Free Speech on Campus? Thirty-Seven Questions (And Almost As Many Answers)

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ABSTRACT

Does the Constitution guarantee free speech on university campuses? The Supreme Court has essentially said so, at least insofar as we are speaking of public universities. Some private universities are interested in adhering to the First Amendment, even though it does not bind them. But what do First Amendment protections entail or require? It is clear that in general, universities may not discriminate on the basis of viewpoint. It is also clear that as educational institutions, universities may sometimes regulate speech to protect their essential mission – by, for example, forbidding "true threats," prohibiting plagiarism, protecting speakers from being shouted down, forbidding students from taking over buildings, and ensuring that students and teachers focus on the topics of their courses. By exploring thirty-seven scenarios, it is possible to concretize these general propositions, and to see which questions are easy and which questions are hard. The broadest conclusion is that to the extent that universities seek to comply with the First Amendment, they must permit a great deal of speech that is offensive, hateful, and even horrifying.

I. SIX GENERAL POINTS

Let us suppose that a public university seeks to comply with the United States Constitution. (It certainly should do that, because public universities are bound by the founding document.) Or suppose that a private university seeks, voluntarily, to comply with the United States Constitution.[1] Insofar as public or private universities are regulating speech, what may they do, consistent with the First Amendment? What are they forbidden to do?

The goal of this Essay is to set out a kind of guide for the perplexed, in the form of thirty-seven scenarios, followed by brisk accounts of the best understanding of existing law. That goal is insistently descriptive, not normative.[2] It would be possible, of course, to challenge existing law

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[1] For an argument that it should do so, see ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017). For reasons that will emerge, it is not at all clear that Professors Chemerinsky and Gillman are correct. For private institutions, one size might not fit all; universities with religious missions might, for example, take a separate path. But I do not engage that question here.

[2] More precisely: In most of the cases, the analysis is purely descriptive. In some of the cases, it is interpretive in the sense used in RONALD DWORKIN, LAW'S EMPIRE (1986), though I attempt to the extent possible to "track" existing law. In the hardest cases, there is no existing law to track.

and to insist (for example) that it is overprotective of speech. It would certainly be possible to contend that the Court should be originalist or Thayerian[3] in this context; both originalism and Thayerism would lead to large-scale revisions in existing understandings.[4] It would be possible to urge a large-scale rethinking of current law by reference to the distinctive mission of academic institutions, and to suggest that current First Amendment doctrines are ill-adapted to the academic setting, not least in virtue of the nature of the academic mission and the idea of academic freedom. (I will touch on these issues, though only lightly.)[5] It would also be possible to assess the relevant questions as a matter of policy rather than law, and to attempt to balance (say) free speech rights against rights of equity and inclusion. Assessments of that kind are tasks for another occasion; I am not attempting to say here what universities should do, if they had a free hand (as private universities do, at least insofar as they are not bound by the First Amendment). Still, I believe that First Amendment doctrine, in its current form, provides an invaluable foundation for thinking through the relevant issues, and that in many cases, it offers appealing answers.

Before we embark, it is important to keep six general points in mind. The first is that under the First Amendment, public institutions may punish speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[6] That formulation is the modern incarnation of the clear-and-present danger test.[7] Public universities may punish speech that runs afoul of the test. It is important to see that the test has four elements: (1) *likelihood* that the action will occur, (2) *intention* of the speaker to incite that action ("directed to inciting"), (3) *imminence* of the action, and (4) *lawlessness* of the action. Speech that condones or counsels violence is not regulable if (for example) such violence is not likely to occur.[8] (There is a fair question whether this framework might be relaxed or refined in the university setting, consistent with the First Amendment.)

The second point, a generalization of the first, is that some categories of speech are not protected by the First Amendment at all. False commercial advertising can be forbidden,[9] and the same is true of obscenity,[10] bribery, defamation and libel (subject to prevailing constitutional

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[3] *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[4] Originalists will not, for example, be comfortable with existing First Amendment law, which is not at all based on the original public meaning (whether or not it overlaps with it). *See, e.g.*, Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari) ("This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears 'no relation to the text, history, or structure of the Constitution.'") (quoting Tah v. Global Witness Publishing, Inc., 991 F.3d 231, 251 (D.C. Cir 2021)).

[5] See Robert Post, Managing Student Expression: A Constitutional Theory of Student Free Speech Rights (unpublished manuscript 2023). Post offers a powerful argument that the academic setting is one for which standard First Amendment thinking is ill-suited. It would be possible to read him to urge that our practice, in fact, recognizes that point, in which case he is offering a significant challenge to my general approach and to some of my conclusions; it would be possible to read him as arguing for a large-scale reorientation of First Amendment law. I read him the second way here. My emphasis on the importance and relevance of the educational mission goes some way toward an accommodation with Post's concerns, though not as far as he would like.

[6] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[7] *See* Douglas Laycock, *The Clear and Present Danger Test*, 25 J. SUP. CT. HIST. 161 (2000).

[8] *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 109 (1973).

[9] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

[10] *See* Miller v. California, 413 U.S. 15 (1973).

standards[11]), "true threats,"[12] sexual harassment (properly defined[13]), criminal solicitation,[14] perjury,[15] and fraud.[16] There is no constitutional right to plagiarize.[17] There is no constitutional right to violate the copyright laws (though we can imagine cases in which plausible First Amendment arguments are made[18]). There is no constitutional right to use Large Language Models to write papers or exam answers.[19] Some platitudes are worth repeating: Universities are allowed to punish unprotected speech.[20]

The third general point is the immense importance of distinguishing among three kinds of restrictions on speech: viewpoint-based, content-based, and content-neutral.[21] A viewpoint-based restriction might say that while students may praise the president of the university, they may not criticize the president of the university. A content-based but viewpoint-neutral restriction might say that students cannot discuss an ongoing war, whatever their viewpoint about it. A content-neutral restriction might say that between the hours of midnight and six a.m., no political activities will be allowed on campus. In general, viewpoint-based restrictions face a strong presumption of invalidity.[22] Content-based but viewpoint-neutral restrictions also face a heavy burden of justification[23] – but as we will see, that burden can sometimes be met in the educational setting, not least because education necessarily involves the establishment of content (and so content-based

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[11] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
[12] *See* Counterman v. Colorado, 600 U.S. 66, 72 (2023); Watts v. United States, 394 U.S. 705, 708 (1969).
[13] J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Eugene Volokh, *Freedom of Speech and Workplace Harassment,* 39 UCLA L. REV. 1791 (1992); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 647 (1997).
[14] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").
[15] *See* United States v. Dunnigan, 507 U.S. 87, 97 (1993) ("To uphold the integrity of our trial system, we have said that the constitutionality of perjury statutes is unquestioned.").
[16] *See, e.g.*, Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948).
[17] The statement in text assumes a suitable definition. On the status of lies and falsehoods, see Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 Harv. J. Law and Tech. 388 (2020).
[18] A classic discussion is Paul Goldstein, *Copyright and the First Amendment*, 70 Colum L Rev. 983 (1970).
[19] This is so even though many imaginable restrictions on the use of Large Language Models would raise serious constitutional questions. See Cass R. Sunstein, Artificial Intelligence and the First Amendment, Geo Wash L Rev (forthcoming 2024).
[20] Even so, they may not discriminate on the basis of viewpoint, which means that they cannot carve out one category of unprotected speech, defined in terms of viewpoint, for regulation or punishment. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).
[21] *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).
[22] R.A.V., 505 U.S. at 388; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). See in particular this illuminating passage from *Rosenberger*:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."

Id. And note this potentially provocative statement: "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Id*. at 831.
[23] *See* Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) ("[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based.").

judgments). Content-neutral restrictions, such as time, place, and manner restrictions, are subject to a balancing test.[24] A content-neutral prohibition on public discussion on campus, except between the hours of 6 a.m. and 6:15 a.m. would fail any such test.

The fourth general point, and the most complicated, is that educational institutions, as such, have authorities that other public institutions lack. They should be, and are, permitted to regulate speech *if the regulation is essential to their educational mission*.[25] That formulation is regrettably vague, is not perfect,[26] could be taken to be excessively broad, requires specification, and leaves a great deal open for discussion and debate.[27] Nonetheless, it points in the right direction. Public institutions are allowed to regulate speech because of their distinctive missions, and that point emphatically holds for educational institutions, including universities. This point suggests that the presumption against content discrimination must be approached with some caution in the educational setting, and the same is true for the presumption against viewpoint discrimination.[28]

Consider a few examples. Even if an English professor would like to discuss climate change rather than Shakespeare in a course in Shakespeare, a university is entitled to insist that he stick to the subject of his course. If a student answers a history test, focused on World War II, with an essay on the superiority of Michael Jordan to Lebron James, or of Christians to Muslims, the professor may flunk that student. There is no First Amendment problem if a teacher gives a low grade, or a flunking grade, to a student who tries to defend the proposition that the earth is flat or that the sun goes around the earth, even if the professor is engaging in content discrimination or viewpoint discrimination. The educational enterprise permits institutions to impose restrictions that would not be acceptable if imposed by (for example) the national government. Least controversially, subject-matter restrictions are often permissible. Viewpoint discrimination may raise hard questions. What if a student writes a term paper defending Hitler? What if an assistant professor writes a celebratory book about Nazism?

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[24] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."); *see generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). There is also a distinction between public forums and nonpublic or limited public forums; the latter may be subject to broader regulation. See Rosenberger, 515 U.S. at 829. I am largely bracketing that issue here, though we could produce scenarios that would test it (see case (29)).

[25] This statement cannot be found in any Supreme Court opinion, and hence it cannot be said to be a necessary reading of current law. *Compare, e.g.*, B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 316 (3d Cir. 2013) ("[S]weeping and total deference to school officials is incompatible with the Supreme Court's teachings") *with* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001) ("[A] school need not tolerate student speech that is inconsistent with its basic educational mission."). Nevertheless, no other formulation can account for established understandings, and the formulation fits well with *Pickering* and *Connick*, discussed *infra*.

[26] It would be possible to argue that the phrase "essential to" is too strong and that It should be replaced by "central to" or "a legitimate part of." See Post, supra note.

[27] *Cf.* Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (objecting to a test centered on a school's "educational mission" on the ground that "[t]he 'educational mission' of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty," such that as a result, "some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups").

[28] See Post, supra note.

However we deal with the hardest question, the central proposition – that educational institutions can act to regulate speech if the act is essential to protect their mission – is a reasonable inference from *Pickering v. Board of Education*,[29] the leading case on the First Amendment rights of public employees, which happened to involve a teacher, and which has a host of implication for free speech on campus. Pickering himself was discharged for writing a letter to a newspaper in which he was sharply critical of decisions of the local Board of Education and the district superintendent of schools, objecting to how they had decided to raise new revenue. According to the board, the letter contained numerous falsehoods and unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. For that reason, they urged, it was permissible to discharge him.

The Supreme Court held that the Pickering's discharge violated the First Amendment. The Court began by noting that public employees, including teachers, retain constitutional rights, and they do not waive those rights by accepting employment. Crucially, Pickering's letter involved not private or internal matters, but issues of legitimate public concern. Also crucially, the letter was not directed at any particular person with whom Pickering "would normally be in contact in the course of his daily work as a teacher. Thus, no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here."[30] To be sure, the letter contained falsehoods, but they could not be shown to have been harmful. The statements that Pickering made "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[31] Thus "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[32] Note the implication of the Court's analysis: If Pickering's letter had impeded his proper performance, or interfered with the regular operation of the school, the outcome might be different.

The approach in *Pickering* was refined in *Connick v. Myers*,[33] not involving teachers but as Assistant District Attorney. The case arose when Sheila Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Resisting the transfer, she produced a questionnaire for the office, asking about office morale and transfer policy. At that point, she was discharged. The Court upheld the discharge, clarifying that as employer, the government has broad authority to discharge employees for speaking on matters of private rather than public concern, at least where the relevant speech would disrupt close working relationships or otherwise make it difficult for the relevant workplace to continue to operate efficiently. With respect to the rights of teachers, a general implication of *Pickering* and *Connick* is that it matters whether university authorities are acting in their distinctive capacity as *employers* or instead in their capacity as *government officials*. (The distinction is also relevant to the rights of students.) This is not the simplest line to draw, but as we shall see, it tends to become clear in the context of particular cases.

[29] 391 U.S. 563 (1968).
[30] *Id.* at 570.
[31] *Id.* at 572–73.
[32] *Id.* at 573.
[33] 461 U.S. 138 (1983).

The fifth general point involves due process and fair notice. Even if speech is regulable, universities would be well-advised to ensure that people are genuinely on notice about what particular kinds of speech might subject them controls or sanctions.[34] Universities should, in short, describe what they intend to prohibit with a degree of clarity, so as to avoid the risk of undue surprise. A standard that forbids "verbal misconduct" might well be unduly open-ended.[35] I shall have something to say in a few places about this problem, but it might arise in essentially all cases.

The sixth general point is that in some respects, the law here is quite underdeveloped. The Supreme Court has said a great deal, of course, about what federal and state governments may do with respect to speech, and it has offered a series of informative decisions on what secondary schools may do.[36] The Court has said that such schools are "nurseries of democracy," and hence must protect a great deal of speech, including speech off-campus.[37] Even so, secondary schools have consider room to maneuver, precisely because they are secondary schools, and they are generally dealing with minors.[38] By contrast, there is not a great deal of learning on what colleges and universities[39] may do.[40] Universities are not nurseries, which means that they have less room to regulate speech than secondary schools do.

In an important passage from decades ago, the Court spoke broadly in favor of the full application of standard free speech principles to college campuses: "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment

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[34] Grayned v. City of Rockford, 408 U.S. 104 (1972)

[35] *See* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

[36] *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021); *Morse*, 551 U.S. at 393; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). In *Mahanoy*, the Court said this:

> This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes "illegal drug use"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper. Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Mahanoy, 141 S. Ct. at 2045 (citations omitted). These statements were made in course of discussions of "schools," where the Court has been alert to the fact that the relevant students are typically minors and educators are acting *in loco parentis*. In colleges and universities, by contrast, the relevant students are typically adults. *See id.* at 2049 n.2 (Alito, J., concurring) ("[F]or several reasons, including the age, independence, and living arrangements of [college] students, regulation of their speech may raise very different questions from those presented" in the primary and secondary school context). Note, however, that some regulations might be self-evidently acceptable from universities, given that they would be or are acceptable from secondary schools; hence the paragraph quoted above provides useful orientation for universities.

[37] *See id*.

[38] *See generally Fraser*, 478 U.S. at 675.

[39] For simplicity, I will generally use the word "universities" to include both colleges and universities, and indeed all institutions of higher education.

[40] The Supreme Court has, of course, spoken on relevant issues, and I shall draw on the decided cases at multiple points. *See, e.g.*, Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Healy v. James, 408 U.S. 169 (1972). *Cf.* Norton v. Discipline Comm. of E. Tennessee State Univ., 399 U.S. 906, 907 (1970) (Marshall, J., dissenting from denial of certiorari) (criticizing Court's decision to decline review of expulsion of students from state university arising from leafletting activity).

protections should apply with less force on college campuses than in the community at large."[41] But that statement cannot possibly be read for all that it is worth. "First Amendment protections" do not allow the government to prevent people from discussing politics on the street; but they may allow universities to prevent teachers and students from discussing politics during biology class. "First Amendment protections" forbid the government from banning the use of obscenities in courthouses;[42] but they may not forbid universities from banning the use of certain four-letter words in classrooms. "First Amendment protections" do not allow the government to ban the making of sexually explicit videos (so long as they are not obscene); but they may not forbid universities from banning their president or chancellor from making sexually explicit videos. There are many unsettled questions.

Still, most actual and imaginable questions have straightforward answers. Where the law is less than entirely clear, it is nonetheless possible to offer informed judgments about its likely content. It is true that in some cases, any such judgments must be tentative.

Let us now explore the details, dividing the scenarios into two categories: speech by students and speech by teachers. As we shall see, the two raise somewhat different considerations. As we shall also see, the goal here is to provide width, in the form of a tour of the horizon, rather than depth, in the form of full answers to the hardest questions. Some of the questions can be essentially resolved with brisk answers. But for some of them, a brisk answer is palpably inadequate; I signal that fact where it is relevant.

II. STUDENT SPEECH

1

Students make a public protest, on campus, of an ongoing war effort, in which American soldiers and American resources have been engaged. During the protest, the students describe American officials as "brutal warmongers" bent on "killing innocent people." The university believes that the protest is "disruptive, disrespectful, and unpatriotic" and "inconsistent with love of country." For that reason, it wants to ban the protest and punish the students.

This is an easy case. The university cannot ban the protest or punish the students. On the facts as stated, any such action would almost certainly be viewpoint-based.[43] The university cannot plausibly justify any such ban or punishment by reference to its educational mission.[44] (A time, place, and manner restriction would raise different questions.)[45]

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[41] *Healy*, 408 U.S. at 180.
[42] Cohen v. California, 403 U.S. 15 (1971).
[43] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").
[44] See id.
[45] *Cf.* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (concluding that content-neutral municipal noise regulation satisfied First Amendment scrutiny).

A group of students say to another student, whom they despise: "If we run across you in a secluded space, you're toast. We don't want your type around here."

The students have issued a "true threat," which is not protected by the First Amendment.[46] At a minimum, they knew that there was a substantial risk that their communications would be taken to threaten violence.[47] For that reason, they can be punished. It does not matter whether the threat was a product of personal animus, racial animus, religious animus, or something else.

3

Members of a student group, called Students for Palestine, march through campus, saying over and over again, "intifada now, intifada tomorrow, intifada forever."

The speech is probably protected by the First Amendment. The word "intifada" means "uprising" or "rebellion."[48] It appears to mean, in context, that a civil uprising would be appropriate in Palestine. A claim to that effect cannot be punished. The case is very close to the student protest at issue in case (1). It might be tempting to note that some people might understand the group's words to suggest something different from a civil uprising (say, the destruction of Israel), but under existing law, what matters is what the speakers intend, not what the audience hears ("directed at inciting"). [49] In any case, an argument on behalf of violence is not regulable as such.[50]

The reason for the word "probably" is that there might be an argument that the march is directed to produce and likely to produce imminent lawless action. [51] On the facts as stated, that does not seem to be an easy argument to make, but we could easily recast the facts – call it case (3a), and see case (8) – to make the argument more plausible. (As in case (1), a different issue would arise if the university were imposing a time, place, and manner restriction.)

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[46] *See* Counterman v. Colorado, 600 U.S. 66, 72 (2023). The Court's first full paragraph tells the tale:

> True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.

Id. at 69.

[47] *See id.* at 74.

[48] *Intifada*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/intifada (last visited Dec. 19, 2023).

[49] *See id.* We could imagine a variation on this case that would pressure on the basic conclusion. Suppose, for example, that a university reasonably believes that the inevitable consequence of the march would be a violent confrontation among students. Must the university deploy a security force? At what expense?

[50] Cf. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (allowing Nazi march in Skokie, Illinois).

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

A student uses ChatGPT to write a term paper in an English course. The university forbids students from using ChatGPT to write term papers. The student insists that he has a right to use whatever sources might be helpful.

The university can punish the student. Just as there is no constitutional right to engage in plagiarism, so there is no constitutional right to use ChatGPT to write a term paper. This is so even if some prohibitions on use of ChatGPT would raise serious constitutional problems.

5

Members of a student group, called Students for Socialism, have decided that during class, they will not address the topics assigned by the teacher, but will speak only about the importance of, and the need for, socialism in the United States. In response to questions about biology or literature, they explain why they are committed to socialism.

The students may be punished, so long as they are not being discriminated against on the basis of viewpoint. To promote its educational mission, a university may insist on a simple proposition: class time is for class.[52] This conclusion is broadly consistent with *Pickering* and *Connick*.

6

A speaker has been invited to give a talk at a public university on "the threat of immigration." The speaker believes that immigration is "destroying America" and "must be stopped." Students protest the speaker, shouting him down and preventing him from giving his remarks.

The students can be punished. There is no First Amendment right to shout down speakers.[53]

7

Students occupy and block access to a university building. They do so on the ground that the university is "complicit" in horrific national policies. They argue that because the university has refused to "take a stand" against those policies, it is rightly subject to this form of protest, until and until it "decides it has to change."

The students can be stopped and punished. There is no First Amendment right to occupy and block access to a building.[54]

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[52] *Cf.* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021) (noting that the "special characteristics" of schools call for "special leeway when schools regulate speech that occurs under its supervision"). *See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (noting that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (school's prohibition of speech that "disrupts or is about to disrupt normal school activities" was lawful under First Amendment, because school had compelling interest in "having an undisrupted school session conducive to the students' learning").

[53] *See* Reno v. Am. C.L. Union, 521 U.S. 844, 880 (1997); Hill v. Colorado, 530 U.S. 703, 734 n.43 (2000).

[54] *See* Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357 (1997); *Hill*, 530 U.S. at 729–30.

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Students stand outside a building, protesting a university's silence on a matter of public concern. A large group is assembled. The leaders argue that that the group should "storm the building" and "take it over for a week, maybe more," to make their views "clear, and heard."

There is a very strong argument that the students can be stopped and punished. It appears that their words are directed to incite and likely to incite imminent lawless action.

9

Students occupy a common room at a university. They do so on the ground that the university is "complicit" in horrific national policies. They argue that because the university has refused to "take a stand" against those policies, it is rightly subject to this form of protest, until and until it "decides it has to change." While they occupy the room, they do not block access to it, and they do not take up all the seats; the room is still available for some students to use.

On the facts as stated, it is not clear whether the students can be punished. Suppose that the university has a viewpoint-neutral policy, stating that the common room is a "place for quiet study and contemplation," and forbidding public expressive activities of any kind in that place. If so, the policy is in the nature of a time, place, and manner restriction, subject to a kind of balancing test. To the extent that the occupation of the common room allows only a small number of students to use it, the case for upholding the restriction is very strong. Even if the disruption is minimal, there continues to be a good argument that the university should be allowed to dedicate certain spaces for certain purposes. Of course the question would be harder if the university made a subject matter distinction, forbidding political activities but allowing (say) religious and purely educational activities,

10

Students engage in a protest of same-sex marriage, which, in their view, "is a desecration of marriage." They believe, and say, that "homosexuality is a sin" and that "homosexuals are sick." The university forbids the protest on the ground that it is "disrespectful to the law of the land and the United States Constitution" and "inconsistent with the university's defining values of diversity, equity, and inclusion."

Same answer as (1) and (3): This is an easy case. The university has violated the First Amendment. It appears to have acted in a viewpoint-based way, and it cannot plausibly justify its action by reference to its educational mission.[55]

11

A group of students, who called themselves "the Putin brigade," march in a university quadrangle in support of Russia, saying, in slogans, that the Russian military action in Ukraine is justified to combat "NATO expansionism" and "U.S. imperialism." Another group of students,

[55] Compare the discussion of Beauharnais v. Illinois, 343 U.S. 250 (1952), infra.

who support Ukraine, stage a counterprotest, describing Russia as "authoritarian aggressors" and as "Nazis." Members of the second group shout at members of the first, using a great deal of profanity.

The university cannot punish either side. It can prevent violence, and it can act if the modern version of the clear-and-present danger test is met, but it cannot prevent the two groups from marching and speaking (or shouting).

12

A student uses profanities in a political science class, including the words "f--k" and "s--t." The university forbids the use of profanity in class, under a clearly stated policy. The stated goal of the policy is to ensure discussions that are "respectful" and "civil."

Whether the student may be punished is not an easy question. The Court has made it clear that profanity might be protected even if it occurs in special environments, such as courtrooms.[56] Following the Court's holding in *Cohen v. California*, a university is probably not permitted to forbid the use of obscenities out of the classroom.[57] But inside the classroom, it might plausibly say that it is trying to maintain a certain kind of tone. For high schools, the Court has said something like this with respect to speech before a school assembly.[58] In particular, the Court said[59]:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In refusing to protect the use of profanity, the Court emphasized that it was dealing with "children in a public school." In a paragraph that fits with the general approach in *Pickering*, the Court referred to the educational mission[60]:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers -- and indeed the older students -- demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be

[56] Cohen v. California, 403 U.S. 15 (1971).
[57] *See id.*; *see also* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2049 n.2 (Alito, J., concurring).
[58] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[59] *Id*. at 681. The Court continued: "[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* at 682 (quoting Thomas v. Board of Education, Granville Central School Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the judgment)).
[60] *Id*. at 683.

conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

Might these ideas apply to the university? That is not at all clear. University students are not children. Still, it is not unreasonable to say that frequent or constant use of obscenities in a university class may severely compromise the educational mission. But punishment for a one-time use, or an infrequent use, might well raise a serious constitutional issue.

13

A group of students have organized themselves as "Students for A Christian America." They hold meetings, distribute pamphlets, and circulate a newsletter in which they say "the United States is a Christian nation" and add that "non-Christians do not belong here."

Same answer as case (1) and case (3): This is not a hard case. The statements in the newsletter cannot easily be interpreted as intending to incite, and likely to incite, imminent lawless action. Unless they can be, the university cannot punish the relevant students. If it did so, it would likely be acting in a viewpoint-based way, and it could not readily justify its action on the ground that it is essential to its educational mission. To be sure, it might try to do so, arguing that the relevant statements make some members of its community feel demeaned and at risk. But under current constitutional standards, that is not enough.

14

Students for a Palestinian State, a group on campus, plans on showing a film called, "The Occupation." The film portrays Israel in an exceedingly negative light – as a brutal, savage, occupying nation. It makes comparisons between Israel and Nazi Germany.

In all likelihood, the university cannot ban the film or punish students for showing it.[61] The First Amendment protects students who want to show the film. Yet again, the case would be different if the film could be seen as directed to incite and likely to incite imminent lawless action. It might also be different if the university had some viewpoint-neutral policy in place that would be violated by a showing of the film; but if such a policy is content-based ("no films or documentaries on the conflict in the Middle East"), it would be difficult to defend.[62]

15

Students engage in a protest of same-sex marriage, which, in their view, "is a desecration of marriage." They believe, and say, that "homosexuality is a sin." As part of their protest, they

[61] *Cf.* Brown v. Bd. of Regents of Univ. of Nebraska, 640 F. Supp. 674, 681 (D. Neb. 1986) (holding that university's decision to cancel showing of controversial film on the basis of its "ideological viewpoint" violated the First Amendment).

[62] *See* City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 69 (2022) (explaining that if a regulation applies to particular speech "because of the topic discussed or the idea or message expressed," it is subject to strict scrutiny) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

target individual students whom they believe to be gay or lesbian, approaching them in the halls and asking them "to find the right path."

This case is different from case (9), because the protesters have targeted individual students. A great deal depends on what that targeting specifically entails. If it can be seen as a "true threat" – that is, if the protesters "consciously disregarded a substantial risk that [their] communications would be viewed as threatening violence"[63] – it can of course be regulated (see case (2)). If there is no threat, but instead a form of personal engagement with particular students that verges on or constitutes bullying, the question is harder.[64] There is no *general* "bullying" or "harassment" exception to the First Amendment,[65] but certain forms of bullying (including cyberbullying)[66] and harassment are unprotected (on harassment, see below). It is difficult to deal with this scenario without specifying the kind of conduct and the degree of invasiveness that are involved. This area of law continues to evolve.

16

A group of students decide to have a "white pride" week. During that week, they hold daily events celebrating "the many achievements of white people" and deploring "constant efforts to make white people ashamed of themselves."

This case is relevantly similar to case (9), and the students cannot be punished. Some members of the university community will be offended, and more, by the relevant events, but the First Amendment does not allow any kind of punishment.[67]

17

[63] Counterman v. Colorado, 600 U.S. 66, 69 (2023).

[64] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), is the source of the "fighting words" doctrine. There the Court said that the Constitution does not protect "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The Court quoted a previous decision: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id.* (quoting Cantwell v. Connecticut, 310 U. S. 296, 309-10). It is not clear how much of this remains good law. The lewd, the obscene, and the libelous are sometimes protected by the First Amendment as it now stands. On fighting words, see Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); "The Court in Chaplinsky affirmed a conviction under a statute that, as authoritatively construed, applied only to words with a direct tendency to cause violence by the persons to whom, individually, the words were addressed. A conviction for less than words that at least tend to incite an immediate breach of the peace cannot be justified under Chaplinsky."

[65] *See, e.g.*, People v. Marquan M., 19 N.E.3d 480 (N.Y. 2014). As then-Judge Alito noted in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3rd Cir. 2001), "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."

[66] The law is in a state of development here. *See* Doe v. Hopkinton Public Schools, 19 F.4d 493 (1st Cir. 2021); Norris v. Cape Elizabeth, 969 F.3d 12 (1st Cir. 2020); S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012); *see generally* Kirsten Hallmark, Death by Words: Do United States Statutes Hold Cyberbullies Liable for Their Victims' Suicide?, 60 HOUS. L. REV. 727 (2023).

[67] *Cf.* Matal v. Tam, 582 U.S. 218, 220, 137 S. Ct. 1744, 1749 (2017) ("Giving offense is a viewpoint. . . . '[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

Same as case (16), but the students also say that "white people are more intelligent than people of color" and that "people of color are more prone to violence than white people." They march and chant, "White Is Beautiful."

This case is harder than case (16); the university might argue that speech of this kind is threatening to students of color, might be directed at producing lawless action that is imminent, and is inconsistent with its educational mission. But on the facts as stated, no individual students are threatened or singled out. The speech is highly likely to be protected.

18

Same as case (17), but the week is not "white pride week"; it is "white supremacy week."[68] All of its events are organized around the theme of white supremacy.

This case is harder than case (16) or case (17); the university might argue more credibly that speech of this kind is threatening to students of color, is directed at producing lawless action that is imminent, and is inconsistent with its educational mission. But on these facts, again, no individual students are threatened or singled out. We need to know more about the risk of lawless action, but the speech is probably protected.

In this case, and perhaps case (17), the university might also invoke Beauharnais v. Illinois,[69] decided in 1950, where the Court upheld a statute saying:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .

In explaining why that statute was valid, the Court pointed to the historical legitimation of libel laws and said that "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group unless we can say that this a willful and purposeless restriction unrelated to the peace and wellbeing of the State."[70] But *Beauharnais* does not seem to be good law. New York Times v. Sullivan,[71] of course, the Court imposed severe restrictions on use of libel law. In addition, R.A.V. v. City of St. Paul[72] held that viewpoint discrimination is impermissible even within the category of unprotected speech. In light of these decisions, it is generally assumed that *Beauharnais* is a dead letter. If that assumption turns out to be wrong, or if it is wrong in the context of campus speech,

[68] For a comparison, see Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).
[69] 343 U.S. 250 (1952),
[70] Id.
[71] 376 U.S. 254 (1964),
[72] 505 U.S. 377 (1992).

we could imagine a variation on case (18), or perhaps case (18) itself, being resolved in a way that allows the university to impose regulation.

III. TEACHERS

19

A history professor, teaching a class on the Civil War, decides to spend a class explaining why he favors one presidential candidate over another. He connects his preference to what he sees as the arc of American history, but he does not relate his comments to the Civil War.

This is an easy case. The professor can be punished, *so long as the university is acting in a viewpoint-neutral fashion*. Suppose, for example, that the university has adopted a principle requiring teachers to focus on the subject of their courses, and not to depart from that subject to elaborate their political views during classroom hours. A content-based, viewpoint-neutral principle of this kind can be justified as essential to the university's educational mission.[73] This case is therefore similar to case (5), and *Pickering* and *Connick* suggest that the university can do as it reasonably wishes here. The case would be much harder for the university if the professor merely stated his political views in the ordinary course of teaching the subject.

20

A professor is exceedingly harsh with his students. He repeatedly tells them that they are "stupid," "hopeless," and "incompetent." The students report that they are demoralized and "cannot learn" in the face of their teacher's harshness.

The professor can be punished for speech of this kind. A general prohibition on exceedingly harsh interactions with students is viewpoint-neutral, and it is reasonably justified as essential to the university's educational mission (though there might be question of vagueness, if the relevant policy does not give fair notice[74]). Here too, *Pickering* and *Connick* suggest that the university can do as it reasonably wishes.[75]

21

A professor publishes an online essay in which she urges that "the sex police are working overtime" and that "political correctness has gotten out of hand." Among other things, she objects that existing rules against romantic relationships, including those between professors and students, "are draconian" and "appalling," because they ignore "what we know about the complexity, the mystery, and the sheer wonder of desire."

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[73] *Cf.* Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006) (holding that First Amendment did not protect cosmetology teacher's religious proselytization in class, and explaining that the "college reasonably took the position that nongermane discussions of religion and other matters had no place in the classroom, because they could impede the school's educational mission").

[74] *See* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

[75] *Cf.* Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) (holding, on application of *Connick*, that college professor had no First Amendment right to "cuss[] out" students in the classroom).

This is an easy case. The professor cannot be punished. What she has said does not fall within any category of unprotected speech. The university might argue that a professor who has written such things cannot perform the duties of a professor, because some studies might feel "vulnerable" or "unsafe" in her class. But on the facts as stated, this argument is difficult to make. Nothing in the online essay represents a threat, or anything close to it.[76]

22

A professor uses the word "n----r" in class. She does so as part of a set of hypothetical questions testing the limits of freedom of speech. Many students are offended, appalled, or both. She says: "That's part of my point."

This case is not entirely easy, but the best answer is that the professor cannot be punished. The reason that it is not entirely easy is that the "n word" has a unique history, and a university might reasonably believe that its use has a unique and damaging effect on the educational environment. But at least in the case under discussion, where no individual is being targeted and the use of the word is connected to the particular class, this content-based restriction on speech is difficult to defend as essential to the educational mission.[77]

23

A professor uses various epithets in class, directed at women, Jews, Hispanics, and Blacks. It is not clear why he is doing so. He says that he wants his students "to develop a thick skin."

The professor can be punished. The teacher is acting in a generally abusive way, with the abuse directed at individual students, and consistent with *Pickering* and *Connick*, a university can reasonably conclude that abuse of this kind is patently inconsistent with its educational mission.[78]

24

A faculty member sexually harasses a student. He does not merely ask for a romantic relationship; he signals that if she agrees to such a relationship, he will help her professionally. He says, "it would be really good for your career if you slept with me."

The faculty member can be punished. Sexual harassment of this kind is not protected by the First Amendment.[79] It is akin to use of the words, "you are fired," uttered to discharge someone

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[76] *Cf.* McLaughlin v. Fla. Int'l Univ. Bd. of Trustees, 533 F. Supp. 3d 1149, 1177 (S.D. Fla. 2021), *aff'd*, No. 21-11453, 2022 WL 1203080 (11th Cir. Apr. 22, 2022) (rejecting First Amendment claim alleging that law professor's left-wing views unconstitutionally chilled speech of conservative student, causing her "subjective discomfort").

[77] *Cf.* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001) (holding that college professor's use of the "n word" in a lecture relating to interpersonal communication was constitutionally protected because it was "germane to the subject matter of his lecture on the power and effect of language").

[78] *Cf. Martin*, 805 F.2d at 583.

[79] See the discussion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992): "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. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." The

on the basis of race or religion. Note that it would not be useful to say, in cases of this kind, that we are dealing with conduct rather than speech.[80] We are dealing with speech, and the relevant speech is not protected.

25

A professor sexually harasses a student. He repeatedly compliments her appearance and asks her on dates. She declines his advances and asks him to stop. He does not stop.

The professor can be punished. As in case (24), sexual harassment of this kind is not protected by the First Amendment.[81]

26

A white professor wears blackface at a Halloween party. He says that he is doing so "because it's politically incorrect" and "to get people to laugh a little." He thinks that people should "lighten up – no pun intended."

The professor cannot be punished. He has almost certainly offended people, but he has not engaged in speech that falls in any unprotected category.[82] The university might argue that he has acted in a way that compromises the educational mission, but that would seem to prove too much; if offense compromises the educational mission, the constitutional rights of professors begin to evaporate.

27

A professor of psychology writes an article claiming that climate change "is not real." The paper urges that the science underlying current concerns is "based on sand" and that people believe in climate change largely because of certain psychological biases, including the availability heuristic.

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conclusion in text follows from *Robinson v. Jacksonville Shipyards, Inc*., 760 F. Supp. 1486 (M.D. Fla. 1991); *Davis v. Monsanto Chem. Co.,* 858 F.2d 345, 350 (6th Cir.1988), *cert. denied,* 490 U.S. 1110 (1989); *Jew v. University of Iowa,* 749 F. Supp. 946, 961 (S.D.Iowa 1990).

[80] *Cf.* 303 Creative LLC v. Elenis, 600 U.S. 570, 597 (2023) (arguing that the line between expressive conduct and speech is elusive and perhaps nonexistent). I am bracketing some complicated issues here, involving "doing things with words" and the idea of speech acts. If Oedipus says the words, "I do," during a wedding ceremony involving his mother and himself, he is committing an illegal act.

[81] See cases cited *supra* note 79; *cf.* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 667 (1999) (Kennedy, J., dissenting) ("A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment").

[82] *Cf.* Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985) (holding that police officer's off-duty public performances in blackface were protected by the First Amendment such that employer could not retaliate against him). The *Battaglia* court further noted that "[a]n appropriate . . . response, perhaps the only one, wholly consistent with the [F]irst [A]mendment, would have been . . . to say to those offended by [the police officer's] speech that their right to protest that speech by all peaceable means would be . . . stringently safeguarded." *Id.* at 1001.

The First Amendment almost certainly protects the professor against any kind of reprisal.[83] The reason for the qualification ("almost certainly") is that if the article is shoddy, and does not live up to professional standards, the university might be able to urge that any reprisal is viewpoint-neutral. Under the circumstances as described, however, that is not likely.

28

A professor of English literature writes a series of papers condemning "capitalism" on the ground that it is a "recipe for both poverty and war." The papers fall well below professional standards.

To know whether the professor can be punished in some way, we need to know more. A viewpoint-based action, on the university's part, would be forbidden. But suppose that the professor is not being retained, or not being promoted, because his papers fall below professional standards.[84] A policy to that effect is unobjectionable.

29

In a course on race relations in the United States, a professor spends two classes on critical race theory, even though the university has banned the teaching of critical race theory.

This is not an obvious case. On the one hand, the university can establish its own curriculum. It can say that a course on race relations will focus on five specific books, and not on any other books. Indeed, the limits on viewpoint-based restrictions finds their limits here.[85] A university can require that classes on evolution not include readings that question the idea of evolution, that courses on the Civil War not include readings that celebrate slavery, and that courses on astronomy not attend to the idea that the sun goes around the earth. On the other hand, specific restrictions on specific points of view, rooted in political considerations rather than clear or even arguable pedagogical purposes, raise issues akin to those raised by removal of books from libraries.[86] Compare, for example, a university rule that no political science teacher may assign materials that speak ill of the current president, or of leaders from a particular political party.

This is an area in which the line-drawing problem is formidable. A restriction on the communication of particular points of view would raise serious constitutional doubts.[87] But outside

[83] *See* Heim v. Daniel, 81 F.4th 212, 233 (2d Cir. 2023) ("[I]n nearly all contexts, government officials are barred from discriminating among speakers based on their own judgments of the quality or content of the speech.").
[84] *See id.* at 234 (concluding that university officials did not violate First Amendment when denying adjunct professor tenure on the basis of his methodological choices). As the court explained, "decision-makers within a university must be permitted to consider the content of an aspiring faculty member's academic speech, and to make judgments informed by their own scholarly views, when making academic appointments." *Id. See also* Lopez v. Bd. of Trustees of Univ. of Illinois at Chicago, 344 F. Supp. 2d 611, 623 (N.D. Ill. 2004) (rejecting First Amendment retaliation claim arising from university's denial of tenure due to concerns about "the quality of [the professor's] scholarship").
[85] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion).
[86] *See id.* at 870; *see also* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967) ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.").
[87] Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

of the most egregious cases, a university's establishment of a curriculum, and its decisions about what teachers may assign, should not be taken to run afoul of the First Amendment.

30

A university committee, consisting of both administrators and professors, decides to remove certain books from the library. It does so on the ground that the books are "inconsistent with American values," "unChristian," and "just plain dirty." A group of professors and students object on constitutional grounds.

The removal is probably unconstitutional under the Supreme Court's decision in *Pico*.[88] In that case, based on similar facts, a plurality of the Court said that with respect to school libraries, "discretion may not be exercised in a narrowly partisan or political manner."[89] In short, the plurality said, "the Constitution does not permit the official suppression of *ideas*," which means that everything depends on the motivations of the authorities. If those authorities "*intended* by their removal decision to deny" people "access to ideas with which" those authorities "disagreed, and if this intent was the decisive factor in" their decision, then the First Amendment has been violated.[90] At the same time, the plurality made it clear that authorities may remove books on the ground that they are "vulgar" or that they did not meet standards of "educational suitability."[91]

In light of *Pico*, the removal at hand appears to violate the First Amendment. It must be noted, however, that the plurality opinion was just that, and while Justice Blackmun's concurring opinion was not substantially different ("I find crucial the State's decision to single out an idea for disapproval and then deny access to it"[92]), it can be understood to be somewhat narrower. It must also be noted that there is no assurance that the current Court would accept *Pico*.

31

Students form an organization: "The Real America Society." The organization is devoted to "traditional values," which include "God, Country, and Family, in that order." Members of the organization believe "America has lost its way," that "woke is a mental illness," that "DEI is a disgrace," that "men and women are different by nature," and that "modern civil rights laws intrude on freedom." The university denies funding for the organization, on the ground that resources are limited and should not be given to a group that "would offend the basic dignity of members of our community." The university does so even though it generally funds any and all student activities; it does not run a competitive process.

The denial of funding is probably unconstitutional under the Supreme Court's decision in *Rosenberger*.[93] In that case, the Court ruled that the University of Virginia could not deny funding to an organization whose student newspaper, *Wide Awake: A Christian Perspective at the*

[88] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).
[89] *Id.* at 870.
[90] *Id.* at 871
[91] *Id.*
[92] *Id.* at 884.
[93] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

University of Virginia, promoted a particular belief about a deity. The Court emphasized that with respect to limited public forums, viewpoint discrimination is impermissible. On that point, it spoke broadly: "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."[94] And in fact, the relevant principles have particular force in the university setting: "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[95]

The limits of *Rosenberger* are not altogether clear.[96] The Court did not say that viewpoint-neutral, content-based funding decisions are unacceptable. That would be preposterous; for funding, content-based funding decisions may be *inevitable*. But in the scenario described here, it seems evident that *Rosenberger* controls.

32

A university eliminates its comparative literature department. It does so on the ground that "while the subject is important, student interest is low, and we want to use our resources for subjects that attract widespread student interest and that prepare students for a competitive marketplace."

The university has not violated the First Amendment. Nothing in that founding document says that the decision whether to continue or to eliminate departments cannot depend on student interest or career preparation. There is content discrimination here, but it is not illicit, and thee is no viewpoint discrimination.

33

A university eliminates its gender studies department. It does so on the ground that the new president and his team believes that the university's gender studies department "has become a place where students are taught preposterous, radical things," including that "gender is a social construction," that "there is no such thing as 'a woman,'" and that "the patriarchy is everywhere."

This is not an easy question. On the one hand, elimination of the gender studies department is clearly viewpoint-based as the scenario has been described. On the other hand, viewpoint discrimination is part and parcel of decisions about curriculum, departments, and offerings. A university can decide not to offer courses on the flatness of the earth, and it need not have a department on Nazi political science or Soviet biology. To be sure, elimination of a department would raise different issues from a refusal to create a department in the first place.[97] It could easily be seen as analogous to removal of books from a library, and might well be

[94] *Id.* at 831.
[95] *Id.* at 836.
[96] See Rust v. Sullivan, 500 U.S. 173 (1991), on the topic of government funding in general.
[97] Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

analyzed similarly, with a notation that courts should and likely would give the authorities a great deal of room to maneuver.

34

A law school is hiring a new faculty member to teach constitutional law. There are two finalists for the position. One of them is an "originalist,"[98] and she is quite conservative. The other believes in moral readings of the Constitution, and he is left-of-center. The faculty decides to hire the originalist. It does so on the ground that she would add intellectual diversity to the institution, which has only one originalist, and which has few conservatives.

The law school has not violated the First Amendment. An institution is allowed to pursue intellectual diversity. To be sure, there has been a degree of viewpoint discrimination here, but in this context, that form of discrimination is not invidious. A central goal of viewpojnt discrimination, in this individual case, is to enlarge viewpoint diversity at the university as a whole. We could imagine more difficult cases, in which (for example) people are not hired, or are denied tenure, because of opposition to their political convictions.[99]

35

A professor of philosophy makes sexually explicit videos with her husband. She considers them to be "instructional" and "fun." The videos are publicly available. The university asks her to take the videos down and to stop making them, and tells her that she will be disciplined and possibly fired if she refuses.

This is not an easy case. On the one hand, the university may claim that its mission is compromised if members of its faculty are making sexually explicit videos, which will be (in its view) a "distraction at best" for students. On the other hand, people generally have a right to make such videos, and the university's view might prove too much: Any expressive activity, including political activity, might distract students. The question is whether the university can convincingly show that the educational mission is genuinely compromised.

36

Same as case (35), except the professor is also the president of the university. This case is much easier for the university, which can plausibly urge that because of the distinctive role of the university's leader, various restriction on speech-related activities are permissible even if they would be questionable for a professor without administrative responsibilities. This would be a plausible inference from *Pickering*.

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[98] See Lawrence Solum, The Public Meaning Thesis, 101 B. U. L. Rev. 1953 (2020).

[99] Those difficult issues would raise problems of academic freedom, a topic that I do not engage directly here. See Post, supra note; Robert Post, The Classic First Amendment Tradition Under Stress: Free Speech and the University 106 in The Free Speech Century (Lee Bollinger and Geoffrey R. Stone eds. 2019). Imagine, for example, that a university decides not to hire someone whose research supports Nazism or Communism, and one of the reasons is antipathy to the relevant viewpoint. Without resolving such questions, let me simply note that universities should be allowed a wide birth in such cases, for reasons connected with the discussion of *Pickering* in text.

37

A law professor writes an essay, attempting to explain what the First Amendment protects and does not protect on campus. Some of its conclusions are arguably wrong (as the professor himself is willing to acknowledge). Some of the professor's kind and generous colleagues write him detailed comments, to which he did not adequately respond. Some students, and some professors, are outraged by the essay.

The university cannot punish the professor.[100]

[100] !