we believe that censorship of words leads inevitably to the censorship of ideas. It is tempting to say that campuses should at the very least be able to prohibit epithets; words like “nigger” and “faggot” cause great harm. But it is not difficult to imagine contexts—in scholarly analysis, popular culture, or casual conversation—where the use of any given word would be considered appropriate. As Justice Harlan eloquently explained: “We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”

Hate speech codes inescapably ban the expression of unpopular ideas and views, which never is tolerable in colleges and universities.

But even if colleges and universities can’t and shouldn’t try to ban hate speech, they still must act to create a conducive learning environment for all students. The question becomes: what can they do?

CHAPTER FIVE

What Campuses Can and Can’t Do

We understand and often sympathize with those who want to punish hateful speech because they believe colleges and universities must take seriously their responsibility to maintain inclusive, nondiscriminatory learning environments. Those of us who believe in free speech values will not win over this generation of students by mocking them, calling them weak or coddled, or dismissing their legitimate concerns. They are correct to highlight the harmful impact of hateful or bullying speech, and correct that historically underrepresented groups face barriers to full inclusion within higher education. Free speech advocates must acknowledge the admirable values that tempt people toward censorship, and then provide a road map for addressing these issues in a way that does not undermine
higher education's necessary commitment to free speech, academic freedom, unfettered inquiry, and robust debate. That is our goal in this chapter.

A major barrier to these efforts is that there is still much confusion about what free speech on college campuses actually means. Some students, hearing administrators talk about the value of free speech, will show up at campus events and shout down speakers they do not like, claiming that they are merely exercising their right to speak. Faculty members who claim the right to express themselves freely in public settings or on social media may argue that the same principles of freedom allow them to do whatever they want in their classrooms or prevent review of the quality of their scholarship. Campus efforts to nurture a voluntary culture of civility may encourage demands for mandatory trigger warnings on syllabi. The fact that universities prevent faculty and students from acting hatefully or uncivilly in professional academic settings leads to demands that administrators also punish people who are hateful or uncivil when protesting on campus. The freedom to protest on open campus grounds is used to claim a right to occupy campus buildings in a way that disrupts the campus's teaching mission or basic operation.

Some of these mistakes reflect a lack of information about basic free speech principles in the United States. Others are based on a failure to take into account the difference between general precepts of free speech, which apply without regard to the special teaching and research mission of college campuses, and the principles of academic freedom, which govern the expression of ideas within professional academic settings. Colleges and universities are properly expected to recognize both a professional zone, which requires standards of peer review, scholarly norms, teaching excellence, and appropriate conduct in the work environment, and a free speech zone, which explicitly rejects professional educational standards in order to allow for a more raucous space of expression, governed only by the principles of the First Amendment.

We will describe, as specifically as we can, what should be permissible and desirable, and impermissible and undesirable, as universities deal with charges that certain forms of expression interfere with students' learning or make them feel unwelcome on campus. We offer this guidance as related pairs of 'can's' and 'can'ts'—what campuses can and can't do to create inclusive learning environments. We realize, of course, that the First Amendment restricts only government action, so in a legal sense these guidelines apply only to public institutions. But as we have argued throughout, academic freedom should be the same at public and private schools: the principles we describe should apply to both.

A campus can't censor or punish speech merely because a person or group considers it offensive or hateful. A campus can censor or punish speech that meets the legal criteria for harassment, true threats, or other speech acts unprotected by the First Amendment.

Colleges and universities can never punish the expression of ideas. The very core of a university's mission requires protection of all views, no matter how objectionable or offensive they may be to some students and faculty.

The Supreme Court has made clear that this is a basic principle of the First Amendment. For example, in Street v.
enforcement, on public land approximately one thousand feet from the church where the funeral was held. The picketers peacefully displayed signs reading “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.”

Albert Snyder, Matthew Snyder’s father, saw the tops of the picketers’ signs when driving to the funeral but did not learn what they said until he watched a news broadcast that night. He sued Phelps, Phelps’s family members who were with him at the funeral, and the Westboro Baptist Church under Maryland state law, claiming intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. A jury in federal court ruled in Snyder’s favor, and the district court judge allowed a $10 million judgment to stand. But the Supreme Court, with only Justice Samuel Alito dissenting, supported the rights of the protestors. As Chief Justice John Roberts explained, “Such speech cannot be restricted simply because it is upsetting or arouses contempt. Indeed, ‘the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.’” Roberts also emphasized that there cannot be liability for “intentional infliction of emotional distress” if the speech is protected by the First Amendment.

Still, we do not take the untenable position that freedom of speech is absolute. The Supreme Court has long recognized categories of unprotected and less-protected speech, and these exceptions are crucial for colleges and universities. They must have the ability to prohibit true threats, harassment,
destruction of property, and speech that disrupts classes or campus activities.\textsuperscript{10}

**True Threats**

No one has a First Amendment right to cause another person to reasonably fear for his or her physical safety. The Supreme Court has held that “true threats” are not protected speech, a principle it first articulated in *Watts v. United States* (1969).\textsuperscript{11} In that case, Robert Watts was heard to say, “If they ever make me carry a rifle the first man I want to get in my sights is LB [President Lyndon Johnson]. They are not going to make me kill my black brothers.” He was convicted of violating a law that made it a crime to “knowingly and willfully . . . [threaten] to take the life of or to inflict bodily harm upon the President.”\textsuperscript{12} The Court ruled that the government must “prove a true ‘threat.’ We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term.”\textsuperscript{13} The Court elaborated on the meaning of “true threat” in *Virginia v. Black* (2003), explaining that “true threats’ encompass those statements when the speaker means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.”\textsuperscript{14}

On college campuses, speech should be subject to punishment if it causes a reasonable person to fear for his or her safety. True threats fall outside the protections of the First Amendment because a prohibition on such speech “protects individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”\textsuperscript{15}

The assessment is based on a “reasonable person” standard, not on the subjective view of any concerned person, because otherwise campuses will be back in the position of having to censor or punish speech merely because an especially sensitive or fearful person claims to feel threatened by the expression of ideas he or she does not like. In the context of a campus environment, the definition of “true threat” can focus on how a reasonable student would interpret the speech.

While we recognize the inherent difficulty of applying any “reasonable person” standard, it has proven to be workable for determining when speech can be punished. For example, the United States Court of Appeals for the Ninth Circuit used that standard to conclude that an anti-abortion website constituted a true threat against doctors who were featured in “wanted posters” that included their home addresses and personal information and said they were “wanted for crimes against humanity,” especially after other doctors who had been similarly depicted had been murdered.\textsuperscript{16} The court explained that “a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person”; thus the speech was “unprotected by the First Amendment.”\textsuperscript{17}

Preventing “true threats” focuses on protecting a person from fear of physical harm, but not from emotional injury. We believe this distinction is essential. If emotional harm were enough to justify suppression or punishment of speech, any view or idea that caused emotional distress could be stopped. We do not discount the importance of emotional injuries, but we see no way to allow liability for emotional harms without also allowing restrictions on the expression of ideas and views.
WHAT CAMPUSES CAN AND CAN'T DO

Harassment

Freedom of speech does not protect a right to harass an individual on account of his or her race, sex, religion, or sexual orientation. What is the line between permissible speech and impermissible harassment? The mere presence of offensive speech cannot be enough for harassment, but there is no free speech right to subject a person to repeated, directed actions that interfere with his or her education.

The law of harassment developed under Title VII of the 1964 Civil Rights Act, which prohibits employers from "discriminat[ing] against any individual with respect to his . . . conditions or privileges of employment because of such individual's race, color, religion, sex or national origin." At the urging of scholars such as Catharine MacKinnon, the Supreme Court recognized workplace harassment as a form of discrimination prohibited by Title VII. MacKinnon argued that there are two basic types of sexual harassment: quid pro quo harassment, such as when an employer says, "sleep with me or you're fired," and a hostile, intimidating or offensive workplace.

While the first category, quid pro quo harassment, poses no problems under the First Amendment, the second category raises difficult free speech questions. Nevertheless, the Supreme Court has adopted this framework and found that sexual harassment in the workplace violates Title VII. In recent decades, courts and administrative agencies have clarified the boundaries between free speech and harassment. Regulations adopted by the Equal Employment Opportunity Commission (EEOC) identify five elements that must be met for a claim of hostile workplace harassment:

- verbal or physical conduct of a sexual or sex-based nature;
- the conduct is unwelcome;
- the conduct is directed against an individual because of her (or his) sex;
- the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment;
- the employer knew or should have known of the conduct and did not take adequate action to stop or prevent it.

Title IX of the Education Amendments of 1972 prohibits educational institutions receiving federal funds from discriminating on the basis of sex, and the Department of Education has created regulations and interpretive guidelines that are similar to the ones put forward by the EEOC. In Franklin v. Gwinnett County Public Schools, the Supreme Court unanimously ruled that a student has the same right to sue for sexual harassment under Title IX that an employee has under Title VII. Title VI of the 1964 Civil Rights Act prohibits recipients of federal funds, including universities, from discriminating based on race, and race-based harassment is subject to the same five-part test.

These legal developments have made campuses fully obligated to comply with the anti-harassment components of federal anti-discrimination law, which include training requirements, reporting requirements, the establishment of effective grievance procedures, taking immediate and appropriate
action when an employee complains, and protecting those who file discrimination charges from retaliation. There is also well-settled case law on the circumstances under which campuses are expected to take affirmative steps to learn about discriminatory conditions, so that they cannot later claim ignorance. These requirements—which extend to both the workplace and the learning environment—often go unnoticed outside the campus administration. Individual instances of offensive speech draw far more attention than the daily efforts to satisfy the requirements of federal anti-discrimination law. But the constant attention to ensuring compliance with federal law is crucial in creating a positive culture of non-discrimination.

The Foundation for Individual Rights in Education has explained that “discriminatory harassment, properly understood and as defined by the Supreme Court, refers to conduct that is (1) unwelcome; (2) discriminatory; (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) ‘so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.’” As one commentator wrote, speech must “meet a threshold of severity or pervasiveness that would objectively prevent an individual from participating in educational programs.” Speech that merely expresses offensive views toward a protected class or is rude, discourteous, or “simple teasing” does not rise to the level of adversely affecting a student’s educational opportunities and benefits.

Under this approach, a noose placed on a tree on a campus cannot by itself be deemed harassment, but a noose tacked to an African American student’s door in a dormitory could be regarded as harassment (or a true threat) unprotected by the First Amendment. Singing a highly offensive racist song on a bus, as occurred at the University of Oklahoma, is protected by the First Amendment, but repeatedly yelling racist epithets at minority students on campus is not. Saying hateful things to a general audience in a public place is protected, but a person who adds African American students to a group text message with racially charged images and threats of lynching can be punished because this targeted act can be reasonably interpreted as representing harassment or a true threat of harm to particular people. Posting an anti-Asian rant on YouTube cannot be punished, but targeting Asian students with repeated harassing emails can be.

These principles call into question a recent decision of the University of Oregon to treat offensive expression by a professor as discriminatory harassment. In October 2016, the University of Oregon Law School suspended Nancy Shurtz, a law professor, after she wore blackface and a hospital gown at a Halloween party. She said that she was doing so to promote a conversation about race, inspired by her admiration for Dr. Damon Tweedy’s book Black Man in a White Coat. Twenty-three law school faculty members wrote a letter urging the professor to resign. The University of Oregon commissioned an investigation which found that her costume exacerbated racial tensions on campus in a way that had a disproportionate impact on students of color, because “minority students [felt] they have become burdened with educating
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other students about racial issues and racial sensitivity and because some students used “other offensive racially based terminology during class times in the context of discussing this event and broader racial issues.” The report concluded: “We find that Nancy Shurtz’s costume . . . constitutes a violation of the university’s policies against discrimination. We further find that the actions constitute discriminatory harassment.”

We, of course, understand why students and faculty were offended by the professor’s actions, and it is clear that the campus was roiled by the ensuing sense of outrage. But it is deeply troubling to use the law of harassment as the basis for finding that her speech was unprotected and that she could be sanctioned for her actions. From the vantage point of ensuring a culture of free expression, there is no difference between sanctioning faculty members because administrators or donors object to their views and sanctioning them because many students are outraged or have been made uncomfortable by the subsequent conversations that arose as a result of otherwise protected speech. Either justification creates boundless opportunities to fire professors for expressing unpopular opinions or ideas. Being very upset that a faculty member or student said something hateful, offensive, or ignorant cannot transform protected speech into harassment without fatally undermining free speech protections. Any other approach risks punishment for any speech that enough members of the academic community refuse to tolerate.

Similarly, anti-discrimination obligations under Title VI and Title IX should never lead campuses to investigate a person merely because a member of the university community is offended by his or her expression of a view. Before any steps are taken by a university, the complaining party should be required to identify a pattern of discriminatory conduct that falls within the legal definitions of harassment.

We make this point because there is reason to be deeply concerned about how the Department of Education’s Office of Civil Rights (OCR) is interpreting obligations on campuses, and whether it is forcing campuses to violate free speech guarantees. A months-long investigation of professor Laura Kipnis should not have been triggered by her publishing an article in a scholarly journal. The OCR should not have instructed the University of New Mexico to punish unwelcome “verbal conduct” of a sexual nature that did not amount to harassment. In light of these occurrences, the OCR should immediately clarify that campuses will not be at risk under Title VI or Title IX for failing to restrict or punish protected speech, and it should update its guidelines to ensure that no investigations by campuses or by OCR can be triggered merely by an allegation that someone was upset by the expression of ideas or views.

Destruction of Property

There is, of course, no First Amendment right to destroy someone else’s property, even if it is done to communicate a message. Colleges and universities can punish such conduct.

Disruption of Classes and Campus Activities

There is no First Amendment right to disrupt classes or other campus activities. This is a corollary of the long-established principle that there is no right to speak in ways
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that constitute an actual breach of the peace. A person has a general right to express a point of view, but not with a bullhorn outside someone's house in the middle of the night. People have a right to decry what is happening at a judicial proceeding, but not to go into a courtroom and shout during those proceedings. People have a right to have their say, but not in a way that prevents others from going about their legitimate business. The key is that any restrictions must be content-neutral and must apply to disruptive speech regardless of its subject or viewpoint.

This limit on speech is illustrated by an incident on our campus some years ago. On February 8, 2010, Israeli ambassador Michael Oren spoke at an event at the University of California, Irvine, at the invitation of several schools and groups on campus. As he began to speak, a student from the audience shouted so that Ambassador Oren could not be heard. The disruptive student was removed and Oren again began to speak, only for another student to shout so that Oren again could not be heard. This happened eleven times with eleven different students; each student was removed, and ultimately Oren was able to speak.

The students claimed that their speech was protected by the First Amendment, but this claim was ultimately rejected by the courts. The protestors could have held their own event or picketed or distributed leaflets, but disrupting a speaker is not conduct protected by the First Amendment. Campuses can and should prevent or punish disruptive efforts designed to deny others their free speech rights. As expressed in the Statement on Principles of Free Expression at the University of Chicago, written by professor Geoffrey Stone, “Although faculty, students and staff are free to criticize, contest and condemn the views expressed on campus, they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe.”

Likewise, there is not a First Amendment right to occupy campus buildings, block access to them, or otherwise interfere with normal university functions. To say that these activities are not protected by free speech principles does not mean that they always should be punished. There are certainly instances where it seems wiser to allow the students to temporarily disrupt an event, or occupy a building or offices within it, in the hope of avoiding the ill will engendered by a show of force. But that kind of accommodation is entirely discretionary and based on practical considerations rather than principles of free speech. It is especially important to avoid such accommodations when the goal of protestors is to interfere with others on campus who are exercising their rights. Allowing short-term protest activity in the lobby of an administrative building is less a threat to free speech values than allowing disruptions of unpopular speakers or the expression of ideas in educational settings. Campuses should be especially vigilant to prevent those sorts of disruptions or to respond to them as serious violations of campus codes of conduct.

A campus can’t prevent protestors from having a meaningful opportunity to get their views across in an effective way.

A campus can impose time, place, and manner restrictions on protests for the purpose of preventing protesters from disrupting the normal work of the campus.
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including the educational environment and administrative operations.

The Berkeley Free Speech Movement established the principle that students and faculty have the right to express themselves on a broad range of topics, and have the right to use campus grounds for personal and political expression. Campuses thus must make efforts to accommodate this expression in ways that make it meaningful and that allow members of the campus community to find an audience. Campuses cannot separate protestors from all potential audiences by restricting them to marginal areas.

Yet it has been a long-standing aspect of First Amendment law that communities can impose reasonable “time, place, and manner” restrictions on expression. This phrase refers to government’s ability to regulate speech in a public forum—government property that it is required to make available for speech—in a manner that minimizes disruption of a public place while still protecting free speech. You have a right to protest, but not to block the freeway. You can use a bullhorn in a public park, but not in a public library. In some locations, what you are allowed to say in public at noon perhaps may not be said at midnight. You can hold up placards or signs, unless your doing so would block the views of the people behind you. As a rule, the Court has approved reasonable time, place, and manner restrictions “provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.”

In Heffron v. International Society for Krishna Consciousness, Inc. (1981), for example, the Supreme Court upheld a regulation at the Minnesota State Fair that prohibited the distribution of literature or the soliciting of funds except at booths, which were available on a first-come, first-serve basis. The International Society for Krishna Consciousness wanted its members to do these things while walking the fairgrounds, and it argued that that the regulation violated its religious freedom. The Court said that the regulation was content-neutral because it applied to all literature and solicitations, regardless of the speaker, viewpoint, or subject matter, and was a reasonable way of regulating the flow of pedestrian traffic through the state fairgrounds. The Court also observed that the Krishna group had other ways of reaching its audience: its members could walk around outside the fairgrounds, or they could obtain a booth.

Many other time, place, and manner restrictions have also been upheld. In Kovacs v. Cooper (1949), the Court upheld a restriction on the use of sound amplification devices such as loudspeakers on trucks. In Grayned v. Rockford (1972) it upheld a city ordinance that prohibited any “person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, [from making] any noise or diversion which disturbs or tends to disturb the peace or good order of such school.” The Court said that the “crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”

Time, place, and manner restrictions apply on college campuses as well. Campuses can designate certain areas as
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speech zones and restrict speech in other areas, so long as the rules are not based on the content of the speech and the zones are not so restrictive as to prevent speakers from having a meaningful opportunity to get their views across. For example, campuses cannot use time, place, and manner regulations to restrict students to one small designated free speech zone that can only be used with prior permission between 9 a.m. and 4 p.m., and exclude any free speech on public sidewalks, walkways, lawns, and other outdoor areas. However, campuses can limit speech activities in and near classroom buildings while classes are in session to prevent disruption of class activities. Schools can condition the use of special facilities on requirements that apply to all, such as limits on occupancy or proof that outside security officials are properly bonded and insured. They may deny requests for gatherings that present insurmountable logistical or security challenges, or if accommodating such challenges would impose costs above a generally applied threshold. More broadly, they can prohibit the disruption of speakers or other campus activities, such as commencement, and can restrict or punish individuals who attempt disruption.

* A campus can’t impose content-based speech restrictions in dormitories.

* A campus can impose content-neutral restrictions in dormitories designed to ensure a supportive living environment for students.

The concept of time, place, and manner restrictions has special significance for college dormitories. It is crucial that campuses protect dormitories as spaces where students can find repose. Therefore, they are places where speech can be restricted, so long as the restrictions are not based on the views expressed. The Supreme Court already has recognized this for speech around people’s homes. In *Frizby v. Schultz* (1988), the Court sustained an ordinance that prohibited picketing “before or about” any residence. Although it was adopted in response to targeted picketing of a doctor’s home by antiabortion protesters, the Court concluded that the law was permissible because it was content neutral and was narrowly tailored to protect people’s tranquility and repose in their homes. Justice O’Connor wrote for the Court, “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech . . . . The resident is figuratively, and perhaps literally, trapped within the home.”

Colleges and universities can and should apply this standard to speech in dormitories. Students in dormitories, too, are captive audiences.

But even regulations meant to protect a captive audience cannot be based on the ideas espoused. What is placed on walls or bulletin boards or in dormitory windows may be regulated so long as the rules are content neutral and applied in a content-neutral manner. A campus may choose to keep students from putting bulletin boards on their doors or displays in their windows, but universities cannot target and exclude certain views and not others. For instance, a campus could have a rule preventing students from affixing anything to the windows of their dormitory rooms, but a campus could not prohibit just the display of Confederate flags on dormitory windows.
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A campus can’t censor or punish some speakers, but not others, for putting up handbills, writing messages in chalk, or engaging in similar acts of expression.
A campus can create general content-neutral regulations governing on-campus expression.

There must be places on campus available for speech, even if providing them imposes some costs on the university. Hague v. CIO and Schneider v. State of New Jersey, both decided in 1939, were crucial in recognizing this right. Hague involved an attempt by a mayor to prevent a union, the Congress of Industrial Organizations, from organizing in his city. An ordinance was enacted that prohibited all public meetings in the streets and other public places without a city permit. In a famous plurality opinion, Justice Owen Roberts found that there was a right to use government property for speech purposes. Roberts wrote: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”

In Schneider, the Court struck down a city ordinance that prohibited the distribution of leaflets on public property. The city of Irvington, New Jersey, maintained that it could do so to minimize litter and maintain the appearance of its streets. The Court rejected this argument. In another opinion by Justice Roberts, the Court said: “We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.”

Schneider is important because it established that a city must allow speech on its property even if doing so will impose costs on the city, especially because “the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

People thus have a right to hand out leaflets on campus or write on the sidewalk in chalk, even though this will impose costs for cleaning up on the university. But campuses can have content-neutral rules, such as time, place, and manner restrictions. If a campus permits chalking, it could say that chalking has to be on outdoor sidewalks that are open to the rain, not on the sides of buildings, and it may prohibit spray paint. A school could say that leaflets can be distributed in public areas of the campus, but not placed under the doors of students’ dorm rooms. Such rules are permissible because they apply to all expression and serve obvious important interests.

A campus can’t engage in content-based discrimination against faculty, students, or other speakers or writers who seek to express themselves outside the professional educational context.
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A campus can engage in content-based evaluation of faculty and students who are operating within the professional educational context, as long as this evaluation is based on professional standards or peer assessments of the quality of scholarship or teaching.

We are disturbed that some campuses have recently excluded speakers with controversial viewpoints, or ruled that an invited speaker will not be allowed unless there is a competing perspective at the event. Campuses must be open to all ideas and views, no matter how controversial or even offensive, and outside of the educational context they cannot mandate the creation of a balanced or impartial program. In the free speech zone, speakers or groups are allowed to have their say on their terms. Of course, a campus can't prevent students from expressing their disagreement with invited speakers or other campus activities; in fact, they should work to create a culture that welcomes controversial speech and encourages opponents to engage and rebut it rather than try to suppress it.

For faculty, freedom of speech is essential to the exercise of academic freedom. This was eloquently expressed by the Supreme Court in Sweezy v. New Hampshire (1957), where the Court found unconstitutional a college professor's conviction for contempt because he refused to answer questions about his political beliefs. Chief Justice Earl Warren wrote for the Court:

Academic freedom and political expression [are] areas in which government should be extremely reticent to tread. The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those

It follows that that faculty members at public universities must be accorded First Amendment protection that the Supreme Court has denied to other government employees. In Garretti v. Ceballos, the Court held that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties. The case involved Richard Ceballos, a supervising district attorney in Los Angeles County who concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth. He wrote a memo to this effect and felt that he was required by the Constitution to inform the defense of this. As a result of this speech, Ceballos alleged that his employers retaliated against him, transferring him to a less desirable position and denying him a promotion. Although the Supreme Court long has held that the speech of government employees is constitutionally protected, it ruled against Ceballos. The Court drew a distinction between speech "as a citizen" and speech "as a public employee," and said only the former is protected by the First Amendment. The Court expressed great concern about the disruptive effects of
allowing employees to bring First Amendment claims based on on-the-job speech.

As applied to public colleges and universities, 
Garcetti v. Ceballos (2006) would mean that professors have no First Amendment protection for their scholarly writing or teaching because it is speech on the job and within the scope of their duties. Justice David Souter, in dissent, stressed his concern for what this would mean for academic freedom and the Court acknowledged that academic freedom could pose a different issue that it was not addressing. The Ninth Circuit subsequently reached exactly this conclusion: “We conclude that 
Garcetti does not—indeed, consistent with the First Amendment—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.” This is an essential clarification of how 
Garcetti should apply in settings that implicate the values of academic freedom.

But the First Amendment and principles of freedom of expression do not preclude campus evaluation of the professional quality of teaching or scholarship, nor do they preclude the campus from requiring that faculty members be fair-minded when presenting materials in educational settings. Neither free speech principles nor academic freedom gives a faculty member the right to use the classroom as his or her personal platform for the expression of political opinions without regard to professional norms, or to prevent students from having their fair opportunity to express views without fear of being punished.

This principle was reiterated by the University of California in 2003 after a controversy over a course description by a pro-Palestinian basic writing instructor at Berkeley. Entitled “The Politics and Poetics of Palestinian Resistance,” the description referred to “the brutal Israeli military occupation of Palestine” and warned that “conservative thinkers are encouraged to seek another section.” After a media firestorm, University of California president Richard Atkinson asked Berkeley law professor Robert Post (later the dean at Yale Law School) to examine the issues of academic freedom that the controversy raised.

In his report, Post noted that it would not be proper to criticize the course on grounds of offensiveness, because “robust scholarly dialogue . . . can be fierce, consequential, and hurtful to those who care intensely about their ideals.” Rather, the key question was “whether the course description complies with relevant professional standards,” and while faculty may be permitted to convey to students that course material will be approached from a certain perspective, that is different from “using a course description as a platform for political preaching. It is possible that the rhetoric of a course description can become so excessive as to become a political tract that bears little relationship to the pedagogical justification of disclosure [of personal perspective]. Faculty members have no business using course descriptions for the mere purpose of disseminating their political views.” While “there is no academic norm that prohibits scholarship from communicating definite viewpoints about important and controversial issues,” the faculty must also recognize “the academic freedom of students,” including their “right to think freely and to exercise independent judgment.” The debate led the university to revise its statement of academic freedom to clarify professors’ right to express themselves in class with passion, but also to note their obligations to be judged by professional standards and to defend the rights of their students.
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Faculty members may choose to provide students warnings before presenting material that might be offensive or upsetting to them.

Colleges and universities should not impose requirements that faculty provide "trigger warnings" before presenting or assigning material that might be offensive or upsetting to students.

Recently, many campuses have considered requiring faculty members to post warnings on syllabi and course materials if some students might find the course content emotionally disturbing. In February 2014, student leaders at the University of California, Santa Barbara, passed a resolution encouraging professors to include trigger warnings in the syllabi for courses that contain potentially upsetting content.

The resolution also urged professors of any such course to "not . . . dock points from a student's overall grade for being absent or leaving class early if the reason for the absence is the triggering content." A guide distributed to professors at Oberlin College instructed them: "Triggers are not only relevant to sexual misconduct, but also to anything that might cause trauma. Be aware of racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of privilege or oppression."

Warning students before exposing them to offensive or upsetting material is nothing new. Before we read our students the racist chant from the fraternity at the University of Oklahoma, we cautioned them that it was racist and deeply offensive. Long before anyone coined the phrase "trigger warnings," we would warn students when we were coming to material that might be offensive, such as in playing for them George Carlin's monologue on the "seven dirty words" when studying the Supreme Court decision about it.

Trigger warnings might be seen as "more speech," since they use speech—the warnings—to prepare students for exposure to offensive material. They also show that the professor is sensitive to the difficulty in dealing with the material. We thus reject the view that all trigger warnings are to be condemned as "coddling of students."

Still, although we do not object such warnings, it is wrong for universities to require them. Professors need to decide how to best educate their students, and for some faculty members, this might include a professional judgment that being exposed to material without a warning makes for more effective instruction. Requiring trigger warnings might cause some professors to change their course assignments and course coverage. It also may force professors to characterize their material in a way that does not reflect their views of the material or the appropriate response to it. Labels warning students that a book's themes are racist or sexist may bias students' reactions in a way that faculty members consider wrong or unfair, and would cast the same pall of censorship that would exist if college librarians were required to add warning labels to the front of selected library books. Although trigger warnings are often desirable, we agree with the Committee on Academic Freedom for the AAUP, which declared, "Institutional requirements or even suggestions that faculty use trigger warnings interfere with faculty academic freedom in the choice of course materials and teaching methods."
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Campuses can create “safe spaces” in educational settings that ensure that individuals feel free to express the widest array of viewpoints, and can support student efforts to self-organize in ways that reflect shared interests and experiences.

Campuses can’t use the concept of “safe space” to censor the expression of ideas considered too offensive for students to bear.

The phrase “safe spaces” has been applied to many different activities on campuses. The concept can be used in ways that enhance free speech and in ways that undermine it. For example, it is appropriate—and even necessary—for campuses and professors to do all they can to make sure that the classroom is a safe space for scholarly exploration, civil debate, reasoned discussion, and making mistakes. The best educational environments remove fears that students may have about asking certain questions or challenging prevailing explanations; the worst environments are those where students feel that they can be punished for expressing views that the professor or other classmates consider heretical. A classroom should be a place where antiracism advocates can ask about the role of race in the choice of course materials, conservatives can question the wisdom or constitutionality of affirmative action, and socialists can criticize the dominant position of the concept of efficiency in economic models. It is a good thing when the idea of a “safe space” refers to a place where one feels safe to express an opinion, without punishment, harassing judgment, or bullying condemnation. It is the theme of this book that campuses must be safe spaces in this sense.

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The concept is also used to refer to efforts by students to exercise their rights of association and create places on campus where they are with people who are like-minded or who share certain experiences. Campuses have always had student societies, fraternities and sororities, student government groups, chess clubs, band rooms, gatherings of College Republicans and College Democrats, theater groups, Christian clubs, Hillel and Chabad, and countless other associations that allow members of a diverse student body to find their place. It raised no concerns in earlier years and should raise no concerns today when its advocates are underrepresented minority students or the LGBTQ community. In fact, if campuses prevented such ordinary activity they would be limiting the associational rights of students in violation of free speech principles.

However, the concept of space spaces also has been used as a basis for demanding that campuses protect students from being exposed to disagreeable or offensive ideas. This is the “safe space activism” underlying the “no platform” movement among students in the UK, and also underlies much of the rhetoric used by some student groups who demand that American campuses remove all hateful or offensive speech. At Emory University, after Trump supporters chanted “Trump” on sidewalks, one protestor complained, “I’m supposed to feel comfortable and safe [here]. . . . I don’t deserve to feel afraid at my school.” When Wesleyan University’s newspaper, the Argus, published an opinion essay that criticized the Black Lives Matter Movement, critics pushed to defund the newspaper on the grounds that publishing such an essay “neglects to provide a safe space for the voices of students of
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When conservative commentator Ben Shapiro spoke at the University of Wisconsin on the topic of “Dismantling Safe Spaces: Facts Don’t Care About Your Feelings,” protestors declared Shapiro’s mere presence on the campus as a threat to the sense of safety and “personal violences” of many students, and interrupted the speech with repeated shouts of “safety!” Campuses cannot and should not accommodate the language of safe spaces when the focus is protecting members of the campus from the expression of ideas, rather than creating a safe environment for the expression of ideas.

A campus can’t prohibit students or faculty from using words that some consider to be examples of “microaggressions.”

A campus can sensitize students and faculty to the impact that certain words may have, as part of an effort to create a respectful work and learning environment.

The concept of microaggressions is now much discussed. As one commentator observed: “The term ‘microaggression’ was used by Columbia professor Derald Sue to refer to ‘brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color.’ Sue borrowed the term from psychiatrist Dr. Chester Pierce who coined the term in the 70s.”

In most current debates, the word “microaggression” refers to a very familiar idea: sometimes, even if we do not intend it, our everyday language is disrespectful to others. The language commonly used in society and in the workplace has changed dramatically for the better over the years. The “hon-epies” or “darlings” that might have been prevalent in the office during the age of Mad Men are happily less prevalent. It should embarrass all people of goodwill to remember what the dominant culture thought was permissible to say, in polite company, about racial, ethnic, and religious minorities, or what used to be considered funny. At each moment of progress it has also been common to hear people grumble that the complaining groups are too sensitive or are engaging in annoying gestures of political correctness.

To the extent that current debates about microaggressions are an extension of this ordinary social evolution, the topic raises no free speech issues. Campuses should try to sensitize their communities to the kinds of words and statements that might be unintentionally offensive. We should all listen when others tell us they feel insulted and hurt. If the changes in language that campuses occasionally suggest seem unnecessary or too extreme, that can be debated or criticized. Campuses should also take steps—through formal training and other initiatives—to sensitize the community about the insidious effects of implicit bias.

A problem arises only when there are efforts to force campuses to police and punish such expression. Outside the legal limits on harassment and other unprotected activities, campuses are not permitted to do this. The occasional use of a phrase that some people find offensive cannot be the basis for censorship or punishment. There is an enormous difference between advocating norms of civility in expression—which always exist and which we all are taught from a young age—and enforcing these norms by censorship or punishment.
Microaggressions are an example of how a false dichotomy is often drawn between campuses punishing speech or their doing nothing. There is a middle course of campuses working to educate students as to situations where their words can cause harm, often unknowingly.

*A campus can ensure that all student organizations, as a condition for recognition and receipt of funding, be open to all students, and can impose sanctions on student organizations for conduct if it is not protected by principles of freedom of speech.*

*A campus cannot deny recognition to a student organization or impose sanctions against it for the views or ideas expressed by the organization, its members, or its speakers.*

In *Christian Legal Society v. Martinez* (2013), the Supreme Court upheld the University of California, Hastings College of Law's policy that required that "Registered Student Organizations" (RSOs) accept "all-comers" and prohibited discrimination based on characteristics such as race, sex, religion, disability, or sexual orientation. The Christian Legal Society at Hastings Law School required its members to sign a "Statement of Faith" which affirmed a belief in Jesus Christ as their savior; the Society also excluded "unrepentant homosexuals" from membership. Hastings refused to recognize the Christian Legal Society as an RSO, which meant that it could not get student activity funds or officially reserve school facilities for its use. The Supreme Court, ruling in favor of Hastings, explained that "the open-access policy ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students," and "encourages tolerance, cooperation, and learning among students," and "incorporates—in fact, subsumes—state-law proscriptions on discrimination." The Court found that the policy was, by definition, viewpoint neutral.

We share the Supreme Court's view that officially recognized student organizations should be open to all students. Moreover, student organizations should not be subject to punishment, such as denial of recognition or of funding, for the views they express or those conveyed by their members or speakers. But, of course, organizations may be sanctioned for conduct that is not protected speech and they can be punished if their membership rules violate antidiscrimination laws and rules. A student organization that plans a disruption of a school activity or systematically harasses other students can be punished, just as individual students who engage in such conduct can be punished.

*Colleges and universities can punish speech over the internet and social media that otherwise is not protected, such as true threats and harassment or speech inconsistent with professional standards.*

*Colleges and universities can't punish speech over the internet on the ground that it is offensive.*

Throughout this chapter, we have deliberately drawn no distinction based on the medium used for speech. There is no reason for campuses to treat speech differently based on whether it is transmitted through old means or new. We recognize, of course, that the internet and social media make it possible for harmful speech to reach a large audience very quickly. But the principles of free speech do not change.
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Speech on the internet and social media cannot be prohibited or punished on the ground that it is offensive, even deeply offensive; colleges and universities may punish threats or harassment that occur via these media; and campuses and their officials can and should respond with more speech when appropriate.

Nor does it matter that speech on the internet and social media are not in any particular location. Some people argue that because the internet and social media are “off campus,” colleges and universities may not impose discipline for speech that occurs via these media.7 We reject this position. If a student’s speech over social media constitutes a true threat or meets the test for harassment of another student or faculty member, it is not protected by the First Amendment. The expression is what causes the harm; its physical location is incidental.

Others have suggested that campuses be limited to regulating speech over social media that relates to the academic program of the university. Jeffrey Sun, Neal Hutchens, and James Breslin, for example, argue: “With speech occurring outside of an instructional setting, ... a sufficient curricular nexus should exist ... to subject student speech to institutional authority on academic grounds.”78 There is no doubt that colleges and universities can discipline a student’s online speech if it relates directly to his or her academic program.79 For example, in Tatro v. University of Minnesota, the Minnesota Supreme Court upheld sanctions imposed on a student, including a failing grade in a course, for her postings on Facebook.80 The student was taking a mortuary science program; the course syllabus for her anatomy lab included rules “set up to promote respect for the cadaver.” These rules allowed

“respectful and discreet” “conversational language of cadaver dissection outside the laboratory” but prohibited “blogging” about the anatomy lab or cadaver dissection.81 The student made repeated Facebook postings, some of which were about her cadaver, that she described as “satirical commentary and violent fantasy about her school experience.”82 The Minnesota Supreme Court upheld the discipline, concluding “that the University did not violate the free speech rights of [the student] by imposing sanctions for her Facebook posts that violated academic program rules where the academic program rules were narrowly tailored and directly related to established professional conduct standards.”83

Colleges and universities also have an affirmative duty to try to ensure that students and other community members do not use the internet to convey true threats or harassment of other students. The Supreme Court has clearly ruled that an educational institution can be held liable if it is “deliberately indifferent” to harassment of its students.84 There thus may be times when a school administrator will need to ask social media to remove threatening or harassing speech, or take other action to protect students.85

A campus should expect university administrators to speak out against especially egregious speech acts and, most important, encourage the university community to make its own decisions about what speech acts deserve praise or condemnation.

A campus should not expect university administrators to comment on or condemn every campus speech act that some person considers offensive.
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Long ago, Justice Louis Brandeis, in one of the Supreme Court’s most eloquent defenses of freedom of speech, said that the best remedy for speech we dislike is more speech. He wrote that the “fitting remedy for evil counsels is good ones” and that “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” Again, Geoffrey Stone’s Statement on Principles of Freedom of Expression at the University of Chicago captures this well: “For members of the University community, as for the University itself, the proper response to ideas they find offensive, unwarranted and dangerous is not interference, obstruction, or suppression. It is, instead, to engage in robust counter-speech that challenges the merits of those ideas and exposes them for what they are. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it. As Robert M. Hutchins observed, without a vibrant commitment to free and open inquiry, a university ceases to be a university.”

One of the most powerful tools that campuses and their officials possess—and one too often overlooked—is the ability to speak. This can take many forms. Colleges should have principles of community expressing what they expect of students. These principles can stress the importance of an inclusive learning environment and can declare that speech expressing hate on the basis of race, sex, religion, or sexual orientation is inconsistent with the values of the campus. Campuses should ensure that the academic community pays serious attention to issues relating to the harms associated with intolerance and structural discrimination. There should be robust efforts to organize co-curricular activities that celebrate cultural diversity and give victims of hateful and bullying acts the opportunity to have their voices heard. Campuses should emphasize that creating and transmitting new knowledge is best accomplished when people of diverse backgrounds and perspectives work together in an environment of respectful engagement.

And it must be remembered that campus officials and other members of the campus community also have free speech rights, and they can and should condemn hate speech when it occurs and explain why it is inimical to the desired community. There are many instances where members of the campus community have done exactly this to great success. At Bowie State University, for instance, a swastika was painted on a column on the patio of the Martin Luther King Jr. Communication Arts Center. Campus officials immediately declared:

This imagery symbolizes deep racial hatred and discrimination that go against the core values of Bowie State University. The incident is being investigated as a possible hate crime by our campus police in collaboration with Prince George’s County Police. We live in a community at Bowie State that values diversity, civility, vigorous debate and scholarly discussions. The imagery that was left seemed to be hateful and as such will not be tolerated. We do not tolerate hate speech among students, faculty or staff. We support those students who have decided to rally in opposition to hate speech.”

TeAna Brown, a senior at the school, told the school newspaper that “the quick response by university officials reassured students that they are safe at Bowie State.”
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At the University of Michigan, messages in chalk appeared at the center of campus, reading “#StopIslam,” “Trump 2016,” and “Build the Wall,” along with other messages. Nearly five hundred University of Michigan faculty members issued a statement denouncing the anti-Islam message on the school’s campus. In an open letter they emphasized the “urgency of the situation” to develop a more inclusive campus. "Whatever the political motivations of those engaged in such acts," the letter read, “their expressions of disrespect for members of our community have nothing but a chilling effect on the social and intellectual life of this campus.” Campus officials also denounced the “repugnant” messages but noted students’ right to speak.

On our campus, when conservative provocateur Milo Yiannopoulos was scheduled to appear and the administration faced demands to cancel the event, the vice chancellor for student affairs underscored our commitment to free speech and acknowledged that we must maintain a neutral position when faced with calls to silence certain voices. But he also noted that there was no requirement for neutrality when the university was deciding what values it would express. He continued: “We will not be neutral when acts of racism, bigotry, sexism, homophobia and oppression are paraded as sport intended to disrupt the cultural sensibilities of our diverse population. We will not be neutral when speakers and the crowds who support them use derogatory and vulgar language to insult and demean persons in our community on the basis of their race, citizenship status, gender or sexual orientation. We will not be neutral when degrading people’s culture and history of struggle becomes comic relief for local and national audiences who seek to affirm themselves and their ideology by belittling others. That is not how we are as a university.”

“More speech” cannot undo the hurt caused by hateful speech. But a willingness of members of the campus community to speak out on behalf of the university’s core values, and to condemn speech that is inimical to them, is an important component of how campuses should deal with offensive expression. Rather than be tempted toward censorship, campus leaders should focus on strategies premised on more speech.

At the same time, university officials cannot be expected to comment on or condemn every campus speech act that some person finds offensive. To encourage the widest diversity of views, colleges and universities should view themselves primarily as the home and sponsor of critics, not as institutions engaged in official editorializing on all expressed opinions. The values articulated by campus officials should relate to the mission of colleges and universities and the importance of scholarly inquiry, teaching excellence, public service, and the free exchange of ideas. Frequent and persistent pronouncements by college or university leaders on the various views expressed within the community risk creating a campus orthodoxy of opinion, and it is the primary responsibility of campus officials to ensure that no such orthodoxy is established. Also, if campus officials speak out against every minor incident that offends someone, their comments are less likely to be effective when faced with more serious events. University officials are no more responsible for every view expressed on a campus than mayors are responsible for every view expressed by people in their cities, and their inability to issue condemnations of every controversial speech act cannot be interpreted as approval.
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Still, there are times when views so assault the campus’s basic values that leaders need to speak up. Obviously, this requires careful and inevitably controversial judgments about when and how campus leaders can most effectively exercise their free speech rights in a way that promotes the free exchange of ideas and fosters an inclusive learning community.

AN AGENDA FOR CAMPUSES

We have been very specific about what campuses can and can’t do to reconcile free speech, academic freedom, and the need for an inclusive learning environment. Some people feel strongly that the last value requires compromising free expression, but we disagree. Still, our strong free speech views should not distract attention away from a wide range of activities that campuses can (and must) do to protect student well-being and promote an inclusive environment. For example, campuses can:

• Protect the rights of all students to engage in meaningful protest and to distribute materials that get their message out;
• Punish speech that constitutes “true threats” or that meets the definition of harassment under federal anti-discrimination law;
• Prevent disruptions of university activities;
• Ensure that campus dormitories are safe spaces of repose, short of imposing content-based restrictions on speech;
• Prevent discrimination by official campus organizations;

• Allow faculty to use trigger warnings when they deem it appropriate in light of their best pedagogical judgment;
• Sensitize the campus community to the harms caused by microaggressions and the effects of implicit bias;
• Ensure that learning environments are safe for the civil expression of ideas;
• Require institution-wide training on the obligation to create inclusive workplace and educational environments;
• Establish clear reporting requirements so that incidents of discriminatory practices can be quickly investigated and addressed;
• Establish clear and effective grievance procedures for those who believe the institution is not taking seriously its legal obligations to create nondiscriminatory workplace and learning environments;
• Prohibit retaliation against any person who complains about discriminatory workplace and learning environments;
• Promulgate clear and powerful principles of community, stressing the importance of an inclusive environment and condemning hateful or stigmatizing speech;
• Encourage faculty and students to research and learn about the harms associated with intolerance and structural discrimination, including through the creation of appropriate academic departments, the establishment of educational requirements
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on diversity and structural inequality, the publication of research, and the sponsoring of academic symposia;
- Organize co-curricular activities that celebrate cultural diversity and provide victims of hateful and bullying acts the opportunity to be heard;
- Emphasize how the campus's scholarly mission is best accomplished when people of diverse backgrounds and perspectives work together in an environment of mutual respect and constructive engagement; and
- Speak out to condemn egregious acts of intolerance as a way of demonstrating the power of “more speech” rather than enforced silence.

CHAPTER SIX

What’s at Stake?

Some student activists and their supporters argue that an emphasis on free speech values is a “self-serving deflection” away from efforts to fight structural racism, everyday exclusion, and the marginalization of underrepresented students in higher education.1 Jelani Cobb warns pro-speech advocates not to be “tone deaf” to these concerns, noting correctly that “the freedom to offend the powerful is not equivalent to the freedom to bully the relatively disempowered.”2 A Yale sophomore, reflecting on the controversies surrounding Erika Christakis’s surprisingly explosive email about Halloween costumes, claimed that when a “false debate about ‘free speech’ is used to question people of color’s humanity,” that is “racism is disguise” and it “needs to stop.”3

On many campuses, debates about free speech have put the problems of inclusion for historically excluded minorities,