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"Trans Talk" and the First Amendment

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Abstract

The rights of transgender youth and their families have increasingly come under attack. In addition to barring transgender youth from participation in sports teams, from accessing bathrooms that match their gender identity, and from receiving gender-affirming healthcare, states are increasingly restricting speech and expression related to transgender issues. Courts and scholars have begun addressing the First Amendment implications of some of these restrictions, including the removal of books related to transgender issues; restrictions upon teachers' classroom speech regarding such issues; school discipline imposed upon students whose social transition includes forms of gender expression that differ from their assigned sex at birth; and bans upon doctors providing minors with referrals for gender-affirming care.

This Article breaks new ground in two respects. First, it focuses on an aspect of student speech regarding transgender issues that has not yet been addressed by courts or in the scholarly literature: namely, whether the Supreme Court's school speech cases would permit states or public school officials to restrict student speech advising a peer to obtain forms of gender-affirming care that are unlawful to minors in the state where the speech occurs. This Article is also the first to apply the history of the battles over free speech regarding slavery and of the Nation's Second Founding following the Civil War to analyze the First Amendment implications of restrictions upon student speech relating to transgender issues.

Under the classic framework of Tinker v. Des Moines School District, *student speech cannot be restricted unless it causes or poses a significant risk of material and substantial disruption to the learning environment. The Supreme Court's post-*Tinker *school speech cases, however, have been significantly more solicitous toward school officials' efforts to restrict student speech. Opponents of gender-affirming care for minors are therefore likely*

*to seek to rely upon the post-*Tinker *jurisprudence to justify restricting or punishing student speech advocating that a peer seek gender-affirming care. This Article argues that the Court's post-*Tinker *school speech cases cannot and should not be read to justify restrictions upon such speech. This Article further argues that extending the post-*Tinker *cases to allow the government to punish student speech advocating that a peer receive gender-affirming care would violate the right to freedom of speech secured at great cost by our Nation's Second Founding.*

"Trans Talk" and the First Amendment

William M. Carter, Jr.*

[The First Amendment assumes] that information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[1]

I. Introduction

The abolitionist orator, constitutional interpreter, and former slave Frederick Douglass observed that "[l]iberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist. That, of all rights, is the dread of tyrants. It is the right which they first of all strike down."[2] History bears out Douglass's insight. Oppressive social movements tend to follow a similar trajectory: the exercise of a targeted group's rights and liberties is criminalized or otherwise punished; quickly thereafter, speech advocating for the protection of the group's rights and liberties is vigorously suppressed.

This pattern persists because the freedom to criticize oppression is a danger to maintaining it in a democratic society. If allowed to exercise their rights of free expression, members of the targeted group and their allies might ultimately persuade the general public that the oppression is immoral, unjust, or unconstitutional. Thus, unless freedom of speech on the subject at issue is suppressed as to everyone, the project of repressing the subordinated group can never truly be secure. As abolitionists shrewdly observed during the battle over slavery prior to the Civil

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[1] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[2] Frederick Douglass, *A Plea For Freedom of Speech in Boston* (Dec. 9, 1860), https://frederickdouglasspapersproject.com/s/digitaledition/item/9060 [hereinafter Douglass, *A Plea For Freedom of Speech*].

War, "a fetter ha[s] shackles on both ends: 'the master is as much fettered to one end of the chain, as the slave is to the other.'"[3] To effectively enforce the oppression of some, the freedom to criticize such oppression must be denied to all, even persons outside of the oppressed group. Insecure in their ability to prevail in a battle of ideas in a free marketplace, oppressors simply monopolize the market by barring opposing ideas from the marketplace entirely.[4]

This dynamic has manifested in numerous instances in American history and is currently playing out on multiple fronts involving numerous contemporary social issues, including attacks on pro-choice speech regarding abortion[5] and speech regarding

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[3] William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1789 (1996).

[4] *Cf.* Abrams v. United States, 40 S. Ct. 17, 22 (1919) (Holmes, J., dissenting) ("If you have no doubt of your premises or your power[,] [then] you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that . . . you doubt either your power or your premises.").

[5] *See, e.g.*, Linda Greenhouse, *Is There a Constitutional Right to Talk About Abortion*, N.Y. TIMES (May 17, 2024) (noting various efforts by "anti-abortion states to curb the flow of information about how to obtain legal abortion care across state lines" following the Supreme Court's decision in Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), overruling *Roe v. Wade* (410 U.S. 113 (1973)). Although speech regarding transgender medical care and speech regarding the availability of abortion services deal with two different issues, the drive to prohibit or punish such speech in both cases derives from a common antipathy toward individual self-determination with regard to "non-traditional" gender roles. *See, e.g.*, Arit John, *How GOP Efforts to Restrict Trans Rights Take a Page from the Anti-Abortion Playbook*, L.A. TIMES (June 7, 2023), https://www.latimes.com/politics/story/2023-06-07/wave-of-anti-trans-laws-reminds-advocates-of-another-struggle-abortion-rights [hereinafter John, *GOP Efforts to Restrict Trans Rights*] ("'You can look at the antiabortion playbook and see parallels here every step of the way,' said Chase Strangio [of] the American Civil Liberties Union's LGBT & HIV Project. '[A] lot of the effort from the [political] right that had gone into systematically eliminating access to abortion [is now] being shifted into attacks on trans people.'"); Rose Mackenzie & Arli Christian, *The Intertwined Future of Attacks on Abortion and Gender-Affirming Care*, AMERICAN CIVIL LIBERTIES UNION (Jan. 18, 2023), https://www.aclu.org/news/reproductive-freedom/the-future-attacks-abortion-gender-affirming-care-lgbtq-rights ("The same lawmakers that don't want people to be able to make decisions about their pregnancies also don't want transgender people to be able to make decisions about their medical care . . . . The fight for abortion access and access to gender affirming care are linked by a simple belief—you are the rightful author of your own life story.").

historical and contemporary issues of racial inequity.[6] One such set of current issues involves LGBTQ rights generally; and specifically, the rights of transgender persons. As with its historical antecedents and contemporary analogues regarding abortion and race, anti-trans activists and government officials have not been content with banning various aspects of gender-affirming care for minors and young adults in numerous states.[7] They have also moved to restrict speech regarding transgender issues and will likely take further steps to do so in the near future. And such restrictions may well fall upon sympathetic judicial ears. After all, the argument would go, if the underlying conduct has been deemed harmful—for example, providing certain medical treatments to minors as part of gender-affirming care—then restrictions upon speech advocating such treatments are merely preventing advocacy of harm to minors, no different than barring advocacy that minors consume alcohol or take up cigarette smoking. Since the underlying conduct has been made illegal in a given state, then speech advocating that a person engage in that conduct is arguably unprotected inasmuch as it amounts to speech urging the commission of (what the state has chosen to make) a crime.

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[6] Many of the same social movement actors seeking to undermine freedom of speech regarding abortion and LGBTQ issues are also deeply involved in efforts to ban "race talk." For example, "Do No Harm," an organization heavily involved in recent efforts to ban gender-affirming care for minors, came to that issue after having helped to lead the charge against diversity, equity, and inclusion programs in medical education. *See* Daniel Payne, *The Conservative Doctor Who's Got the GOP's Ear on Trans Kids' Care*, POLITICO (July 21, 2024), https://www.politico.com/news/2024/07/21/conservative-kidney-doctor-trans-kids-care-00166641 ("Do No Harm's formation was in part fueled by the aftermath of the death of George Floyd, when health institutions pledged to take on the racism within their organizations and the wider health system . . . . [Its founder] came later to [the issue of] gender-affirming care . . . .").

[7] *See, e.g.*, Charlie Ferguson, *We're All Born Naked and the Rest is Speech: Gender Expression and the First Amendment*, 172 U. PA. L. REV. 829, 831 (2024) ("[O]ver the last decade, the amount of antitransgender legislation has exploded, with each subsequent year since 2018 being the highest on record for proposed bills restricting transgender people's civil rights"); Jo Yurcaba, *Florida Becomes Eighth State to Restrict Transgender Care for Minors*, NBC NEWS (Mar. 16, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-becomes-eighth-state-restrict-transgender-care-minors-rcna75337, cited in Ian McDonald, *Gender Queer? More like Gender-Outta-Here!: Preserving* Pico's *Protections for LGBTQ Students*, 48 VT. L. REV. 269, 271 n.9 [hereinafter *Gender Queer*] (noting the numerous recently-adopted state laws restricting various forms of gender-affirming care).

The suppression of speech about transgender issues has taken many forms in recent years. Such restrictions include, but are not limited to, the banning or restricting of books regarding gender identity;[8] proscribing certain curricular materials discussing transgender issues;[9] restricting teachers' pedagogical choices regarding whether and how to teach issues related to gender identity;[10] and barring medical professionals from providing minors with referrals for gender-affirming care.[11]

Courts and scholars have begun to address such restrictions upon speech related to LGBTQ+ issues.[12] This Article is the first to

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[8] *See, e.g.*, Caroline Lester, *Say Gay: Why H.B. 1557 is an Unconstitutional Infringement of Minors' First Amendment Right to Receive Information*, 25 GEO. J. GENDER & L. 141, 144 (2023) [hereinafter Lester, *Say Gay*] (noting that the Palm Beach school board asked school staff "to flag any books that touch on [gender identity]. [T]he school board then restricted fifteen books to grades four and above, including *My Rainbow* (a picture book for ages four-to-eight years about a rainbow-colored wig), *Frankie & Bug* (a middle-school novel that features a trans main character), and three books about trans children written by a transgender man.").

[9] *See, e.g.*, FLA. STAT. ANN. § 1001.42(8)(c)(3) (July 1, 2023) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 [with certain limited exceptions, including for purposes of teaching the benefits of abstinence or that 'reproductive roles are binary, stable, and unchangeable']. If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards.").

[10] *See, e.g.*, Fla. Stat. § 1001.42(8)(c)(3) (2022) (providing that, with some exceptions, "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . ."); Laura Meckler, *Gender Identity Lessons, Banned in Some Schools, are Rising in Others*, WASH. POST (June 3, 2022), https://www.washingtonpost.com/education/2022/06/03/schools-gender-identity-transgender-lessons/ (noting that "[f]ive states, including Florida, ban or limit how teachers can talk about gender identity and sexual orientation, with at least 10 states considering such measures, according to the National Conference of State Legislatures").

[11] *See, e.g.*, Arkansas Act 626 (providing that "a physician, or other healthcare professional shall not refer any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures" and authorizing private causes of action, administrative enforcement, and professional discipline for violations of this provision).

[12] *See, e.g.*, Timothy Pratt, *Georgia Lawsuit Challenges Anti-LGBTQ+ Book Bans Over 'Real Harms*,' The Guardian (July 3, 2024),

address a specific aspect of prohibitions on "trans talk:" namely, restrictions upon public school students engaging in speech advocating or advising that a fellow student seek forms of gender-affirming care that are currently unlawful to minors in the state where the speech occurs. Under the classic framework of *Tinker v. Des Moines School District*,[13] such student speech would almost surely be protected by the First Amendment unless it actually caused or posed a substantial risk of causing significant disruption to the school's ability to carry out its educational mission. The Supreme Court's post-*Tinker* decisions—particularly *Bethel School District v. Fraser*[14] and *Morse v. Frederick*[15]—however, have opened the door to an argument that the First Amendment would allow a public school to punish students who encourage their peers to seek gender-affirming medical care in the form of surgical interventions, hormone therapy, puberty blockers, or other medications that are medically appropriate but unlawful in the state where the students are located.

Although the current attacks on "trans talk" range broadly, this Article focuses specifically upon the First Amendment rights of public school students to engage in speech advocating gender-affirming care for several reasons. First, because *Fraser* and *Morse* opened opportunities for new lines of attack upon public school students' First Amendment rights, their rights are uniquely vulnerable in the current environment. Secondly, restrictions on transgender-related speech have for that very reason been disproportionately aimed at public school students and public school teachers.[16] Third, peers are an important source of information for adolescents. For example, in discussing their experience, a trans student stated that because "[w]e don't really

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https://www.theguardian.com/us-news/article/2024/jul/03/georgia-lawsuit-book-bans#:~:text=The%20Southern%20Poverty%20Law%20Center,book%20bans"%20in%20the%20state (discussing lawsuit challenging Georgia's "divisive concepts" law, under which a teacher was terminated for reading a book featuring a non-binary main character to her students); Brandt v. Rutledge, 677 F.Supp.3d 877, (E.D. Ark. 2023) (holding that an Arkansas statute banning health care professionals from providing minors with referrals for gender-affirming care violated the First Amendment).

[13] 393 U.S. 503 (1969).

[14] 478 U.S. 675 (1986).

[15] 551 U.S. 393 (2007).

[16] *See* notes 8-10, *supra*, and accompanying text.

have trusted adults in the high school or middle school," trans students are "all on our own[,] and we end up finding community in each other and safety in each other because all of the adults who were supposed to protect us have failed time and time again to protect us."[17] Legislatures and school officials are therefore particularly likely to seek to restrict student expression regarding gender-affirming care specifically because it is likely to be especially influential. Fourth, adolescence is the life stage when a person is uniquely likely to begin examining their gender identity and therefore to begin seeking information and support relating to gender-affirming care.

Finally, and perhaps most crucially for First Amendment purposes, public school students are uniquely vulnerable to the kind of "chilling effects" that are a traditional concern of First Amendment doctrine. School discipline can have lifelong consequences, especially for students of color. Such consequences are of particular concern as it relates to disciplining students for "trans talk" in public schools. Given that Black and Latino students in general are far more likely to be subject to school discipline than their white peers,[18] that LGBTQ students are more likely to be subject to school discipline than their non-LGBTQ peers,[19] and that

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[17] Elizabeth Izzo, *Local Teenagers Discuss Anti-Trans Bias, Attacks at School*, LAKE PLACID NEWS (June 6, 2024), https://www.lakeplacidnews.com/news/local-news/2024/06/06/local-teenagers-discuss-anti-trans-bias-attacks-at-school/ (quoting Bingo Valentin, a transgender student).

[18] *See, e.g.*, Equal Justice Society, *Breaking the Chains: The School-to-Prison Pipeline, Implicit Bias, and Racial Trauma: An Executive Summary*, http://www.fixschooldiscipline.org/wp-content/uploads/2020/09/8.Breaking-the-Chains-Report-2016.pdf ("Black students are 3.8 times more likely to be suspended than White students; Black girls are 6 times more likely to be suspended than White girls; Latino students represent 21% of suspensions and 25% of expulsions[; and] 9% of LGBTQ students were disciplined for simply identifying as LGBTQ.").

[19] *See, e.g.*, Nadra Nittle, *LGBTQ+ Students Face Disproportionately High Rates of Discipline in Schools, Research Shows* (stating that "[o]penly LGBTQ+ students . . . disproportionately face discipline in schools, often for reasons related to their sexual orientation or gender identity . . . ." and noting that "[a]lthough about 10 percent of youth between the ages of 13 and 17 identify as LGBTQ+, 33 percent of queer students report experiencing school discipline of some sort, including principal's office visits, detention, suspension or expulsion").

a significant proportion of trans-identifying individuals are people of color,[20] trans-identifying students of color are especially likely to be subject to school discipline for engaging in "trans talk."[21] They are therefore also particularly likely to be deterred from engaging in such speech, even if it would ultimately be protected by the First Amendment.

This Article argues that the Court's post-*Tinker* cases, read properly, do not allow public schools to suppress or punish such student speech. This conclusion is, however, a closer call than it should be in light of the breadth of the majority opinions in *Fraser* and *Morse*, the facts of those cases, and the current Court's predisposition toward maximalism in its rulings restricting constitutional rights.[22] Thus, *Fraser* and *Morse* can arguably be read to support the proposition that the First Amendment would impose no barrier to punishing a student for speech advising or advocating that a peer seek forms of gender-affirming care that are

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[20] Andrew R. Flores, Taylor N.T. Brown & Jody L. Herman, *Race and Ethnicity of Adults Who Identify as Transgender in the United States* at 2, THE WILLIAMS INSTITUTE, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-Ethnicity-Trans-Adults-US-Oct-2016.pdf ("[T]he population of adults who identify as transgender is more racially and ethnically diverse than the U.S. general population. We estimate that, among adults who identify as transgender nationally, 55% identify as White, 16% identify as African-American or Black, 21% identify as Latino or Hispanic, and 8% identify as another race or ethnicity.").

[21] LGBTQ students of color also experience alarmingly high rates of depression and suicidal ideation: "[f]orty-two percent of LGBTQIA+ youth seriously considered attempting suicide in 2021, with significantly higher rates among Native, Black, and multiracial youth." Lester, *Say Gay*, *supra* note ___, at 144–45. To make clear the direction of the causal arrow: it is the dehumanization, alienation, and rejection of their identity that drives these children's mental health issues. Numerous studies have shown that "gender- and sexuality-affirming support for LGBTQIA+ youth significantly decreases depression and suicidal ideation." *Id. See also* Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAMILY FOUNDATION (June 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/ ("Inability to access gender affirming care, such as puberty suppressors and hormone therapy, has been linked to worse mental health outcomes for transgender youth, including with respect to suicidal ideation, potentially exacerbating the already existing disparities. Conversely, access to this care is associated with improved outcomes in these domains.").

[22] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling *Roe v. Wade*).

now illegal in the state where the student speaker and listener reside. This Article therefore takes seriously the possibility—indeed, the likelihood—that *Fraser* and *Morse* can and will be so applied. The history of suppressing speech that advocates for the liberty, dignity, and autonomy of subordinated groups;[23] the current restrictions on speech characterized as "aiding and abetting" the provision of gender-affirming care;[24] and the contemporary efforts to suppress speech on related subjects[25] all suggest that this likelihood is a near-certainty.

This Article is mindful of concerns about centering gender-affirming care in our legal and social discourse regarding persons who are transgender.[26] As Scott Skinner-Thompson has noted, the "persistent linking of transgender identity with medicalized diagnoses, including but not limited to 'gender dysphoria,' potentially to harness medical care, lends credence to a regulatory approach where medical providers and administrators, not the student, have control over the child's identity."[27] Transgender persons are not defined by their healthcare. When a transgender student wishes to receive information from a peer about gender-affirming care, however, the First Amendment protects their right to receive it and the speaker's right to convey it.

Section II of this Article provides a brief overview of gender-affirming care and of restrictions that states have imposed upon minors receiving such care. Section III summarizes general principles of First Amendment doctrine and analyzes the Supreme Court's school speech cases in detail. Section III then argues that although the Court's post-*Tinker* cases, while more solicitous in tone of school officials' efforts to restrict student speech, are best read as establishing specific exceptions where *Tinker* does not apply and should not be read as allowing the government to punish

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[23] *See* Part ___, *infra*, discussing the history of suppressing anti-slavery speech.
[24] *See* Part II.B., *infra*, describing such provisions adopted as part of the current wave of state laws and executive action banning gender-affirming care for minors.
[25] *See* Part II.B., *infra*, discussing the overlapping tactics of the contemporary anti-abortion and anti-trans movements.
[26] That risk is even more pronounced in the case of those who, like the Author, do not themselves have lived experience as a transgender person.
[27] Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV 657, 661 (2022).

or suppress student speech advocating that a peer seek to obtain gender-affirming care, even when such care is unlawful to minors in the state at issue. Finally, Section IV. contends that to the extent school and government officials attempt to rely upon the Court's post-*Tinker* cases to justify restrictions upon such speech, such a reading of those cases is inconsistent with the right to freedom of speech as embodied in our post-Civil War Constitution.

II. State Restrictions on Gender-Affirming Medical Care

Prior to examining the First Amendment implications of speech advocating gender-affirming care, it is important to first understand the basic details of the bans of such care. Part II.A. therefore first provides a brief overview of some aspects of gender-affirming care. To be clear: this Part does not purport to be a comprehensive review of the medical literature nor to imply that every transgender person's journey is the same, medically or otherwise. Rather, this Part simply provides a synopsis of the basic aspects of gender-affirming medical care in order to provide the background necessary to understand the many state bans or restrictions that have recently been imposed. Part II.B. then describes the various restrictions that states have recently imposed upon such medical care.

A. An Overview of Gender-Affirming Medical Care

The World Professional Association for Transgender Health Standards of Care[28] are "the internationally recognized guidelines for the treatment of gender dysphoria"[29] and are widely accepted by other major professional medical associations.[30] The Standards "recommend an individualized approach to gender transition, consisting of one or more of the following evidence-based treatment options for gender dysphoria: social transition, hormone therapy, psychotherapy, and transition surgery."[31]

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[28] *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, International Journal of Transgender Health* (2022), https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644.

[29] Jennifer Levi & Kevin M. Barry, *Transgender Rights and the Eighth Amendment*, 95 S. CAL. L. REV. 109, 120 (2021).

[30] *Id.* at 121.

[31] *Id.* at 122.

Social transitioning involves "changes in an individual's gender expression and role, which involve living in the gender role consistent with one's gender identity."[32] Hormone therapy entails "the administration of exogenous endocrine agents to induce feminizing or masculinizing changes,"[33] including changes to one's voice, facial hair, and body type, among other aspects of one's gender presentation or perception.[34] Psychotherapy aims to support the person in "achiev[ing] long-term comfort in their gender identity expression," whatever their gender identity may ultimately be.[35] Last, transition surgery encompasses "a range of procedures that change one's primary and/or secondary sex characteristics, including surgery on the breasts or chest, external or internal genitalia, and facial features."[36]

By recommending an individualized approach, the Standards recognize that the treatment options that a person might choose or that would be medically appropriate will differ for each person.[37] Access to complete information about the full range of options, however, is nonetheless important in order for each individual to make a decision consistent with medical norms of informed consent and with societal norms of individual dignity and autonomy.

B. State Restrictions on Gender-Affirming Medical Care for Minors

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[32] *Id.*
[33] *Id.*
[34] *Id.* at 123.
[35] *Id.* (internal quotation marks omitted).
[36] *Id.*
[37] For example: although state restrictions on gender-affirming care for minors often target both hormone therapy and transition surgery, the latter was only quite rarely advised for or provided to minors even prior to such restrictions being adopted. *See, e.g.*, Ken Alltucker, *More People are Getting Gender-Affirming Care, under Attack in Many States. Few are Kids.*, https://www.usatoday.com/story/news/health/2023/08/23/gender-affirming-care-restrictions-for-minors-grow/70652104007/ (Aug. 2023) (summarizing a study published in JAMA Network Open finding that fewer than 8% of patients who received any form of transition surgery from 2016–2020 were in the 12–18 year old range).

The Williams Institute estimates that as of March 2023, thirty-two states have through legislative or executive action banned or restricted minors' access to gender-affirming care or have bills pending that would do so.[38] Such restrictions include provisions imposing liability on medical professionals who provide gender-affirming care to minors;[39] prohibiting the use of public funds and/or barring state tax deductions or the use of state health insurance plans for such care;[40] banning gender transition surgeries and imposing moratoriums on hormone treatments for minors;[41] discouraging recognition of minors' social transition as expressed through their chosen names, clothing, and pronouns;[42] defining referrals for gender-affirming treatment for minors as unprofessional conduct subject to discipline by health care providers' licensing and regulatory boards;[43] and proscribing conduct and speech that "aids or abets" the provision or receipt of prohibited gender transition procedures.[44]

As Professor Mary Ruth Ziegler has explained, the targeting of minors is purposeful. The "'linchpin of the strategy'

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[38] Elana Redfield, Kerith J. Conron, Will Tentindo & Erica Browning, *Prohibiting Gender-Affirming Medical Care for Youth*, THE WILLIAMS INSTITUTE, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2023.pdf (Mar. 2023) [hereinafter WILLIAMS INSTITUTE REPORT] ("156,500 transgender youth live in 32 states where access to gender-affirming care has been restricted or was at risk of being banned due to legislation filed this legislative session").

[39] *See, e.g.*, S.F. 538, 90th Gen, Assemb., Reg. Sess. (Iowa 2023).

[40] *See, e.g.*, H.B. 1125, 2023 Leg., Reg. Sess. (Miss. 2023); Ark. Code Ann. § 20-9-1501, *et seq.* 2021).

[41] S.B. 16, 2023 Leg., Gen. Sess. (Utah 2023).

[42] *See, e.g.*, Office of the State Surgeon Gen., Fla. Dept. of Health, *Treatment of Gender Dysphoria for Children and Adolescents* (Apr. 20, 2022), https://www.floridahealth.gov/_documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-guidance.pdf.

[43] *See, e.g.*, S.B. 1138, 55th Gen. Assemb., 2d Reg. Sess. (Ariz. 2022).

[44] *See, e.g.*, H.B. 1125, 2023 Leg., Reg. Sess. (Miss. 2023) ("A person shall not knowingly engage in conduct that aids or abets the performance or inducement of gender transition procedures to any person under eighteen (18) years of age. This subsection may not be construed to impose liability on any speech protected by federal or state law."); *see also* S.F. 538, 90th Gen, Assemb., Reg. Sess. (Iowa 2023).

used by opponents of both abortion access and transgender rights has been [to start] 'with the rights of minors:'"[45]

> After *Roe* was decided, abortion opponents shifted their attention to minors accessing abortions by promoting parental consent laws. "If people are on the fence about whether they're going to tolerate something—a decision that's different from what they would make—they tend to be more uncomfortable when it's their own child, or even the thought of any child making that decision," Ziegler said. "It was always, then as now, designed to be an opening wedge in an effort to delegitimize whatever it was for everyone."[46]

Thus, "[c]onservatives have tried to frame their efforts to limit transgender healthcare access as an effort to protect children and the rights of parents, even as the laws introduced around the country have increasingly focused on adults."[47]

In addition to being especially targeted by such restrictions, children are particularly vulnerable to their effects. "Trans and nonbinary youth are two to three times more likely than their cisgender peers to experience bullying, threats, and discrimination in schools. They are also two to three times more likely to be depressed than peers."[48] Gender-affirming support and medical care are "associated with better mental health and feelings of safety at school."[49] For example, minors "who sought gender-affirming care at a gender clinic reported lower odds of depression and suicidality among those who initiated puberty blockers or gender-affirming hormone therapy."[50] Banning such care, by contrast, inflicts real and substantial harms upon children and their families. The Williams Institute, for example, notes that bans on gender-affirming care increase "the burden of stress experienced

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[45] John, *GOP Efforts to Restrict Trans Rights*, *supra* note ___ (quoting Professor Ziegler).
[46] *Id.*
[47] *Id.*
[48] Lester, *Say Gay*, *supra* note ___, at 144–45.
[49] WILLIAMS INSTITUTE REPORT, *supra* note___, at 4.
[50] *Id.*

by transgender youth and their families . . . . Parents of transgender youth in two separate studies reported considerable concern about worsening mental health and increased risk of suicidality for their child due to proposed legislative restrictions on access to gender-affirming care.[51] Such targeting of children is therefore particularly cruel. As discussed in Part III, government suppression of gender-affirming counter-speech compounds the injury.

III. The First Amendment Implications of Restrictions on Gender-Affirming Speech by or Directed Toward Minors

A. First Amendment First Principles

Restrictions on speech affect both the speaker and the listener. Although free speech jurisprudence and scholarship largely tends to focus on the speaker's First Amendment rights, "[t]he paradigm case of free speech involves a matched pair of a willing speaker and a willing listener."[52] The Supreme Court's cases therefore make clear that actual or potential listeners also have a First Amendment interest in receiving information and that that interest is distinct from the speaker's interest. The Court has noted that "[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both. [Thus, there is a] First Amendment right to receive information and ideas, and [the] freedom of speech necessarily protects the right to receive."[53]

As a general matter, a content-based restriction on the ability of a willing speaker to convey to a willing listener information regarding gender-affirming care would almost certainly violate the First Amendment. Courts are to "apply the most exacting scrutiny to regulations that suppress, disadvantage,

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[51] *Id.* at 15–16.

[52] James Grimmelmann, *Listeners' Choices*, 90 COLORADO L. REV. 365, 366 (2019).

[53] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 756-57 (1976). *See also* Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas . . . . [The] freedom (of speech and press) . . . necessarily protects the right to receive . . . .") (internal citations and quotation marks omitted).

or impose differential burdens upon speech because of its content.[54] Content-based restrictions on speech are therefore as a general rule subject to strict scrutiny. As the Court noted in *Reed v. Town of Gilbert*, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[55] And although strict scrutiny is not designed to be "strict in theory but fatal in fact,"[56] it is difficult to envision in a scenario under general First Amendment principles wherein proscribing or punishing the sharing of information regarding the availability of gender-affirming care, or even direct advocacy that the listener herself should obtain such care unlawfully, would be the least restrictive means of achieving a compelling governmental interest.

General First Amendment principles, however, do not always apply. Bans on "trans talk" by minors are particularly likely to operate in the school environment, wherein restrictions on student speech are given greater judicial deference than would ordinarily be the case. Part III.B. therefore explores the exceptions and context-dependent tests that create an opening for anti-trans legislators and officials to seek to justify bans on "trans talk" by minors: specifically, the Court's public school student speech cases, and especially the "incitement-lite" doctrine of *Morse v. Frederick*.

B. Public School Student Speech: The *Tinker* Test

The Supreme Court has long held that "the right of free speech is not absolute at all times and under all circumstances."[57] Thus, First Amendment protections may differ depending upon the context in which speech occurs. The Court's First Amendment doctrine has accordingly evolved to encompass numerous exceptions whereby either (1) the context, content, location, or mode of speech or (2) the nature and purpose of the government's restriction on speech is such that the speech receives lesser protection than it would otherwise. These include: the categories of

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[54] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641–42 (1994).
[55] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[56] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
[57] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

unprotected speech, *i.e.*, those categories of speech that, due to their content or form, have historically and traditionally been treated as unprotected;[58] speech in limited or non-public forums;[59] circumstances involving speech by the government itself (the "government speech" doctrine);[60] commercial speech;[61] certain speech in broadcast media;[62] content-neutral restrictions on the time, place, and manner of speech or on conduct having an expressive component;[63] and speech by certain speakers, such as government employees,[64] incarcerated persons,[65] military personnel,[66] and—most relevant to this Article—public school students.[67]

The default rule of the First Amendment is that speech is protected unless there are specific reasons in a given case why it is not. Hence, the various exceptions and context-specific tests are to be applied rigorously and narrowly, lest they swallow the rule.[68] As is often the case in legal doctrine, however, some exceptions expand to such a degree that they pose a serious risk of undermining the broader rule. This has proven to be the case regarding public school student speech. This Section therefore briefly describes the evolution of the Supreme Court's cases involving the First Amendment rights of public school students.

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[58] *See, e.g.*, United States v. Stevens, 559 U.S. 460 (2010) (holding that "[f]rom 1791 to the present . . . , the First Amendment has permitted restrictions upon the content of speech in certain limited "historic and traditional categories").
[59] *See, e.g.*, Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
[60] *See, e.g.*, Walker v. Sons of Confederate Veterans, 576 U.S. 200 (2015).
[61] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
[62] *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
[63] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. O'Brien, 391 U.S. 367 (1968).
[64] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006).
[65] *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977).
[66] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974).
[67] *See, e.g.*, *Tinker*, 393 U.S. 503 (1969).
[68] *See, e.g.*, *Turner Broadcasting*, 512 U.S. at 641 ("[T]he First Amendment, *subject only to narrow and well-understood exceptions*, does not countenance governmental control over the content of messages expressed by private individuals.") (emphasis added).

The Court's decision in *Tinker v. Des Moines School District*[69] is the seminal case regarding public school students' First Amendment rights. *Tinker* arose in the context of student opposition to the Vietnam War. A group of public school students, with the support of their parents, decided to collectively wear black armbands with peace signs on them to school as a way of expressing their opposition to the war.[70] Upon learning of the students' plan to wear armbands to school, school officials decided that students wearing such an armband to school would be told to remove it and would be suspended if they refused to do so.[71] Several students nonetheless wore their armbands to school as planned and were suspended as a result.[72] The students' parents filed suit, alleging that the discipline imposed violated the students' First Amendment rights.

The Supreme Court held that the disciplinary actions taken against the students violated the First Amendment. In an ordinary case, *i.e.*, outside of the school environment, there would have been little doubt that the First Amendment bars government officials from punishing a person -- whether an adult or a minor -- for wearing such an armband. Moreover, the *Tinker* Court emphasized that even in the school environment, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[73] To the contrary, students retain significant First Amendment rights while at school or participating in school-related activities.

Because the students' expression in *Tinker* occurred at a school during school hours, however, the Court found it necessary to balance the First Amendment rights that the students undoubtedly retained with the "special characteristics of the school environment"[74] that might justify limiting the exercise of those rights in ways that would be impermissible in other contexts. Specifically, the Court held that:

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[69] 393 U.S. 503 (1969).
[70] *Id.* at 504.
[71] *Id.*
[72] *Id.*
[73] *Tinker*, 393 U.S. at 506.
[74] *Id.*

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.[75]

Thus, under the *Tinker* test, school officials may only regulate student speech based on its content or viewpoint[76] when such speech causes or threatens to cause material and substantial interference with the functioning of the school.

In *Tinker*, the Court found no evidence or reasonable apprehension of material and substantial disruption to normal school operations due to students' wearing of armbands in protest of the war. The Court reasoned that the trial court's findings of fact and the Court's own review of the record "fail[] to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[77] Although the armbands may have caused some upset, disagreement, and minor distractions during the school day, "no disturbances or disorders on the school premises in fact occurred. These [students] merely went about their ordained rounds in school."[78] The Court

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[75] *Id.* at 509.

[76] As in other contexts, however, the government may regulate the time, place, and manner of student expression during school-related activities provided that the regulation is indeed content and viewpoint neutral and that it satisfies the lower standard of review applicable to such restrictions. *See Tinker*, 393 U.S. at 513 ("[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

[77] *Id.* at 509.

[78] *Id.* at 514.

further noted that the students' wearing of the armbands "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder."[79] Thus, the only justification for punishing the students was a desire by school officials to avoid controversy and upset, which was not sufficient justification for curtailing the students' First Amendment rights.[80]

If the state of the law had rested at *Tinker*, it would be clear that school officials cannot not punish student speech that merely advises or advocates in a non-disruptive manner that a fellow student seek gender-affirming care. Certain aspects of gender-affirming care for minors may be considered to be controversial, and discussions of such care in school may therefore cause disagreement or upset among students who oppose such care and overhear such advice or advocacy.[81] Under *Tinker*, however, none of these factors—controversy, disagreement, upset, or sporadic discussion during school hours—would themselves justify infringing the First Amendment rights of the student speaker or the willing student listener. Rather, under *Tinker*, in order for student speech advising or advocating that a fellow student seek gender-affirming care, such advice or advocacy would need to be accompanied by specific evidence showing that material and substantial disruption of school activities actually occurred or that which school officials reasonably could have anticipated such disruption occurring. As the *Tinker* Court reasoned, even in the school context:

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression . . . . Any word spoken, in

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[79] *Id.*

[80] *Id.* at 510 ("[T]he action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.").

[81] Indeed, certain forms of gender-affirming care that a student advises a peer to obtain may even be illegal in the state at issue. As explained more fully in Part ___ below, however, advocacy that a listener engage in illegal action is protected speech unless it amounts to legally-proscribable incitement.

> class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[82]

The state of the law, however, has not rested at *Tinker*. To the contrary, subsequent developments in the Supreme Court's student speech jurisprudence raise the very real risk that school and government officials will seek to use the current doctrine as a justification for deterring and punishing student speech advocating that a fellow student seek gender-affirming care. Part III.C. therefore examines the Court's post-*Tinker* cases; describes how those cases can be argued to allowing suppressing student advocacy of gender-affirming care in states where such care is illegal; and then explains that, notwithstanding the erosion of *Tinker*, the Court's post-*Tinker* cases cannot reasonably be read as allowing such suppression.

C. Post-*Tinker* School Speech Jurisprudence

Tinker stands for the proposition that the speech of public school students may only be restricted in circumstances where it causes or is reasonably feared to cause substantial and material disruption to the school's operations. For many decades, this remained the standard. Subsequent Supreme Court cases, however, have eroded *Tinker* such that it is no longer *the* test, but rather merely *a* test, by which restrictions on student speech are to be judged.

In *Bethel School District v. Fraser*,[83] a student speaker at a mandatory school assembly employed an "elaborate, graphic, and explicit sexual metaphor"[84] during his remarks. Some of the

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[82] *Id.* at 508–09.
[83] 478 U.S. 675 (1986).
[84] *Id.* at 678.

students at the assembly reacted positively; some reacted negatively; and some reacted with confusion or embarrassment.[85] Additionally, one teacher decided to change her lesson plan the next day in order to devote time to discussion of the student's remarks at the assembly.[86]

Pursuant to the school's policy prohibiting students from using "obscene [or] profane language or gestures"[87] during school activities, school administrators suspended the student speaker and barred him from being a speaker at the school's graduation ceremony. The student's father sued on behalf of the student, arguing that the sanctions imposed in response to the student's remarks violated the First Amendment. The lower courts ruled in the student's favor, because, *inter alia*, they found that the student's remarks did not have "a disruptive effect on the educational process"[88] as *Tinker* would require in order for the First Amendment to permit the school to punish the student for his speech.

The Supreme Court reversed. The Court distinguished *Tinker*, holding that the key points of the analysis in *Tinker* were that the wearing of armbands in that case (1) conveyed a political message rather than sexual content and (2) did not "intrude[] upon the work of the schools or the rights of other students."[89] The Court reasoned that while students do retain substantial First Amendment rights in the context of school-related activities, First Amendment analysis "must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."[90] The Court reasoned that although lewd or offensive expression may be constitutionally protected in other contexts, "it does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same

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[85] *Id.* ("[S]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech.").
[86] *Id.*
[87] *Id.*
[88] *Id.* at 679.
[89] *Id.* at 680.
[90] *Id.* at 681.

latitude must be permitted to children in a public school."[91] One of the functions of public schools, the Court stated, is to prepare students for participation in civil society; and one of the "fundamental values necessary to the maintenance of a democratic political system [is to] disfavor the use of terms of debate highly offensive or highly threatening to others."[92] Thus, the Court held, "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct"[93] during school-related activities, and therefore may punish such speech or conduct by students even in the absence of evidence of the kind of material and substantial disruption of school functions that would be required under *Tinker*. "The inculcation of these [civic] values is truly the 'work of the schools,'"[94] the Court reasoned; thus, student speech that interferes with the inculcation of such values therefore interferes with this component of the schools' work.

Fraser is in essence a carve-out from the *Tinker* framework applicable to a specific circumstance: *i.e.*, when students employ lewd, indecent, or offensive speech during school-related activities. The reasoning of *Fraser* is that interpreting the First Amendment to require a school to tolerate such speech unless it has the effect of material and substantial disruption would be equivalent to the school condoning it, which would be inconsistent with the school's mission of inculcating by example "the shared values of a civilized social order."[95] In doing so, the Court's reasoning elevated the importance for First Amendment purposes of schools' *in loco parentis* role with regard to public school students, whereas *Tinker* emphasized the schools' mission of providing substantive education free of material and substantial disruption to its ability to do so. The former emphasis naturally tends to be less protective of student speech than the latter; there are many forms of non-disruptive speech that a parental figure may nonetheless find to be inconsistent with the values they wish to inculcate in their minor wards. *Fraser* therefore arguably opened the door to allowing

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[91] *Id.* at 682.
[92] *Id.*
[93] *Id.* at 683.
[94] *Id.* (quoting *Tinker*).
[95] *Id.*

school officials to regulate non-disruptive student speech solely because they perceive the speech at issue to be inconsistent with the values they wish to impart.

This is not to suggest that *Tinker* held that the public schools' *in loco parentis* role is irrelevant to First Amendment analysis. It is clear, however, that at least in the context of the facts of the case and the nature of the speech at issue, *Tinker* strongly emphasized students' dignitary and autonomy interests in their speech in a way that *Fraser* did not. The *Tinker* Court stated that:

> In our system, state-operated schools may not be enclaves of totalitarianism . . . . [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views . . . . [S]chool officials cannot suppress expressions of feelings with which they do not wish to contend.[96]

Fraser, by contrast, focused much more heavily on the schools' interest than on the students' interests.

Morse v. Frederick[97] established another exception to the applicability of the *Tinker* test. *Morse* involved student speech at a school-approved trip for students to participate in the passing of the Olympic Torch along a street adjacent to the school during school hours.[98] As the Torch procession and film crews passed by the school, Frederick, a student at the school, along with his friends

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[96] *Tinker*, 393 U.S. at 511.

[97] 551 U.S. 393 (2007).

[98] Given that the speech "occurred during normal school hours[,] was sanctioned by [the school principal] as an approved social event or class trip[,] [t]eachers and administrators were interspersed among the students and charged with supervising them[,] and [t]he high school band and cheerleaders performed[,]" the Court found that *Morse* was a school speech case, even though the speech at issue occurred on a public street, which is a traditional public forum. *Id.* at 400–01.

(all of whom but one were also students at the school) unfurled a banner that he had brought with him from home reading "Bong Hits 4 Jesus."[99]

The school's principal believed that the banner advocated the illegal use of drugs in contravention of the school district's standing policy, which "specifically prohibit[ed] any assembly or public expression that . . . advocates the use of substances that are illegal to minors."[100] She therefore ordered that the banner be taken down. Frederick refused to do so and was accordingly suspended from school. The district superintendent upheld the suspension based on his finding that "[t]he common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana" and the banner "was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use."[101] The superintendent therefore concluded, per the Court's decision in *Fraser*, that the banner amounted to "speech or action that intrudes upon the work of the schools"[102] and that Frederick could therefore be punished for displaying it.

Frederick sued, arguing that the suspension violated his First Amendment rights. The district court rejected his claim, but the Ninth Circuit ruled in his favor. The Ninth Circuit found that even if the banner were interpreted as "express[ing] a positive sentiment about marijuana use,"[103] Frederick's First Amendment rights were violated "because the school punished Frederick without demonstrating that his speech gave rise to a risk of substantial disruption" as required by *Tinker*.[104]

The Supreme Court reversed. The Court held that "the rule of *Tinker* is not the only basis for restricting student speech."[105] Thus, under *Morse*, while a showing of material and substantial

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[99] *Morse*, 551 U.S. at 397.
[100] *Id.* at 398.
[101] *Id.* at 398–99.
[102] *Id.* at 399.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 406.

disruption is sufficient, it is not always required in order to justify limitations on students' First Amendment rights. Depending upon the nature and context of the speech at issue, it may fall under an exception to *Tinker* whereby a showing of actual or potential disruption is not required.

The Court began its analysis by reviewing *Tinker* as well as its subsequent cases establishing carve-outs to the *Tinker* test. *Tinker*, the Court stated, involved facts "implicating concerns at the heart of the First Amendment,"[106] given that it involved political speech about the Vietnam War. Further, the Court noted, the school's justification for suppressing the students' speech in *Tinker* was merely a desire to avoid potential controversy or discomfort.[107] The *Morse* Court reasoned that those two factors—the very high degree of political salience of the speech at issue, and the very low degree of the school's interest in suppressing it—justified finding in *Tinker* that the school could only suppress such speech if it posed a risk of substantial disruption to school operations. When either or both factors are absent or of different weight than in *Tinker*, the Court reasoned, then there may be other grounds beyond the risk of disruption that may justify limitations on students' First Amendment rights.

The *Morse* Court noted that *Fraser*, as discussed above, found that a school's punishment of a student for employing lewd language during a school assembly did not violate the student's First Amendment rights, despite the absence of a finding of material and substantial disruption[108] and notwithstanding the fact that had the student "delivered the same speech in a public forum outside the school context, it would have been protected [by the First Amendment]."[109] The *Morse* Court further reasoned that in *Kuhlmeier v. Hazelwood School District*,[110] decided after *Fraser*,

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[106] *Id.* at 403.
[107] *Id.* at 403–04 ("The only interest the [*Tinker*] Court discerned underlying the school's actions was the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, or an urgent wish to avoid the controversy which might result from the expression," which was insufficient "to justify banning a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.").
[108] *Id.* at 404.
[109] *Id.* at 405.
[110] 484 U.S. 260 (1988).

the Court held that the First Amendment permits a school to restrict student speech in "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,"[111] such as a high school newspaper, without needing to show that the speech poses a risk of disruption.[112]

Drawing upon *Fraser* and *Kuhlmeier*,[113] the *Morse* Court held that "the mode of analysis set forth in *Tinker* is not absolute."[114] Thus, *Morse* held, a showing of material and substantial disruption to school functions is not always required in order for restrictions upon student speech to be permissible under the First Amendment. *Morse* can therefore be read as standing for the circular proposition that restrictions on student's First Amendment rights are justifiable whenever they are adequately justified, with the risk of disruption being only one such possible justification.

Another such justification, *Morse* held, is when the student speech "is reasonably viewed as promoting illegal drug use."[115] Although the words "Bong Hits 4 Jesus" could be interpreted in various ways, not all of which amount to advocacy of the use of illegal use of drugs,[116] the Court held that the principal's interpretation was plainly reasonable. It was therefore sufficient to

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[111] *Morse*, 551 U.S. at 405 (internal quotation marks omitted).
[112] *Id.*, quoting *Kuhlmeier* ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").
[113] The Court also analogized to its Fourth Amendment cases holding that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Morse*, 551 U.S. at 406.
[114] *Id.* at 405.
[115] *Id.* at 404.
[116] Indeed, most of the reasonable interpretations of the banner would not construe it as advocacy of "the use of substances that are illegal to minors." The student himself disclaimed such a meaning; indeed, he disclaimed that the words on the banner had any intended substantive meaning at all. *See id.* at 401, 402 (noting that the student stated that "the words were just nonsense meant to attract television cameras"; and were intended to be "meaningless and funny"). Moreover, as the dissent in *Morse* noted, the words on the banner could—and in the dissent's view, should—have been interpreted as ridiculous, silly, or ambiguous rather than as advocating the use of drugs that are illegal to minors. *See id.* at 402.

satisfy the requirements of the First Amendment "in light of the special characteristics of the school environment."[117] The Court reasoned that:

> Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one. As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"—in violation of school policy.[118]

Thus, a school official's interpretation of the speech at issue need not necessarily be correct or even the most reasonable interpretation. Under *Morse*, if school officials who see or hear the speech at issue can reasonably interpret it as advocating that minors use drugs that are illegal to them, the First Amendment is satisfied.

The Supreme Court's most recent student speech case is *Mahanoy Area School District v. B.L.*[119] The *B.L.* case dealt with the First Amendment implications of student speech, such as social media posts, which occurs off campus and apart from any school-sanctioned activities but that is directed toward and has an impact within the school. In *B.L.*, a rising sophomore student was disappointed and angry that she was not selected for her school's varsity cheerleading team. While at an off-campus convenience store, the student posted two messages to her Snapchat. The first was a picture of herself and friend raising their middle fingers, with the caption "Fuck school fuck softball fuck cheer fuck everything."[120] The second post criticized the decision not to select

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[117] *Id.* at 397.
[118] *Id.* at 401.
[119] 594 U.S. 180 (2021).
[120] *Id.* at 185.

her for a varsity cheerleading slot in light of an entering freshman student being selected directly for the varsity team: "Love how me and [another student] get told we need a year of [junior varsity] before we make varsity but tha[t] doesn't matter to anyone else?"[121]

Many of the student's Snapchat friends were also students at her school; thus, her messages were viewed by and re-shared with other members of the school community, including members of the cheerleading squad, teachers, and other students. In-school discussions about the student's posts ensued, including during an Algebra class and among cheerleading coaches, members of the cheerleading team, and other students, some of whom were "visibly upset" about the student's Snapchat posts.[122] School officials suspended the student based upon her posts' use of profanity regarding a school-sponsored activity. The student and her family sued, alleging that the suspension violated her First Amendment rights.

The issue in *B.L.* was "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus."[123] The Third Circuit ruled that off-campus student speech is not subject to *Tinker*, meaning that students retain their full First Amendment rights regarding such speech. The Supreme Court rejected this categorical approach, holding that "we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus."[124] Thus, under *B.L.*, off-campus student speech may or may not be subject to *Tinker*'s lower standard giving schools "special leeway"[125] to regulate student speech, depending on the circumstances.

While rejecting the Third Circuit's categorical approach, the Supreme Court also declined to adopt a categorical approach of its own. Especially given the rise in use of remote online platforms

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[121] *Id.* (first and third alterations in original).
[122] *Id.*
[123] *Id.* at 187 (alterations in original).
[124] *Id.* at 188.
[125] *Id.*

for teaching and learning, the Court believed it best to proceed incrementally on a case-by-case basis in defining when "off campus" is subject to *Tinker's* special (*i.e.*, lower) standard of First Amendment protection.[126] The Court, however, did outline three features of off-campus speech that will generally put it outside of *Tinker*.

As an initial matter, school officials rarely stand *in loco parentis* with regard to a student's off-campus speech. Thus, the First Amendment generally should not grant school officials special leeway to regulate students' off-campus speech because they usually will not be "standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them."[127] Further, courts should be skeptical of school officials' efforts to regulate students' off-campus speech, lest students' speech *de facto* become subject to school regulation and discipline around the clock.[128] Such judicial skepticism should be particularly heightened in circumstances involving a student's "political or religious speech that occurs outside school or a school program or activity," given that speech on such matters implicates core First Amendment values. Last, schools themselves have "an interest in protecting a student's unpopular expression, especially when the expression takes place off campus"[129] in order to impart the value of the marketplace of ideas by modeling it in operation. The Court reasoned that taken together, "these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished."[130] Thus, they create a presumption—but not a bright-line rule—that *Tinker* does not

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[126] *Id.* at 189 (declining to adopt any "broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community").
[127] *Id.* at 189.
[128] *Id.* at 189–90 (noting that school regulation of students' off-campus speech, "when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.").
[129] *Id.* at 190.
[130] *Id.*

apply to students' off-campus speech and that such speech is therefore subject to the usual strict First Amendment standards for when the government may proscribe or punish speech based upon its content or viewpoint.

On the facts of the case, the *B.L.* Court found that the student's off-campus speech did not present circumstances justifying applying *Tinker* in order to grant school officials special First Amendment leeway to regulate the student's speech. Although the student's speech was profane, neither its content nor its form was of such a nature as to render it unprotected speech under ordinary First Amendment doctrine.[131] Furthermore, the speech was unquestionably "off campus," both in a geographic and in a functional sense. The speech was not made on school grounds or at a school-sponsored activity; nor did it target specific members of the school community or utilize school-provided tools or channels of communication.[132] The school's interest in regulating the speech was therefore comparatively low, even though the speech could (and did) reach the school community. Moreover, to the extent that the school's interest was in teaching good manners to the student speaker, the speech occurred in a context where the school did not stand *in loco parentis* to the student, meaning the school's interest in that regard was also low. Finally, even if *Tinker* were applicable and the school's justification for punishing the student's speech was to prevent disruption or upset among the school community or to preserve morale of the school's cheerleading time, there was insufficient evidence of substantial disruption or impact on morale resulting from the speech to justify the school punishing it.[133]

D. The Court's post-*Tinker* Cases Applied to Advocacy of Gender-Affirming Care

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[131] The student's speech "did not involve features that would place it outside the First Amendment's ordinary protection. B.L.'s posts, while crude, did not amount to fighting words. And while B.L. used vulgarity, her speech was not obscene as this Court has understood that term." *B.L.*, 594 U.S. at 191(internal citations omitted). The Court accordingly noted that, "B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection." *Id.*

[132] *Id.*

[133] *Id.* at 191–93.

The Supreme Court's post-*Tinker* school speech cases are rife with potential for abuse.[134] To be sure, there are costs to even the relatively low level of First Amendment protection provided by the *Tinker* test, just as there are costs to all First Amendment rules (and all constitutional rights generally). The Court's post-*Tinker* cases, however, weigh the costs of protecting student speech too heavily and the benefits of doing so far too lightly. Taking those cases as a given, however, the needless breadth of their reasoning creates opportunities for government officials and school administrators to rely upon these cases to justify suppressing student speech that they simply dislike. This Part therefore briefly sketches out the arguments that could be made from the Court's post-*Tinker* cases to justify proscribing or punishing student speech advocating or advising that a fellow student seek forms of gender-affirming care that are illegal to minors in the state where the latter student resides but are legal elsewhere. This Part then explains why such arguments represent a dangerous and inaccurate overreading of the Court's post-*Tinker* cases.

This Section proceeds with some trepidation about the risk of providing opponents of gender-affirming care with a roadmap for suppressing student speech regarding it. That said: the crusade against trans rights is well-populated with sophisticated lawyers who are both capable of and highly motivated to devise such arguments from the Court's post-*Tinker* cases. It therefore does little good to pretend that such arguments might not be made. It is better to anticipate and address such arguments, given that those who seek to suppress speech are, in the words of former slave and abolitionist William Brown, sufficiently "crafty and politic (as deliberate tyrants generally are)" to devise such arguments of their own accord.[135]

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[134] It is worth recalling that *Tinker* already represents a fairly low level of First Amendment protection. *See, e.g.*, Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 450 (2024) (hereinafter Purvis, *Transgender Students and the First Amendment*) (noting that "commentators both at the time [of *Tinker*] and in later decades pointed out that by hinging the protection of speech on the reaction of listeners, one student's speech rights could be controlled by hostile listeners, or hecklers.".

[135] WILLIAM W. BROWN, THE NARRATIVE OF WILLIAM W. BROWN, AN AMERICAN SLAVE iv (1849), https://docsouth.unc.edu/fpn/brownw/brown.html. To be clear: as discussed in Part ___, below, this Article does not compare the position of trans persons today to that of enslaved persons during the American

There are at least three arguments to be made that the Supreme Court's post-*Tinker* jurisprudence would allow state officials and school administrators to proscribe or punish student speech advocating or advising forms of gender-affirming care that are illegal in the state in question. They are as follows:

- Student speech advocating that a peer should obtain hormone therapy, puberty blockers, or other medications amount to speech advocating the use of substances that are illegal to minors, which *Morse* allows a school to ban even in the absence of the kind of substantial and material disruption required under *Tinker*.

- Student speech discussing the physiological effects of gender-affirming care is sufficiently "lewd" that school officials may punish it pursuant to *Fraser*, inasmuch as condoning it would undermine the school's mission of inculcating by example the "shared values of a civilized social order."

- More broadly, *Fraser*, *Morse*, and *Kuhlmeier* stand for the proposition that student speech may be restricted whenever the "special characteristics of the school environment" call for the school to have "special leeway" to do so.

This Part briefly addresses each argument in turn.

1. The Morse *Exception for Student Speech Advocating Drug Use*

Morse held that a school may discipline students for speech that school administrators reasonably interpret as advocating the use of drugs that are illegal to minors. At its simplest level, the argument from *Morse* would be that, in states that ban hormone treatment, puberty blockers, or other related medications for

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slave regime. This Article does, however, contend that the battle of ideas over slavery provides important lessons and guidance regarding the meaning of the First Amendment in our post-Civil War Constitution.

minors, such medications are similarly "drugs" that are illegal to minors. Thus, student speech advocating or advising that a minor obtain and use such drugs can be argued to fall within the rule of *Morse* such that schools may punish it without needing to show that the speech caused or risked substantial disruption.

A somewhat more sophisticated version of this argument is that although the Court's opinion in *Morse* focused on advocacy of the use of recreational drugs such as marijuana, the actual school policy that the Court upheld was not limited to advocacy of the use recreational drugs (or, indeed, to drugs at all). The school district's policy in *Morse* provided that: "The Board specifically prohibits any assembly or public expression that . . . advocates the use of *substances that are illegal to minors* . . . ."[136] In other words: the school district's policy at issue in *Morse* did not merely ban advocacy of the use of recreational drugs, nor merely of "drugs"; rather, it banned advocacy of "substances" that are "illegal to minors." Recreational drugs are one form of such substance; non-recreational drugs are another. But so too are tobacco, alcohol, and vaping devices. So, the argument would go, regardless of whether hormone therapy and other medications are considered to be "drugs" in the same sense as marijuana, they are nonetheless "substances that are illegal to minors" in states that ban the provision of those medications to minors. Thus, school officials could argue that under *Morse*, they may punish advocacy of the use of such treatments even absent any evidence of actual or anticipated disruption, as long as school officials can reasonably interpret the speech at issue to be advocating that a student obtain and use these medications.

A second argument would be that in holding that schools have a free hand to punish students' pro-drug use speech, the Supreme Court relied heavily on what it characterized as the very strong "governmental interest in stopping student drug abuse."[137] Evidence of this strong interest consisted of, *inter alia*, Congress "provid[ing] billions of dollars to support state and local drug-prevention programs" and requiring that such programs expressly

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[136] *Morse*, 551 U.S. at 398 (emphasis added).
[137] *Id.* at 407.

convey that "the illegal use of drugs [is] wrong and harmful."[138] School officials in states that bar minors from obtaining hormone therapy and related medications could argue a similarly strong governmental interest in stopping student use thereof, as evidenced by the fact that the state has made it illegal to do so and the numerous statements by governors and state legislators characterizing gender-affirming care as posing an "unacceptably high risk of doing harm" to minors.[139]

Finally, the reasoning in *Morse* could be argued to establish an exception to *Tinker* for circumstances where it is reasonably feared that the student speech at issue is likely to persuade student listeners to engage in illegal conduct. School officials might therefore argue that student speech advocating that a peer obtain forms of gender-affirming care that are unlawful in the state is similarly likely to persuade the student listener; in other words, that *Morse* embodies a more general "incitement-lite" standard applicable to the school context.

Even taking *Morse* as settled law, the arguments described above overread the case. First, it is clear that in holding that schools are free to discipline pro-drug use student speech, the *Morse* Court was contemplating the common meaning of "drugs" as intoxicants rather than "drugs" as medications or prescribed pharmaceuticals. The speech at issue in *Morse* dealt with marijuana, not medications; moreover, the Court's reasoning focused on the unique dangers that drug abuse poses to schoolchildren, especially adolescents. The Court noted that "[s]ome 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year"[140] and that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe.[141] Hormone therapy, puberty blockers, and other forms of medicated treatment are neither intoxicants nor addictive. Indeed, to the

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[138] *Id.* at 408.
[139] *See, e.g.*, Office of the State Surgeon Gen., Fla. Dept. of Health, *Treatment of Gender Dysphoria for Children and Adolescents* (Apr. 20, 2022), https://www.floridahealth.gov/_documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-guidance.pdf.
[140] *Morse*, 551 U.S. at 407.
[141] *Id.*

contrary, there is substantial evidence that receiving gender-affirming care makes adolescents *less* likely to engage in the abuse of substances that are intoxicating and addictive, such as alcohol, marijuana, opioids, and tobacco, whereas stigmatizing transgender youth by denying such care has precisely the opposite effect.[142] Thus, the *Morse* Court's concerns about the potentially severe and widespread effects of "pro-drug use" speech are inapplicable to speech advocating the use of medications for gender-affirming care.

Most importantly, the *Morse* exception for pro-drug use student speech already stretches the traditional First Amendment rules to the maximum extent. As Justice Alito and Kennedy stated in their concurrence in *Morse*:

> In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. *See* [*Brandenburg v. Ohio*, 395 U.S. 444 (1969).] But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence . . . . As we have [previously held], illegal drug use presents a grave and *in many ways unique threat* to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.[143]

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[142] *See* Ryan J. Watson et al., *Risk and Protective Factors for Transgender Youths' Substance Use*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6542768/ (finding that stigmatization of transgender youth were linked to higher odds of engaging in substance abuse); Lester, *Say Gay*, *supra* note ___, at 145 ("Study after study has shown that gender- and sexuality-affirming support for LGBTQIA+ youth significantly decreases depression and suicidal ideation," which are also linked with substance abuse.).

[143] *Morse*, 551 U.S. at 407 (Alito, J., concurring) (emphasis added).

Thus, two of the five Justices comprising the majority in *Morse* expressly noted that their agreement with the ruling turned upon their belief that the kind of drugs at issue there (marijuana, etc.) pose a *sui generis* threat to students' safety, and that *Morse* therefore should not be extended beyond that specific threat.

2. *The* Fraser *Exception for Lewd Student Speech*

Fraser held that the First Amendment allows schools to punish non-disruptive student speech when it is sufficiently lewd, indecent, vulgar, or offensive so as to interfere with what the Court characterized as "truly the work of the schools" in inculcating the "fundamental values necessary to the maintenance of a democratic political system."[144] These values, the Court stated, include engaging in public discourse without resorting to language that is "highly offensive or highly threatening to others."[145] The Court further reasoned that "school authorities acting *in loco parentis*" may punish students for such language simply to protect students "from exposure to sexually explicit, indecent, or lewd speech."[146]

The argument that *Fraser*'s reasoning supports restricting student speech advising a peer to seek forms of gender-affirming care that are unlawful to minors in the state at issue would that such speech qualifies as lewd or obscene. Opponents of trans rights routinely characterize pro-LGBTQ speech generally, and speech about trans issues specifically, in these terms.[147] Thus, given that

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[144] *Fraser*, 478 U.S. at 683.
[145] *Id.*
[146] *Id.* at 684.
[147] *See, e.g.*, Purvis, *Transgender Students and the First Amendment*, *supra* note ___, at 439 ("Current statutes restricting discussion of gender identity in schools define discussion of gender identity as sexual obscenity, clearly teeing up an analysis of *Fraser* that is currently missing from legal scholarship."); *McDonald*, *supra* note ___, at 272–73 (noting that proponents of efforts to remove "books validating queer existence" from school libraries often justify such book bans "by smearing the materials as obscene or inappropriate"); Hannah Natanson, *Objections to Sexual, LGBTQ Content Propels Spike in Book Challenges*, WASH. POST (May 23, 2023), https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers/ [hereinafter Natanson, *Objections to LGBTQ Content*] (finding that "in 62 percent of objections to LGBTQ [books], challengers complained of 'sexual' content;" and noting that a founding member of the group "Moms for Liberty," which has advocated for removing LGBTQ-oriented materials from

other student listeners might overhear or be exposed to student speech advising that a peer obtain medications used for gender-affirming care, and to the extent that such advice includes describing the physiological effects that such treatment entails, *Fraser* arguably allows schools to restrict or punish such speech on the ground that it is sexually explicit.

This reading of *Fraser* is thin at best. First, advocacy to seek gender-affirming care would not necessarily reference physiological effects of such care at all. For example, the mere statement by one student to another that "You should look into getting hormone therapy or puberty blockers" does not reference any details regarding sexual organs or sexual activity. Moreover, even those statements that might reference such matters—*e.g.*, advising a peer to seek "top surgery," which implicitly references breasts, or "bottom surgery," which implicitly references genitals, cannot be equated to the kind of sexually explicit, indecent, or lewd speech at issue in *Fraser*. Merely referencing details of human anatomy cannot legally be considered lewd. If it were, it would lead to the legally-absurd results that a student's answer referencing those same details in responding a teacher's question in a high school Human Anatomy class would be similarly lewd and similarly unprotected by the First Amendment, notwithstanding that the student was asked (indeed, required) by a school employee to so respond.

Furthermore, referencing human anatomy in describing gender-affirming care is a far cry from the speech at issue in *Fraser*, which entailed an "elaborate, graphic, and explicit sexual metaphor,"[148] delivered at length. Specifically, as reproduced in Justice Brennan's concurrence in *Fraser*, the student speaker, by way of advocating for the election of a candidate for student government, stated that:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of

schools, "attributed the concern over LGBTQ books not to homophobia but to the texts' [allegedly] sexually explicit nature").

[148] *Fraser*, 478 U.S. at 678.

> Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.[149]

Thus, the student speech at issue in *Fraser* alluded to sexual activity graphically and at great length. By contrast, student speech merely referencing details of human anatomy in advising a peer to seek gender-affirming care, by contrast, need not -- and most often, would not -- reference sexual activity at all. Even if it does, it is highly unlikely to do so in the extended lascivious manner of the student's speech in *Fraser*. Absent such characteristics, *Fraser* is inapplicable:

> *Fraser* and its progeny of cases all deal with speech that is offensive because of the manner in which it is conveyed. Examples are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder. Rather than being concerned with the actual content of what is being conveyed, the *Fraser* justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed.[150]

Finally, to the extent that opponents of trans-related student speech would argue that such speech is potentially offensive to other student listeners and may therefore under *Fraser* be punished for that reason alone, such an argument overreads *Fraser* and misunderstands the Court's school speech cases more generally. It is true that *Fraser*, consistent with the Court's school speech jurisprudence, held that the "constitutional rights of students in

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[149] *Id.* at 687 (Brennan, J., concurring).

[150] Nixon v. N. Loc. Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005), quoted in Purvis, *Transgender Students and the First Amendment*, *supra* note ___ at 464-65.

public school are not automatically coextensive with the rights of adults in other settings."[151] Thus, "simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, [it does not follow that] the same latitude must be permitted to children in a public school."[152] Accordingly, the Court held, "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, *or* offensive speech and conduct."[153] The *Fraser* Court went on, however, to specifically note that it was the "*pervasive sexual innuendo* in Fraser's speech" that was "plainly offensive to both teachers and students . . . . By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."[154]

The *Fraser* Court thus did not hold that all student speech that causes other students to experience any sort of offense or discomfort is beyond the protection of the First Amendment. Nor could it have, without overruling *Tinker* (and a goodly swath of First Amendment jurisprudence along the way). *Tinker* could not have been clearer on this point. The Court stated that "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[155] Indeed, the Court in *Morse*, decided after *Fraser*, explicitly stated that *Fraser* should not be read to permit schools to punish all student speech that school officials deem to be "offensive" or that may in fact offend some student listeners who overhear it:

> Petitioners urge us to adopt the broader rule that [the student's allegedly pro-drug use] speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to

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[151] *Id.* at 682.
[152] *Id.*
[153] *Id.* at 683.
[154] *Id.* (emphasis added).
[155] *Tinker*, 393 U.S. at 509.

> encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that [the student's] speech was offensive, but that it was reasonably viewed as promoting illegal drug use.[156]

Similarly, in *Mahanoy Area School District v. B.L.*,[157] decided after both *Morse* and *Fraser*, the Court stated that the schools themselves have "an interest in protecting a student's unpopular expression."[158] Public schools, the Court reasoned, "are the nurseries of democracy . . . . [As such,] schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[159] Justice Alito's concurrence in *B.L.* further emphasizes the point, stating that "public school students, like all other Americans, have the right to express unpopular ideas on public issues, even when those ideas are expressed in language that some find inappropriate or hurtful."[160] Thus, while the Court's school speech cases do allow greater restrictions on students' First Amendment rights than would be permissible outside of the school environment, none of the Court's cases hold that the mere possibility that some students who may overhear the speech might be offended by it is among the "special characteristics of the school environment"[161] justifying such restrictions.

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[156] *Morse*, 551 U.S. at 409.
[157] 594 U.S. 180 (2021).
[158] *Id.* at 190.
[159] *Id.*
[160] *Id.* at 195 (Alito, J., concurring).
[161] *Id.* At most, *Fraser* can be read to mean that among the "special characteristics of the school environment" that might justify restricting "offensive" but non-disruptive student speech are situations involving a captive audience at a school-related activity, such as the mandatory school assembly at issue in *Fraser* itself. *See Fraser*, 478 U.S. at 684 (stating that the Court has "recognized an interest in protecting minors from exposure to vulgar and offensive spoken language," as well as "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech"). Even accepting that reading of *Fraser* for the sake of argument, however, the kind of speech discussed in this Article—*i.e.*, one-to-one speech by a student advising another student to seek gender-affirming

*3. The Post-*Tinker *Trend Toward Greater Allowance of Restrictions on Student Speech*

As discussed in Part III.C. above, the Supreme Court's school speech jurisprudence since *Tinker* has generally been solicitous toward school officials' efforts to punish or restrict student speech. The Court's analysis in *Tinker* proceeded from the presumption that student speech is generally protected unless it causes substantial disruption to the learning environment. By contrast, *Fraser*, *Morse*, and *Kuhlmeier*, in carving out an increasing list of exceptions to *Tinker*, arguably suggest that any reasonable ground for restricting student speech will suffice. Allowing school officials to restrict or punish student speech advocating or advising that a fellow student obtain forms of gender-affirming care that are illegal to minors would therefore just be one more exception. Thus, the argument would go, such restrictions would be permissible as long as school officials reasonably believe that the particular instance of speech might persuade a student listener to engage in unlawful conduct.

At a high level of generality, this argument has some plausibility. The Court's opinions in *Fraser*, *Morse*, and *Kuhlmeier* are certainly more solicitous in tone toward school officials' efforts to restrict or punish student speech than its opinion in *Tinker*. This argument, however, is ultimately unpersuasive for several reasons. First, *Fraser*, *Morse*, and *Kuhlmeier* each distinguished *Tinker* based on the kind of speech before the Court in those cases: in *Fraser*, speech that school officials reasonably construe as lewd; in *Morse*, speech that school officials reasonably construe as

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care—by no means presents a captive audience problem. To the contrary, classic First Amendment principles supply a ready answer to a scenario in which other students happen to overhear such speech in passing and are offended by it: they "could effectively avoid further bombardment of their sensibilities simply by averting their eyes" (or, in this case, their ears), given that the speech is not directed to them. Cohen v. California, 403 U.S. 15, 21 (1971). Even in the school speech context, the First Amendment does not contain a blanket carveout for speech that may make a listener feel ideologically, emotionally, or intellectually uncomfortable, at least not when that listener only briefly encounters it and could simply walk away. This is particularly true in the case of older students, who are the ones most likely to be engaging in or overhearing discussions about gender-affirming care.

promoting drug use; and in *Kuhlmeier*, speech that can reasonably be construed as bearing the school's imprimatur. In doing so, however, each also reaffirmed the central holding of *Tinker* that students retain substantial First Amendment rights in the school context, subject only to those restrictions that may be necessary in light of the special characteristics of the school environment.[162] The Court's post-*Tinker* cases therefore cannot be read as overturning *Tinker* nor as disavowing it.[163]

Nor should *Fraser*, *Morse*, and *Kuhlmeier* be read as granting freewheeling authority for schools to suppress student speech on any "reasonable" ground. The Court made clear in *B.L.*, its most recent school speech case that its post-*Tinker* cases "outlined *three specific categories* of student speech that schools may regulate in certain circumstances,"[164] namely:

> (1) indecent, lewd, or vulgar speech uttered during a school assembly on school grounds [*Fraser*]; (2) speech, uttered during a class trip, that promotes illegal drug use [*Morse*], and (3) speech that others may reasonably perceive as bearing the imprimatur

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[162] *See Fraser*, 478 U.S. at 680, 684 (stating that "[t]his Court acknowledged in [*Tinker*] that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but that "[t]his Court's First Amendment jurisprudence has [also] acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children"). *See also* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 125 (2019) [hereinafter DRIVER, THE SCHOOLHOUSE GATE] ("The Court's [post-*Tinker*] opinions can plausibly be viewed as retreating in particular areas—involving speech that is lewd, school-sponsored, or pro-drug. But it is implausible to contend that those decisions indicate that *Tinker* has been hollowed out entirely so that only its edifice remains.").

[163] *See Morse*, 551 U.S. at 418 (Thomas, J., concurring) (stating that "[t]oday, the Court creates another exception [to *Tinker*]. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not"); DRIVER, THE SCHOOLHOUSE GATE, *supra* note ___, at 125 ("Reports of *Tinker*'s demise . . . have been greatly exaggerated. The Supreme Court in *Fraser*, *Kuhlmeier*, and *Frederick* did not purport to undercut *Tinker*'s core contribution: students, typically speaking, continue to possess the right to express themselves in schools, even if educators do not support their messages.").

[164] *B.L.*, 594 U.S. at 187 (emphasis added).

> of the school, such as that appearing in a school-sponsored newspaper [*Kuhlmeier*].[165]

Thus, the *B.L.* Court characterized those cases as establishing specific exceptions to the applicability of *Tinker* rather than as embodying a general principal that schools may restrict student speech whenever they reasonably believe it is advisable to do so. Hence, *B.L.*, while not overruling *Fraser*, *Morse*, or *Kuhlmeier*, represents at least a modest turn in a more speech-protective direction.

IV. "Trans Talk," the First Amendment, and the Second Founding

This Article has thus far made the case against extending the Supreme Court's post-*Tinker* jurisprudence to permit schools to punish non-disruptive student speech urging a peer to obtain forms of gender-affirming care that the state has made unlawful to minors. This Section turns to making an affirmative case for protecting such speech, drawing upon the history and values of our post-Civil War Constitution. This Section describes the constitutional vision of the Nation's "Second Founding" after the Civil War and then argues that that vision should inform the First Amendment analysis of student speech advocating gender-affirming care.

To be clear at the outset: in drawing upon the history of suppressing anti-slavery speech and the Second Founding's rejection of such suppression, this Article does not argue that transgender persons are in a position analogous to enslaved persons with regard to limitations on their constitutional rights. This Article does, however, contend that the suppression of free speech rights in order to reinforce the subordination of a legally and socially outcast group is inconsistent with the First Amendment as interpreted through the lens of the Second Founding.

A. Slavery and the Constitution

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[165] *Id.* at 187–88 (internal quotation marks, citations, and alterations omitted).

In interpreting the First Amendment, the Supreme Court's jurisprudence assumes an uninterrupted through-line from the Revolutionary Era through today. That is, although members of the Court differ regarding whether sources of historical evidence should be dispositive or merely relevant to the search for constitutional meaning, the shared assumption is that the only relevant timeframe for such evidence is the original Founding period in the late-1700s that culminated in the drafting and ratification of the Constitution and the Bill of Rights. That assumption, however, fails to recognize the impact of the Civil War and Reconstruction Era upon the Constitution as a whole. This Section discusses slavery and the original Constitution; Part IV.B. then discusses the nation's Second Founding following the Civil War.

The First Founding embodied a fundamental contradiction: "a nation conceived in liberty and dedicated to equal rights [was also] the nation, by the mid-nineteenth century, with the largest number of slaves in the Western Hemisphere."[166] The original Constitution attempted to sidestep this contradiction by neither banning slavery nor explicitly sanctioning it. This "compromise," however, was almost wholly one-sided. The Constitution did not merely tolerate the existence of slavery: it contained various provisions protecting and supporting slaveowners' interests. For example, the Slave Trade Clause[167] forbade Congress from banning the international slave trade until the year 1808 at earliest, a full generation after the Constitution was ratified. The Fugitive Slave Clause[168] in effect nationalized slave status by granting slaveholders a right to reclaim their human property anywhere in

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[166] David Brion Davis, *Crucial Barriers to Abolition in the Antebellum Years*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT xvi (Alexander Tsesis ed., Columbia Univ. Press 2010).

[167] U.S. CONST. art. I, § 9, cl. 1 ("The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight . . . .").

[168] U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

the Nation, even in free states or territories. And the suppression of slave rebellions was a key issue leading to the adoption of the Militia Clause,[169] which empowered Congress to raise a militia to put down domestic insurrections, including slave uprisings.

Indeed, the original Constitution went further, embedding structural provisions designed to hinder anti-slavery advocates from using the political process to seek the elimination of slavery. The Three-Fifths Clause,[170] by partially counting enslaved persons for purposes of apportioning congressional seats, gave slaveholding states disproportionate power in the national legislature, which they exercised to prevent Congress from taking action against slavery. The Electoral College[171] gave slaveholding states a similar advantage with regard to electing the President, since the number of a state's electors is determined by the state's congressional representation, which was distorted to the slave states' benefit via the Three-Fifths Clause.[172] Further, given that Article II of the Constitution provides the advice and consent of the Senate if necessary for the President to appoint federal judges,[173] slaveholding interests were also well represented in the ranks of the federal judiciary.[174] Finally, the amendment process in

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[169] U.S. CONST. art. I, § 8, cl. 15 ("Congress shall have Power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

[170] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

[171] U.S. CONST. art. II, § 1, cl. 2.

[172] *See, e.g.*, Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 230 (1994) (arguing that the constitutional structures regarding presidential elections were adopted as "constitutional appeasements to southern slaveholding interests").

[173] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court, and all other officers of the United States . . . .").

[174] *See* John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1215 (1997) ("The drafters of the Civil War Amendments had known only a Supreme Court which had always had a majority of Justices who sided with slave holders and sought to prevent Congress from giving any legal protection to former slaves.").

Article V,[175] by requiring a supermajority of the states in order to amend the Constitution, "ensur[ed] that the slaveholding states would have a perpetual veto over any constitutional changes"[176] since they would never agree to any amendment that threatened slavery.[177] Thus, the original Founding created the constitutional foundation for the formation of America as a slave society.[178] Federal statutes and state laws, as well as private action and custom, combined to build upon that foundation to a degree so pervasive and well understood as to be given a proper name: an all-encompassing "Slave Power."[179]

As American slavery expanded and evolved into a race-based system of perpetual and inheritable Black subjugation, it became clear the Slave Power would not ultimately be satisfied with slavery remaining a "peculiar institution" isolated in the South.[180] Although the more radical abolitionists and anti-slavery

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[175] U.S. CONST. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid . . . when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof . . . .").

[176] Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1031 (1993).

[177] Indeed, it is striking that under Article V, "[h]ad all 15 slave states remained in the Union, they would to this day be able to prevent an amendment on any subject. In a 50-state union, it takes only 13 states to block any amendment." *Id.* n.155.

[178] Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, *supra* note ___, at 1010 n.9 ("[A]s the great classical scholar M.I. Finley notes, the United States South was one of only five places in the world to have developed not merely slavery, but a slave society . . . . The others were classical Greece, ancient Rome, Brazil, and the Caribbean.").

[179] "The idea of a southern 'Slave Power' that dominated national politics . . . emerged in the 1830's and became part of the nation's political discourse in the years leading up to the Civil War." Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 801 (2011). Similarly, Senator (and later Vice President) Henry Wilson's treatise examining the history of slavery and its ultimate extinction was entitled the "History of the Rise and Fall of the Slave Power in America." *See* HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA (Samuel Hunt ed., 1872).

[180] *See, e.g.*, Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book,* The Impending Crisis*: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1129 (1993) [hereinafter Curtis, *Free Speech and Slavery*] (noting that

activists had since the First Founding fervently fought for the total elimination of slavery nationally,[181] mainstream political leaders and moderate anti-slavery activists pursued various political accommodations and offered many concessions to slaveholders and their allies. The attempts at compromise ultimately proved insufficient,[182] and the efforts of abolitionists and radical anti-slavery activists were suppressed and punished both through the legal system and by pro-slavery private white individuals and mobs who murdered and maimed with impunity (and often, with active state participation).[183] It became evident that, in the words of President Lincoln, the country could not permanently endure "half slave and half free. . . . It [would] become *all* one thing, or *all* the other."[184] Frederick Douglass, presaging President Lincoln's "House Divided" speech, sounded similar themes in remarks he delivered four years earlier. Douglas stated in an 1854 speech that

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especially after the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), holding that, *inter alia*, Congress could not ban slavery in the territories, "Republicans feared a slave power conspiracy to nationalize slavery, planting it not only in all the territories but in the free states as well").

[181] *See, e.g.*, William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 114–15 (1974) (noting the "ferment of antislavery activities in the Northern colonies" during the colonial era, starting as early as 1700 and continuing to the Revolutionary Era in the mid-1770s).

[182] Perhaps the most shocking of these attempts at compromise is that "shortly before the [Civil] War began[,] Congress came close to amending the Constitution to deprive Congress of the power to abolish slavery." Rebecca Zeitlow, *Free at Last: Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 269 (2010). In what became known as the Corwin Amendment (so named after the leader of a congressional committee tasked with developing compromises that could stave off war), allies of President Lincoln "proposed an amendment that would have prohibited adopting any [constitutional] amendment interfering with slavery in the southern states . . . ." *Id.* The Corwin Amendment, which would have become the Thirteenth Amendment to the Constitution, came very close to being enacted: "[This] first Thirteenth Amendment carried both Houses of Congress and two state legislatures ratified it. Nevertheless, the ratification process ended when the Rebels fired upon Fort Sumter." *Id.*

[183] *See, e.g.*, JAMES BREWER STEWART, HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY 69–73 (Hill & Wang 1986) (describing the campaign of terrorism carried out by private white mobs in the North and the South in the mid-1830s in response to abolitionist campaigning).

184. Abraham Lincoln, *Address at the Republican State Convention* (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953) (emphasis in original).

slavery and freedom could not "dwell in the United States in peaceful relations . . . . The South must either give up slavery, or the North must give up liberty. The two interests are hostile, and are irreconcilable. The just demands of liberty are inconsistent with the overgrown exactions of the slave power."[185]

Like all totalitarian movements and institutions, slavery demanded complete fealty to its ideology. And like all systems of subjugation, slavery sought the total domination of the oppressed class in body, mind, and spirit. Both of these aspects of the legal history of slavery have implications for free speech jurisprudence as it relates to speakers' and listeners' rights.

The Slave Power sought to silence and control both freedom speakers and freedom seekers. As to the former: slaveowners and their allies suppressed anti-slavery speech through a wide variety of legal and extra-legal means. As to the latter: enslavers enforced wide-ranging restrictions upon the sources of information that were available to enslaved persons. Furthermore, proponents of both types of restrictions most often justified them in terms of benevolent paternalism: enslavers and their allies couched restrictions on speech as necessary to prevent the spread of ideas characterized as having a dangerous tendency to persuade listeners (especially enslaved persons, who were deemed to have diminished capacity for judgment) to act unlawfully by opposing or seeking to escape enslavement. Part IV.B. discusses the restrictions imposed upon anti-slavery speech and enslaved persons' access to information.

B. Slavery and Freedom Speakers: Restrictions Upon Anti-Slavery Speech

During slavery, individual slave owners as well as pro-slavery political leaders argued that the maintenance of slavery required the suppression of freedom of speech. In criticizing restrictions on anti-slavery speech, Senator Charles Sumner, a leading abolitionist and a Framer of the post-Civil War constitutional amendments, noted in 1860 that slavery "can be

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[185] Frederick Douglass, *The Kansas-Nebraska Bill, A Speech Delivered in Chicago, Illinois, on Oct. 30, 1854*, https://rbscp.lib.rochester.edu/4400 [hereinafter Douglass, *The Kansas-Nebraska Bill*].

sustained only by disregard of other rights, common to the whole community, whether of person, of the press, or of speech. . . . [S]ince slavery is endangered by liberty in any form, therefore all liberty must be restrained."[186] The restrictions on anti-slavery speech were wide-ranging, and the punishments for violating them severe.

The states' Slave Codes expressly targeted and severely punished speech critical of slavery. For example, Mississippi's Slave Code imposed penalties that ranged from imprisonment at hard labor for up to twenty-one years to the death penalty for "using language having a tendency to promote discontent among free colored people or insubordination among slaves";[187] North Carolina similarly "banned publications with the tendency to excite insurrection, conspiracy, or resistance in slaves."[188] Indeed, "with the exception of Kentucky, every Southern state eventually passed laws exercising loose to rigid control of speech, press, and discussion."[189] Moreover, such restrictions were not limited to the South. The pro-slavery government of the Kansas territory enacted a Slave Code that "made expressing antislavery opinions a crime."[190] The Governor of New York "advocated legislative action to punish persons who engaged in acts calculated and intended to produce [slave] rebellion[s] in other states,"[191] even though New York itself was by that time a free state.[192]

Frederick Douglass, in cataloging the aims of the Slave Power, listed suppressing freedom of speech as chief among them and noted that such suppression would by design be extended into free states:

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[186] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1129.
[187] *See* J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1107 (1994).
[188] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1123.
[189] RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860, at 140 (Michigan State College Press 1949).
[190] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1129.
[191] *Id.* at 1131.
[192] The New York Legislature declined to adopt such legislation, but not on humanitarian or principled grounds. Rather, the Legislature "responded that [white] mobs made legislative action unnecessary," *i.e.*, that vigilante violence would be sufficient to deter and punish anti-slavery speech in New York. *Id.*

> I understand the first purpose of the slave power to be the suppression of all anti-slavery discussion. Next, the extension of slavery over all the territories. Next, the nationalizing of slavery, and to make slavery respected in every State in the Union . . . . [The Slave Power intends] to make it an offence against the law to speak, write, and publish against slavery, here in the free States, just as it now is an offence against the law to do so in the slave States. One end of the slave's chain must be fastened to a padlock in the lips of Northern freemen, else the slave will himself become free.[193]

Slavery was, of course, not only legal in the slave states, but was affirmatively protected by positive state law. Hence, the underlying forms of conduct that speech restrictions were concerned with—resisting enslavement by force (either individually or by organized rebellion); escaping from slavery; or otherwise impeding the operation of slavery—were themselves illegal. Thus, restrictions on speech that might persuade listeners to engage in such conduct were in a sense "merely" restrictions upon speech urging illegal activity. Examining these restrictions in hindsight, however, presumably no one would argue that such restrictions were consistent with the First Amendment. Thus, the mere fact that speech advocates illegal conduct cannot in itself be sufficient justification for such speech to fall outside of the First Amendment's traditional protections.[194]

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[193] Douglass, *The Kansas-Nebraska Bill*, *supra* note ___.

[194] The Civil Rights Movement of the mid-twentieth century provides another example. In states with segregationist laws, it was illegal, for example, for Blacks to ride in or sit at the "Whites Only" sections of public transportation and restaurants; to drink from "Whites Only" water fountains; to use racially-segregated swimming pools; or attempt to register to vote in states that effectively limited the vote to whites by virtue of grandfather clauses. Yet speech urging violation of segregationist laws as a means of protesting and drawing attention to them was ultimately deemed entitled to First Amendment protection. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, ___ (2007) (Stevens, J., concurring) (noting that in *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court "vacated a civil rights leader's conviction for disturbing the peace, even though a Baton Rouge sheriff had 'deem[ed]' the leader's 'appeal to . . . students to sit in at the lunch counters to be 'inflammatory'").

Indeed, the benefit of hindsight is not necessary to reach this conclusion. During the slave era, anti-slavery activists and organizations argued that "one of the greatest evils of slavery was the denial in the South of freedom of speech and opinion in regard to it."[195] For example, the American Anti-Slavery Society stated in its 1835 "Declaration of Sentiments and Constitution" that "[w]e believe that American citizens have the right to express and publish their opinions of the constitutions, laws, and institutions of any and every State and nation under heaven; and we mean never to surrender the liberty of speech, of the press, and of conscience . . . ."[196] Its Declaration, moreover, included the text of "all Federal and state constitutional guarantees of free speech and press."[197] Similarly, the pre-War Republican Party from its very beginning "specifically made demands for free speech," especially on the subject of slavery, "a centerpiece of their political program."[198]

The abolitionist Wendell Phillips likewise condemned restrictions on anti-slavery speech as violating the constitutional bargain whereby the slave states and the free states agreed that the battle over slavery would ultimately be decided in a free and open marketplace of ideas. Phillips argued that the original Framers were aware of the inherent tension between American ideals of liberty and the reality of slavery, "[b]ut they thought under [the Constitution] they could discuss it to a peaceful solution: ballots and parties, types [i.e., printing presses] and free speech, would make brother States and sister States settle the conflict between two irreconcilable civilizations."[199] Phillips continued:

> [The slave states said,] "I agreed at the outset to abide the issue of free discussion and put my system on trial against [free states']." The North [then]

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[195] NYE, FETTERED FREEDOM, *supra* note ___, at 100.
[196] *Id.* at 99.
[197] *Id.*
[198] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1151. Indeed, the demand for free speech was so central to the Republican presidential campaign that their campaign slogan was "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont [the 1856 Republican candidate for President]." *Id.*
[199] WENDELL PHILLIPS, SPEECHES, LECTURES, AND LETTERS 536 (reprinted by Negro Universities Press 1968) [hereinafter PHILLIPS, SPEECHES AND LECTURES].

> flung down the gauntlet of the printing press and said, "I will prove that my system—freedom—is the best." [When, however, the South saw that] slavery was sinking . . . she said: "I know I made the bargain, but I cannot abide it."[200]

Representative James Ashley of Ohio likewise noted during the congressional debates regarding the Thirteenth Amendment that restrictions on anti-slavery speech violated the constitutional rights of whites as well as Blacks, stating that slavery "has for many years defied the Government and trampled upon the national Constitution, by kidnapping, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes."[201]

Slaveowners and their allies justified restrictions on anti-slavery speech on two primary grounds: fear and paternalism. In common with "earlier and later cases of suppression of political speech, laws against antislavery speech and press were often explicitly framed or justified in terms of the bad tendencies the speech was thought to have."[202] Under this theory, it need not be proven that enslaved persons were likely to act upon anti-slavery speech nor even that such speech actually ever reached any enslaved person; rather, it was sufficient that such speech might have a tendency to create an atmosphere of discontent slavery. Thus, for example, North Carolina law outlawed the distribution of "any written or printed pamphlet or paper . . . the evident tendency whereof is to cause slaves to become discontented with the bondage in which they are held . . . and free negroes to be dissatisfied with their social condition."[203] The fear was that such an atmosphere of discontent could at some point lead enslaved persons to try to escape or resist slavery, either by fleeing, engaging in individual acts of resistance, or participating in organized rebellions. Indeed, restrictions on anti-slavery speech ultimately reached all the way to Congress with the adoption of a

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[200] *Id.* at 537.
[201] CONG. GLOBE, 38th Cong., 2d Sess. 139 (1865) (statement of Rep. James Ashley).
[202] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1130.
[203] *Id.* at 1164.

"gag rule" barring the House of Representatives from considering antislavery petitions and banning discussions of abolition.[204]

The possibility that anti-slavery speech could lead slaves to flee posed the risk of catastrophic economic loss to slaveholders, given the value of enslaved persons[205] and the dependency of the Southern economy upon slave labor. Moreover, the possibility of individual or organized slave resistance left Southern slaveholders "close to hysteria,"[206] in light of the large populations of enslaved persons in the South and several high-profile slave rebellions domestically and abroad from the late-1700s through the mid-1830s.[207] Similarly, during the Civil War, "[f]earful of 'pernicious influences' among their slaves, Mississippi whites dozens of blacks and their white allies on suspicion of plotting insurrections . . . . Georgia imprisoned eighteen slaves for fomenting rebellion, and hanged one white and two black plotters . . . ."[208] Furthermore, in addition to the possibility of organized slave revolts, the many intimate household duties that enslaved persons performed led enslavers to fear they were especially vulnerable to attacks or poisonings if anti-slavery speech led the persons whom they enslaved to take action to resist their enslavement.[209]

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[204] *See* NYE, FETTERED FREEDOM, *supra* note ___, at 35–36 (discussing the congressional gag rule).

[205] *See* David Brion Davis, *Crucial Barriers to Abolition in the Antebellum Years*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT xvi (Alexander Tsesis, ed.) (Columbia Univ. Press, 2010) ("The value of Southern slaves in 1860 equaled 80 percent of the gross national product, or what today would be equivalent to $9.75 trillion.").

[206] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1123.

[207] For example, a Virginia lawmaker stated that slaveholders harbored "the suspicion that a Nat Turner might be in every family, that the same bloody deed [as Nat Turner's Slave Rebellion in 1831, which killed dozens of whites], could be acted over at any time and in any place. . . ." Curtis, *Free Speech and Slavery*, *supra* note ___, at 1123.

[208] ANDREW WARD, THE SLAVES' WAR 162–63 (2008).

[209] *See, e.g.*, JAMES WALVIN, ATLAS OF SLAVERY 106 (2006) (stating that enslaved persons "cared for their owners' every domestic need, looked after (and helped to rear) their children, and catered for the most intimate of domestic needs and habits").

This reasoning, of course, assumes that but for outside agitators, enslaved persons would otherwise remain content with their lot. This assumption is dubious at best. Enslaved persons did not need external evidence to reveal the injustice of slavery, and many enslaved persons engaged in acts of resistance without the urging of external actors.[210] Nevertheless, under the paternalistic caricature of Black persons—whether slave or free—as childlike and lacking the capacity for rational independent decisionmaking, special restrictions upon their liberty were argued to be both necessary and beneficent. The Preamble to South Carolina's Slave Code is instructive in this regard, stating:

> [Because] negroes and other slaves . . . are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the [general] laws . . . it is absolutely necessary, that such other [laws] be made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity, to which they are naturally prone and inclined . . . .[211]

Pro-slavery advocates thus expressly invoked the need for the state and the slaveowner to stand *in loco parentis* to enslaved persons in order to protect them from their own innate poor judgment, arguing that slavery and its concomitant restraints on liberty ere "the best and safest way of life for the childlike and irresponsible Negro [because] it provided for him greater protection than any other system."[212] Thus, because enslaved persons were presumed to lack the mental capacity to make informed decisions and therefore susceptible to being unduly swayed by anti-slavery speech, pro-slavery forces proscribed such speech entirely.

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[210] *See* DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 206 (Oxford Univ. Press 2006) (noting that the body of evidence regarding "[slave] resistance of all kinds has seemed extremely important in counteracting the older traditional white view that African American slaves passively accepted their plight and were even loyal and dutiful to their owners . . . .") [hereinafter DAVIS, INHUMAN BONDAGE].

[211] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 109–10 (Univ. of North Carolina Press 2012).

[212] NYE, FETTERED FREEDOM, *supra* note ___, at 19.

C. Slavery and Freedom Seekers: Restrictions Upon Enslaved Persons' Rights as Listeners

In addition to limiting their access to anti-slavery speech specifically by banning such speech entirely, slaveowners and legislatures tightly regulated enslaved persons' access to information more generally. For example, David Walker wrote in his anti-slavery pamphlet *Walker's Appeal* that:

> If they find [an enslaved person] with a book of any description in our hand, they will beat us nearly to death—they are so afraid we will learn to read, and enlighten our dark and benighted minds . . . . They keep us in the most death-like ignorance by keeping us from all source[s] of information."[213]

Among other measures, the slave states made it a crime to teach enslaved persons how to read and write, lest they become able to directly access information that could lead them to flee, challenge, or even question their enslaved status.[214]

Slaveowners viewed a literate slave both as a potential danger and as an affront to whiteness. The account of Stephen, an enslaved man, provides a telling example. Stephen's owner confronted him about counterfeit freedom papers and passes that Stephen had forged for himself and other enslaved persons.

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[213] DAVID WALKER, WALKER'S APPEAL IN FOUR ARTICLES; TOGETHER WITH A PREAMBLE, TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA, WRITTEN IN BOSTON, STATE OF MASSACHUSETTS 74 (3d ed. 1830), https://docsouth.unc.edu/nc/walker/walker.html.

[214] *See* Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031, 1041 (2022) [hereinafter Black, *The Right to Education*] (noting that the increase in abolitionist publications in the early-to-mid-1800s "stoked fears that subversive written materials would provoke more unrest. Many slave owners had also long understood that slave literacy increased the risk of escape. Literate enslaved people could coordinate and plan their own individual escapes and share information with others who might do the same or take even more extreme measures."). *See also* NYE, FETTERED FREEDOM, *supra* note ___, at 71 ("To most Southerners, a slave who could read was potentially dangerous," since they "'would have placed in their hands [materials] inculcating insubordination and rebellion'" (quoting S. Presbyterian, *Ought Our Slaves Be Taught to Read?*, 18 DE BOW'S REV. 52, 52 (1855)).

Stephen's owner threatened to kill him, as much for being literate as for forging the papers. The owner stated angrily:

> Who taught you how to write? I did not know you were educated. Here you are, better educated than any white man around here. An educated [slave] is a dangerous thing, and the best place for him is six feet under the ground, buried face foremost. Ah, sir, your end is come [sic], and you will not have use for papers, books, and pens any longer.[215]

Prohibitions on educating enslaved persons increased in scope and severity as slaveowners' fear of slave rebellions grew.[216] In many states, these prohibitions were ultimately extended to bar the education of all Blacks, whether enslaved or free.[217]

Slaveowners also imposed extra-legal -- but no less effective -- restraints on enslaved persons' access to information. For example, William Robinson noted that one of his owner's first acts when he heard news of the shots fired at Fort Sumter marking the beginning of the Civil War was to immediately to take action limiting communications with and among the slaves he owned. The slaveowner dispatched Robinson to deliver a note to the

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[215] OCTAVIA V. ROGERS ALBERT, THE HOUSE OF BONDAGE OR CHARLOTTE BROOKS AND OTHER SLAVES 111 (Hunt & Eaton 1890), https://docsouth.unc.edu/neh/albert/albert.html#albert138. *See also* Black, *The Right to Education*, *supra* note___, at 1041 (noting that in addition to fears about enslaved persons escaping or rebelling, "fundamentally, literacy challenged slave owners' dominion. As Frederick Douglass's enslaver proclaimed, 'Learning would *spoil* the best [racial epithet] in the world' and "'forever unfit him to be a slave . . . .'") (emphasis in original).

[216] DAVIS, INHUMAN BONDAGE, *supra* note ___, at 209 ("One of the most telling and drastic responses to [Nat Turner's 1831 slave rebellion] was the rush by Southern states to pass laws making it a crime to teach slaves to read [because] Turner was literate and many whites suspected that he and his men had been influenced by such radical antislavery works as David Walker's *Appeal to the Colored Citizens of the World* . . . ."). *See also* Curtis, *Free Speech and Slavery*, *supra* note ___, at 1123 ("The first reaction [to fear of slave revolts] was repression, often aimed at slaves and free Negroes . . . . North Carolina, like some other Southern states, made it a crime to teach slaves to read or write.").

[217] NYE, FETTERED FREEDOM, *supra* note ___, at 70–71 (stating that by the 1830s and 1840s, most Southern states had enacted laws prohibiting education of all Blacks, while some others simply "depended [instead] upon the pressure of public opinion" to effectively forbid it).

slaveowner's wife asking her "to tell the overseer to keep a very close watch on the Negroes and see that there's no private talk among them, and to give two local whites suspected of abolitionist tendencies no opportunity to talk with the Negroes."[218] Indeed, slaveowners prohibited the mere sharing of factual information about the War with enslaved persons. Harry Smith recounted that while he was enslaved, "some of the lower classes of whites used to steal into the slave quarters, and with a person watching to see if Master was coming, would read [news to the slaves] about the coming war."[219] Smith continued that "if any [whites] were caught reading to the slaves, or giving them any information, they were tied and received fifty lashes."[220]

Enslaved persons' freedom of association and assembly were also severely restricted. Slaves were barred by law and by slaveowners' fiat from assembling for any purpose without the owner's permission. The Slave Code of Georgia, for example, barred "the assembling of negroes under pretense of divine worship"[221] and further provided that "any justice of the peace may disperse any assembly of slaves which may endanger the peace; and every slave found at such meeting shall receive, without trial" [222] twenty-five lashes. Slaveowners also imposed extra-legal restrictions on gatherings and communications among enslaved persons. For example, describing a journey with his owner, Charles Ball stated that: "Throughout the whole journey, until after we were released from our irons, he had forbidden us to converse together beyond a few words in relation to our temporary condition and wants, [and] he rigidly enforced his edict of silence. I presume that the reason of this prohibition of all conversation was to prevent us from devising plans of escape . . . ."[223]

As Frederick Douglass aptly observed, the First Amendment protects listeners as well as speakers. In an 1860

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[218] ANDREW WARD, THE SLAVES' WAR 4 (Mariner Books 2009) (internal quotation marks omitted) [hereinafter WARD, THE SLAVES' WAR].
[219] *Id.* at 28 (internal quotation marks omitted).
[220] *Id.*
[221] *Id.* at 1108.
[222] *Id.* at 1108–09.
[223] CHARLES BALL, FIFTY YEARS IN CHAINS; OR, THE LIFE OF AN AMERICAN SLAVE 59 (1859), https://docsouth.unc.edu/fpn/ball/ball.html.

speech in Boston, delivered mere days after another speech he delivered was shut down by a violent white mob, Douglass argued that "[to] suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker."[224] The Supreme Court's jurisprudence similarly recognizes listeners' rights as a distinct interest worthy of First Amendment protection. In *Stanley v. Georgia*,[225] for example, the Court stated that "it is now well established that the Constitution protects the right to receive information and ideas."[226]

The plurality opinion in *Island Trees Union Free School District No. 26 v. Pico*,[227] extended this recognition to the school speech context. In *Pico*, which involved the removal of certain books from a school library on the ground that they contained objectionable content, the plurality explained that the right to receive information rests upon two independent First Amendment grounds. In terms of the speaker's rights, "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[228] And in terms of the listener's rights, "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom,"[229] since information that the listener consumes and considers provides the listener with knowledge to inform her own views and, consequently, shapes her own speech. The *Pico* plurality stated that students, like the public at large, have rights as listeners:

> [J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members . . . . [S]tudents must always remain free

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[224] Douglass, *A Plea For Freedom of Speech*, *supra* note ___.
[225] 394 U.S. 557 (1969).
[226] *Id.* at 564.
[227] 457 U.S. 853 (1982).
[228] *Id.* at 867.
[229] *Id.*

> to inquire, to study and to evaluate, to gain new maturity and understanding.[230]

As a a plurality opinion, *Pico*'s precedential weight is limited. Moreover, the *Pico* plurality "emphasized that their decision only applied to [school] library books"[231] and therefore did not address other sources of information that might invoke students' right to receive. As the Court's most extensive discussion of listeners' rights in the school context, however, *Pico* is instructive and is routinely relied upon by the lower courts. Furthermore, *Pico*'s underlying insight—that listeners (including student listeners) have a right to receive information that a willing speaker wishes to share—is not unique to the *Pico* plurality.

D. The Second Founding's First Amendment Principles Applied to Speech Advocating Gender-Affirming Care

The Nation's near-dissolution in the Civil War and the subsequent Reconstruction Era represented a clear break with the prior constitutional regime.[232] Whether by purposeful design or necessary compromise, the First Founding's Constitution had always subverted liberty in service of slavery.[233] The issue of slavery was ultimately determined by the Union's victory in the Civil War. Following the War, the question therefore became: what constitutional principles and values would inform the Nation's Second Founding?

By rejecting slavery and the legalized white supremacist structures that supported it, the post-Civil War Framers sought to bring about a "new birth of freedom,"[234] in President Lincoln's words. The immediate goals of the Second Founding were to constitutionalize the destruction of slavery that had been achieved by the Union's military victory and to guarantee that Blacks would

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[230] *Id.* at 868.
[231] Lester, *Say Gay*, *supra* note ___, at 157.
[232] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (Random House 2005) ("[T]he [original] Founders' Constitution failed in 1861–65. The system almost died, and more than half a million people did die.").
[233] *See* Part IV.A, *supra*, for discussion of how the original Constitution supported slavery.
[234] Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

henceforth receive full and equal enjoyment of civil rights by virtue of the Thirteenth,[235] Fourteenth,[236] and Fifteenth[237] Amendments and accompanying civil rights legislation. The Second Founding also incorporated new constitutional principles of universal applicability. Prior to the Civil War, the Constitution, "in every clause and line and word," had always been interpreted "[in favor of] human slavery."[238] The post-War Constitution, by contrast, was always to be "interpreted uniformly and thoroughly for human rights"[239] in all matters.

As discussed above, enslaved and free Blacks—as well as anti-slavery activists, abolitionists and Unionists of all races—were subject to extensive and draconian measures aimed at suppressing their speech. The slave regime's denial of freedom of speech to enslaved persons and their allies was chief among the badges and incidents of slavery that the Second Founding's Framers sought to redress.

During the debates leading to adoption of the Thirteenth Amendment, Representative James Wilson of Iowa noted that prior to the Civil War, freedom of speech "could be enjoyed only when debased to the uses of slavery. Slaveholders and their supporters alone were free to think and print, to do and say what seemed to them best . . . ."[240] Senator James Harlan similarly remarked that one of the badges and incidents of slavery to be abolished by the Thirteenth Amendment was "the suppression of the freedom of speech and of the press, not only among those [enslaved persons] themselves but among the white race."[241] Senator Lyman Trumbull stated that denial of the right of enslaved persons to receive information by barring them from being educated was a badge or incident of slavery that was abolished along with the abolition of slavery itself:

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[235] U.S. CONST. amend. XIII.
[236] U.S. CONST. amend. XIV.
[237] U.S. CONST. amend. XV.
[238] CHARLES SUMNER, THE WORKS OF CHARLES SUMNER, vol. 14, at 424 [hereinafter WORKS OF CHARLES SUMNER]. Senator Sumner was one of the primary Framers of the Second Founding.
[239] *Id.*
[240] CONG. GLOBE, 38th Cong., 1st Sess. 1202–03 (1864).
[241] CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also. Those laws that prevented the colored man from going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; *that did not allow him to be educated*, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.[242]

In sum, the Second Founding's Framers, enslaved persons, and anti-slavery activists all understood the freedom of speech and the right to receive information to be essential components of the struggle for liberty. They therefore considered the full and equal protection of free speech rights to be a core value embedded in the post-Civil War Constitution.

The constitutional guarantee of freedom of speech as applied through the Fourteenth Amendment should be interpreted to protect student speech urging a peer to obtain gender-affirming care, even in circumstances where such care is unlawful for minors. It is true that the Supreme Court has held that some restrictions on constitutional rights that would be impermissible for adults may be permissible in the case of minors, even including older adolescents who are near adult age. The Court, however, has nonetheless recognized that depriving minors as a class of constitutional rights must be based upon some reasonable, and reasonably specific, ground for believing that the unqualified exercise of the right at issues is inappropriate for minors in the context at issue.

Thus, in *Bellotti v. Baird*,[243] for example, the Court stated that "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices

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[242] CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (emphasis added).
[243] 443 U.S. 622 (1979).

with potentially serious consequences."[244] The *Bellotti* Court held, however, that notwithstanding the general principle that the rights of minors may be limited in ways that those of adults may not, a state could not impose an absolute requirement of parental consent in order for an unmarried minor to obtain an abortion. The Court reasoned, *inter alia*, that "[a]lthough the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, [*Tinker*] illustrates that it may not arbitrarily deprive them of their freedom of action altogether."[245] Limitations upon students' rights to engage in and to receive speech advising gender-affirming care cannot be justified based upon a blanket assumption that no minor, regardless of their age or the context in which the speech occurs, can be trusted to exercise appropriate judgment regarding whether to follow such advice. This is particularly true given that such speech goes to a core concern of the Second Founding: namely, protecting the right of individuals who are members of stigmatized and subordinated groups to receive information relating to their liberty, dignity, and autonomy.

Nor does the argument from paternalism for suppressing student speech advising a peer obtain gender-affirming care fare any better when examined through the lens of the Second Founding. Paternalism was one of the key justifications that enslavers and their allies in government offered to defend restrictions on anti-slavery speech, arguing that enslaved persons lacked the decisionmaking capacity to evaluate such speech properly.[246] Activists and legislators similarly invoke paternalistic reasoning in justifying bans on gender-affirming care, arguing that the government must intervene to protect trans children and their parents from their own ignorance and credulity. As Scott Skinner-Thompson has noted, "[b]ans on providing healthcare, be it hormonal interventions or surgical ones, are often justified in the name of protecting transgender youth--whom the legislatures

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[244] *Id.* at 635.
[245] *Id.* at 637 n.15. *See also* Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) (stating that "a State may permissibly determine that, *at least in some precisely delineated areas*, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (emphasis added).
[246] *See supra* notes 203–05 and accompanying text.

believe lack the capacity to identify their gender--from purportedly unsafe and experimental medical treatment."[247] For example: according to Dr. Stanley Goldfarb -- the founder of a highly influential organization that opposes gender-affirming care for minors and whose research has been heavily relied upon by state legislatures that have recently banned such care -- trans children and their families simply "don't understand the lifetime implications of some of these treatments . . . . [Therefore,] [t]he government has to step in."[248]

Advocates and providers of gender-affirming care would vigorously disagree, noting that trans children and their families likely have engaged in extensive research and considerable reflection before deciding to pursue gender-affirming care. The University of California, San Francisco's Gender Affirming Health Program, for example, recommends that the first step in considering gender transition is to explore one's gender identity:

> This can include any combination of internal self-reflection, connecting with community and support groups, or working with a therapist who has expertise in gender identity issues. This process could take anywhere from months to years . . . . For transgender and gender non-binary people under the age of 18, there are some additional considerations both for gender identity exploration as well as for undergoing various medical or surgical interventions. In general[,] this involves first working with a behavioral health provider or child & adolescent gender program to explore identity and process.[249]

The bulk of the evidence indicates that trans children and their families seek gender-affirming care because they have come to an

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[247] Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 990 (2024).
[248] Daniel Payne, *The Conservative Doctor Who's Got the GOP's Ear on Trans Kids' Care*, POLITICO (July 21, 2024), https://www.politico.com/news/2024/07/21/conservative-kidney-doctor-trans-kids-care-00166641.
[249] UCSF Gender Affirming Health Program, *Transition Roadmap* (2019), https://transcare.ucsf.edu/transition-roadmap.

informed and considered decision that such medical care is best for the child.[250] For First Amendment purposes, however, it would not matter, because there is a ready alternative to the "highly paternalistic approach"[251] advanced by opponents of gender-affirming care. "That alternative is to assume that information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[252]

To be sure, young children may not have the same decisionmaking capacity as adults as a general matter; but young children are highly unlikely to be the ones having discussions in school about obtaining gender-affirming care. Such discussions are far more likely to occur between older adolescents, who are treated under federal and state law as having the capacity to make a wide variety of momentous decisions, including joining the military on active duty[253] and purchasing or possessing firearms, including assault rifles.[254] Moreover, the undifferentiated fear that an older

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[250] *See, e.g.*, Timmy Broderick, *Evidence Undermines 'Rapid Onset Gender Dysphoria' Claims*, Scientific American (August 24, 2023), https://www.scientificamerican.com/article/evidence-undermines-rapid-onset-gender-dysphoria-claims/ (noting that for most youth who decide to seek gender-affirming care, "considerable time elapses between when they realize they may be transgender and when they receive such care. A recent analysis of 10 Canadian medical centers in the *Journal of Pediatrics* found that 98.3 percent of young people seeking gender-affirming care had realized more than a year prior that they may have been transgender.").

[251] Virginia State Bd. of Pharmacy, 425 U.S. at 770.

[252] *Id*,

[253] USA.gov, *Requirements to Join the U.S. Military*, https://www.usa.gov/military-requirements#:~:text=Each%20branch%20of%20the%20military,Coast%20Guard%3A%2017%20%2D%2041 (noting that every branch of the U.S. military sets seventeen as the minimum age to enlist for active duty).

[254] *See* Everytown Research & Policy, *Has the State Raised the Minimum Age for Purchasing Firearms*, https://everytownresearch.org/rankings/law/minimum-age-to-purchase/ (noting that while federal law sets eighteen as the minimum age to purchase long guns from federally-licensed dealers, many states have no minimum age whatsoever to purchase long guns, including assault rifles, from unlicensed dealers). *See also* Shirin Ali, *The Legal Ages for Buying a Gun in the U.S.*, THE HILL (May 18, 2022), https://thehill.com/changing-america/3493244-the-legal-ages-for-buying-a-gun-in-the-us/#:~:text=At%20the%20same%20time%2C%20Texas,handgun%20or%20a%20long%20gun (noting that "Alaska has gone as far as lowering the age limit for

adolescent may impulsively follow a peer's advice that they seek forms of gender-affirming care of which the state disapproves is insufficient to limit students' First Amendment rights,[255] and has no more basis in evidence than similar fears that reading LGBTQ-themed books, viewing drag performances, or seeing rainbow flags will "make" students gay.[256]

Moreover, the fact that the underlying conduct urged is unlawful is not in itself justification for restricting the student speaker's and listener's rights. Escaping from or resisting one's enslavement was also unlawful, yet the Second Founding's Framers clearly believed that speech urging such action was constitutionally protected.[257] Similarly, the fact that student speech advocating that a peer seek gender-affirming care might create a general atmosphere in which that peer is more likely to seek such care cannot be grounds for suppressing such speech. The Second Founding unequivocally rejected the idea that a generalized fear of "pernicious influences"[258] that might have a "bad tendency"[259] to influence a listener to action should be sufficient to suppress pro-freedom speech. For example, Congressman John Bingham, the primary author of the Fourteenth Amendment (through which the First Amendment is applicable to the states), in 1856 argued that a Kansas statute making it a crime to express "any sentiment

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the possession of a handgun to 16 years old, while Louisiana lowered their minimum age requirement to 17 years old[,]" and that "Texas, Wyoming, Ohio, New Hampshire, Montana and Maine have no age restrictions when it comes to who can be in possession of a handgun or a long gun").

[255] Among other reasons: as discussed below, such undifferentiated fear falls short of meeting the standard for incitement, even as adjusted for the school context.

[256] *See, e.g.*, Natanson, *Objections to LGBTQ Content*, *supra* note ___ (noting that many proponents of banning books with LGBTQ content stated that "reading books about LGBTQ people could cause children to alter their sexuality or gender" and quoting illustrative unsupported arguments that "[t]he theme or purpose of [a book about a transgender boy] is to confuse our children and get them to question whether they are a boy or a girl[;]" that a book about a gay African American adolescent will give "ideas to children [on how to] discover that they are gay [and] how to persuade others they may be gay as well[;]" and that "Books like this is where teens get the idea it's ok!" in reference to a book involving a same-sex couple).

[257] *See* Parts IV.B. and C., *supra*.

[258] *See* WARD, THE SLAVES' WAR, *supra* note ___, and accompanying text.

[259] *See* Curtis, *Free Speech and Slavery*, *supra* note ___, and accompanying text.

calculated to induce slaves to escape from the service of their masters"[260] violated the Constitution. The Kansas statute, Bingham stated, had the effect of:

> [making it] a felony to read in the hearing of one [an enslaved person] the words of the Declaration [of Independence], "All men are born free and equal, and endowed by their Creator with the inalienable rights of life and liberty" . . . . Before you hold this enactment to be law, burn our immortal Declaration and our free-written Constitution [and] fetter our free press . . . .[261]

Enslaved and free Blacks were similarly scornful of the notion that generalized white fear of the possible effects of free speech could justify suppressing it. For example, Samuel Ward stated in his slave narrative that "among the heaviest of my maledictions against slavery is that which it deserves for keeping my poor father—and millions like him—in the midnight and dungeon of the grossest ignorance."[262] Ward continued: "Cowardly system as it is, [slavery] does not dare to allow the slave access to the commonest sources of light and learning."[263]

Finally, while student speech advising a peer to seek unlawful gender-affirming care would be subject to restriction if it reached the threshold for proscribable incitement, cases where that threshold would be met would be exceedingly rare. Although it took over a century, the Supreme Court's decision in *Brandenburg v. Ohio*[264] ultimately embraced the Second Founding's lesson that the fact that speech advocates unlawful conduct should not in itself deprive the speech of constitutional protection.[265] The *Brandenburg*

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[260] Curtis, *Free Speech and Slavery*, *supra* note ___, at 1129–30.
[261] *Id.* at 1130.
[262] SAMUEL WARD, AUTOBIOGRAPHY OF A FUGITIVE NEGRO: HIS ANTI-SLAVERY LABOURS IN THE UNITED STATES, CANADA, & ENGLAND 6 (1855), https://docsouth.unc.edu/neh/wards/ward.html.
[263] *Id.*
[264] 395 U.S. 444 (1969).
[265] *See* Parts IV.B. and C., *supra*. *See also* William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEXAS L. REV. 1065, 1113 (2021) (summarizing the historical evidence and concluding that "[t]he *Brandenburg* understanding of proscribable incitement largely accords with the experiences of

test for incitement provides that the government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[266] Although the Supreme Court has never attempted to quantify the imminence requirement of the test for incitement, the reasoning behind it makes clear that the feared action must be likely to happen in very close temporal proximity to the speech urging it. Speech encouraging a listener to engage in unlawful conduct is protected by the First Amendment unless the nature and context of the speech "leaves its audience with [no] time to reflect on the ideas it disseminates, to get other opinions, to decide for themselves what to believe."[267] Whenever there is such time, "the remedy to be applied is more speech, not enforced silence."[268]

Even if a student speaker has the requisite intent to produce imminent lawless action in the sense of urging the student listener to immediately obtain forms of gender-affirming care that are illegal to minors, it is highly unlikely for several reasons that the listener would, or even could, do so imminently. First, unlike recreational drugs or alcohol, it is highly improbable that the prototypical schoolyard drug dealer's wares would include a regimen of puberty blockers and hormones. Such medications are only available from a medical professional; thus, even if a student listener were inclined to uncritically follow a peer's advice to immediately seek puberty blockers or hormone therapy, the listener could not imminently obtain them. Second, as with most other forms of medical care, a minor would generally have to get (or at least to seek) parental consent in order to be eligible to receive puberty blockers, hormone therapy, or other medications used in gender-affirming care.[269] Third, if the form of gender-

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slaves and abolitionists in that punishing speech merely because it is incendiary or deemed to have 'pernicious tendencies,' *i.e.*, simply because of the possibility that listeners might be persuaded by it, was seen as violating the right to free speech").

[266] *Brandenburg*, 395 U.S. at 447.

[267] Evelyn Douek & Genevieve Lakier, *Rereading* Schenck v. United States, KNIGHT INSTITUTE (July 7, 2022), https://knightcolumbia.org/blog/rereading-schenck-v-united-states-2.

[268] Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring).

[269] *See, e.g.*, Renuka Ryasam, *The Transgender Care that States Are Banning, Explained*, POLITICO (Mar. 25, 2022),

affirming care at issue is unlawful in the state at issue, the minor would either need to travel to a state where such care remains legal or find an in-state provider who is still administering such care "underground" in defiance of state law. Accordingly, even assuming *arguendo* that a minor might be prone to act impulsively, the realities of actually obtaining medications used for gender-affirming care are such that there is no reasonable likelihood that the minor could obtain them imminently following their peer's advice to do so.

V. Conclusion

As it has in other movements for civil rights throughout American history, the First Amendment has played a key role in advancing LGBTQ+ rights. As Carlos Ball has noted, "protections related to free speech and association have allowed LGBT individuals to better understand their sexuality, to find each other and form identity-based bonds, to highlight and criticize discriminatory government policies and social norms, and to

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https://www.politico.com/newsletters/politico-nightly/2022/03/25/the-transgender-care-that-states-are-banning-explained-00020580 ("In all states, minors who seek transgender treatment need parental consent."). There may be limited exceptions to the requirement of parental consent. The state of Maine, for example, has recently enacted a law allowing sixteen-year-olds to receive gender-affirming hormone therapy (but not puberty blockers) without parental consent, but only in certain limited circumstances and subject to various requirements. In addition to being at least sixteen years old, the Maine law requires that the person has been medically diagnosed with gender dysphoria; is evaluated by the treating physician or other medical professional as experiencing or expected to experience harm from not receiving gender-affirming hormone therapy; has discussed the matter with a parent or guardian, who has refused to support gender-affirming treatment; has provided their written informed consent to receiving hormone therapy; and that such written informed consent be preceded by, *inter alia*, a full exploration with the treating doctor or medical professional of alternate treatment options as well as of the "physiological effects, benefits, and possible consequences" of hormone therapy. *See* H.P. 340-L.D. 535, *An Act Regarding Consent for Gender-Affirming Hormone Therapy for Certain Minors* (Maine 2023), https://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0340&item=5&snum=131. Even in circumstances where there are exceptions to the requirement of parental consent, the steps necessary to satisfy such exceptions nonetheless inherently entail a significant delay between the speech and the conduct.

organize politically . . . ."[270] The contemporary movement to limit LGBTQ+ persons' rights has also taken a page from history, seeking to suppress freedom of speech.

People who oppose gender-affirming care for minors may seek to persuade lawmakers to adopt their viewpoint. If successful, the government may then limit such care, provided that such limitations are otherwise consistent with the Constitution.[271] The government may also, consistent with the First Amendment, express its own view that gender-affirming care for minors is undesirable. The government, however, may neither muzzle those who wish to share information about gender-affirming care nor prevent willing listeners from hearing it because of the state's opposition to trans rights or "a bare desire to harm a politically unpopular group."[272] Moreover, to the extent that restrictions on "trans talk" are motivated by the belief that speech advocating gender-affirming care will have a tendency to encourage others to seek such care unlawfully, the First Amendment does not allow the government to suppress speech simply because the government believes that listeners—even listeners who are minors—may be persuaded by it. As the Supreme Court has noted, the fact that the government "finds expression too persuasive does not permit it to

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[270] Carlos A. Ball, The First Amendment and LGBT Equality: A Contentious History 1-2 (Harvard Univ. Press 2017). *See also* Scott Skinner-Thompson, *Solidifying Students' Rights to Gender Expression*, 104 B.U. L. REV. 503, 504 (2024) ("[T]he First Amendment's protections of free speech . . . have served as a cornerstone of queer liberation for over a half-century, protecting queer people's ability to gather together, develop their identities, and share their experiences.").

[271] Although beyond the scope of this Article, many such restrictions are of dubious constitutionality inasmuch as they likely violate both the Equal Protection Clause and the substantive due process right to bodily integrity. *See, e.g.*, Doe v. Lapado, 2024 WL 2947123, *39 (N.D. Fla., June 11, 2024) (stating that "gender identity is real" and holding that Florida's ban on gender-affirming care for minors violated the Equal Protection Clause). The Supreme Court may soon resolve the issue, having recently announced that it will hear a challenge to states' bans on providing hormone treatment and puberty blockers for minors. *See* Amy Howe, *Supreme Court Takes Up Challenge to Ban on Gender-Affirming Case*, SCOTUSBLOG (June 24, 2024), https://www.scotusblog.com/2024/06/supreme-court-takes-up-challenge-to-ban-on-gender-affirming-care/.

[272] Romer v. Evans, 517 U.S. 620, 634 (1996) (internal quotation marks and alterations omitted).

quiet the speech or to burden its messengers . . . . The choice between the dangers of suppressing information, and the dangers of its [supposed] misuse if it is freely available is one that the First Amendment makes for us."[273]

[273] Sorrell v. IMS Health Inc., 564 U.S. 552, 578 (2011). Although *Sorrell* and *Virginia State Bd. of Pharmacy* (cited earlier in this Article) were cases involving the commercial speech doctrine, their anti-paternalism reasoning applies with even greater force to the type of speech with which this Article is concerned.