2022

Hostile Learning Environments, the First Amendment, and Public Higher Education

Todd E. Pettys

CONNECTICUT
LAW REVIEW

VOLUME 54 MARCH 2022 NUMBER 1

Article

Hostile Learning Environments, the First Amendment, and Public Higher Education

TODD E. PETTYS

The Supreme Court has never squarely addressed the First Amendment status of student-on-student verbal harassment at public institutions of higher education. Does the First Amendment permit public colleges and universities to discipline students on the grounds that their speech has created a hostile learning environment for others on campus? If so, what is the analysis underlying that constitutional judgment, and what are the requisite hallmarks of such an environment? Does it matter whether a student's speech created the hostile learning environment on its own or whether it wielded that power only by virtue of its combination with the speech of other students? Does it matter whether the speech was directed to those for whom it created the hostile learning environment or whether the speech was merely overheard?

This Article addresses those questions. To frame the First Amendment discussion, the Article provides a statute-centered description of harassment and hostile learning environments; the description is a familiar one, but it is nevertheless often mischaracterized. The Article then argues that, if the Court's Speech Clause jurisprudence was insistently originalist in nature, we could confidently say that the First Amendment gives public colleges and universities broad latitude to discipline students for speech that, in administrators' judgment, is antithetical to important institutional values. But the Court today rejects key analytic touchstones that an originalist methodology would likely favor. Using the modern Court's preferred framework, the Article advances arguments that rely heavily upon both tradition and modern free-speech values. The Article contends that, in some circumstances, student speech that creates hostile learning environments for classmates is categorically excluded from the First Amendment's protection. In other circumstances, however, the First Amendment shields students from discipline, unless they make harassing statements with a mens rea akin to that of actual malice in defamation law.

ARTICLE CONTENTS

Hostile Learning Environments, the First Amendment, and Public Higher Education

TODD E. PETTYS [*]

INTRODUCTION

At public colleges and universities, does the First Amendment permit school officials to discipline students on the grounds that their speech has created a hostile learning environment for other students on campus?[1] If so, what is the analysis underlying that constitutional judgment, and what are the requisite hallmarks of such an environment? Does it matter whether a student's speech created the hostile learning environment on its own or whether it wielded that power only by virtue of its combination with the speech of other students? Does it matter whether the speech was directed to those for whom it created the hostile learning environment or whether the speech was merely overheard?

These questions, all of which I address in this Article, relate to the bind in which public institutions of higher education can find themselves when students speak in ways that other students find unacceptable.[2] On the one hand, postsecondary schools have powerful incentives to create learning environments that will appeal to the students they aim to recruit and retain. Colleges and universities compete with one another for mobile tuition-payers, of course, but they have noneconomic reasons to think about their campus climates, as well. An institution that wishes to reap the educational benefits that can flow from assembling a racially diverse student body, for example, will want to maintain a campus environment that welcomes, rather than alienates, students of color.[3] On the other hand, the

---

[*] H. Blair and Joan V. White Chair in Civil Litigation, University of Iowa College of Law.

[1] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of . . . liberty . . . without due process of law . . . ."); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[2] *See* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1804–06 (2017) (providing examples of campus speech controversies and describing the pressures they place on administrators); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1863 (2017) ("Those who administer the effectiveness of young adults' educational experiences must walk a tightrope of providing their charges with the means to discuss controversial issues while preventing debate from deteriorating into harassment.").

[3] *Cf.* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) ("The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.").

First Amendment does not permit public colleges and universities to restrict some students' speech simply because other students find the speech objectionable. As the Supreme Court explained half a century ago, its "precedents . . . leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[4] When it comes to speech in the larger community, the Court has repeatedly stressed that the First Amendment does not allow public officials to restrict expression merely because some deem it offensive,[5] or even outrageous.[6]

There are, to be sure, a few well-established categories of expression that public officials may entirely proscribe, but those categories are exceptionally narrow in scope. For example, policymakers can ban "fighting words"—words that a speaker directs to another person and that are likely to provoke an immediate, violent response.[7] But the fighting-words doctrine does not typically apply when speakers deliver their messages in a manner not involving face-to-face confrontations, such as when the target of harassment finds a note slipped under her door, graffiti scrawled on a wall,

---

[4] Healy v. James, 408 U.S. 169, 180 (1972).

[5] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Courts have invalidated some schools' speech codes on these grounds. *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 317–20 (3d Cir. 2008) (invalidating Temple University's ban on "offensive" speech); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–84 (6th Cir. 1995) (invalidating Central Michigan University's ban on speech creating an offensive educational environment).

[6] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011) (explaining that "[o]utrageousness" is a constitutionally unacceptable basis on which to restrict speech); Boos v. Barry, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"); Hustler Mag. v. Falwell, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.").

[7] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942) (articulating the fighting-words doctrine); *see also Johnson*, 491 U.S. at 409 (stating that fighting words are those that a reasonable person would take as "an invitation to exchange fisticuffs"); Cohen v. California, 403 U.S. 15, 20 (1971) (defining fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"). The *Chaplinsky* Court said that fighting words also include words that "by their very utterance inflict injury." *Chaplinsky*, 315 U.S. at 572. As *Johnson* and *Cohen* illustrate, however, that portion of the *Chaplinsky* formulation has since been dropped. *See* Purtell v. Mason, 527 F.3d 615, 623–25 (7th Cir. 2008) (describing the doctrine's evolution).

or a noose hung in a locker.[8] Even when speakers and their audiences do meet face to face, the doctrine often gets no traction because the circumstances are not ones in which immediate violence is likely to erupt.[9]

State officials can also ban "true threats," but the doctrine similarly covers only a small fraction of the speech that students might find environmentally toxic. True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[10] Although threats are certainly capable of causing great upheaval in people's lives, there are innumerable other expressive means by which students can poison the learning climate for classmates.

The same is true for other established categories of wholly proscribable speech, such as incitement[11] and obscenity.[12] Environmentally problematic speech might sometimes take such forms, but often it will not. We must, therefore, think about environmental concerns on their own terms. Under what circumstances, if any, does the First Amendment permit public institutions of higher education to discipline student speakers for the very reason that their speech has created a hostile learning environment for others?

I begin in Part I by describing the hallmarks of hostile learning environments. The description flows from federal legislation that imposes financial consequences on colleges and universities if they receive federal financial assistance and fail to respond to known harassment in a statutorily adequate manner. When it comes to student-on-student harassment, the criteria for statutory liability are demanding—more demanding, I will argue, than some have been willing to acknowledge. Although one could define hostile learning environments in less stringent ways for the purpose of framing a First Amendment discussion, I seize upon the statute-centered

---

[8] *See* State v. Dugan, 303 P.3d 755, 765–67 (Mont. 2013) (surveying multiple jurisdictions' rulings and concluding that the fighting-words doctrine entails a face-to-face requirement and thus does not apply to words uttered during a telephone call); Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1554 (1993) ("Insulting language must be spoken in close physical proximity to the addressee to be considered fighting words. Otherwise, the burden is on the addressee to 'cool off.'").

[9] Courts applying the fighting-words doctrine examine the speech's context to determine whether an ordinary person in those circumstances likely would have responded to the speaker with immediate physical violence. *See In re* Nickolas S., 245 P.3d 446, 451–52 (Ariz. 2011) (discussing cases taking this approach). In *Nickolas S.*, for example, the Arizona Supreme Court concluded that a student had not uttered fighting words when—from ten feet away and in a loud voice—he called his teacher a "fucking bitch." *Id.* at 447–48. The court did not believe that "the natural reaction of the average teacher to a student's profane and insulting outburst, unaccompanied by any threats, would be to beat the student." *Id.* at 452.

[10] Virginia v. Black, 538 U.S. 343, 359 (2003). The doctrine's purpose is to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[11] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[12] *See* Miller v. California, 413 U.S. 15, 24 (1973) (describing the key components of constitutionally unprotected obscenity).

definition for two primary reasons. First, the Court has never determined the First Amendment status of speech that amounts to statutorily proscribed harassment, so it remains an issue of considerable importance. Second, if the Court ultimately finds that the First Amendment can be squared with speech restrictions aimed at eliminating hostile learning environments on college and university campuses, it almost certainly will be—for reasons that will become clear as the Article proceeds—with the statute-centered definition of those environments in mind.

I argue in Part II that, if the Court's Speech Clause jurisprudence was insistently originalist in nature, we could say, with a high degree of confidence, that the First Amendment gives public colleges and universities broad latitude to discipline students for speech that administrators regard as antithetical to important institutional objectives. The modern Court, however, has rejected key analytic touchstones that an originalist methodology would likely favor, both with respect to Speech Clause principles in general and with respect to the rights of postsecondary students in particular. Understanding the degree to which the Court has departed from originalist precepts helps illuminate the challenges one faces when arguing that the First Amendment permits public institutions of higher education to discipline student speakers on hostile-environment grounds.

In Part III, I use several short scenarios to advance a range of constitutional arguments. I first contend that the First Amendment does not permit a public college or university to discipline a student merely on the grounds that he or she has made a statement that would create a hostile learning environment for others if it were repeated with sufficient frequency. Relying on reasons grounded both in tradition and in core free-expression values, I then argue that the First Amendment does not bar public institutions of higher education from disciplining students who single-handedly create hostile learning environments of the type defined in Part I. When the hostile learning environment is created by multiple students who each add a few bricks to the harassment wall, or when it is created by speech that is not directed to the harassment victim but that the victim nevertheless overhears, I contend that discipline should be deemed constitutionally permissible only when the speakers make their utterances with a mens rea akin to that of actual malice in defamation law.

I. THE HALLMARKS OF HOSTILE LEARNING ENVIRONMENTS

There are many ways we might define hostile learning environments, but the most constitutionally promising account comes from the Court's interpretation of federal antidiscrimination legislation. Briefly told, the story

begins with a few foundational notes about Title VII of the Civil Rights Act of 1964 and the uncertain First Amendment status of speech that creates hostile *work* environments, then shifts to legislation that pertains more directly to the statutory rights of students.

A. *Title VII and Hostile Work Environments*

Title VII makes it unlawful for employers "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[13] Embracing guidelines issued in 1980 by the Equal Employment Opportunity Commission,[14] the Court in *Meritor Savings Bank, FSB v. Vinson*[15] confirmed that one form of discrimination forbidden by Title VII is "hostile environment" harassment.[16] For a Title VII hostile-environment claim to be actionable, the harassment inflicted upon the employee must be more than merely offensive.[17] Both subjectively (from the perspective of the plaintiff) and objectively (from the perspective of a reasonable person),[18] the harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[19]

Harassment that violates Title VII can take the form of conduct or speech.[20] When it takes the form of speech, might the First Amendment shield the employer from liability? Remarkably, the Court has never directly answered that question, though it has brushed up against it more than once.

Writing for the Court in *R.A.V. v. City of St. Paul*, Justice Scalia indicated in dictum that at least some applications of Title VII's ban on harassing workplace speech are constitutionally permissible.[21] The Court

---

[13] 42 U.S.C. § 2000e-2(a)(1).

[14] 29 C.F.R. § 1604.11(a) (1980).

[15] 477 U.S. 57 (1986).

[16] *See id.* at 65–66. This is different from "quid pro quo" harassment, which occurs when, for example, an employer threatens to fire an employee unless she engages in sexual activity or denounces her religion. *See id.* at 65.

[17] *See id.* at 67 (stating that the "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII") (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

[18] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

[19] *Meritor Sav. Bank*, 477 U.S. at 67 (alteration and internal quotation marks omitted); *see also Harris*, 510 U.S. at 23 (explaining that, to determine whether an actionably hostile environment exists, a court should examine all the circumstances, including (among relevant others) "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance").

[20] *See, e.g.*, Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994) (recounting both verbal and physical harassment of a female employee). For a brief discussion of Judge Posner's influential opinion in *Carr*, see Martha Nussbaum, Carr*, Before and After: Power and Sex in* Carr v Allison Gas Turbine Division, General Motors Corp, 74 U. CHI. L. REV. 1831 (2007).

[21] 505 U.S. 377, 391 (1992).

in *R.A.V.* held that the First Amendment's hostility to content-based speech restrictions extends even to areas of wholly proscribable expression, such as when policymakers permit some fighting words but ban others, then distinguish between the permissible and the forbidden based on what the speaker says.[22] Justice Scalia reasoned that, if lawmakers are troubled by certain instances of wholly proscribable speech, they need not make content-based distinctions within the given category of proscribable expression to address their concerns; they can simply ban the entire category.[23] The Court identified exceptional circumstances, however, when lawmakers may indeed make content-based distinctions rather than enact category-wide bans.[24] One such set of circumstances is when the subcategory of expression that lawmakers opt to proscribe "happens to be associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the speech."[25] To illustrate, Justice Scalia pointed to Title VII:

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. . . . Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.[26]

---

[22] *See id.* at 382–84; *see also supra* notes 7–12 and accompanying text (describing several categories of wholly proscribable expression). Content-based speech restrictions are permissible only if the government can show that they are "narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); *see also id.* ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

[23] *See R.A.V.*, 505 U.S. at 395–96 ("The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.").

[24] *See id.* at 388–90. The thread running through each exception is that there is no risk that the government is trying to "'drive certain ideas or viewpoints from the marketplace.'" *Id*. at 387 (quoting Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

[25] *Id.* at 389 (alteration omitted) (internal quotation marks omitted) (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[26] *Id.*

Writing for himself and for Justices Blackmun, O'Connor, and Stevens, Justice White was unpersuaded. He believed the majority had held that "a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech."[27] Under that approach, an alarmed Justice White wrote, "Title VII hostile work environment claims would suddenly be unconstitutional," since Congress could have banned "workplace harassment generally" instead of banning only harassment that is based on specified traits.[28] He took no comfort in Justice Scalia's use of Title VII to illustrate an exception to the Court's general rule. Far from reaching harassing speech merely as an incidental byproduct of regulating discriminatory conduct, Justice White argued, Title VII and its accompanying regulations focus, to a large degree, squarely on speech.[29]

Although all nine Justices in *R.A.V.* thus looked favorably upon Title VII in at least some of its applications, they could not agree upon the First Amendment analysis that would render such applications permissible. Just two Terms later, in *Harris v. Forklift Systems, Inc.*,[30] the Court had an opportunity to resolve the matter. The primary question in *Harris* was whether a Title VII plaintiff bringing a hostile-environment claim must prove that the harassment "seriously affect[ed] [his or her] psychological well-being."[31] As part of its argument in that case, the employer contended that the First Amendment bars Title VII liability for hostile-environment harassment, unless the harassment adversely impacted the "plaintiff's ability to do her job."[32] The plaintiff replied that the First Amendment does not protect harassing speech when it is severe or pervasive and is directed at a particular employee.[33]

---

[27] *Id.* at 404 (White, J., concurring in the judgment).

[28] *Id.* at 409. Justice White did not explain the First Amendment analysis that, in his view, would render such a ban permissible.

[29] *See id.* at 409–10 (citing 29 C.F.R. § 1604.11(a) (1991)); *see also* Peter Caldwell, *Hostile Environment Sexual Harassment & First Amendment Content-Neutrality: Putting the Supreme Court on the Right Path*, 23 HOFSTRA LAB. & EMP. L.J. 373, 386 (2006) ("Some scholars would agree that the 'conduct-not-speech' exception is not legally tenable in the manner described by Justice Scalia [in *R.A.V.*].."). Justice White would have preferred to decide the case on overbreadth grounds. *See R.A.V.*, 505 U.S. at 411–14 (White, J., concurring in the judgment).

[30] 510 U.S. 17 (1993).

[31] *Id.* at 20. The Court ruled that psychological injury is not an essential element of a Title VII hostile-environment claim. *See id.* at 22 ("Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct.").

[32] Brief for Respondent at 32, *Harris*, 510 U.S. 17 (No. 92-1168). Citing First Amendment concerns, amicus Feminists for Free Expression urged the Court to "adopt a standard which focuses not on the plaintiff's subjective reactions to the conduct or expression involved, but rather on the harmfulness of repeated or pervasive harassing conduct which has demonstrably hindered an employee in his or her work performance." Brief of Amicus Curiae Feminists for Free Expression in Support of Petitioner at 6, *Harris*, 510 U.S. 17 (No. 92-1168).

[33] *See* Reply Brief of Petitioner at 10–11, *Harris*, 510 U.S. 17 (No. 92-1168).

Did the Justices weigh in on that First Amendment dispute? It depends on whom you ask. When the Court handed down its decision in *Harris* less than a month after oral argument, readers discovered that the majority's analysis was only three pages in length and it said nothing about the constitutional issues that the litigants had raised.[34] For some, the *Harris* Court's silence signaled that the Justices found the employer's First Amendment defense so frivolous that it did not even merit a response.[35] That conclusion, however, probably takes things too far. Given the Court's internal disagreements about the appropriate First Amendment analysis for Title VII liability just a year and a half earlier in *R.A.V.*,[36] it seems more likely that the Justices concluded there was no need to venture into the First Amendment thicket to decide the narrow statutory question on which they had granted certiorari.

Nearly three decades have since passed, however, and the Court still has not returned to First Amendment questions about Title VII—a lengthy silence that could very well reflect a favorable disposition toward Title VII, even if the constitutional premises that should underlie that disposition remain in dispute. Whatever the reasons for the silence, we have been left for the time being to sort out the important First Amendment details for ourselves. Invoking a variety of rationales, many have concluded that the First Amendment gives those who violate Title VII no refuge.[37] Others have

---

[34] *See Harris*, 510 U.S. at 19–23.

[35] *See, e.g.*, Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 356 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (arguing that, through its silence, the Court intended to "insult" the argument that verbal harassers are constitutionally entitled to alter the conditions of other people's employment). Characterizing the employer's First Amendment objections as the "dog that didn't bark," Richard Fallon similarly infers that the Court "is highly unlikely" to hold that the First Amendment protects "workplace expressions of gender-based hostility and communications of explicitly sexual messages." *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 2, 9.

[36] *See supra* notes 21–29 and accompanying text (discussing *R.A.V.*).

[37] So far as lower courts' opinions are concerned, the leading ruling remains *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). In *Robinson*, pictures of nude women appeared throughout the workplace, male employees often read pornographic magazines at work, and male employees frequently made sexually outrageous statements to their female coworkers. *See id.* at 1493–1502. The court unleashed a fusillade of rationales for knocking down First Amendment obstacles to Title VII liability, but it did not elaborate at length on any of them. In two breathless pages, the court concluded that the verbal sexual harassment at issue in that case was best seen as "discriminatory conduct . . . . indistinguishable from the speech that comprises a crime"; "the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech"; the female employees who suffered the harassment were a "captive audience," such that the First Amendment did not bar Congress's effort to bring them relief; even if the harassing speech enjoyed the First Amendment's full protection, Title VII survives strict scrutiny; and, because the First Amendment

argued that, in fact, the First Amendment bars Title VII liability for verbal harassment, unless the harassing speech falls within one of the narrowly defined categories of wholly proscribable expression that the Court has already identified.[38]

---

permits governmental employers to regulate employee speech when necessary to maintain order and morale, Congress can insist that private employers do the same. *Id.* at 1535–36.

Commentators who agree that the First Amendment does not shield employers from Title VII liability have invoked some of those same arguments, as well as others. Some contend, for example, that harassing speech should be reconceptualized as conduct. *See, e.g.*, John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 908 (2007) ("The congruence between the case law establishing the scope of the hostile work environment doctrine and the verbal act concept is not perfect. However, it is sufficiently close to justify retention of this cause of action as consistent with the mandates of the First Amendment."); *cf.* CATHARINE A. MACKINNON, ONLY WORDS 45 (1993) ("If ever words have been understood as acts, it has been when they are sexual harassment."). Some posit that Congress's regulation of harassing speech is actually content-neutral in nature, such that the regulation must survive a standard of review less onerous than strict scrutiny. *See, e.g.*, Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile-Environment Theory*, 1996 UTAH L. REV. 227, 227–28 ("[P]roperly interpreted, Title VII regulates speech and conduct not so much on the basis of the content of ideas expressed as on the harasser's selection of targets for harassment and the effect the harassment produces on working conditions."). Focusing on Title VII's ban on sexual harassment in the workplace, Jack Balkin invokes the captive-audience doctrine, arguing that the legislation is designed to bring relief to women trapped in coercive, subordinating work conditions. *See* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310–13 (1999). Cynthia Estlund contends that the government should have greater leeway to regulate speech in the workplace than it does in the public square "because it is workplace diversity, as enforced by the equality norm, that renders the workplace a uniquely valuable forum for speech and an important satellite forum for public discourse." Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 694–95 (1997); *cf.* Robert Post, *Sexual Harassment and the First Amendment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 35, at 382, 391–92 (suggesting that the workplace is a site where people can be trained for constructive participation in civil discourse and that the government might thus have greater regulatory powers in that realm akin to those it possesses in K–12 schools). Still others argue that the values commonly associated with the freedom of expression are not advanced by tolerating harassment. *See, e.g.*, Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 479–80 (1995) (discussing sexual harassment).

Some of those arguments suffer from clear weaknesses. Declaring that all harassing speech is mere conduct, for example, seems perilously close to alchemy designed to evade First Amendment obstacles. *See infra* notes 197–200 and accompanying text. The notion that federal antiharassment legislation regulates speech on a content-neutral basis is weak on its face: how can one know whether harassing speech concerns a trait like race or sex or is objectively offensive, for example, unless one examines what the speaker has said? And the captive-audience doctrine is famously slippery. *See* Papandrea, *supra* note 2, at 1824 ("The Court has not always embraced the captive audience doctrine, and defining this doctrine is a study in frustration."); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 501 ("The captive audience concept in particular is an elusive and challenging one to apply.").

[38] *See, e.g.*, David E. Bernstein, *Hostile Environment Law and the Threat to Freedom of Expression in the Workplace*, 30 OHIO N.U. L. REV. 1, 13 (2004) (likening the then-emerging body of hostile-environment law to "fascism"); Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563, 605 (2001) (arguing that many applications of Title VII are unconstitutional); Richard Allen Olmstead, *In Defense of the Indefensible: Title VII Hostile Environment Claims Unconstitutionally Restrict Free Speech*, 27 OHIO N.U. L. REV. 691, 692 (2001) ("Hostile environment harassment law is an unconstitutional restriction on free speech."); *cf.* Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1035 (1993) (concluding that "the Supreme Court's treatment of the First Amendment raises serious concerns for the enforcement of hostile-

Despite its silence on constitutional questions concerning speech and hostile work environments, the Court has built upon aspects of its Title VII jurisprudence when resolving statutory questions about the federal rights of students. It is to those matters that we now turn.

B. *Federal Antidiscrimination Legislation and Hostile Learning Environments*

Three similarly worded antidiscrimination statutes are important for our purposes here: Title VI of the Civil Rights Act of 1964, which declares that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance";[39] Title IX of the Education Amendments of 1972, which states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance";[40] and section 504 of the Rehabilitation Act of 1973, which provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[41] Under these enactments, schools risk being held liable in private actions for damages[42] and losing their

environment sexual harassment litigation"); Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 811 (1995) (arguing that "public policy supports upholding the First Amendment defense to defeat Title VII hostile environment claims based solely on speech about matters of public concern") (capitalization altered).

[39] Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d.

[40] Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a).

[41] Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a). The three statutes described above are not the only statutes of that type. The Age Discrimination Act of 1975 declares, for example, that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." Age Discrimination Act of 1975 § 303, 42 U.S.C. § 6102.

[42] None of these three statutes—the Civil Rights Act, the Education Amendments, and the Rehabilitation Act—expressly authorizes private actions for damages, but courts have found such authorizations implied. Regarding Title IX, the Supreme Court first found an implied right of action in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), but did not say whether damages were among the available remedies. *See id.* at 717. The Court subsequently held in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), that Title IX permits private actions for damages against schools for teacher-on-student harassment but did not elaborate on the circumstances in which those damages are owed. *See id.* at 74–76. The Court moved more deeply into those waters in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), holding that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective

federal funding[43] if they do not satisfactorily respond when their students are badly harassed by classmates or school employees on the basis of race, color, national origin, sex, or disability.[44]

As is true with respect to Title VII and hostile work environments,[45] speech and conduct—either alone or in combination—can bring these federal statutes into play. Both harassing speech and harassing conduct were alleged, for example, in recent Title IX litigation involving students in the University of Michigan's M.B.A. program.[46] In a Title IX case concerning the University of Mary Washington, the harassment took the

---

measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds in a manner that manifests "deliberate indifference to [that] discrimination." *Id.* at 290. The *Gebser* Court did not have occasion to elaborate on the "deliberate indifference" standard because the plaintiff's claim in that case clearly failed on the first requirement—namely, the school did not have actual knowledge of the harassment that the plaintiff was suffering. *See id.* at 291. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court held that Title IX authorizes private damages actions when schools are deliberately indifferent to known acts of *student*-on-student harassment, and the Court elaborated on what deliberate indifference entails. *Id.* at 643; *see also infra* notes 51–71 and accompanying text (discussing *Davis*).

Regarding Title VI, the *Cannon* Court noted that Congress modeled Title IX on Title VI and that—when Congress enacted Title IX in 1972—numerous lower courts had already held that Title VI implicitly authorized private enforcement actions. *Cannon*, 441 U.S. at 694–96. The Court reiterated in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that section 601 "prohibits only intentional discrimination" and "private individuals may sue to enforce [that statutory provision] and obtain both injunctive relief and damages." *Id*. at 279–80. The Court has not provided further guidance on Title VI liability, but lower courts routinely draw close parallels between Title VI's and Title IX's requirements. *See infra* note 72 and accompanying text (noting lower courts' rulings).

Regarding section 504 of the Rehabilitation Act of 1973, Congress declared via amendment in 1978 that the remedies available for violations of Title VI shall also be available for violations of section 504. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2955, 2983 (1978) (codified as amended at 29 U.S.C. § 794a(a)(2)). The Court has strongly suggested that private actions for compensatory (but not punitive) damages are thus permissible. *See* Barnes v. Gorman, 536 U.S. 181, 184–90 (2002) (holding that punitive damages are impermissible but indicating in dictum that compensatory damages for violations of section 504 are available). Lower courts have held that section 504 does indeed provide an implied private right of action for damages. *See, e.g.*, Mark H. v. Lemahieu, 513 F.3d 922, 930 (9th Cir. 2008) ("Section 504 establishes an implied private right of action allowing victims of prohibited discrimination, exclusion, or denial of benefits to seek the full panoply of remedies, including equitable relief and compensatory damages.") (alteration omitted) (internal quotation marks omitted); Miener v. Missouri, 673 F.2d 969, 973–74, 978–79 (8th Cir. 1982) (concluding that section 504 implicitly authorizes private actions for damages).

[43] *See* Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (directing federal funding departments and agencies to issue rules aimed at ensuring compliance with Title VI's antidiscrimination requirements and declaring that, so long as specified procedures are followed, federal funds may be withdrawn if recipients fail to obey those rules); Education Amendments of 1972 § 902, 20 U.S.C. § 1682 (issuing similar directions for enforcing Title IX); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (issuing similar directions for enforcing the Rehabilitation Act).

[44] *See, e.g.*, Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655 (2d Cir. 2012) (adjudicating a Title VI claim alleging that a New York school district did not adequately respond to racial harassment that Caucasian students inflicted upon a Latino high school student over a period of more than three years); Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007) (adjudicating a Title IX claim alleging that the University of North Carolina did not adequately respond to sexual harassment that a soccer coach allegedly inflicted on his players).

[45] *See supra* note 20 and accompanying text (explaining that Title VII harassment can take the form of conduct or speech).

[46] Foster v. Bd. of Regents of Univ. of Mich., 982 F.3d 960 (6th Cir. 2020) (en banc).

form of misogynistic speech directed at female students who opposed on-campus fraternities and who condemned male rugby team members for reportedly chanting lyrics that glorified violence against women.[47] In a Title VI case concerning a school district in Texas, the alleged harassment primarily consisted of racist statements repeatedly directed at three African-American siblings.[48] In a section 504 case concerning a different Texas school district, students both verbally and physically harassed a disabled student.[49] My focus here, of course, is on harassment that takes the form of speech or that takes the form of conduct sufficiently expressive to bring the First Amendment into play.[50]

With respect to student-on-student harassment based on one of the congressionally specified traits, when, precisely, are schools statutorily obliged to intervene? The central authority on these matters is the Court's 1999 decision in *Davis v. Monroe County Board of Education*.[51] In that case, a mother filed a Title IX damages action against a Georgia school board, alleging that the board had not adequately responded when her fifth-grade daughter was sexually harassed by a classmate.[52] The Court had ruled one year earlier in *Gebser v. Lago Vista Independent School District*[53] that recipients of federal funding are liable for damages under Title IX when they know about *teacher*-on-student sexual harassment and are "deliberately indifferent" to it.[54] The plaintiff in *Davis* argued that the same rule should apply when a student's harasser is a classmate.[55] The lower courts rejected that argument but, by a 5-4 vote, the Supreme Court

---

[47] Feminist Majority Found. v. Hurley, 911 F.3d 674, 680–84 (4th Cir. 2018).

[48] Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398, 402–06 (5th Cir. 2015).

[49] Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 987–89 (5th Cir. 2014).

[50] Conduct can indeed be sufficiently expressive to qualify as speech. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("[T]he First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika . . . . [A] narrow, succinctly articulable message is not a condition of constitutional protection . . . .") (citations omitted) (internal quotation marks omitted); Texas v. Johnson, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.") (alterations omitted) (internal quotation marks omitted).

[51] 526 U.S. 629 (1999).

[52] *Id.* at 632–33.

[53] 524 U.S. 274 (1998).

[54] *Id.* at 277.

[55] *See* Brief for Petitioner, *Davis*, 526 U.S. 629 (No. 97-843), 1998 WL 792418, at *42–45.

embraced it.[56] With Justice O'Connor writing for the majority, the Court agreed with the school board that "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct."[57] But "in certain limited circumstances," Justice O'Connor explained, a school's reaction to student harassment can itself amount to statutorily forbidden discrimination.[58]

The *Davis* Court outlined three sets of interrelated facts that are necessary to trigger schools' Title IX liability for their handling of student-on-student harassment. All three are relevant to our discussion of public colleges and universities, but it is the third on which I ultimately focus most of my attention. First, as the Justices had already explained in *Gebser*,[59] a school becomes liable only when it actually knows about the harassment and is "deliberately indifferent" to it.[60] To amount to deliberate indifference, the school's response to the harassment must be "clearly unreasonable in light of the known circumstances."[61] Justice O'Connor explained that, if there is more than one way that school officials could reasonably respond to harassment in a given instance, courts must give those officials room to decide which remedial steps to take since Congress has not itself specified any particular remedial measures that are required.[62] The Court acknowledged, for example, that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."[63]

Second, an institution is liable only if it has "substantial control over both the harasser and the context in which the known harassment occurs."[64] Absent such control, one cannot say that the institution plays a causal role in the harassment.[65] If a person unaffiliated with a school sexually harasses one of the school's students outside of school hours and beyond school

---

[56] Joined by Chief Justice Rehnquist and Justices Scalia and Thomas in dissent, Justice Kennedy argued that "Title IX did not give States unambiguous notice that accepting federal funds meant ceding to the Federal Government power over the day-to-day disciplinary decisions of schools." *Davis*, 526 U.S. at 658 (Kennedy, J., dissenting).

[57] *Id.* at 640.

[58] *Id.* at 643.

[59] *Gebser*, 524 U.S. at 290.

[60] *Davis*, 526 U.S. at 643.

[61] *Id.* at 648.

[62] *See id.* (rejecting the proposition "that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action" and explaining that "courts should refrain from second-guessing the disciplinary decisions made by school administrators").

[63] *Id.* at 649.

[64] *Id.* at 645; *see also id.* at 646–47 (stating that a school may not be held liable unless "the harasser is under the school's disciplinary authority").

[65] *See id.* at 644–46; *see also id.* at 644 (stating that a school "cannot be directly liable for its indifference where it lacks the authority to take remedial action"); *id.* at 645 (stating that, for statutory liability to attach, a funding recipient's "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it") (alterations omitted) (internal quotation marks omitted).

grounds, for example, school officials are not able to take action against the harasser in a bid to bring the harassment to an end. Even when the harasser is one of the victim's classmates and the harassment occurs on school property, statutory liability depends on whether school officials are empowered to control the harasser's behavior. Because "the nature of [the State's] power [over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults,"[66] the Court observed, it follows that "[a] university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy."[67]

Third, focusing on Title IX's reference to individuals being "excluded from participation in [or] denied the benefits of . . . any education[al] program or activity,"[68] the Court concluded that a school is liable under Title IX only for deliberate indifference to harassment that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[69] Single incidents of teasing, name-calling, or other common forms of peer-on-peer harassment among children, for example, are unlikely to rise to that level.[70] The plaintiff's allegations in *Davis* itself, however, were sufficient to survive a motion to dismiss: the alleged harassment occurred repeatedly over a five-month period; it consisted of both speech and "objectively offensive touching"; it negatively affected the plaintiff's education; the alleged harasser had other victims who sought the school principal's help; and the school board allegedly knew of the harassment but "made no effort whatsoever either to investigate or to put an end to [it]."[71]

Davis was a Title IX case, but its significance extends well beyond that realm. Lower courts have concluded that *Davis* provides the appropriate analytic framework for adjudicating federal-funding recipients' obligations under Title VI when one student harasses another

---

[66] *Id.* at 646 (alteration in original) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)).

[67] *Id.* at 649.

[68] 20 U.S.C. § 1681(a).

[69] *Davis*, 526 U.S. at 651 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)); *see also id.* at 652 (explaining that the harassment that Congress aimed to curb when it enacted Title IX is harassment "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity").

[70] *Id.* at 651–52.

[71] *Id.* at 653–54.

on grounds of race, color, or national origin,[72] and under section 504 when one student harasses another on grounds of disability.[73] Moreover, although the Court has said that the liability standards for Title IX claims and for sex-discrimination claims brought under the Fourteenth Amendment's Equal Protection Clause "may not be wholly congruent,"[74] lower courts have embraced much of the *Davis* standard for resolving equal protection claims brought against public school officials for student-on-student harassment.[75]

---

[72] One District Court recently summarized the relevant Title VI law this way:

> To sustain a student-on-student harassment claim against a school, the plaintiff must demonstrate the following elements: "(1) the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive [the plaintiff] of access to the educational opportunities or benefits provided by the school; (2) [the school] had actual knowledge of the harassment; and (3) [the school was] deliberately indifferent to the harassment."

Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ., 341 F. Supp. 3d 793, 803 (S.D. Ohio 2018) (quoting Brooks v. Skinner, 139 F. Supp. 3d 869, 882 (S.D. Ohio 2015)); *see also* Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398, 408 (5th Cir. 2015) ("We agree that the correct analytical framework for a Title VI student-on-student harassment claim is the deliberate indifference standard [described in *Davis*]."); Doe v. Galster, 768 F.3d 611, 617 (7th Cir. 2014) ("Title VI and Title IX are so similar that a decision interpreting one generally applies to the other."); Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 665 (2d Cir. 2012) (deploying the *Davis* framework to adjudicate a Title VI claim of deliberate indifference to student-on-student racial discrimination); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) ("The Court's reasoning in *Davis* guides our resolution of the instant case because Congress based Title IX on Title VI; therefore, the Court's analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa)."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 n.5 (3d Cir. 2001) ("Although . . . *Davis* dealt with sexual harassment under Title IX, we believe that [its] reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI and other relevant federal anti-discrimination statutes."). The Supreme Court has said nothing to the contrary. *Cf.* Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

[73] A 2016 Fourth Circuit ruling illustrates the point:

> In the [section] 504 context, the *Davis* deliberate indifference standard requires a plaintiff [suing a school that receives federal funds] to show that he was an individual with a disability, harassed by fellow students based on his disability; that the disability-based harassment was sufficiently "severe, pervasive, and objectively offensive" that it effectively deprived him of "access to educational benefits and opportunities" at school; and that the school knew about the disability-based student-on-student harassment and was deliberately indifferent to it.

S.B. *ex rel.* A.L. v. Bd. of Educ., 819 F.3d 69, 76 (4th Cir. 2016) (quoting *Davis*, 526 U.S. at 650); *see also* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 995–96 (5th Cir. 2014) (citing illustrative cases).

[74] Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009).

[75] *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 234 (2d Cir. 2010) (adjudicating an equal protection claim that a school discriminated based on sex by unduly tolerating student-on-student harassment); Hill v. Blount Cnty. Bd. of Educ., 203 F. Supp. 3d 871, 880 (E.D. Tenn. 2016) (adjudicating an equal protection claim alleging that a school district discriminated based on nationality by unduly tolerating student-on-student harassment); G.D.S. *ex rel.* Slade v. Northport-East Northport Union Free Sch. Dist., 915 F. Supp. 2d 268, 278 (E.D.N.Y. 2012) (adjudicating an equal protection claim that a school district discriminated based on religion by unduly tolerating student-on-student harassment).

To define hostile learning environments for purposes of the First Amendment discussion that follows, I seize on the third component of the *Davis* framework—the component that obliges schools to respond only if the harassment is "so severe, pervasive, and objectively offensive . . . that the victim-students are effectively denied equal access to an institution's resources and opportunities."[76] One could offer less stringent definitions of hostile learning environments, of course, but it is best to proceed with the *Davis* test in hand. Given the Court's insistence that offense and outrage are never independently sufficient bases on which to restrict speech,[77] the only First Amendment conversations worth having about student-on-student harassment are ones concerning speech that inflicts harm of a different sort. The *Davis* formulation satisfies that discussion-framing requirement because it marks the point at which a related, but analytically distinct, kind of harm occurs—namely, the denial of equal access to a school's facilities, programs, or activities.[78] Moreover, as I argue in Part III, the Court is likely to find that the First Amendment permits public institutions of higher education to discipline student speakers on hostile-environment grounds only if that environment is defined in the *Davis*-centered terms that I seize upon here.

Given the risk of First Amendment difficulties, one might think that wise administrators would always respond to student-on-student verbal harassment in ways that stop well short of constitutional limits. After all, the *Davis* Court emphasized that when students harass other students, school officials have the option to choose from whatever array of reasonable responses might be available.[79] But avoiding First Amendment difficulties is not always as easy as that. In addition to the public pressure that is sometimes brought to bear when allegations of verbal harassment are publicized—pressure that can push strongly for punitive action against the speakers[80]—statutory forces can push school officials to respond to harassment in ways that test constitutional boundaries. The Sixth Circuit has said, for example, that when a school "has actual knowledge that its efforts to remediate [sexual harassment] are ineffective, and it continues to use those same methods to no avail, such [school] has failed to act

---

[76] *Davis*, 526 U.S. at 651. I certainly am not the first to define hostile learning environments this way. *See, e.g.*, Papandrea, *supra* note 2, at 1858 (using the phrase "hostile learning environment" to describe instances in which harassment rises to the level necessary for federal statutory liability).

[77] *See supra* notes 5–6 and accompanying text.

[78] *See supra* notes 68–69 and accompanying text.

[79] *See supra* notes 62–63 and accompanying text.

[80] *See supra* note 2 and accompanying text (citing sources that provide examples).

reasonably in light of the known circumstances."[81] The Fourth Circuit has similarly explained that a school confronted with persistent sexual harassment must respond with efforts "reasonably calculated to end [the] harassment," rather than stick with remedial responses that have failed to stem the harassment tide.[82] With such rulings in mind, suppose a university faced with student-on-student harassment initially chooses a remedial response that stops short of disciplining the speaker. Perhaps, for example, the first response consists of a condemnatory email sent by the university's president to the campus community. If the harassment continues and is based on a trait that Congress has singled out for special protection, the threat of statutory liability may push the school ever closer to a response that raises First Amendment concerns.

Before turning to those concerns, I should emphasize two final points regarding the *Davis* formulation and the statutory context from which it comes. First, note the Court's use of the conjunction "and" in the phrase "severe, pervasive, and objectively offensive."[83] That formulation subtly, but importantly, differs from the *Meritor Savings Bank* Court's finding that Title VII renders employers liable for hostile work environments when the harassment is "severe *or* pervasive."[84] The *Davis* standard requires both severity and pervasiveness, while the *Meritor Savings Bank* standard requires only one or the other.[85] In both settings, the notions of severity and pervasiveness are deployed in service to Congress's desire to prevent specified ends from occurring. In the Title VII context, the goal is to avoid abusive working environments and discriminatory alterations in employees' conditions of employment.[86] In the context of Title IX and similar legislation, the goal is to avoid the denial of equal access to school resources and opportunities.[87] In the Court's judgment, Congress has concluded that either severity or pervasiveness is sufficient to produce the undesired ends in the former situation, but both are required to produce the undesired ends in the latter.[88]

Even ordinarily reliable narrators nevertheless often use *Meritor Savings Bank*'s "or" formulation when describing the statutory standard

---

[81] Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 261 (6th Cir. 2000); *see also* Tesoriero v. Syosset Cent. Sch. Dist., 382 F. Supp. 2d 387, 399 (E.D.N.Y. 2005) (applying *Vance*).

[82] Feminist Majority Found. v. Hurley, 911 F.3d 674, 689–91 (4th Cir. 2018) (alteration in original) (quoting Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 669 (2d Cir. 2012)); *accord* Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999) (stating that "if [a school] learns that its measures have proved inadequate, it may be required to take further steps to avoid new liability").

[83] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999).

[84] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (emphasis added); *see also supra* notes 13–19 and accompanying text (describing Title VII).

[85] *Davis*, 526 U.S. at 651; *Meritor Sav. Bank*, 477 U.S. at 67.

[86] *See supra* notes 13–19 and accompanying text (discussing Title VII).

[87] *See supra* notes 39–42 and accompanying text (discussing statutory restrictions on federal funding recipients).

[88] *Meritor Sav. Bank*, 477 U.S. at 67; *Davis*, 526 U.S. at 651.

for student-on-student harassment.[89] For some writers, this extension of the Title VII formulation is probably just the result of inattention. For others, it is part of a campaign to push the law governing student harassment toward the "or" formulation, so federal funding recipients can more easily be held liable when students are harassed based on statutorily specified traits.[90]

My use of the *Davis* Court's "and" formulation is deliberate. Many courts have held that the less demanding "or" standard applies when students sue federal funding recipients under Title IX or similar legislation for harassment inflicted by school *employees*.[91] That approach

---

[89] There are many examples, but just a sampling will suffice. *See, e.g.*, Doe v. Sch. Dist. No. 1, 970 F.3d 1300, 1316 (10th Cir. 2020) (Tymkovich, C.J., concurring) (using the "or" formulation when discussing Title IX liability); Feminist Majority Found. v. Hurley, 911 F.3d 674, 686, 689–91 (4th Cir. 2018) (citing the *Davis* Court's "and" formulation but using it interchangeably with its own "or" formulation); DJ *ex rel.* Hughes v. Sch. Bd., 488 F. Supp. 3d 307, 332–33 (E.D. Va. 2020) (using the "or" formulation when discussing both Title VI liability and Title IX liability); Williams v. Lenape Bd. of Educ., No. 17-7482, 2020 U.S. Dist. LEXIS 77757, at *43–44 (D.N.J. May 4, 2020) (using the "or" formulation when discussing Title VI liability); Weckhorst v. Kan. State Univ., 241 F. Supp. 3d 1154, 1164–65 (D. Kan. 2017) (using the "and" and "or" formulations interchangeably when discussing Title IX liability); Moore v. Chilton Cnty. Bd. of Educ., 1 F. Supp. 3d 1281, 1292, 1297–98 (M.D. Ala. 2014) (using the "and" and "or" formulations interchangeably when discussing section 504 liability).

[90] In Title IX regulations promulgated in the spring of 2020, the Trump administration's Department of Education defined sexual harassment as including "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 C.F.R. § 106.30(a)(2) (2021) (emphasis added); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,036 nn.88–89 (May 19, 2020) (explaining the Department's decision to use the conjunctive "and" rather than the disjunctive "or"). For a discussion of the history behind these regulations, see Samantha Harris, *A Long Time Coming: The New Title IX Regulations Take Effect Today*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Aug. 14, 2020), https://www.thefire.org/a-long-time-coming-the-new-title-ix-regulations-take-effect-today/?utm_source=FIRE_Update&utm_medium=email&utm_campaign=Update&show_popup=false. A coalition of organizations sued, contending that Title VI and section 504 are triggered when harassment is "severe, pervasive, *or* objectively offensive" and that the Trump administration should not be allowed to treat Title IX as triggered only when sexual harassment is "severe, pervasive, *and* objectively offensive." *See* Complaint for Declaratory and Injunctive Relief at 20–23, 26–27, Know Your IX v. Devos, No. RDB-20-01224 (D. Md. Oct. 20, 2020) (emphasis added). The Foundation for Individual Rights in Education, the Independent Women's Law Center, and Speech First, Inc. asked to intervene in order to defend the position that the conjunctive "and" is necessary to bring the proposed regulations into alignment with both *Davis* and the First Amendment. *See* Memorandum of Law in Support of Motion to Intervene as Defendants at 1, *Know Your IX*, No. RDB-20-01224 (D. Md. Oct. 20, 2020). On October 20, 2020, the District Court dismissed the case, ruling that the plaintiffs lacked Article III standing. *See* Know Your IX v. Devos, No. RDB-20-01224, 2020 U.S. Dist. LEXIS 194288, at *3 (D. Md. Oct. 20, 2020).

[91] *See, e.g.*, Doe v. Pawtucket Sch. Dep't, 969 F.3d 1, 10–11 (1st Cir. 2020); Doe v. Miami Univ., 882 F.3d 579, 589–90 (6th Cir. 2018); Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 89 (2d Cir. 2011); Jennings v. Univ. of N.C., 482 F.3d 686, 695–96 (4th Cir. 2007); Hendrichsen v. Ball State Univ., 107 F. App'x 680, 684 (7th Cir. 2004); Hayut v. State Univ. of N.Y., 352 F.3d 733, 744–45 (2d Cir. 2003); Garcia *ex rel.* Marin v. Clovis Unified Sch. Dist., 627 F. Supp. 2d 1187, 1196, 1198 (E.D. Cal. 2009).

makes good sense. Whether at K–12 schools or at institutions of higher education, school employees often have multiple forms of institutional authority over students, and those employees' power-infused roles are frequently such that students who wish to take full advantage of school resources cannot easily avoid entering those employees' spheres of influence. When employees take advantage of the resulting opportunities to harass students, the asymmetrical distribution of power between students and employees can easily hinder the harassed students' ability to protect themselves with self-help remedies.[92] So, it is easy to imagine that when harassment is either severe or pervasive, students will suffer a loss of equal access to certain aspects of school life. Moreover, public employers are constitutionally permitted to wield significant control over the speech of their employees,[93] and those employers already monitor their employees for speech and conduct that amount to harassment under Title VII's "or" standard. Given all of these circumstances, it would be perverse to allow school employees to harass students in ways that would be impermissible if inflicted on coworkers. It is fitting to oblige schools to intervene, therefore, when employees' harassment of students is either severe or pervasive.

Harassment inflicted on students *by other students* is a different matter. Any institutional authority that students hold over one another is typically not comparable to the authority that teachers, coaches, and administrators possess.[94] College students come to campus as peers, standing in relation to one another merely as adults who share a desire to pursue studies at the given institution. In their dealings with one another, students usually can be expected to protect themselves with the same kinds of self-help strategies they use when managing interpersonal conflicts in the larger

---

[92] *Cf.* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, FOUND. FOR INDIVIDUAL RTS. EDUC. (May 7, 2009), https://www.thefire.org/the-misapplication-of-peer-harassment-law-on-college-and-university-campuses-and-the-loss-of-student-speech-rights/ ("Given the power differentials and economic constraints at play in one's employment, it is simply not realistic to expect employees to protect themselves against harassment under a 'marketplace of ideas' model.").

[93] *See* Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (holding that the First Amendment gives public employees no protection for speech they utter pursuant to their job responsibilities); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (adopting a balancing test to determine whether public employers can respond adversely when their employees speak in their personal capacities on matters of public concern). The *Garcetti* Court reserved judgment on whether its rule applies to faculty members' teaching and scholarship. *Garcetti*, 547 U.S. at 425. Lower courts are split on that question. *Compare, e.g.*, Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) ("We hold that *Garcetti* does not apply to speech related to scholarship or teaching.") (internal quotation marks omitted), *with* Ross v. New York, No. 15-CV-3286, 2016 U.S. Dist. LEXIS 18517, at *20–21 (S.D.N.Y. Feb. 16, 2016) (holding that an accounting professor lacked First Amendment protection for his classroom speech because teaching was one of his job responsibilities).

[94] *See* Majeed, *supra* note 92 ("Peer harassment in education . . . very rarely involves a power imbalance element [comparable to what one commonly finds in employer-employee relationships]."). I am setting to one side the nuances that might arise when one student stands in a supervisory or other formalized position of power over another student.

community. Moreover, students at public colleges and universities enjoy First Amendment rights vis-à-vis their schools that are greater than the rights enjoyed by those schools' employees.[95] Indeed, broad freedom of expression is crucial for the educational purposes that bring students to campus in the first place.[96] Thus, there are good reasons to say that one college or university student's speech does not deprive another student of equal access to school resources and opportunities unless the speech constitutes harassment of an especially high order. *Davis* reasonably holds that student-on-student harassment reaches the access-denying level only when it is "severe, pervasive, and objectively offensive."[97]

Finally, there is one significant way in which the federal antidiscrimination statutes that the *Davis* standard serves do not constrain the description of hostile learning environments that I provide here. Student-on-student harassment can result in a denial of equal access even when the harassment does not concern race, color, national origin, sex, or disability—the traits that Title VI, Title IX, and section 504 collectively single out for protection. Not everyone shares this view. The Foundation for Individual Rights in Education, for example, would allow universities to discipline students for their harassing speech only when, among other things, the harassment concerns an "immutable status," like race, sex, or gender identity.[98] But suppose a student at a public university is harassed

---

[95] *See* Healy v. James, 408 U.S. 169, 180 (1972) (explaining that the First Amendment applies with as much "force on college campuses [as it does] in the community at large").

[96] *See id.* at 180–81 ("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.") (internal quotation marks omitted); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The 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.") (alterations omitted) (internal quotation marks omitted).

[97] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999).

[98] *See Model Code of Student Conduct*, FOUND. FOR INDIVIDUAL RTS. EDUC., https://www.thefire.org/legal/procedural-advocacy/model-code/ (last visited Aug. 14, 2021). In an earlier publication, the Foundation for Individual Rights in Education took the comparable position that harassment is actionable only if, among other things, it was "on the basis of a protected status, like gender, race, disability, or age." HARVEY A. SILVERGLATE, DAVID FRENCH & GREG LUKIANOFF, FOUND. FOR INDIVIDUAL RTS. EDUC., FIRE'S GUIDE TO FREE SPEECH ON CAMPUS 91 (Greg Lukianoff & William Creeley eds., 2d ed. 2012). Reflecting on his experience drafting a speech code for Stanford University, Thomas Grey argues that harassment based on "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" is most worthy of proscription because "these characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination." Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 906 (1996). Even if that is true, it does not mean that harassment based on other traits is *incapable* of creating a hostile learning environment. If such harassment does occur, a university might decide that it ought to bring the harassment to an end and might want to know whether the First Amendment restricts the ways in which it may do so.

by a classmate regarding, say, his or her family's scandals, economic deprivation, or some other matter to which antidiscrimination statutes do not speak. There is no reason to stipulate *a priori* that the harassment cannot become so severe, pervasive, and objectively offensive that its target is denied equal access to resources and opportunities that the university provides. Even absent a statutory obligation to intervene, school officials might thus still wish to do so. Does the First Amendment permit the university to discipline the harasser? We owe the school a good answer to that question, just as we owe the school a good answer when it tries to square the First Amendment with its obligations under Title VI, Title IX, and section 504. What, then, does the First Amendment say about these matters?

II. FREE-SPEECH ORIGINALISM AND THE MODERN COURT

Given the composition of today's Court and the rise of originalism as a favored method of constitutional interpretation,[99] one might assume that the Justices' answers to our First Amendment inquiries concerning student speech in public higher education would depend largely upon their assessment of the Speech Clause's original meaning and the rights of college students in early America. The modern Court's orientation toward free-speech controversies, however, is decidedly non-originalist in nature. Understanding the Court's rejection of key originalist touchstones helps clarify the challenges that public college and university administrators will face if they wish to persuade the Court that they may discipline students for saying things that create hostile learning environments for others.

A. *Originalist Touchstones*

Despite its ascendance in other constitutional domains, originalism has been conspicuously noninfluential in the modern Court's free-speech

[99] When the Court interpreted the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), for example, the Justices split 5–4 but all nine framed at least some of their arguments in originalist terms. *See id.* at 576 ("In interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.") (alterations omitted) (internal quotation marks omitted); *id.* at 592 (concluding that the Court's reading of the Second Amendment "is strongly confirmed by the historical background of the Second Amendment"); *id.* at 637 (Stevens, J., dissenting) (stating that he is guided by the "text" and "history" of the Second Amendment and concluding that "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution"). Justice Kagan famously put it this way during her 2010 confirmation hearings: "[S]ometimes [the framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists." *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (testimony of Solicitor General Elena Kagan).

jurisprudence.[100] This might be due, in part, to an evidentiary problem: it is difficult to substantiate nuanced claims about what, precisely, the Speech Clause did and did not mean to the founding generation.[101] There is little evidence of debate about the freedom of speech in the Congress that proposed the First Amendment or in the state conventions that ratified it.[102] The freedom of the *press* figured prominently in early Americans' thinking, but the freedom of *speech* as a distinct legal concept lagged far behind.[103]

---

[100] *See* Hon. Michael W. McConnell, Free Speech & Election Law: Originalism and the First Amendment, 2016 National Lawyers Convention, held by the Federalist Society, at 01:02:06 (Nov. 18, 2016) (audio available at https://fedsoc.org/conferences/2016-national-lawyers-convention?#agenda-item-free-speech-election-law-originalism-and-the-first-amendment) [hereinafter *Originalism and the First Amendment*] ("It is, I think, true that free speech law has been kind of a desert when it comes to originalism."); *cf.* Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMMC'N L. & POL'Y 385, 402 (2012) (concluding that, between his appointment in 1986 and the conclusion of the October 2010 Term, Justice Scalia invoked originalism in only 30.4% of the free-speech opinions he wrote); *id.* at 408 (concluding that, between his appointment in 1991 and the conclusion of the October 2010 Term, Justice Thomas invoked originalism in only 29.4% of the free-speech opinions he wrote).

[101] *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 38 (1992) ("[N]o clear, consistent vision of what the framers meant by freedom of speech will ever emerge."); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 27 (2011) ("In the face of . . . deeply conflicting evidence, most scholars of the First Amendment have despaired of producing any coherent originalist account of the Speech and Press Clauses, at least when examining the question in terms of the intentions of the framers."). The Supreme Court was not pressed to begin developing a detailed Speech Clause jurisprudence until the late nineteenth century since federal restrictions on expression were rare prior to that time. *See* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 271 (1986) ("[T]he federal government did little to provoke litigation over first amendment rights to freedom of speech and the press until after the Civil War. . . . Thus, not until the 1870's did Supreme Court decisions on freedom of expression become more frequent.") (footnotes omitted).

[102] *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 281 (1985) ("[W]e do not know what the First Amendment's freedom of speech-and-press clause meant to the men who drafted and ratified it at the time that they did so."); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.5(a) (5th ed. 2013) ("There is little that anyone can draw . . . from the debates within the House concerning the meaning of the First Amendment. In addition, there is the absence of useful records of debates in the Senate or the states on its ratification.") (footnotes omitted); Rosenthal, *supra* note 101, at 16 ("After a conference committee agreed on the Senate version of the Speech and Press Clauses, the proposed amendment passed both Houses and was sent to the states for ratification without further substantive discussion of the Speech or Press Clauses. No record survives of the debates in the ratifying states, or of the public discussion of the proposed amendment.") (footnotes omitted).

[103] *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983) ("[F]reedom of speech, unlike freedom of the press, had little history as an independent concept when the first amendment was framed. . . . Epistemologically, at least, the press clause was primary and the speech clause secondary."); *id.* ("Freedom of the press was neither equated with nor viewed as a derivative of freedom of speech [at the time of the founding]. Most of the state constitutions protected freedom of the press, but only one protected speech.").

As Robert Bork put it, "The framers . . . appear not to have been overly concerned with the subject."[104]

A more consequentialist explanation for originalism's small footprint in modern free-speech law concerns the conclusions to which an originalist quest for meaning could reasonably lead. I say "*could* reasonably lead" because it would be unreasonable to suppose that all originalist analyses of First Amendment questions would yield identical conclusions.[105] Originalism is not a single theory of constitutional interpretation; it is, rather, a cluster of theories that share a commitment to the propositions that the meaning of constitutional texts is fixed at the time of adoption and that this meaning constrains the actions of judges and other government officials.[106] On just about any contemporary issue, one can find originalists on opposite sides.[107] My aim here is simply to describe conclusions that the court today could easily reach if guided by originalist lights.

1. *Blackstonian Principles*

At the time of our country's founding, a widely held view was that freedom of expression is among our natural rights, but policymakers can restrict that freedom in order to serve the interests of society as a whole.[108] This view sprang from Blackstone's description of the English common

---

[104] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971); *accord* SMOLLA, *supra* note 101, at 36 ("[T]here is the high probability that many of those involved in the adoption of the First Amendment never really focused on the precise meaning of the principles it embodied at all.").

[105] There is no need here to wade into the debate about the founders' understanding of the First Amendment status of speech critical of governmental entities. *Compare, e.g.*, ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1946) ("The First Amendment was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."), *with* LEVY, *supra* note 102, at xii ("I . . . aim to demolish the proposition formerly accepted in both law and history that it was the intent of the American Revolution or the Framers of the First Amendment to abolish the common law of seditious libel."). Members of the founding generation themselves disagreed sharply on these matters. *See* Rosenthal, *supra* note 101, at 20–21.

[106] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6 (2015) ("Contemporary originalism is a family of constitutional theories, united by two core ideas, fixation and constraint."). For an introduction to some of the methodological issues on which originalists today disagree, see Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 14–18 (2018).

[107] *Compare, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 715 (2015) (Scalia, J., dissenting) ("When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases."), *with* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 654 (2016) ("We conclude that originalism must lead to the conclusion that bans on same-sex marriage are unconstitutional, and that *Obergefell v. Hodges* was thereby correctly decided.").

[108] *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017) ("Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good—generally defined as the good of the society as a whole. . . . In this sense, speech and press freedoms were expansive in scope—applying to all forms of expression—but weak in their legal effect.") (footnotes omitted).

law.[109] Blackstone explained that government officials could not place prior restraints upon speech, but they *could* punish speakers who abused their resulting freedom to say whatever they wished:

> Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. . . . [T]o punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; *the abuse only of that free will is the object of legal punishment*. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.[110]

In the years immediately following the Revolutionary War and continuing for more than a century, the Blackstonian view exerted a powerful influence in America.[111] Pennsylvania provides an important

---

[109] *See* LEVY, *supra* note 102, at 281 (concluding that, although the evidence is indeterminate, the best bet is that the founding generation believed the First Amendment's speech and press clauses embodied Blackstone's description of expressive freedoms); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 637–38, 642–43 (5th ed. 1891) (1833) (approvingly reciting Blackstone's description of expressive freedoms); Rosenthal, *supra* note 101, at 16 ("The use of the definite article at the beginning of [an early draft of the First Amendment] hints at a reference to a preexisting legal concept, and given the state of framing-era law, the most likely suspect is Blackstone."); *id.* at 32 ("[E]ven in originalist terms, most likely the best understanding of the Speech and Press Clauses is that they were to create a common law of free speech and a free press in which competing interests would be put to the balance, rather than dictating particular outcomes to the process of balancing."). *Cf.* SMOLLA, *supra* note 101, at 33 (arguing that some framers likely believed the First Amendment embodied the Blackstonian view, while other framers probably "saw the First Amendment . . . as a departure from English tradition"). Zechariah Chafee launched perhaps the most famous assault on Blackstone's relevance to our understanding of the First Amendment. *See* CHAFEE, *supra* note 105, at 18 ("The men of 1791 went as far as Blackstone, and much farther.").

[110] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 189–90 (William G. Hammond ed., Bancroft-Whitney Co. 1890) (1778) (emphasis added).

[111] *See* Am. Bush v. City of S. Salt Lake, 140 P.3d 1235, 1247 (Utah 2006) ("As the revolutionary fervor in the United States cooled . . . the broader ideas about the limits of the freedom of speech right embodied in the revolutionary constitutions were blunted by the more conservative Blackstone

example. In 1776, Pennsylvania became the first state to adopt a constitutional provision protecting the freedom of speech.[112] Several other state constitutions protected the freedom of the press,[113] but Pennsylvania went further, declaring that "the people have a right to freedom of speech, and of writing, and publishing their sentiments."[114] But when the commonwealth adopted its 1790 constitution—just one year prior to the First Amendment's ratification—it swung unmistakably in Blackstone's direction, declaring that "every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*."[115] In the years that followed, nearly every state in the Union adopted abuse clauses when framing or amending their constitutions' speech provisions.[116] Still in place today,[117] these clauses limit the value of state constitutions' speech provisions for those asserting expressive freedoms.[118]

---

formulation of the freedom of the press."); SMOLLA, *supra* note 101, at 33 ("[I]t is quite clear that for at least *some* of the framers, freedom of speech went as far as Blackstone *and no further*."); Campbell, *supra* note 108, at 276 ("Speaking, writing, and publishing were thus ordinarily subject to restrictions under laws that promoted the public good."). This did not mean, however, that policymakers could punish any speech whatsoever. *See* Campbell, *supra* note 108, at 260 (stating that the Founders generally agreed that the government could not "punish well-intentioned statements of one's thoughts absent direct injury to others").

[112] *See* Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12, 14–15 (2002).

[113] *See id.* at 15.

[114] PA. CONST. of 1776, art. XII; *see also* Anderson, *supra* note 103, at 487 ("Most of the state constitutions protected freedom of the press, but only one protected speech.").

[115] PA. CONST. of 1790, art. IX, § VII (emphasis added); *see also Am. Bush*, 140 P.3d at 1247 ("In view of the liberal and unqualified nature of the 1776 clause, the addition of this Blackstonian limitation is no empty formulation, but represents a shift to a more limited freedom of speech right.").

[116] *See Am. Bush*, 140 P.3d at 1247 (stating that "the vast majority of the states adopted a 'responsibility for abuse' provision"); CHAFEE, *supra* note 105, at 5 n.2 (reporting that, in 1942, only five states lacked "abuse" clauses in their constitutions); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 457 n.1 (2d ed. 1871) (quoting all of the speech clauses that then appeared in state constitutions).

[117] Forty-three state constitutions today contain "abuse" provisions in their speech clauses. *See* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 5-103–5-114 (4th ed. 2006) (quoting all state constitutions' speech provisions).

[118] *See, e.g.*, J.D. v. State, 859 N.E.2d 341, 344 (Ind. 2007) ("Because it obstructed and interfered with Deputy Gibbons, J.D.'s alleged political speech clearly amounted to an abuse of the right to free speech and thus subjected her to accountability under Section 9."); People v. Ford, 773 P.2d 1059, 1066 (Colo. 1989) ("We believe that when the constitutional convention adopted article II, section 10 [of the Colorado Constitution], it accepted the widely held concept that obscenity was an abuse of the freedom of speech."); K. Gordon Murray Prods., Inc. v. Floyd, 125 S.E.2d 207, 212 (Ga. 1962) ("The decisions of this court clearly show that an 'abuse of that liberty' as expressed in our Constitution does not come within the speech or press which is protected."). In my home state of Iowa, the constitution's speech clause opens with language that plainly echoes the text adopted in Pennsylvania more than two centuries ago: "Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right." IOWA CONST. art. I, § 7. As a result, Iowa's speech clause is rarely invoked by free speech claimants today. *See* TODD E. PETTYS, THE IOWA STATE CONSTITUTION 80 (2d ed. 2018) (explaining that Iowa's free speech provision plays virtually no role in constitutional litigation today). Early rulings in the nation's history made clear the kinds of conclusions these abuse clauses could yield. *See, e.g.*, People v. Most, 64 N.E. 175, 176–78 (N.Y. 1902) (upholding the conviction of a man who had "endangered the public peace" by urging revolution, and emphasizing that New York's constitution left

Blackstone's influence extended beyond the framing of state constitutions; he shaped many people's understanding of the natural rights protected by the First Amendment, as well.[119] Lawrence Rosenthal observes, for example, that "leading commentators in the first half of the nineteenth century hewed to Blackstone, explaining that the First Amendment preserved the common law and accordingly prohibited only prior restraints."[120] Joseph Story was one of those writers, explaining in his 1833 *Commentaries on the Constitution of the United States* that it was "too wild" to be believed that the First Amendment gave "every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private."[121] In Story's view, punishing speakers for their "dangerous or offensive" communications was

> necessary for the preservation of peace and good order, of government and religion,—the only solid foundations of civil liberty. Thus, the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. . . . A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials.[122]

Blackstone's influence in federal quarters was still being felt in the early 1900s.[123] Consider, for example, Justice Holmes's opinion for the Court in

---

the legislature free to prescribe punishments for those who abused their expressive freedom); Commonwealth v. Kneeland, 37 Mass. 206, 219 (1838) (refusing to invalidate Massachusetts's blasphemy statute because the Massachusetts constitution left "every citizen responsible for any offence capable of being committed by the use of language"); People v. Ruggles, 8 Johns. 290, 294–95 (N.Y. Sup. Ct. 1811) (upholding a blasphemy conviction because the speaker's utterances about Jesus Christ and his mother were "a gross violation of decency and good order" and "an abuse of" the freedom to talk about religious matters).

[119] *See* LEVY, *supra* note 102, at xv ("[T]he intentions of the framers were not the most libertarian and their insights on the subject of freedom of expression not the most edifying. But this should be expected because the Framers were nurtured on . . . the narrow conservatism of Blackstone."); *id.* at 16 ("The American people [at the time of the founding] simply did not believe or understand that freedom of thought and expression means equal freedom for the other person, especially the one with hated ideas.").

[120] Rosenthal, *supra* note 101, at 23; *see also id.* at 24 ("[B]y the time of the Fourteenth Amendment's ratification, developments in First Amendment jurisprudence had not been dramatic.").

[121] STORY, *supra* note 109, at 634–35.

[122] *Id.* at 638. In the passage quoted here, he speaks specifically about publications, but he explains a few pages earlier that a person has a "right to speak . . . his opinions upon any subject whatsoever, without any prior restraint," but may be punished if his or her speech "injure[s] any other person" or "disturb[s] the public peace." *Id.* at 635.

[123] *See* Campbell, *supra* note 108, at 259 ("Although perhaps strange to modern readers, this [Blackstonian] interpretation of the First Amendment—generally permitting the government to restrict speech in the public interest—survived into the early twentieth century.").

Patterson v. Colorado.[124] Thomas Patterson had been held in criminal contempt for publishing materials that criticized the Colorado Supreme Court.[125] He argued that the Fourteenth Amendment's Due Process Clause brought the First Amendment's Speech Clause to bear on state officials, but—on Blackstonian grounds—the Court found it unnecessary to resolve that issue:

> [E]ven if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. . . . [T]he main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.[126]

If today's Court were firmly committed to originalism and concluded that the First Amendment should be understood in Blackstonian terms, the Court would likely find that public officials may prescribe punishments for specified categories of speech when they reasonably believe doing so will promote the public good. It would be only a small step from there to the conclusion that the First Amendment leaves administrators at public colleges and universities free to discipline students whose speech creates a hostile learning environment for others.[127]

2. *College Students' Rights in Early America*

Even if an originalism-driven Court did not wed itself to Blackstone, it still could easily find it appropriate to uphold speech restrictions on college and university students. Justice Thomas's own jurisprudential views point toward that conclusion. Two examples illustrate the point, with the first providing context for the more relevant second. In *McKee v. Cosby*,[128] the Court denied certiorari in a defamation dispute concerning the public-figure status of a woman who accused Bill Cosby of rape.[129] Justice Thomas

---

[124] 205 U.S. 454 (1907).

[125] *Id.* at 458–59.

[126] *Id.* at 462 (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313–14 (1825)). The Court assumed the Speech Clause's incorporation sixteen years later. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[127] I do not ask here whether administrators could act upon such calculations on their own authority or whether they would need the approval of state lawmakers. *See generally* Campbell, *supra* note 108, at 257 (arguing that, at the time of the founding, many believed the First Amendment provided "broad latitude for *the people and their representatives* to determine which regulations of expression would promote the public good") (emphasis added).

[128] 139 S. Ct. 675 (2019).

[129] For the facts of the case and the parties' various contentions, see McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675 (2019).

concurred in the denial of certiorari but signaled that, in a future case, the Court should critically revisit *New York Times Co. v. Sullivan*,[130] one of the most influential First Amendment rulings of the past century.[131] The *Sullivan* Court famously ruled that public officials suing speakers for defamation cannot prevail unless they demonstrate that the speakers uttered their defamatory statements with "actual malice."[132] In later rulings, the Justices extended that rule to defamation suits brought by nongovernmental public figures.[133] Justice Thomas argued that *Sullivan* and its progeny were troublingly out of step with "the First Amendment as it was understood by the people who ratified it."[134] In his view, the Court should consider moving toward legal principles that make it far more perilous to criticize those who hold prominent positions in public life:

> The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages. . . . Far from increasing a public figure's burden in a defamation action, the common law deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels.[135]

If one believes that the First Amendment does not provide much protection for those who speak disparagingly about public figures, might it do better for students saying things that school administrators find problematic? In Justice Thomas's view, it does not. In the 2007 decision *Morse v. Frederick*,[136] the Court held that a high school student did not have a First Amendment right to display a banner declaring "BONG HiTS 4

---

[130] 376 U.S. 254 (1964).

[131] *McKee*, 139 S. Ct. at 682 (Thomas, J., concurring in the denial of certiorari); *accord* Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 735 (2012) (listing *Sullivan* just after *Brown v. Board of Education* in a list of the Court's most influential liberal opinions).

[132] *See Sullivan*, 376 U.S. at 279–80.

[133] *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 133 n.† (1967) (noting the composition of the majority on this point).

[134] *McKee*, 139 S. Ct. at 676 (Thomas, J., concurring).

[135] *Id.* at 678–79. For a recent critique of *Sullivan* on different grounds, see David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759 (2020) (arguing that, due to changes in communications technologies and platforms, falsehoods now present problems that the *Sullivan* Court did not anticipate). Citing Logan heavily, Justice Gorsuch has said—without committing to a position on the merits—that he believes changes in the media landscape since 1964 likely necessitate taking a second look at *Sullivan*. Berisha v. Lawson, 141 S. Ct. 2424, 2427–28 (2021) (Gorsuch, J., dissenting from the denial of certiorari).

[136] 551 U.S. 393 (2007).

JESUS" at a school-sponsored event.[137] The majority reached its conclusion only after carefully discussing the Court's landmark decision in *Tinker v. Des Moines Independent Community School District*.[138] *Tinker* held that high school students had a First Amendment right to protest the Vietnam War by wearing black armbands to school because there was no evidence that their expression threatened to substantially disrupt school activities.[139] Justice Thomas filed a concurring opinion in *Morse*, arguing that *Tinker* "is without basis in the Constitution" and that his colleagues in the majority thus need not have worried about its implications.[140] "As originally understood," Justice Thomas wrote, "the Constitution does not afford students a right to free speech in public schools."[141] Although he was focusing primarily on K–12 students, he indicated that his narrow understanding of students' speech rights extends, at least to some degree, to higher education:

> Even at the college level, strict obedience was required of students [at the time of the founding]: "The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions. This one-sided relationship between the student and the college mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique legal privileges afforded the university corporation."[142]

Justice Thomas's description of college students' slender prerogatives in early America enjoys strong support in the historical record. As Glenn Altschuler and Isaac Kramnick colorfully put it, the nation's first century was "the golden age of in loco parentis" at American colleges and universities, with "academic regulations cover[ing] virtually all aspects of

---

[137] *Id.* at 397, 409–10.

[138] 393 U.S. 503 (1969); *see also Morse*, 551 U.S. at 403–08 (discussing *Tinker* and related authorities). For recent reflections on *Tinker* and free speech disputes in higher education, see Christina Bohannan, *On the 50th Anniversary of* Tinker v. Des Moines*: Toward a Positive View of Free Speech on College Campuses*, 105 IOWA L. REV. 2233 (2020).

[139] *Tinker*, 393 U.S. at 513–14.

[140] *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

[141] *Id.* at 418–19 (Thomas, J., concurring). For criticism of Justice Thomas's argument, see Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 341–46 (2010) (arguing that Justice Thomas's conclusions are weakly grounded because public education did not arrive on the scene until the latter half of the nineteenth century and because the First Amendment constrained only the federal government prior to the twentieth century).

[142] *Morse*, 551 U.S. at 412 n.2 (Thomas, J., concurring) (quoting Brian Jackson, Note, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1140 (1991)).

students' lives, from libido to laundry."[143] In 1891, for instance, the Supreme Court of Illinois described schools' power in sweeping terms and found no constitutional difficulty with a state university's expulsion of a student who refused to attend chapel services:

> By voluntarily entering the university, or being placed there by those having the right to control him, he necessarily surrenders very many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; that he shall not visit certain places; his hours of study and recreation,—in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters . . . .[144]

Some colleges and universities loosened their grip on students in the latter half of the nineteenth century,[145] but the move in that direction was not swift. For example, in its 1913 ruling in *Gott v. Berea College*[146]—a case concerning a private college's refusal to allow students to patronize a particular restaurant—the Kentucky Court of Appeals found that "[c]ollege authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils."[147] The court said it was "unable to see why . . . [college leaders] may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose."[148]

---

[143] Glenn C. Altschuler & Isaac Kramnick, *A Better Idea Has Replaced 'In Loco Parentis'*, CHRON. HIGHER EDUC. (Nov. 5, 1999), https://www.chronicle.com/article/a-better-idea-has-replaced-in-loco-parentis; *accord* Timothy J. Tracey, *The Demise of Equal Access and a Return to the Early-American Understanding of Student Rights*, 43 U. MEMPHIS L. REV. 557, 563 (2013) ("[T]he idea that students could use the First Amendment to veto university decisions is a recent phenomenon, and not one that early-American universities would have understood.").

[144] North v. Bd. of Trs., 27 N.E. 54, 56 (Ill. 1891).

[145] *See* Jackson, *supra* note 142, at 1141–43; *see also* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 50 (2008) ("In the late nineteenth century, the American university had started to change its focus from molding and training students to cutting-edge research. . . . An institution focused on obtaining new truths, rather than on training youth, necessarily has a different relationship to its students.").

[146] 161 S.W. 204 (Ky. 1913).

[147] *Id.* at 206.

[148] *Id.* The ensuing shift to the modern era—an era in which students' legal rights are taken far more seriously—was heralded by the Fifth Circuit's influential ruling in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). The *Dixon* court held that public institutions of higher education cannot expel students without affording those students meaningful procedural protections. *Id.* at 158–59. That decision helped trigger a series of student-protecting rulings that extended across many legal fronts. *See* Tracey, *supra* note 143, at 623 ("With the Fifth Circuit's decision in *Dixon v. Alabama State Board of Education*, the law turned 180 degrees on the issue of student rights.") (internal quotation marks omitted); *id.* at 624 ("*Dixon* became the cornerstone of student-university litigation throughout the 1960s and 1970s, and effectively struck the finishing blow to the *in loco parentis* doctrine."); Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1, 13 (2005) ("Most university law

Whether Blackstone and early American history are taken separately or together, it is not difficult to predict where our journey might take us if we deployed them as our chief guides for the issues under discussion here. They could carry us quickly to the conclusion that public colleges and universities may discipline student speakers when administrators reasonably determine that those students have expressed themselves in ways contrary to important institutional values and objectives.

B. *The Modern Court's Non-Originalist Jurisprudence*

As the reader undoubtedly is aware, the First Amendment rules under which we live today are far removed from those I have just described. An unwavering commitment to Blackstonian principles, for example, would necessitate a revolution in how we understand our First Amendment rights today.[149] The modern Court holds that the First Amendment largely strips policymakers of the power to restrict speech based upon their own assessments of the common good. The Court has not *entirely* barred public officials from imposing speech restrictions that accord with their public-interest calculations, but any such restrictions draw great judicial skepticism.

Consider, for example, the Court's 2010 opinion in *United States v. Stevens*.[150] Responding to the stomach-turning world of "crush videos"—videos depicting women crushing small animals beneath their feet—Congress made it a crime to create, sell, or possess depictions of animal cruelty for commercial gain.[151] Writing for the Court, Chief Justice Roberts rejected the Federal Government's "startling and dangerous" contention that a legislature may proscribe a category of speech if it concludes that the category's "social costs" outweigh its benefits.[152] (Note how far from Blackstone we have traveled. What once was widely regarded as a legislative prerogative[153] is now a "startling and dangerous" proposition.) The Court acknowledged that there might be "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[154] The Justices, however, resolved not to use "the Government's

---

commentators view *Dixon v. Alabama State Board of Education* as the decision that set the stage for the demise of *in loco parentis*.") (footnotes omitted).

[149] *See* SMOLLA, *supra* note 101, at 32 ("If Blackstone's view of free speech was the *real* original meaning of the First Amendment, then arguably [ninety] percent of modern free speech jurisprudence . . . is intellectually dishonest and historically illegitimate."); Campbell, *supra* note 108, at 256 ("If the Supreme Court wanted to apply only those legal rules [concerning free speech] that the Founders recognized (or likely would have recognized), a huge swath of modern case law would have to go.").

[150] 559 U.S. 460 (2010).

[151] *Id.* at 464–66.

[152] *Id.* at 470.

[153] *See supra* Part II.A.1.

[154] *Stevens*, 559 U.S. at 472.

highly manipulable balancing test as a means of identifying them."[155] The Chief Justice explained:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."[156]

As we have seen, that account of early Americans' understanding of the First Amendment is, to a large degree, likely apocryphal.[157] But it is an account to which the Court is now tightly bound. One year after *Stevens*, for example, the Court issued its ruling in *Brown v. Entertainment Merchants Association*,[158] striking down a California law that barred the sale or rental of violent video games to minors.[159] Writing for the Court, Justice Scalia reiterated *Stevens*'s anti-Blackstonian insistence that the First Amendment does not leave lawmakers free to punish or otherwise restrict speech based upon their assessment of how best to serve the common good.[160] Although embracing an analytic framework that is itself ahistorical in its suppositions, the Court said that the fate of policymakers' categorical judgments about speech depends primarily upon an historical inquiry. Justice Scalia wrote, "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[161] The First Amendment strips policymakers of the power to make

---

[155] *Id.*

[156] *Id.* at 470 (quoting Marbury v. Madison, 5 U.S. 137, 178 (1803)).

[157] *See supra* Part II.A.1 (discussing Blackstonian principles); Campbell, *supra* note 108, at 257 ("[T]he First Amendment did not enshrine a judgment that the costs of restricting expression outweigh the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote the public good.").

[158] 564 U.S. 786 (2011).

[159] *Id.* at 789, 805.

[160] *Id.* at 790–91.

[161] *Id.* at 792 (alteration in original) (quoting *Stevens*, 559 U.S. at 470); *see also id.* at 795 ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.").

categorical content-based judgments about speech, in other words, unless those judgments align with judgments that policymakers have long made.

Public colleges and universities are not exempt from this skeptical disposition toward speech restrictions. As I noted earlier, the Court has said that the First Amendment applies on public campuses with as much rigor as in society at large.[162] Consider, for example, the Court's 1973 ruling in *Papish v. Board of Curators of the University of Missouri*,[163] a case concerning a state university's expulsion of a journalism student who distributed a newspaper containing the word "mother-fucker" and depicting police officers raping the Statue of Liberty and the Goddess of Justice.[164] The Eighth Circuit had upheld the expulsion, reasoning that "no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a University campus."[165] The Eighth Circuit's reasoning would fly with the Supreme Court thirteen years later in a case concerning K–12 schools,[166] but it did not fly with the *Papish* Court for university students. Reversing the ruling below, the Court stressed 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.'"[167]

When it comes to student speech that creates hostile learning environments, where does this leave public colleges and universities? Absent a categorical exception of the kind I defend in Part III, our analysis

---

[162] *See* Healy v. James, 408 U.S. 169, 180 (1972); s*ee also supra* note 4 and accompanying text (noting *Healy*).

[163] 410 U.S. 667 (1973) (per curiam).

[164] *See id.* at 667–68.

[165] Papish v. Bd. of Curators, 464 F.2d 136, 145 (8th Cir. 1972), *rev'd*, 410 U.S. 667 (1973) (per curiam).

[166] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 683 (1986) (explaining that the "highly appropriate function[s] of public [K–12] school[s]" include "teaching students the boundaries of socially appropriate behavior"; teaching children to speak in ways that accommodate "the sensibilities of others" by "disfavor[ing] the use of terms of debate [that others may find] highly offensive"; and equipping students with "'the habits and manners of civility . . . [that are] indispensable to the practice of self-government in the community and the nation'") (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). That does not mean K–12 officials can always restrict speech merely because some may find it unpleasant. As the Court later pointed out, "much political and religious speech [by schoolchildren] might be perceived as offensive to some" yet will nevertheless enjoy the First Amendment's protection. Morse v. Frederick, 551 U.S. 393, 409 (2007). Some may have been offended by John and Mary Beth Tinker's black-armband protest of the Vietnam War, for example, but their speech was nevertheless constitutionally shielded from restriction by school officials. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 514 (1969). But the First Amendment does not strip elementary and secondary schools of their power to regulate student speech in ways that take appropriate account of "the special characteristics of the school environment." *Id.* at 506. In *Fraser* itself, for example, the Court concluded that officials at a public high school had not violated the First Amendment when they disciplined a student for giving a sexually crude (but non-obscene) speech at a school assembly. *Fraser*, 478 U.S. at 685.

[167] *Papish*, 410 U.S. at 670; *see also id.* at 671 (stating that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech").

presumably would run as follows. Disciplining students for speaking in ways that create hostile learning environments for others is a content-based regulation of speech because the decision to impose discipline is based upon the effects of the speech's content on others.[168] Imposing such discipline at a public institution of higher education is thus permissible only if it can withstand strict scrutiny.[169] When dealing with hostile learning environments of the access-denying sort described in Part I.B, a school may confidently predict that courts will share administrators' judgment that compelling interests are at stake.[170] The more difficult case-by-case challenge will be to establish that discipline—rather than some less aggressive response—is necessary to restore the harassment victim's access to the resources and opportunities that the school provides.[171] Indeed, when the harassment concerns a trait that Congress has singled out for protection,[172] school officials may face a conundrum. Recall the *Davis* Court's observation that, because Congress has not specified particular anti-harassment measures that schools must deploy when students are harassed by classmates, there might be a variety of statutorily acceptable ways in which schools may respond.[173] The range of remedial possibilities that a

[168] *Cf.* Boos v. Barry, 485 U.S. 312, 321 (1988) (finding that a restriction on picketing outside foreign embassies was a content-based restriction on speech because it was based upon the perceived "need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments").

[169] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); *see also* United States v. Playboy Ent. Grp., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

[170] *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) ("Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest.").

[171] Courts frequently find that content-based speech restrictions are not the least restrictive means of achieving the government's objectives. *See, e.g.*, *Playboy Ent. Grp.*, 529 U.S. at 816–27 (regarding means of shielding children from indecent material on television); Reno v. ACLU, 521 U.S. 844, 879–80 (1997) (regarding means of shielding children from indecent material on the internet). Of course, there are additional ways that content-based laws can fail narrow-tailoring analysis. Sometimes, for example, courts strike down content-based restrictions because they are under-inclusive. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 387, 395–96 (1992) (striking down content-based distinctions made within a category of wholly proscribable speech because the government could have proscribed the entire category). Other times, a law's under-inclusivity weakens the government's argument that a content-based restriction is truly intended to achieve the objective that the government touts as compelling. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 171–72 (2015) (holding that the under-inclusivity of a town's content-based sign restrictions fatally undercut the town's argument that the restrictions were designed to reduce driver distractions).

[172] *See supra* notes 39–44 and accompanying text (discussing federal antidiscrimination legislation).

[173] *See supra* notes 62–63 and accompanying text (discussing that portion of the *Davis* ruling).

school may emphasize when trying to deflect a harassment victim's threat of statutory repercussions for not responding in the victim's preferred manner is the same range of remedial possibilities that an accused harasser may emphasize when arguing that harsh discipline is not necessary to restore the victim's equal access to school programs, activities, and facilities.[174]

That conundrum is not insoluble, but the difficulties it presents underscore the importance of asking whether, as a categorical matter, student speech creating hostile learning environments enjoys no greater First Amendment protection than fighting words, true threats, or other varieties of wholly proscribable expression.[175] We turn to that possibility now.

III. FIRST AMENDMENT SCENARIOS

In the discussion that follows, I use four brief scenarios to advance several constitutional arguments concerning hostile learning environments of the access-denying kind described in Part I.B. I argue that schools may not discipline student speakers in a preemptive bid to ward off hostile learning environments that might be in the offing but have not yet materialized. But, for reasons involving both tradition and free-speech values, the First Amendment poses no obstacle to discipline once a student has indeed harassed a classmate to such a degree that the classmate is denied equal access to school resources and opportunities. When the hostile environment is created not by one harasser whose speech is independently sufficient to deprive a classmate of equal access, but by multiple speakers who each add a few bricks to the harassment wall, or is created by speech that the harassment victim merely overhears, courts should rule that the First Amendment shields the student speakers from discipline unless they made their harassing statements with a mens rea akin to that of actual malice in defamation law.

A. *Four Scenarios*

Consider four scenarios involving student speakers and their classmates at a public college or university. I use the term "classmates" here simply to refer to students who attend the same school, regardless of whether they are enrolled with the speakers in the same courses. In each scenario, I assume that the harassing speech does not take the form of fighting words, true threats, or any other variety of speech that the Court

---

[174] *Cf.* Doe v. Univ. of Ill., 138 F.3d 653, 679 (7th Cir. 1998) (Posner, C. J., dissenting from the denial of rehearing en banc) ("Liability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measures would be to expose the school to a suit by the victim of the alleged harassment.").

[175] *See supra* notes 7–12 and accompanying text (discussing categories of wholly proscribable speech).

has already deemed wholly proscribable.[176] With that assumption in place, we can focus on whether the First Amendment permits administrators to discipline students for the very reason that their speech has created a hostile learning environment for other students on campus.

Scenario One: Student Speaker makes a statement to Classmate. The statement does not create a hostile learning environment for Classmate, but Classmate would indeed suffer a loss of equal access to the school's programs, activities, or facilities if statements of that type were to pervade Classmate's campus experience. Even if the speech concerns a congressionally specified trait, federal antidiscrimination legislation does not oblige the school to intervene because Student Speaker's speech has not caused Classmate to suffer a loss of equal access to school resources and opportunities.[177] But suppose campus officials wish to discipline Student Speaker anyway in a preemptive bid to ensure that such speech does not become commonplace. Does the First Amendment bar them from doing so?

Scenario Two: Student Speaker repeatedly makes statements to Classmate like the statement made in Scenario One, and those statements collectively constitute severe, pervasive, and objectively offensive harassment.[178] If the statements concern a congressionally protected trait, school officials are statutorily obliged to respond in a reasonable manner.[179] Regardless of whether the harassment does indeed concern a statutorily specified trait, school officials wish to discipline Student Speaker for his or her speech. Does the First Amendment bar them from doing so? If not, why not?

Scenario Three: Student Speaker has made numerous statements to Classmate like the statement made in Scenario One, but they collectively fall just short of severe, pervasive, and objectively offensive harassment. Along comes Second Student Speaker, who makes the same kind of statement to Classmate. Second Student Speaker's statement is the last straw. Classmate is now suffering a denial of equal access by virtue of the hostile learning environment that the two student speakers' statements,

---

[176] *See id.*

[177] *See supra* Part I.B (discussing schools' federal statutory obligations).

[178] *Cf.* Foster v. Bd. of Regents, 982 F.3d 960, 962–63 (6th Cir. 2020) (en banc) (addressing allegations that one student persistently harassed another).

[179] *See supra* Part I.B (discussing schools' federal statutory obligations).

taken together, have created.[180] The institution's statutory obligations remain clear: if the institution knows about the harassment and the harassment concerns a trait that Congress has identified for protection, the institution must respond to the harassment in a reasonable manner.[181] But what should we say about the First Amendment? Arguably, both Student Speaker and Second Student Speaker stand in the same position as Student Speaker in Scenario One—namely, they have made statements that do not independently create a hostile learning environment for Classmate. If we say that the speech in Scenario One enjoys the First Amendment's full protection, should we say the same about the speech of both student speakers here? Or does each student speaker's constitutional susceptibility to discipline change by virtue of the other's speech?

Scenario Four: In each of the prior scenarios, the student speakers directed their statements to Classmate. Suppose that, in Scenarios Two and Three, the speakers were not directing their comments to Classmate, but Classmate nevertheless overheard what they said.[182] Does that factual difference affect our constitutional analysis?

B. *Scenario One: Preemptive Discipline*

The first scenario does not require extended analysis, but it helps establish a baseline that will aid discussion of the others. Here, Student Speaker has made one statement to Classmate and that statement does not amount to severe, pervasive, and objectively offensive harassment. The statement might deeply offend Classmate, but offense alone is a constitutionally inadequate basis on which to deem the speech unprotected.[183] Because Classmate has not suffered a denial of equal access to the school's programs, activities, or facilities, there is no harm that would constitutionally justify discipline. Permitting the school to take adverse action against Student Speaker because that individual or others might later speak to Classmate in similar ways would give campus officials unacceptably broad authority to impose content-based speech restrictions on the strength of speculative what-ifs. Justice Kennedy may have had just such situations in mind when he dissented in *Davis*. Although his chief

---

[180] *Cf.* Feminist Majority Found. v. Hurley, 911 F.3d 674, 684–85 (4th Cir. 2018) (discussing harassment that female students at the University of Mary Washington suffered at the hands of multiple students).

[181] *See supra* Part I.B (discussing schools' federal statutory obligations).

[182] *Cf.* Adam Steinbaugh, *University of Connecticut Police Arrest Students for Use of Racial Slur*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Oct. 22, 2019), https://www.thefire.org/university-of-connecticut-police-arrest-students-for-use-of-racial-slur/ ("Two students at the University of Connecticut were arrested Monday by the University of Connecticut Police Department for saying the N-word loudly enough for others to hear.").

[183] *See supra* notes 4–6 and accompanying text (discussing this principle).

concern lay elsewhere,[184] Justice Kennedy cautioned that the Court's ruling would "add fuel to the debate over campus speech codes that, in the name of *preventing* a hostile educational environment, may infringe students' First Amendment rights."[185]

It is one thing to burden speech when it creates demonstrable harms; it is quite another to burden speech based on fears about harms that will not materialize in the absence of additional speech that might not ever occur. Consider, for example, the categories of expression that the Court has long said are wholly proscribable. An utterance typically falls within one of those categories only when that utterance *itself* is sufficient to create the harm that renders such speech proscribable in the first place. For example, speech amounts to incitement only if the utterance itself "is likely to incite or produce [imminent lawless] action";[186] speech amounts to fighting words only if the utterance itself is "inherently likely to provoke violent reaction";[187] and speech amounts to defamation only if the utterance itself harms others' reputations.[188] In addition, the First Amendment permits governments to punish those who issue a true threat because of the disruptive fear that the utterance itself can instill,[189] and governments may ban the creation and distribution of child pornography because of the harms that the creation and distribution of such materials inflict upon the children involved.[190] In none of these instances do we say that speech is proscribable because, if combined with speech of the same type that might or might not occur in the future, it would create harms justifying its proscription.

This does not mean that administrators and other members of the campus community must stand idly by after Student Speaker makes the statement to Classmate. They can condemn the statement as antithetical to campus values, for example, and advise Student Speaker about the harms that continued expressions of that sort might inflict. As we will see when discussing Scenario Three,[191] advising Student Speaker in this way can

---

[184] *See supra* note 56 (explaining that Justice Kennedy and his colleagues in dissent believed Congress had not sufficiently put states on notice of the consequences that would flow from accepting Title IX funds).

[185] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 682 (1999) (Kennedy, J., dissenting) (emphasis added); *see also supra* Part I.B (discussing *Davis*).

[186] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[187] Cohen v. California, 403 U.S. 15, 20 (1971).

[188] *See* United States v. Alvarez, 567 U.S. 709, 734 (2012) ("Defamation statutes focus upon statements of a kind that harm the reputation of another or deter third parties from association or dealing with the victim.").

[189] *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (describing this harm).

[190] *See* New York v. Ferber, 458 U.S. 747, 758–59 (1982) (describing these harms).

[191] *See infra* Part III.D.

help lay a foundation for a more punitive response if he or she continues to speak to Classmate in problematic ways that, by virtue of their combination with the speech of other students, create a hostile learning environment. But if the worst we can say about Student Speaker's statement is that it would inhibit Classmate's school access if it became commonplace, then Student Speaker's speech has not yet caused an injury that would constitutionally justify discipline.

C. *Scenario Two: The Single-Handed Harasser*

In Scenario Two, Student Speaker has single-handedly created a hostile learning environment for Classmate by making statements that cumulatively amount to harassment so severe, pervasive, and objectively offensive that Classmate no longer has equal access to school programs or other resources. Does the First Amendment shield Student Speaker from discipline? No, it does not.

One thin argument that some might think points to this conclusion flows from the subdued nature of the *Davis* Court's references to First Amendment concerns when it extracted the "severe, pervasive, and objectively offensive" formulation from Title IX.[192] Joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas in dissent, Justice Kennedy briefly flagged First Amendment worries, particularly with respect to speech on college and university campuses.[193] The majority did not see fit to reply, other than to say that it would be reasonable for schools to avoid responding to harassment in ways that could provoke "constitutional or statutory claims" and that a college or university "might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy."[194] If the Justices in the majority believed Title IX's standard would sharply collide with the First Amendment whenever access-denying harassment takes the form of speech and schools want to impose discipline as a remedy, they signaled those concerns in a remarkably lowkey way. Just as some argue that the Court's silence about First Amendment issues tells us all we need to know about the constitutional status of speech that creates hostile *work* environments,[195] one might thus argue that the *Davis* Court's failure to say more about First

---

[192] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649–51 (1999); *see also supra* notes 51–71 and accompanying text (discussing *Davis*).

[193] He pointed out that the First Amendment allows public colleges and universities only limited control over students' speech, *Davis*, 526 U.S. at 667–68 (Kennedy, J., dissenting), and he feared that the Court's ruling would "add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights," *id.* at 682; *see also supra* note 56 and accompanying text (noting Justice Kennedy's dissent).

[194] *Davis*, 526 U.S. at 649.

[195] *See supra* note 35 and accompanying text (noting such arguments).

Amendment issues tells us all we need to know about student speech that creates hostile *learning* environments.

But this is an uncertain and ultimately unhelpful path to take. The Court did briefly acknowledge the First Amendment's relevance in this realm, and the dispute in *Davis* did not require it to say more than that. In any event, speculative arguments based on judicial silence do little to deepen our understanding of "the supreme Law of the Land"[196] and its jurisprudential underpinnings. The day will come when the Supreme Court speaks directly to the First Amendment status of harassing speech and, when it does, any disagreements among the Justices will not principally turn on the significance attached to the fleeting nature of the *Davis* Court's references to constitutional concerns. The Justices will speak directly to the merits of the issue, and so should we.

A different approach that some might initially find appealing would be to argue that Student Speaker's speech should simply be regarded as conduct. That argument would run something like this: (1) The law would not allow Student Speaker to *physically* block Classmate from accessing campus facilities or other resources; (2) Student Speaker is accomplishing, through speech, what the law would not permit him or her to accomplish through conduct; and so (3) Student Speaker's speech is just conduct, and it thus lies beyond the First Amendment's protection.[197] Those making such an argument may emphasize that school officials are targeting Student Speaker's speech not because they object to the message it conveys, but because Student Speaker has stripped Classmate of equal access to campus programs and the like.[198] So, one might conclude that Student Speaker is entitled to no more constitutional protection than would be available if he or she had stripped Classmate of equal access by physical means.

That is not the path I take here. As Eugene Volokh writes, "[W]hen speech is restricted because of harms caused by its content, we ought not try to evade the First Amendment problem by simply renaming the speech

---

[196] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

[197] *Cf., e.g.*, Wirenius, *supra* note 37, at 907 (arguing that verbal sexual harassment in the workplace is "a 'verbal act,' an act [that is] performed through speech and thus remains outside the boundaries of First Amendment protection, not based upon governmental disapproval of the speech in question but because those words spoken in the particular factual context have the effect of an act, not of a communication").

[198] *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (finding that the First Amendment permits content-based distinctions within realms of wholly proscribable speech when "there is no realistic possibility that official suppression of ideas is afoot").

'conduct.'"[199] Here in Scenario Two, there is no avoiding the fact that Classmate's lack of equal access flows from the contents of Student Speaker's speech, and there is no alchemical process by which Student Speaker's speech ceases to be speech such by virtue of the fact that he or she could have inflicted the same harm by non-expressive means.[200] The First Amendment protects the freedom of speech, so we need to confront the possibility of First Amendment protection head-on.

For at least two reasons, the Court should conclude, as a categorical matter, that when a student at a public college or university verbally harasses a classmate so severely, pervasively, and objectively offensively that the classmate is denied equal access to school facilities or other resources, the speech falls beyond the First Amendment's protection, giving it the same status as fighting words, true threats, and the like.[201] The first argument concerns history and tradition, while the second focuses on free-speech values.

The first argument picks up where the Court in *Stevens* and *Entertainment Merchants* left off. Recall that the Court in those cases insisted, contrary to Blackstone, that a legislature cannot restrict a content-defined category of expression based simply on its determination that, on balance, the expression disserves the common good.[202] But the Court also acknowledged that the First Amendment might permit such content-based restrictions if they are "part of a long (if heretofore unrecognized) tradition of proscription."[203] The speech restrictions in *Stevens* and *Entertainment Merchants* could make no such historical

---

[199] Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1336 (2005).

[200] Because the arguments I make below focus on the fact that Classmate has been denied equal access to campus resources, they do echo the kinds of arguments one would make when defending laws that prevent one student from physically blocking another student's access to campus. *Cf.* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 722 (2016) ("[W]hen defining new unprotected categories of speech, determining whether speech fits into a particular category, or applying the constitutional scrutiny that corresponds to particular categories, a court should give weight to the harms caused by speech only when these harms can be analogized to conduct harms."). But I make those arguments to defend the conclusion that Student Speaker's speech does not merit the First Amendment's protection, not to establish that the speech really is not speech in the first place.

[201] *See supra* notes 7–12 and accompanying text (discussing categories of wholly proscribable speech); *see also R.A.V.*, 505 U.S. at 383 ("[A] limited categorical approach has remained an important part of our First Amendment jurisprudence.").

[202] *See* United States v. Stevens, 559 U.S. 460, 472 (2010) ("Our decisions [in the modern era] cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) ("Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."); *see also supra* notes 150–161 and accompanying text (discussing *Stevens* and *Entertainment Merchants*).

[203] *Ent. Merchs. Ass'n*, 564 U.S. at 792; *see also id.* at 795 ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none."); *Stevens*, 559 U.S. at 469 (rejecting the federal government's contention "that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation").

claim. The statutes challenged in those cases banned, respectively, the creation, sale, and distribution of materials containing depictions of certain kinds of animal cruelty[204] and the rental or sale of violent video games to children.[205] In both instances, the Court found the speech restrictions to be unprecedented.[206]

When it comes to student-on-student harassment, however, the historical analysis yields a different conclusion. As we have seen, college and university students enjoyed few free-speech prerogatives during much of the nation's history.[207] The pendulum swung powerfully in students' direction beginning in the 1960s, bringing many constitutional features of that earlier era to a decisive end.[208] But that pendulum did not swing so far as to acknowledge a student's constitutional right to thwart schools' efforts to provide educational opportunities for other students. To the contrary, through a series of enactments that began with Title VI in 1964, the nation's lawmakers have imposed significant financial consequences on schools that deprive some students of equal access to school programs and activities, including when they fail to take reasonable remedial action when they know that one student is badly harassing another.[209] With more than half a century of action under those legal principles already under the nation's belt, the argument only grows stronger with each passing year that we have "a longstanding tradition in this country"[210] of embracing Congress's calculation that the public interest is disserved when schools knowingly tolerate student-on-student harassment that denies equal access to harassment victims.

When Congress was first expressing that calculation through landmark legislation in the 1960s and early 1970s, the Court was revealing that it saw matters the same way. In the 1972 decision *Healy v. James*,[211] the Court held that the First Amendment did not permit a state college to block students' efforts to associate with one another in the form of a local chapter

---

[204] *Stevens*, 559 U.S. at 464–65.

[205] *Ent. Merchs. Ass'n*, 564 U.S. at 789.

[206] *See id.* at 794 (stating that California's creation of "a wholly new category of content-based regulation that is permissible only for speech directed at children" was "unprecedented and mistaken"); *Stevens*, 559 U.S. at 469 ("[W]e are unaware of any . . . tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment, and the Government points us to none.").

[207] *See supra* notes 142–148 and accompanying text (discussing this history).

[208] *See supra* note 148 (noting this important development).

[209] *See supra* Part I.B (discussing schools' federal statutory obligations).

[210] *Ent. Merchs. Ass'n*, 564 U.S. at 795.

[211] 408 U.S. 169 (1972).

of Students for a Democratic Society.[212] School officials said they feared the organization would disrupt campus activities, but the Court found those fears to be unsubstantiated.[213] The eight-member majority also hastened to explain, however, that "[a]ssociational activities need not be tolerated where they . . . substantially interfere with the opportunity of other students to obtain an education."[214] Substantial interference with a student's educational opportunities is precisely what one finds when one student harasses another so badly that the victim loses equal access to school programs, activities, or facilities. When one student's speech or expressive activities block other students from taking equal advantage of school offerings, it is the former that must yield.

The Justices had made the same point three years earlier in *Tinker*,[215] finding that three junior high and high school students had a First Amendment right to protest the Vietnam War by wearing black armbands to school.[216] The Court emphasized that the armband protest had not "colli[ded] with the rights of other students to be secure and to be let alone"[217] and that the protestors had not "sought to intrude in . . . the lives of others."[218] It would have been a very different case if the protestors had significantly impeded other students' ability to take advantage of the educational opportunities that the schools were offering them.

When inviting tradition-based arguments of the sort I am making here, the Court in *Stevens* and *Entertainment Merchants* left important questions unanswered. The Court said, for example, that a content-based speech restriction might be constitutionally permissible if it is "part of a *long* . . . tradition of proscription."[219] But how long is "long"? At what level of

---

[212] *See id.* at 194.

[213] *See id.* at 189–90.

[214] *Id.* at 189; *see also* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (reiterating the Court's commitment to this principle).

[215] 393 U.S. 503 (1969).

[216] *See id.* at 514 (holding that public K–12 school officials may restrict students' speech when they "reasonably . . . forecast substantial disruption of or material interference with school activities"); *see also id.* at 505 (finding that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it"); *Healy*, 408 U.S. at 189 (citing *Tinker*). In the brief discussion of *Tinker* above, I do not argue that *Tinker*'s famous substantial-disruption standard applies to public colleges and universities in the same ways it applies to public K–12 schools. Others have sensibly expressed reservations about making that argument. *See, e.g.*, McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2010) ("Public universities have significantly less leeway in regulating student speech than public elementary or high schools."); Meggen Lindsay, Note, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1481 (2012) ("Students enrolled at public universities should have a greater degree of free-speech protections than high school and junior high students.").

[217] *Tinker*, 393 U.S. at 508; *see also id.* (observing that the protest had not "intrude[d] upon . . . the rights of other students"); *see also id.* at 513 ("[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

[218] *Id.* at 514.

[219] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (emphasis added).

abstraction should the tradition be defined?[220] Is the relevant tradition of intolerance limited here to harassment based on the congressionally specified traits, or can we describe it more broadly?

It seems reasonable to conclude that half a century is ample time to justify the conclusion that the American people and their governmental leaders have thoughtfully embraced the antiharassment regime that Title VI and similar legislation introduced. Moreover, when it comes to defining the contents of that decades-long tradition, the Court itself appeared to signal in *Healy* and *Tinker* that access-denying expression need not be tolerated, no matter what communicative specifics it happens to entail.[221] For First Amendment purposes, what matters is the interference with other students' lives and educational opportunities, rather than the traits invoked when that interference occurs.

Some readers might wonder, however, whether Congress's antiharassment regime has indeed been in place long enough to count. Even those who conclude that half a century is long enough might retrospectively wonder about the First Amendment status of student-on-student verbal harassment that occurred during the legislative regime's initial years on the books. It is useful, therefore, to get one's bearings within the First Amendment landscape by thinking about core values relating to the freedom of expression. It is here that we find the second reason to conclude, as a categorical matter, that the First Amendment provides no refuge for a student at a public college or university who verbally harasses a classmate so severely, pervasively, and objectively offensively that the classmate is denied equal access to school resources and opportunities.

This second argument springs paradoxically from the fact that maintaining a community of open and uninhibited discourse is especially important in the lives of colleges and universities. As the authors of the widely praised Report of the Committee on Freedom of Expression at the University of Chicago put it, institutions of higher education today "should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the questioning

---

[220] Some have argued, for example, that traditions should be narrowly defined when searching for evidence of unenumerated rights that restrict governments' regulatory reach into our lives. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."). *Cf.* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.").

[221] *See supra* notes 211–218 and accompanying text (discussing *Healy* and *Tinker*).

of stubborn assumptions, can flourish in an environment of the greatest freedom."[222] The Court has similarly recognized that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'";[223] "[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'";[224] "[t]eachers 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";[225] and "given the . . . expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[226]

Usually, of course, these principles provide powerful reasons to permit college and university students to say whatever they think appropriate.[227] But these same principles also drive us to the conclusion that students do

---

[222] GEOFFREY R. STONE, MARIANNE BERTRAND, ANGELA OLINTO, MARK SIEGLER, DAVID A. STRAUSS, KENNETH W. WARREN & AMANDA WOODWARD, UNIV. OF CHI., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015) [hereinafter CHICAGO STATEMENT], https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf (internal quotation marks omitted) (quoting University of Chicago President Hanna Holborn Gray). The authors of the Chicago Statement elaborate on the importance of uninhibited inquiry in higher-education communities:

> Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community "to discuss any problem that presents itself."
>
> Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

Id. Dozens of institutions have adopted the Chicago Statement. *See Chicago Statement: University and Faculty Body Support*, FOUND. FOR INDIVIDUAL RTS. EDUC. (June 15, 2021), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/.

[223] Healy v. James, 408 U.S. 169, 180 (1972) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[224] *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

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

[226] Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

[227] *See, e.g.*, Papish v. Bd. of Curators, 410 U.S. 667, 667–68, 670–71 (1973) (per curiam) (holding that a public university could not expel a journalism student for distributing a newspaper containing language and imagery that some found deeply offensive); *see also supra* notes 163–167 and accompanying text (discussing *Papish*); CHICAGO STATEMENT, *supra* note 222 ("[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.").

not have a First Amendment right to verbally harass classmates in ways so severe, pervasive, and objectively offensive that they deprive those classmates of equal access to school programs, activities, or facilities in which they could add *their own* voices to the mix. When student speech pushes other students' voices off campus, it undercuts some of the basic precepts that justify giving student speech strong constitutional protection in the first place. One student's freedom to join a campus community's "multitude of tongues" cannot be the freedom to make the multitude less numerous; one student's freedom to contribute to a campus community's "marketplace of ideas" cannot be the freedom to deprive other students of opportunities to make marketplace contributions of their own. To say otherwise would be to assume that the speaker's harassing utterances are more valuable than the speech those harassing utterances drive away. That assumption is one that our most basic First Amendment commitments do not permit us to indulge.

This values-based argument is not limited to harassment involving the traits for which Congress has provided special protection—race, color, national origin, sex, and disability[228]—but it does carry particularly strong force when those are indeed the traits at issue. The Court has acknowledged that enrolling "students who will contribute the most to the 'robust exchange of ideas' . . . 'is of paramount importance in the fulfillment of [a university's] mission,'"[229] and it has acknowledged that schools may thus aim to attract "students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom."[230] Harassment based on race or other traits long associated with invidious discrimination risks driving away voices that can make unique and valuable contributions to that important project.

Both for historical reasons and for reasons relating to free-expression values on college and university campuses, therefore, Student Speaker's harassment of Classmate in Scenario Two should categorically be deemed to fall beyond the First Amendment's protection.

---

[228] *See supra* notes 39–41 and accompanying text (describing this legislation).

[229] *Grutter*, 539 U.S. at 329 (quoting *Keyishian*, 385 U.S. at 603).

[230] *Id.* at 319; *see also id.* (stating that the law school sought to admit students who could bring "a perspective different from that of members of groups which have not been the victims of such discrimination"); *id.* at 328 ("The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*.").

D. *Scenarios Three and Four: Multi-Speaker and Overheard-Speech Situations*

In Scenario One—where Student Speaker makes one statement of a type that would help create a hostile learning environment if many statements of that type followed—I argued that the speech enjoys full First Amendment protection. In Scenario Two—where Student Speaker single-handedly creates a hostile learning environment by repeatedly directing statements of that same type to Classmate—I argued the contrary. What happens when the hostile learning environment is created by multiple students, each of whom claims to be standing in the same legal position as Student Speaker in Scenario One? Or when Classmate merely overhears the statements that deprive him or her of equal access to school resources and opportunities? So far as statutory liability is concerned, these cases remain relatively straightforward: if the school knows about the harassment and the harassment concerns a trait that Congress has identified for special protection, the school is statutorily obliged to intervene in a reasonable fashion.[231] The constitutional questions, however, are trickier to resolve.

We might respond to Scenarios Three and Four simply by saying that the First Amendment gives the speakers no protection because, when they spoke, they assumed the risk that their speech would create or contribute to a hostile learning environment for Classmate. The speech-chilling consequences of that approach, however, would be unacceptable for a nation that prizes the freedom of expression on its college and university campuses. It is one thing to *encourage* adults to think about how their speech might be received by all who hear it. It is quite another to tell adults that the government will impose punitive consequences upon them if their speech happens to draw a particularly adverse reaction. It is still another to place adults under the threat of such consequences when they are members of a campus community that purports to encourage "lively and fearless" inquiry and debate.[232] Under an assumption-of-risk regime, the wisest path for discipline-averse students to take would be to remain silent if they have any doubts about whether those who hear what they wish to say could reasonably regard it as harassing.[233] The costs in lost speech would simply be too high.[234]

---

[231] *See supra* Part I.B (discussing schools' federal statutory obligations).

[232] CHICAGO STATEMENT, *supra* note 222.

[233] *Cf.* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 316 (2001) ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech.").

[234] *Cf.* Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (explaining that the overbreadth doctrine is based upon the judgment "that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted").

We might make headway with Scenario Four (regarding overheard speech) if we say that the First Amendment allows campus officials to discipline the student speakers for contributing to Classmate's hostile learning environment only if Classmate was a member of the student speakers' intended audience. The Foundation for Individual Rights in Education ("FIRE") takes this position in its Model Code of Student Conduct, arguing that a college student's speech should be deemed "discriminatory harassment" only when, among other things, it is part of a "pattern of *targeted*, unwelcome conduct."[235] FIRE says this requirement "ensures that [s]tudents are not charged with harassment merely because third parties happen to overhear remarks they find subjectively offensive."[236] As supporting authority, FIRE cites Eugene Volokh's argument that Title VII liability for hostile-environment harassment in the workplace should be limited to statements that an employee directs to an unwelcoming coworker, lest "a vast amount of important public discourse" be chilled;[237] the California Supreme Court's observation that harassment is usually less severe when it is directed at others rather than at oneself;[238] and the U.S. Supreme Court's finding that, in many instances, those offended by expression should simply turn their attention elsewhere, rather than depend upon the government to intervene.[239]

As I indicated when rejecting the assumption-of-risk approach, the kinds of chilling effects that Professor Volokh identifies deserve serious—sometimes even dispositive—attention.[240] Moreover, as the California Supreme Court's observation suggests, the distinction between being the target of objectionable statements and simply overhearing them can play a role when resolving disputes concerning hostile learning environments. Courts facing questions of statutory liability, for example, sometimes put that distinction to work when evaluating the severity of the harassment that an individual has suffered.[241] But when verbal harassment

---

[235] *Model Code of Student Conduct*, *supra* note 98.

[236] *Id.*

[237] Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1797–98 (1992) ("There is a substantial difference between offensive speech that is directed at an unwilling listener, and speech that is aimed at willing listeners, but seen or overheard by someone whom it offends. The latter speech . . . can only be suppressed at the risk of chilling a vast amount of important public discourse.").

[238] *See* Lyle v. Warner Bros. Television Prods., 132 P.3d 211, 223 (Cal. 2006).

[239] *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

[240] *See supra* notes 233–234 and accompanying text (discussing overbroad remedies).

[241] *See, e.g.*, Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1010 (7th Cir. 1994) ("[I]t is a lot more uncomfortable to be the target of offensive words and conduct than to be merely an observer of them."). *But cf.* Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("A coach's

rises to the level of being so severe, pervasive, and objectively offensive that the harassment's targets no longer enjoy equal access to school programs and activities, we ought to think twice before concluding that the First Amendment frees speakers to pay no regard to how unintended audiences within earshot might be harmed by what they hear.

Imagine, for example, that several white students at a public university think it is great fun to refer to one another using the N-word[242] and to speak to one another using a vocabulary and accent that they stereotypically attribute to Black people. They do not direct their remarks to students of color; indeed, they laughingly speak to one another this way no matter who is around. But a Black student frequently overhears them, and the statements collectively are sufficiently severe, pervasive, and objectively offensive to create a hostile learning environment for him. When trying to restore this student's equal access, should school leaders be barred from disciplining the speakers because the classmate is not the person to whom they direct their statements, even if the speakers have been told that a classmate of color overhears them and is deeply affected, yet they persist?

For both Scenarios Three and Four, we need a middle path—one that neither excessively chills harmless speech nor frees speakers to entirely disregard the access-denying harm their words might inflict. The solution, I contend, is to add a mens rea component to the First Amendment analysis. When one examines the categories of speech that the Court has long said are wholly proscribable, a culpable mens rea sometimes appears prominently in the definitions. A person's speech amounts to incitement, for example, only if he *intends* to spur others to engage in imminent lawless action,[243] just as a person issues a true threat only if she *intends* to make others believe that she plans to unlawfully harm them.[244] By requiring such states of mind, the Court avoids chilling vast swaths of ultimately harmless speech and yet gives the government room to address serious harms that speech can cause.

---

sexually charged comments in a team setting, even if not directed specifically to the plaintiff, are relevant to determining whether the plaintiff was subjected to sex-based harassment."); Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179, 190 (2d Cir. 2001) (acknowledging "that evidence of harassment directed at other co-workers can be relevant to an employee's own claim of hostile work environment discrimination").

[242] For reflections on the use of that word in situations comparable to my presentation of this scenario, see John McWhorter, *The Idea That Whites Can't Refer to the N-Word*, ATLANTIC (Aug. 27, 2019), https://www.theatlantic.com/ideas/archive/2019/08/whites-refer-to-the-n-word/596872/.

[243] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy *is directed* to inciting or producing imminent lawless action and is likely to incite or produce such action.") (emphasis added); *see also* Hess v. Indiana, 414 U.S. 105, 109 (1973) (per curiam) (stating that an incitement conviction would be improper on the presented facts "since there was no evidence, or rational inference from the import of the language, that [the speaker's] words were *intended* to produce . . . disorder") (emphasis added).

[244] *See* Virginia v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.") (emphasis added).

We did not need to craft a mens rea inquiry to answer the First Amendment question posed in Scenario Two because a state-of-mind requirement was already implicitly baked into our analysis. If Student Speaker single-handedly harasses Classmate in ways that are so severe, pervasive, and objectively offensive that Classmate loses equal access to campus life, we can safely assume that, at a minimum, Student Speaker should have known that his or her speech crossed an important line. An explicit mens rea requirement would prove useful, however, in situations like those in Scenarios Three and Four. In those instances, the student speakers either do not single-handedly create the hostile learning environment or do not direct their statements to Classmate, so the grounds for finding constitutionally significant culpability are less clear.

For speech that creates hostile learning environments, what should the mens rea standard be? A negligence-based "should have known" threshold would not demand enough of the government in multi-speaker and overheard-speech situations like those in Scenarios Three and Four. That standard would give school leaders tremendous latitude to make judgments about what speakers ought to have known about the composition and sensibilities of their intended and unintended audiences. That decision-making latitude would, in turn, chill the speech of students who reasonably conclude that it is safer to say nothing than to say something that might offensively challenge others' deeply held commitments.[245] Requiring intent to deprive classmates of equal access to school resources and opportunities, on the other hand, would demand too much.[246] The white students' speech in my hypothetical is patently troubling, for example, and there is no good reason why the student of color should have to lose equal access to school resources simply because the speakers' intent is merely to amuse themselves.

We would best be served by a standard modeled after the actual-malice standard that, under *Sullivan*, limits speakers' defamation liability for statements made about public officials and public figures.[247] The actual-malice standard insulates speakers from tort liability unless they make their defamatory statements knowing that the statements are false or

---

[245] *Cf.* Rothman, *supra* note 233, at 316–17 (rejecting a negligence standard for threats because "[s]peakers will have difficulty telling in advance what will be construed as a threat by a jury, and therefore may be deterred from speaking even where their speech is not negligent").

[246] *But cf.* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 77 (1995) ("Campus speech codes, if they must exist, should be directed primarily and carefully at the intentionally injurious use of speech.").

[247] New York Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

recklessly disregarding the possibility that they are false.[248] A speaker recklessly disregards the possibility that a statement is false when he or she knows that it probably is false but makes it anyway.[249] In our setting here, of course, we are not necessarily worried about statements' falsity or about the freedom to discuss prominent individuals. But we *are* searching for a standard that is faithful to colleges' and universities' commitment to discourse that is "lively and fearless."[250] The *Sullivan* Court crafted the actual-malice standard because it faced a similar need—namely, the need to ensure that discourse about matters of public significance is "uninhibited, robust, and wide-open."[251]

Adapting the actual-malice standard for our purposes here, we would say that the First Amendment permits a public college or university to impose discipline for student speech that creates or contributes to a classmate's hostile learning environment only if (1) the speaker single-handedly creates that environment through speech directed to the harassed classmate, as in Scenario Two, or (2) one or more speakers make the harassing statements knowing that they will probably help create a hostile learning environment for a classmate, and such an environment is indeed created as a result. This is a decidedly pro-speech standard that would allow a lot of offensive speech to initially go unchecked. But note that the speech *initially* goes unchecked. The standard assigns a legal function to schools' educational efforts to advise students about the nature and impact of harassment within their campus communities. By talking with speakers who have made harassing statements of the sort that could lead to other students' loss of equal access if repeated with sufficient frequency, campus leaders can put speakers on notice of the harms their speech might cause if it persists. With that foundation in place, it becomes easier to satisfy the requirements of the mens rea standard when the severe and objectively offensive harassment continues and a student suffers a denial of equal access as a result.

In my example concerning overheard racist speech,[252] the student speakers would be susceptible to discipline if both (1) their speech collectively amounted to severe, pervasive, and objectively offensive

---

[248] *See Sullivan*, 376 U.S. at 279–80 (stating that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring in the judgment) (concluding that the *Sullivan* standard should govern defamation suits brought by public figures, a point on which a majority of the Justices agreed).

[249] *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (explaining that a person makes a statement with "reckless disregard" for its truth only if he or she "in fact entertain[s] serious doubts as to the [statement's] truth" and that a speaker is liable only if he or she knew the statement was probably false).

[250] CHICAGO STATEMENT, *supra* note 222.

[251] *Sullivan*, 376 U.S. at 270.

[252] *See supra* note 242 and accompanying text.

harassment, and (2) the speakers *knew* they probably were creating that hostile learning environment, even if it was not their intent. If these speakers are not initially aware of the impact their speech is probably having, they can be advised about that impact, thereby setting the stage for more aggressive institutional intervention if the harassment continues. We would say the same thing about the two student speakers in Scenario Three who separately make harassing statements that, when combined, create a hostile learning environment for a classmate.[253] Those student speakers might or might not be subject to discipline, depending on what they knew at the time they made their statements. The more that a speaker learns about the likely impact of his or her contemplated speech, the greater his or her exposure to constitutionally permissible discipline.

IV. CONCLUSION

Explicitly rejecting the Blackstonian principles that influenced many Americans' thinking about expressive freedoms during the nation's first century,[254] the modern Court has constructed a First Amendment regime that provides us with strong protection to say what we wish without fear of adverse legal consequences.[255] Unlike their early-American predecessors, students today carry that protection with them, in full, when they pursue postsecondary studies at public colleges and universities.[256]

Students' resulting expressive freedoms are appropriately vast, but they are not unlimited. Both as a matter of tradition and as a matter of core free-speech values, students do not have a First Amendment right to harass other students in ways so severe, pervasive, and objectively offensive that harassment victims are denied equal access to school programs, activities, or facilities.[257] That principle is most easily applied when a student single-handedly inflicts access-denying harassment upon a targeted classmate.[258] But we can also deploy it—albeit in a more limited fashion—when multiple student speakers combine to create the harassment or when harassing speech is merely overheard. In those instances, the student speakers should be deemed constitutionally susceptible to discipline only if they make their harassing utterances knowing that they

---

[253] *See supra* notes 180–181 and accompanying text.
[254] *See supra* Part II.A.
[255] *See supra* Part II.B.
[256] *See supra* notes 4, 162–167 and accompanying text.
[257] *See supra* Parts I, III.A–C.
[258] *See supra* Part III.C.

are probably thereby contributing to a classmate's hostile learning environment, and such an environment is indeed created as a result.[259] If student speakers are not aware of such problems when they first make their harassing statements, others can lay the informational groundwork that will render a more punitive response constitutionally permissible if the harassment sufficiently persists. The resulting legal regime will ensure that no student has a First Amendment right to drive other students away from campus life, while also ensuring, to the greatest extent practicable, that campus dialogue is—to borrow the Court's famous phrase—"uninhibited, robust, and wide-open."[260]

[259] *See supra* Part III.D.
[260] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).