THE FIRST AMENDMENT IN EDUCATION: MAY FACULTY AT PUBLIC SCHOOLS BE DISCIPLINED FOR POLITICAL HATE SPEECH?

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ABSTRACT

At a House hearing on December 5, 2023, the presidents of three universities—Harvard, MIT, and the University of Pennsylvania—refused to state that certain kinds of hate speech, specifically calls for genocide of Jews, are prohibited on their campuses. The backlash against two of them, Harvard's Claudine Gay and Penn's Liz Magill, was swift and devastating; both were successfully pressured to resign. Still, while Professors Gay's and Magill's responses were widely criticized as tone-deaf, they were legally correct. At many private, and all public, colleges and universities, even the worst hate speech is generally protected unless it is accompanied by aggressive, threatening, or violent conduct.

These "demotions" augur even worse consequences, including termination, for less powerful faculty who say the "wrong" thing, in particular statements in support of Trumpism, an increasingly mainstream ideology that stitches together white supremacy, misogyny, a preference for autocracy over democracy, and several phobias—homophobia, Islamophobia, transphobia, and xenophobia. The question I address in this Article is whether these consequences are constitutional at public schools. Whose right is stronger—a public-school teacher's First Amendment right to express pro-Trumpist sentiments or a public school's right to maintain a fair, inclusive, and welcoming learning environment? I argue that the public school has the upper hand here, that it is indeed constitutionally permitted to prohibit political hate speech that contributes to a hostile learning environment. Still, I narrowly limit this prohibition to dehumanizing speech—that is, speech explicitly suggesting that some human beings are "lesser," intrinsically less valuable, than other human beings.

One objection to this position is that public schools may not prohibit any speech, no matter how dehumanizing, because such prohibition amounts to constitutionally impermissible viewpoint discrimination. I argue, however, that viewpoint discrimination is an integral part of education and therefore constitutionally permissible.

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Education necessarily involves promoting some values over others. These values fall into seven categories: constitutional principles, the humanist virtues, successful character traits and behaviors, knowledge and truth, art and beauty, health (both mental and physical), and social goods (such as justice, peace, and rule of law).

INTRODUCTION

On December 5, 2023, the presidents of Harvard (Claudine Gay), MIT (Sally Kornbluth), and the University of Pennsylvania (Liz Magill) testified before the House Education and the Workforce Committee about the issue of "Holding Campus Leaders Accountable and Confronting Antisemitism."[1] When U.S. Representative Elise Stefanik asked the three witnesses whether genocidal hate speech is prohibited on their campuses, they refused to state that it was.[2] Instead, they tried to give more legally nuanced answers. Here, for example, are the most noteworthy excerpts of Rep. Stefanik's exchanges with Dr. Gay:[3]

> ELISE STEFANIK: Dr. Gay, a Harvard student calling for the mass murder of African Americans is not protected free speech at Harvard, correct?
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> CLAUDINE GAY: Our commitment to free speech—
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> . . .

[1] *See* Rachel Treisman, *Lawmakers Grill the Presidents of Harvard, MIT and Penn over Antisemitism on Campus*, NPR (Dec. 5, 2023, 6:36 PM), https://www.npr.org/2023/12/05/1217459477/harvard-penn-mit-antisemitism-congress-hearing [https://perma.cc/GMF3-X6F9] ("The hearing—which was titled 'Holding Campus Leaders Accountable and Confronting Antisemitism'—turned combative at times.").

[2] *See Transcript: What Harvard, MIT and Penn Presidents Said at Antisemitism Hearing*, ROLL CALL (Dec. 13, 2023, 1:39 PM), https://rollcall.com/2023/12/13/transcript-what-harvard-mit-and-penn-presidents-said-at-antisemitism-hearing/ [https://perma.cc/JQ8G-9GZK].

[3] *Id.*

ELISE STEFANIK: So, based upon your testimony, you understand that this call for intifada is to commit genocide against the Jewish people in Israel and globally, correct?

CLAUDINE GAY: I will say again that type of hateful speech is personally abhorrent to me.

. . .

ELISE STEFANIK: Can you not say here that it is against the code of conduct at Harvard?

CLAUDINE GAY: We embrace a commitment to free expression, even of views that are objectionable, offensive, hateful. It's when that speech crosses into conduct that violates our policies against bullying, harassment—

ELISE STEFANIK: Does that speech not cross that barrier? Does that speech not call for the genocide of Jews and the elimination of Israel?

CLAUDINE GAY: When—

ELISE STEFANIK: You testify that you understand that it's the definition of intifada. Is that speech according to the code of conduct or not?

CLAUDINE GAY: We embrace a commitment to free expression and give a wide berth to free expression even of views that are objectionable—

ELISE STEFANIK: You and I both know that's not the case.

. . .

ELISE STEFANIK: Can you say yes to that question of, does calling for the genocide of Jews violate Harvard's rules on bullying and harassment?

CLAUDINE GAY: Calling for the genocide of Jews is anti-Semitic.

ELISE STEFANIK: So yes?

CLAUDINE GAY: And that is anti-Semitic speech. And as I have said, when speech—

ELISE STEFANIK: And it's a yes?

CLAUDINE GAY: Crosses into conduct—

ELISE STEFANIK: And it's a yes. I've asked the witnesses—

CLAUDINE GAY: When speech crosses—when speech crosses into conduct, we take action.

ELISE STEFANIK: So, is that a yes? Is that a yes? The witness hasn't answered, Madam Chair. Is that a yes? You cannot answer the question.

CLAUDINE GAY: When speech crosses into conduct—

. . .

ELISE STEFANIK: . . . Dr. Gay, at Harvard, does calling for the genocide of Jews violate Harvard's rules of bullying and harassment, yes or no?

CLAUDINE GAY: It can be. Depending on the context.

ELISE STEFANIK: What's the context?

CLAUDINE GAY: Targeted as an individual, targeted as—at an individual, severe, pervasive.

ELISE STEFANIK: It's targeted at Jewish students, Jewish individuals. Do you understand your testimony is dehumanizing them? Do you understand that dehumanization is part of anti-Semitism? I will ask you one more time. Does calling for the genocide of Jews violate Harvard's rules of bullying and harassment, yes or no?

CLAUDINE GAY: Anti-Semitic rhetoric, when it crosses into conduct—

ELISE STEFANIK: And is it anti-Semitic rhetoric—

> CLAUDINE GAY: Anti-Semitic rhetoric, when it crosses into conduct, that amounts to bullying, harassment, intimidation. That is actionable conduct, and we do take action.
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> ELISE STEFANIK: So, the answer is yes, that calling for the genocide of Jews violates Harvard code of conduct, correct?
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> CLAUDINE GAY: Again, it depends on the context.
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> ELISE STEFANIK: It does not depend on the context. The answer is yes. And this is why you should resign. These are unacceptable answers across the board.

Dr. Gay's responses were widely criticized as tone-deaf, a reaction that largely motivated her decision to do what Rep. Stefanik recommended and resign from her position as Harvard's president.[4] But Dr. Gay was not wrong;[5] Harvard's general rule is that students may speak their minds with impunity, even if their minds are full of anger and hatred.[6] They can get into official trouble—that is, exposure to punishment by the school—only when their hate speech is accompanied by conduct that amounts to bullying, harassment, or violence.[7] And Harvard is hardly alone; many other private colleges and universities equally repudiate prohibitions of merely offensive speech.[8] Indeed, most private colleges and universities purport to prize

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[4] *See* Susan Svrluga, *Harvard President Resigns Amid Plagiarism Allegations, Testimony Backlash*, WASH. POST (Jan. 2, 2024, 7:45 PM), https://www.washingtonpost.com/education/2024/01/02/claudine-gay-resigns-harvard/ [https://perma.cc/S7QW-P7UJ]. After offering similar responses and receiving similar criticism, Prof. Magill resigned from her position as Penn's president on December 9, 2023. *See id.*

[5] *See* Noah Feldman, *Campus Antisemitism Debate Muddles Nuances of Free Speech*, BLOOMBERG L. (Dec. 7, 2023, 3:15 PM), https://www.bloomberg.com/opinion/articles/2023-12-07/campus-antisemitism-debate-muddles-nuances-of-free-speech [https://perma.cc/ZAB3-EWQL] ("The crucial importance of 'context' mentioned by the university presidents is not some wishy-washy equivocation. It's free-speech bedrock. . . . Without a line between speech and conduct, there can be no free expression. That line, [Supreme Court Justice Oliver Wendell] Holmes taught, depends on context. That's not an equivocation: Our whole free-speech tradition depends on it.").

[6] *See id.* ("It is . . . entirely possible that under Harvard's existing free-speech rules, advocacy of genocide in a march on campus would be protected.").

[7] *See id.* ("Harvard defines harassment as 'unwelcome and offensive conduct that is based on an individual or group's protected status' and considers factors like frequency, severity, physical threat, and interference with the victim's academic or work performance. . . . [T]he ordinary legal (and colloquial) meaning of the word 'conduct' does not extend to the pure expression of ideas—even vile ones. . . . Aggression aimed specifically at individuals is also different from simple expression of ideas . . . . A violent threat aimed at a person would be treated differently from a march advocating political violence.").

[8] On its website, the Foundation for Individual Rights and Expression (FIRE) notes that "over 100 institutions" have adopted the "Chicago Statement." *Adopting the Chicago*

freedom of speech just as much as public schools do.[9] As a result, the speech and conduct codes that they adopt tend to be quite similar to those at public schools; most of them permit, or at least aspire to permit, the broadest range of expression.[10]

Statement, FIRE, https://www.thefire.org/research-learn/adopting-chicago-statement [https://perma.cc/82HL-RRF4] (last visited Sept. 25, 2024). It states in relevant part:

> [T]he 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. . . . [C]oncerns 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.
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> The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. . . . But these are narrow exceptions to the general principle of freedom of expression . . . .
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> In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.

Geoffrey R. Stone et al., *Report of the Committee on Freedom of Expression*, UNIV. CHI.: OFF. PROVOST, https://provost.uchicago.edu/sites/default/files/documents/report/FOECommitteeReport.pdf [https://perma.cc/QB7F-5RHP] (last visited Sept. 25, 2024).

[9] *See Private Universities*, FIRE, https://www.thefire.org/research-learn/private-universities [https://perma.cc/77W8-2Y27] (last visited Sept. 25, 2024) ("[T]he vast majority of private universities have traditionally viewed themselves—and sold themselves—as bastions of free thought and expression.").

[10] *See* Feldman, *supra* note 5 ("In practice . . . Harvard's academic freedom policy often appears to track First Amendment principles."); Susan M. Finegan, *Anti-Harassment Disciplinary Policies: A Violation of First Amendment Rights on the Public University Campus?*, 11 B.C. THIRD WORLD L.J. 107, 112 n.25 (1991) ("[M]ost [private universities] follow the tenets of the first amendment for philosophical or, if mentioned in the college catalogue, for contractual reasons."); Chi Steve Kwok, *A Study in Contradiction: A Look at the Conflicting Assumptions Underlying Standard Arguments for Speech Codes and the Diversity Rationale*, 4 U. PA. J. CONST. L. 493, 495 n.15 (2002) ("[M]ost private universities seek to follow the requirements imposed by the Constitution and voluntarily tailor their policies with this goal in mind."); Brian J. Steffen, *Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 140 n.6 (2002) (noting "a trend set by many private schools in their *voluntary* recognition of First Amendment rights for their students"); *see also* John Hasnas, *Freedom of Expression at the Private University*, *in* THE VALUE AND LIMITS OF ACADEMIC SPEECH: PHILOSOPHICAL, POLITICAL, AND LEGAL PERSPECTIVES 78, 87, 89–90 (Donald Alexander Downs & Chris W. Surprenant eds., 2018) (proposing language for private universities to adopt in anticipation of complaints of speech-based harassment). *But see* Geoffrey R. Stone & Will Creeley, *Restoring Free Speech on Campus*, WASH. POST

At public schools, institutions that are subject to the First Amendment,[11] speech is actionable if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[12] One implication of this standard is that speech alone—that is, speech that is *not* accompanied by aggressive, threatening, or violent conduct—may be actionable.[13] Assuming this implication, the question I wish to address in this Article is whether *teachers* at public schools may be disciplined for expressing *political* hate speech.[14] It may seem at first as though the answer is

(Sept. 25, 2015, 8:24 PM), https://www.washingtonpost.com/opinions/restoring-free-speech-on-campus/2015/09/25/65d58666-6243-11e5-8e9e-dce8a2a2a679_story.html [https://perma.cc/9SRZ-7U3K] ("The Foundation for Individual Rights in Education's most recent survey of college and university policies found that more than 55 percent of institutions maintain illiberal speech codes that prohibit what should be protected speech.").

[11] The First Amendment is binding on every state and state agency. *See* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 808 (2019) ("Ratified in 1791, the First Amendment provides in relevant part that 'Congress shall make no law . . . abridging the freedom of speech.' Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States . . . ." (first alteration in original)).

[12] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969); *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264–65 (3d Cir. 2002) ("[A] particular form of harassment or intimidation can be regulated . . . only if . . . the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others."); James Hart, *The Constitution and Demographic Shifts*, 14 ALA. C.R. & C.L. L. REV. 1, 3 (2023) ("The Court has held that while hate speech is protected by the First Amendment, threats, fighting words, and incitement speech are not."); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 778 (2000) ("Bigotry . . . . do[es] not pose a danger to society, and [its] presence in political discourse serves to fine-tune democratic ideals of racial and ethnic equality. On the other hand, speech used to incite people to violent, bigoted actions against outgroups is not benign." (footnotes omitted)).

[13] *See* Karp v. Becken, 477 F.2d 171, 174–75 (9th Cir. 1973) ("*Tinker* then provides that the students' rights to free speech may not be abridged in the absence of 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .' [B]ecause of the state's interest in education, the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." (first alteration in original) (quoting *Tinker*, 393 U.S. at 514)); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1110 (C.D. Cal. 2010) ("The Supreme Court in *Tinker* established that a school can regulate student speech if such speech 'materially and substantially disrupt[s] the work and discipline of the school.' This standard does not require that the school authorities wait until an actual disruption occurs; where school authorities can 'reasonably portend disruption' in light of the facts presented to them in the particular situation, regulation of student expression is permissible." (citation omitted)); *id.* at 1113 ("[T]he content of the speech alone may be a sufficient basis upon which to reasonably predict a substantial disruption, at least where the speech is violent or threatens harm to a person affiliated with the school.").

[14] By "hate speech," I mean written, oral, or graphic expression of hatred, animosity, contempt, or disgust for another person or persons by virtue of their membership in a group defined

obviously yes. Indeed, a good number of both public and private college and university professors have recently been disciplined for using offensive language.[15] But none of these professors were disciplined for offensive *political* speech, most notably *Trumpism*, an ideology composed of a white supremacy, misogyny, a preference for autocracy over democracy, and several phobias—homophobia, Islamophobia, transphobia, and xenophobia.[16] What, then, is a public school to do if a

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by characteristics that are thought to be largely or entirely outside people's control: disability, ethnicity, gender, national origin, race, sexual orientation, or religion. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 5–6 (2012) ("[H]ate speech is both a calculated affront to the dignity of vulnerable members of society and a calculated assault on the public good of inclusiveness."); *see also id.* at 27 (defining hate speech as "publications which express profound disrespect, hatred, and vilification for the members of minority groups"); Lucas Swaine, *Does Hate Speech Violate Freedom of Thought?*, 29 VA. J. SOC. POL'Y & L. 1, 5 (2022) ("I shall define 'hate speech' as 'an expressive act that communicates intense or passionate dislike of individuals or groups, based on ascriptive identity factors of those persons.'").

[15] *See, e.g.*, Anders Anglesey, *SDSU Professor Disciplined Over Racial Slur Claims 'Merely Doing His Job*,*'* NEWSWEEK (Apr. 11, 2022, 4:32 AM), https://www.newsweek.com/sdsu-professor-angelo-corlett-disciplined-racial-slur-merely-doing-his-job-1696727 [https://perma.cc/79U2-GPRY] ("Philosophy and ethics professor J. Angelo Corlett, of San Diego State University (SDSU), was removed from two courses—Philosophy, Racism and Justice, and Critical Thinking and Composition—on March 1, after complaints he used the n-word in a lecture."); Bonnie Bolden, *Nursing Professor Who Used Racial Slur No Longer at ULM*, THE NEWS STAR (July 13, 2020, 12:35 PM), https://www.thenewsstar.com/story/news/education/2020/07/11/nursing-professor-who-used-racial-slur-no-longer-at-ulm/3193863001/ [https://perma.cc/CY3F-TBPM] (discussing the departure of University of Louisiana at Monroe Assistant Professor Mary Holmes for referring to President Obama as a "monkey"); Colleen Flaherty, *Oberlin Ousts Professor*, INSIDE HIGHER ED (Nov. 15, 2016), https://www.insidehighered.com/news/2016/11/16/oberlin-fires-joy-karega-following-investigation-her-anti-semitic-statements-social [https://perma.cc/D2WZ-TAPU] (discussing Oberlin's termination of Assistant Professor Joy Karega for her anti-Semitic and anti-Israel social-media posts); Vima Patel, *A Lecturer Showed a Painting of the Prophet Muhammad. She Lost Her Job.*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2023/01/08/us/hamline-university-islam-prophet-muhammad.html [https://perma.cc/FT8B-36JR] (discussing the termination of Hamline University Adjunct Professor Erika López Prater for showing her students images of Muhammad in a class about Islamic art); Catherine Thorbecke & Benjamin Siu, *Georgetown Law Professor Terminated After Remarks About Black Students*, ABC NEWS (Mar. 12, 2021, 1:26 PM), https://abcnews.go.com/US/georgetown-law-professor-terminated-remarks-black-students/story?id=76413267 [https://perma.cc/C9MP-YBH7] (discussing the termination of Georgetown Law Adjunct Professor Sandra Sellars for stating in a video call that "a lot of my lower [students] are Blacks"); *see also* Jack Stripling, *The Professor Is Canceled. Now What?*, WASH. POST (June 21, 2023, 4:47 PM), https://www.washingtonpost.com/education/2023/06/21/college-professors-fired-cancel-culture/ [https://perma.cc/7V4R-JG5G] (discussing a number of universities that have struggled to figure out the right way to handle professors who use offensive language).

[16] *See* Paul Benahene Adjei, *Race to the Bottom: Obama's Presidency, Trump's Election Victory, and the Perceived Insidious Greed of Whiteness*, 25 RACE, GENDER & CLASS 43, 45

professor expresses pro-Trumpist sentiments in her classes, publications, or social media? May they prohibit or punish this speech? Or does the First Amendment require them to tolerate it?

One possible answer to these questions is that public schools must tolerate faculty's political hate speech because it is constitutionally impermissible for public schools to favor one political ideology over another political ideology. But I will argue that this is position is wrong. Public schools, just like other public institutions, do not need to remain neutral between all values and therefore neutral about all speech that concerns these values. On the contrary, they not only may, but are morally obligated to, endorse (for example) racial and gender equality and therefore repudiate speech that promotes racial or gender inequality.

Still, it is one thing for public schools to express an opinion one way or another about a particular teacher's speech; it is another thing for public schools to *punish* a teacher's speech. Can they do *this*? Or would such punishment violate the First Amendment? In Parts I and II, I will try to answer these questions. The position I will defend is that public schools may indeed punish faculty's political hate speech on the grounds of their right to maintain a fair, inclusive, and welcoming learning environment. In Part III, I will provide a limiting principle, which I will refer to as the "No Dehumanizing Speech Standard" (NDS Standard). According to the NDS

(2018) ("Trump launched his [2016] political campaign with a speech that was nothing other than racism and xenophobia towards Mexicans. From then onwards, almost everything Candidate Trump said or did entailed elements of racism, xenophobia, Islamophobia, and sexism."); Mariano Aguirre, *Trumpism, an Ideology for the Extreme Far-Right Globally*, OPENDEMOCRACY (Dec. 14, 2020, 12:25 PM), https://www.opendemocracy.net/en/trumpism-ideology-extreme-far-right-globally/ [https://perma.cc/Q3QM-5X4J] ("Trump has not elaborated an ideology, but with his policies he has generated a paradigm, a far-right ideological frame of reference that, at the same time, is part of a global authoritarian trend in the discrediting of democracy and attack on inclusive societies."); Madeline Ducharme, *Trump's Anti-LGBTQ Agenda Has Been Hidden in Plain Sight*, SLATE (Nov. 23, 2020, 5:45 AM), https://slate.com/news-and-politics/2020/11/trump-four-year-assault-on-lgbtq-rights.html [https://perma.cc/V7AJ-3FSG] ("Then Trump took office, and a relentless anti-gay and distinctly anti-trans agenda became a low hum beneath the administration's other human rights abuses. . . . [T]he departments of Justice, Housing and Urban Development, Health and Human Services, and Education worked to quietly gut LGBTQ nondiscrimination protections, and punish queer and trans people at home and abroad for simply being queer and trans. During Trump's four years in office, he nominated anti-LGBTQ judges to lifetime appointments while his administration attempted to bar LGBTQ people from public institutions and codify the right to discriminate against [them] on 'religious' grounds. Among the most heinous anti-LGBTQ policies the Trump administration pursued were its attempts to make transgender people's lives miserable."); Erin Aubry Kaplan, *Donald Trump Is (Still) President of White America*, POLITICO (Nov. 20, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/11/20/donald-trump-culture-white-supremacy-00069597 [https://perma.cc/6YCP-5687] ("Trump was, and continues to be, the chief executive not of a nation, or of the Republican Party, or even of a cult, but of a culture—namely a culture of white supremacy.").

Standard, public schools may discipline teachers only for expressing explicitly dehumanizing speech—that is, speech explicitly indicating that some human beings are intrinsically less valuable than other human beings. In Part IV, I will anticipate and address several objections to the NDS Standard. In Part V, I will address a final objection: (a) public schools' prohibition of (dehumanizing) political hate speech amounts to indoctrination and (b) indoctrination is inconsistent with the First Amendment. I will respond by arguing that public schools' prohibition of (dehumanizing) political hate speech, including Trumpism, is education, not indoctrination, and therefore perfectly consistent with the First Amendment.

I. THE CONSTITUTIONAL PROBLEM

Suppose that Alan is a tenured[17] political science professor at "Generic State University" (GSU), he espouses white supremacy in the classroom, and several students subsequently complain to the administration. How should GSU respond? The most rational approach is to talk with Alan. If he agrees to refrain from further endorsements of white supremacy, then it seems reasonable to conclude that he should not be (seriously) disciplined. But suppose that Alan is defiant; instead of cooperating, he insists that he has a constitutional right to express his political viewpoint without interference from GSU—a state institution. Now what? May GSU discipline him? Or is Alan right that GSU's hands are tied by the First Amendment?

What makes these questions so difficult to answer is that Alan's hate speech lies in a gray area between two clear rights.[18] One is the right of Alan—an American citizen, a political science professor, and a state employee—to express his political beliefs. The First Amendment provides very broad protection of speech, especially

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[17] I stipulate that Alan is tenured simply to avoid the tangential issue of pretextual termination. The school administration will not be able to offer a speech-independent pretext—for example, student complaints about Alan's teaching, weak scholarship, or budget limitations—for terminating him. Instead, it will have to cite the real reason, his controversial remarks, which will directly implicate the First Amendment.

[18] *See* Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 768 (2009) ("The hard question in this area is when does speech cross the line and become harassment. There is the right to say hateful things on the campus of a public university, but there is not a right to threaten someone or create a hostile environment. In some instances, this may require difficult line drawing."); Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 L. & PHIL. 701, 702 (2013) ("The legal status of hate speech is an absorbing issue because it lies across a point of tension in liberal democratic thought. . . . The twin liberal commitments to free speech and social equality . . . seem to come into conflict where hate speech is at issue."); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1877 (2017) ("Public universities face the double dilemma of being bound by the First Amendment to protect free speech rights and yet also needing to create guidelines to avoid losing federal funding and being subject to federal causes of action.").

normative (moral and political) speech, even if it is offensive, hurtful, or unpopular.[19] The other right is his employer's (GSU's): to maintain a fair, inclusive, and welcoming learning environment—that is, an environment free of speech and conduct so abusive, unwelcoming, or intimidating that "target" students have difficulty performing the activities necessary to receive an education, primarily concentration and open, constructive discussion.[20] While public schools are obviously part of society, they also stand apart from society insofar as they must preserve this fair, inclusive, and welcoming learning environment in order to fulfill their primary educational purpose.[21]

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[19] *See* 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."); Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973) ("[T]he 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.'"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) ("'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."); *id.* at 210 ("That speech about 'values' may offend is not cause for its prohibition, but rather the reason for its protection . . . .").

[20] *See* Erwin Chemerinsky, *Education, The First Amendment, and the Constitution*, 92 U. CIN. L. REV. 12, 24–25 (2023) ("I believe that schools, whether we are talking about elementary or high schools, colleges or universities (including law schools), have an obligation to create a learning environment that is inclusive for all students, and it is essential that school administrators be conscious of all things that might undermine the ability to have an inclusive environment for all students."); Chemerinsky, *supra* note 18, at 772 ("College and university administrators have the responsibility to act to make sure that every student is made to feel safe and welcome."); Stanley Fish, *Free Speech Is Not an Academic Value*, CHRON. HIGHER ED. (Mar. 20, 2017), https://www.chronicle.com/article/free-speech-is-not-an-academic-value/?bc_nonce=eeodk0s8t2mi738toz00mo&cid=reg_wall_signup [https://perma.cc/4JHU-BL8C] ("[T]he administration's job, first, [is] to ensure that the classroom is a safe space for intellectual deliberation . . . . "); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 832 (1993) ("Perhaps there should be a presumption in favor of a university's judgment that hate speech directed at blacks or women, or showing racial or gender hatred, produces harm that is especially threatening to the educational enterprise."); Tsesis, *supra* note 18, at 1866 ("The power of speech in educational settings cannot be overemphasized. Discourse expands audiences' intellectual and public perspectives by exposing them to diverse and novel points of view or confirms prior convictions.").

[21] *See* Sunstein, *supra* note 20, at 797 ("Colleges and universities ought to have mildly broader authority over hate speech, because restrictions on some such speech may be necessary to the educational mission."); Tsesis, *supra* note 18, at 1917 ("University campuses are critical for the development of debates, culture, personal opinions, and scientific knowledge. Robust dialogue is essential to all aspects of the educational mission. Racist,

Clearly, the two rights, Alan's and GSU's, must be carefully balanced.[22] But in order to balance these two rights, we first have to make a decision about the nature of Alan's hate speech. Is it more political speech that is protected by the First Amendment?[23] Or is it more verbal harassment that violates GSU's right to maintain a fair, inclusive, and welcoming learning environment?[24] It is arguably both, but this

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xenophobic, and sexist speech inhibits the free exchange of ideas about topics as diverse as politics, history, and art.").

[22] *See* Healy v. James, 408 U.S. 169, 171 (1972) (trying to balance the "mutual interest of students, faculty members, and administrators . . . [to be] free from disruptive interference with the educational process" and "the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order"); Chemerinsky, *supra* note 20, at 27 ("[I]t is an enormously difficult issue that administrators at all levels have to deal with. How do we balance speech rights, even if it is ugly speech, with the need to create a conducive learning environment?"); Jason McGahan, *How a Mild-Mannered USC Professor Accidentally Ignited Academia's Latest Culture War*, L.A. MAG. (Oct. 21, 2020), https://lamag.com/news/usc-professor-slur [https://perma.cc/N9VA-U7GN] ("[A]dministrators have struggled to balance a newfound commitment to confront racist microaggressions on campus with the imperative for open dialogue and academic freedom."); *see also* Sunstein, *supra* note 20, at 802 ("The constitutional task . . . is to interpret the free speech and anticaste principles in such a way as to accommodate both aspirations."); Tsesis, *supra* note 18, at 1891 ("Administrators must carefully balance the fundamental right of speech, which the Court has never found to be absolute, with other educational concerns on matters such as civility, self-advancement, creativity, open dialogue, pursuit of social justice, informational acquisition, scholarship, innovation, and acculturation." (footnotes omitted)). *But see* Doe v. Univ. of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989) ("While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech.").

[23] *See Saxe*, 240 F.3d at 210 ("That speech about 'values' may offend is not cause for its prohibition, but rather the reason for its protection . . . ."); *see also* Sunstein, *supra* note 20, at 796 ("Racial hate speech, including cross-burning, often qualifies as speech. In some circumstances, it is high-value speech. Much racist speech belongs at the free speech core because it is a self-conscious contribution to social deliberation about political issues."); *id.* at 815 ("[A] good deal of public debate involves racial or religious bigotry or even hatred, implicit or explicit. If we were to excise all such speech from political debate, we would severely curtail our discussion of such important matters as civil rights, foreign policy, crime, conscription, abortion, and social welfare policy.").

[24] *See* STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 170–71 (2008) ("[H]ate speech violates what I shall call the right to recognition. . . . Recognition is the most fundamental right that individuals have, a right that lies at the basis of all their other rights. At the same time, mutual recognition is the bond that constitutes the political community. For these reasons, individuals have a duty to recognize one another as human beings and citizens. Hate speech violates this duty in a way that profoundly affects both the targets themselves and the society as a whole."); *id.* at 178–79 ("[H]ate speech transgresses the most basic ground rules of public discourse. . . . [H]ate speech may be regarded as a form of abuse that violates the rules of order that make democratic deliberation possible. . . . [T]he aim of hate speech is to dominate and subordinate others. In this way it is inconsistent with those 'relations of mutual recognition in which each person can expect to be respected by all as free and equal.'").

answer is practically untenable because it simultaneously recommends for and against discipline.

In this Part, I will offer three reasons to think that Alan's right to free speech outweighs GSU's right to maintain a fair, inclusive, and welcoming learning environment and therefore that public schools may not punish teachers' hate speech (when it is relevant to their teaching or research). But this is not my final conclusion; in the next Part, I will offer five *collectively stronger* reasons to adopt the opposite position.

First, a *reductio ad absurdum*. If GSU may discipline Alan for espousing white supremacy, then it would seem that they may also discipline Alan's tenured colleague Bob for espousing white supremacy under a different name: Trumpism.[25] And if GSU may discipline Bob for espousing Trumpism, then—given that millions of Americans now embrace this ideology—it seems only fair that they may also discipline Alan's and Bob's tenured colleague Claudia for espousing *egalitarianism*, the ideology of the Democratic party. But it is *absurd* to suggest that Claudia may be disciplined for expressing values that are etched into the Declaration of Independence,[26] the Equal Protection Clause of the Fourteenth Amendment,[27] Title VI of the 1964 Civil Rights Act,[28] and GSU's bylaws regarding equality and diversity.[29]

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[25] *See supra* note 16 and accompanying text; *see also* Kaplan, *supra* note 16 ("What *is* new is that in 2022, under the increasingly thin guise of conservatism—and greatly aided by the internet, social media[,] and big media like Fox News—the culture of white supremacy has gone fully, almost gleefully mainstream. Republican policy agendas have been replaced with relentless attacks on critical race theory and the whole notion of social justice; voter suppression is orchestrated out in the open; Jan. 6, an attempt by a largely white minority to subvert democracy, has been met with less than universal condemnation from GOP leadership."); Keeanga-Yamahtta Taylor, *The Bitter Fruits of Trump's White-Power Presidency*, NEW YORKER (Jan. 12, 2021), https://www.newyorker.com/news/our-columnists/the-bitter-fruits-of-trumps-white-power-presidency [https://perma.cc/8MSJ-62QK] ("Not only have white supremacists largely averted being disrupted or even investigated, but they also have had the comfort of seeing their racial fantasies expounded through the bully pulpit of Donald Trump and the wider mouthpiece of the Republican Party. . . . [Certain] acts reflect the growing unity between establishment Republican Party and white supremacists . . . .").

[26] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident, that all [human beings] are created equal . . . .").

[27] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[28] *See* 42 U.S.C. § 2000d ("No 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."). In addition to Title VI, which prohibits discrimination on the basis of race, color, or national origin in any federally financed program, Title VII prohibits employment discrimination based on race, color, religion, sex or national origin; and Title IX prohibits discrimination based on sex in education programs or activities that receive federal financial assistance. *See* 42 U.S.C. § 2000d *et seq.*; 42 U.S.C. § 2000e *et seq.*; 20 U.S.C. § 1681 *et seq.*

[29] *See* Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment*

Conclusion: because GSU may not discipline Claudia for espousing one political ideology, then—by parity—they may not discipline Alan and Bob for espousing another political ideology.[30]

Second, one might naturally respond to the first argument above that only Alan and Bob, not Claudia, may be disciplined. But GSU, a state entity, may not favor one political ideology over another political ideology; such favoritism amounts to constitutionally impermissible "viewpoint discrimination."[31] When it comes to citizens' speech, especially normative speech, the First Amendment requires the state and state agencies to remain viewpoint-neutral and thereby let the "marketplace of ideas,"[32] not the heavy hand of political leaders and imperious bureaucrats,

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Opportunism, 16 WM. & MARY BILL RTS. J. 1025, 1042 (2008) ("[T]he regulations in question are not speech codes but harassment policies. . . . [T]heir aim is not to restrict any form of speech per se, as is the case with speech codes; rather, it is to eliminate those forms of discrimination that deny students an equal educational opportunity based on prohibited classifications, regardless of whether the discriminatory conduct includes the use of words." (footnote omitted)); Tsesis, *supra* note 18, at 1897 ("Federal law requires educational institutions to maintain nondiscriminatory environments. . . . The law applies to a variety of federally funded institutions, including private and public universities.").

[30] *See* Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243, 243, 251 (2001) (arguing for the contrapositive: if a state may prevent bar membership on the basis of an individual's "racist beliefs, statements, and associations," then they may also censor speech in support of civil rights).

[31] *See* Matal v. Tam, 582 U.S. 218, 243 (2017) ("[W]hat we have termed 'viewpoint discrimination' is forbidden. . . . Giving offense is a viewpoint."); Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience."); Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PENN. J. CONST. L. 727, 727 (2018) ("Viewpoint-based regulations have long been regarded as the most contemptuous, democracy-threatening restrictions on speech: 'censorship in its purest form' that attempts to suppress disfavored or supposedly dangerous ideas." (footnote omitted)); Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 901 (1993) ("[A] viewpoint restriction that results in excising ideas from public discourse ordinarily ought not to be countenanced—even when the restriction applies only to low-value speech and even when the restriction closely responds to serious harms."); James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 540 (2017) ("[L]aws that forbid people from expressing certain viewpoints can impede democracy by depriving the electorate of information needed to make decisions.").

[32] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 231 (2003) ("The primary civil libertarian defense of freedom of expression from government suppression is that such freedom is necessary to ensure the existence of a robust marketplace

determine which ideas are good or true and which are bad or false.[33] This "neutrality principle," which is designed to protect "minority and dissenting views"[34] from government censorship,[35] would be violated if GSU, a state entity, were to favor Claudia's speech over Alan's and Bob's speech.[36] So, once again, as the first argument above

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of ideas."); Jeffrey Herbst & Geoffrey R. Stone, *The New Censorship on Campus*, CHRON. HIGHER EDUC. (June 5, 2017), https://www.chronicle.com/article/the-new-censorship-on-campus/ [https://perma.cc/EAD9-DC4X] ("'[O]ne thing I can guarantee you—you will have to deal with ignorance, hatred, racism' and stupidity 'at every stage of your life.' It is through debate, argument, and courage—not censorship—that truth will win out." (quoting President Obama)). *But see* HEYMAN, *supra* note 24, at 173–74 (arguing that the marketplace of ideas will sometimes tend toward majoritarian fiat rather than objective truth); ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 62 (2012) ("Universities are essential institutions for the creation of disciplinary knowledge, and such knowledge is produced by discriminating between good and bad ideas. It follows that academic freedom cannot usefully be conceptualized as protecting a marketplace of ideas.").

[33] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); Clay Calvert, *Merging Offensive-Speech Cases with Viewpoint-Discrimination Principles: The Immediate Impact of* Matal v. Tam *on Two Strands of First Amendment Jurisprudence*, 27 WM. & MARY BILL RTS. J. 829, 834 (2019) ("[In viewpoint-discrimination cases], discrimination is premised on the underlying substantive position, opinion, or perspective that a message conveys. Censorship in these scenarios is wrongly justified by the government deeming one substantive position, opinion, or perspective more legitimate than another in the metaphorical marketplace of ideas." (footnote omitted)).

[34] *Matal*, 582 U.S. at 253–54 (Kennedy, J., concurring).

[35] *See* Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) ("History has amply proved the virtue of political activity by minority, dissident groups . . . . Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society."); Herbst & Stone, *supra* note 32 ("It is an illusion for minority groups to believe that they can censor the speech of others today without having their own expression muzzled tomorrow. . . . [A] fierce commitment to freedom of speech is most important to those who lack political power."); Maleiha Malik, *Extreme Speech and Liberalism*, *in* EXTREME SPEECH AND DEMOCRACY 96, 105 (Ivan Hare & James Weinstein eds., 2009) ("There is also increasing concern that provisions such as incitement to racial and religious hatred are used more frequently to criminalize the speech of minorities rather than protect them from hate speech."); *cf.* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 21 (1998) ("[T]he [First] Amendment's historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.").

[36] *See* Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) ("Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people."); Sunstein, *supra* note 20, at 831 ("If a public university were to ban students from defending certain causes in political science classes, a serious free speech issue would be raised. There are therefore real limits to permissible viewpoint discrimination within the classroom, even if it is hard for courts to police the relevant boundaries."); Tsesis, *supra* note 18, at 1875 ("[W]here [trigger warnings] are administrative mandates on

concluded, if GSU may not discipline Claudia for her egalitarian speech, then they equally may not discipline Alan and Bob for their inegalitarian speech.

Third, *academic freedom* is arguably as protected by the First Amendment as normative speech is.[37] This is why the U.S. Supreme Court has held that the First Amendment prohibits states from terminating public-school teachers merely for refusing to certify that they are not Communists[38] or for criticizing their administrations;[39] why the Southern District of New York held that a public community college could not instruct a professor to stop discussing "controversial college matters" in his classroom;[40] and why the Second Circuit held that a public college could not create an alternative section for a Philosophy 101 course after the professor published several writings containing "a number of denigrating comments concerning the intelligence and social characteristics of blacks."[41]

II. WHY PUBLIC SCHOOLS MAY PUNISH TEACHERS' HATE SPEECH

Contrary to the arguments in Part I, my ultimate position is that GSU *may* discipline Alan for espousing white supremacy even though they may *not* discipline Claudia for espousing egalitarianism.[42] This distinction between Alan and Claudia may seem arbitrary and unfair, but it really isn't. In this Part, I will explain why.

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university faculty to present specific viewpoints in classrooms or at university events, then they constitute unconstitutional censorship. It is . . . [impermissible] to demand that they mimic the administration's favored perspectives.").

[37] *See* Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society . . . ."); Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); Nicholas B. Dirks, *How Colleges Make Themselves Easy Targets*, CHRON. HIGHER EDUC. (Oct. 28, 2018), https://www.chronicle.com/article/how-colleges-make-themselves-easy-targets/ [https://perma.cc/X7UY-KLRU] (referring to academic freedom as "a critical ingredient not just for excellence in higher education but also for the health of our democracy"). *But see* Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) ("[W]e do not find support to conclude that academic freedom is an independent First Amendment right."); Fish, *supra* note 20 ("Freedom of speech is not an academic value. Accuracy of speech is an academic value; completeness of speech is an academic value; relevance of speech is an academic value."); Jennifer Ruth, *When Academic Bullies Claim the Mantle of Free Speech*, CHRON. HIGHER EDUC. 28, 30 (Mar. 18, 2021), https://www.chronicle.com/article/when-academic-bullies-claim-the-mantle-of-free-speech [https://perma.cc/G6WP-BK2D] ("Professors at public colleges and universities in the United States have the First Amendment right to say any number of vicious, unhinged, and/or batshit-crazy things. That does not mean they have the *academic freedom* to do so.").

[38] *See Keyishian*, 385 U.S. at 605–10.

[39] *See* Perry v. Sindermann, 408 U.S. 593, 596–98 (1972).

[40] *See* Mahoney v. Hankin, 593 F. Supp. 1171, 1174–75 (S.D.N.Y. 1984).

[41] *See* Levin v. Harleston, 966 F.2d 85, 87–89 (2d Cir. 1992).

[42] I will get to Bob the Trumpist in Parts III and IV.

First, GSU has the right, and moral obligation, to maintain a fair, inclusive, and welcoming learning environment.[43] By espousing white supremacy, Alan is saying that all of his nonwhite students are of lesser intrinsic value than all of his white students. Aside from being just plain false,[44] this hate speech creates a hostile learning environment for Alan's students. Some of them will now have a much harder time engaging in activities—especially concentrating on, and engaging in open, constructive discussions about, the material—that are necessary for them to receive a proper education.[45]

Second, as I mentioned in Part I, Claudia, unlike Alan, is merely echoing values expressed in the Declaration of Independence; the Equal Protection Clause of the Fourteenth Amendment; Titles VI, VII, and IX of the 1964 Civil Rights Act; and GSU's bylaws. So we may reject the argument in Part I that GSU is guilty of impermissible viewpoint discrimination by favoring Claudia's speech over Alan's and Bob's speech. GSU is not only permitted but *required* to express and enforce the values of (for example) racial equality and gender equality.[46]

Third, in *Chaplinsky v. New Hampshire*,[47] the Supreme Court held that so-called "fighting words"—words that "tend to incite an immediate breach of the peace"[48]—are not constitutionally protected.[49] Alan's racist statements are either fighting words

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[43] *See supra* notes 20–21 and accompanying text.

[44] *See* WALDRON, *supra* note 14, at 58 ("We believe that all humans, whatever their color or appearance, are equally persons, with the rights and dignity of humanity.").

[45] *Cf.* Chemerinsky, *supra* note 20, at 17–18 ("I wonder, what if a professor, instead of not using chosen pronouns, repeatedly used a racist epithet when calling on students every time a Black student raised their hand? Or, you can pick other epithets. For example, if every time someone who identified as a Jewish student raised their hand, the professor used an offensive term to call on the student. Can the professor be disciplined for that? I am convinced that every court would say yes. Does it not create a hostile environment?").

[46] *See* Shurtleff v. City of Boston, 596 U.S. 243, 251 (2022) ("The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say." (citation omitted)); Matal v. Tam, 582 U.S. 218, 234 (2017) ("[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint-neutrality when its officers and employees speak about that venture."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) ("A school must also retain the authority . . . to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'" (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954))).

[47] 315 U.S. 568 (1942).

[48] *Id.* at 572.

[49] *See id.* at 573 ("We are unable to say that the limited scope of the statute [prohibiting fighting words] . . . contravenes the [c]onstitutional right of free expression. It is a statute

or closer to fighting words than they are to protected political speech.[50] Their very utterance is a "verbal slap" in all (present) non-whites' faces.[51] And while Alan's racist statements are less likely to incite violence than they would in face-to-face encounters, this is only because of morally irrelevant situational differences such as the power differential between Alan and his students as well as his presumable physical distance from them.[52] The underlying hurt and anger that would otherwise motivate the violent response is still there. And *this* psychological harm, not the increased likelihood of a violent response, is arguably the *real* evil of hate speech.[53]

Fourth, ten years after deciding *Chaplinsky*, the Supreme Court, in *Beauharnais v. Illinois*, *upheld* an Illinois statute *prohibiting* hate speech—specifically:

> any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity,

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narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.").

[50] *See* Doe v. Univ. of Mich., 721 F. Supp. 852, 862 (E.D. Mich. 1989) ("Under certain circumstances racial and ethnic epithets, slurs, and insults might [qualify as fighting words] . . . and could constitutionally be prohibited by the University.").

[51] *See* Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html [https://perma.cc/3XXU-MCYT] ("If words can cause stress, and if prolonged stress can cause physical harm, then it seems that speech—at least certain types of speech—can be a form of violence."); Chemerinsky, *supra* note 20, at 25 ("There is voluminous literature that hate speech undermines education and inflicts injuries on those who have traditionally been excluded."); Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 410 (2005) ("[The prohibition] of particular fighting words with gendered or racial connotations might increase societal recognition that such words cause psychic harm in addition to breaches of the peace."); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 293 (1990) ("Often a speaker consciously sets out to wound and humiliate a listener. He aims to make the other feel degraded and hated, and chooses words to achieve that effect. In what they accomplish, insults of this sort are a form of psychic assault; they do not differ much from physical assaults, like slaps or pinches, that cause no real physical hurt." (footnote omitted)); Sunstein, *supra* note 20, at 824 ("Surely it seems plausible to say that cross-burning, swastikas, and the like are an especially distinctive kind of 'fighting word'—distinctive because of the objective and subjective harm they inflict on their victims and on society in general.").

[52] *Cf.* Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2128–29 (2019) (noting similar difficulties in applying the fighting-words doctrine to cyber-speech).

[53] *See* Greenawalt, *supra* note 51 ("[I]n many of the cruelest instances in which abusive words are used, no fight is contemplated: white adults shout epithets at [B]lack children walking to an integrated school; strong men insult much smaller women."); *id.* at 298–99 ("Neither statutory nor constitutional standards should require that a particular addressee be, or appear, likely to react violently. . . . The hurt in a particular instance may not correlate with a willingness to fight; indeed, words may hurt the defenseless more than those who are able to strike back."). *But see* WALDRON, *supra* note 14, at 107 ("[Hurt] feelings will naturally accompany an assault on dignity, but they are not the root of the matter.").

> 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. . . .[54]

The Court reasoned that (a) the prohibited speech qualified as "criminal libel" and (b) "the prevention and punishment" of "the libelous" among other categories of speech ("the lewd and obscene, the profane . . . and the insulting or 'fighting' words") "have never been thought to raise any Constitutional problem" because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[55]

It is commonly assumed that the Court later implicitly overturned *Beauharnais* in at least two different cases:[56] *New York Times v. Sullivan*[57] and *R.A.V. v. City of St. Paul*.[58] But this common assumption is false. The *Sullivan* Court did not say that libel, which it more or less equated with hate speech, is constitutionally protected; it only made the much narrower point that libel *of individual public officials* is not actionable *unless stated with* "*actual malice.*"[59] And the *R.A.V.* Court did not hold that prohibitions of hate speech are unconstitutional; rather, it held only that *selective*

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[54] 343 U.S. 250, 251 (1952) (alteration in original).

[55] *Id.* at 256–57; *see also* WALDRON, *supra* note 14, at 42–44 (offering a brief history of libel law); *id.* at 52 ("Unlike civil libel, criminal libel has traditionally been interested not in protecting the intricate detail of each individual's personalized reputation and that person's particular position in the scale of social estimation, but in protecting the foundation of each person's reputation.").

[56] *See* WALDRON, *supra* note 14, at 28 ("[I]t is not at all clear that the reasoning in *New York Times v. Sullivan* would protect the defendant in the *Beauharnais* case."); Michael J. Cole, *A Perfect Storm: Race, Ethnicity, Hate Speech, Libel and First Amendment Jurisprudence*, 73 S.C. L. REV. 437, 454 (2021) ("Circuit court cases . . . have interpreted *Sullivan* as severely undermining *Beauharnais*. . . . Many legal scholars, including John H. Garvey and Frederick Schauer, concur." (footnotes omitted)); *id.* at 459 ("[A] defendant may argue that the Court should overrule *Beauharnais* . . . because *Beauharnais* conflicts with *R.A.V. v. City of St. Paul*, in which the Court disallowed content-based restrictions of unprotected speech."); Sunstein, *supra* note 20, at 814 ("[M]ost people think that after *New York Times v. Sullivan*, *Beauharnais* is no longer the law.").

[57] 376 U.S. 254 (1964).

[58] 505 U.S. 377 (1992).

[59] *See Sullivan*, 376 U.S. at 279–80 ("The constitutional guarantees require, we think, a federal rule that 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."); WALDRON, *supra* note 14, at 62–63 ("[I]t is not at all clear why the reasoning in *New York Times v. Sullivan* should protect Joseph Beauharnais or anyone else in his position. . . . [T]here is a carelessness about the consensus of modern First Amendment jurists that *Sullivan* implicitly overturns *Beauharnais* . . . .").

prohibitions of *fighting words* are unconstitutional.[60] Jeremy Waldron has also argued that the Court's decision in *Brandenburg v. Ohio*[61] conflicts with *Beauharnais*.[62] But *Brandenburg* had nothing to do with hate speech; instead, it concerned an entirely different category of speech: advocacy of violence.[63] I conclude that *Beauharnais*, which (again) found a statute criminalizing hate speech to be constitutional, remains good law.

Finally, several courts have held that public-school teachers may indeed be disciplined for highly offensive speech. First, in *Pickering v. Board of Education of Township High School District 205*,[64] the Supreme Court held that a public school *may* discipline a teacher for speech that "interfere[s] with the regular operation of the school[] generally" and is not a "matter of legitimate public concern."[65] Second, following *Pickering*, the Seventh Circuit held that a state "may limit a teacher's right to say what he pleases" on several grounds:

> (1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.[66]

Third, the Sixth Circuit held that a teacher at a predominantly Black public school could be fired for her racist remarks to the school's principal because they "cast[ed] serious doubt on her judgment and general competence as a teacher" and conflicted

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[60] *See R.A.V.*, 505 U.S. at 391–96; *cf.* Sunstein, *supra* note 20, at 822–29 (offering a powerful critique of the Court's *R.A.V.* decision).

[61] 395 U.S. 444 (1969).

[62] WALDRON, *supra* note 14, at 29 ("[Anthony] Lewis is probably right that Joseph Beauharnais's conviction would not be upheld today. [The Court in *Brandenburg v. Ohio*] held that hate speech, like seditious speech, is protected unless it is calculated to incite or likely to produce imminent lawless action."); *id.* at 61–62 ("In one or two cases, lower courts have expressed misgivings about [*Beauharnais*], and among First Amendment scholars there is some considerable doubt as to whether the Supreme Court would nowadays accept the idea of group libel as an exception to First Amendment protection. Many jurists—better informed than I am in the ways of the justices—say they probably would not." (footnote omitted)).

[63] *Brandenburg*, 395 U.S. at 448–49 (striking down a state statute that prohibited advocating or teaching "'the duty, necessity, or propriety' of violence, 'as a means of accomplishing industrial or political reform'" on the grounds that the statute failed to distinguish between "mere advocacy," which is protected by the First and Fourteenth Amendments, and "incitement to imminent lawless action," which is not).

[64] 391 U.S. 563 (1968).

[65] *Id.* at 571–73.

[66] Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972).

with "the interest of the school board in maintaining an efficient and regularly functioning school system."[67] Fourth, the Eleventh Circuit held that a public university could instruct an Exercise Physiology professor to stop interjecting his religious beliefs during class on the grounds that public schools have the "authority to reasonably control the content of its curriculum, particularly that content imparted during class time."[68] Fifth, the Second Circuit held that a public university could remove a Black Studies professor from his position as department chair for "ma[king] several derogatory statements, particularly about Jews" in a public speech.[69]

I conclude that Alan's freedom of speech is, while broad, not absolute. There are limits. GSU's right to maintain a fair, inclusive, and welcoming learning environment ultimately outweighs Alan's right to free speech because GSU is Alan's employer, which means that Alan is there to serve GSU, not the other way around. Clearly, if Alan were not a member of the GSU community—if, for example, he were a local talk-radio personality spouting white supremacy—GSU, not to mention the state itself, would not have any recourse; they would have no right to silence him.[70] But once Alan became an employee of GSU, his right to free speech contracted a bit. He could *now* be disciplined for speech that contributed to a hostile learning environment. This is not so-called "cancel culture" or "political correctness" run amok; it is just a straightforward result of weighing the tremendous value of free

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[67] Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981).

[68] Bishop v. Aronov, 926 F.2d 1068, 1074 (11th Cir. 1991).

[69] Jeffries v. Harleston, 52 F.3d 9, 11, 13–15 (2d Cir. 1995).

[70] In the U.S., the only extant hate-speech statutes are extremely narrow. *See, e.g.*, 720 ILL. COMP. STAT. § 5/12-7.6 (2012) ("(a) A person commits cross burning when he or she, with the intent to intimidate any other person or group of persons, burns or causes to be burned a cross."); LA. STAT ANN. § 14:40.4 (2003) ("A. It shall be unlawful for any person, with the intent of intimidating any person or group of persons to burn, or cause to be burned, a cross on the property of another, a highway, or other public place."); MO. REV. STAT. § 574.140 (2017) ("1. A person commits the offense of cross burning if he or she burns, or causes to be burned, a cross with the purpose to frighten, intimidate, or cause emotional distress to any person or group of persons."). Many other countries have passed much broader laws prohibiting hate speech, in accordance with Article 20(2) of the International Covenant on Civil and Political Rights. *See* NATALIE ALKIVIADOU ET AL., GLOBAL HANDBOOK ON HATE SPEECH LAWS (2020), https://futurefreespeech.org/wp-content/uploads/2020/11/Report_Global-Handbook-on-Hate-Speech-Laws.pdf [https://perma.cc/F4UT-PRXE]; WALDRON, *supra* note 14, at 8, 12–13, 29, 39–40; Sunstein, *supra* note 20, at 815 ("[M]ost European countries, including flourishing democracies committed to free speech, make exceptions for [racial hate speech]."); Tsesis, *supra* note 12, at 772–73 ("Unlike the United States, many foreign countries recognize the dangerousness of hate speech and have enacted criminal laws to protect targeted outgroups from expositions of bigotry. . . . Laws penalizing the dissemination of hate speech exist in the following countries: Israel, Germany, France, Canada, England, Belgium, Brazil, Cyprus, Italy, the Netherlands, Austria, and Switzerland." (footnote omitted)).

speech against the tremendous value of a fair, inclusive, and welcoming learning environment in our public schools. The latter slightly outweighs the former.

III. THE NO DEHUMANIZING SPEECH STANDARD

It is all well and good to say that GSU may discipline Alan for espousing white supremacy. But this example is a little too easy. What about either (a) speech that is not as offensive or (b) speech that is as offensive but has at least some academic merit? In this Section, I will try to provide a limiting principle, which I refer to as the "No Dehumanizing Speech Standard" (NDS Standard).

Return to Bob, who espouses Trumpism in class. Arguments could go either way here. On the one hand, Trumpism can very arguably been seen as white supremacy (among other things—for example, misogyny and xenophobia) under a different name.[71] So if Alan may be disciplined for espousing white supremacy, then Bob may equally be disciplined for espousing Trumpism. On the other hand, Bob has a defense that Alan arguably does not: Trump was the President of the United States for four years, Trumpism is now embraced by one of America's two main parties, and a public-school teacher cannot be disciplined for mainstream political speech any more than they could have been disciplined in years past for endorsing pre-2016 Republican politicians or their right-wing ideology. So, which is it? Is Bob more like Alan, who may be disciplined? Or is Bob more like a traditional Republican, who may not be disciplined?

According to the NDS Standard, public-school teachers have a First Amendment right to express their moral and political views without fear of discipline *unless they explicitly suggest that some humans are of lesser intrinsic value than other humans*.[72] Should they violate this rule, they subject themselves to discipline, ranging from mere reprimand to termination. I have incorporated *explicitness* into the definition of dehumanizing speech to avoid the problem of over-inclusiveness. If merely *implying* inferiority also qualified as dehumanizing speech, the regulation would have a chilling effect on otherwise acceptable speech, including "edgy" humor,

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[71] *See supra* notes 16, 25 and accompanying text.

[72] *Cf.* WALDRON, *supra* note 14, at 61 ("[W]hat hate speech legislation stands for is the dignity of equal citizenship (for all members of all groups), and it does what it can to put a stop to group defamation when group defamation . . . threatens to undermine that status for a whole class of citizens."); Greenawalt, *supra* note 51, at 306 ("Some lesser showing of immediate injury is appropriate for words that historically have inflicted grave humiliations and damage to ideals of equality and continue to do so."); Sunstein, *supra* note 20, at 814–15 ("[S]ome forms of hate speech amount to a denial of the premise of political equality that is central to a well-functioning democracy."); Tsesis, *supra* note 12, at 779–80 ("Hate speech has played a significant role in organized and systematic discrimination and persecution. . . . The laws adopted must only prohibit speech that, in its virulent expression of hatred toward outgroups, poses a threat to republican democracy.").

sarcasm, and good-faith disagreements about sensitive issues such as oppression and marginalization. Much of this speech may be offensive, but it does not cross the "dehumanization line."

Suppose, for example, that Bob enthusiastically supports Trump's Muslim ban[73] while teaching a class on national security law. By itself, this offensive remark is probably not actionable. Suppose further, however, that a student asks Bob why he supports the ban, and Bob says that he regards Muslims as "backward," "dangerous," "evil," or "terrorists" and therefore unwelcome in this country. According to the NDS Standard, Bob now *is* subject to disciplinary action by the GSU administration because his statements are explicitly dehumanizing. He is explicitly suggesting that Muslims are of lesser intrinsic value than non-Muslims.[74]

IV. OBJECTIONS AND REPLIES

Five difficult objections against the NDS Standard need to be addressed. The first objection is that the NDS Standard will have terrible consequences, especially creeping authoritarianism. As soon as the state is allowed to punish *any* speech, no matter how offensive, it will only be the beginning of the end of our First Amendment freedoms.[75] Emboldened by this first intrusion, the state will sooner or later seek to ban even more speech. And before we know it, our freedom of speech—and all arguably dependent freedoms, such as association, assembly, and religious exercise—will be eviscerated.

There are three problems with this "slippery-slope" objection. The first problem: It rests on pure speculation. Maybe the state would further erode civil liberties, but maybe it would not. The second problem: Even if the state tried to further erode civil liberties, there is no guarantee that it would be successful. All fifty states and the federal government have imposed limits on our freedoms, including our freedom of speech, freedom of association, freedom of assembly, and freedom of religious

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[73] *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[74] *See* Anderson v. Evans, 660 F.2d 153, 159 (1981) (approving public school board's termination of tenured teacher for making racist remarks on the grounds that they "cast[ed] serious doubt on her judgment and general competence as a teacher").

[75] *See* Bernstein, *supra* note 32, at 228 ("[T]he alternative to protecting the constitutional rights of such scoundrels [who utter hate speech] is . . . the gradual evisceration of the pluralism, autonomy, and check on government power that civil liberties provide."); *id.* at 235 ("The alternative to an unregulated speech marketplace is to permit government censorship, leaving 'the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.'" (quoting Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986))); Marcus, *supra* note 29, at 1052 ("[I]t must be acknowledged that any conduct regulation broad enough to encompass some amount of speech runs the risk of abuse.").

exercise.[76] Some of these limits are generally accepted; others have been rejected by the courts. So if the first objection is to be successful, it must explain what is different about the NDS Standard, why *it* is the regulation that would finally lead to tyranny when all others have failed to do so. In the end, it is difficult to see how prohibiting public-school faculty from expressing dehumanizing language would amount to a serious deprivation of free speech, no less a deprivation of any other right.[77] The third problem: If GSU were to reject the NDS Standard and allow Bob to continue espousing Trumpism to his students, *Bob's* right to free speech might not be violated, but *his students'* right not to be verbally harassed *would* be violated. In other words, it is not simply a question of Bob's First Amendment rights, as if he existed in a vacuum; it is also a question of his students' right to attend a public school with a fair, inclusive, and welcoming learning environment.[78] Dehumanizing language is a zero-sum game.[79] Somebody's rights must be limited here—either the teacher's or the students'. And I contend that *it is overall preferable to tip the balance in favor of the students over the teacher*—that is, in favor of the students' right to avoid dehumanizing speech over the teacher's right to express dehumanizing speech.

The second objection against the NDS Standard involves academic freedom—specifically, the extent of scholars' freedom to say what they think in the course of teaching and scholarship, even if this speech devalues individuals on the basis of disability, ethnicity, gender, national origin, race, religion, or sexual orientation. Suppose a tenured GSU Sociology professor, Dana, learns of studies that purport to show different mathematical abilities between two racial groups, accepts both their

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[76] *See* 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:50 (Apr. 2024) ("[A]bsolutism is fundamentally too simplistic a method of analysis to be a viable method for handling modern First Amendment conflicts. Numerous judicial decisions recognize that absolutism cannot function as a magic talisman in First Amendment litigation, as it cannot so function in most arenas of constitutional law."); Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?* McCutcheon*, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015) ("[V]irtually no constitutional rights are absolute under contemporary doctrine.").

[77] *See* Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMMENT. 697, 711–12 (2017) ("The main way in which we express people's opinions in the political process is by counting their votes, and we do count the votes of those whose free expression is impacted by hate speech laws.").

[78] *See* Marcus, *supra* note 29, at 1052–53, 1056–58 (repudiating "First Amendment opportunism"—i.e., using the First Amendment to protect the right to communicate speech that amounts to harassment); Tsesis, *supra* note 18, at 1917 ("Equating harassment on campus with core First Amendment values creates a false analogy between the dissemination of information, discourse, and self-fulfillment and vitriolic attacks aimed at disturbing targeted students until they withdraw, avoid locations on campus, or suffer health problems.").

[79] *See* Marcus, *supra* note 29, at 1050–52 (arguing that silencing is inevitable—of the speaker if verbal harassment is prohibited, of the audience if verbal harassment is not prohibited); *see also id.* at 1049–50 (arguing that regulating harassment actually enhances rather than reduces free speech).

methodologies and conclusions, and presents them to her sociology class. Suppose further that some of Dana's students (understandably) feel insulted by this presentation and complain to the GSU administration. The NDS Standard arguably warrants disciplining Dana, but this result seems wrong. Dana could make the very compelling argument that her job obligates her to convey what she believes to be important information to her class, even if this information conflicts with her and their egalitarian assumptions.

One response to this objection might be that Dana is not actually expressing dehumanizing speech if her motives are purely academic rather than hatred or contempt. But the NDS Standard that I am proposing is not really concerned with the teacher's motives. Instead, the NDS Standard is concerned solely with the content of the teacher's speech.[80] If, for example, Alan is motivated to express white-supremacist thoughts not from hatred or contempt but rather from a good-faith, intellectual belief in white supremacy, he is still subject to discipline under the NDS Standard.[81]

A stronger response to the second objection is that a limited academic-freedom exception to the NDS Standard should be permitted. There is a clear difference between Bob's anti-Muslim speech and Dana's arguably racist speech. Bob's anti-Muslim speech is purely normative; it is not at all based on empirical data. Dana's academic speech, however, is based on empirical data.[82] This is not to say that empirical data is indisputable; data can always be misinterpreted, falsified, manipulated, or disputed.[83] It is only to say that, unlike Bob, Dana can presumptively *justify*

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[80] *Cf.* Waldron, *supra* note 77, at 701 (arguing that hate-speech restrictions should "get at content only by virtue of its intended effect on the community, rather than on the sole basis of the propositions expressed" and require that "the speech which is intended to have [this] effect . . . be expressed *in a certain manner* before it is liable to prosecution"); *id.* at 703 (indicating that hate-speech regulations in other countries are concerned with the harms caused by, not the motivations for, hate speech).

[81] *But see* Tsesis, *supra* note 12, at 777–78 ("The First Amendment protects persons making purely abstract arguments about the inferiority of specific groups because their speech does not advocate present or future violence or persecution."). I strongly disagree with Professor Tsesis here, at least in the context of education.

[82] *See* POST, *supra* note 32, at 88–89 ("Academic freedom of research and publication includes, at a minimum, the freedom to communicate the results of research to students when it is pedagogically relevant to do so. . . . It is difficult to construe [purely normative assertions] as a report of scholarly expertise."); Alexander C. Kafka, *A Scholar Asked, 'Why Can't We Hate Men?' Now She Responds to the Deluge of Criticism*, CHRON. HIGHER EDUC. (June 19, 2018), https://www.chronicle.com/article/a-scholar-asked-why-cant-we-hate-men-now-she-responds-to-the-deluge-of-criticism/ [https://perma.cc/GJN3-ANZ2] ("I'm making an argument with material and data. It is not hate speech. . . . [T]o talk about a feminist author who writes an op-ed with data that is indisputable and says, [w]e have a right to anger—to say that that is hate speech is absolutely ludicrous." (quoting Suzanna Danuta Walters)).

[83] The real worry here is the possibility of professors making inegalitarian remarks that are based on falsehoods. *See* Flaherty, *supra* note 15 ("[Oberlin Assistant Professor Joy]

the arguably dehumanizing nature of her speech; she can argue that the inegalitarian ideas she is promoting derive not from any inegalitarian assumptions but rather from inegalitarian facts.[84] Of course, it may very well be that Dana, like Bob, does have inegalitarian sentiments and is motivated by these inegalitarian sentiments to promote these inegalitarian conclusions. But, once again, Dana has something that Bob does not: empirical data. All Bob has is *baseless* inegalitarian opinion. To this extent, only Bob's, not Dana's, speech should be punishable.

The third objection against the NDS Standard is that it is simply inconsistent with the Constitution; the simple fact of the matter is that we all have a First Amendment right to engage in hate speech. The state may not arrest or imprison anybody for espousing white supremacy in their homes, in online or written publications, or in public places,[85] as long as it is not directed toward individuals in such a way that is likely to provoke violence.[86] But if the state may not punish violations of the NDS Standard, then neither may a *public school*, which is an agency of the state.

The third objection is unsuccessful, as it overlooks the critical distinction between the state as sovereign and the state as employer. As sovereign, the state is prohibited by the First Amendment from punishing citizens' hate speech.[87] But as employer, the state has broader authority. While state employees still enjoy significant First Amendment rights, these rights are narrower than they are for citizens who are *not* employed by the state. Unlike non-state employees, state employees may be disciplined for speech that satisfies two conditions: (a) it is not about "matters of

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Karega's case has raised questions about whether academic freedom covers statements that have no basis in fact.").

[84] *See* Barrett, *supra* note 51 ("[W]hen the political scientist Charles Murray argues that genetic factors help account for racial disparities in I.Q. scores, you might find his view to be repugnant and misguided, but it's only offensive. It is offered as a scholarly hypothesis to be debated, not thrown like a grenade. There is a difference between permitting a culture of casual brutality and entertaining an opinion you strongly oppose. The former is a danger to a civil society (and to our health); the latter is the lifeblood of democracy."); Musa al-Gharbi, *Too Noxious for Tenure?*, CHRON. HIGHER EDUC. (Aug. 1, 2019), https://www.chronicle.com/article/too-noxious-for-tenure/ [https://perma.cc/P8L5-CKQF] ("In [John Dewey's] view, faculty members should be able to follow the facts as they understand them, wherever they lead—and describe the world as they see it—even if it runs sharply against the ideological and political sensibilities of the people who run the universities . . . even if the positions being advanced are unpopular with other academics or the public at large. Indeed, it is precisely in these instances where academic freedom matters most."); Tsesis, *supra* note 12, at 778 ("Scientific or anthropological arguments, which do not call for violent action against outgroups, should not be censured. . . . Such ideas do not pose a danger to society, and their presence in political discourse serves to fine-tune democratic ideals of racial and ethnic equality.").

[85] *See supra* note 70 and accompanying text.

[86] *See supra* notes 47–49 and accompanying text.

[87] *See supra* note 70 and accompanying text.

public concern" and (b) it disrupts the workplace—i.e., undermines the "efficien[cy]" of the government's, or government agency's, operations.[88] This same general rule applies to all state employees, including public-school teachers,[89] but public-school teachers are generally given a little more leeway. Because of academic freedom, their speech carries some extra "weight" that most other state employees do not enjoy.[90]

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[88] *See* Garcetti v. Ceballos, 547 U.S. 410, 410–11, 421 (9th Cir. 2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); Waters v. Churchill, 511 U.S. 661, 675 (1994) ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."); Connick v. Myers, 461 U.S. 138, 152 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."); Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568 (1968) ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."); WALDRON, *supra* note 14, at 117 ("From one point of view, a prohibition on racial epithets in the workplace can be justified by reference to the exigencies of the business: most employers do not want their employees to be bullied, traumatized, distressed, and demoralized in this way. . . . In the United States, the logic of hostile environment seems to make great sense to people at this level, and they can easily see that concerns of this kind must be able to prevail over First Amendment considerations in the workplace.").

[89] *See supra* notes 64–69 and accompanying text; *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) ("The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.").

[90] *See supra* notes 37–41 and accompanying text; *see also Garcetti*, 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."); *id.* at 421–22 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. . . . [State] employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit."); Demers v. Austin, 746 F.3d 402, 411–12 (9th Cir. 2014) ("[T]eaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are 'a special concern of the First Amendment.' We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. . . . We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." (citations omitted)); POST, *supra* note 32, at 91–92 (criticizing the Court's decision in *Garcetti* on the grounds that it "threatens to strip classroom communications of academic freedom protections. . . . Were faculty to be merely employees of a university, as *Garcetti*

The fourth objection against the NDS Standard is First Amendment "absolutism." By definition, the First Amendment absolutist thinks that faculty at public schools should be allowed to say whatever dehumanizing thing they want with impunity.[91] Consider the example with which I began this Article: antisemitism.[92] The First Amendment absolutist would oppose punishment for any public-school teacher who suggests in any way that Jewish people are inferior—for example, that "Hitler should have finished the job." In my view, this position is entirely implausible—such language serves no legitimate pedagogical purpose[93]—and flatly inconsistent

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conceptualizes employees, their job would be to transmit the views of university administrators. Faculty would then no longer expand knowledge, because they would no longer be responsible for applying independent professional, disciplinary standards. In such circumstances, universities would no longer advance the value of democratic competence"); Chemerinsky, *supra* note 20, at 19 ("If the Supreme Court applies *Garcetti v. Ceballos* to the university context, it would eviscerate any protection for professors—whether or not it is called academic freedom or free speech under the First Amendment—in the context of the classrooms."); Dirks, *supra* note 37 ("Universities must . . . uphold freedom of speech, not only because of the First Amendment but also because of at least three other compelling (and related) values: institutional autonomy, the importance of engaging ideas no matter how unpalatable they might seem, and academic freedom.").

[91] *See* Bernstein, *supra* note 32, at 230 ("[A]n unregulated marketplace of ideas should be defended, not because the marketplace of ideas is efficient and always leads to benign results, but because the alternative of government regulation is far worse."); Strossen, *supra* note 30, at 254 ("The viewpoint-neutrality principle reflects the philosophy . . . that the appropriate response to speech with which one disagrees in a free society is not censorship but counterspeech—more speech, not less. Persuasion, not coercion, is the solution. Accordingly, the appropriate response to hate speech is not to censor it, but to answer it." (footnote omitted)); *id.* at 258 ("Censoring hate speech is doubly flawed. Not only does it violate fundamental free speech principles . . . but worse yet, it does so with no countervailing benefit. Many advocates of suppressing hate speech hope thereby to promote equality and non-discrimination. In practice, though, censoring hate speech is at best ineffective in promoting these important goals, and at worst counterproductive.").

[92] *See* Maureen Groppe, *With More than 800 Antisemitic Acts Since Oct. 7, Jewish Student Groups Plead for Biden's Help,* USA TODAY (Apr. 18, 2024, 7:26 AM), https://www.usatoday.com/story/news/politics/2023/11/20/rising-antisemitism-campus-federal-investigation/71579893007/ [https://perma.cc/B8CN-MX4S] ("Incidents of antisemitism had already been on the rise before Hamas attacked Israel. Antisemitic hate crimes rose 25% from 2021 to 2022, according to the most recent FBI statistics. Although Jewish people make up only 2.4% of the U.S. population, they are the targets of more than half of all reported religion-based hate crimes."); Tsesis, *supra* note 18, at 1880 ("Antisemitism on U.S. campuses has grown at a disturbing rate in recent years.").

[93] *See* Stuart Chinn, *Free Speech Controversies and Consequences on Campus*, 54 TULSA L. REV. 225, 231 (2019) ("[E]ven if one were to concede that students' intellectual development was aided in some small (or large) degree by exposure to hateful, demeaning speech, it is also not hard to imagine that the ability of certain students to learn—particularly the targets of such speech—might be significantly impaired as a result. . . . [I]f the goal in question is the dissemination of knowledge within an intellectual community, is it so obvious that this trade-off in likely consequences—minimal value of hate speech versus potentially

with precedent,[94] so I do not take the First Amendment absolutist's objection very seriously.

Fifth, I *do* take seriously the very converse of the First Amendment absolutist's objection: The NDS Standard is *too narrow*. According to *this* objection, the NDS Standard still seems to leave too much room for hate speech—for example, anti-semitic stereotypes ("Jews are greedy"; "Jews are power-hungry") and antisemitic assertions ("The Jews killed Christ"; "The Jews' plot to take over the world is documented in *Protocols of the Elders of Zion*"; "The Holocaust never happened")—that are grossly offensive but not necessarily dehumanizing (i.e., that they do not necessarily suggest that Jewish people are intrinsically less valuable than non-Jews).[95] But precisely because they are grossly offensive, the NDS Standard should be expanded to cover a wider range of hate speech.

In response to this objection, I take a firm position only on drawing the line at dehumanizing speech, not on whether the kinds of antisemitic statements in the previous paragraph are in fact dehumanizing. I think that they are, but for the purposes of this Article, I do not commit either way; I do not commit to the proposition that they are dehumanizing and therefore should be punishable or to the proposition that they are not dehumanizing and therefore should not be punishable. I need not

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significant costs to student learning—clearly presses in favor of allowing hateful speech? . . . [O]ne might argue . . . that the distinctive mission of the university to educate predominately young learners provides particular reasons for university administrators to be sensitive to the detrimental effects of hateful and intolerant speech upon student learning that may be less compelling outside the campus context."); Kathryn M. Stanchi, *Dealing with Hate in the Feminist Classroom: Re-Thinking the Balance*, 11 MICH. J. GENDER & L. 173, 203–10 (2005) (arguing that hate speech in the classroom causes too many students to refrain from participating and, as a result, diminishes their learning of the material).

[94] *See supra* notes 64–69, 88 and accompanying text; *see also* Stanchi, *supra* note 93, at 173–74 ("Feminists have long argued that an absolutist view of free speech maintains and privileges the speech of the dominant and undermines and silences the speech of those outside the dominant class. . . . [T]he free speech promise of absolutism is illusory for those whose speech is already burdened. . . . [W]hat absolutism accomplishes in reality is to maintain the status quo of unequal power, allowing 'unfettered' speech to those individuals who are already free to speak and doing nothing about the fetters that bind the speech of the less powerful. In the university context, the absolutist approach . . . makes hate speech an effective tool for excluding and silencing outsider students. The absolutist approach is especially misguided in the educational arena, because hate speech can stop learning and teaching, the *sine qua non* of the university. Students who are silenced, frightened or intimidated cannot learn." (footnotes omitted)).

[95] *See* Michael Whine, *Expanding Holocaust Denial and Legislation Against It*, *in* EXTREME SPEECH AND DEMOCRACY, *supra* note 35, at 542 ("Holocaust denial is now universally recognized as a specific form of hate."); *id.* at 547 ("Denying crimes against humanity is one of the most acute forms of racial defamation towards the Jews and of incitement to hatred of them." (quoting the European Court of Human Rights' June 24, 2003 Judgment against French Holocaust denier Roger Garaudy)).

take a firm position here because my primary aim in this Article has been merely to establish a *principle*—that public schools may, consistent with the First Amendment, discipline teachers for dehumanizing speech—not to resolve all difficult applications of this principle. Where exactly we draw the line between speech that is dehumanizing and speech that is merely offensive but not dehumanizing remains a matter for public schools and the courts to work out on a case-by-case basis.[96] And there is no reason at all to think that they cannot work this matter out in a fair and principled manner.

V. EDUCATION VS. INDOCTRINATION: WHAT DOES THE FIRST AMENDMENT SAY?

In Parts II through IV, I argued that public schools are *not* necessarily engaging in constitutionally impermissible viewpoint discrimination when they allow teachers to promote some values over others. In response, it might be argued that (a) teachers who promote some values over others are *indoctrinating* their students and (b) indoctrinating speech is not protected by the First Amendment. In this Section, I will argue that most values-promotion by public-school teachers is educational, not indoctrinating, and therefore well within the scope of the First Amendment.

A. Education vs. Indoctrination

The difference between education and indoctrination is not obvious. After all, both involve telling others what to believe. Generally speaking, there are three critical distinctions between education and indoctrination: goals, techniques, and content.[97]

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[96] *Cf.* Barrett, *supra* note 51 ("[S]cientific findings . . . provide empirical guidance for which kinds of controversial speech should and shouldn't be acceptable on campus and in civil society. In short, the answer depends on whether the speech is abusive or merely offensive. Offensiveness is not bad for your body and brain.").

[97] *Cf.* Oliver v. Arnold, 19 F.4th 843, 845 (5th Cir. 2021) ("Schools should educate—not indoctrinate. Teachers can teach. And teachers can test. But teachers cannot require students to endorse a particular political viewpoint."); David Copp, *Moral Education Versus Indoctrination*, 14 THEORY & RES. EDUC. 149, 154 (2016) (defining indoctrination as "induc[ing] people to believe something *uncritically* . . . [either] without providing epistemic reasons for believing it . . . or . . . without addressing any local controversy about it"); Tom Nachtigal, *Responsible Education: Responsibility Under International Law for Indoctrination to Hatred and Violence in Education Systems*, 57 COLUM. J. TRANSNAT'L L. 600, 610 (2019) ("[I]ndoctrination, for the purposes of this Note, is defined as teaching with the intention of instilling certain beliefs and propositions among pupils, by disregarding evidence, reasoning, and logic in the teaching process."); Ruth J. Wareham, *Indoctrination, Delusion and the Possibility of Epistemic Innocence*, 17 THEORY & RES. EDUC. 40, 43–44 (2018) (arguing for an "outcome-based account," according to which "indoctrination is best described as a teaching process . . . which directly results in an illegitimate barrier between the beliefs an individual holds and the evidence or reasons she has for holding them; a barrier which causes her to be closed-minded").

Goals. While individual teachers here and there may have nefarious agendas, the educational system itself, from kindergarten up to high school, is designed to create and maintain a citizenry that is armed with basic knowledge about the world, civic values, and essential life skills.[98] (The same can be said of higher education and trade schools, but the kind of information and skills that they seek to impart tend to be much more specialized.) By contrast, organizations that seek more to indoctrinate than educate—the paradigmatic example being *cults*—are primarily interested in their own survival, growth, and profit than in their members' well-being or future contributions to society.[99] Members are regarded more as means to each organization's ulterior ends than as ends in themselves.

Techniques. Educators at different levels tend to use a combination of lecture, repetition, open discussion, practice, and testing. And while there is some level of coercion, especially for children and teens, it is generally benign. Students are not mistreated; they are simply given lower grades for lower achievement and proportionally disciplined—for example, with detentions and suspensions—for misconduct. By contrast, indoctrinators generally subject their disciples to much worse treatment than lower grades, detentions, and suspensions. These abuses include physical or sexual assault, deception, degradation, humiliation, isolation, manipulation, starvation, threats, and torture.[100]

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[98] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("'[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' In *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979), we echoed the essence of this statement of the objectives of public education as the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'" (alterations in original) (citations omitted)); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[The State] notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); Copp, *supra* note 97, at 156 ("Education ought to equip students to engage with the world the way it actually is and to think critically so that they can distinguish well-supported ideas about the world from mere speculation or worse.").

[99] *See generally* SARAH BERMAN, DON'T CALL IT A CULT: THE SHOCKING STORY OF KEITH RANIERE AND THE WOMEN OF NXIVM (2021); ELIZABETH R. BURCHARD & JUDITH L. CARLONE, THE CULT NEXT DOOR: A MANHATTAN MEMOIR (2013).

[100] *See* Joseph D. Salande & David R. Perkins, *An Object Relations Approach to Cult*

These two distinctions—goals and techniques—help distinguish between education and indoctrination. But they are not enough. We can easily imagine indoctrination that, at least nominally, if not actually, aspires toward the same goals as education and mainly relies on the same kinds of non-coercive techniques. There would still be a difference between them, and the only place where this distinction could lie is in the *contents* of instruction. So how to spell out this distinction?

Contents. The distinction in this third area cannot be that education involves purely objective, values-free instruction while indoctrination is subjective, values-filled instruction. The simple fact is that education cannot be values-free; even the most objective, impartial education is at least implicitly promoting the values of objectivity and impartiality. Instead, both education and indoctrination are equally values-filled. Where they differ is in the *quality* of the values. Quite simply, it is education if the values being promoted are *good*, and it is indoctrination if the values being promoted are *bad*.[101]

This proposition may at first sound implausible. After all, who will decide which values are good or bad?[102] And whoever this all-knowing "demigod" is, what do we say to all the people who disagree with her? My answer is that things are not as hopelessly subjective as they first seem. Public (and private) schools have actually been promoting values to their students for a very long time. These values fall into

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Membership, 65 AM. J. PSYCHOTHERAPY 381, 382–83 (2011) ("[T]he following are frequently reported occurrences in what are referred [to] as cults[:] coercion, intimidation, threats, physical and verbal abuse, manipulation, dishonesty (by leadership), sexual bullying, isolation and separation from friends and family, and forfeiture of personal finances." (citation omitted)); Lita Linzer Schwartz & Florence W. Kaslow, *The Cult Phenomenon: A Turn of the Century Update*, 29 AM. J. FAM. THERAPY 13, 14 (2001) ("[Cults'] practices . . . includ[e] strict obedience to the will or dictates of the leader, harsh punishment for those who question the rules, and often child abuse and illicit sexual activities."); *id.* at 18 ("Using confrontational techniques, trainers 'create a sense of powerlessness in the seminar attendees. Once this sense is achieved, it becomes a lot easier to erase old patterns of thinking and behavior', and to take control of the person's thoughts, beliefs, and commitment to the cult as family." (citation omitted)); *cf.* Michael J. Diamond, *Perverted Containment: Trumpism, Cult Creation, and the Rise of Destructive American Populism*, 43 PSYCHOANALYTIC INQUIRY 96, 99–100 (2023) (noting four techniques typically used by cult leaders: "milieu control," "doctrine over person," "loading the language," and "dispensing of existence"). *See generally* BERMAN, *supra* note 99; BURCHARD & CARLONE, *supra* note 99.

[101] *Cf.* R. Roderick Palmer, *Education and Indoctrination*, 34 PEABODY J. EDUC. 224, 226 (1957) ("If indoctrination is defined as any kind of teaching which hampers independent thinking in a given field . . . education as contrasted with indoctrination is said to be a process of teaching the pupil *how* to think rather than *what* to think. Its object is not to secure the acceptance of any doctrine whatever, but to assist the learner to choose or develop his own doctrines.").

[102] *See* Copp, *supra* note 97, at 149 ("Many citizens want the schools to teach 'values' and 'strict standards of right and wrong', but in a pluralistic society, there is disagreement about what this would consist in." (footnote omitted)).

seven categories:[103] (1) constitutional principles; (2) the humanist virtues; (3) successful character traits and behaviors; (4) knowledge and truth; (5) art and beauty; (6) health, both mental and physical; and (7) social goods.

Constitutional principles include democracy, due process, pluralism, separation of powers, universal equality, and universal individual rights and freedoms. The *humanist virtues* include compassion, courage, fairness, generosity, gratitude, honesty, human dignity,[104] inclusion, integrity, kindness, love, non-violence, respect, and tolerance. The *successful character traits and behaviors* include civility, cooperation, creativity, critical thinking, curiosity, grit, intelligence (cognitive, emotional, and social), judgment, listening, open-mindedness, positivity, self-awareness, self-control, self-esteem, social intelligence, and thinking for oneself. *Knowledge and truth* include economics, the humanities, math, science, and more specialized areas that are necessary for the professions—for example, business, law, and medicine. *Art and beauty* include architecture, gastronomy, literature, music, painting, sculpture, and theater. *Health* includes physical well-being as well as mental well-being and all the things that contribute to both of them: adequate healthcare (both physical and psychological), adequate nutrition, adequate shelter, adequate sleep, exercise, financial security, friends (both human and non-human), fulfilling hobbies, fulfilling work, leisure, nature, a sense of belonging, social affirmation, sports, and travel. Finally, *social goods* include affordable and accessible childcare, clean air and water, justice, peace, reasonably regulated capitalism, rule of law, and technology.

What follows is that the bad values are their opposites. In the anti-constitutional category fall aristocracy, exploitation, fascism, inequality, and oppression. In the anti-virtues category fall bigotry, callous indifference, cruelty, dishonesty, exclusion, greed, hatred, hypocrisy, malice, malignant narcissism, tribalism, and violence.[105]

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[103] *Cf. id.* at 155 ("With the youngest children, the primary goal of moral education would seem to be character building. The goal is to inculcate the values of honesty, fairness, tolerance, and the like. With older children, the goal can shift toward helping students to understand and to think critically about controversial and difficult moral issues."); *id.* at 157 ("Moral socialization, I say, is a matter of teaching children how to feel and how to behave. As such, moral socialization is of a piece with two of the 'three Rs' of primary education: reading, writing, and arithmetic." (footnote omitted)); *id.* at 160 ("[I]t seems to me that not even the more directive kind of moral teaching must be indoctrinal."); Steve Taylor, *The Problem of Pathocracy*, PSYCHOLOGIST (Sept. 27, 2021), https://www.bps.org.uk/psychologist/problem-pathocracy [https://perma.cc/SS54-RG5E] ("[T]o my mind, a responsible, moral and benevolent person is someone who experiences a strong sense of connection to others, which expresses itself through empathy, compassion, and altruism. Because of their empathy and compassion, such people are likely to treat others with respect and promote justice and equality.").

[104] *See* WALDRON, *supra* note 14, at 59–60 ("[Dignity] is a matter of status—one's status as a member of society in good standing—and it generates demands for recognition and for treatment that accords with that status. . . . [A]s a social and legal status, it has to be established, upheld, maintained, and vindicated by society and the law . . . . ").

[105] *See* Taylor, *supra* note 103 ("A ruthless, amoral and malevolent person is someone

In the anti-successful-character-traits-and-behaviors category fall arrogance, closed-mindedness,[106] incivility, laziness, negativity, self-certainty, and self-superiority. In the anti–knowledge-and-truth category fall bad-faith conspiracy theories, dogmatism,[107] historical revisionism, propaganda, pseudo-science, stereotyping, and superstition. In the anti-art category fall all attempts to ban or suppress works of art—for example, fiction evoking love and promoting tolerance. In the anti-health category fall bullying, drug abuse, exploitative work environments, inaccessible or unaffordable healthcare, inadequate nutrition, inadequate sleep, insufficient leisure time, poverty, and unrewarding work. And in the anti–social-goods category fall natural destruction, oligarchy, political corruption, pollution, and uneven application of the laws.

Primary education generally involves promoting the good values; it is designed to help students grow into adults who will adopt and incorporate the seven categories of values and thereby become decent, law-abiding, productive, self-sufficient, and well-informed citizens.[108] By contrast, indoctrination tends to involve promoting the bad values.[109] But because they are bad, indoctrinators generally do not come right out and promote them. They generally do not, for example, say that greed is morally superior to generosity or fascism preferable to democracy. Instead, they adopt a different tactic: explicitly promoting good values in name but their opposites in application.

For example, indoctrinators will often elevate children—their mental health, safety, and innocence—as a primary good. And we all have to agree; the children come first, right? ("Parents' rights" come a close second.)[110] But they then argue that we must "protect" this primary good from "dangerous" books and "harmful" ideas.[111] And the principal "dangers" and "harms" tend to be such ideas as universal

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who experiences a strong sense of disconnection, which expresses itself through selfishness, callousness and lack of empathy. Such people are likely to exploit and abuse others and promote injustice and inequality.").

[106] *See generally* Heather Battaly, *Closed-Mindedness and Dogmatism*, 15 EPISTEME 261 (2018).

[107] *See id.* at 278 (defining dogmatism as "a sub-set of closed-mindedness . . . it is an unwillingness to engage, or engage seriously, with relevant alternatives to the beliefs or views one already holds").

[108] *See supra* notes 98, 103 and accompanying text.

[109] *See* Nachtigal, *supra* note 97, at 620–23.

[110] *See* Brooke Schultz, *Explainer: The History Behind 'Parents' Rights' in Schools*, AP NEWS (Nov. 14, 2022, 2:16 PM), https://apnews.com/article/religion-education-gender-identity-0e2ca2cf0ef7d7bc6ef5b125f1ee0969 [https://perma.cc/3VYN-6CA3] ("The movement for 'parents' rights' saw many of its candidates come up short in this year's midterm elections. But if history is any guide, the cause is sure to live on—in one form or another. Activists through the generations have stood up for a range of things in the name of parents' rights in education.").

[111] *See* Li Cohen, *Florida School District Pulls Dictionaries and Encyclopedias as Part*

equality because it threatens or offends their white privilege. So teachers must not say anything or assign any material that might be construed as putting whiteness or Christianity or conservatism in a bad light.[112] Instead, they must now either teach certain subjects in new ways (for example, whitewashing slavery) or cease discussing certain "divisive concepts" altogether (for example, systemic racism).[113] All of

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of "Inappropriate" Content Review, CBS NEWS (Jan. 12, 2024, 12:35 PM), https://www.cbsnews.com/news/florida-school-district-pulls-dictionaries-and-encyclopedias-as-part-of-sexual-or-inappropriate-content-review/ [https://perma.cc/D6FG-Z4Q6] ("One school district in Florida is looking to extend the state's book ban to an unexpected genre: dictionaries. . . . [T]he Escambia County school district has included five dictionaries, eight encyclopedias and 'The Guinness Book of World Records,' in its list of more than 1,600 books that could soon be banned."); Barbara VanDenburgh, *Book Bans Are on the Rise. What Are the Most Banned Books and Why?*, USA TODAY (Sept. 29, 2023, 8:09 PM), https://www.usatoday.com/story/entertainment/books/2022/06/29/banned-books-explained/7772046001/ [https://perma.cc/4G83-25V9] ("A dramatic uptick in challenged books over the past few years, an escalation of censorship tactics, and the coordinated harassment of teachers and librarians has regularly put book banning efforts in news headlines. . . . In 2022, the [American Library Association] recorded more than 1,200 challenges of more than 2,500 different books, nearly double the then-record total from 2021 and by far the most since the ALA began keeping data 20 years ago. The actual numbers are likely much higher . . . . A recent analysis by PEN America found that many challenged books focus on communities of color, the history of racism in America and LGBTQ characters. In fact, one in three books restricted by school districts in the past year featured LGBTQ themes or characters.").

[112] *See* Peter L. Forberg, *"No Cult Tells You to Think for Yourself": Discursive Ideology and the Limits of Rationality in Conspiracy Theory QAnon*, 67 AM. BEHAV. SCIENTIST 649, 657 (2023) ("Appeals to 'goodness' (read: White, traditional, Christian) allowed for easy recognition from other members or easier indoctrination, often presenting overbroad moral statements that lacked nuance (e.g., law enforcement is good, therefore all people who support law enforcement are good people) and could disguise the hidden agendas of malicious actors. In this way, the *good versus evil* tenet could absorb and contextualize other political beliefs and values, such as the value of free speech or the need to secure national borders."); *cf.* Amanda Marcotte, *Republicans Don't Care About Kids—Just Imaginary Children*, SALON (May 25, 2022, 1:10 PM), https://www.salon.com/2022/05/25/dont-care-about-kids--just-imaginary-children/ [https://perma.cc/AH8Y-7EF9] ("Republicans love to go on and on about fictional curricula in imaginary classrooms where dreamed-up white kids are being told that they're personally responsible for systemic racism. In reality, the whole 'critical race theory' hysteria is a hoax designed to give cover to a larger agenda meant to bully teachers into quitting, ban books, and ultimately, gut public education.").

[113] *See* Joe Heim, *Teaching America's Truth*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/education/2019/08/28/teaching-slavery-schools/ [https://perma.cc/L55B-32ZA] ("[J]ust four years ago, textbooks told students 'workers' were brought from Africa to America, not men, women[,] and children in chains. It is why, last year, a teacher asked students to list 'positive' aspects of slavery. . . . Misinformation and flawed teaching about America's 'original sin' fills our classrooms from an early age. . . . Many baby boomers were fed tales in school that masked the reality of slavery. Some teaching even emphasized the idea that Africans brought here in chains were actually better off."); Antonio Planas, *New*

this is indoctrination in the name of fighting indoctrination, not education.[114] It is a transparent attempt to promote their own selfish interests, which tend to be opposed to some of our deepest values: equality, freedom of information, freedom of speech, knowledge, and tolerance.[115]

Florida Standards Teach Students that Some Black People Benefited from Slavery Because it Taught Useful Skills, NBC NEWS (July 20, 2023, 6:14 PM), https://www.nbcnews.com/news/us-news/new-florida-standards-teach-black-people-benefited-slavery-taught-usef-rcna95418 [https://perma.cc/H29V-N9P2] ("Florida's public schools will now teach students that some Black people benefited from slavery because it taught them useful skills . . . . Other language [in the Florida State Board of Education's new standards] . . . includes teaching about how Black people were also perpetrators of violence during race massacres."); Terry Gross, *From Slavery to Socialism, New Legislation Restricts What Teachers Can Discuss*, NPR (Feb. 3, 2022, 2:10 PM), https://www.npr.org/2022/02/03/1077878538/legislation-restricts-what-teachers-can-discuss [https://perma.cc/M9TR-2KSB] ("Across the U.S., educators are being censored for broaching controversial topics. Since January 2021 . . . 35 states have introduced 137 bills limiting what schools can teach with regard to race, American history, politics, sexual orientation[,] and gender identity."); *see also* Rebecca Klein, *The Rightwing US Textbooks That Teach Slavery as 'Black Immigration,'* THE GUARDIAN (Aug. 12, 2021, 7:00 AM), https://www.theguardian.com/education/2021/aug/12/right-wing-textbooks-teach-slavery-black-immigration [https://perma.cc/7SCS-CD2P]; Anuli Ononye & Jackson Walker, *The States Taking Steps to Ban Critical Race Theory*, THE HILL (June 9, 2021, 1:13 PM), https://thehill.com/homenews/state-watch/557571-the-states-taking-steps-to-ban-critical-race-theory/ [https://perma.cc/PBU8-24R6]; Joan W. Scott, *How the Right Weaponized Free Speech*, CHRON. HIGHER EDUC. (Jan. 7, 2018), https://www.chronicle.com/article/how-the-right-weaponized-free-speech/ [https://perma.cc/5GYK-4BH6].

[114] *See* Planas, *supra* note 113 ("In January [2023], [Florida Gov. Ron] DeSantis' administration blocked a new Advanced Placement course on African American studies being taught in high schools . . . . DeSantis and [Florida] Education Commissioner Manny Diaz Jr. . . . . said that the course was a Trojan horse for 'indoctrinating' students with a left-wing ideology under the guise of teaching about the Black experience and African American history."); *Governor Ron DeSantis Debunks Book Ban Hoax*, RON DESANTIS: 46TH GOVERNOR OF FLORIDA (Mar. 8, 2023), https://www.flgov.com/2023/03/08/governor-ron-desantis-debunks-book-ban-hoax/ [https://perma.cc/GLF8-RAKJ] ("'[S]ome are attempting to use our schools for indoctrination,' said Governor Ron DeSantis. . . . 'Florida is the education state and that means providing students with a quality education free from sexualization and harmful materials that are not age appropriate.' 'Education is about the pursuit of truth, not woke indoctrination,' said Florida Commissioner of Education Manny Diaz, Jr.").

[115] *See* Jamelle Bouie, *The Republican Party Says It Wants to Protect Children, but Not All Children*, N.Y. TIMES (Mar. 31, 2023), https://www.nytimes.com/2023/03/31/opinion/protecting-children-republicans.html [https://perma.cc/PD38-FSZM] ("The way [Republicans] talk about them, these children are not real, living, vulnerable kids. They are a symbol, and the calls to protect them are an excuse, a pretext for wielding the state against the perceived cultural enemies of the American right."); Marcotte, *supra* note 112 ("The fictional threats to imaginary children are useful for political rhetoric and for bashing your opponents, with no real cost. Providing for real children cuts into resources Republicans would rather see spent on yacht improvements for their donor base. Keeping real children safe means embracing policies, like gun control, that offend the easily bruised egos of their

B. The First Amendment

The Free Speech Clause of the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech,"[116] does not mention education, no less indoctrination. So a purely textualist reading fails to determine whether the First Amendment protects public-school teachers' promotion of the kinds of values described in the previous Section. But considering the kinds of speech that the Supreme Court has placed *outside* the protection of the First Amendment—including child pornography,[117] language presenting a "clear and present danger" of "actual or imminent harm,"[118] defamation,[119] fighting words,[120] perjury,[121] and true threats[122]—it is difficult to see them adding public schools'

voting base of child-men and their wives. The examples extend far beyond the melodramatic affection for the theoretical child seen in an embryo versus the indifference to the actual children gunned down in a classroom."); Paul Waldman, *Why Is the Right Ignoring the Southern Baptist Abuse Scandal?*, WASH. POST (May 24, 2022, 1:51 PM), https://www.washingtonpost.com/opinions/2022/05/24/right-ignoring-southern-baptist-convention-abuse-scandal/ [https://perma.cc/699F-KHKH] ("There are few things that members of the American right emphasize more often about themselves than their deep commitment to protecting children—particularly when it comes to the threat of sexual abuse. . . . They'll rush to sign laws to stop the 'grooming' of children by a gay teacher mentioning that she's married to a woman. But if genuine abuse is happening in churches all over their states? That's not a good thing, but they don't think it's their job to do anything about it. No outraged news conferences, no fulminating on Fox and no bills rushed through Republican legislatures.").

[116] U.S. CONST. amend. I.

[117] United States v. Williams, 553 U.S. 285, 288 (2008) ("We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment. Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults." (citation omitted)).

[118] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.").

[119] *See* N.Y. Times v. Sullivan, 376 U.S. at 279–80 ("The constitutional guarantees require, we think, a federal rule that 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.").

[120] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the insulting or 'fighting' words—those which . . . tend to incite an immediate breach of the peace." (footnote omitted)).

[121] *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.").

[122] *See* Counterman v. Colorado, 600 U.S. 66, 69 (2023) ("True threats of violence are outside the bounds of First Amendment protection and punishable as crimes.").

promotion of good values (again, constitutional principles, humanist virtues, successful character traits and behaviors, knowledge and truth, art and beauty, health, and social goods) to the list.

More controversial is whether public schools' promotion of *bad* values—i.e., indoctrination—might qualify for the list of speech acts *not* protected by the First Amendment. Return to Bob, who espouses Trumpism. Can the GSU administration punish Bob for this political hate speech? Or does the First Amendment protect it? As I argued above, my answer is that (a) Bob's political hate speech should qualify for First Amendment protection unless is it is explicitly dehumanizing and (b) dehumanizing language should not qualify for First Amendment protection simply because it does not serve a legitimate pedagogical purpose.[123] Indeed, it should receive no more First Amendment protection than teaching students false arithmetic—for example, 2+2=5. Such speech is entirely inconsistent with the kinds of information and values that public-school teachers are morally and occupationally obligated to impart to their students.

CONCLUSION

Hate speech is a very difficult subject. One reason is that it is difficult to define; definitions tend to be either over-inclusive or under-inclusive.[124] The second reason is that free-speech jurisprudence, including from the U.S. Supreme Court, keeps moving in different, unpredictable directions.[125]

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[123] *See supra* note 93 and accompanying text.

[124] *See* Chris Demaske, *Social Justice, Recognition Theory and the First Amendment: A New Approach to Hate Speech Restriction*, 24 COMM. L. & POL'Y 347, 349–50 (2019) ("'Hate speech' is a messy, highly contested term in political theory, legal theory, legal documents, and in simple common usage with its meaning changing depending on the context of who is using it and to what ends. In addition, the term itself is often conflated or confused with other terms such as hateful speech, racist speech, or harmful speech. Defining 'hate speech' concretely, then, is a difficult task requiring a clear understanding of context and purpose." (footnotes omitted)); *cf.* Jean-Marie Kamatali, *"Hate Speech" in America: Is It Really Protected?*, 61 WASHBURN L.J. 163, 165 (2021) ("'Hate speech' is . . . more of a sociological term than a legal term. It has no single legal definition, which explains why the term is often used with quotation marks. Furthermore, the Supreme Court has deliberately avoided using this term and has not provided a legal definition." (footnotes omitted)).

[125] *See* Stephen M. Feldman, *Free-Speech Formalism and Social Injustice*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 47, 74 (2019) (referring to "the unpredictable and dynamic intersection of formalism and politics in free-speech decisions" by the Supreme Court); Tamara Lemmon, *Not High Value Because, High Value Unless: A New Threshold Question for Speech*, 48 U. DAYTON L. REV. 117, 117 (2023) ("The categorization of speech into protected and unprotected, high and low value, and the resulting consequentialist balancing test of First Amendment jurisprudence has resulted in conflicting decisions and unpredictable results."); R. George Wright, *The Problems of Overbreadth and What to Do About Them*, 60 HOUS. L. REV. 1115, 1116 (2023) ("Few important areas of the law exhibit the unpredictability of free speech overbreadth cases.").

The third, and (for our purposes) most important, reason is that the nature of hate-speech controversies can vary significantly with institution, context, speaker, and targets.[126] The First Amendment gives all participants in public schools—administrators, faculty, staff, students, invited guests, and outside speakers—broad license to say what they want. But broad is by no means absolute; we must draw lines. And this is easier said than done. Different lines must be drawn for each category of speaker, and even more lines must be drawn for the many different contexts in which the speaker speaks: the classroom, the office, the gym, the school newspaper, social media, etc.[127] So many different lines must be drawn that it quickly becomes tempting to give up the whole project altogether and just leave it to the courts and schools to work out each situation on a case-by-case basis. But this approach invites arbitrariness, and arbitrariness is unacceptable when the stakes are so high—not only people's fundamental rights but also their livelihoods and careers.

In this Article, I have tried to draw the right lines for what I predict will be one of the more common situations over the next five to ten years: public-school teachers engaging in political hate speech. I have argued that they *may* be disciplined for this speech when, and only when, it is dehumanizing. My position is certainly controversial, but I think that the only alternative—*allowing* public-school teachers to engage in dehumanizing speech *with impunity*—is much *more* controversial. To be sure, such free-speech "absolutism" is a simpler position and much easier to implement. But it would ultimately cause much more emotional, social, and institutional harm than would my more principled approach.

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[126] *See generally* HEYMAN, *supra* note 24, at 164–83.

[127] *See id.* at 182 ("[C]ontext is important: as [Robert] Post has suggested, it may be reasonable to apply different rules to the dormitories, classrooms, and open spaces of universities." (footnote omitted)).