posting the image on the listserv[243] and later found Key guilty of that charge.[244] In Key's subsequent lawsuit, he alleged, among other claims, that Regent had violated its contractual promises of free speech by punishing him for posting the image on the listserv.[245]

The court held that a contract did not exist due to a disclaimer in the school handbook stating the handbook was not a contract.[246] As a result, the court did not analyze the content of Key's claim.[247] However, if the court had analyzed the claim, it should have found that Key's claim was not tenable in light of Regent's specific limitations on free speech. Regent makes clear that the education it provides is a "biblical" one and that students' right to free expression does not extend to irreligious or offensive forms of expression, as students are obligated to conduct themselves in a "Christ-like" manner.[248] Consequently, when students

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237. Regent Univ., Mission Statement, http://www.regent.edu/about_us/overview/mission_statement.cfm (last visited Aug. 12, 2009).

238. REGENT UNIV., *supra* note 233.

239. Key v. Robertson, 626 F. Supp. 2d 566, 570 (E.D. Va. 2009).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 570–71.

244. *Id.* at 584–85.

245. *Id.* at 583.

246. *Id.* at 585.

247. *Id.*

248. Regent Univ. Student Handbook, s*upra* note 236.

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enroll at Regent, they are on notice that their freedom ends where biblical mandates begin.[249]

In another case, a Catholic college's policies stated that students could be expelled for failing to live up to the "ideals of Christian education and conduct."[250] After two students participated in a civil—as opposed to religious—marriage ceremony and two other students served as witnesses to the ceremony, the school expelled all four students for failing to abide by Catholic doctrine,[251] which prohibits civil marriages.[252] The court upheld the expulsion against a contract claim, finding that the school was clearly a Catholic institution and that the school's policy explicitly requiring "Christian conduct" was widely understood to mean "Catholic conduct."[253] Furthermore, the students did "not claim that they understood it to mean anything else, nor do they claim that they did not understand what they were doing or the consequences of their act in the eyes of their Church."[254] In other words, the reasonable expectation of students attending a Catholic college that requires abidance by religious principles is that their behavior must accord with the dictates of the Church.

Like ideological universities, private military academies require students to forego a large degree of freedom of expression and conduct.[255] Norwich University is the only private university on the Army's list of senior military colleges.[256] Like its public counterparts, Norwich requires those in the cadet program to lead a highly structured life.[257] This regimented training, with the accompanying oaths and honor codes, requires

249. *See*, *e.g*., Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11, 12–13 (Ky. Ct. App. 1979) (holding theological seminary could withhold degree because student failed to remain committed to Christian principles, as handbook clearly stated students must abide by Christian principles); Carr v. St. John's Univ., 231 N.Y.S.2d 410, 633–34 (N.Y. App. Div. 1962) (holding religious university's policies clearly stated that students must abide by Christian principles and school could therefore expel students for not abiding by those principles).

250. *Carr*, 231 N.Y.S.2d at 410.

251. *Id.*

252. *Id.* at 413.

253. *Id.* at 410.

254. *Id.*

255. *See*, *e.g*., Norwich Univ., Cadet Oath, http://www.norwich.edu/cadets/oath.html (last visited Dec. 19, 2009).

256. *See* 10 U.S.C § 2111a(f) (2006).

257. *See*, *e.g*., Norwich Univ., *supra* note 255; NORWICH UNIV., NORWICH STUDENT RULES AND REGULATIONS 12–13 (2008), *available at* http://www.norwich.edu/about/policy/StudentRulesRegs.pdf [hereinafter STUDENT RULES AND REGULATIONS] (stating that cadets undergo a "strict orientation and training period," and during that time period, they "are not allowed to speak outdoors unless addressed" by a superior).

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students to forego the ability to speak freely and to accord great deference to their superiors.[258] Students are on notice of the regimented nature of the institution and its accompanying lack of freedom prior to enrollment.[259]

Given the explicit restrictions on behavior and expression military academies and ideological universities demand of their students, students' reasonable expectations would be that they would have a more limited right to free speech at such an institution. Therefore, courts should interpret the institution's policies in that light, prioritizing the school's ideology or military purpose when reconciling conflicting policies.

VI. CONCLUSION

Most top-rated private universities issue contradictory written policies that both restrict and promise free speech. As private universities should have a right to associate according to the values they choose, forcing them to respect community members' freedom of speech does not provide the optimal solution to this widespread problem. Applying a contractual framework, including the university's written policies as part of the contract, in contrast, respects the universities' right of private association as well as students, faculty, and donors' reasonable expectations of what the university provides.

The long-standing purpose of the liberal arts and research universities is realized through free speech on campus, and students, faculty, and donors reasonably expect it to prevail. While the First Amendment resolves the conflict between a public university's policies that promise free speech and those policies that restrict free speech, it does not resolve the same conflict that occurs at a private university. Therefore, courts must hold private liberal arts and research universities to their official promises of free speech. Ideological universities, in contrast, offer an *in loco parentis* moral education and thus students' default expectation would be that they must forego some measure of freedom of

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258. STUDENT RULES AND REGULATIONS, *supra* note 257, at 12–13.

259. *See*, *e.g.*, *id.* at 11–12 (prohibiting students from, among other things, using "profanity or vulgar language," engaging in "lewd and or lascivious behavior," showing "disrespect or exhibiting a lack of respect or courteous regard towards students or official duty staff/faculty members," or "glamorizing the use of alcohol").

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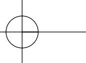
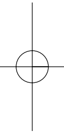
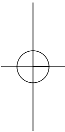

speech to abide by the dictates of the university's ideology. In either case, however, courts should consider the parties' reasonable expectations in the contract law framework to reconcile conflicting policies and representations and to help afford relief to students, faculty, and donors who find that a university has breached its explicit promises of free speech.