FREE SPEECH VERSUS ANTIDISCRIMINATION

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ABSTRACT

Conflicts between free speech and antidiscrimination law make up a substantial subset of Eugene Volokh's wide-ranging scholarship. That work includes: criticism of those courts that have interpreted expression that would otherwise be protected under the First Amendment as triggering liability for the creation of a hostile workplace environment under Title VII; views about the proper scope of constitutionally required exceptions to public accommodations laws for expressive businesses; disagreement with the common assumption that boycotts themselves, as distinct from any accompanying expression, are constitutionally protected free speech; and a bold position on recent clashes between free speech and Title VI on college and university campuses. Canvassing this portion of Volokh's oeuvre, one sees libertarian instincts but also a genuine appreciation for competing egalitarian concerns. Even when one finds Volokh's bottom line ultimately unpersuasive, one cannot gainsay his clarity of thought, originality, or fearlessness.

INTRODUCTION

In *The Hedgehog and the Fox*, Isaiah Berlin invoked an aphorism of Archilochus—"*the fox knows many things, but the hedgehog knows one big thing*"—to categorize various thinkers.[1]

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1. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 1 (1953) (emphasis added).

Berlin's essay was nominally agnostic about the relative merits of hedgehogs and foxes, but the breadth of his other writing makes clear that he himself was a fox. Indeed, if we extend the metaphor beyond knowledge to the domain of value, we can see that Berlin was a fox in two ways. As a value pluralist, he not only knew but also valued many things.[2]

Eugene Volokh is also a fox in both senses. As an expert in, *inter alia*, computer programming, criminal law, English language usage, firearms regulation, free speech and free exercise of religion, intellectual property, legal writing, torts, and more,[3] Volokh knows and has written thoughtfully about more subjects than many entire faculties.

Volokh is also a value pluralist. To be sure, having been born and having lived the first seven years of his life under Soviet communism,[4] his instincts are understandably libertarian—in the sense that in cases of conflict between liberty and other values, Volokh will typically place greater value on liberty than do most progressives, including me. But he is neither a reflexive libertarian nor a monistic one who thinks that liberty claims can be overridden only by competing liberty claims. He values equality (and many other things) too.

Because Volokh is an extraordinarily prolific scholar whose work ranges over a great many topics, it would be a gross oversimplification to identify any single idea or even any single set of ideas as his distinctive contribution to legal scholarship. However, it is fair to say that *one of* Volokh's distinctive contributions is his approach to clashes between a central aspect of liberty—free speech—and a central protection for equality—antidiscrimination law.

This Essay highlights some of Volokh's key interventions in that ongoing clash, which figures in a great many of our most contentious contemporary controversies. Part I discusses his early

2. *See, e.g.*, ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 171 (Oxford University Press 1970) (1958) ("Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind.").

3. *About Eugene Volokh, Thomas M. Siebel Senior Fellow*, HOOVER INST., https://www.hoover.org/profiles/eugene-volokh (last visited Mar. 15, 2025).

4. Eugene Volokh, *Thoughts from an American About the Invasion of Ukraine*, VOLOKH CONSPIRACY (Feb. 26, 2022), https://reason.com/volokh/2022/02/26/thoughts-from-an-american-about-the-invasion-of-ukraine.

work identifying the potential for tension between free speech and Title VII's prohibition on workplace sexual harassment. Part II addresses Volokh's approach to claims by merchants engaged in expressive businesses (such as the prevailing plaintiffs in *303 Creative v. Elenis*[5]) to exemptions from public accommodations laws. Part III considers his scholarship and advocacy (in which he and I have often worked together) concerning laws restricting boycotts. Part IV examines the recent conflicts between free speech and antidiscrimination on college campuses. In the course of summarizing Volokh's views on contests between free speech and antidiscrimination law, I agree with some of them and critique others. I conclude by emphasizing how his work not only elucidates but exemplifies the virtues of free speech it extols.

I. LIBERTY VERSUS EQUALITY AT WORK

In 1992, the *UCLA Law Review* published Volokh's extremely influential article on the potential for conflict between free speech and Title VII's prohibition on workplace harassment. Much of the contribution of *Freedom of Speech and Workplace Harassment*[6] consisted in recognizing that there *was* a potential for conflict. Volokh dramatized that potential by summarizing numerous cases in which employers—acting in ways that seemed prudent as a means of limiting potential legal exposure—forbade employees from engaging in speech that would clearly be protected from direct content-based restriction by the government were it acting in its general regulatory capacity.[7]

To make clear that he was not merely cherry-picking outliers in the way that Fox News hosts might highlight oddball cases in support of the claim that there is a "war on Christmas,"[8] Volokh followed up in a 1997 paper with numerous additional examples.[9] To this day, he maintains a webpage detailing myriad further cases.[10]

5. 600 U.S. 570 (2023).

6. 39 UCLA L. REV. 1791 (1992).

7. *See id.* at 1794–96.

8. *See e.g.*, Greg Wehner, *War on Christmas: From a Thrown Tree to a Split Parade, Battles Public and Private Raged on in 2022*, FOX NEWS (Dec. 20, 2022), https://www.foxnews.com/us/war-christmas-thrown-tree-split-parade-battles-public-private-raged-2022.

9. Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 629–35 (1997).

10. *See* Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law—A*

Volokh's work in this area digests cases in which courts have found that workplace harassment law required employers to suppress otherwise non-proscribable employee speech on the ground that it created a hostile environment. However, and to his credit, he has never contended that every such case amounts to a First Amendment violation. Rather, in fox-like fashion, he observed in the initial 1992 paper that whether any of the unprofessional or offensive but otherwise protected speech barred by workplace harassment law should be denied "full First Amendment protection when said in the workplace . . . should only follow a serious First Amendment analysis."[11] Volokh would have us weigh the competing values at stake to determine where the free speech fist ends and the hostile environment nose begins.

How does that weighing come out? In the 1992 article, Volokh argued for distinguishing between "*directed* speech—speech that is aimed at a particular employee because of her race, sex, religion, or national origin[,]"—which he thought could be forbidden, "and *undirected* speech—speech between other employees that is overheard by the offended employee, or printed material, intended to communicate to the other employees in general, that is seen by the offended employee," which he thought could not be forbidden.[12]

Neither the courts nor most commentators have accepted Volokh's proposal. Indeed, within months of the publication of Volokh's article, the Supreme Court—speaking through Justice Scalia—suggested a much more sweeping basis upon which to reconcile hostile environment workplace harassment law with free speech. In *R.A.V. v. City of St. Paul*,[13] the Court appeared to say (albeit in *dicta*) that Title VII liability for hostile work environment sexual harassment did not raise serious First Amendment concerns at all because it involved the application of a regulation of conduct—sex discrimination—that merely incidentally happened in some particular cases to involve expression.[14]

Growing Conflict, UCLA L., https://www2.law.ucla.edu/volokh/harass (last visited Jul. 4, 2025).

11. Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 6, at 1796.

12. *Id.* at 1846; *see also id.* 1843–70 (providing arguments for the directed/undirected distinction).

13. 505 U.S. 377, 389–90, 409–10 (1992).

14. *See id.* at 389–90 ("[S]exually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in

To be sure, the Court would later back away from this view, concluding in *Holder v. Humanitarian Law Project*[15] that even though the law at issue there (forbidding material support for terrorism) was "directed at conduct," because its application to the particular plaintiffs was, by operation of the statute, triggered by their communication of a message, it should be deemed a content-based restriction on speech.[16] Volokh noted at the time that this approach departed from the Court's prior cases in which the application of a content-neutral law to a particular message was deemed content-neutral,[17] although, so far as I am aware, he did not comment on the fact that those prior cases themselves provided a broader ground for reconciling antidiscrimination law with free speech than did his proposed distinction between directed and undirected messages.

If the *R.A.V.* rationale for sustaining hostile environment harassment liability against a First Amendment challenge is no longer available, what is the basis for sustaining it? The Supreme Court has not squarely addressed that question, but there is no shortage of proposals by scholars. For example, Richard Fallon has argued that the special context of the workplace demands a departure from any strict insistence on content-neutrality.[18] More

employment practices, [but w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."). I say in text that the Court only "appeared" to draw the conclusion described, because *R.A.V.* concerned a law that the state court had construed to reach only fighting words. One might think that the government has broad authority to forbid fighting words in the workplace, as fighting words are a category of unprotected speech. However, that caveat itself seems inapt, given that the *holding* of *R.A.V.* is that even otherwise unprotected fighting words are protected as against rules of law that single out a sub-category based on the expression of a discriminatory message. Accordingly, the quoted language from *R.A.V.* probably is best read to express the position that Title VII liability for a hostile work environment is broadly compatible with the First Amendment because it is embedded within a general antidiscrimination law that focuses on discriminatory conduct whether or not such conduct is expressive.

15. 561 U.S. 1 (2010).

16. *Id.* at 28. The Court nonetheless upheld the law's application on the ground that it satisfied strict scrutiny. *See id.* at 28–39.

17. *See* Eugene Volokh, *Content Discrimination and* Humanitarian Law Project, VOLOKH CONSPIRACY (Jun. 21, 2010, 12:38 PM), https://volokh.com/2010/06/21/content-discrimination-and-humanitarian-law-project (pointing to inconsistency with *Hill v. Colorado*, 530 U.S. 703 (2000)). Roughly simultaneously, I argued that *Humanitarian Law Project* was not merely a departure from the prior approach but also called into question the clarity and thus the utility of the distinction between content-based and content-neutral laws. Michael C. Dorf, *Content*, DORF ON LAW (Jun. 24, 2010), https://www.dorfonlaw.org/2010/06/content.html.

18. Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First*

sweepingly, Suzanne Sangree has suggested both that equality outweighs free speech in the workplace and that the logic of the argument offered by Volokh would itself undermine antidiscrimination law beyond the hostile environment setting.[19] Deborah Epstein has described her view as giving greater recognition to speech interests than Sangree's,[20] but she also concludes that the characteristics of the workplace permit substantially greater regulation of speech than Volokh's approach would.[21]

Whether any of those approaches or any other approach to reconciling extant hostile environment harassment law with the First Amendment ultimately prevails remains to be seen. Perhaps the Supreme Court will someday find that much of the case law it now regards as unlawful harassment impermissibly infringes free speech after all. Perhaps it will even adopt Volokh's line between directed and undirected harassment. If so, it will then need to clarify what makes a statement directed at a specific individual. Do statements directed at a group count? If so, is there a size limit to the group? To count as directed, must the speech use the second person or do third-person statements suffice if the referent is apparent? How apparent? Does the determination whether a statement is proscribably directed turn on the subjective mental state of the speaker? Such questions are not impossible to answer,[22] but a process of case-by-case clarification would likely take years. However, even if the Court never endorses Volokh's proposal, his work will continue to be important in shaping the conversation about the relation between hostile environment harassment and free speech, as it has done for over three decades already.

Amendment Dog that Didn't Bark, 1994 SUP. CT. REV. 1, 2 (contending that the unanimous ruling in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), "implicitly acknowledged that distinctive principles should apply to sexually harassing speech in the workplace").

19. Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 474 (1995) (contending that if the logic of Volokh's argument in the hostile environment setting is accepted, "it will undermine discrimination law generally.").

20. Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 401 (1996) ("This article stakes out a middle ground between Sangree on the one hand and . . . Volokh on the other").

21. *See id.* at 420–33 (characterizing the "physical" and "interpersonal" contexts of the workplace).

22. *Cf.* Counterman v. Colorado, 600 U.S. 66, 69 (2023) (holding that "a mental state of recklessness" with regard to "a substantial risk that [one's] communications would be viewed as threatening violence" suffices to prove a proscribable true threat).

II. BAKERS, WEB DESIGNERS, AND OTHER EXPRESSIVE BUSINESSES

Public accommodations law provides another site of potential conflict between antidiscrimination principles and free expression, and here too, Volokh's work will likely prove consequential. The civil-rights-era Supreme Court categorically dismissed a First Amendment objection to Title II—the public accommodations provision of the Civil Rights Act of 1964—as "patently frivolous."[23] But that was over half a century ago. In 2023, in *303 Creative v. Elenis*,[24] the Court held that public accommodations laws violate the First Amendment when invoked to compel speech by an "expressive" business. Justice Gorsuch's opinion for the Court contained two important gaps.

First, after finding that Colorado's public accommodations law as applied to the web designer respondent amounted to an abridgment of the latter's speech, the Court announced that it was therefore an "impermissible abridgment of the First Amendment's right to speak freely."[25] Yet despite the First Amendment's literal text prohibiting all laws "abridging the freedom of speech," modern case law has typically allowed that abridgments of speech are constitutional if they satisfy strict scrutiny.[26] The *303 Creative* Court can hardly have forgotten as much, as its recitation of the case's procedural history included the fact that the Tenth Circuit had found that Colorado's public accommodations law survived strict scrutiny.[27]

Moreover, Justice Gorsuch reaffirmed "that governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation."[28] That is the first half of strict scrutiny. So why didn't the law satisfy the other half of strict scrutiny—the narrow tailoring requirement? The Court implied that application of Colorado's public accommodations law to the web designer was not narrowly

23. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402–03 n.5 (1968) (per curiam) (characterizing a religious freedom objection to complying with the legal obligation to serve customers without regard to race).

24. 600 U.S. 570 (2023).

25. *Id.* at 589.

26. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (holding that a town's content-based sign code, which subjected ideological signs to certain restrictions, restricted speech and therefore was subject to strict scrutiny).

27. *See* 600 U.S. at 583–84.

28. *Id.* at 590 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

tailored,[29] but it did not say so in as many words, nor did it attempt to explain why. Does the case fall into some category in which free speech infringement automatically entails unconstitutionality? If so, how is that category defined? The Court made much of the fact that the web designer provided bespoke services.[30] Is that critical?[31] If so, how much customization suffices? The resolution of these issues must apparently await further litigation.

Second, the *303 Creative* Court left open a critical threshold question: what kinds of businesses are eligible to challenge public accommodations laws on free speech grounds? Virtually every business involves some element of expression. If *303 Creative* is not to become a get-out-of-public-accommodations-law-free card, there must be some limiting principle. Justice Gorsuch nonetheless punted. He acknowledged for the Court that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions" but did not consider himself obligated to answer any such questions in the case before the Court because the parties had stipulated that the respondent's web design services were both expressive and customized.[32]

Eventually the Court will need to decide what counts as an expressive business. Already the Justices have encountered cases involving a baker[33] and a web designer.[34] Prominent cases in the lower courts have involved florists[35] and photographers.[36] What about bartenders, waiters, chauffeurs, hair stylists, and people engaged in any of the host of other trades and crafts that include at least some expressive element? Here too, *303 Creative* appears to be an invitation to further litigation.

29. *See id.* at 592 ("[P]ublic accommodations statutes can sweep too broadly when deployed to compel speech.").

30. *Id.* at 579.

31. Dale Carpenter, who was part of an amicus brief with Volokh urging the Court to rule for the web designer in *303 Creative*, *see generally* Brief of Amici Curiae Prof. Dale Carpenter et al. in Support of Petitioners, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2022 WL 2020643 [hereinafter Brief of Amici Curiae *303 Creative*], reads the decision to require *both* expressive and customized goods or services. *See* Dale Carpenter, *How to Read 303 Creative v. Elenis*, VOLOKH CONSPIRACY (Jul. 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis. I agree that this is the most sensible reading, but the opinion itself could certainly be clearer on the point.

32. *303 Creative*, 600 U.S. at 599.

33. *See* Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

34. *See 303 Creative*, 600 U.S. 570.

35. *See* State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).

36. *See* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

How will the courts resolve the key questions left open by *303 Creative*? I suspect that they will look to what Volokh has written on the subject—especially two amicus briefs on behalf of himself and others for which he served as counsel of record: one in *303 Creative* itself,[37] and another in the prequel, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[38] In these briefs, Volokh and his fellow amici addressed both questions—how to apply the narrow tailoring prong and what counts as an expressive business—in considerably greater detail than the Court ultimately did.

With respect to narrow tailoring, Volokh and his fellow amici in *303 Creative* urged the Court to take note of the availability of alternatives. A same-sex couple seeking web design services has numerous options even if several custom web designers object to the message they are asked to convey.[39] Thus, the amicus brief argued, permitting an exemption for custom expressive goods and services is consistent with the compelling interest public accommodations law serves: "making sure that people have access to goods and services generally regardless of their identities."[40] And if a hypothetical law with an exception for the likes of 303 Creative adequately advances the compelling interest, then, the argument concludes, the actual law without such an exception is not narrowly tailored.

Lower courts will likely find that analysis instructive, although I do not find it persuasive, for two reasons. First, in most settings, customers denied goods or services by one business will be able to find the equivalent from other providers. With the exception of in-person services, that will typically be true even in remote or rural areas, given the availability of Internet shopping. Thus, an exception for expressive goods and services for which substitutes are available would punch a very large hole in antidiscrimination law.

Second, focusing on alternative shopping venues fails to reckon with an important goal of public accommodations law: to

37. Brief of Amici Curiae *303 Creative*, *supra* note 31.

38. Brief of American Unity Fund and Profs. Dale Carpenter & Eugene Volokh as Amici Curiae in Support of Respondents, Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018) (No. 16-111), 2017 WL 4918194 [hereinafter Brief of Amici Curiae *Masterpiece Cakeshop*].

39. Brief of Amici Curiae *303 Creative*, *supra* note 31, at 19–22 (contesting the Tenth Circuit's view that 303 Creative had a "monopoly" over the relevant market).

40. *Id.* at 18.

combat the stigmatic injury that results from discrimination. A restauranteur who refuses to serve Black patrons violates not just the letter but also the spirit of public accommodations law, even if there are dozens of nearby restaurants that offer equal or better quality and value but do not engage in race discrimination. To be sure, it might nonetheless be possible to construct an argument for the conclusion that the application of Colorado's public accommodations law to *303 Creative* failed narrow tailoring even with respect to the state's compelling interest in combating stigmatic harm, but the amicus brief does not provide such an argument.

The amicus brief Volokh and his co-amici filed in *Masterpiece Cakeshop* did address the other key issue—what counts as an expressive business?—and it did so creatively and effectively. It offered a straightforward test: a business is expressive if and only if a law targeting that business would be deemed a law regulating speech.[41] "Some actions cannot count as speech" for purposes of determining what counts as a limit on speech, the brief explains, "even if they are 'expressive,' 'artistic,' or 'creative' in the broad sense of using a person's creativity and mental effort to produce something original, even something original and beautiful."[42] Just as a law targeting baking[43] would not be properly deemed a law targeting expression, so, the argument goes, a baker should not be entitled to a constitutionally mandated expressive business exception from public accommodations law.[44] Thus, Volokh and his fellow *Masterpiece Cakeshop* amici would borrow from existing doctrine a line between, on one hand, those enterprises that are "historically protected" as "inherently expressive,"[45] and, on the other hand, those enterprises that are not.

41. Brief of Amici Curiae *Masterpiece Cakeshop*, *supra* note 38, at 4–14.

42. *Id.* at 4–5.

43. By "a law targeting baking," I mean a law targeting the non-expressive aspects of baking, such as a law forbidding the use of certain unhealthful additives in baked goods. It is possible to imagine a law targeting messages on cake decorations, such as one forbidding pro-Republican or unpatriotic such messages. Such a law would target baking and also target messages. Readers should thus call to mind only content-neutral laws targeting baking.

44. *See* Brief of Amici Curiae *Masterpiece Cakeshop*, *supra* note 38, at 5 ("A chef, however brilliant, cannot claim a Free Speech Clause right not to serve certain people at his restaurant, even if his dishes look stunning. The same is true for bakers, even ones who create beautiful cakes for use at weddings.").

45. *Id.* at 7.

Where that line lies is not always obvious. Nor is it even obvious that "inherently expressive" is the right divider. My own preference would be for something like "inherently expressive of an articulable message," which would leave florists and maybe even photographers on the non-expressive side of the line.

However, my goal here is not to quibble over where to draw the line between expressive and non-expressive businesses. I agree with Volokh that free speech can be infringed by public accommodations laws—especially laws that forbid places of public accommodations from discriminating on the basis of political viewpoint and could thus require, for example, the printing of offensive messages for Klansmen or neo-Nazis.[46] Volokh and I also agree that the mere fact that someone disapproves of the message they believe that some action sends does not entail even a *prima facie* free speech right to engage in that action in the teeth of a prohibition that targets activities that are not generally expressive. Yes, there are boundary questions about what makes an activity *generally*, much less, *inherently*, expressive.[47] But Volokh is surely right about the overall shape of a sound test for distinguishing free speech claims that can plausibly be asserted to block public accommodations laws from those that cannot.

III. REFUSALS TO DEAL

Yet another conflict between free speech and equality concerns refusals to deal. Here too, Volokh's thinking is subtle and influential. I am happy to say that in this area, I find myself in complete agreement with him. Indeed, prior to his having written up the argument in scholarly form,[48] Volokh had articulated it chiefly in amicus briefs on behalf of himself, Professor Andrew Koppelman, and me in a series of cases in which states forbade

46. *See* Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J.L. & LIBERTY 490, 491–92 (2022) (discussing a similar example); *see also* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation,* 16 TEX. REV. L. & POL. 295 (2012) (addressing the issue in the context of employment discrimination).

47. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1205 n.127 (1996) ("Even what we normally term 'pure' speech is only communicative in *nearly* all cases, rather than *all* cases.").

48. Eugene Volokh, *The First Amendment and Refusals to Deal*, 54 U. PAC. L. REV. 732 (2023).

government contractors from boycotting Israel.[49] As Volokh succinctly summed up the point in the opening sentences of his scholarly write-up, laws that forbid such boycotts (sometimes called anti-BDS laws to refer to the movement to boycott, divest, and sanction Israel in protest of one or more of its policies) "are generally constitutional—for the same reason that anti-discrimination laws are generally constitutional: Refusals to deal are, outside some narrow situations, generally unprotected by the First Amendment."[50]

Volokh's discussion of refusals to deal (like much of his other work) shows him to be an astute reader of case law. For at least a generation, many legal scholars have held what they dismissively call "doctrinal scholarship" in relatively low esteem.[51] Insofar as doctrinalists aim simply to summarize the cases or to "play judge" by pointing out how they could have reached better decisions than those they critique, the evaluation is not entirely unfair. However, the best doctrinalists have always done much more. They synthesize and analyze in ways that generate new insights, and by casting their scholarly gaze over a much wider field than a court deciding a single case has occasion to consider, creative doctrinalists see connections and draw out consequences that would otherwise go unnoticed.

Volokh's discussion of refusals to deal exemplifies doctrinalism at its best. The leading argument for a free speech right to boycott invokes the Supreme Court's decision in *NAACP v. Claiborne Hardware Co*.,[52] which found that a civil-rights era NAACP-organized boycott of white merchants was protected by the First Amendment. On its face, the case could be read to say

49. *See, e.g.*, Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, & Eugene Volokh as Amici Curiae in Support of Defendants-Appellees, Ark. Times LP v. Waldrip, 143 S.Ct. 774 (2023) (No. 19-1378), 2019 WL 2488957 (mem.); Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, & Eugene Volokh as Amici Curiae in Support of Defendants-Appellants, Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020) (No. 19-50384). Although Professor Koppelman and I assisted and agreed with the briefs as ultimately filed, Professor Volokh was undoubtedly the driving force and the chief drafter of the briefs.

50. Volokh, *Refusals to Deal*, *supra* note 48, at 732.

51. *See, e.g.*, Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 234–35 (1988) ("[T]here is a sense of unease and discord in law schools today about the nature and value of doctrinal resolution as a major purpose of legal scholarship.").

52. 458 U.S. 886 (1982).

that peaceful boycotts necessarily are protected free speech.[53] However, as Volokh explains, the *Claiborne Hardware* Court had no occasion to decide whether a boycott *as distinguished from expressive activities that typically accompany the boycott*—such as picketing and even advocating a boycott[54]—is itself protected speech, and we have good doctrinal as well as policy reasons for thinking it is not.

As a matter of doctrine, Volokh points to the Supreme Court's unanimous decision in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR), Inc*.[55] There the Court held that law schools lacked a First Amendment right to deny access to military recruiters, notwithstanding that they sought to do so in protest of (what was then) a policy forbidding gay and lesbian service members from serving openly. The Court did not say that an interest in national security outweighed the law schools' expressive interests, nor that the obligation to permit military recruiters was justified as a condition of the schools' acceptance of federal funds.[56] Rather, the Court held that while of course expression of disapproval of the homophobic policy was protected speech, a refusal "to allow military recruiters" on campus, i.e., as Volokh characterizes it, a "boycott of such recruiters . . . 'is not inherently expressive.'"[57] Volokh goes on to explain why consumer boycotts—whether or not they should be forbidden as a policy matter—are likewise not inherently expressive.[58]

Doctrinal scholarship can be useful even when it only points to previously unnoticed implications and applications. However, insofar as doctrinalism bears a family resemblance to common-law reasoning, one inevitably wants to know whether it makes

53. *See* Hanaa J. Masalmeh, *Corporate Activism on Israel-Palestine and the Unconstitutionality of State Anti-Boycott Laws*, 48 J. CORP. L. 871, 882–83 (2023) (arguing for this reading of *Claiborne*).

54. *See* Volokh, *Refusals to Deal*, *supra* note 48, at 735–36. To be sure, it is difficult to organize a boycott without speech publicizing the boycott. However, that does not render the boycott itself speech. It is difficult to organize a mass immunization drive or a lottery in which tens of thousands of tickets are sold without speech publicizing the immunization drive or the lottery, but that hardly renders immunization or a lottery speech.

55. 547 U.S. 47 (2006).

56. *See id.* at 59–60 ("This case does not require us to determine when a condition placed on university funding . . . becomes an unconstitutional condition. . . . Because the First Amendment would not prevent Congress from directly imposing the . . . requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.").

57. Volokh, *Refusals to Deal*, *supra* note 48, at 734 (quoting *FAIR*, 547 U.S. at 64).

58. *See id.* at 738, 740–41.

sense. As a policy matter, I supported the law schools' protests against on-campus recruiting by the military while the homophobic policy was in place. Meanwhile, as a longtime vegan who joins with millions of other vegans in boycotting animal products, I very much appreciate the policy grounds for opposing laws that forbid boycotts. I would be offended and harmed by a law that required everyone to buy meat or dairy each time they purchased vegetables.[59] Thus, were *FAIR* and the anti-BDS statutes the only applications of the principle that boycotting is not inherently expressive, I would be inclined to resist the implications of the existing doctrine based on its consequences.

I do not know whether Volokh would have the same inclination. I do know that it was important to him—as is evident in our briefs and in his article re-articulating the position we took in those briefs—that a free speech right to boycott would have pernicious consequences from an egalitarian perspective, even though it would have a strongly libertarian cast. Notwithstanding the reasons why any of us might value the liberty to boycott in particular circumstances, a *free speech right to boycott* should be resisted because it would *Lochner*ize the First Amendment, i.e., it would turn the First Amendment into a weapon by which powerful industries could use the courts to invalidate regulation in the public interest.[60] And that would fatally undercut antidiscrimination law.[61] Preserving antidiscrimination law was important to Koppelman and me, given our egalitarian commitments.[62] That it also concerned Volokh might surprise

59. To the objection that the government in effect does require something like that through subsidies for animal agriculture funded via tax revenues, *see USDA Livestock Subsidies Top $72 Billion*, ENV'T WORKING GRP. (Oct. 28, 2024), https://www.ewg.org/news-insights/news/2023/08/usda-livestock-subsidies-top-59-billion ("The Department of Agriculture has spent at least $72 billion in subsidies for livestock and seafood producers in recent decades"), I say that I am in fact offended and harmed by those subsidies (which is not to say that they are unconstitutional).

60. *See* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (explaining how commercial interests have increasingly deployed First Amendment arguments to challenge regulation in ways reminiscent of the Supreme Court's use of the Constitution's due process clauses to the same effect in cases such as *Lochner v. New York*, 198 U.S. 45 (1905)).

61. I explained these positions in greater detail in Michael C. Dorf, *A Corrected Harvard Law Review Note Now Accurately Reflects the View of the Dorf/Koppelman/Volokh Brief in the Arkansas Anti-BDS-Law Case*, DORF ON LAW (Feb. 24, 2020), https://www.dorfonlaw.org/2020/02/a-corrected-harvard-law-review-note-now.html, and sources cited therein.

62. *See*, *e.g.*, Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEX. L. REV. 133 (2013) (reviewing ANDREW KOPPELMAN, THE TOUGH LUCK

inattentive observers who regard him as a thoroughgoing libertarian, but those of us who know him to be a foxy libertarian were not at all surprised.

IV. CAMPUS SPEECH

Herbert Wechsler was rightly pilloried for his infamously hand-wringing suggestion that there was no principled way to support the result in *Brown v. Board of Education*,[63] but the framing device of the article in which that suggestion appeared was surely correct: to sincerely espouse a legal principle means espousing it even when it leads to results one disfavors on policy grounds.[64] Volokh's scholarship fully exemplifies this conception of principle. Lest anyone think that Volokh concluded that there is no constitutional right to refuse to deal rested in any way on his views about the Israel/Palestine conflict,[65] I offer his views about recent campus speech policies as a corrective.

Following the Hamas-led atrocities in Israel on October 7, 2023,[66] and Israel's ensuing war in Gaza, with its very high number of civilian casualties and suffering, during the 2024 spring semester, college campuses became a key site of conflict between speech and antidiscrimination norms. Some of that conflict has a clear-cut solution. Antisemitic or Islamophobic violence and true threats[67] are unprotected wherever they occur; they can clearly be proscribed on campus, whether by a state university or a private one. But other clashes pose hard questions.

CONSTITUTION AND THE ASSAULT ON HEALTH CARE (2013)) (each critiquing libertarianism).

63. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959); 347 U.S. 483 (1954). The leading instance of the pillorying was the rejoinder in Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

64. *See* Wechsler, *supra* note 63, at 15 ("I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

65. *See* Dorf, *supra* note 62 (noting that our amicus brief in the Arkansas anti-BDS-law case took no "position on the Israel-Palestine conflict, the wisdom of BDS, or the wisdom of anti-BDS laws").

66. *See generally* Jim Zanotti & Jeremy M. Sharp, CONG. RSCH. SERV., R47828, *Israel and Hamas Conflict In Brief* 1 (2024).

67. The phrase "true threats" is a term of art in First Amendment jurisprudence that describes one of a small number of categories of proscribable speech. *See supra* note 22.

In a made-for-virality confrontation in December 2023, Congresswoman Elise Stefanik grilled the presidents of Harvard, M.I.T., and the University of Pennsylvania as to whether a call for genocide would violate the schools' codes of conduct.[68] The university presidents attempted to give nuanced and legally correct answers. For example, Harvard's then-President Claudine Gay described such speech as "hateful" and contrary to "Harvard's values," but noted that, given the university's commitment to free speech, whether a call for genocide violated the campus code would depend on whether it crossed the line into actual violence, bullying, or harassment.[69] That was not good enough for Stefanik and others; both Gay and University of Pennsylvania President Elizabeth Magill would soon lose their jobs as a consequence of bringing a lawyer to a knife-fight.[70]

Even many liberals who recognized Stefanik's bad-faith demagoguery criticized the university presidents for their tone-deafness or worse.[71] Meanwhile, the leaders of other universities rushed to clarify that calls for genocide would indeed violate their codes of student conduct. For example, Stanford University issued a statement on social media condemning "calls for the genocide of Jews or any peoples," which, it said, "would clearly

68. *Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the H. Comm. on Educ. and the Workforce*, 118th Cong. 162–63 [hereinafter *Hearing*] (statement of Rep. Stefanik, Member, H. Comm. on Educ. and the Workforce).

69. *Id.* at 13–15, 93–94 (statement of Dr. Claudine Gay, President, Harvard University).

70. Marc Levy, *Liz Magill, U. Penn's President, and Board Chair Resign as Antisemitism Testimony Draws Backlash*, ASSOCIATED PRESS (Dec. 9, 2023, 6:55 PM), https://apnews.com/article/new-york-governor-antisemitism-colleges-israel-gaza-ae1294d644b3305cc51e8d9bb7252766; Emma H. Haidar & Cam E. Kettles, *Harvard President Claudine Gay Resigns, Shortest Tenure in University History*, HARV. CRIMSON (Jan. 3, 2024), https://www.thecrimson.com/article/2024/1/3/claudine-gay-resign-harvard. The Harvard Corporation initially voted to retain Gay; she resigned following revelations of plagiarism in her academic work; however, the reaction against Gay's Congressional testimony appeared to catalyze the vigor of the investigation that led to her resignation. *See id.*

71. *See* David Cole, *Who's Canceling Whom?*, N.Y. REV. BOOKS (Feb. 8, 2024), https://www.nybooks.com/articles/2024/02/08/whos-canceling-whom-canceling-of-the-american-mind. Cole lists Pennsylvania Governor Josh Shapiro, then-Second Gentleman Doug Emhoff, and Harvard professor Laurence Tribe as examples of liberals who criticized the university presidents. Tribe disputed Cole's characterization of his comments in a letter in a later issue. Laurence H. Tribe & Greg Lukianoff, Letter to the Editor, *Free Speech on Campus: An Exchange*, N.Y. REV. BOOKS (Mar. 7, 2024), https://www.nybooks.com/ articles/ 2024/03/07/free-speech-on-campus-an-exchange.

violate Stanford's . . . code of conduct for all students at the university."[72]

Volokh pushed back hard in an essay on his eponymous blog.[73] Noting that both Stanford's own commitments and a California statute known as the Leonard Law[74] protect free speech on campus to the same extent that the First Amendment protects non-campus speech,[75] Volokh explained that calls for genocide, absent more, are in fact protected speech.[76] He went on to say (as he had in an initial blog post three days earlier)[77] that respectable arguments could be made for genocide, at least in certain circumstances.[78] His principal examples of genocides that might be justified were the actual U.S. atomic bombing of Hiroshima and Nagasaki if understood as aiming at securing a Japanese surrender without an even greater loss of life and a hypothetical retaliatory nuclear strike as a means of maintaining a deterrent against further nuclear strikes by the aggressor.[79]

Volokh's point was not that, in these examples or any others, genocide would be self-evidently justified. On the contrary, Volokh recognized that what amounts to genocide and whether it is justified are contested. Many of Israel's critics contend that Israel's actions during the Gaza war amounted to genocide;[80] if

72. Stanford University (@Stanford), X (Dec. 8, 2023, 12:29 AM), https://twitter.com/Stanford/status/1733010882249249056.

73. Eugene Volokh, *More on Advocacy of Genocide*, VOLOKH CONSPIRACY (Dec. 9, 2023, 2:23 PM), https://reason.com/volokh/2023/12/09/more-on-advocacy-of-genocide.

74. CAL. EDUC. CODE § 94367(a) (West, 2009) ("No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.").

75. To the same extent so far as penalties are concerned, that is. The Leonard Law protects only against discipline. *Id.*

76. Volokh, *More on Advocacy of Genocide*, *supra* note 73.

77. Eugene Volokh, *Should Universities Ban "Advocacy of Genocide?,"* VOLOKH CONSPIRACY (Dec. 6, 2023, 4:36 PM), https://reason.com/volokh/2023/12/06/should-universities-ban-advocacy-of-genocide.

78. Volokh, *More on Advocacy of Genocide*, *supra* note 73.

79. *Id*. In each example, Volokh argued, the internationally accepted definition of genocide would be satisfied because the bombing would involve "[k]illing" "with intent to destroy, in whole or in part, a national . . . group . . . ." Volokh, *More on Advocacy of Genocide*, *supra* note 73 (quoting Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951)) (internal quotation marks omitted).

80. *See*, *e.g.*, Aryeh Neier, *Is Israel Committing Genocide?*, N.Y. REV. BOOKS (Jun. 6, 2024), https://www.nybooks.com/articles/2024/06/06/is-israel-committing-genocide-

they are correct, then defenses of Israel's conduct of the war could be deemed calls for genocide. Meanwhile, some critics of protesters on behalf of Palestinians argue that slogans like "from the river to the sea" and defenses of *intifada* are calls for genocide.[81] However, so long as neither side crosses over into its own violence, true threats, or otherwise unprotected expression or conduct, Volokh argued, standard free speech doctrine—which applies at all campuses in California, including Stanford—protects calls for genocide.

I agree with Volokh's analysis at least as a descriptive matter. There is no "calls for genocide" exception to the First Amendment. But I am not fully persuaded about the inferences he draws for college campuses outside California.[82]

To be clear, Volokh and I agree that a private university outside of California could, consistent with the Constitution, subject students to discipline or even expulsion for engaging in speech that would be fully protected against general government regulation. However, Volokh thinks private universities *shouldn't* take such measures, because, he says, private universities do not "need more speech restrictions than . . . public universities that are governed by the First Amendment."[83] I agree with that proposition as well. But I do not fully agree with his assessment of what the First Amendment entails where it applies of its own force, that is, to public universities.

aryeh-neier; UNIV. NETWORK FOR HUM. RTS. ET AL., GENOCIDE IN GAZA (2024); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application Instituting Proceedings and Request for the Indication of Provisional Measures, 2023 I.C.J. 192 (Dec. 29). *But see id.*, Provisional Measures, 2024 I.C.J. 192 (Jan. 26) at 6–7 (dissenting opinion by Sebutinde, J.) (arguing that Israel's use of force does not rise to the level of genocide because it lacks the requisite intent to destroy Palestinians as a national, racial, or ethnic group).

81. *See, e.g.*, *Hearing*, *supra* note 68, at 63 (statement of Rep. Stefanik) (contending that the term *intifada* is "[A] call for violent armed resistance against the State of Israel, including violence against civilians and the genocide of Jews."); Simon Sebag Montefiore, *The Decolonization Narrative Is Dangerous and False*, ATLANTIC (Oct. 27, 2023), https://www.theatlantic.com/ideas/archive/2023/10/decolonization-narrative-dangerous-and-false/675799 (arguing that the phrase "from the river to the sea" "implicitly endorses the killing or deportation of the 9 million Israelis.").

82. Indeed, to the extent that Title VI validly requires colleges and universities to take steps that the Leonard Law forbids, the former preempts the latter. Therefore, Volokh's inferences could be mistaken within California as well.

83. Volokh, *More on Advocacy of Genocide*, *supra* note 73.

So far as free speech is concerned, the campus setting is a double-edged sword.[84] On one hand, it provides special reasons for solicitude towards speech claims. As I noted some years ago, "one of the very reasons for existence of the college or university is to encourage robust debate through uninhibited expression of views, including controversial ones."[85] And the Supreme Court has left open the possibility that the First Amendment extends some protection to academic freedom.[86] However, and on the other hand, even if special speech-protective constitutional rules and standards apply in many academic settings, they do not apply in all such settings. In some respects, the campus context has the opposite implication: the First Amendment allows even a public university to restrict some speech that would be fully protected if it occurred off-campus.

To see why, it is useful to explore other special contexts in which the First Amendment permits restrictions on speech that would be impermissible if imposed broadly by the government as regulator. It is a commonplace that the limitations the First Amendment imposes on government efforts to regulate speech can depend on the relation between the government and the speaker[87] as well as the physical space within which the speech occurs. Consider a few examples.

Although the Supreme Court has "applied the captive audience doctrine only sparingly,"[88] it has recognized that in certain settings the government interest in protecting people from

84. To be more precise, it is a double-edged sword with a flat surface in between. *See* Michael C. Dorf, *Disaggregating Free Speech on Campus*, DORF ON LAW (Nov. 17, 2017), https://www.dorfonlaw.org/2017/11/disaggregating-free-speech-on-campus.html ("In some contexts, the fact that speech claims are made on campus should make them stronger relative to competing claims; in other contexts, the fact that speech claims are made on campus should make them relatively weaker; and in still other contexts, the campus setting should make no difference.").

85. *Id.*

86. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 528 (2022) ("questions of academic freedom . . . may or may not involve 'additional' First Amendment 'interests' beyond those captured by th[e regular employee speech] framework") (quoting Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) and also citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

87. *Cf.* Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 599 (2011) (observing that "all Free Speech Clause theories must operate differently when the government is acting in these special capacities than when the government is using its sovereign power over every citizen").

88. Snyder v. Phelps, 562 U.S. 443, 459 (2011).

unwelcome messages justifies restrictions on speech that would be impermissible in more purely public settings. The leading Supreme Court cases involve speech that intrudes on people in their homes,[89] but the principle is not limited to the home. For example, the United States Court of Appeals for the Second Circuit upheld a prohibition on begging in the New York City subway, where commuters are effectively a captive audience;[90] three years later, that court distinguished "[t]he special conditions of the subway" system in the course of striking down a broader begging prohibition that applied in any public place.[91] The juxtaposition illustrates the commonsense idea that the protection the Constitution affords speech can depend on the characteristics of the space in which it occurs—an idea that also finds expression in the Supreme Court's public forum doctrine.[92]

The workplace is another setting in which speech that could not be the basis for general regulation can be limited by the government as employer. That is not for the reason Oliver Wendell Holmes, Jr., speaking for the Massachusetts Supreme Judicial Court, offered: because the government can condition employment on the waiver of the constitutional right to free speech.[93] Rather, the employee speech doctrine recognizes that government as employer has speech-infringing interests that government as regulator lacks.[94] Among them is the interest in

89. *See* Frisby v. Schultz, 487 U.S. 474, 486 (1988) (sustaining "targeted picketing" regulation in light of that activity's "devastating effect . . . on the quiet enjoyment of the home"); Rowan v. Post Off. Dep't, 397 U.S. 728 (1970) (sustaining federal statute forbidding unsolicited mail from senders to recipients who choose to block mail from those senders).

90. Young v. N.Y.C. Transit Auth., 903 F.2d 146, 158 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) ("Begging is 'inherently aggressive' to the 'captive' passengers in the close confines of the subway atmosphere.").

91. Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 703 (2d Cir. 1993).

92. *See, e.g.*, Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983) (finding that the State may reserve use of its non-public forum property so long as its regulation on speech is reasonable and not an effort to supress expression solely because public officials oppose a speaker's viewpoint); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (declining to extend the public forum doctrine to televised candidate debates); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

93. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

94. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 422–23 (2006) ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official

protecting workers—who are in essence a captive audience for the speech of their co-workers—from unwelcome speech. Even if an employer would not choose to offer such protection to its employees absent legal compulsion, employers undoubtedly have an interest in complying with federal law protecting workers from invidious discrimination.

The captive audience concept provides part, but not all of, the justification for the conclusion that Title VII's proscription of hostile environment harassment does not contravene the First Amendment. There is also the antidiscrimination policy itself. After all, application of Title VII to bar hostile-environment harassment does not merely protect workers against unwelcome messages. It implements the statutory goal of ensuring equal employment opportunity free of invidious discrimination.

Similar interests justify restricting student expression under Title VI in its application to colleges and universities that receive federal funds, which is to say every major college and university in the United States.[95] In classrooms and dormitories, students are a captive audience. Indeed, a dormitory is a home, triggering the special considerations associated with the captive audience cases addressing the home.[96] Meanwhile, just as Title VII aims to ensure

communications are accurate, demonstrate sound judgment, and promote the employer's mission.").

95. *See generally* PEW CHARITABLE TRS., TWO DECADES OF CHANGE IN FEDERAL AND STATE HIGHER EDUCATION FUNDING 10–11 (2019) (discussing sources of federal funding to public and private universities).

96. During the discussion session following my oral presentation of a draft of this essay, Professor Volokh noted that a college dormitory is a home for *both* speakers and unwilling listeners. Fair enough. For that reason, the decision by Barnard College to ban all signs on dormitory doors as a content-neutral means of protecting other students in the dormitory from hurtful messages seems excessive. Emily Forgash, *Barnard Mandates Removal of Dorm Door Decor Citing 'Unintended Effect of Isolating Those Who Have Different Views,'* COLUM. SPECTATOR (Feb. 23, 2024, 4:05 PM), https://www.columbiaspectator.com/news/2024/02/23/barnard-mandates-removal-of-dorm-door-decor-citing-unintended-effect-of-isolating-those-who-have-different-views. If my neighbor displays an offensive sign, it does not intrude into *my* home, even if my neighbor lives very close nearby so that I cannot avoid seeing the sign each time I enter or leave my home. *Cf.* Resident Action Council v. Seattle Hous. Auth., 174 P.3d 84 (Wash. 2008) (invalidating rule forbidding public housing tenants from posting signs on the outside of their apartment doors under state and federal constitutional right to free speech). That is not to say, however, that a speaker's right necessarily prevails over an unwilling listener's right, so long as they are both at home. Quiet hours in the dormitories appropriately privilege listeners. Speech-related disputes between roommates present further questions, although these matters are often more in the nature of interpersonal relations than legal doctrine. *Cf.* Michael C. Dorf, *Justice Alito Fails Both Constitutional Law and Property Law*, DORF ON LAW (Jun. 3, 2024), https://www.dorfonlaw.org/2024/06/justice-alito-fails-

equal employment opportunities, Title VI (as applied to colleges and universities) aims to ensure equal educational opportunities. To the extent that a hostile environment based on membership in a protected class interferes with such opportunities, it contravenes the antidiscrimination statute's purpose (and text).[97]

However, while antidiscrimination norms justify some restrictions on campus speech in classrooms and dormitories, students are not a captive audience everywhere on campus. A campus quadrangle is a rough analogue of a public park. On the quad or its equivalent, the university setting should not afford administrators any greater power to censor speech than the government enjoys relative to the general public in parks.[98]

Nonetheless, lawsuits by Jewish students at the University of California at Berkeley, Columbia, Harvard, and elsewhere made Title VI claims in partial reliance on statements by pro-Palestinian protesters in outdoor settings and on social media; the plaintiffs alleges that the administrations at their respective schools took insufficient steps to protect them from a hostile environment.[99] While some of the plaintiffs' allegations involved

both-constitutional.html (skeptically evaluating Justice Alito's statement that because he and his wife own their home jointly, he could not take down a flag she had chosen to display).

97. Title VI forbids discrimination (and thus harassment) based on "race, color, or national origin." 42 U.S.C. § 2000d. A Department of Education "Dear Colleague" letter (sensibly) read that language to cover antisemitic and Islamophobic harassment where such harassment turns on actual or imputed ethnic characteristics, as it often does. Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ. Off. of C.R. 1–2 (Nov. 7, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf.

98. To be sure, depending on the campus layout, students and faculty might need to cross the quad to get to class, thus exposing them to speech they might prefer to avoid. But the same could be true of someone who needs to cross a public park (or take a long detour) to get to work. Moreover, streets and sidewalks are traditional public fora no less than are parks. *See, e.g.*, United States v. Grace, 461 U.S. 171, 177 (1983) ("'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"). Yet proximity to passersby who cannot completely avoid unwanted messages is not a sufficient reason to deny speech rights on captive audience grounds.

99. *See, e.g.*, Surina Venkat, *Columbia Reaches Settlement in Class Action Suit Alleging Hostile Environment for Jewish Students, Establishes Additional Security Measures*, COLUM. SPECTATOR (June 6, 2024, 7:16 PM), https://www.columbiaspectator.com/news/2024/06/06/columbia-reaches-settlement-in-class-action-suit-alleging-hostile-environment-for-jewish-students-establishes-additional-security-measures; Michelle N. Amponsah & Joyce E. Kim, *Harvard Seeks to Dismiss Lawsuit Alleging 'Pervasive' Antisemitism on Campus*, HARV. CRIMSON (Apr. 15, 2024, 1:06 AM), https://www.thecrimson.com/article/2024/4/15/harvard-motion-to-dismiss-antisemitism-lawsuit; Salvador Hernandez, *Lawsuit Accuses UC Berkeley of Fostering*

targeted threats, others concern statements that, while wrong-headed or offensive, would clearly constitute protected political speech if made at a rally in a public park.[100]

The claims against universities for not doing enough to rein in allegedly antisemitic speech have gained traction. In the Harvard case, a federal district court rejected a motion to dismiss the complaint without reaching the question whether Title VI, if construed to require a private university to infringe the speech of its students, would violate the First Amendment.[101] Meanwhile, the Department of Education (DOE) Office of Civil Rights took a position similar to that of the plaintiffs in the cases described above. For example, in addressing complaints against the University of Michigan, it declared: "While the University may not discipline speakers for protected speech, the University retains a Title VI legal obligation to take other steps as necessary to ensure that no hostile environment based on shared ancestry persists."[102] The suggestion is that statements by students can be instances of protected free speech but also, either on their own or when aggregated with other similar statements or conduct,

Antisemitism. Dean Calls Accusations 'Stunningly Inaccurate,' L.A. TIMES (Dec. 1, 2023, 6:00 AM), https://www.latimes.com/california/story/2023-12-01/lawsuit-accuses-uc-berkeley-of-fostering-anti-semitism-dean-calls-accusations-inaccurate.

100. *See, e.g.*, Complaint at 35–42, Ingber v. N.Y.U., No. 23-cv-10023 (S.D.N.Y. Nov. 14, 2023), 2024 WL 2046106 (alleging that statements calling Israel's actions in Gaza "apartheid," "genocide," "ethnic cleansing," and "colonial racial violence," as well as statements placing at least some of the responsibility for the Oct. 7 attacks on Israel, fostered a hostile environment for Jewish students).

101. Kestenbaum v. President and Fellows of Harv. Coll., No. 24-10092-RGS, 2024 WL 3658793, at *6 (D. Mass Aug. 6, 2024) ("whether" the First Amendment "has any teeth is a decision best reserved for a later day. The record is too thin to determine whether Harvard in fact acted to protect free speech rights as it contends Title VI required it to do and whether the protest activity itself comes within the protections of the First Amendment.").

102. Letter from Brian Gnandt, Reg'l Program Manager, U.S. Dep't of Educ. Off. of C.R., to Kelly Cruz, Assoc. Gen. Couns., Univ. of Mich. 10 (Jun. 17, 2024), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15242066-a.pdf; Press Release, U.S. Dep't of Educ. Off. of C.R., U.S. Department of Education's Office for Civil Rights Announces Resolution of Two Complaints Against the University of Michigan Alleging Antisemitic Discrimination (June 17, 2024), https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-two-complaints-against-university-michigan-alleging-antisemitic-discrimination; Press Release, U.S. Dep't of Educ. Off. of C.R., U.S. Department of Education's Office for Civil Rights Announces Resolution of Nine Complaints Against CUNY Alleging Discrimination Based on National Origin, Including Antisemitic, Anti-Palestinian, Anti-Muslim, and Anti-Arab Harassment (June 17, 2024).

contribute to a hostile environment for other students in violation of Title VI.

The second Trump administration has gone much further, peremptorily withholding hundreds of millions of federal funding from prominent universities based on allegations that they responded inadequately to antisemitism.[103] But even the Biden DOE's stance was problematic, as it placed universities in an extremely awkward position. Ordinarily, the obligation to prevent or remediate a hostile environment can be satisfied through means such as individual discipline and general training.[104] Yet the Biden DOE itself acknowledged that discipline is not available for protected speech. Thus, training cannot truthfully instruct students that they will face any remedial consequences for protected speech. Training usually consists of dos and don'ts. Given the DOE's acknowledgment that speech can be both protected and also a contributor to a hostile environment, any training would need to consist of dos and please-don'ts.

What, then, can universities do? They can provide tools to support the emotional wellbeing of students who feel besieged by speech they experience as hostile—although doing so invites complaints about coddling oversensitive young adults.[105] Counter-speech by the university administration is another option—although engaging in such counter-speech when the underlying speech concerns divisive issues risks violating the neutrality commitments some universities have made.[106] The Biden DOE

103. *See, e.g.*, DOJ, HHS, ED, and GSA Announce Initial Cancellation of Grants and Contracts to Columbia University Worth $400 Million, GSA (Mar. 7, 2025), https://www.gsa.gov/about-us/newsroom/news-releases/doj-hhs-ed-and-gsa-announce-initial-cancellation-of-grants-and-contracts-03072025. In my view, the cutoff was unlawful; *cf*. Michael C. Dorf, *Trump's Columbia Funding Cutoff Is Illegal*, CHRON. HIGHER EDUC. (Mar. 10, 2025), https://www.chronicle.com/article/trumps-columbia-funding-cutoff-is-illegal.

104. *See, e.g.*, Resolution Agreement, Faulkner State Community College, OCR Case No. 04-14-2054, https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/ 04142054-b.pdf (including as remedies staff training and grievance procedures).

105. For an insightful defense of campus "safe spaces" against such charges, see Ashutosh Bhagwat & John Inazu, *Searching for Safe Spaces*, INSIDE HIGHER ED (Mar. 20, 2017), https://www.insidehighered.com/views/2017/03/21/easily-caricatured-safe-spaces-can-help-students-learn-essay.

106. *See, e.g.*, KALVEN COMM., REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION 2 (1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf ("[T]here emerges . . . a heavy presumption against the university taking collective action or expressing opinions on the political and social issues of the day, or modifying its corporate activities to foster social or political values, however compelling and appealing they may be."). Harvard recently made a similar commitment.

did not provide clear guidance about what universities should do to counter any discriminatory impact of protected speech without violating the First Amendment, whereas the Trump administration has exerted financial pressure on universities to take steps that seemingly violate students' First Amendment rights.

As the latest round of conflicts between free speech and antidiscrimination law works its way through the legal system, lawyers and judges should adopt an approach with fewer inherent tensions. A simpler solution would be to conclude that if speech is protected (or would be at a public university), it necessarily cannot be deemed a contribution to a hostile environment. That approach would not make all of the difficult tradeoffs go away, but it would simplify the analysis. It would also be very much in the spirit of Volokh's work—which, while invariably attentive to nuance, nevertheless puts a thumb on the scale in favor of both liberty and clear rules rather than vague standards.

CONCLUSION

"Those who won our independence by revolution were not cowards," wrote Justice Brandeis in his concurrence in *Whitney v. California*,[107] in "what may be the most important judicial opinion ever written on the subject of freedom of speech."[108] It is tempting to read the *Whitney* concurrence and its companion in the canonical precursors of modern free speech doctrine—the dissent of Justice Holmes in *Abrams v. United States*,[109]—as focused on the courage to tolerate disagreeable opinions on the chance that they might usefully dislodge flawed conventional wisdom. It is tempting, in other words, to read Brandeis as extolling the courage to tolerate the offensive views of *others*.

That is surely part of what Brandeis meant, but it is not the whole of it. A culture of free speech requires not only the courage to listen politely while the loudmouths have their say but the courage of thoughtful people to speak up—to take and defend

INSTITUTIONAL VOICE WORKING GRP., REPORT ON INSTITUTIONAL VOICE IN THE UNIVERSITY (2024), https://provost.harvard.edu/sites/hwpi.harvard.edu/files/provost/files/institutional_voice_may_2024.pdf.

107. 274 U.S. 357, 377 (1927).

108. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 660 (1988).

109. 250 U.S. 616, 624–31 (1919).

unpopular positions, to follow arguments where they lead, to consider the force of countervailing considerations and give them their due, but no more. As Vincent Blasi has insightfully observed, the essential civics lesson Brandeis sought to convey in *Whitney* was that "the key to a successful democracy lies in the spirit, the vitality, the daring, the inventiveness of its citizens."[110]

Eugene Volokh's career not only endorses but exemplifies those virtues. His work on the conflict between free speech and antidiscrimination law is especially illuminating. Even when one disagrees with his bottom line, it is impossible to read Volokh without coming away with a deeper appreciation for the values at stake or the costs and benefits of various approaches to resolving the conflict. As we confront so many unresolved questions pitting free speech claims against equality claims, now more than ever, our lawmakers, judges, educators, and others need Volokh's spirited, vital, daring, and inventive contributions to public discourse.

110. Blasi, *supra* note 108, at 686.