

Steve McGuire:

Tony and Tom, thanks for joining us on the podcast today.

Tom Ginsburg:

Our pleasure.

Tony Banout:

Thanks for having us, Steve. Excited about the conversation.

Steve McGuire:

So I want to focus our conversation today on institutional neutrality and the Kalven Report, but before we get to that, you are heading a new initiative at the University of Chicago, the Forum for Free Inquiry and Expression. And I wanted to ask you about that first, why was this new forum created and what sort of work do you hope to do with it?

Tony Banout:

Yeah, thanks for that question, Steve. The Chicago Forum for Free Inquiry and Expression was launched last October and is the next step in a longstanding tradition in history of a commitment to a core value that really is foundational for the University of Chicago around upholding free inquiry and expression in an academic context. The university has received a lot of attention from many of its reports. We'll be discussing one of them in particular, but of course, what became known as the Chicago Principles, the Stone Committee's report on freedom of expression was subsequently adopted by nearly a hundred campuses.

And I think for the university, the decision to launch the forum is about inculturating the practice here beyond the mere articulation of principles or the official statements and actually actively building and nurturing an environment in which people are productively engaging a diversity of ideas so that per our mission knowledge can grow and flourish. As a research institution that is ultimately the telos, that truth-seeking discovery improvement, dissemination of knowledge is at the heart of what we do and free inquiry and expression is what our current president calls the first principle to make that a reality.

So the forum's mission is to promote the practice, the understanding and the advancement of free and open discourse here at the university and where it's helpful to collaborate with other colleagues in higher education and pockets of civil society who also think this is a good idea and something worth improving upon.

Steve McGuire:

So this foundational principle, it goes right back to the founding of the University of Chicago. I wonder, do people who come to the University of Chicago as students, as faculty, as staff, are they briefed on this history, say during the admissions process or the hiring process? Are students told about the University of Chicago's commitments, say during orientation? Is there a general awareness, do you think, at the University of Chicago among the community that this is what the university has committed itself to all along?

Tom Ginsburg:

So this is part of our mission actually, is to introduce these fundamental concepts there, as you say, very old in the history of the university to everyone who walks through the door. And ultimately we'd like every student, every faculty member, even every staff person to be familiar with this history. But the fact is we haven't done that traditionally. And some of these things like institutional neutrality are often misunderstood. They require some explanation even to current members of the community, what it means, what you can and can't do and such and so educating people about, it's really part of what we want to do.

Steve McGuire:

Okay, great. Well, it sounds like a great initiative. So let's turn to institutional neutrality then and just start before we talk maybe in detail about the Kalven Report and the history of institutional neutrality. Like you say, I think a lot of people, maybe they don't know what institutional neutrality is. I think even in higher ed, probably more people have heard about the Chicago principles or the Chicago statement than have heard about institutional neutrality or the Kalven Report specifically. So maybe you could just start by explaining to our listeners what is institutional neutrality and why is it important? How does it serve the purpose of the university?

Tom Ginsburg:

Yeah, let me start with that. Institutional neutrality is the idea that the institution itself doesn't take positions on the issues of the day. And it's rooted in a vision of the university as a decentralized community of scholars and learners who each have their own voices. It's plural. And that conversation, if you will, might be hampered if the university leadership was to speak out and make pronouncements about what's right and what's wrong. So it's kind of an anti-orthodoxy position is how we understand it. And of course that's in some tension with how universities have come to operate in the early 21st century when they're making statements all the time on all kinds of issues. So it's certainly not something that all institutions have adopted, but we think it's valuable for the ultimate telos of the university, which Tony mentioned, which is of course to inquire and learn and discover.

Steve McGuire:

Great. Great.

Tony Banout:

Yeah, if would add to that-

Steve McGuire:

Tom, would you care to add?

Tony Banout:

Yeah, I mean I would say, look, I think of the many principles that formed the Chicago tradition, which are first articulated in 1899 by a body that was called the Congregation. The university was founded by Baptist. There was this, William Rainey Harper developed this body called the Congregation. It was consisted of all minted PhDs, I think a set of trustees and a set of faculty members. And they unanimously adopt three principles in 1899. And the first is that complete freedom of expression on all matters is how we've always done things. The second, which is I think deliciously quizzical and is worth unpacking is that this principle, number one, complete freedom of speech on all matters cannot now nor

at any point in the future be called into question. And the third is like a proto-Kalven essentially that it's advantageous for the university to not appear as a disputant on public matters.

So why Tom and I like to remind people that this goes back to 1899 is that often when we focus on Kalven, we focus on the social upheaval and the tumult of the late 1960s, the student sit-ins, the rank protests, et cetera. And there it is perceived as a move by the administration to quell the disruption and the protests that were happening on America's campuses. That is a misperception. The founders of the university from the very start saw a principle of institutional neutrality as key to constructing the kind of environment that would be most conducive for complete academic freedom and a robust diversity of views across the body of the faculty and the student body. And it was understood as that. So if you think of the tradition as a semi-precious stone with multiple cuts, the institutional neutrality cut is one cut. And I think focusing on just that, you lose sight of the overall purpose and the whole. So I think it's really important to situate it within the kind of robust, highly ideologically diverse, broader speech and inquiry environment we are trying to uphold and nurture.

Steve McGuire:

Okay, fascinating. So I want to get into a bit more of that history and tradition, but let me ask you about the Kalven Report first because I think when people think of institutional neutrality, if they know about it, the Kalven Report is probably the document that their mind goes to. So maybe just tell us a little bit about the history of the Kalven Report, the committee that came up with it, how was it formed? Why was it formed? What ultimately did they say? Did they argue and maybe how was that received as well by the University of Chicago campus community?

Tom Ginsburg:

Yes. Well, the Kalven committee was formed in 1967 by President Beadle at the time. Sixties of course, a lot of stuff going on, the immediate impetus seems to have been protests about the Vietnam War and trying to get the university to divest from investments in the war machine. But then also there was something, a controversy around the same time about giving class ranks to the selective service. I guess in the sixties, they would leave the smartest kids in the university and take the ones who were less academically successful and send them off to Vietnam. And so students were protesting that too. In any case, the president convenes a committee around Harry Kalven who's a legendary figure in First Amendment law and free speech law, constitutional law here at the law school at the University of Chicago. He's the chair. There's a number of members, George Stigler, John Hope Franklin, some very famous scholars. And interestingly, they disagree a lot and they come up with a report.

And one of the things we'd like to do with Jamie Kalven, Harry Kalven's son, is go a little bit more into the history of the actual production of the report. Their basic conclusion is the university should not take positions on the issues of the day and they do not recommend divestment. They think that would be a political statement of sorts. And we're off and running. Now the report reflects some internal disagreement about exceptions because there are exceptions of course, and we can talk about that in more depth if you like. But internally, the authors of the report, the committee members disagree about how often the university president should be able to speak out and on what kinds of issues because everyone knows there are some things.

Steve McGuire:

And do you know what the immediate response was when they came out with this committee report? I imagine that some of the students and faculty who were protesting disagreed and still wanted the university to divest or take a stance.

Tony Banout:

Yeah, I imagine. I mean, I think to Tom's point, and maybe if we're going to keep this in, he mentioned Jamie Kalven as Harry Kalven's son. So I'm thinking an offline comment now, it might be helpful to give more content to that relationship because Jamie is not only his son, he took it upon himself as a labor of love. Harry Kalven, I think died in his sixties, excuse me. And Jamie I think was in his twenties. So one of the things that Jamie did was dedicate a lot of time to bringing a tome that Harry Kalven wrote on First Amendment jurisprudence to publication, and it was published posthumously. And he also spent time digging into the history and the context of what his father was doing around the report. So he's someone who's invested a lot of time into digging this in. He's talked to John Hope Franklin about this around the time when there was another push for divestment around the Darfur genocide in mid to late 2000s. So just to give a little bit of context there-

Steve McGuire:

And I've heard I think that Jamie Kalven tries to stress that his father or the committee never imagined this as some kind of final statement on these questions.

Tony Banout:

And I think Jamie's right about that. And you could be a textualist and see that. The first paragraph of the Kalven Report says, "We understand our task as providing a point of departure for this important discussion." The words are to that effect. It's very clear that the intent is not to close the door to further conversation, but to open it more widely

Somewhere else it says, "Admittedly, we're addressing large matters of principle and the application of principle to individual cases will not be easy." This was not an authoritative administrative stiff arm to stifle conversation. It was an invitation to really wrestle with what it means to live key principles, among them institutional neutrality. And I think their position very clearly invited the conversation further. So we do know that after this comes out, the late sixties continue to be a period in which there's successive and intense sit-ins at the university. There's John Boyer, the former Dean Emeritus of the college who served for nearly 35 years, wrote a history of the University of Chicago and gets into this period and shows. So we do know that right after the Kalven Report came out, it's not as though folks read it and were like, okay, well we're going to put our activism on a shelf.

The student body continued to be very active, and that I think is as it should be. That the administration, the university, qua university did not issue statements and did not divest in keeping with the principles of Kalven. But this is not about quelling an environment in which there is protest and dissent. In fact, in what Tom and I assembled as the Chicago canon, many of the reports openly state, "We seek to create an environment in which protest is affirmatively welcomed and embraced." It is part of the speech environment. There's obviously an issue when that protest goes to the point of disrupting other members of the community's ability to express themselves, of course, or the university to conduct its legitimate business holding classes, maintaining the safety and operations of its buildings, of course. But we're not looking to create a climate in which there's no push and pull, there's no protest, there's no, that's to be welcomed.

Steve McGuire:

Yeah. It seems like the spirit of Kalven is essentially the opposite of that, that it's trying to say that the university should stand on the sidelines or back off on making official statements or taking official

positions so that that dynamic campus debate can take place among the individual members of the community.

Tony Banout:

Absolutely. The Kalven Report is saying universities have a great and unique role to play in fostering the development of social and political values in society. And it's saying that the role of the university, qua university, the administration, is to get out of the way. So that can happen. And when it happens, well, a great university will necessarily by design and effect be the language in the report, be upsetting like Socrates. So these are the things because Kalven like any articulation of principles it's exegeted and used in various ways by various actors, one of the things that's sometimes missed is it's not talking about a mealy-mouthed environment in which there isn't robust exchange of ideas. It's actively affirming the notion that universities who are on the frontiers of interrogating and producing new knowledge are necessarily going to be abutting against established social norms and values, and that's upsetting, like Socrates. So I think that those elements are really important when we seek to properly understand the intent of the report and the principle of institutional neutrality.

Steve McGuire:

Thanks. Yeah, that's great. So you've mentioned the collection that you have coming out, the Chicago canon on Free Inquiry and Expression, which includes the classic documents as well as other important statements by say, leaders at the University of Chicago over the years. And in the course of our conversation today, you've mentioned the idea of tradition a few times, and I noticed in the introduction that you address that as well, in your introduction to this volume that's coming out and discuss the idea of a living tradition, something that's a kind of ongoing process or conversation.

And I do want to ask you about that point you made earlier that people might try to sort of single Kalven out and maybe see it as a standalone document from a particular moment where maybe the university was trying to shut down this call for divestment or something like that, but that in fact it was part of this ongoing tradition at the University of Chicago going all the way back to its founding. You mentioned the idea of a sort of proto-Kalven at the beginning. So maybe could you unpack that a little bit for us, how the idea in the Kalven Report are already present in the history of the University of Chicago, going back to its founding and maybe how this idea has been negotiated over time up to the Kalven Report, and then we can also get into subsequent debates in today as well.

Tom Ginsburg:

Yeah. Well, obviously when you have a university that's 130 years old now different challenges are going to arise at different times. And the role of principles is to guide decision-making when these crises erupt. This idea of institutional neutrality was initially adopted to protect the faculty from donor pressure in the 1890s when we were founded. It's the Gilded Age, and you need money from rich people who then want to choose what the professors are teaching. And our founding president, William Rainey Harper basically said, "No, we don't have the power to control what professors are doing." This is before the association, excuse me. This is before the creation of the AUP, the Association of University Professors, which articulates a notion of academic freedom. John Dewey was on our faculty at the time. So these ideas are just nascent there. And the idea of institutional neutrality was one piece of that, and it allowed the president to protect scholars and just say, "Hey, they're talking, I can't take any position. All I can do is provide an environment for them to have their debate."

So that idea, which is progressive era idea was there at the beginning. Now you move forward in history, throughout the 20th century, there's basically two issues which challenge free speech on campuses, war

and communism. And we see beginning with World War I and then repeatedly World War II and the Vietnam War, the crises erupt over what can we speak, what's the university doing in this crisis? And gradually over the course of the 20th century, the First Amendment emerges in which free speech as we come to understand it, as citizens gets fully developed in ways that were not true before the 20th century.

For universities, of course we're facing challenges, pressures to shut down certain speakers, shut down faculty members and anti-communism was present really from the founding of the Soviet Union in 1917. And again, the idea that the university could not be captured by any group because it does not speak help to insulate our faculty and allow the university to say, "Hey, don't worry about if these people are communists or not. We don't care if they're communists. All we care about is that they're good scholars." And I think one reason that was a credible argument is because the center couldn't be captured by any group of faculty because it doesn't speak. So the neutrality was really important in that context. Yeah.

Steve McGuire:

Interesting. And so that's interesting that it was originally thought of as a way to protect faculty from donors. Do you think that that's changed over time? Presumably that concern is still present, but then it seems like certainly by the time you get to the Kalven Report, you're talking about members of the campus community who are pressuring the administration to do something. And so that seems like a shift maybe that they weren't thinking about when they first articulated the principle.

Tom Ginsburg:

But it's equally important. So we launched our forum on October 6th, so then October 7th happens in Israel and you have massive challenges to campus speech environments. We see both dynamics that you described, donors pressure university presidents to say X or Y. When university presidents have been speaking out regularly on all kinds of things, it's hard for them to say, "Well, I'm not going to speak out about this one." And then of course, we also have members of the community and it's a very contentious issue. It goes without saying. And so an internal politics lobbying for particular statements or stances by the university, and to my mind, and I've written an article about this, something like principle of institutional neutrality plays a kind of constitutional function because it basically says, don't try, don't bother us because there's no way we're going to say anything. Go back and do your scholarship, and if you want your scholarship to advance your particular views, pursue social justice through your work in some sense, not through capturing the center.

And I think that's analogous in some sense to a constitutional order where we basically try to have political institutions where they can't really touch core interests that are really important to people like what religion you have or your physical integrity. And by limiting government, we actually empower it. We channel political energy into problems that government can solve. So I think there's an analogy there. Certainly there are, you did mention accurately two sources of pressure, which is of course donors and the community itself. I would add the state, which now is emerging in 2024 as a new kind of threat to academic freedom.

Steve McGuire:

Interesting. Yeah. So you mentioned October 7th, and obviously it's been very rocky on many campuses in the United States since Hamas attacked Israel, and then the subsequent response by Israel. Of course, there was the spectacle of the three college presidents who participated in the hearing in Congress. One thing I noticed, I've been following this fairly closely on a number of campuses, and it seems like the

University of Chicago has certainly had protests, and it seems like there have been occasions where maybe protesters have crossed the line in terms of potentially violating some campus rules and that sort of thing. I don't want to get into litigating that per se, but just to say that it seems like Chicago has certainly had controversy surrounding responses to these events and claims of antisemitism, et cetera. But one thing I've noticed is that it seems like the University of Chicago hasn't publicly or politically drawn as much attention as some of these other universities and colleges have, like Harvard or the University of Pennsylvania.

I wonder if you think that part of the reason for that is the Kalven Report and the university's approach to these things. Now, I looked at the time to see what did the University of Chicago do, and correct me if I'm wrong, but it looks like not through the president, but maybe it was through the provost or student life or something like that. There was a statement issued, but it was one about sort of acknowledging that something serious had happened that would be affecting members of the community and that there's a variety of resources available to people, but there was no real political stance taken on the actual events and otherwise it seems like Chicago has more maybe internally been dealing with whatever's been going on on its campus without having so much attention brought to it as those other colleges universities have. Does that seem like that's probably in part at least because of Kalven, to you?

Tom Ginsburg:

Yeah, so I'm teaching international law and thus I'm pretty engaged in Israel Palestine issues, and I'm in touch with students on both sides of this and passions are obviously super high, but I think it's safe to say in my conversations with students that they recognize that as passionate as they are and how as upset they are with their students on the other side, they recognize that they're lucky to be here. And I'm sure that's not universally true, but a lot of students I've talked to from both sides say, "Oh my God, thank goodness we're here. Look at what's happening on X or Y campus." Because there is a lot of suppression and there's a lot of, what's the word, tension, we have had some minor things go on, but for the most part it's been, people have been of course able to protest and such in ways that are consistent with the rules.

There obviously are limits, and it turns out you cannot occupy a building. The president did send out something reminding our students and our community of the gifts as he put it, of free expression, that we have this precious thing from our history and that we should treasure it and we should exercise it. But of course there are limits. You can't tear down posters, you can't interfere with someone else's speech. By and large, I think we've had a pretty good run of it. Now notice that dogs that don't bark never make the news, and so it's therefore hard to know how unique we are. Maybe there's a lot of other campuses, but I would say that I think we're combining a lot of political activism, not quiescence, people are really engaged in the issue, but at the same time relatively less conflict.

Tony Banout:

It really seems to me, I think that's right. And I often say, look, I personally don't believe in utopias. There's no human community or society in which everything is perfect. I think it's very dangerous political theory if you expect that to actually be possible. So of course we've had tensions and we've had legitimate protests and we've had some things that were disruptive of other people's rights and privileges. But by and large, I think what one of the subtexts is, and the congressional hearing in which three presidents and a professor were brought to the stand is the danger of having a history of a litany of issuing opinions and positions on a large range of social and political matters that may or may not be tied clearly to the work and the telos of the university.

Puts you in a position in which when something then does happen that is traumatic and significant, like the attacks on October 7th and the ensuing war and the situation now in Gaza, that silence is loud. And by and large for the University of Chicago, we're not in that position because we don't have said litany of statements on a number of things. Not that our tradition has been absolutely perfect, but we're not quite at the same place. And so it's much, we're just in a different situation and you can't really take us to task on what's perceived as inconsistency at best, hypocrisy at worst.

Steve McGuire:

I think that-

Tom Ginsburg:

To be honest... May I? There is one element in which, so it sort of leads to a discussion of the exceptions. When does the university speak out? And we have had situations where the president judges that it's time to speak out on something. The basic theory is that if the university's ability to function is threatened, the president not only can speak out but must, that's the job of the president. So for example, former President Zimmer, when we had the Trump immigration restrictions viewed that as an existential threat to our ability to operate and spoke out against them.

On occasion, leaders will speak out about other things. We did have a George Floyd statement, for example. We learned, I didn't know that at the time, but we did have one. There was one on Asian American violence. And so occasionally leaders do speak out, and so then the debate begins, well, why this time and not that time? And I guess what I would say is one way that we learn about these things is that the community itself will have that discussion. And I think in retrospect, some of those statements people would say were mistakes, but some of them, I didn't hear any controversy about Zimmer speaking out for immigration. That was something where I think the community was very happy to have him interpret that as one of those rare instances where the university really did have to speak.

Tony Banout:

Got a follow up there. I mean, I'd say from my point of view, I think it's helpful to point out that some of our colleagues in this space, Nadine Strossen, for example, John Tomasi, who is the president of the Heterodox Academy, Keith Wittington who Tom co-authored this, I'm sorry, who's editing the volume that Tom wrote this chapter for drawing corollaries between constitutional democracies and institutional neutrality in Kalven's principles, sometimes talk about, not the exceptions, but the obligation clause. The term is the obligation clause in Kalven, and I think that's a much more truthful.

And in fact, if you read the text, that is how it's phrased. That's a much more powerful idea that when the university's core values around free inquiry and expression and its core business operations are threatened, it's not just that you may speak, you're permitted to speak, you are obligated to speak. You're obligated to speak. I think that deserves pointing out. Again because it gives you a picture of Kalven as not an excuse for cowardice. The text itself also says, "Don't construe this as a lack of courage, indifference or insensitivity. This principle of neutrality or restraint is out of deep respect for free inquiry and an obligation to cherish a diversity of viewpoints." So if that's threatened, you got to protect that. You got to protect that. And of course, making those judgments, discerning that, that's the contextual difficult work of first and foremost, the president's office.

Steve McGuire:

Right. Well, I'm really glad, Tom, that you brought up the examples when the university has made statements including about George Floyd. And Tony, that's really fascinating to point out that it's framed



as an obligation. So maybe let me try this, take the immigration example. Is this one that you would say fits, if you were to sort of explain why President Zimmer made this statement that you would say this is one that fits this obligation passage that he was required to do so, and if yes, if that's where you would sort of slot it in the Kalven Report, why? Why did he have to make that statement?

Tom Ginsburg:

I think the idea is that university is dependent on foreign scholars, recruiting scholars from all over the world. I always describe the scholarship as being part of a global community and we want the best people from all over the world, so it affects our ability to recruit staff and faculty and of course also affects our ability to have students come because we do draw students from all over the world. And so I think of scholarship as not nationally oriented. It's really an international thing. And so that I think was the argument, if you're going to restrict immigration from certain countries, if you were going to make it harder for people to get back, remember in the early years of the Trump administration, we had students who couldn't get back. Wow, that really is hindering our mission. And so it was worth speaking out about. I think that was a very easy case.

Tony Banout:

Yeah, I think there's two aspects to that obligation clause. I'm going back to the text to remind myself, but one, so I don't, from my point of view, it doesn't seem like that is as squarely under the category of the first principle of free inquiry and expression. That's obligation clause, category A. Category B is the core business and functioning of the university, and I think it is much more squarely threatening of that. Given everything that Tom said, we have a good percentage of our students are foreign nationals, we probably then like now have researchers that are overseas that need to get back. We have all kinds of complications where that would derail our ability to do our work.

Steve McGuire:

Let me ask you about another more recent one. And I have to confess, I'm not sure what the University of Chicago said if anything, but the Supreme Court recently came down with an opinion in *SFA v Harvard* on affirmative action or race-based admissions, whatever you want to call it. And obviously it's a complex decision, but is essentially read as saying you can't determine your admissions solely on the basis of race, or at least using that as a clear criteria for how there was still this idea that if students are going to talk about their identity, whether it's race or something else, say in their essays and explain how that has contributed to their life experiences and made them who they are and that sort of thing, that that would be completely fine.

The Supreme Court didn't want to tell people they couldn't talk about their identity in their applications and that sort of thing. But certainly what it seemed Harvard was doing where it had fairly significantly different levels of admissions based on test scores and that sort of thing for different groups based on their racial background, the court assumed you saying you can't do that. So I mean you could say that affects the university's operations in terms of the university's, the way that it thinks it needs to conduct itself in terms of admitting students. On the other hand-

Tom Ginsburg:

The leaders did speak out, they did sign an amicus brief in the case, as I understand it. I haven't actually read the amicus brief. So that was an instance where they believed this affected our core ability to operate. And so that again goes to the core of what a university is trying to do. And so then you say, well, what's outside of it? Universities should not have foreign policies. That's my view. Neither by the

way, should departments, and this is maybe a separate topic, does this, extended departments, but as we all know, many universities made statements about Russia's invasion of Ukraine essentially saying one side is correct here, one side is bad, one side is good, which I agree with. It happens to align with US foreign policy and other things. But every time you do that, there are a million other conflicts you are ignoring.

And just to name a couple, Yemen and Ethiopia, there are no university statements about those conflicts, nothing on Myanmar that I know of. So there's really things which clearly universities are definitely way outside their actual operations, affirmative action, immigration, our leaders have decided that those were worth speaking out about.

Tony Banout:

I also think, to my mind too, and I should be curious to hear what my colleague thinks about this, Tom. There are different ways of speaking out, of course. So it's no secret and you probably do a web search and find our amicus filed in the SFFA case, it's very different to put on our home page the fact that we filed an amicus and express our position on the matter at hand per se. I think in that case, we are clearly those tasked with running the organization have to make decisions based on the viability of its operations. And when the Supreme Court is looking at making a decision that is going to profoundly affect that, it's no surprise that an institution has an opinion and might file an amicus. To me that's very different than an impassioned full-throated defense of affirmative action say from an articulation of a point of view on reparations and what's owed African Americans in this country that sits prominently on our landing page and is blasted out. Those are very different kinds of things.

Steve McGuire:

Yeah, that's interesting. That makes me think too of just other aspects of university operations that certainly some people would argue are inevitably political in some way. So take the calls for divestment in companies that are making weapons or something like that, and the people who do the investments for the university's endowment, they have to make decisions. What are they going to invest in? What are they not going to invest in? And maybe they're just kind of making decisions the way anybody else would investing in the companies that they think are going to be the most profitable or the stocks or what have you, the funds, and they're not making decisions in their minds based on political values or something like that.

But on the other hand, from the standpoint of the people who want divestment, they're saying, "Well, no, you're saying let's be neutral and let's not politicize this. But what you're really doing is siding with the status quo, which is inevitably political, and you're basically saying that, well, we're siding with the view that thinks it's okay to invest without regard for the fact that this company's making weapons." Or something like that. How do you respond to people who make that kind of argument, that it's inevitably political when the university is operating in these ways? And so we have to decide which side we're going to take.

Tony Banout:

So yeah, I love the question because there's both. So let's observe that there's both the substantive particular case that you're raising on investment divestment and the alleged neutrality or partisanship or values-based discretion in making those decisions, on the one hand. There's also the principle level claim of neutrality is fictitious. So if it's okay with you, Tom, I'd like to speak to the latter. This is an important habit of mind, I believe is thinking through what is your opponent or the dissenting view's strongest case against the position you hold. And in this particular case, I do think one of the strongest dissenting

positions is that neutrality is fictitious because neutrality ends up solidifying the status quo when the status quo is embedded with particular values that preference and perpetuate those who have more privilege, more money, more power. I think there's actually some truth to that and the best rejoinder to that, there's some truth, but I'm not fully convinced by the entailments of that position.

The best rejoinder I found is the great philosopher Kwame Anthony Appiah's position. He wrote this in the Atlantic about a year ago, I believe. That, "Neutrality is a fiction, but it's a fiction worth upholding like other values or principles that guide decision-making in important ways." So even if you grant the idea that the status quo perpetuates certain values that are already normative and therefore you can't be neutral on a moving train as I think Howard Zinn liked to put it, there's still a very important principle of neutrality at play. The substantive question, maybe Tom, I don't know if you'd like to take the substantive question on divestment and investment decisions.

Tom Ginsburg:

Yeah, I think about that a lot because again, what's the purpose of institutional neutrality, to foster a community of learners unconstrained by authority, not thinking that the positions they take are going to affect their career outcomes, which is why it's really important that departments also be neutral. There's lots of reasons that have to do with inquiry as the primary mission of the university. Now, if you think of that's the core purpose, investment policy is kind of outside of that, it's kind of orthogonal and I think the critics are correct that there is no neutral investment policy. I think what we say, neutral investment policy, we mean give it to some technocrats who will maximize the returns and there's no reason that we have to maximize returns. There's all kinds of ESG funds that people invest in which are trying to do well by doing good and such. And so I find that one to be in some sense the most difficult to rebut.

But I also know that a good investment policy, we have to make some money with these endowment funds. It's a duty to the institution. And I'm just not sure that having a collective conversation or vote among people who are uninformed by how to make good investment policy is going to get you there. So I'm kind of conflicted about it. I don't think it is a core case, even though it was the case that motivated the Kalven Report. I also just want to say we have movements, for example, to divest from fossil fuels. This is something where I think those movements, what I'd like to see is that they get redirected away from the investment to things on campus that would reduce demand and reduce our carbon footprint. There's lots of things we can do and it's perfectly okay for people to lobby and try to get those things changed within the university that would address the problem of climate change maybe more directly than a more expressive idea that we're divesting from X or Y cause we don't like.

So anyway, that's a kind of rambling answer and I do think it is a tough case.

Tony Banout:

I think Tom's latter point I think is really important in that there is, because frequently I believe the tendency is one that pushes for virtue signaling, take this position because we believe it is the moral and right position to take, and we want the institution that we're affiliated with to be in line with what we think is right. I don't give much credence to virtue signaling and what Tom raises is the actual effects and function of a move, which is another way to analyze and think about the worthiness of an act.

Steve McGuire:

Yeah, that's interesting. I wasn't going to use the word virtue signaling, but I was thinking in terms of the earlier point about the affirmative action case and submitting a brief versus making a big statement on the website. And similarly here, Tom's mentioned, okay, we're going to hand off to a bunch of

technocrats, the task of running the university's investments and that sort of thing. But if you were to get the university to divest, there would be some concrete win there, I suppose, in the sense that the university would no longer be investing in these companies that were making weapons, and that might have some impact. Certainly it might if thousands of institutions did this, but really it seems like one of the main goals is a kind of symbolic win where you're basically getting the university to come out and make a de facto statement that we're not going to support this war effort. And that would be in a way, the bigger win that is being sought through a divestment campaign.

And so that would seem to then move closer into this territory of potentially violating the spirit of Kalven and creating a space for open inquiry. Similarly with climate change, I mean I suppose I could imagine being a scholar at the University of Chicago who thought that the more orthodox opinions on climate change are way off and we shouldn't be even worrying about, I don't know, recycling or something like that. And all around you, the university is making all these efforts to lower its carbon footprint and use less plastic and that sort of thing. And you can kind of feel like you're this heterodox thinker amidst all of these sort of orthodox positions on climate change.

But maybe you guys would say even there, there's going to be a difference between, look, the university is going to have to make some decisions on what kinds of straws it uses or something like that. That's an operational question. And if it more or less, people are lobbying and that sort of thing, but if it more or less just sort of makes more sort of technocratic bureaucratic type decisions about these things and then moves on, maybe you can still function as a heterodox thinker on these questions in a way that's freer than if the university were coming out and saying, "Look, if you in any way deny this view of environmental issues, you really don't fit with the program here at the university."

Tony Banout:

I mean, I think on this particular case, we do have no shortage of out-of-the-box thinking and a climate engineering program that's looking at different ways to solve the very real crisis, I believe. And many of us fully believe there's a scientific consensus around that we are facing and that's good. And I personally would also like to see us reduce our carbon footprint in ways that make sense. When it comes to investment choices and divestment choices. I think one of the elements there is that the intent, we don't have a chief investment officer who's picking particular stocks and out of political motivation saying, "I'm going to invest in the military industrial complex because I believe in it." Those decisions are made with the appropriate telos of maximizing returns, whereas the divestment decision would be made with the telos of ridding oneself of what is deemed to be problematic or morally wrong and unjustifiable decisions. So I think that there's a key difference there. I think there's a key difference there. I think Tom, you wanted to get into...

Tom Ginsburg:

Well, I was just going to say that, yeah, one of my colleagues at an event recently said, "Divestment is different than investment." So divestment would be purely expressive, investment, presumably there's another motivation, but the example you give with the straws is part of the exception. In the Kalven Report, they say there's certain aspects in which we can't avoid speaking, purchasing and such, and I see no squelching of inquiry if we decide to use paper straws and not plastic, I can't imagine. I'm sure that would be controversial, because everything is controversial on the university campus, but it doesn't strike me as a core case where we should be really outraged by the decision that is made, and I hope they do make that one.

Steve McGuire:

Okay, good. Yeah, so on that subject, what I was calling the exceptions paragraph, but will henceforth refer to as the obligations and exceptions paragraph or something along those lines. There's the second half where it talks about there's just things like this where the university is going to get involved, and the one committee member, Stigler, he added this sort of, I don't know if you call it dissenting paragraph, I forget exactly what the words are.

Tony Banout:

Special comments. Special comment.

Steve McGuire:

Special comment. That's right. And so he basically says that he would prefer if they had said something else. And so I think the parties he's referring to reads, "There's another context in which questions as to the appropriate role of the university may possibly arise. Situations involving university ownership of property, its receipt of funds, its awarding of honors, its membership, and other organizations." Awarding of honors is an interesting one too because it's common obviously to have commencement speakers or people who receive honorary degrees. And I've seen articles about these where they say, go overwhelmingly towards Democrats or something like that. And people are upset about that. Obviously you don't award these things necessarily based on somebody's political views, but people look at that and they wonder what's going on?

Then it goes on and says, "Here of necessity, the university, however, acts must act as an institution in its corporate capacity... ". Et cetera, et cetera. And he wanted it to say. "The university when it acts in its corporate capacity as employer and property owner should of course conduct its affairs with honor. The university should not use these corporate activities to foster any moral or political values because such use of its facilities will impair its integrity as the home of intellectual freedom." Which it really does sound nice. He is well phrased, but I was just wondering if you could elaborate at all on why he added this special comment and if you had any thoughts on like does that substantive, would that if they had used those words instead of the ones that are in there in your view, would that have substantively changed what Kalven is sort of allowing as an exception here?

Tom Ginsburg:

I think the phrase that he took issue with is, "... in the exceptional instance, corporate activities of the university may appear so incompatible with paramount social values as to require careful assessment of the consequences." I think that's right.

Tony Banout:

Yeah, I read that way too.

Tom Ginsburg:

And so what he's worried about is that who's going to judge paramount social values and he wants a very limited view. And so you could say, well, did George Floyd, was that paramount social values? Is that a thing where we had to speak up as an institution that's located on the south side of Chicago, you can make an argument. And if Stigler had had his way, I'm not sure you'd be able to make that argument. So this was a dissenting view. We need to do more research on exactly how that all played out and that'll be fun to learn about.

But more broadly on the question of commencement speakers and stuff, sometimes those things are controversial and I think those are easily resolved by ensuring that there are faculty involvement. So I was on a committee that gave honorary degrees for a couple of years, and so that faculty choose and they're nominated from all over. It's kind of a collective decision. Commencement speakers have been chosen by the center traditionally, and at an event we had recently, there were a lot of faculty are very upset about that, and that seems quite easy to have faculty involvement. The point being that when you invite someone to speak for the university as a whole, that person might be communicating something because of their past positions. And so you can't avoid speaking in that moment by who you have asked to actually speak at the occasion.

Steve McGuire:

So do you think if, universities are going to, I think continue to do this, and so is the proper response maybe to have some institutional memory as to who's been invited over time and be aware when maybe you are attuned to when people outside the community or within the community raise concerns about particular speakers or people who are honored and you say, "Look, we're going to invite people, but maybe if we invited someone who was concerning to this community, then we'll turn around in the future and make a note to try and bring someone in that they would appreciate." Or something like that and try to make it so that you have some balance.

Tony Banout:

I think there's a primary principle for me that maybe needs to be better inculturated and understood, and it's that giving someone a platform to speak does not mean that you platform everything they say or how they use that. That's an obfuscation. And it goes directly against the idea that you have a robust speech environment in which you're going to hear things that you might find even harmful or offensive. And that's not an excuse to not necessarily hear those things, nor is it a reason to restrict that speech necessarily.

So to the extent that there's an underlying premise that giving someone the stage means a full-throated endorsement of everything they've ever said, that needs to be, I think disentangled, and it would be important for us to help especially students understand that. That said, without a doubt, of course, we live in the real world and it's going to come across a certain way if 99% of your speakers incline a certain way politically. And I do think it's pragmatic and wise to seek a relative balance, especially when you're dealing with the significant stages. The class day speaker, the commencement speakers are always university faculty members, which is one, I think the university maintains a tradition that is a little bit insulated from those charges.

Steve McGuire:

A couple more. So the paramount social values, that phrase when I was reading from the text, it comes in the part that I skipped at the end of that paragraph with the exceptions and the obligations. So it is in the context of talking about the corporate activities of the university when that comes up. But I feel like I have to ask, are there moral or political principles that are so fundamental to human community or human nature or to say the United States in particular, since that's where the University of Chicago is, where a university might be justified or even required to say something?

And I mean, some of the examples have already come up in our conversation today where people might say something like that, I think. George Floyd might be one example where someone might say that this event and the social and political problems surrounding it are just so horrific and so egregious that something needed to be said perhaps, or maybe that's how someone would think about it. Another

example would be Hamas attack on Israel. You might say, "Look, I understand people debate this." That's quite evident in the last several months. But you might say, "Look, this was a terrorist attack on innocent civilians, crimes against humanity, absolutely horrific. A university or at least a university president, needs to be able to come out and say something about that."

And another example that I don't think we've mentioned today might be something like January 6th, which of course is also controversial, but certainly you could imagine that some people would say that this was such a fundamental attack on the principles of the democracy in which we exist. And you could kind of maybe see yourself start to make an argument like, well, the University of Chicago depends on the continuing existence of the United States in some way. I mean, that may or may not be the case. Obviously many universities have existed longer than the country, certainly like a Harvard, for example, pre-exists, what we know today as the United States, and you could go to European universities or whatever, and they've obviously seen ebbs and flows of various political arrangements over the centuries.

But nonetheless, you might look at January 6th and say, this is a fundamental attack on our democracy. Certainly lots of people have argued this and something we can't pretend that we're neutral about that, surely. Right? I'm kind of just setting up the argument here and giving a few different examples. And I guess my central question is, do you think there are, like I said at the beginning, sort of moral and political issues or points where you just have to say, "Yeah, neutrality doesn't really cover it at this point. We have to say there are certain things that you just can't defend."

Tom Ginsburg:

It's a really bad world out there. There's horrors going on in places that our students couldn't find on a map, every single day. And to me, the core criteria is, does it affect the university? Now you have something like the Hamas attacks and the Israeli response. That definitely affects students in the university because people have family there, but it doesn't affect the operations of the university. So clearly a university can speak to its population, say, "We know you're hurting, here's some resources." No one questions that. That's obviously something that they can do and should do in our era. But when it comes to commenting on the issues of the day, I do think it has to have a plausible connection. I mean, under Kalven, under ideas of neutrality, it has to have a plausible connection with the operation of the university. And I would think that you could make a case for January 6th. We do depend on democracy. You can't have free universities without a free country. So I could see something like that.

Now again, it's just principles that we debate. John Hope Franklin towards the end of his life was asked whether he thought the Darfur genocide was worth speaking out about. And he said, "Yes, actually." And he was one of the original drafters of the Kalven Report. And so that's a powerful and important voice. But I think if I could talk to John Hope Franklin, which would be amazing, I might say, "Well, yeah, but why that one and why not Myanmar and why not the things going on in Sudan and the Congo and such?" And once we go down that road, I have this image of the university president chained to his desk in the basement crafting banal statements all day long about issues of the day and not actually doing the work that he is supposed to do, which is of course to run the university.

So I think it's good principle. I think the word neutrality is one that's contested, and we don't have to use the term neutrality. Dan Diermeier at Vanderbilt uses the term institutional restraint, but it's still the same basic idea. You don't speak out unless you have to, you shouldn't view the university president as some kind of moral leader. And I know some university presidents disagree with that, but that's our tradition and we're sticking with it as they say.

Tony Banout:

I think to Tom's point as well is you set up, you essentially incent an environment in which people are lobbying for different positions, and that's not a healthy academic environment from my point of view. It's very interesting to think about how, this is true for any text, the Constitution, scriptural texts, what was written and how communities subsequently over time receive and exegete and understand.

So a couple of things are noteworthy with Kalven is this term institutional neutrality technically isn't used. It does use neutrality of the institution. And I'm not trying to be cute by pointing that out, but it's curious that institutional neutrality has become the buzzword. Perhaps more importantly, the notion of neutrality is not titular. It's not in the title. Unlike the Stone report, which is the report on free expression. What is titular is the role, our role in political and social action, and we talk a lot less in how we've received the document about proper roles and which bodies within the campus community ought to have agency in addressing social and political values. And if you frame it that way, you actually start to see different things. The role of the administration is to get out of the way so that the university can do the hard work of knowledge flourishing, production, dissemination, which will challenge, consequentially challenge and abut with political and social values that are regnant in a society. And like Socrates be upsetting. You get a very different understanding of what this is all about, if that's your starting point.

And I find it interesting that our tendency has been to receive it and frame it first and foremost as an articulation of institutional neutrality. It is about that. It is about neutrality, but the writers didn't think that that particular framing was how to organize and express their thought fundamentally.

Steve McGuire:

That's really good. Yeah. Okay. Just to move this towards a conclusion, one last question. I'm thinking of the average American. It's one thing for people who are working in higher ed to have these debates about institutional neutrality and try to sort out whether they want to abide by it or not. But from the perspective of the average American, I wonder what is the case that you might make to them about why it might be important for them to care about institutional neutrality in their universities and think that this would be a good thing.

And I can't help but think in the back of my mind of some of the survey results that have come out recently showing rock bottom confidence in higher education among the American people. And the other thing you notice in these results is that it's very polarizing politically. I mean, you see that even Democrats, according to some of these polls are losing confidence. But it's really like Republicans have, it just seems like if these polls are accurate, which you can always question polls, it seems like they're starting to just really break ranks with seeing our universities as a positive contributor to our society.

And so Tony, I really love the sort of powerful defense of what Kalven is arguing in terms of the mission and the purpose of the university. And maybe that's where you'd go with this, but I also wonder just in terms of how the American public tends to be perceiving our colleges and universities and whether you think explaining Kalven or adopting Kalven helps with that.

Tom Ginsburg:

Yes, universities are in trouble because in a sense, our existence depends on a bargain with the public that we're going to be able to deliver education, we're going to be able to work on the really tough problems that face society. And that's why I'm really concerned about the statistic you mentioned. Suppose the person who has a solution to problems of global inequality or climate change or a cure for cancer is a conservative who never enters the university because they perceive it as being a place of left-



wing indoctrination. Now, of course, faculties tend, we know this, statistically, tend to skew left, and there's no problem with that whatsoever, as long as our mission is one of inquiry.

But when the institution itself speaks out, I think that really undermines the ability to really serve all our citizens. I'm from California originally, the president of the University of California made a statement about the Dobbs decision, which my cousins we're very happy with the Dobbs decision. And it doesn't affect the state of California whatsoever in any case. Well, you're basically saying to them and their children, this is the kind of place we are. So I think institutional neutrality is critical to restoring trust for universities and to reconnecting with society, having a bargain with all aspects of society that will allow us to go forward. And that's going to allow the social justice work to go forward too, for those who think that their scholarship contributes to that, but without it, I think we're really going down a very bad road.

Steve McGuire:

Thanks very much, Tom. Care to add anything to that, Tony?

Tony Banout:

Thanks, Tom. I am very concerned with the plummeting confidence in higher education, as you said, Steve from primarily Republicans, but also independents, you're seeing in the last decade a real cliff amongst those two groups, especially. Some deterioration amongst Democrats too, but not as dramatic. And I think you're seeing that from multiple polls. So to your point, polls can be wrong, but there's multiple attestation here and I think a lot of cause per concern.

What I would say to the modal American is, look, like diverse democracies, universities need to be institutions that can hold a pluriformity of ideas and views, and to the extent that they position themselves as partisan on any side, they're doing a disservice to the wholeness of the community and the existing range of views within that community. I read the lack, the declining levels of confidence as indicative of, I think Tom alluded to this, universities seeming like they're out of touch, left-wing bastions that only are relevant for a particular segment of the population. There's a lot of those views that I'm actually sympathetic to, but that's the wrong way to position an institution. I think you can make analogies for a corporation or the country at large that contain diverse communities and should, ideologically diverse communities, folks that really feel differently about different things, potentially irreconcilable differences. It's not easy to create, nurture and maintain a space like that. That is what university leaders are tasked with, I think.

Steve McGuire:

Great. Great. Well, I think we can wrap up there. Thanks very much for joining us on the podcast today and looking forward to the new book on the Chicago canon coming out and looking forward to seeing the work of the forum in the years to come.

Tony Banout:

Thanks so much, Steve. It's been a pleasure.