MORE SPEECH IS BETTER

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In this Reply, Professor Chemerinsky argues that the application of First Amendment principles to private institutions is desirable. Under traditional law, the free speech interests of private institutions are always favored over the free speech interests of individuals. Transporting First Amendment norms to the private sector is desirable because more speech is generally best and private power can chill and prevent speech just as much as government actions. Courts should balance the competing free speech interests of institutions and individuals, rather than always siding with the institution over the individual.

INTRODUCTION

As I read Julian’s paper, I could hear his vibrant voice speaking the words. As I came to a humorous turn of phrase, I could see his incandescent smile and hear his infectious laugh. I truly am honored to have been asked to comment on Julian’s paper, as so superbly completed by Jonathan Varat. Yet, as Julian says, with every blessing comes a curse, and mine is how to say anything critical about Julian’s paper as part of this wonderful symposium honoring him.

On reflection, I realize that the answer is in Julian and his love for dialogue and argument. Julian first described to me his idea for this paper several years ago at a conference that he, his wife Carole, and I attended at

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the University of Colorado. Julian and I spent the entire luncheon, about
two hours, with his presenting his arguments, my disagreeing, and his
responding to each of my points with three replies, each supported by cita-
tions. A year and a half ago, Julian shared with me a draft of his paper and,
as always, I was so impressed by the elegance of his prose and the force
of his arguments. Yet, I still very much disagreed with him. In this Reply,
I want to outline the arguments that I presented to Julian.

Imagine that it is the late 1950s or early 1960s, and that several pri-
ivate schools in Georgia, both high schools and colleges, have decided to
fire any teacher or to expel any student who participates in demonstra-
tions to advance civil rights. Imagine that a courageous state legislator intro-
duced a bill into the Georgia legislature to protect freedom of speech
of students and faculty in private institutions. I imagine that few among us
would oppose such a law under those circumstances.

Or imagine that it is the early 1950s, at the height of the McCarthy
anticommunist hysteria, and private schools throughout a state are regu-
larly firing teachers even suspected of being a communist. Again, imagine
a courageous state legislator who introduces a bill to protect freedom of
speech for those in private institutions. Again, wouldn’t virtually all of
us regard that as desirable? Or imagine that it is the late 1960s and a
conservative private college or high school administration decides to fire
teachers and expel students who participate in anti–Viet Nam War
protests. Once more, I would think that almost all of us would welcome a
law protecting the speech rights of these individuals.

The examples are relatively recent and illustrate the desirability of
protecting speech from suppression by private power. The examples are
important because I believe that Julian gains great rhetorical force in his
paper by focusing almost exclusively on one example: the ability of private
colleges and universities to enact hate speech codes. Although Julian pro-
fesses opposition to such codes,¹ many liberals feel an ambivalence about
them, sympathizing with their goal of advancing equality though being
uncomfortable with their suppression of speech. Yet, it is a mistake to
appraise the desirability of transporting First Amendment norms to the
private sector solely through one example.

My overall response to Julian is that more speech is generally better.
Speech—and all of its benefits to the individual in expressing a message

¹. See Julian N. Eule, as completed by Jonathan D. Varat, Transporting First Amendment
Norms to the Private Sector: With Every Wish There Comes a Curse, 45 UCLA L. REV. 1537,
and to society in receiving it—can be lost just as much when private entities prohibit and punish it as when the government does so. If free speech values are not applied to the private sector, the result is a rule that always favors the interests of the private institution over the interests of the individual. I believe that this is undesirable and that laws protecting the speech rights of those in private institutions are a good thing. I develop this argument in four steps.

I. GOVERNMENT-IMPOSED ORTHODOXY CAN BE GOOD

First, government-imposed orthodoxy in private institutions is neither inherently good nor inherently bad; it all depends on the nature of the mandate. From the very beginning, Julian's article speaks critically of government-imposed orthodoxy. This gives rhetorical force to Julian's argument because it invokes the eloquent words of Justice Robert Jackson in West Virginia Board of Education v. Barnette, \(^2\) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

Yet, on reflection, government-imposed orthodoxy on private institutions often is a good thing. Laws prohibiting race and gender discrimination by private entities are certainly imposing an orthodoxy. Indeed, this orthodoxy has First Amendment implications. Private institutions, including private schools, claim a First Amendment right to freedom of association and thus the right to choose who will be admitted or hired. The Supreme Court, although recognizing that antidiscrimination laws interfere with freedom of association, has upheld such laws because of the compelling need to end race and gender discrimination. \(^4\) If Julian is correct that schools should be regarded as a community, the application of anti-discrimination laws to private schools keeps them from defining their community as they may wish to do so. Yet, thankfully, this is a government-imposed orthodoxy that is now widely accepted.

At the end of their article, Julian and Jon address this and argue that there is a meaningful distinction between laws prohibiting discrimination by private schools and statutes requiring that private schools comply with

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2. 319 U.S. 624 (1943).
3. Id. at 642.
First Amendment norms. Yet, I know no reason for this conclusion; free speech and equality are both deeply entrenched values in American society. Remarkably few, other than lawyers, realize that either constitutional protection applies only to the government and that private conduct is not governed by the Constitution.

Second, Julian and Jon suggest that transporting freedom of speech protections to the private sector gives the government more control over the “daily operation of the organization” than does application of antidiscrimination laws. This claim seems wrong because the application of antidiscrimination laws to private entities gives the government authority over every hiring and every admission decision, a tremendous intrusion on the daily operation of an entity. There is no reason to believe that transporting First Amendment norms is more intrusive than transporting equality.

Third, and most importantly, Julian and Jon argue that free speech is different because transporting First Amendment norms to the private sector creates a conflict in First Amendment claims: Statutes protecting the speech of individuals interfere with private institution’s freedom of expression. This, of course, is the core of their argument, and I turn to it next. However, before doing so, it should be noted that it is unclear why a conflict between competing First Amendment claims is more troubling than a conflict between a free speech interest and an equality interest. Applying antidiscrimination laws to private entities poses a conflict between the interests of advancing equality and the freedom of association claims of those in the private institution. In either instance, the courts must balance competing constitutional values.

II. TRADITIONAL LAW ALWAYS FAVORS THE SPEECH INTERESTS OF PRIVATE INSTITUTIONS OVER THE SPEECH INTERESTS OF THE INDIVIDUAL

The most important insight in Julian’s article is that laws transporting First Amendment norms to the private sector interfere with the free speech

5. See Eule & Varat, supra note 1, at 1632.
6. Id.
7. See id.
8. See id. at 1632–33.
interests of private entities. Julian forcefully argues that institutions have an interest in not expressing messages that they wish to disavow or that even might be inimical to their values. Forcing a private institution to allow its property, and indirectly its name, to be used to convey such speech infringes the institution’s First Amendment rights.

Thus, Julian’s article does an excellent job of demonstrating that transporting First Amendment norms to the private sector creates a conflict between the free speech rights of the institution and the free speech rights of the individual. For example, Julian uses academic freedom to explain why educational institutions have free speech interests in avoiding government-mandates. But protecting the institution’s academic freedom can compromise the academic freedom of the teacher or student who is disciplined for speech activities. Likewise, Julian writes of the autonomy and associational interests of those within a private institution to define their environment by regulating speech. However, protecting these interests can mean that the autonomy of those who want to speak out is sacrificed.

My point here is descriptive: Traditional law always favors the institution’s interests over the individual’s. Traditional law, as embodied in the state action doctrine, creates a bright-line rule that the private institution always wins and the individual fired or disciplined by it for expression always loses. Absent a statute transporting First Amendment values to the private sector, a suit by a teacher or student against a private school for infringing freedom of speech will be dismissed for failure to state a claim. Thus, the speech interests of the institution, that Julian quite correctly identifies, always, without exception, win over the speech rights of the individual.

Julian tries to soften this by calling the institutions “communities” and invoking the romantic notion of communitarian self-determination. First, I am very skeptical that many of the institutions really are communities in any meaningful sense of that term. A university the size of the University of Southern California is hardly a community in a meaningful way. If the president of the university orders me fired for my speech activities, it is not likely an exercise of communitarian self-determination, but rather an institution firing a dissident for his speech.

Julian’s article not only deals with transporting First Amendment norms to private schools, but also criticizes state laws, such as those in

Connecticut, preventing private employers from discharging or disciplining any employee for constitutionally protected speech. Yet, I find it difficult to think of large corporations, or any except for the smallest workplaces, as communities. Indeed, Julian forcefully argues as to why private schools should be free from government speech regulation, but never really explains why private employers have the same interests.

Second, Julian equates every act of censorship or suppression of speech by a private institution with a fostering of community. It is here that his reliance on the sole example of hate speech codes is misleading. Often institutions might discipline a teacher or student for criticizing the administration or for expressing a political view that particular administrators dislike. Such suppression of speech only remotely relates to creating a particular type of community.

Third, calling an institution a “community” does not change the need to balance the speech interests of the community against those of the individual. Much of constitutional law involves tensions between the claims of a community, acting through its elected representatives, and those of the individual. For instance, laws that prohibit obscenity, or regulate the location of adult bookstores and movie theaters, very much involve a conflict between the asserted interests of communities and those of individuals who want access to sexually explicit material. Thus, transporting First Amendment values to private entities raises the question of how to balance the speech interests of those communities against the speech interests of individuals within them. Current law does not balance at all; absent statutes transporting free speech values, the state action doctrine means that the speech interests of the private community always win over the speech interests of the individual.

III. ALWAYS FAVORING THE INSTITUTION’S SPEECH INTERESTS OVER THE INDIVIDUAL’S IS UNDESIRABLE

Julian’s burden is to defend an absolute and to justify why the private institution’s speech interests always are more important than the individ-

10. See Eule & Varat, supra note 1, at 1587–89.
11. See CONN. GEN. STAT. ANN. § 51g (West 1987).
12. See, e.g., Paris Adult Theatre v. Slaton, 413 U.S. 49, 57 (1973) (identifying the interests of the community in regulating obscene material).
ual's. I believe that Julian is wrong in that he undervalues the speech interests of individuals and overestimates the harmful impact of transporting First Amendment values on institutions.

First, in general, speech interests of individuals are more important than free speech interests of institutions. There is a voluminous body of literature considering why freedom of speech is protected as a fundamental right. Some argue that it is because freedom of speech is essential in a democracy; some contend that speech provides a marketplace of ideas in which truth can ultimately triumph; some suggest that speech is protected because expression is integral to personal autonomy. Discussing these theories is obviously beyond the scope of this paper, but from any of these perspectives, more speech is better. More speech about politics and government is assumed to be better for the functioning of the democratic process. More speech about issues best advances the search for truth. More speech means that more individuals on a more frequent basis have spoken out and exercised this aspect of autonomy.

The reality is that when private institutions prohibit and punish expression there is a loss of speech, just as when the government prohibits and punishes expression. If private schools could expel students or fire teachers for participating in civil rights demonstrations or antiwar protests, fewer students or teachers would have engaged in these activities. The Constitution is concerned exclusively with controlling government power, but the reality is that private power can infringe the same rights with the same effect as the government.

I find merit in all of the theories explaining why freedom of speech is a fundamental right, though I ultimately conclude that freedom of speech is protected because it is essential for freedom of thought and conscience. I see freedom of thought and conscience as core values and that freedom of speech directly advances them. Receiving information and ideas is crucial to a person's developing thoughts and ideas. Articulating views and getting responses further develops a person's thoughts and ideas.

Obviously, individuals, not institutions, have freedom of thought and conscience. This explains why the speech interests of individuals generally should be given more weight than the speech interests of institutions.


Julian assumes that the free speech interests of institutions are of equal value to those of individuals. I disagree and believe that, if balancing is to be done, protecting individuals deserves the highest priority.

Second, I believe that transporting First Amendment norms to the private sector is less harmful than Julian argues. Institutions still can express their own messages, they just cannot do so by silencing others. If the institution wants to express its opposition to civil rights or its support for the Viet Nam War, it can do so, but it should not advocate its position by suppressing the speech of others. Likewise, a private institution can condemn hate speech that occurs in its midst and thereby advance its notion of community. In fact, it may well be that the most effective response to hate speech is more speech, not enforced silence.

The Supreme Court’s decision in PruneYard Shopping Center v. Robins supports the view that the institution can protect its speech interests by expressing its own message. The issue in PruneYard was whether the First Amendment rights of shopping center owners were violated by a requirement, under the California Constitution, that they allow speech to occur on their property. The Court rejected the shopping center owners’ contention that forcing them to allow speech was impermissible coerced expression. The Court noted that “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner.” Moreover, the Court said that “no specific message is dictated by the State to be displayed on appellants’ property . . . [and] appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.” Likewise, private institutions required to obey First Amendment norms by other laws are not obligated to express any specific message and can disavow any message expressed by others.

Julian analogizes to the Supreme Court’s recent decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, in which the Court unanimously held that it violated the free speech rights of those organizing a parade to be forced to include messages that they wished to exclude. A parade, however, exists to convey a message. A school or workplace, by contrast, exists primarily to perform other functions.

18. See id.
19. Id. at 87.
20. Id.
Requiring that a parade include a message that the organizers find antithetical is thus different than requiring that the school or workplace tolerate in its midst speech that it dislikes.

There also is a fundamental difference in terms of the effect on speech when a parade excludes a message as opposed to when a school or employer exercises control over speech. If a parade does not allow a person to participate, the individual can find some other way to express the message. But if a school can expel a student or fire a teacher for expressing a message anywhere at any time, the effect on speech is far greater.

Julian argues that the marketplace of ideas works best when there are many different mediating institutions throughout society. Although I certainly concur that it is desirable to have many institutions each expressing their own views, I do not agree that this justifies allowing the institutions to control the speech of others. I fear that at some points in time, all or most of these institutions might make the same choices to suppress speech. The result will be not a diversity of views in the marketplace of ideas, but an orthodoxy as to what can be expressed. Julian expresses great concern over orthodoxy, but ignores that empowering private control over speech could lead to even more of an orthodoxy.

My argument is not that the speech interests of individuals always should trump the speech interests of institutions. Rather, my burden is far less than that; I need only show that it is undesirable to always favor the speech interests of institutions over those of individuals. At least sometimes, and I would say often, the speech interests of individuals are more important than the speech interests of institutions. The only way to protect individuals in these instances is by transporting First Amendment values to the private sector.

IV. STATUTES PROTECTING SPEECH FROM PRIVATE INSTITUTIONS ARE DESIRABLE

Thus, my conclusion is that if speech is good, more speech is better. Individuals generally should be able to speak without fear of reprisals from private power sources, such as schools or employers. Free speech, though, is not an absolute. Private institutions should be able to punish speech if they can demonstrate that it is expression unprotected by the First Amendment or that a sufficient interest is served by limiting expression.

In other words, I favor statutes that provide that individuals in private schools have the same speech rights as individuals in public schools. Likewise, I support laws that provide the same protection for free speech for
private employees as the Constitution provides for public employees. This does not mean that the private institutions always will lose when they restrict speech, any more than the First Amendment means that the government always loses in free speech cases.

If Julian is correct that institutions have free speech interests as well as individuals, then courts should openly and explicitly balance these competing interests. The fact that both interests are derived from the First Amendment does not make the balancing any more difficult than when the Court must balance competing rights, such as free press and fair trial or privacy and freedom of speech. Put most simply, the key flaw in Julian's argument is that he masterfully shows that institutions have free speech interests, but he fails to demonstrate why these interests always should trump the speech interests of individuals.

CONCLUSION

Each of us occupies many different roles in our lives. Each of us only can hope to be as successful in any of our roles as Julian was in all of his. Within UCLA Law School, Julian was renowned for being a superb teacher and a wonderful colleague. I knew Julian in his role as a dear and very supportive friend.

This Symposium is honoring Julian in his role as scholar. In the other roles, Julian lives on in the hearts and minds of all who knew him. In his role as scholar, Julian will live on as long as there is a copy of this issue of the UCLA Law Review on the shelf of some library or even in cyberspace. For this reason, Julian's friends and the entire community of scholars owe Jon Varat a great debt of gratitude for his superb job of finishing Julian's article.