2016

Microaggressions, Trigger Warnings, and the Fight to Redefine Free Speech: An Analysis of the Judiciary's Response to Campus Speech Codes Through Liberal and Communitarian Perspectives

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MICROAGGRESSIONS, TRIGGER WARNINGS, AND THE FIGHT TO REDEFINE FREE SPEECH: AN ANALYSIS OF THE JUDICIARY'S RESPONSE TO CAMPUS SPEECH CODES THROUGH LIBERAL AND COMMUNITARIAN PERSPECTIVES

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An Independent Study Thesis
submitted to the Department of Political Science
at The College of Wooster
March, 2016
in partial fulfillment of the requirement of I.S. Thesis

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ABSTRACT

As campus speech codes enjoy a renaissance surrounding microaggressions and trigger warnings, understanding how and whether such speech codes can stand up to constitutional scrutiny is crucial. This project offers a historical overview of the evolution of free speech in U.S. history, with a particular focus on the jurisprudential history of hate speech and the "first wave" of litigation surrounding campus speech codes in the 1980s and '90s. I use two theoretical frameworks, liberalism and communitarianism, to analyze the judiciary's response to speech codes and to understand whether that response aligns with either framework. Lastly, I offer three proposals for future consideration of speech codes in the courts, with an emphasis on current speech controversies. My primary research question is this: Have the judiciary's decisions regarding campus speech codes been more similar to a liberal or a communitarian conception of speech, and should a new approach be considered as colleges move into a new era of speech regulations?

ACKNOWLEDGEMENTS

This project would not have been possible without the help of many people. I can never adequately express my gratitude to them all, but here is my best attempt. I am a lucky woman to have so many people to thank.

To my Mom, thank you for teaching me that women need to be able to argue, and argue well. Thank you for your encouragement, but also for your willingness to talk to me honestly as I navigate life. Thank you for showing me how to be resourceful and to get what I need. But when that fails, thank you for always, always being there when I can't quite figure things out on my own and still need someone to lean on. Thank you for forcing me to stick out the tough parts. I would not have made it through college without you.

To my Dad, thank you for raising me to always question authority and to stick it to the man whenever possible. Thank you for putting up with such a headstrong kid — I hope you think it was worth it to end up with an adult daughter who still doesn't quite know when to stop arguing. Thank you for all the drives to Wooster. I will miss them dearly, but I will always need to be driven somewhere. Most importantly, thank you for always, always rescuing me when I need it. I would not have made it through college without you.

To Henry, thank you for putting up with years of tickling, punching, yelling, and general bossiness. Thanks for being forgiving when I monopolized Mom and Dad's time with my problems. I'm sorry for not being a better sister, but I am so glad you still want to be my brother now that we're grown up. Thanks for being a smart, funny, talented little brother who reminds me to try new things and take a breath now and then.

To Ben, you are a more patient and forgiving boyfriend than I have a right to ask for. I don't deserve you, but for some reason you've stuck around — possibly because you love to argue as much as I do. Thank you for putting up with me, for disagreeing with me, and for pushing me to be able to defend what I believe in. Thank you for showing me how to be a kinder and more ethical person. Sorry for defeating you so soundly in all of our arguments.

To Emily, thank you for being the Ann to my Leslie, the barn own to my Yente. Thank you for helping me talk through things and for reminding me to slow down and take care of myself when I am truly being as manic as Leslie Knope. Thanks for being a forgiving friend when I (often) fail to match your kindness, humor and patience.

To my advisor Mark Weaver, I can't thank you enough. You made this project possible by helping me figure out how to turn my rabid passion for free speech into a coherent project. Thank you so much for your patient guidance throughout this entire project, and thank you for not rolling your eyes too much at my attempts to figure out political theory during my senior thesis. I am also incredibly grateful for the countless hours you put in coaching the Moot Court team. Your presence on the team will always be irreplaceable, and I am so proud to have been a member of your last moot class. You helped me become a better public speaker, a more meticulous thinker, and a more confident person.

To my second reader Eric Moskowitz, thank you for your guidance throughout my time at Wooster and for your willingness to drop everything to chat with me whenever I stop by your office. You were my first political science professor, and your insights into political science, as well as into the politics of this college, have been a highlight of my time here. Thank you for your empathy, understanding and pragmatism in helping me through some of my most difficult decisions of the past four years.

To the Voice staff, thanks for being understanding when I inevitably snapped and started yelling every Tuesday. I loved working myself to the bone with you guys. Keep sticking it to the man. To my co-editors, Dom and Mariah, thank you for being by my side while we slogged our way through the hardest, best job on campus.

To the Moot Court team, thanks for pushing me to argue better and to value good arguments, even if I disagree with them. To my partner Alex, thanks for all the wins.

To Dom, Travis Marmon, and Mr. Drushal, thank you so much for lending your editing skills to this project.

To everyone who listened to me rant about the First Amendment at some point this year, and especially to those who offered constructive feedback, thank you.

Finally, thanks to Tina Fey and "30 Rock" for making me feel better when I failed to adequately balance being nice and working hard. In her words, "Bitches get stuff done."

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INTRODUCTION

At colleges across the United States, students are requesting — and in some cases demanding — greater protection from speech they consider harmful. In a contrast from the student protests of the 1960s, students have largely stopped pressing for greater freedom of speech and are instead campaigning to limit speech that, in their view, prevents colleges and universities from being truly pluralistic (Zeitz 2015). Specifically, today's students are more aware of "microaggressions," or everyday slights against people of color, women, and other minority groups, and "triggers," or material that could cause severe flashbacks to traumatic incidents in students with PTSD. Many students see microaggressions and triggering material as impediments to learning for those who are most affected by them.

Some student requests, however, have been widely viewed as infringements of free speech and part of a larger push to institute mandatory "political correctness." In cases where students have demanded mandatory trigger warnings (requiring professors to label potentially triggering material) or where administrators have acquiesced to students by implementing microaggression trainings (some of which appear to censure particular viewpoints), pushback from faculty, dissenting students, pundits, and even politicians has followed. President Obama himself criticized the culture of political correctness on college campuses, saying in an interview that it is "a recipe for dogmatism" (Chait 2015). Republican presidential candidates have widely mocked college students, tapping into a general feeling among members of the public that political correctness has gone too far — 68% believe that political correctness is a "big problem" in the United States (Edsall 2015). Even basketball legend Kareem Abdul-Jabbar (2016) recently entered the fray, arguing in an opinion piece for *The Washington Post* that political correctness is

a laudable goal but that mandatory microaggression trainings and trigger warnings go a step too far.

Are these concepts really such a threat to free speech, or are they in fact a useful tool in bringing more voices into academia? The case for limiting some speech is that the students who are most affected by it are prevented from fully participating in educational opportunities. A student who has to put up with racial microaggressions every day, or a student with PTSD who is triggered by discussions of violence in classes, cannot access educational advantages in the same way a white student, or a student without PTSD, is able to. From this perspective, providing guidelines about how to avoid microaggressions or requiring that professors offer warnings on material that could be triggering, actually serves to allow more speech by inviting more students into academic discussions.

This complex debate, which I will discuss in greater detail in the chapters to follow, becomes even more complicated when we consider the legality of campus speech regulations. We can look to recent history to find the courts' views on the matter — in the 1980s and '90s, campus speech codes were implemented at more than 300 schools (Shiell 1998). A number of the codes were challenged in court, and not a single one survived judicial scrutiny. What does this judicial history imply about the speech battles taking place on campuses today? This Independent Study project seeks to place this question in historical and legal perspective and to offer proposals for how colleges can balance free speech and students' rights to equal educational opportunities.

This issue is particularly timely because 2015 saw an explosion of protests on college campuses, many of which touched on issues of speech and equality. As such, the issue of whether speech regulations violate free speech has become all the more urgent. For an example

of how a speech regulation can blur the line between protecting students and stifling speech, we need look no further than a recent incident at The College of Wooster. Importantly, The College of Wooster is a private school, and thus not held to the same standards of free speech as a public school. But The College of Wooster's example demonstrates the importance of studying how speech regulations are implemented and how they could be used inappropriately at a public institution.

In November of 2015, a group of anonymous students protested The College of Wooster's handling of sexual assault cases by disseminating hundreds of posters in dormitories and academic buildings around campus. The posters portrayed silhouetted college students making statements such as "Wooster told my rapist that persuasion is consent," "My rapist gets to walk at graduation," and "The administration told me not to talk about my suicide attempt." The posters were distributed late at night, but were immediately noticed by many students and, crucially, resident assistants. Before administrators had even been alerted to the posters, RAs began removing them because they believed the posters' content could be "triggering" to victims of sexual assault. The RAs sought to protect victims of trauma from unwanted images and messages when they took down the posters; however, in doing so, however, the RAs silenced their classmates' protest and thwarted a larger discussion about the handling of sexual assault on Wooster's campus.

Although many students supported the removal of the posters because of their content, it's significant that administrators quickly latched onto the idea of triggering content as a justification for the posters' removal. The morning after the poster campaign went up, administrators told Resident Assistants to continue tearing down any posters they had missed, as the campaign was "violating our posting policy and triggering a number of our students,"

according to an email. As a private institution, The College of Wooster has far more leeway in regulating speech than would a public school in this situation. The College may set posting policies inside its buildings, and it may decide what posters to remove from its property. But this reasoning was not emphasized in an email to the student body that went out two days after the posters went up; rather, Administrative Director of Student Life Angela Johnston informed students that the posters were removed because they provided false information about the sexual assault reporting process, violated Title IX by publicizing identifiable information about survivors of rape, and because "Residence Life staff immediately heard from a number of students who felt triggered by these posters" (personal communication 2015).

Of these three explanations for the posters' removal, the first two do not explain why all of the posters had to be removed. If some of the posters contained false information, those specific posters could be removed without silencing the entire protest. If some of the posters included information that could be used to identify participants (victims or the accused) in a sexual assault case, those specific posters could be removed or administrators could make an effort to discover whether the information was publicized with permission from the sexual assault survivors, which presumably does not violate Title IX — especially if that information was given for the express purpose of pointing out flaws in the sexual assault reporting process. Only the final explanation, the idea that the posters triggered students, is broad enough to justify the removal of all of the posters, because it is based upon the claim that any poster relating to sexual assault could act as a trigger.

Thus, administrators were able to appropriate the concept of "triggering" for their own purposes and shut down a protest of school policies. In a dizzying contradiction, a concept that was created by marginalized groups to protect themselves from oppressive systems of power

(trigger warnings) was utilized by those in power to silence a protest aimed at protecting a marginalized group: the victims of sexual assault. And in doing so, administrators were able to end the protest without sparking significant outrage among the student body; in fact, significant student outrage was directed at the coordinators of the poster campaign for their lack of concern over the safety of those who might be triggered.

This is just one example of the many controversies that have popped up at colleges since terms like microaggressions and trigger warnings first became popularized. This case gives a sample of the difficulties colleges face in balancing students' needs and rights, as well as the possibility of misuse or misinterpretation by the administrators who apply speech codes. College campuses are once again a central battleground in a fight to redefine free speech — this time, however, student opinions seem to favor less speech, rather than more. It is crucial that these debates be analyzed and understood, and this project seeks to make a contribution to that understanding.

In Chapter One, I will offer a general overview of free speech in U.S. history, going back to the nation's birth, as well as more detailed descriptions of recent noteworthy Supreme Court cases that have formed the foundation of modern free speech jurisprudence as it relates to this new controversy. Chapter One also provides a synopsis of the "first wave" of campus speech codes, which took place in the 1980s and '90s, and considers those speech codes and the lawsuits they inspired as a jumping-off point for understanding the issues of today. In Chapter Two, I will examine two competing theoretical models of free speech: liberalism, which is oriented toward individual rights; and communitarianism, which is oriented toward shared communal values. Chapter Three will be comprised of my analyses of a series of essential Supreme Court free speech cases and several campus speech code cases from the first wave of speech codes using

these two models. In Chapter Four, I will introduce today's speech debates surrounding microaggressions and trigger warnings, and in Chapter Five I will offer three proposals for how colleges and the courts should resolve questions over campus speech codes and relieve the double-bind in which colleges find themselves caught between ensuring individual freedom of speech and offering equal opportunities to education.

CHAPTER ONE: FREE SPEECH AND HATE SPEECH HISTORIES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
- First Amendment of the United States Constitution

I. Overview of Free Speech in United States History

Like most areas of constitutional law, the core of the First Amendment is a battle between personal freedoms and the needs of society at large. In various times in American history, the pendulum has swung in favor of one side or another, but neither can declare a decisive victory. The meaning of the First Amendment has changed drastically since the Founders drafted it. How can an amendment that was once thought to have referred to only an absence of prior restraints now defend hate speech and seditious libel? The answer, in part, lies in the Supreme Court, which has played a major role in shaping the First Amendment and the freedom it provides. Here, I offer a brief overview of the First Amendment in U.S. history with a focus on the shift from protecting "the greater good," or the necessary social order, to protecting personal freedoms.

After the American Revolutionary War, the scales were tipped decisively in favor of the greater good, and personal freedoms were allowed to fall by the wayside. Although they were free of the yoke of English rule, the Founders did not take a more enlightened approach to free speech than did their former sovereign. O'Brien writes that, upon ratification of the Constitution, the First Amendment was thought to provide significantly fewer protections than it does today: "The [First] amendment was thought to protect only against prior restraint by the national government; it did not provide absolute immunity for what speakers or publishers might utter or print" (2011, 434).

The First Amendment did not, at the time, refer to much more than an absence of prior restraint, or government suppression, of what was published by the press. Beyond that, the Founders did not place much emphasis on the personal freedoms we now consider synonymous with the First Amendment, such as the freedom to express unpopular political views. The Founders were generally agreed upon the idea that seditious libel — speaking or publishing ideas aimed at promoting insurrection — should be punishable by law, an idea that was not unusual for the time (O'Brien 2011). Ensuring the continued existence of the union by limiting opposition was considered the ultimate "greater good" that could justify the suppression of disfavored viewpoints.

The Alien and Sedition Acts of 1798 demonstrated the Founders' belief in criminalizing opposing political viewpoints. The Sedition Act allowed for the punishment of "any false, scandalous writing against the government of the United States." (O'Brien 2011, 435). The Alien Act allowed the removal of aliens whom the president "suspected of 'treasonable or secret machinations against the government'" (Tedford 1985, 41, citing the Alien Act).

Tedford writes that the Sedition Act and similar acts of the same year were aimed at quieting ongoing disputes with France between 1793 and 1800, but they also had the convenient effect of chilling discourse among the political enemies of the Federalist Party and of President John Adams. "The measures against aliens, therefore, served the dual purposes of revenge upon France and protection for the incumbent party," he writes (Tedford 1985, 41). Both Acts were allowed to expire in the first years of the nineteenth century, without ever coming before the Supreme Court for consideration.

A free and open debate was not, then, a priority of the Founders. The ability of the government to restrict expression continued to be the norm for decades. After 1812, when the

Supreme Court ruled that the *federal* government did not have authority to establish a "common law of crimes, including the crime of seditious libel," constitutional commentators continued to believe the *states* could limit individual speech that caused "public offense" in its "blasphemy, obscenity, or scandalous character" (O'Brien 2011, 436–7) (quoting Thomas Cooley). O'Brien writes that the Blackstonian view of free speech — that speech could be punishable if it was deemed "improper, mischievous, or illegal" — was carried over from British Common Law and was standard in the United States during the nineteenth century (2011, 437).

This early period was also characterized by the Supreme Court's hesitance to intervene in state issues; without the Court's leadership, however, speech was suppressed somewhat readily. "In the nineteenth century, lower courts, legislatures, government officials, and ultimately the shifting tides of public opinion enjoyed broad power to punish speech and press and thereby the power to deprive the rights of minorities to express unpopular views," O'Brien writes (2011, 437). This trend, which privileged "the greater good" (as perceived by the majority) over individual liberties, continued throughout the nineteenth century and into the twentieth. The Civil War offered abundant opportunities for censorship, from a prohibition on abolitionist literature in the South to the suspension of students who "expressed the slightest understanding for the secessionist cause" at Northern universities (Stevens 1982, 42, citing Nelson 1967). The second half of the nineteenth century also bred censorship of the obscene by self-styled morality defenders.

It was not until World War I and subsequent speech cases that the Supreme Court took on "the vexing responsibility of giving meaning to the First Amendment by developing standards and tests for determining the scope of constitutionally protected free speech and press" (O'Brien 2011, 439). The first World War provided ample opportunity for the Court to do so — as Stevens

puts it, “In no other American crisis, before or since, were civil liberties so trampled. Thousands ... were prosecuted under laws or by vigilantes for uttering remarks that some of their neighbors found ‘antiwar’” (1982, 44). In particular, the Espionage Act of 1917 criminalized any speech that interfered with the success of the military, a notion that was broadly interpreted. Fears of communism and anarchism also led to restrictive laws in many states.

Although the Court did not find any of the World War I laws that restricted speech unconstitutional, Justice Oliver Wendell Holmes used one of these cases, *Schenk v. United States*, 249 U.S. 47 (1919), to carve out a new standard for considering free speech cases. Holmes took the Court from the “bad tendency” doctrine, in which any speech that “had a reasonable tendency to undermine governmental stability at some future date” was not protected, to the “clear and present danger” doctrine (Shapiro 1966, 48). Quoting Justice Brandeis, Shapiro describes the clear and present danger requirement as “the probability of serious injury to the state,” heightening the threat necessary to declare speech unprotected (1966, 50).

O’Brien writes that the clear and present danger doctrine was hopelessly warped after Chief Justice Vinson declared it to be a balancing test between the interests of the state and the speech interest in *Dennis v. United States*, 341 U.S. 494 (1951). “In Vinson’s hands, the clear and present danger test became a balancing technique for rationalizing restrictions on speech,” O’Brien writes (2011, 446). Shapiro claims the shift from clear and present danger to a balancing test allowed the justices to side with Congress in almost every instance. In balancing between individual liberties and governmental interest, it was easy for the Court to side with the behemoth of government and “the greater good” associated with protecting the nation. Shapiro frames the balancing arguments this way: “The weight given national security may be so great as to wreck the scales entirely, for it is always tempting to argue in defense of any repression that

the preservation of our state is the fundamental prerequisite of all our liberties" (1966, 84). In this time period, protecting "the greater good" referred to protecting the United States from communists and other "undesirables" — during the Cold War, opponents of controversial views could easily argue that protecting speech on an individual basis might lead to an existential threat to the United States. Thus, "the greater good" won out in cases where the Supreme Court balanced individual freedoms against the need to defend the nation. After all, without a government, what use would speech protections be?

By the latter half of the twentieth century, however, the Court developed a new method for considering speech cases — what O'Brien calls a "two-level theory or definitional balancing approach to the First Amendment" that firmly protects some types of speech (political speech, for instance) while designating a few categories of speech less deserving of protection (2011, 439). Justice Murphy outlined this approach in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), concluding that some types of speech, like "fighting words," have so little social value as to be essentially unprotected by the First Amendment.

The other categories of less protected speech are obscenity, libel, and commercial speech. Although the two-level theory has strengthened protection for personal freedoms, it remains controversial in some ways, particularly in how the Court decides which speech is deserving of protection and which is not. Although the categories of speech limit the use of balancing tests, the Court must still balance individual rights against government interest in determining whether certain forms of speech are protected or unprotected. Within each category of unprotected speech, there are circumstances in which speech that is normally considered "valueless" can still be protected. "Offensive speech may convey a political statement and hence be entitled to protection," O'Brien writes. The creation of categories of speech that can be regulated is an

outcome of relatively recent free speech jurisprudence — so, too is the development of strong protections for political expression, expressive conduct, and other forms of speech.

II. Survey of Modern Speech Cases

The expansion of speech protections and the clarification of what speech is protected can be traced to a number of specific cases. As it stands today, the result of these cases is a complex web of precedents that leaves much unclear, especially in the realm of hate speech.[1] The following is a chronological overview of key cases in the development of modern doctrines surrounding speech, based upon those cases that are frequently highlighted in the literature. Although not all of these cases deal directly with hate speech — in fact, most of them do not — they are relevant in the sense that they define the bounds within which the government and its agents may regulate speech and expressive conduct.

A. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)*[2]

In this case, a Jehovah's Witness named Walter Chaplinsky referred to a police officer as "a God damned racketeer" and "a damned Fascist" and was charged under a statute that "forbade addressing 'any offensive, derisive or annoying word to any other person'" (Greenawalt 1995, 50, citing the New Hampshire statute). The Court upheld the statute and Chaplinsky's conviction on the grounds that Chaplinsky's speech could be categorized as "fighting words."[3] Writing for the unanimous Court, Justice Murphy distinguished such words as a class of speech that was so harmful and of so little social value that the government's interest in social order justified

[1] The meaning of the term "hate speech" is the subject of extensive debate. Where the term is used in this project, it is used in the sense that *some* might consider the speech in question to fall into the category of "hate speech," not in the sense that there is general consensus that the speech is considered hateful. When the term is used in this thesis, readers should not assume that I am endorsing any particular view of whether the speech in question is "hate speech."

[2] Cases marked with an asterisk will be described and analyzed in greater detail in Chapter Three, and thus explanations of those cases have been condensed in this chapter to limit repetition.

[3] Like "hate speech," "fighting words" is a subjective characterization. Again, my use of the term to describe speech should not necessarily be taken to indicate my endorsement of that characterization.

regulating it. *Chaplinsky* was the first articulation of the "fighting words doctrine" in Supreme Court jurisprudence.

B. *Terminiello v. Chicago*, 337 U.S. 1 (1949)*

A speech by Father Arthur Terminiello, delivered to a large audience, incited a crowd to riot because of its criticism of particular races, religions, and political groups. Terminiello was charged and found guilty of inciting a breach of the peace under a Chicago ordinance. In a 5-4 majority, Justice Douglas wrote, "… A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging" (337 U.S. 1, 4). The audience's response to Terminiello's speech, though severe, did not mean the government could prohibit his speech. The Court held that the speech could not be prohibited based upon an audience's response to it. To regulate speech based upon the response it provokes would be to give angry crowds a "heckler's veto," allowing the silencing of unpopular views. The Court found that such an ordinance was untenable.

C. *Beauharnais v. Illinois*, 343 U.S. 250 (1952)

The White Circle League, led by Beauharnais, distributed leaflets depicting black Americans as dangerous criminals and asking for the Chicago city government to take action to protect whites. Beauharnais was convicted of violating an Illinois law forbidding any person from distributing information that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion…" (343 U.S. 250, 251, citing the Illinois law). Beauharnais challenged the conviction on the grounds that it violated his First Amendment rights.

The 5-4 majority, authored by Justice Frankfurter, found that Beauharnais' conviction was legal because it fell under the category of "group libel." The Court determined that the Illinois legislature had the right to take action against the racial violence that had plagued the state by prohibiting libel against groups on the basis of their race, religion or creed. Frankfurter wrote, "willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, poyglot community" (343 U.S. 250, 259). Because libelous statements are not protected speech, the Court found that the Illinois regulation was permissible.

D. *U.S. v. O'Brien*, 391 U.S. 367 (1968)

At the height of the Vietnam War, David O'Brien and three other men burned their draft registration certificates in front of a crowd on the steps of a Boston courthouse. Upon seeing this display, members of the crowd attacked O'Brien and his companions, at which point four FBI agents in the crowd stepped in to bring the card-burners to safety. At that point, O'Brien admitted to burning his draft card because of his antiwar beliefs. O'Brien was convicted of violating a federal law that prohibited "the knowing destruction or mutilation of certificates," but appealed on the grounds that the law abridged free speech.

The Court held that the law was constitutional because it regulated conduct and had only an incidental effect on First Amendment freedoms. Although O'Brien's conduct was intended to be expressive, Chief Justice Warren authored a unanimous decision that rejected O'Brien's argument that burning the draft card was protected "symbolic speech." It was instead deemed a "nonspeech element" of O'Brien's conduct, which also happened to include the expression of antiwar beliefs (a "speech element") (391 U.S. 367, 376). Because the law in question regulated

only the "noncommunicative aspect of O'Brien's conduct," the Court held that the law did not aim to suppress expression (391 U.S. 367, 382).

The Court developed a four-pronged test to determine when Congress may regulate "nonspeech elements" of conduct that includes "speech elements": "(1) Is the regulation within Congress's authority to enact? (2) Does the regulation further a [substantial] government interest? (3) Is the regulation unrelated to the suppression of speech? And (4) Is the regulation only an incidental restriction on speech?" (O'Brien 2011, 674). The Court found that the law prohibiting the destruction of draft cards was not aimed at suppressing speech; rather, it sought to protect draft cards because of their importance to Congress's ability to raise an army. Since this law furthered an important state interest and because it had only an incidental, rather than direct, impact on speech, the Court found it to be constitutional.

The essential rule we can take from this case is that when speech is implicated in illegal conduct, that speech may be incidentally suppressed in the pursuit of a legitimate regulation of conduct, so long as the regulation is not targeting speech itself. Greenawalt characterizes the case's implications this way: "If a law is not directed at speech, but speech is one means by which the law can be violated, the harm of content regulation of expression is avoided" (1995, 82).

E. *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

Clarence Brandenburg, a leader of a Ku Klux Klan chapter, called a Cincinnati television station to advertise a KKK rally, which members of the station attended and filmed. The footage showed 12 individuals carrying firearms and burning a cross in an Ohio field. It also caught snippets of a speech delivered by Brandenburg, in which he delivered implicit threats against the government ("'…if our President, our Congress, our Supreme Court, continues to suppress the

white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken'") and against Jewish people and African Americans (395 U.S. 444, 446). Brandenburg was arrested and convicted of advocating violence under a 1919 Ohio anti-syndicalism statute that forbid "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" (395 U.S. 444, 444–445).

On appeal, the Supreme Court ruled that the Ohio statute was an unconstitutional violation of First Amendment freedoms. In a *per curiam* decision, the Court held that "the constitutional guarantees of free speech and free press do not permit a state to 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" (395 U.S. 444, 447). The promotion of violence is not enough, therefore, to allow the government to prohibit speech; under *Brandenburg*, "imminent lawless action must be the speaker's objective *and* be actually likely to happen" (Greenawalt 1995, 18).

This decision marked a final, decisive shift away from the "clear and present danger" test and toward stronger speech protections. In his concurring opinion to *Brandenburg*, Justice Douglas indicates that the "clear and present danger" test failed to provide strong protection for First Amendment freedoms. Referring back to the World War I-era doctrine, Douglas writes, "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in times of peace" (395 U.S. 444, 452) (Douglas, J. concurring).

F. *Cohen v. California*, 403 U.S. 15 (1971)

In 1968, Paul Robert Cohen walked through the Los Angeles County Courthouse wearing a jacket with the words "Fuck the Draft" inscribed on it. Cohen knowingly wore the jacket to express his feelings about the Vietnam War. He did not engage in any violent action or vocal protest while inside the Courthouse. Cohen was convicted of "'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person … by … offensive conduct" (403 U.S. 15, 16, citing California Penal Code).

Authored by Justice Harlan, the 5-4 majority opinion first found that Cohen's display of antiwar sentiment was speech, not conduct. Cohen's message was not an action that could be considered expressive by only some; it was an act of communication aimed solely at expressing a message to a broader audience. Because Cohen took no action to actively evade the draft or engage in other illegal activity, his jacket's message was considered speech. The Court also found that Cohen's speech was not an example of fighting words, or words that are "inherently likely to provoke a violent reaction" and are thus unprotected (403 U.S. 15, 20). Because the words "Fuck the Draft" were not a personal insult directed at any individual, and nor did they incite violence, they were not deemed fighting words. Going further, the Court held that even if some members of the public might react with violence to Cohen's message, that was not enough to deem the speech unprotected. The Court also determined that "four-letter words, however offensive, are not per se excluded from First Amendment protection," and that those who were subjected to Cohen's message in the Courthouse were not "captive audiences" (unable to escape Cohen's message) (O'Brien 2011, 524). Consequently, *Cohen* limited the privacy rights of those who view offensive messages outside the home.

G. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977)*

In a *per curiam* decision, the Court held that it was impermissible for the village of Skokie to block a petition to parade by the National Socialist Party of America. The Circuit Court of Cook County issued an injunction against the members of the National Socialist Party, prohibiting them from wearing party uniforms, displaying swastikas, or distributing materials that promoted hatred on the basis of race, religion or ancestry within the village of Skokie. The Illinois Supreme Court denied a request for a stay of the injunction.

In a brief opinion, the Court reversed the injunction on the National Socialist Party's march, holding that the Illinois Supreme Court's denial of a stay violated the National Socialist Party's First Amendment freedoms during the appeals period. While the Party waited for its appeals to be considered by higher courts, it would be unconstitutionally blocked from marching (and from distributing material considered offensive by some).

H. *Texas v. Johnson*, 491 U.S. 397 (1989)

During a protest at the 1984 Republican National Convention, Gregory Lee Johnson poured kerosene on an American flag and burned it in front of Dallas City Hall. Johnson was convicted of desecrating a venerated object under Texas law. The Court overturned that conviction, ruling in a 5-4 vote that Johnson's action was expressive conduct that was protected under the First Amendment. Although burning the flag was conduct, not speech, the Court held that the conduct conveyed a message by testing whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it'" (491 U.S. 397, 404, citing *Spence v. Washington*, 418 U.S. 405) Because Johnson burned the flag at a political demonstration, the majority deemed the act communicative enough to be deemed expressive conduct.

After determining whether burning the flag was a form of expression, the Court turned to the question of whether the Texas law forbidding flag burning was related to the prohibition of expression. The state offered two potential interests in protecting the flag: the first, in preventing breaches of the peace that might erupt at the sight of a flag burning, and the second, in preserving the symbolic importance of the flag. The Court determined that the first interest was not implicated because no breach of the peace occurred when Johnson burned his flag and because his expression was not an example of fighting words, as it did not personally offend an individual to the point of violence. The second interest, in preserving the flag's symbolism, was deemed illegitimate because it amounted to a content-based regulation of expression. Burning a flag for disposal purposes, the Court reasoned, would not have violated the Texas law; however, because Johnson burned the flag as a means of expression, he could be found in violation of the law. This suggested that the government favored one view of flag burning over others, making the law an unconstitutional violation of the First Amendment.

I. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)*

R.A.V., a minor, and several friends crafted a makeshift cross out of chair legs and burned it in the front lawn of an African-American neighbor. The teens were charged under St. Paul's "Bias-Motivated Crime Ordinance," which forbade placing symbols or objects that "[arouse] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" (505 U.S. 377, 380, citing the St. Paul ordinance). R.A.V. asked that the charges be dismissed on the grounds that the ordinance was a content-based speech regulation and thus invalid. The Court voted in R.A.V.'s favor, although there was disagreement among the justices as to how to justify that holding.

The majority opinion, authored by Justice Scalia, reemphasized the principle that content-based regulations of speech are facially unconstitutional, even when the speech in question falls into a category of "proscribable content," like fighting words (505 U.S. 377, 383). Even assuming *arguendo* the words covered by the St. Paul ordinance were fighting words, the Court still found the words received a minimal level of protection under the First Amendment. Although it is permissible to prohibit fighting words as a whole category because of their impact, the government still may not regulate particular fighting words on the basis of their content. Importantly, Greenawalt characterizes this decision as having "blocked the possibility of any statute that treats hate speech against groups as special" (1995, 55).

J. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

This case relates to hate *crimes*, which are similar to but distinguishable from hate *speech*. Walker defines hate crimes as those crimes in which "the perpetrator is motivated by racial or religious hatred for the victim" (1994, 9). State and federal statutes provide for harsher penalties when a crime appears to have been motivated by animus on the basis of race, gender religion, or similar characteristics. Although seemingly comparable to the St. Paul statute in *R.A.V. v. City of St. Paul*, the Court upheld a Wisconsin statute mandating a heightened penalty for crimes motivated by prejudice.

In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), several African American men were given enhanced sentences for assaulting a white teenager after one of them shouted "There goes a white boy; go get him!" Mitchell was punished for his speech, which expressed a particular point of view while also inspiring others to commit a crime. As Justice Rehnquist summarized in the majority, "Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive" (508 U.S. 476, 487). But the Court found that

Mitchell's enhanced sentence was permissible because the Wisconsin statute regulated conduct; in particular, the state considered his conduct particularly pernicious to society because it was based on discrimination, and thus it was appropriate to enhance his sentence.

K. *Virginia v. Black*, 538 U.S. 343 (2003)*

Barry Black was one of three individuals who were convicted of burning crosses in violation of Virginia law. Black led a Ku Klux Klan rally on private property that ended with the burning of a large cross. A neighbor reported feeling frightened after hearing the group speak disparagingly about African Americans and members of other nonwhite races. Black was arrested and found guilty of violating a Virginia law that forbade cross burning for the purpose of intimidation.

A divided court determined that Black's conviction was unconstitutional on the grounds that the Virginia law went too far in banning cross burning. Justice O'Connor wrote for the plurality opinion that the state of Virginia could not assume that intimidation was the intent behind every cross burning. The banning of "true threats" was found to be permissible (and this category could include *some* cross burnings), but the banning of all cross burnings unconstitutionally included those with a cultural, political, or religious purpose. O'Connor wrote, "It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings" (538 U.S. 343, 366).

L. *Snyder v. Phelps*, 562 U.S. 443 (2011)*

The founder of the Westboro Baptist Church, Fred Phelps, along with several members of his family, picketed the funeral of a soldier who died in Iraq. Phelps and his family stood on public land in accordance with directions from the police and held signs with messages including

"Thank God for Dead Soldiers," and "You're Going to Hell" (562 U.S. 443, 448). The father of the dead soldier sued, claiming the signs inflicted emotional damage.

The Court ruled, in an 8-1 decision, that the Westboro Baptist Church's speech near the funeral was strongly protected because its content was of public concern, rather than private. The majority, authored by Chief Justice Roberts, found that the speech in question was of public concern because it dealt with issues of concern to society at large — namely, whether the United States' policies and morals are dooming the nation. The fact that the church members' speech was upsetting did not mean it lost the strong protection afforded to speech on matters of public concern under the First Amendment.

III. Discussion of the History of Supreme Court Cases Relevant to Hate Speech

Rather than a uniform doctrine of free speech, the Supreme Court has crafted a patchwork of speech protections that can shift with each new decision. The modern speech cases represent a move away from a focus on "the greater good" and toward a focus on individual freedom. *Terminiello* and *Brandenburg* show some of the "clear and present danger" test's last breaths as the Court began to reject its inherent subjectivity. More recent cases explicitly privilege individual freedom above preserving the social order if the means of preserving order include prohibiting potentially upsetting speech.

Importantly for this project, the Court has not offered a precise definition of "hate speech." Although the term is heavily implied in a number of cases, the Court never explicitly uses it. A Lexis Nexis search of the term, in fact, returns only four lower court cases that use the term in reference to some of the cases surveyed above, including *R.A.V. v. City of St. Paul*, *Texas v. Johnson*, *Brandenburg v. Ohio*, and *Virginia v. Black*. None of these cases explicitly describe hate speech, but lower courts have interpreted them as cases that touch on the subject.

In many ways, these cases do touch on hate speech. The fighting words doctrine, in particular, resonates because much hate speech seems likely to provoke a violent response. The fighting words doctrine, however, has been narrowed to such a degree that it hardly seems to exist as a category of speech. The initial definition in *Chaplinsky* included words that are "no essential part of any exposition of ideas" or have no social value, and "inflict injury" or incite an "immediate breach of the peace." But only a few years later in *Terminiello*, the Court contradicted this precept when it overturned the conviction of a man whose speech whipped up two opposing crowds into what can only be described as an "immediate breach of the peace."

In *Brandenburg*, proscribable speech was limited further, this time to speech aimed at producing "imminent" illegal action that was likely to occur (395 U.S. 444). *Texas v. Johnson* determined that the term fighting words applied only to speech that provokes or insults an individual, not a group. Even then, Shiell writes that "if a reasonable person could ignore or walk away from speech or would be moved to violence only later, the expression does not constitute fighting words" (1998, 57). Thus, if an individual engages in speech aimed at provoking violence that does not actually succeed in provoking violence, the Court seems likely to find that speech to be protected. *R.A.V.* also found that even within the fighting words category, speech may not be regulated on the basis of its content. If fighting words express a political view, they can also be offered protection (notably, *Chaplinsky* would suggest that any speech with political value is not a form of fighting words). With all these exemptions, it is difficult to imagine a form of speech that the current Court would consider fighting words. Strossen argues that the narrowness of the category has made it very difficult for prohibitions on hate speech to exist within the bounds of the Constitution.

IV. The First Wave of Hate Speech Codes on College Campuses

As difficult as it may be to prohibit hate speech, many colleges and universities have attempted to do so within the confines of the Constitution. But what is hate speech? For all the discussion of the term among scholars, a true definition is difficult to find. A number of texts use the term without providing any definition, assuming the reader will know what is meant by the phrase "hate speech." For the most part, this assumption is not far off — most people can identify speech they consider hateful when they hear it. But the assumption also shows the inherent subjectivity of the definition of "hate speech," which can shift depending on the context, the listener, and the location in which the statement took place. To one student, a professor who reads a racial slur aloud from a work of literature is merely providing students with a lesson in the power of language; to another, the professor has engaged in a hateful form of speech that can lead to physical and psychological stress responses. Is the statement hate speech?

The literature on hate speech offers little guidance. Walker writes, "There is no universally agreed-on definition of hate speech" (1994, 8). Even by the clearest definitions provided in scholarly works, hate speech is necessarily subjective. Delgado and Stefancic demonstrate the breadth of hate speech when they write, "One can consider hate speech along various axes, including direct and indirect, veiled or overt, single or repeated, backed by authority and power or not, and accompanied by threat of violence or not" (2004, 11). The ambiguity of hate speech and the possibility of its being interpreted differently by different people and groups makes it all the more difficult to understand. Walker forwards a simple understanding of hate speech: "any form of expression deemed offensive to any racial, religious, ethnic, or national group," a definition that has been expanded to include gender, sexual

orientation, ability, and other characteristics in many campus speech codes (1994, 8). This definition clearly indicates just how many ways in which the term can be used.

Regardless of the term's precise definition, it is clear that in the 1980s and '90s, colleges all over the United States were facing an increasingly untenable amount of hate speech, perhaps in response to the increase in diversity on campuses. At the same time, the need for free expression in college was no less necessary than it had been in the past. This time period was marked by a noticeable uptick in the number of campus speech codes across the United States. Shiell reports that, by 1992, upwards of 300 campuses had adopted speech codes restricting hate speech nationwide (1998, 3). With very limited exceptions (California's Leonard Law, for example, grants private college students the same free speech rights as public college students), the constitutional questions surrounding speech codes impacted only public schools, as arms of the government. Thus, this discussion will focus primarily on controversies at public institutions.

Colleges are faced with two equally important mandates that can sometimes appear contradictory. On one hand, public colleges are required, under the Fourteenth Amendment, to provide an equal opportunity for all students to access education. On the other, colleges must provide adequate room for the free and open exchange of ideas in the pursuit of knowledge and are just as bound to protecting students' free speech rights under the First Amendment as they are to protecting equal opportunity under the Fourteenth Amendment.

A. The Equal Opportunity Mandate

At the time speech codes were becoming popular, hate speech against women and minorities was reaching a new high on college campuses. In his essay on hate speech regulations, Lawrence (1990) points to a lengthy list of examples, including fraternity "jungle parties" at which members wore blackface, the distribution of racist leaflets, use of the N-word in

vandalism and threatening notes, the creation of white supremacist student groups, and similar statements and threats to other minority groups on campuses. One can presume these were only the high-profile examples. As Shiell characterized the state of things in 1998, "Go to an American college campus and you will see and hear hate speech" (2).

Public colleges in the United States are required to provide a learning environment in which all students have an equal opportunity to learn. As arms of the government, public colleges and universities are obligated, under the Fourteenth Amendment and a number of federal statutes, to grant equal educational opportunities to all students, regardless of race or gender (Shiell 1998). Hate speech makes it difficult to provide such an environment; proponents of speech codes argue that the simple fact that minorities and females are more likely to bear the brunt of hate speech means that they are not being offered an equal opportunity. Shiell writes that the harms of hate speech have "led many people to believe that hate speech, at least under certain conditions, violates the guarantees of equal protection under the law provided for by the Fourteenth Amendment" (1998, 2). Lawrence (1990) and Matsuda (1989) argue that being a victim of hate speech can result in emotional trauma and even physical symptoms that make it more difficult for some students to participate in academia than others.

Matsuda writes that college students are a particularly vulnerable group in need of protections from hate speech: "When racist propaganda appears on campus, target-group students experience debilitated access to the full university experience" (1989, 2372). That a white male student would probably never find himself the victim of such propaganda stacks the deck even more in his favor. Hate speech also prevents minorities and women from having an equal voice in the "marketplace of ideas" on a college campus by "devaluing" their speech (Shiell 1998, 46).

Some colleges were faced with threats of legal action from the Fourteenth Amendment side of this controversy. After a series of racist incidents on the University of Michigan's campus, the United Coalition Against Racism threatened "to file a class-action civil rights suit against the university 'for not maintaining or creating a non-racist, non-violent atmosphere' on campus" (Shiell 1998, 19). These arguments were compelling to many colleges, and they responded by creating speech codes that could limit hate speech on the basis of race, color, creed, religion, gender, sexual orientation, and handicap, among other categories.

B. The Free Expression Mandate

While public colleges are required to provide a safe and equal environment for students, public schools are also required, under the First Amendment, to allow for the expression of protected forms of speech. Critics of speech codes point out that the restriction of speech on campuses has a chilling effect that can prevent useful discussion. For instance, in the case of the University of Michigan speech code, a student who had not been penalized under the code brought a suit against the university — he worried that he *would* be penalized if he brought up controversial ideas about biological differences between the races and the sexes during a class (Shiell 1998, 75).

In her critique of campus speech codes, Strossen argues that even narrowly drawn speech codes can chill speech in the classroom. She writes, "In the recent wave of college crackdowns on racist and other forms of hate speech, examples abound of attempts to censor speech conveying ideas that clearly play a legitimate role in academic discourse" (Strossen 1990, 528). Critics say that codes aimed at preventing hate speech can create a fear of punishment and misinterpretation of speech that can lead students to keep quiet during class rather than raise potentially offensive topics. Shiell writes that that fear also has the potential to spread to faculty,

preemptively halting challenging conversations: “If all speech that intentionally inflicted emotional distress were punishable, academia would be in serious trouble” (1998, 59). Shiell relates the story of a University of Pennsylvania professor who was censured after “vigorously challenging students during a classroom debate of the Thirteenth Amendment” (1998, 59).

C. Speech Code Cases

Despite the conflicting mandates of equal protection and free expression, colleges began implementing hate speech codes en masse in the 1980s and 90s. As these codes became more popular and more students pressed back with legal challenges, schools attempted to wrestle their speech codes into the speech protection requirements laid out by the Court. It was a challenge that no school successfully met. The following cases have been highlighted in the literature as prominent examples of campus speech codes that fell when challenged in court.

1. The University of Michigan

The University of Michigan adopted its speech code in 1988. According to Shiell, the code incorporated three tiers of speech; one that exempted the two student newspapers on campus, one that covered the public areas of the campus and only regulated violent or destructive conduct, and a third that covered the campus’s academic buildings (1998, 19). Generally, the speech code forbade language that created a hostile learning environment or inhibited participation in academics. The broad speech regulations contained in the code laid the groundwork for the first major lawsuit against a university hate speech code: *Doe v. University of Michigan*, 721 F. Supp 852 (E.D. Mich. 1989). In an overview of the case, Shiell writes that the district court found the speech codes to be both “overbroad (subjected protected speech to sanctions) and unduly vague (so ambiguous as to allow officials to arbitrarily enforce the policy and violate due process rights)” (1998, 75). Although the University had the right to prohibit

some forms of conduct, it could not restrict speech on the grounds that the speech was offensive or because the ideas expressed were unsavory. Because it prohibited broad classes of speech that included protected speech, the University of Michigan code was deemed overbroad; in its application, the policy had impinged on protected speech several times. The speech code was also ruled unduly vague, in part because it failed to offer clear guidelines as to what was protected speech and what was not. The lack of clarity in the code contributed to a chilling of speech on the campus as students came to fear repercussions because they did not know what was permitted. The code's opacity also offered opportunities for administrators to interpret the rules in an arbitrary manner. The speech code was thus held unconstitutional.

2. The University of Wisconsin

Although the University of Michigan's code was deemed unconstitutional, *Doe v. University of Michigan* served to inform other schools as they crafted their own speech codes. The University of Wisconsin designed a hate speech code that Shiell calls "superior" to that of the University of Michigan. He writes, "…it was both clearer and narrower in scope because it specifically excluded comments made in classrooms to the group and required the behavior to create a hostile environment" (1998, 78). The Wisconsin speech code was believed to limit only fighting words in the sense that words that create a hostile environment are fighting words by their nature. But in a challenge brought by the University of Wisconsin-Milwaukee's student newspaper, *The UWM Post*, the Wisconsin speech code was struck down. In *UWM Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp 1163 (E.D. Wis. 1991), the district court held not only that the speech code was overbroad and vague, much like the Michigan code, but that the Wisconsin code went further than just prohibiting fighting words.

The district judge ruled that the definition of fighting words was significantly narrower than the interpretation used by the drafters of the Wisconsin code. Shiell writes that the definition of fighting words, as used by the judge in this case, required that the words in question be "likely to result in a breach of the peace," "highly likely to result in imminent violence," and "directed at a specific individual in a face-to-face encounter" (1998, 79). Because the district court ruled that the creation of a hostile environment does not automatically characterize speech as fighting words, the Wisconsin code was found to unconstitutionally prohibit protected speech.

3. George Mason University

In another case, *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 773 F. Supp 792 (E.D. Va. 1991), the district court for Eastern Virginia ruled against a college once more, this time specifically holding that the university could not prohibit "expressive messages that offend merely because the administration or some other students disapprove of the message" (Shiell 1998, 81). Shiell writes that the district court also rejected a Fourteenth Amendment defense that the school needed the speech code to provide equal educational opportunities to students of all races and genders. In this instance, a fraternity brought the case after being censured for hosting a performance in which one student wore blackface. The district judge determined that because the performances did not "substantially or materially disrupt these aspects of GMU's educational mission," the college's Fourteenth Amendment argument was not relevant enough to justify a speech restriction (Shiell 1998, 82).

4. Stanford University

In 1995, Stanford University also faced a lawsuit over its attempt to limit hate speech. Although a private institution, Stanford fell under the jurisdiction of a California law that forbade even private colleges from disciplining students on the basis of their speech or expressive

conduct (Shiell 1998, 89). The Stanford policy attempted to regulate what it referred to as "Discriminatory Harassment" and defined prohibited speech as that which insulted on the basis of "sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin" and was directed at an individual or group with the intention of insulting them (Lawrence 1990, 450, citing the Stanford policy).

The policy was carefully crafted to ensure it covered only fighting words. Lawrence points out that it did little more than "prohibit intentional face-to-face insults, a form of speech that is unprotected by the First Amendment" (1990, 451). Nevertheless, five years after Lawrence's article on the policy's constitutionality, it was struck down in *Corry v. Stanford University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) due to overbreadth and the fact that the law regulated speech on the basis of its content.

V. Discussion of Hate Speech Codes on College Campuses

Campus speech code cases seem to point out a glaring flaw in the current iteration of the fighting words doctrine: unless physical violence actually arises from speech, or is imminent as a result of speech, that speech will likely not be deemed fighting words. This essentially means that any speech, if heard by a coolheaded person who is unlikely to resort to violence, could be freed of the fighting words doctrine and considered protected. Even deeply offensive words can be protected if the listener does not respond with violence; although the Court has made use of the "reasonable person" standard to determine whether words have the potential to incite violence, it has also seemingly contradicted that standard by using the presence or absence of violence to determine whether speech could be deemed fighting words in cases like *Cohen v. California* and *U.S. v. O'Brien*.

As Lawrence argues, this is problematic in the realm of hate speech. "The fighting words doctrine presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence," he writes. Although his view of fighting words doesn't quite align with the facts of *Chaplinsky*, in which there was a power imbalance between the police officer and Chaplinsky himself, it does acknowledge the fact that some members of minority groups are less likely to respond to fighting words from, for instance, a white male, due to power differences between the two. It's this difference in power that Lawrence is referring to when he writes, "The fighting words doctrine is a paradigm based on a white male point of view. In most situations, minorities correctly perceive that a violent response to fighting words will result in a risk to their own life and limb" (Lawrence 1990, 454). Lawrence asks for a new understanding of fighting words that takes into account the harms of racist hate speech without requiring a violent response.

Does the fighting words doctrine provide enough protection for minorities — or for anyone — when it mandates that actual violence be used in response to offensive speech? To proponents of campus speech codes, the answer is an obvious no. The fighting words doctrine has not provided enough space to make campus speech codes constitutional in the eyes of the courts, even when those codes are expressly aimed at only limiting fighting words. Further, the *R.A.V.* standard makes any code that distinguishes between types of fighting words unconstitutional. The alternative would be to create a speech code that limits *all* fighting words, but this approach presents the additional problem of predicting what may cause violence and limiting speech based upon the "heckler's veto."

Particularly in light of the power dynamics pointed out by Lawrence, the gaps in the fighting words doctrine present a question: should the courts take a different approach to speech,

one that protects those in marginalized groups who are unwilling or unable to literally "fight" in response to fighting words? Matsuda, for instance, proposes a new judicial approach to hate speech that allows for some content-based limitations of especially invidious speech. She writes, "setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech" (Matsuda 1989, 2357).

Opponents of campus speech codes would argue such a loophole leaves open the possibility of even more speech restrictions that could be used to silence minority groups. Strossen describes this as a major stumbling point. "Such rules constitute a precedent that can be used to restrict other types of speech," she writes (Strossen 1990, 521). The chilling effect of speech codes could also lead to self-censorship, she writes, thus restricting protected speech without ever having to bring judicial charges. One of the key differences between Strossen's argument and those of Lawrence and Matsuda, though, is that Strossen relies upon existing Supreme Court jurisprudence to justify her points and ultimately decide that campus speech codes are an intolerable violation of free speech. Because she has the law on her side, Strossen can safely argue that proponents of campus speech codes do not have a constitutional leg to stand on and base that argument in case law. She may call upon *R.A.V.* and seemingly prove that a content-based regulation of speech is utterly unacceptable.

Lawrence and Matsuda, however, must argue outside existing free speech doctrines as defined by the Court. Both explore possible new judicial approaches to hate speech that have yet to be recognized (or have been actively denied by the Court): for Lawrence, it is a fighting words doctrine that doesn't require imminent violence, and for Matsuda, it is a way of thinking about the First Amendment that allows for the regulation of particularly pernicious racial hate speech. Neither argument has the full backing of First Amendment jurisprudence (although Lawrence's

is at least derived from the fighting words doctrine). Both use a different understanding of what the goals of the First Amendment should be than Strossen uses. Strossen believes the First Amendment should defend all speech equally, and that repellent ideas will eventually be defeated through open debate. Lawrence and Matsuda instead prioritize limiting some speech in the hopes that doing so will encourage more voices — namely, those of traditionally oppressed groups — to enter into the fray in a way they currently cannot because of the ongoing harms of hate speech.

These two approaches, one that emphasizes individual freedoms and one that emphasizes the need to prevent harm and uphold a "higher standard," represent a larger debate over what the First Amendment should protect. It is to this debate that I now turn.

CHAPTER TWO: THEORIES AND METHODOLOGY

I. Theories

While the complexity of the hate-speech debate cannot be reduced to two competing perspectives, I will limit my discussion to two broad frameworks, liberalism and communitarianism, for the sake of clarity. My preliminary analysis of hate speech suggests that the debate is dominated by these two major ways of thinking on the issue; these two perspectives also seem to capture the opposing mandates colleges must meet. Put simply, the two sides disagree about the extent to which speech may be regulated and the reasons for regulating it. Liberalism and communitarianism are broad and diverse schools of thought, but for the purposes of this project, I will only investigate their implications in terms of speech's value and role and their takes on the issue of hate speech.

A. The Liberal Model of Free Speech

Although what I am calling the liberal model goes by many names in the literature,[4] it is possible to identify consistent traits frequently attributed to the term as it relates to free speech. Sandel writes that liberalism posits "the idea that government should be neutral among competing conceptions of the good life" (2005, 212). In other words, the immense power of the state must be restricted from choosing sides in social debates. Sandel describes this principle as "the claim that the right is prior to the good": in speech terms, this is the idea that the right to free speech must be prioritized over the necessity of establishing or protecting a given conception of "the good" in society (2005, 212). In a diverse democratic society, where conceptions of the good will not be easily agreed upon, it is more important that each individual be able to express

[4] Sandel uses the term "political liberalism," while Smolla refers to libertarianism, a subset of liberalism, in his discussion of hate speech. Schauer uses the term "argument from truth" as a stand-in for liberalism in his "philosophical enquiry" into free speech.

his or her ideas about the good than it is that any one idea be endorsed and defended by the government.

Schauer (1982) refers to the "marketplace of ideas" as another key tenet of liberalism — the suggestion that truth can only be found in an open arena, where all ideas can be expressed and considered. "Just as Adam Smith's 'invisible hand' will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all opinions are permitted freely to compete," Schauer writes (1982, 16). A government that regulates which ideas may be expressed could very well be clouding the truth in favor of a false view. Liberalism suggests this is impermissible. An open marketplace is necessary to the functioning of a free society.

In "Liberalism: The Life of an Idea," Fawcett refers to this aspect of liberalism as the principle of nonintrusion, or the idea that each person has a sphere of inviolable personal liberties with which the government may not interfere (2014, 121). Speech, or the ability to publicly express views, is included in this sphere. Smolla specifically delineates the areas in which the government has authority to regulate according to liberalism's precepts. He writes, "[T]he legitimate jurisdiction of government only extends so far as is necessary to keep one citizen from harming another" (1990, 174). Smolla adds that under the liberal tradition, "Law exists to keep minimal order, to provide for the common defense, to insure domestic tranquility" (1990, 74). Thus, the law may regulate speech in limited ways, but may only do so in ways that are necessary to ensure the continued existence of the state and the safety of individuals. Liberalism emphasizes the importance of individual decision making and responsibility — the notion that individuals must be able to choose what speech they engage in, regardless of how offensive it might be, to ensure that all are heard in the marketplace of ideas.

Regulating hate speech is not considered one of these permissible spheres of government regulation in most, if not all, conceptions of liberalism. Smolla writes, "[R]aising the level of public discourse or improving sensitivity to communal values is beyond the ken of the state" (1990, 174). To regulate hate speech would be to take sides in a social debate, no matter how repellent one side may seem. From this liberal perspective, it is unacceptable for the government to endorse "anti-racist" or "anti-sexist" views, even if such an endorsement might seem to have a positive impact on society by limiting the spread of discriminatory ideas. The value of the speech being regulated is immaterial, Smolla writes: "The libertarian is forced to defend racists and sexists on the pure market principle that the lack of any discernible redeeming value does not matter" (1990, 175). Further, the fact that racist or sexist (or otherwise hateful speech) causes offense or emotional pain is not considered a valid reason to regulate it under a liberal doctrine. "Some injury more palpable than moral outrage is required," Smolla writes (1990, 175). So long as no physical injury is provoked by hate speech (in a fighting words scenario, for instance), it is not considered within the government's jurisdiction. Sandel writes, "The liberal would therefore oppose restrictions on hate speech, except where it is likely to provoke some actual physical harm — some harm independent of the speech itself" (2005, 258).

Thus, in terms of speech, the liberal view is fairly consistent: speech may not be regulated merely because it insults. Government intrusion in the "marketplace of ideas" is impermissible except under the direst circumstances, such as a threat to national security, because it hinders the ability of the market to unearth truth. To a proponent of hate speech bans, the liberal would respond that all ideas must be heard, but that the truth would win out in the long run — in fact, the best way to defeat hate speech is to respond with opposing ideas and let them slowly overtake hateful ideas in the marketplace. A preference for individual liberties and

for permitting speech in nearly all circumstances will be used as key identifying features of the liberal model throughout this project. Because the liberal conception of speech emphasizes the importance of speech in determining truth and in sifting through the plurality of ideas in any society, I will also consider these and related ideas to be evidence of a liberal perspective.

B. The Communitarian Model of Free Speech

The communitarian model of free speech favors a more values-based approach to speech regulation. Smolla writes of the communitarian viewpoint, "[L]aw exists to make men good by binding them together in a cohesive and just community" (1990, 173). This assertion might not describe the views of every communitarian, but in a general sense, it articulates communitarianism's concern with liberalism: that it does not offer enough protection for shared communal values. The communitarian believes, according to Sandel, that "our deliberations about justice and rights cannot proceed without reference to the conceptions of the good that find expression in the many cultures and traditions within which those deliberations take place" (2005, 213). In other words, persons cannot be seen solely as individuals, but as members of groups with responsibilities and loyalties to those groups. Rights are not "prior to the good," as a liberal might posit, but rather follow from agreed-upon standards of morality and civility. Smolla writes that under a communitarian doctrine, "speech that promotes the good life and that affirms values of community, justice, and the rule of law will be fostered and nurtured by the state; speech destructive of those ends will be condemned" (1990, 173).

Communitarianism developed as a critique of liberalism's emphasis on individual rights (to the detriment of community) and in defense of the community as a source of rights. Whipps writes, "While liberalism elevates one's personal choices and personal responsibilities, communitarianism highlights each person's responsibility to the communal welfare, a type of

social commitment often missing from liberalism" (2009, 118). Unlike liberalism, communitarianism leaves room for individuals to have one or more communal identities, perhaps based upon personal identity, geography, or other unifying characteristics, and to base their system of rights upon those identities. Sandel argues that in deciding what speech is deserving of protection, a communitarian would consider "the moral importance of the speech in relation to the moral status of the settled identities the speech would disrupt or offend" (2005, 258). To be sure, not every community places a premium upon shared identity at the expense of some speech, but the communitarian perspective suggests that communities *can* define their values based upon group identity, and can place less priority on some rights, such as speech.

According to the communitarian model, hate speech based upon a group characteristic such as race or sex may have less value than the community value of inclusion and tolerance, and thus could be regulated. Put differently, the communitarian perspective might, under some conditions, allow for the silencing of a small group engaging in hate speech to protect these values of the larger community. A communitarian understanding of free speech allows for subjectivity in the sense that the government may try to defend the values that define the community based upon "substantive moral judgment," as Sandel puts it (2005, 260).

The case of *National Socialist Party of America v. Village of Skokie* offers an example where communitarians and liberals would be likely to disagree in their interpretation of how and whether speech should be regulated. Although the village of Skokie had a substantial population of Holocaust survivors, according to Philippa Strum's 1999 book on the case, a local branch of a U.S. variety of Nazism was ultimately allowed to march through town (the party ended up canceling the march). A communitarian would argue that the community's fear of Nazism and their identity as Jewish survivors of the Holocaust should, perhaps, outweigh the value of the

National Socialist Party's hateful and intimidating message. This demonstrates the communitarian view that some communal values should be morally prior to speech. Although not all adherents of the communitarian model would agree to this outcome, all would agree that individual free speech must be weighed in the context of the good of the community. For the purposes of this project, communitarian assumptions regarding free speech will be identified based upon references to community values and morals for the justification of speech regulations.

II. Application of Theories to Hate-Speech Debate

The liberal and communitarian models are useful theoretical lenses through which to approach the contemporary hate-speech debate for several reasons. First, the divide between liberalism and communitarianism captures the core philosophical differences between two major sides in the hate-speech debate. As discussed in the previous chapter, some civil libertarians, like Strossen (1990), believe that the best way to combat hate speech is to fight it with words. The message of tolerance can only spread and win out if it is heard, and prohibiting speech impedes that goal.

Alternatively, those in favor of hate speech restrictions, like Lawrence (1990) and Matsuda (1989), argue that communal values of equality should outweigh an individual's right to engage in hate speech on the basis of group characteristics. On college campuses, the argument goes, the right to express hateful views should not outweigh the right of minority and female students to enjoy a learning environment that is as safe for them as it is for their white, male peers and to maintain their place in the educational community. The liberal-communitarian contrast helps us understand the different assumptions being employed on the two sides of the hate speech debate both among scholars and in the legal system.

The liberal and communitarian models also parallel the opposing mandates faced by public colleges and universities: colleges must protect students' First Amendment rights and their ability to engage freely in protected forms of speech, but they must also defend students' Fourteenth Amendment right to equal protection, which mandates that students be protected from discrimination in higher education. These mandates are striking in their similarity to the principles of liberalism and communitarianism. The First Amendment mandate highlights the importance of civil liberties and free expression, while the Fourteenth Amendment mandate emphasizes equality as an important value — a value that seeks to repair the damage of large-scale and ongoing racism, sexism, and other forms of oppression.

Because liberal and communitarian values are so steeped in the hate-speech controversy, they provide important theoretical frameworks for this project. Using these two competing conceptions of the value and role of free speech, I will identify the theoretical assumptions and arguments underlying judges' opinions in campus hate speech cases.

III. Approach to Judicial Case Analysis

To determine which theoretical framework has been most favored by the judiciary, I will perform a qualitative content analysis of a number of cases, including several of the key free speech cases identified in Chapter One and several cases from the first wave of litigation over campus speech codes. The goal of this analysis is to determine whether the judiciary's deliberations (as presented in their opinions) on free speech, and hate speech specifically, contain assumptions and principles that fit liberalism, communitarianism, or other theoretical assumptions. The first set of cases, those from the free speech cases listed in Section II of Chapter One, have been chosen for deeper analysis based upon their relevance to the hate speech question and the likelihood, based upon their deliberations and holdings, that they articulate

some of the fundamental principles underlying the Court's rulings on free speech. The campus speech code cases have been chosen based upon Shiell's "Campus Hate Speech on Trial," which offers an overview of the most important cases from the first wave of speech codes.

My analysis of each case will include majority, concurring, and dissenting opinions to ensure that I capture both the "winning" logic and the "losing" logic. This will allow me to ascertain patterns in what types of reasoning the courts have considered, accepted and dismissed. In my analysis, I will review each case and attempt to identify the primary logic of the decision and whether it conforms to the frameworks of liberalism, communitarianism, or alternative assumptions I have not identified. I will also include an analysis of the overall holding of each case and which theoretical framework it seems to support.

In the entire endeavor, I will seek to be as transparent as possible as I identify case logic and the frameworks used by the Court. I will combat any potential for subjectivity in qualitative analysis by giving plentiful context for the case logic and explanation as to why I believe the logic demonstrates a liberal, communitarian, or other conception of free speech. In spite of the limitations of such an analysis, I have elected to perform a qualitative analysis over a quantitative one because qualitative analysis offers greater subtlety and nuance. The theoretical assumptions used in judicial opinions can be better identified through qualitative means. Rather than attempting to quantify statements within these opinions, I will take a more holistic approach. In his discussion of qualitative content analysis, Siegfried Kracauer writes that while qualitative analyses are inherently somewhat subjective, they also uncover "the patterns, the wholes, which can be made manifest by qualitative exegesis and which can throw light upon a textual characteristic which is allergic to quantitative breakdowns" (1953, 640). Hall and Wright also endorse a more qualitative approach to analyzing judicial opinions, writing that this approach can

be useful for "descriptive or explanatory studies" (2008, 90). "The approach is loosely structured, calling on the researcher simply to observe and document what can be found," they write (Hall & Wright 2008, 90). Likewise, my project will rely upon observance and documentation to identify patterns through qualitative means.

IV. Case Selection

I will analyze six speech cases from those listed in Section II of Chapter One. I have selected each because they are major cases in free speech jurisprudence and because they contain some of the most important expressions of the Court's free speech doctrines as they relate to hate speech. I will analyze *Chaplinsky v. New Hampshire* and *Terminiello v. Chicago* for their contributions to the fighting words doctrine, which plays a major role in recent cases relating to campus speech codes. I will also examine *National Socialist Party of America v. Village of Skokie* and *R.A.V. v. City of St. Paul* because they deal with the tension between community values and individual rights and demonstrate how the Court has balanced these competing interests. *R.A.V.* is also the primary case relating to hate speech that the Supreme Court has decided, as it deals with expression motivated by racial hatred. Similarly, *Virginia v. Black* illustrates the Court's thinking on the difference between expressive conduct and speech, and how that difference plays into the hate speech debate. Finally, I will analyze *Snyder v. Phelps*, one of the most recent cases dealing with the restriction of unpleasant speech. This case should offer insight into the Court's attempts to balance individual rights to expressive speech against the social interests in restricting certain types of speech. *Snyder v. Phelps* is important because it is so recent, and will thus offer an idea of the Court's contemporary views on speech and speech restrictions.

In addition to these background cases, I will analyze several campus speech code cases from the first wave of speech codes. Like in my analysis of Supreme Court cases, I will identify the primary logic of the decision and interpret whether it utilizes a liberal, communitarian, or other framework. I will use the cases laid out by Shiell in his chapter on campus hate speech cases, as they have been identified as key cases in this genre.

The first set of cases I analyze will establish the Court's reasoning regarding the value and limits of free speech, as well as whether that reasoning displays a preference for liberal, communitarian, or other values, while the second set will establish how that preference has played out in campus speech code cases and the implications for colleges and universities. An understanding of both sets of cases and the theoretical frameworks used therein will act as a foundation for my later chapters, in which I will consider whether the Court should utilize a different framework or conception of free speech as it moves forward into the "second wave" of campus speech codes.

CHAPTER THREE: JUDICIAL CASE ANALYSIS

I. Supreme Court Cases

A. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

1. Background

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a Jehovah's Witness named Walter Chaplinsky was convicted of violating New Hampshire law after describing a police officer using strong derogatory terms. The law in question read: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name…" (315 U.S. 568, 569). After Chaplinsky provoked an unruly crowd by referring to all religion as a "racket" while he attempted to distribute leaflets on the Jehovah's Witnesses, he was given warnings and eventually arrested by police, at which point he declared one officer "a damned Fascist" and "a God damned racketeer" (315 U.S. 568, 569). Chaplinsky was found guilty of violating the New Hampshire law at trial, a finding that he appealed on the grounds that it violated several constitutional rights, including free speech.

2. Unanimous Opinion

The Supreme Court unanimously upheld Chaplinsky's conviction on the grounds that his words were "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace" (315 U.S. 568, 574). The opinion, authored by Justice Murphy, articulated the definition of fighting words as:

> Those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (315 U.S. 568, 572)

The Court found that the terms Chaplinsky used to describe the police officer were likely to stir violence in an average person and cause a breach of the peace. Thus, because these words are deemed to have almost no social value, they may be regulated under the First Amendment. Murphy wrote, "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem" (315 U.S. 568, 571–572).

In the specific case of the New Hampshire law, Murphy quoted the New Hampshire Supreme Court's test of what terms may be considered offensive: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. … The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight" (315 U.S. 568, 573).

From the Court's decision, several meanings of fighting words can be discerned. Words that "inflict injury" or "incite an immediate breach of the peace" are found to be "no essential part of any exposition of ideas" and to be lacking in social benefits that could outweigh the government's interest in regulating them. Further, the term is taken to mean any speech that "men of common intelligence would understand would be words likely to cause an average addressee to fight" (315 U.S. 568, 573). Implicit in the Court's definitions is the idea that some speech is so base as to be undeserving of significant First Amendment protection — a contrast to the liberal principle of the marketplace of ideas, in which "offensive" speech must be defeated through argument rather than through government intervention.

Among the cases being investigated here, *Chaplinsky* provides perhaps the best example of the Court's use of logic that fits neatly with communitarian values. Murphy wrote explicitly

that any interest in protecting fighting words does not outweigh the government's "social interest in order and morality" (315 U.S. 568, 572). The idea that the government may limit speech in furtherance of a state interest in morality suggests that Murphy employed principles with which a communitarian would be likely to agree. As Rodney Smolla writes of communitarianism, "speech that promotes the good life and that affirms values of community, justice, and the rule of law will be fostered and nurtured by the state; speech destructive of those ends will be condemned" (1990, 173). *Chaplinsky* is a clear example of the Court using its authority to condemn speech it deems destructive of the community and the rule of law. That this decision was a unanimous one suggests that, at least in 1942, the Court was supportive of logic that was quite similar to communitarian values that allow for government intervention against "harmful" speech like fighting words.

B. *Terminiello v. Chicago*, 337 U.S. 1 (1949)

1. Background

In *Terminiello v. Chicago*, 337 U.S. 1 (1949), Arthur Terminiello, a former priest, was charged with and found guilty of disturbing the peace in violation of a Chicago ordinance after giving a speech that incited an angry crowd of protesters to riot. Although police were present, they were unable to contain the crowd outside the theater where Terminiello was speaking. Terminiello's speech specifically targeted some of the religious, political, and racial groups that made up the group of protesters outside the theater, provoking outrage among the crowd. The lower court in this case ruled that the Chicago ordinance, which forbade "misbehavior [that] may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance," regulated solely fighting words and was thus permissible (337 U.S. 1, 2).

2. Majority Opinion

The Supreme Court voted 5-4 to overturn Terminiello's conviction; however, the Court declined to decide whether Terminiello's speech could be deemed fighting words and instead determined the ordinance violated the First Amendment on other grounds. Justices Vinson, Frankfurter, and Jackson authored dissenting opinions. Justice Douglas, who authored the majority opinion, emphasized that the most important role of speech in a democracy is to maintain government responsiveness and free discussion of ideas. "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes" (337 U.S. 1, 4). Douglas wrote that while speech is not an absolute freedom, Terminiello's speech (like all speech that challenges the status quo) was uncomfortable but constitutionally permissible. Unless the speech demonstrated a clear and present danger beyond creating a disturbance, it could not be regulated.

Douglas wrote, "There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups" (337 U.S. 1, 4–5). As a result, the Court found that the Chicago statute was unconstitutional because it allowed for the audience's response to determine the legality of speech — in other words, the ordinance granted a "heckler's veto" that would make speech illegal if the audience took issue with the content of the message and responded by creating a disturbance. To allow a heckler's veto would stifle the very purpose of free speech, which is to invite dissent and discussion of controversial speech.

Douglas' majority demonstrated a preference for individual rights over the need for social order, in seeming dissonance with the decision in *Chaplinsky*, which was announced only seven

years before *Terminiello*. This decision shows the Court is also open to logic that fits more closely with liberal thinking.

3. Vinson's Dissent

Chief Justice Vinson's dissenting opinion is based upon the procedural history of the case, rather than the substantive First Amendment issue, and thus does not offer any logic that is relevant to my analysis. To Vinson, the fact that that Terminiello's lawyers never objected to the constitutionality of the Chicago statute during jury instruction in the initial trial was dispositive in determining that there was no basis for an appeal.

4. Frankfurter's Dissent

Justice Frankfurter's dissent also focuses on the case's procedural history, albeit in greater detail than Chief Justice Vinson's. Frankfurter wrote that while the First Amendment protects individuals' right to challenge the status quo, that Terminiello's speech was of such a vile nature (and his complaint over a fine of only $100) that his case was not worth violating traditional rules of standing that would normally prevent the Court from stepping in given the circumstances discussed in the Vinson's dissenting opinion.

5. Jackson's Dissent

In dissent, Justice Jackson took issue with the Court's findings, arguing the majority gave too little deference to the need to protect the public order. Quoting extensively from Terminiello's speech, Jackson (joined by Justice Burton) argued that Terminiello actively sought to provoke violence between two opposed groups — his audience and a crowd of protesters outside the theater. Jackson wrote:

> Behind Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order. This Court seems to regard these as enemies of each other and to be of the view that we must

> forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order. (337 U.S. 1, 14)

Jackson emphasized the fact that Terminiello's speech, quite literally, caused a riot: that his speech was not an abstract discussion of ideas but a targeted message with the intention of causing a breach of the peace. Jackson also pointed out that the majority's ruling prevented cities across America from instituting ordinances similar to Chicago's, which he saw as problematic because of the rash of hostile interactions between quasi-fascist and -communist groups occurring frequently at the time of the Court's decision. Because, as Jackson put it, totalitarian groups wished to undermine democratic government, the government should have the power to prevent violent outbursts by those groups, even if it meant limiting speech in small ways.

Jackson accused the majority of abandoning the precedents set forth in *Schenk v. United States*, 249 U.S. 47 (1919), which allowed for the regulation of speech that presented a clear and present danger, and *Chaplinsky*'s fighting words doctrine. That a crowd was incited to violence as a result of Terminiello's speech demonstrated a clear and present danger, according to Jackson. Jackson also contended that Terminiello's speech was an obvious example of fighting words because it provoked or was likely to provoke a violent response, similar to the terms used in *Chaplinsky*. Jackson argued that a government that cannot provide order cannot protect speech, and as such the ability to punish those who disrupt order is a crucial power of the government. "Freedom of speech exists only under law and not independently of it," Jackson wrote (337 U.S. 31). He describes the result of the majority opinion as "a dogma of absolute freedom for irresponsible and provocative utterance which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics" (337 U.S. 1, 28).

Jackson added: "In considering abuse of freedom by provocative utterances it is necessary to observe that the law is more tolerant of discussion than are most individuals or

communities" (337 U.S. 1, 32). This statement suggests that, while the American legal system is open to free debate and discussion in an abstract sense, some speech is simply not accepted in American communities. As such, Jackson argued, those who choose to engage in highly controversial speech must at some point be held responsible when their listeners react with violence.

Jackson's dissent called upon the notion that an individual's right to free speech is secondary to the social order because the right to free speech cannot exist without social order. He also emphasized that, while the law cannot permit a "heckler's veto," the reality of American society is that some speech will not be tolerated or responded to peacefully. This notion is similar the communitarian idea that communities can select and enforce their own social values. Like *Chaplinsky*, Jackson's dissent offers a mode of considering free speech that echoes communitarianism; however, in this case, these similarities are found in a dissent, rather than a majority opinion, suggesting the Court shifted its primary manner of considering free speech after *Chaplinsky*.

C. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977)

1. Background

The case of *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) originated when the local government of Skokie, Illinois blocked the National Socialist Party of America from marching in the village. According to Philippa Strum's retelling of "the Skokie Affair," the party was a U.S. variety of Nazism that maintained the view that Jewish and African-American persons were "biologically inferior" (1999, 1). The leader of the party, Frank Collin, claimed the group wished to establish an all-white nation (Strum 1999, 14). Because Skokie had a sizable population of Jewish survivors of the Holocaust, the National Socialist

Party's messages were considered especially vile. The party was blocked from marching via an injunction from the Circuit Court of Cook County. Skokie officials argued "Any display of the swastika in Skokie would be so severe a 'symbolic assault' on the hundreds of Holocaust survivors … that it would constitute an 'incitation to violence and retaliation'" (Strum 1999, 25). The injunction forbade the following:

> [M]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion. (432 U.S. 43, 43, citing the injunction)

2. *Per Curiam* Opinion

The contention that the march would be the equivalent of a physical attack on the people of Skokie did not convince the Supreme Court, which issued a short *per curiam* opinion reversing the injunction. Justice Rehnquist authored a dissenting opinion. The Court found that the injunction denied the National Socialist Party's First Amendment rights because they would not be able to march during the appeals process. The Court remanded the case to the Illinois Appellate Court, which reversed the injunction with the exception of the swastika. The Illinois Supreme Court followed this decision with the finding that even the swastika was a protected form of symbolic speech (Strum 1999). The Supreme Court refused to hear an appeal by the city of Skokie, effectively upholding the decision of the Illinois Supreme Court and allowing the National Socialist Party to march (Strum 1999). Two years after the U.S. Supreme Court initially protected the party's right to march, Frank Collin announced the group would not march in Skokie (Strum 1999).

In *Skokie*, the Court demonstrated a strong affinity for individual rights over community values and standards. In spite of enormous public disapproval for Frank Collin and the National

Socialist Party, which Strum describes as a relatively small group that was never able to get even 200 people to its rallies, the Court found in the group's favor (1999, 5). The community of Skokie had deeply held values that would not have allowed for the National Socialist Party to express its views, but the Court offered little sympathy for these values. Rather, it chose to protect the individual rights of the party's members over the community's wishes in an unpopular decision that aligns closely with liberal ideology (Strum 1999).

3. Rehnquist's Dissent

Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, filed a dissenting opinion. While Rehnquist did not disagree with the *per curiam* decision's findings with regards to the First Amendment issue, he contended that the Court has overstepped its constitutional bounds in accepting the case in the first place. As such, his dissenting opinion does not offer logic worthy of analysis in this project.

D. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

1. Background

After several teenagers fashioned a cross and burned it on the lawn of a black family in St. Paul, Minnesota, the city charged them with violating an ordinance that forbade certain actions that were likely to "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," including burning a cross or swastika. The teenagers sued on the grounds that the ordinance violated their First Amendment rights. A trial court found that it did, but the Minnesota Supreme Court reversed this finding, ruling that the ordinance passed the strict scrutiny test requiring the law be a narrowly tailored means of achieving a compelling government interest.

2. Majority Opinion

In a unanimous decision but with split logic, the Supreme Court overturned the St. Paul ordinance. A majority held that the ordinance was facially unconstitutional because it prohibited speech on the basis of content. Justices White and Blackmun authored concurring opinions. Although the majority did not decide whether the ordinance regulated fighting words, it found (assuming *arguendo* that the ordinance did regulate fighting words) that it was unconstitutional to regulate only *some* fighting words based upon their content and audience. Because the statute limited fighting words that were based upon the race or gender of the victim, but not fighting words that were based upon other characteristics, like political affiliation, the government was expressing a preference for some forms of speech over others. Justice Scalia, who authored the majority, explained this concept colorfully: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules" (505 U.S. 377, 392).

The government cannot express a particular distaste for some fighting words and not others, the Court found. As Scalia put it in the majority opinion, categories of regulatable expression are not "categories of speech entirely invisible to the Constitution, so that they may be made vehicles for content discrimination unrelated to their distinctively proscribable content" (505 U.S. 377, 383–384). Such a categorization would allow for the government to regulate only libel that criticizes the government, for instance, in a clear violation of the First Amendment (505 U.S. 377, 384). Quoting *Chaplinsky*, Scalia emphasized that the Court had found that fighting words are not "'*no* part of the expression of ideas,'" but rather that they are "'no *essential* part of any exposition of ideas'" (505 U.S. 377, 384). Scalia used this seemingly small distinction to show that even fighting words can be worthy of some aspects of First Amendment protection.

The government may not regulate even fighting words on the basis of their content, even while it can enact neutral regulations of such words as an entire category.

Scalia wrote, "One must wholeheartedly agree with the Minnesota Supreme Court that 'it is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,' but the manner of that confrontation cannot consist of selective limitations upon speech" (505 U.S. 377, 392). He also dismissed the idea that the "injury" caused by some hateful speech (namely, speech motivated by hatred on the basis of race, religion, gender, or creed) is "qualitatively different" than the harm of other hateful speech, as well as the idea that the hurtful impact of speech upon a listener is an adequate reason to limit speech (505 U.S. 377, 392). Scalia even went so far as to acknowledge that the state has compelling interests in preserving the human rights of those who are members of marginalized groups by protecting them from hateful speech on the basis of their status as members of those groups, but still concluded that the state could meet those interests through content-neutral methods that do not demonstrate a preference for some views over others. Scalia concluded: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire" (505 U.S. 377, 396). In other words, St. Paul could have used other measures and laws (trespassing or harassment laws, for instance) to convict R.A.V. without implicating the First Amendment.

The majority opinion rejected several notions of the importance of community values and identity. Scalia explicitly denied the legitimacy of a legal argument that seeks to protect marginalized groups through content-based speech regulations. In doing so, he denied the ability of each community to define what forms of communication are acceptable and what forms are

not — in the case of St. Paul, for instance, the city wished to define hateful communication based upon race, gender, and creed as unacceptable. But this tactic is deemed inappropriate when the Court places greater value on the individual's right to speak even hateful ideas as far greater than the right of the community to create boundaries for acceptable speech. This preference for R.A.V.'s speech rights over the emotional injuries caused by hateful speech is a demonstration of logic that prioritizes individual rights over communal values; once again, the Court's logic aligns closely with liberal thinking.

3. White's Concurrence

The concurring opinion, authored by Justice White and joined by three other justices, disagreed with the logic of the majority, but agreed with the outcome, finding that the statute was overbroad because it prohibited protected speech. First, White pointed out that the Court frequently allows for content-based regulations of some forms of speech, particularly those forms that are considered of little value to society. He offered as an example obscenity and libel laws that forbid some forms of speech on the basis of content, and took issue with the majority's assertion that the only acceptable law regulating fighting words would have to regulate all fighting words and not just some. White wrote:

> Any contribution of this holding [the majority] to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment. (505 U.S. 377, 402) (White, J., concurring)

Because fighting words fall outside the protection of the First Amendment, according to White, they can be regulated based upon their content, similar to obscene speech. White took issue with the Court's finding that content-based regulations of speech "outside the First Amendment" are facially unconstitutional (505 U.S. 377, 403) (White, J., concurring).

White also reproached Scalia's contention that the St. Paul ordinance fails strict scrutiny because it could potentially be accomplished in a content-neutral manner. White pointed out that to require a content-neutral ordinance would be to require the regulation of even more speech, paradoxically creating a *less* narrowly tailored ordinance. He emphasized that the ordinance is a reflection of St. Paul's determination as to which speech is most harmful to the city, writing, "This selective regulation reflects the city's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words" (505 U.S. 377, 407) (White, J., concurring).

Rather than following the logic of the majority, the concurrence found that the St. Paul ordinance was overbroad. The speech covered by the statute did not rise to the level of fighting words because the expression was not likely to spark a violent response or injury. "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected" (505 U.S. 377, 414) (White, J., concurring).

Like the majority opinion, this concurrence denies the ability of St. Paul to determine what language is harmful enough to require regulation. Although the concurring opinion recognizes that St. Paul might wish to regulate some speech on the basis that its harms are more substantial, the opinion also emphasizes that a real, physical injury must follow from speech for it to be considered regulatable. This is yet another iteration of the Court's preference for individual rights over the ability of communities to selectively regulate speech on the basis of the harms it causes.

4. Blackmun's Concurrence

Justice Blackmun authored another concurring opinion, in which he took issue with some of the reasoning in Justice White's concurrence. Blackmun emphasized the importance of

context in defining the lines of free speech, and particularly the importance of flexibility in the creation of speech categories like obscenity. Offering what he described as a "more complex and subtle analysis," he concluded that a "selective, subject-matter regulation of proscribable speech is constitutional" (505 U.S. 377, 428-429) (Blackmun, J., concurring).

Blackmun concluded that the St. Paul statute is overbroad, but wrote that if it were not so, he would have voted to uphold it on the grounds that the law is not a viewpoint-based regulation of speech, but a subject-matter regulation, in the sense that it equally prohibits both sides of a debate from engaging in the same types of speech — a Muslim may not verbally attack a Catholic on the basis of religion, but neither may a Catholic verbally attack a Muslim on the same grounds. Were the St. Paul ordinance not overbroad, it would pass constitutional muster because it regulated proscribable fighting words and merely took into account the different harms caused by different types of fighting words.

Blackmun's solo concurrence emphasized the context surrounding speech regulations, allowing room for communities to enact subject-based regulations of speech that consider the different ways in which proscribable speech can be harmful. If St. Paul decided that racial, gendered, or religious hate speech caused significant harm, then the city should rightfully be able to enact very limited legislation preventing that speech's utterance by all, not just by one side of a debate. Blackmun demonstrated an approach more similar to communitarianism in his concurrence, although his conclusion matched the majority's.

E. *Virginia v. Black*, 538 U.S. 343 (2003)

1. Background

Barry Black led a Ku Klux Klan rally on private property in Cana, Virginia. The rally, which ended with the burning of a large cross, was comprised of about thirty participants who

were visible and audible from off the property, according to neighbors and passersby. One neighbor, Rebecca Sechrist, stated later that she felt "scared" when she heard rally participants saying they wanted to "randomly shoot the blacks" and after witnessing the cross burning from a nearby property. Black was charged and found guilty of violating a Virginia statute that forbade cross burning with the intent of intimidating any person. The law went further, stating, "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons" (538 U.S. 343, 348, citing the Virginia statute). In a separate case that was joined with Black's, two other men were convicted under the same statute after setting fire to a wooden cross they placed in a black neighbor's front yard.

2. Plurality Opinion

In a divided plurality decision authored by Justice O'Connor, the Court overturned Black's conviction, finding that it was permissible for Virginia to ban cross burnings if their purpose was intimidation, but that that intent could not be assumed in all instances of cross burning. Five justices agreed to the conclusion that Black's conviction should be overturned, although several disagreed with O'Connor's logic and four authored concurring, dissenting, or mixed opinions. O'Connor reasoned that it is permissible to issue content-based bans on "true threats," in which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group" — the government may, for example, ban threats upon the President's life based on the content of the threats (538 U.S. 343, 359). Because of the threatening symbolism inherent in burning a cross, and because the Virginia law did not distinguish between types of intimidation (intimidation based upon race versus religion, for example) a ban on cross burning for the purpose of intimidation was deemed acceptable.

However, as O'Connor pointed out, not all cross burnings are intended to intimidate, although they may have that effect. In some cases, cross burnings have been used as a celebratory symbol for members of the Ku Klux Klan, or as expression of political views — thus, the assertion in the Virginia law that cross burning alone is enough to indicate an intent to intimidate was found to be a violation of the First Amendment because it suppressed protected expression. Thus, "the provision as so interpreted 'would create an unacceptable risk of the suppression of ideas'" (538 U.S. 343, 365). The prima facie evidence provision of the Virginia law was thus found to be facially invalid.

Interestingly, the plurality opinion specified that the context surrounding a cross burning be taken into account when considering whether it was undertaken with the intent of intimidating others. This perspective defended individuals' right to burn a cross for non-threatening reasons, suggesting a fit with liberal theory, and it also proposed that the context of the action is relevant to the decision — that cross burning has some importance to the "white supremacist community," as it were, was deemed relevant to the Court's decision. Thus, this case emphasized the importance of protecting the speech rights of *all* groups, even those with repugnant views, in order to ensure individual freedom of speech in as many circumstances as possible.

3. Stevens' Concurrence

Justice Stevens added a very brief concurring opinion to state that cross burning that *is* intended to intimidate is unquestionably within a category of speech that the government may regulate. He was joined in part by Justices Scalia and Souter. Here, Stevens defended the government's need to protect its citizens from fear of bodily harm over the right of KKK members to burn crosses if that action's intent is to threaten, making an argument that seems to align with the communitarian perspective.

4. Thomas' Dissent

Justice Thomas, joined in part by Justices Scalia and Souter, dissented from Justice O'Connor's opinion on the grounds that the action of burning a cross should not be considered to have an expressive component. Thomas argued that the symbol of a burning cross is so culturally intertwined with a particular message that it is always threatening. "In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence" (538 U.S. 343, 391) (Thomas, J., dissenting). As evidence of this conclusion, Thomas cited the fact that the Virginia statute in question was approved by a firmly segregationist legislature in the state — "even segregationists understood the difference between intimidating and terroristic conduct and racist expression," Thomas wrote (538 U.S. 343, 394) (Thomas, J., dissenting). The dissenting opinion posited that the Court should consider the right of passersby to avoid the fear and distress a cross burning can cause. "That cross burning subjects it targets, and, sometimes, an unintended audience, … to extreme emotional distress, and is virtually never viewed merely as 'unwanted communication,' but rather, as a physical threat, is of no concern to the plurality" (538 U.S. 343, 400) (Thomas, J., dissenting).

Thomas offered a historically based explanation as to why the context surrounding cross burning, as well as its impact upon those who view it, should be part of the Court's considerations. Thomas believed the history of violence that is strongly associated with cross burning should be a factor in deciding whether the practice can ever be non-threatening; under his assertions, it cannot. The history of cross burning is so inextricable from the fear it instills in its viewers that any instance of cross burning can be assumed to threaten and intimidate, no matter the intent behind it. Thomas' argument resonates with the communitarian view that social order and values should outweigh individual rights to expression in some instances. Preventing

the burning of crosses to protect marginalized members of society is a strong example of the communitarian understanding of the necessary limits of free speech, although once again, it makes its appearance in a dissenting opinion rather than a majority.

5. Scalia's Part-Concurrence, Part-Dissent

Justice Scalia agreed with the plurality's finding that a law banning cross burnings intended to intimidate would be constitutional, but disagreed with the finding that the prima facie evidence provision is facially unconstitutional. Scalia wrote that the plurality must have applied some form of the "overbreadth" doctrine to find the statute facially unconstitutional, but argued that the class of people who might be injured by the law's possibly unconstitutional aspects is so small as to prevent the use of "overbreadth" to strike down the law. Scalia determined, in a technical argument, that the law would only injure those persons who burn a cross without threatening intentions, are prosecuted, and then refuse to offer a defense. Because this class is so small as to be practically nonexistent, Scalia concluded that an "overbreadth" finding by the plurality is inapposite. Scalia's opinion offers little substantive First Amendment logic, and as such offers little for analysis in this project.

6. Souter's Part-Concurrence, Part-Dissent

Justice Souter argued that the Virginia statutes should be overturned entirely because it is a content-based regulation of expression. By choosing to proscribe the burning of a cross rather than any other symbolic expression with the intent to intimidate, the state regulates on the basis of an ideology it wishes to squelch, in this case, violent white supremacy. "But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy" (538 U.S. 343, 381) (Souter, J., concurring).

Souter's opinion strongly supported an individual's right to self-expression, even in extreme ways, as part of the marketplace of ideas. Souter suggested that so long as an action expresses an ideology, it is protected under the First Amendment, regardless of its impact upon viewers. His opinion fit closely with liberalism in that it greatly preferred individual rights over the social order or the need to protect marginalized groups.

F. *Snyder v. Phelps*, 562 U.S. 443 (2011)

1. Background

In *Snyder v. Phelps*, 562 U.S. 443 (2011), the Westboro Baptist Church picketed near a U.S. soldier's funeral, causing emotional distress to the soldier's father, Albert Snyder. Albert Snyder argued that the church members' signs, which bore messages like "Thank God for Dead Soldiers," caused substantial emotional distress worthy of financial compensation. Snyder testified at the initial trial on this matter that "he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it" (562 U.S. 443, 450). The church had alerted local authorities to the fact that they would be picketing, and they completed their protest on public land that was about 1,000 feet away from the funeral service. A jury found in Snyder's favor and awarded him sizable damages, but the decision was reversed on appeal to the Fourth Circuit Court of Appeals.

2. Majority Opinion

The Supreme Court upheld the Court of Appeals' decision and held 8-1 that Snyder was not owed damages. Chief Justice Roberts authored the majority opinion, Justice Breyer offered a concurrence, and Justice Alito filed a dissenting opinion. Roberts presented the constitutional

question at hand as "whether the First Amendment shields the church members from tort liability for their speech in this case" (562 U.S. 443, 447). The majority held that it does.

The Court found this primarily because the Westboro Baptist Church's speech is considered speech on a matter of public concern — the church protests criticized U.S. policies, especially the inclusion of gays in the military. Because the speech touched on issues that were up for public debate, it is granted some of the strongest protection the First Amendment can offer. Quoting *New York Times Co. v. Sullivan*, 376 U.S. 270, Roberts wrote in *Snyder* that "the First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" (562 U.S. 443, 452). Roberts went on to define a public issue as any of "political, social, or other concern to the community" (562 U.S. 443, 453). Even in a case such as this one, where the speech in question makes a "negligible" contribution to the marketplace of ideas, speech of public concern is offered strong First Amendment protection (562 U.S. 443, 460). Alternatively, Roberts wrote that the restriction of speech on private issues is of less concern from a free speech perspective (562 U.S. 443, 452). The Westboro Baptist Church's speech also met the time, place, and manner restrictions in place in Maryland (where the picketing took place), meaning their speech did not violate any laws, which might grant it less protection. "Simply put, the church members had the right to be where they were," Roberts wrote (562 U.S. 443, 457).

The majority does note that many considered the speech in question reprehensible. Roberts wrote, "Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father" (562 U.S. 443, 456). However, the emotional harm caused by the speech does not disqualify it from First Amendment protection. The majority stated, "given that Westboro's

speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt" (562 U.S. 443, 458, citing *Texas v. Johnson*, 491 U.S. 414).

This opinion is an example of the Court's use of logic that parallels liberalism. In *Snyder*, the Court offered steadfast protection for speech that most Americans find disgusting. In an editorial, *The New York Times* described the Westboro Baptist Church's signs as "hurtful and hateful" (2011). In her analysis of this case, Christina Wells wrote for *The California Law Review* that "Few people will lose sleep if the Court finds that the First Amendment allows Albert Snyder to sue the Phelpses for intentional infliction of emotional distress and invasion of privacy for protesting near his son's funeral" — but, in the end, the Court did not take this position (2010). The Westboro Baptist Church's message, which conveys the belief that God is punishing the United States for its collective sins by killing soldiers, has been maligned in the press and in public opinion generally. Taken in combination with the traditional American belief in the heroism of U.S. soldiers and the sanctity of religious ceremonies such as funerals, the Westboro Baptist Church's ideas are perhaps some of the most consistently despised in recent memory.

In spite of these facts, which Roberts came very close to openly acknowledging in his opinion, the church's speech was granted "special protection" because of its contribution to public discourse, no matter how minimal that contribution might be considered by the majority. The majority chose to maintain the neutrality of the government by prohibiting interference in the marketplace of ideas. Just as Sandel describes the liberal view of free speech as "the idea that government should be neutral among competing conceptions of the good life," the Court in *Snyder* found that even when a majority of Americans agree on a conception of the good life that

is contrary to that forwarded by the Westboro Baptist Church, the government may not favor one side over another in this debate (2005, 212). The preservation of the individuals' right to express controversial views, so long as they are relevant to issues of public importance, is emphasized in this decision.

Also relevant is the fact that the emotional harm caused by this speech was not considered an adequate reason for limiting the speech. Smolla writes of the liberal perspective that "some injury more palpable than moral outrage is required" to regulate speech (1990, 175). The Court found in *Snyder* that even "outrageous" or "hateful" speech could not be limited on the basis that it offended listeners, again defending a basic liberal principle. Wells writes, "the Court protects offensive speech for two reasons. First, speech on matters of public concern retains its value even when delivered in an offensive manner. Second, attempts to punish offensive speech too often lead to censorship of unpopular ideas" (2010). *Snyder* demonstrates the Court's use of both lines of logic — the Westboro Baptist Church was afforded protection precisely because its speech was so unpopular and required defense, and because its speech was about a matter of public significance, even though it was presented in a manner of which many disapproved. Roberts concluded the majority opinion with this assertion on the value of free speech:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate. (562 U.S. 443, 460–461)

In this short paragraph, Roberts emphasized the "free market" principle that is central to the liberal understanding of free speech: the principle that the truth will best be reached through

almost entirely free speech, and that offense or even deep pain does not justify the regulation of political speech in the public arena.

However, Roberts also presented a viewpoint that could be seen as communitarian when he wrote in the quote above, "As a Nation we have chosen a different course" (562 U.S. 443, 461). This statement suggests that Roberts saw free speech as an essential value of the United States and of Americans. By defending this shared value, was Roberts in fact defending what he sees as a communal value that is important to our identities as Americans? While this would be an extremely broad interpretation of what makes up a "community," it is possible that Roberts' assertion could represent a middle ground between liberals and communitarians, where individual free speech is one of the communal values on which we base our identities.

3. Breyer's Concurrence

Justice Breyer joined the majority but added his belief that the government may restrict picketing in some circumstances, even if that picketing is on a matter of public concern. Breyer gave the example of fighting words to illustrate the notion that the manner in which speech is delivered can impact its constitutionality. The concurring opinion simply emphasized that private individuals can be protected from obnoxious or hateful speech in some limited circumstances. Breyer wrote, "As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection" (562 U.S. 443, 462) (Breyer, J., concurring). In his opinion, Breyer backed logic similar to the liberal principle of defending most speech; this logic still allows room, however, for the communitarian idea going back to *Chaplinsky* and fighting words — that some speech, when its aim is to harm others, is not deserving of constitutional protection.

4. Alito's Dissent

Justice Alito began his dissent in frank contrast to the majority opinion: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case" (562 U.S. 443, 463) (Alito, J., dissenting). Alito characterized the Westboro Baptist Church's messages as making "no contribution to public debate," particularly because of the resulting "severe emotional injury on persons at a time of intense emotional sensitivity" (562 U.S. 443, 464) (Alito, J., dissenting). The emotional harm caused by the church's signs and messages, Alito found, extended far enough to render the speech essentially fighting words: they "'by their very utterance inflict[ed] injury'" and "form[ed] 'no essential part of any exposition of ideas,'" under the definitions provided in *Chaplinsky*. (562 U.S. 443, 465) (Alito, J., dissenting). Alito argued that the protest, which specifically targeted Albert Snyder's son, was not on issues of public importance but rather a personal attack that was not deserving of First Amendment protection. Finally, Alito wrote that "funerals are unique events at which special protection against emotional assaults is in order," suggesting that although the speech occurred in a public space, it intruded on a private event and emotionally harmed those present to the extent that First Amendment protection for the speech could be diminished (562 U.S. 443, 473) (Alito, J., dissenting).

These appeals harkened back to the fighting words doctrine, which found that some speech was so harmful and of so little value to society that it could be limited. Alito also appealed to a cultural idea of funerals as sacred and protected spaces in which families should be safe from emotionally harmful speech. Both these ideas refer to a communitarian principle that the right to speech can be limited when the speech in question is inherently harmful. Speech that inflicts harm on a private person during an emotionally vulnerable time can be limited, Alito

argued. This logic, however, is not widely supported by the Court. Alito stood alone in his view of *Snyder*, and refers back to *Chaplinsky*, which has been significantly limited since it was decided in 1942. Alito's dissent, while using logic similar to communitarian principles, also demonstrated the very narrow support for these principles within the Court's First Amendment jurisprudence.

II. Campus Speech Code Cases

A. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989)

1. Background

The University of Michigan felt compelled to craft a speech policy restricting "Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status" after a series of racist incidents on the campus (721 F. Supp. 852, 856). The incidents included one in which an unknown person distributed fliers that used racist stereotypes and stated it was "open season" on black students; in another, a Ku Klux Klan uniform was displayed from the window of a dormitory (721 F. Supp. 852, 854).

After much pressure from students and the threat of a lawsuit against the school for failing to create a safe learning environment, the school sought to end these incidents through a campus speech policy. The policy limited the areas in which speech was regulated, specifically leaving out public areas of campus and campus-sponsored newspapers — according to the code itself, only speech in academic, study, and recreational centers could be subject to regulation and penalties (721 F. Supp. 852, 856).

Students found in violation of the code were first required to go through a mediation process that could be followed by a formal hearing if the mediation was unsuccessful. Sanctions

ranging from a "formal reprimand" to expulsion, in more extreme cases, could be meted out at either stage in the process (721 F. Supp. 852, 857). Doe, an anonymous student, sued on the grounds that he felt his ability to speak on controversial topics in class had been "chilled" by the policy.

2. Opinion

District Judge Avern Cohn authored the opinion, which nullified the University of Michigan's speech policy. His decision began by determining whether Doe had standing in the case. Cohn decided that although the policy had never been applied to Doe, he had standing to bring the suit because he had a reasonable fear of being sanctioned if he were to discuss "certain controversial theories positing biologically-based differences between sexes and races" in his graduate-level biology classes (721 F. Supp. 852, 858). Cohn concluded that because the University had applied the policy to students who discussed controversial topics that offended fellow students in classes, that Doe had reason to fear sanctions.

Cohn's opinion included an analysis of the type of speech being regulated by the policy. Importantly, he found that the University would be within its rights to regulate certain types of "verbal conduct," as is the case in the regulation of workplace sexual harassment. However, the University's ability to regulate "pure speech" is limited to specific categories, including fighting words, credible threats, and obscenity (721 F. Supp. 852, 862–863). Cohn pointed out that some language covered by the policy could be considered fighting words: "Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University" (721 F. Supp. 852, 862).

However, he reasoned that the University could not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or

messages sought to be conveyed. … Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people" (721 F. Supp. 852, 863). Cohn emphasized the importance of free speech in the university setting, where "the free and unfettered interplay of competing views is essential to the institution's educational mission" (721 F. Supp. 852, 863).

Cohn found the University's policy overbroad because it was applied to students who engaged in speech protected by the First Amendment. Students who raised controversial opinions during class discussions had been found to be in violation of the school's policy on several specific occasions, in spite of the fact that their opinions were protected speech. Further, the fact that the University failed to offer a clear distinction between protected and unprotected speech in the policy meant that it could also be classified as vague. As such, with the policy being found to be both vague and overbroad, it was declared unconstitutional and the University was prohibited from continuing to enforce it.

Cohn concluded, "While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech. Unfortunately, this was precisely what the University did" (721 F. Supp. 852, 868). Here, Cohn expressly acknowledged the University's competing mandates to defend both equal protection and free speech; he determines, however, that free speech may not be diluted in the course of attempting to ensure equal protection. Cohn's ruling lands squarely in favor of individual rights and the marketplace of ideas — his reasoning emphasized the importance of controversial ideas in the classroom and of each individual's right to espouse those ideas. In reaching this conclusion, Cohn followed the Supreme Court's pattern of using logic that weighs

individual rights more heavily than communal values, applying this logic to academia in the same way the Supreme Court has applied it to other communities.

Although Cohn found the policy to be facially overbroad and vague, Cohn left room for the existence of a speech code that, if differently conceived, could be constitutional. He also showed sympathy for those students who the policy sought to protect: minority and female students who were subjected to hateful speech on their campus. He wrote, "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values" (721 F. Supp. 852, 853). Thus, the *Doe v. University of Michigan* opinion represents Cohn's best effort to balance the interests of equality and free speech. In this instance, the Michigan policy was found to go too far, but Cohn left open the possibility of speech codes on campuses, so long as they offer adequate protection for free speech.

B. *UWM Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991)

1. Background

The Board of Regents of the University of Wisconsin ordered all schools in the University of Wisconsin system to adopt a "Design for Diversity" plan in response to a number of high profile incidents of racism. These incidents included the installation of a large statue of a black "islander" at a fraternity party, a racially motivated fight between two fraternities, and a fraternity's depiction of a "slave auction," in which students wore blackface and caricatured black Americans in a skit (774 F. Supp. 1163, 1165). As part of their implementation of the "Design for Diversity" plan, the University of Wisconsin-Madison asked several of its law professors to design a new rule for the student conduct code; the code they proposed was shortly

approved by the Board of Regents for use in the entire University of Wisconsin system. The rule required that actionable speech or expressive conduct meet the following four characteristics:

> "(1) Be racist or discriminatory;
> (2) Be directed at an individual;
> (3) Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual addressed; and
> (4) Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity" (774 F. Supp. 1163, 1166)

The rule also came with a detailed brochure explaining how the rule should be applied. *The UWM Post, Inc*., an independent student newspaper at the University of Wisconsin-Milwaukee, and several other plaintiffs, asked the District Court for the Eastern District of Wisconsin to find the rule facially invalid on the grounds that it violated the First Amendment. At the time of the lawsuit, nine students had been punished under the rule — for the most part, each was at a different University of Wisconsin campus.

2. Opinion

Judge Warren began his opinion with an analysis of the overbreadth doctrine. While the plaintiffs argued that the rule was overbroad because it regulated protected speech, the University of Wisconsin argued the rule regulated only fighting words as outlined in *Chaplinsky*. Warren wrote, "the *Chaplinsky* Court set out a two-part definition for fighting words: (1) words which by their very utterance inflict injury and (2) words which by their very utterance tend to incite an immediate breach of the peace" (774 F. Supp. 1163, 1169). He added, however, that the Supreme Court has narrowed the definition of fighting words since *Chaplinsky*, scrapping the first half of the original definition and limiting the second half so it only included words that provoke an immediate violent response and that are directed at the hearer (774 F. Supp. 1163, 1170).

Warren determined that because the language of the University of Wisconsin rule did not require that regulatable speech "tend to incite immediate violent reaction," the rule was outside the scope of the fighting words doctrine. Thus, in a somewhat paradoxical decision, Warren found that the lack of a violent response to some speech the rule regulated, even to speech that intimidated listeners, was dispositive in determining that the rule covered more than just fighting words.

Thus, because the rule regulated more than just fighting words, Warren declined to use the balancing test laid out in *Chaplinsky*, because to do so would require that he create a new category of unprotected speech and because the rule was a content-based regulation. Warren also reasoned that even those who used racial epithets were engaging in speech with some social value because the epithets served "to inform their listeners of their racist or discriminatory views" (774 F. Supp. 1163, 1175). Warren went so far as to say the rule actually impaired diversity: "By establishing content-based restrictions on speech, the rule limits the diversity of ideas among students and thereby prevents the 'robust exchange of ideas' which intellectually diverse campuses provide" (774 F. Supp. 1163, 1176). He also dismissed the University of Wisconsin's argument that the rule fulfilled its mandate to provide equal opportunities to education for all students, arguing that the rule regulated student behavior rather than state employees' behavior. Warren wrote, "Since students are generally not state actors, the Board's Fourteenth Amendment equal protection argument is inapplicable to this case" (774 F. Supp. 1163, 1176).

Thus, because the rule covered protected speech and did not offer compelling reasons to regulate such speech, Warren found the rule to be overbroad. He also found the rule to be vague, as it did not clarify whether the speaker had to "actually create a hostile educational environment

or whether speaker must merely intend to create such an environment" to violate the rule (774 F. Supp. 1163, 1179). As such, Warren declared the rule facially invalid because of its violations of the overbreadth and vagueness doctrines.

Like *Doe v. University of Michigan*, this case favored individual rights over the University of Wisconsin's wish to take measures to provide a more comfortable community for its students. Although Judge Warren recognized that schools have a Fourteenth Amendment obligation to provide equal educational opportunities to students regardless of race, gender, religion, or other characteristics, he wrote in his opinion that a campus speech code that regulates student discussion cannot have an impact upon the equal protection mandate because students are not state actors. As long as the school itself is offering students equal opportunities, Warren reasoned, it is in compliance with the Fourteenth Amendment — students' racist speech is a different issue entirely from equal protection. Like in *Doe v. University of Michigan*, the opinion in this case offers ideas about how to craft a constitutional speech code. In this case, Warren proposed that a speech code would have to specify that the objectionable speech must be likely to trigger an immediate violent response to fit in the fighting words doctrine and cover only unprotected speech. He also laid out just how narrow the fighting words doctrine has become, suggesting that only a very limited speech code would be acceptable under the doctrine.

C. *Iota Xi Chapter Of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (4th Cir. 1993)

1. Background

On April 4, 1991, the Iota Xi chapter of the Sigma Chi fraternity at George Mason University, a state school, hosted an event called "Dress a Sig," in which participants were to dress as "ugly women." One wore blackface and dressed as a black woman. The group had been granted permission by the University in advance of the event, but the school imposed sanctions

against the group after students complained that they were offended by the racial and sexual stereotypes portrayed at the "Dress a Sig" event. The fraternity was required to suspend all activities for a two-year period, with the exception of pre-approved activities focused on cultural awareness. The fraternity filed suit, claiming that its rights under the First Amendment were violated by the sanctions. This circuit court decision is distinct from the district court decision on the same case discussed by Shiell and in Chapter One of this project.

2. Majority Opinion

Judge Sprouse authored the majority opinion. Judge Widener joined Sprouse in the opinion, and Judge Murnaghan authored a concurring opinion. Sprouse first determined that the fraternity's conduct was "expressive and thus entitled to First Amendment protection" (993 F.2d 386, 391). The "obvious sophomoric nature" of the production was not enough to strip it of the protection of the First Amendment (993 F.2d 386, 389). Because the fraternity intended to express a message through the skit, and because that message was likely to be understood by others, the skit passed the test for expressive conduct laid out in *Texas v. Johnson*: "What is evident is that the Fraternity's purposefully nonsensical treatment of sexual and racial themes was intended to impart a message that the University's concerns, in the Fraternity's view, should be treated humorously" (993 F.2d 386, 392).

When the University punished a skit that expressed mockery for the University's desire for racial and gender equality, it unconstitutionally barred one viewpoint while expressing preference for its own. "The First Amendment generally prevents government from proscribing … expressive conduct because of disapproval of the ideas expressed" (993 F.2d 386, 393, citing *Texas v. Johnson*). As such, Sprouse found that the University's sanctions against the fraternity could not be enforced.

Once again, the majority opinion protects individual freedom over the University's ability to decide what speech and expressive conduct is acceptable. In this case, George Mason did not have an explicit speech code, but rather chose to penalize the fraternity based upon its offensive message. This gave the school even less ground to stand on than the University of Michigan or the University of Wisconsin, which had written codes, because George Mason seemed to be penalizing the group simply for mocking the school's emphasis on racial and gender equality. The court here seriously limited George Mason University's ability to restrict speech that was considered offensive on the basis of racist or sexist content.

3. Murnaghan's Concurrence

Judge Murnaghan agreed with the majority opinion's decision to halt the enactment of sanctions against the fraternity, but felt the decision went too far. "By holding that the First Amendment prohibits any action by a public university to prevent or punish offensive conduct like that at issue, the majority goes much further than necessary," Murnaghan wrote (993 F.2d 386, 394) (Murnaghan, J., concurring). Murnaghan argued the majority could have come to the same conclusion simply by holding that the University could not punish the fraternity for an event that had already garnered the school's approval. However, Murnaghan emphasized that a content-based speech regulation *could* be permissible if the University demonstrated that it was a narrowly tailored means of achieving a compelling state interest — that is, if the University's measures passed strict scrutiny. In this case, the University should have been granted the ability to punish the skit because it must be able to protect other students, Murnaghan wrote. "The University must have some leeway to regulate conduct which counters that interest, and thereby infringes upon the right of other students to learn" (993 F.2d 386, 395).

This opinion offers a more balanced view of the competing interests faced by the University than that of the majority. Murnaghan wrote in favor of the University's ability to limit some speech or expressive content in favor of protecting other students' ability to learn in a safe and welcoming environment. Further, Murnaghan recognized that the University has more than just an educational mission — it must also ensure that diversity is fostered and that minority and female students have equal opportunities to benefit from education.

D. *Corry v. Stanford University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995)

1. Background

Although little background information is available for this case, its uniqueness in the body of judicial responses to campus speech codes necessitates its inclusion. The basic facts are as follows: Stanford University enacted a speech code "intended to clarify the point at which free expression ends and prohibited discriminatory harassment begins" (*Corry v. Stanford* 1). The speech code was intended only to prohibit fighting words under the definition provided in *Chaplinsky v. New Hampshire*. Robert Corry and several other students brought suit against the University under the state of California's "Leonard Law," which ensured students at private universities the same free speech rights as those at public universities; while normally a private institution would not be held to the standards of the First Amendment, Corry argued that the Leonard Law meant Stanford University was required to comply with the First Amendment. The court took on both the First Amendment issue as well as the question of the constitutionality of the Leonard Law.

2. Opinion

Judge Stone authored the opinion in this case. Stanford University claimed that their speech code targeted only fighting words and did not prohibit the expression of any views, no

matter how objectionable; as such, the school argued, their policy covered only unprotected speech and held up under the First Amendment. However, like in *Iota Xi v. George Mason University*, the court found that the fighting words doctrine had been substantially narrowed since *Chaplinsky*. Using the same conception of fighting words as the court in *George Mason*, Stone here determined that the Stanford speech code regulated some protected speech: "On its face, the Speech Code prohibits words which will not only cause people to react violently, but also cause them to feel insulted or stigmatized" (*Corry v. Stanford* 8). Hurt feelings, Stone wrote, are not enough to render speech unprotected. Because the speech code regulated speech that expressed a protected message and did not merely prohibit speech that was likely to incite violence, it was found to be overbroad.

Further, even if the speech code only regulated fighting words, it would remain unconstitutional because it regulated those words on the basis of their content in a manner the Supreme Court forbade in *R.A.V. v. City of St. Paul*. Like the ordinance in *R.A.V.*, the Stanford speech code regulated speech based upon whether it expressed a hostile view on the basis of race, gender, religion, or creed. Stone applied strict scrutiny on the grounds that even a content-based regulation of speech would be permissible if the University could demonstrate that it was a narrowly tailored means of achieving compelling state interests. Like in *R.A.V.*, "the Court acknowledged that the ordinance supported a compelling interest because it sought to protect individuals, society at large, from various hateful discrimination" (*Corry v. Stanford* 18). However, Stone found that the University could use less restrictive measures to combat racism and encourage racial harmony. Judge Stone also found, using logic less relevant to this project, that California's Leonard Law was constitutional and that it could be used to ensure that

Stanford's speech code was in accordance with the First Amendment, in spite of the school's status as a private institution.

As in every other major campus speech code case *in toto*, the court here found in favor of individual freedom over even a private university's ability to set standards for acceptable speech within the educational community. Although the court recognized the importance of creating a safe educational environment for all students in its strict scrutiny analysis, it ultimately found that universities must regulate as little speech as possible, or none at all, in the furtherance of that goal. Although Stanford University sought to create guidelines to prevent harassment, its efforts were squelched by a court that ruled these guidelines unconstitutional on the basis that they infringed individual speech rights.

III. Conclusions

In my analysis of these cases, a clear pattern has emerged: the Supreme Court and the lower courts that follow its precedent have generally favored individual freedoms over shared communal values. Time and again, the courts have ruled in favor of individuals over communities that sought to implement standards of acceptable speech. Although courts have proposed constitutional alternatives in several cases, such as more narrowly tailored speech codes, it seems that colleges and local governments have yet to find a successful way to control hate speech. The fighting words doctrine, after which several universities tried to model their speech codes, has proven unhelpful because it has been narrowed so significantly since *Chaplinsky v. New Hampshire*.

Thus, the courts have seemed to endorse the liberal conception of free speech over the communitarian one. The marketplace of ideas, in which unsavory speech can be best addressed through discourse, is frequently referenced in speech cases. Further, the idea that no content-

based speech restrictions can be permitted on the grounds that the government cannot be given control of acceptable speech content is a substantial obstacle in the way of speech codes. The courts' endorsement of these ideas have created a prevailing way of thinking about free speech in the legal system — a way of thinking in which individual rights to speak even hateful messages outweigh a community's right to limit some speech to protect its people and to validate standards based upon communal values. Even if, in a given community, the entire group agreed upon the need the limit hateful speech in defense of the group's values of equality, the courts would likely strike down such a limitation in defense of the right of a single person to enter the community and make his or her contrary ideas known. This principle applies, and has been applied, to universities, which have been entirely unsuccessful in crafting speech codes that are designed to protect their stated values of racial and gender equality. Colleges and universities have yet to make a convincing constitutional argument for the proposition that community values can sometimes outweigh individual freedoms.

CHAPTER FOUR: CURRENT SPEECH DEBATES

I. Overview

The end of 2015 was marked by student protests across the United States. Most notably, students at Yale University and The University of Missouri in November engaged in highly publicized campaigns which, although distinct, revolved around the same basic principle: that predominantly white institutions are not doing enough to improve the racial climate in which students live and study. At Yale University, a controversial email exchange about culturally appropriative Halloween costumes sparked a major, days-long protest that caught national attention. One Yale lecturer suggested in an email to students that anyone offended by costumes they found culturally insensitive should "look away," or engage with debates with the wearer, according to an *Atlantic* overview of student protests (Wong & Green 2016)[5].

The email, however, was largely agreed to be just a tipping point in a slow-burning sense of unwelcome and lack of support for students of color — there were reportedly a number of incidents, including "swastikas painted on campus, or a frat turning black girls away from a party," leading up to the email, all of which made students of color feel unsafe on campus, according to another *Atlantic* article on the incident (White 2015). Thousands of students supported the protest and many of the protesters' demands, including the hiring of more faculty members of color and an increase in support for campus cultural centers (Wong & Green 2016).

At The University of Missouri, students began to protest after feeling their long-held concerns about the campus racial climate were not being taken seriously by administrators. "Black students have long described a segregated and unwelcoming environment at the university that administrators failed to address," Wong and Green write. After University

[5] Please note that many citations in Chapters Four and Five do not include a page number because they refer to articles that are only available online.

President Tim Wolfe largely ignored student complaints, a large protest formed, including a strike by the school's Division I football team and a faculty walkout. The massive protests received national attention and concluded with the resignation of Wolfe and another high-level administrator. Promises were also made regarding efforts to improve retention of students and faculty of color, as well as the hiring of a number of administrators devoted to making students of color more comfortable (Wong & Green 2016). The University of Missouri protest is widely credited for sparking a wide range of student protest movements surrounding racial climates on college campuses in the following weeks.

These protests touched on speech issues in several ways. At Yale, many felt the student protesters were unwilling to engage in dialogue with anyone they disagreed with. In his *Atlantic* piece entitled "The New Intolerance of Student Activism," journalist Conor Friedersdorf (2015) described the campus protests as "alarming": "As students saw it, their pain ought to have been the decisive factor in determining the acceptability of the Halloween email. They thought their request for an apology ought to have been sufficient to secure one." Protesters demanded the resignation of the Yale lecturer who sent the offending email (and the resignation of her husband, who is a Yale administrator), and reportedly spit on attendees as a conference on free speech being held at Yale University. The University of Missouri protests also raised questions when students and a faculty member forcibly removed photojournalists from a "safe space" on public land designated for students of color to mentally recuperate from the protests. The faculty member, Melissa Click, was suspended and then fired in February 2016, but according to a *USA Today* article, students protested for her reinstatement (Deutsch 2016).

These incidents highlighted what many college students see as a fundamental tension between colleges' and universities' need to encourage free speech while also providing a safe

and comfortable home for students. As Friedersdorf (2015) put it, "The Yale student[s] appear to believe that creating an intellectual space and a home are at odds with each other." Are they at odds? For many students of color, the way their white peers engage in "free expression" has long been a source of pain and resentment. The way their administrators react has been considered inadequate. Many outside observers in the media and the public at large took the protests at Yale and The University of Missouri (but particularly Yale) to be an example of the hypersensitivity of today's college students. As one online commenter going by the username "Siestasis" remarked on a 2015 *New York Times* editorial about The University of Missouri and Yale: "So you are called a derogatory term, so you may have to listen to someone who has a different point of view. Grow up, it is a real world out there and these spoiled brats are not going to be ready for it."

But, as columnist Nicholas Kristof (2015) pointed out in the editorial to which that commenter added his or her view, "imagine if you're an 18-year-old for whom this [campus] is your 24/7 home — named, say, for a 19th-century pro-slavery white supremacist." Kristof was referencing the fact that many Yale students demanded the renaming of Calhoun College, named for pro-slavery advocate John C. Calhoun, as well as the idea that students of color at predominantly white institutions do experience challenges that can be difficult for white Americans to fathom.

These examples of student protests offer only a small sampling of some of the speech issues that are implicated in recent campus activism. I will limit my analysis to two of the most notable speech debates: trigger warnings, or "alerts that professors are expected to issue if something in a course might cause a strong emotional response," and microaggressions, or "small actions or word choices that seem on their face to have no malicious intent but that are

thought of as a kind of violence nonetheless," as the terms are defined in Greg Lukianoff and Jonathan Haidt's much-discussed 2015 *Atlantic* article, "The Coddling of the American Mind." These terms represent some of the more popular expressions of campus activism's impact on free speech: both have been popularized in recent years as they gained popularity on college campuses, and both have been the topics of heated debate among academics, students, and political commentators.

II. Microaggressions

A. Background

Even the definition of microaggressions is subject to extensive debate. For an alternative to Lukianoff and Haidt's (2015) definition, we can look to Derald Wing Sue et al. (2007), who define racial microaggressions as follows:

> Brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color. Perpetrators of microaggressions are often unaware that they engage in such communications when they interact with racial/ethnic minorities. (271)

Wing Sue et al. emphasize that microaggressions are frequently unintentional and often seem minor or even invisible to anyone not on the receiving end. Perhaps for that reason, microaggressions have been much maligned on the Internet by those who see them as inconsequential slights that should be ignored or laughed off.[6]

Wing Sue, a professor of psychology at Columbia University, provides a useful example of a microaggression and its impact in his 2007 paper:

> I traveled with an African American colleague on a plane flying from New York to Boston. The plane was a small "hopper" with a single row of seats on one side and double seats on the other. As the plane was only sparsely populated, we were told by the

[6] For examples of columnists who consider microaggressions inconsequential, see Fleck's (2015) "What Passes for Microaggressions at Columbia: White Male Professors, 'Stressful Situations,'" and McArdle's (2015) "How Grown-Ups Deal with 'Microaggressions' Instead of Playing the Victim."

> flight attendant (White) that we could sit anywhere, so we sat at the front, across the aisle from one another. This made it easy for us to converse and provided a larger comfortable space on a small plane for both of us. As the attendant was about to close the hatch, three White men in suits entered the plane, were informed they could sit anywhere, and promptly seated themselves in front of us. Just before take-off, the attendant proceeded to close all overhead compartments and seemed to scan the plane with her eyes. At that point she approached us, leaned over, interrupted our conversation, and asked if we would mind moving to the back of the plane. She indicated that she needed to distribute weight on the plane evenly.
>
> Both of us (passengers of color) had similar negative reactions. First, balancing the weight on the plane seemed reasonable, but why were we being singled out? After all, we had boarded first and the three White men were the last passengers to arrive. Why were they not being asked to move? Were we being singled out because of our race? Was this just a random event with no racial overtones? Were we being oversensitive and petty?
>
> Although we complied by moving to the back of the plane, both of us felt resentment, irritation, and anger. In light of our everyday racial experiences, we both came to the same conclusion: The flight attendant had treated us like second-class citizens because of our race. (275)

Wing Sue and his colleagues argue that microaggressions are ubiquitous, partly because those who use microaggressions may not be aware of the offense their words cause. "Microaggressive acts can usually be explained away by seemingly nonbiased and valid reasons. For the recipient of a microaggression, however, there is always the nagging question of whether it really happened," Wing Sue et al. write (275).

On college campuses, microaggressions frequently take on an educational theme. Professors Solorzano, Ceja and Yosso (2000) write that many black college students report feeling discouraged by omnipresent microaggressions, many of which are also pointed out by Wing Sue: buildings named for wealthy white males, degrading comments by peers suggesting that black students are beneficiaries of affirmative action and do not really belong, low expectations on the part of faculty and staff, being expected to speak on behalf of all black people in classes and discussions. Solorzano et al. report that such microaggressions have caused many black students to feel they cannot succeed. "The sense of discouragement, frustration, and

exhaustion resulting from racial microaggressions left some African American students despondent and made them feel that they could not perform well academically" (Solorzano et al. 2000, 69).

William A. Smith (2010), a professor of ethnic studies at The University of Utah, asserts that the buildup of racial microaggressions can give black college students "racial battle fatigue" and can significantly inhibit educational opportunities. The symptoms of "battle fatigue" can include both "psychological symptoms (e.g., frustration, shock, anger, disappointment, resentment, anxiety, helplessness, hopelessness, fear) and physiological symptoms (e.g., headaches, teeth grinding, chest pain, shortness of breath, high blood pressure, muscle aches, … fatigue, insomnia, frequent illness)" (Smith 2010, 268). These symptoms can add up over time and eventually harm the academic success of black students, Smith argues. Sumie Okazaki (2009), a professor of psychology at NYU Shanghai, agrees, writing that existing evidence regarding psychological responses to racism "suggest that perceived racism is associated with negative psychological states including symptoms of depression and anxiety, lower well-being, lower self-regard, and ill health" (105). Journalist Peter Schmidt (2015) reported in *The Chronicle of Higher Education* that a recent survey of minority students at the University of Illinois at Urbana-Champaign found that more than half had experienced racial microaggressions in the classroom.

Importantly, microaggressions are not considered to be a phenomenon solely directed at black Americans or even people of color generally. Although many definitions of the term use it solely to describe slights against people of color, Wing Sue writes in a *Psychology Today* article that microaggressions can be based upon gender, sexuality, religion, culture, ethnicity, disability, and other characteristics (2010).

However, not all scholars agree that microaggressions are (or perhaps should be) as damaging as Wing Sue and others argue. Lukianoff and Haidt (2015) describe the recent awareness of microaggressions as part of a larger push to sanitize college campuses of painful or uncomfortable ideas. Lukianoff, president of the Foundation for Individual Rights in Education (FIRE), and Haidt, a social psychologist, allege that, in addition to the generally accepted definition of microaggressions, "the definition has expanded in recent years to include anything that can be perceived as discriminatory on virtually any basis" (2015). The authors argue that microaggressions can be explained in terms of two psychological terms: magnification, or "'exaggerat[ing] the importance of things,'" and labeling, or "'assign[ing] global negative traits to yourself and others'" (Lukianoff & Haidt 2015, citing Burns & Leahy, Holland & McGinn respectively). In other words, the authors argue student sensitivity to microaggressions is the result of a focus on victimhood that values exaggerated complaints and a disproportionate emphasis on individual discomfort.

Campbell and Manning, both professors of social theory, agree, asserting that students' responses to microaggressions signify the prevalence of "victimhood culture," which is "characterized by concern with status and sensitivity to slight combined with a heavy reliance on third parties" (2014, 715). The authors write, "When the victims publicize microaggressions they call attention to what they see as the deviant behavior of the offenders. In doing so they also call attention to their own victimization" (Campbell & Manning 2014, 707) Thus, there is literature that contends that microaggressions and their current popularity are the result of a trend of hypersensitivity on college campuses, not a heightened awareness and recognition of students' legitimate grievances, and that attempts to regulate microaggressions are misguided.

B. Speech Implications

The trend toward regulating microaggressions has major implications for speech on college campuses. According to Schmidt, the Ithaca College Student Government Association is in the process of developing a microaggression reporting system by which slights can be reported anonymously to campus administrative authorities. Such reporting mechanisms became a popular request by student activists in the aftermath of the protests in November 2015 (Statscavage 2015, Soave 2015, *College Fix* 2015). Schmidt (2015) reports that some are concerned about the effect these reporting systems may have on free speech, especially considering what phrases are being named as microaggressions. "The Foundation for Individual Rights in Education has sounded alarms about the Ithaca effort, saying the proposed reporting system lacks a clear definition of a microaggression — creating the potential for unjust accusations — and threatens to chill speech," he writes (Schmidt 2015).

In addition to anonymous reporting systems, free speech advocates fear the effects of mandatory training on microaggressions for students and faculty, particularly when new faculty are without tenure and could fear repercussions if they disagree (Schmidt 2015). The types of microaggressions listed in these trainings are of additional concern: some seem to imply that certain opinions are microaggressions and thus impermissible. Schmidt (2015) writes:

> Free-speech concerns also have been raised in connection with faculty-training efforts at the University of Wisconsin at Stevens Point and at the University of California, a key battleground in the nation's affirmative-action debate, which includes the statement "Affirmative action is racist" on its list of microaggressions.

Students have also taken to demanding the resignations of administrators who engage in microaggressions. Journalist Emily Shire (2015) writes for *The Daily Beast* that an administrator at Claremont McKenna College quit her post in response to outrage after she emailed a student asking to discuss how to better serve minority students, describing them as "those that don't fit

our CMC mold." The lecturer who sent the explosive email regarding Halloween costumes at Yale has chosen not to return to her teaching post, according to Anemona Hartocollis (2015), a *New York Times* journalist.

These ongoing battles over microaggressions and how to fight them present serious questions regarding free speech and the free exchange of ideas on campuses. Whether some of the preventative measures taken by public colleges would be considered constitutional has yet to be determined, although Schmidt (2015) writes that FIRE has said it anticipates legal action in the future.

III. Trigger Warnings

A. Background

Like microaggression awareness, trigger warnings have recently gained popularity on college campuses. Kate Manne, a professor of philosophy at Cornell University, writes in an opinion piece for *The New York Times* that trigger warnings originated in online forums, where they serve as a caution to anyone who had experienced trauma: "The idea was to flag content that depicted or discussed common causes of trauma, like military combat, child abuse, incest, and sexual violence. People could then choose whether or not to engage with this material" (2015). In the classroom, Manne asserts, trigger warnings take the form of advance notice that allows students to prepare themselves for readings they might find traumatic. She argues that trigger warnings on class materials exist to warn students and allow them to prepare themselves, not to encourage them to skip the material entirely.

Trigger warnings, many argue, should be encouraged as a preventive measure against PTSD-like flashbacks to traumatic events. They are most frequently associated with sexual assault, but can be applied to many forms of trauma. Blogger Gillian Brown describes her

experience of being triggered on "The Body is Not an Apology," a feminist blog, as follows: "Whenever I am exposed to things relating to death and certain illnesses, I suddenly and quite dramatically feel all-encompassing panic spread through my entire body. Sometimes, it goes away in seconds; at other times, it lingers for weeks, making it difficult to function normally" (2015).

To many, trigger warnings are the college syllabus equivalent of a movie rating. Journalist Kat Stoeffel, writing for *New York Magazine* in 2015, describes trigger warnings before films as "a neutral disclaimer that impinges on neither the filmmaker's freedom of speech nor the other students' intellectual development. At worst, it's a plot spoiler." They exist to ensure that everyone can enjoy a safe and healthy classroom environment, proponents say.

However, although trigger warnings are by no means ubiquitous at colleges, they have spread past the traditional use of warning victims of trauma about potentially triggering content. A draft of a 2013 Oberlin College guide on what material should be marked with trigger warnings advised: "Triggers are not only relevant to sexual misconduct, but also to anything that might cause trauma. Be aware of racism, classism, ableism, and other issues of privilege and oppression. Realize that all forms of violence are traumatic, and that your students have lives before and outside your classroom, experiences you may not expect or understand" (Friedersdorf 2014, citing the Oberlin guide).

Some students argue that even those who have not suffered a specific traumatic event can be triggered by mentions of systemic forms of oppression if they are members of a marginalized group, writes Colleen Flaherty (2014), a journalist for *Inside Higher Ed*. This understanding of trigger warnings substantially expands what should be marked as potentially troublesome.

It's this understanding that Lukianoff and Haidt, among others, challenge as overzealous. They find that the tendency for students to assume others will find material triggering, without actually being triggered themselves, is a form of confirmation bias. "This is an example of what psychologists call 'motivated reasoning' — we spontaneously generate arguments for conclusions we want to support. Once you find something hateful, it is easy to argue that exposure to the hateful thing could traumatize some other people," they write (Lukianoff & Haidt 2015). They also argue that trigger warnings are in fact psychologically harmful to those who really suffer from PTSD, because total avoidance of a triggering topic is not generally considered a healthy course of psychological treatment. Lukianoff and Haidt (2015) write, "Students with PTSD should of course get treatment, but they should not try to avoid normal life, with its many opportunities for habituation. Classroom discussions are safe places to be exposed to incidental reminders of trauma."

A. Speech Implications

Many also see the move to endorse trigger warnings as one step away from censorship. Some colleges (most notably Oberlin) have gone so far as to try to mandate trigger warnings, and 63% of U.S. college students say they support mandatory trigger warnings in the classroom, according to a 2015 study cited by Robby Soave in a *Reason.com* article. While Oberlin soon retracted its policy, partially cited above, in the face of faculty backlash, Lukainoff and Haidt point out that the Oberlin task force that crafted the policy "recommended that materials that might trigger negative reactions among students be avoided altogether unless they 'contribute directly' to course goals, and suggested that works that were 'too important to avoid' be made optional." As Jerry Coyne, a professor at The University of Chicago, points out in a 2015 *New Republic* article, famous works such as "Huckleberry Finn," "The Great Gatsby," and even the

Bible could fall under the umbrella of triggering content, and be discouraged under such a policy.

Some students have asked that triggering topics be abandoned entirely. Jeannie Suk, a law professor at Harvard University who teaches rape law, wrote about her experiences with such student requests in a 2014 *New Yorker* article. She writes, "One teacher I know was recently asked by a student not to use the word "violate" in class — as in 'Does this conduct violate the law?' — because the word was triggering. Some students have even suggested that rape law should not be taught because of its potential to cause distress" (Luk 2014). Luk adds that campus activists have encouraged her students to skip or disengage from class sessions relating to rape law if they might feel threatened by the materials, starkly contrasting Manne's (2015) assertion that trigger warnings are not used to encourage dismissal of upsetting topics. Luk writes that faculty feel obligated to respond to students' requests for trigger warnings "because it would be considered injurious for them not to acknowledge a student's trauma or potential trauma."

Trigger warnings, Lukianoff and Haidt argue, have become a method for silencing unpopular viewpoints by claiming they are psychologically damaging to students or even the equivalent of physical violence. "Trigger warnings are sometimes demanded for a long list of ideas and attitudes that some students find politically offensive, in the name of preventing other students from being harmed," the authors write (Lukianoff & Haidt 2015). In fact, in Luk's case, she claims that trigger warnings are being used to sanitize class discussions in a manner that actually harms marginalized groups. She writes, "If the topic of sexual assault were to leave the law-school classroom, it would be a tremendous loss — above all to victims of sexual assault" (Luk 2015). In fact, the removal of rape law from law schools would set back curriculums to a time when rape law was largely not taken seriously as an area of study. The calls for trigger warnings

or even for students to ignore rape law suggest that students do not need to learn about rape law, when Luk argues its teaching is in fact critical to the protection of rape survivors.

Thus, while some consider trigger warnings to be little more than a "spoiler," others find that their effect on the classroom has been a chilling one. The speech implications introduced by trigger warnings could impact the ways in which professors feel comfortable engaging in class discussions, or even whether they bring up certain topics at all, according to many opponents. Although mandatory trigger warnings have not and may never become widely embraced at colleges and universities, their potential implications for free speech, should they become more accepted in the near future, have yet to be understood.

CHAPTER FIVE: PROPOSALS AND CONCLUSIONS

I. Introduction

The judiciary has, perhaps understandably, struggled with free speech questions since its inception as a branch of the U.S. government. In the area of hate speech, in particular, the courts have attempted to balance the competing interests of individual rights and the needs of the community. For the most part, as was demonstrated in Chapter Three, the Supreme Court and lower courts have granted individual freedoms much more weight than communal values in this balance. Colleges, in particular, failed in the 1980s and '90s to introduce measures that both protected students from hate speech and fit into the judiciary's narrow requirements for speech regulations. There continues to be much debate over whether the courts have struck an adequate balance, or whether the courts' rulings have exaggerated the importance of individual speech rights while failing to acknowledge the damage words can do to both individuals and their communities.

That debate has, in large part, taken place on college campuses, where many students believe their college's obligation to create a comfortable and welcoming environment outweighs its obligation to foster a vigorous marketplace of ideas, in contrast to the balance the courts have struck. This tension between the courts and college students has left colleges unsure how to move forward, students unhappy with the current state of affairs, and free speech advocates displeased as some schools, both private and public, have chosen to implement speech codes in spite of the courts' rulings. (According to FIRE, 55% of the 400 private and public colleges the organization surveyed in 2015 have speech codes in place that "clearly and substantially restric[t] freedom of speech" (FIRE 2015)). No one is happy with the current system.

In the midst of this complex situation I would like to forward three proposals, with the goal of determining how best to navigate today's speech debates on college campuses. These proposals will represent different ways in which new issues, like microaggressions and trigger warnings, and can be considered and dealt with, although the proposals will not present ways of solving the problem that will please everyone. My analyses will include (1) information regarding where the proposals fall between the liberal and communitarian models, as well as (2) their likelihood of success in the courts based on judicial precedent. Each will consider whether the courts' approach to these issues has been adequate or not.

The proposals are essentially compromises, in which both sides would be required to make concessions to varying degrees. Each proposal will balance individual freedoms against communal values differently. Not every proposal will seem feasible or even desirable to everyone. However, it is important to understand what options are available so that we can proceed in a knowledgeable manner as we work through the thicket of individual rights and equal protection at colleges and universities across the United States. Although public schools are most affected by this issue because of their federal mandates, private schools may also wish to consider ways in which they can offer both a welcoming environment and intellectual freedom to their students.

A. Proposal One: Speech codes should be entirely abandoned because they infringe upon individual rights.

This proposal fits best into the liberal speech framework laid out in Chapter Two and is the most supported by jurisprudence. It is also the least compromising of the three proposals. This proposal is based upon the notion that speech codes run entirely contrary to constitutional principles because any regulation of speech on the basis of its content is unacceptable. Particularly at colleges, where students should be grappling with uncomfortable new ideas in an

open environment, speech codes are indefensible. The first wave of speech codes in the 1980s and ’90s demonstrated this through the numerous examples wherein students were unjustly punished for protected speech, and many of the speech battles happening now on college campuses are likely to have the same fundamental flaws. A 2007 article in *The Chronicle of Higher Education* reported that “most college and university speech codes would not survive a legal challenge,” according to FIRE (Lipka 2007). As the free speech jurisprudence discussed in previous chapters demonstrates, any speech code that regulates speech on the basis of content should be considered with the utmost caution. In the Supreme Court case of *R.A.V. v. City of St. Paul*, the majority found St. Paul’s content-based regulation of fighting words to be facially unconstitutional, while in the district court case *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, one judge argued in a concurring opinion that a content-based regulation *could* be permissible, but only if it passed strict scrutiny by demonstrating that it accomplished a compelling state interest through narrowly tailored means. No college’s speech code has yet met this stringent standard.

It also no longer seems possible to craft a speech code that targets only fighting words. Although several colleges have tried, the courts have consistently found that speech codes cover more than just fighting words. Cases from the first wave of speech codes repeatedly found that colleges went too far in their attempts to regulate fighting words. Initially, the Court in *Chaplinsky* enumerated several conditions of the fighting words doctrine:

> Those [words] which (1) by their very utterance inflict injury or (2) tend to incite an immediate breach of the peace. It has been well observed that such utterances are (3) no essential part of any exposition of ideas, and are (4) of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (315 U.S. 568, 572) [numbers added for clarity]

A civil liberties-oriented liberal would likely argue that this definition was too expansive to begin with, and would support the significant narrowing of *Chaplinsky* that has occurred in the decades since the decision. During the first wave of speech codes, lower courts consistently applied only part two of the *Chaplinsky* guidelines, requiring that speech codes limit solely speech that "cause[s] people to react violently" (*Corry v. Stanford* 8). This narrowing of *Chaplinsky* is a step in the right direction, from the liberal perspective. As such, we should readily accept the courts' new and narrowed conception of fighting words (if not push for a complete overturn of *Chaplinsky*), and acknowledge that colleges have repeatedly failed to craft speech policies that fit into this version of the fighting words doctrine.

During both the first wave of speech codes and the current resurgence of speech restrictions, colleges' attempts to prohibit hateful or offensive speech have ended with the regulation of protected speech. As discussed in Chapter Four, some colleges (notably the public University of California) have discouraged professors and students from making use of microaggressions, including opinion-based phrases such as "I believe the most qualified person should get the job" (in relation to affirmative action policies). Eugene Volokh (2015) writes for *The Washington Post* that, while UC's guidelines were not mandatory, they strongly suggested that the use of microaggressions — as defined by the listener — could contribute to the creation of "'hostile learning environments,' which the university and the federal government views as legally actionable." Volokh argues that by defining certain viewpoints as racial microaggressions, the university labels those views racist and insinuates that they are not welcome in the classroom. Microaggression trainings thus chill particular viewpoints, but also generally target specific content — content that is likely to be considered offensive by a particular group. Even if microaggression trainings did not attempt to limit the expression of

specific views, they would remain problematic in their attempts to limit certain areas of discussion to what is deemed inoffensive by listeners.

Like microaggression trainings, trigger warnings have become a frequent demand of students and administrators, although trigger warnings have not yet been widely adopted. Trigger warnings are distinct from microaggressions in that they do not neatly fit into the fighting words doctrine (and thus have less grounding in jurisprudential history), but they remain a viewpoint- and content-based speech regulation that, under *R.A.V.*, must be considered highly suspect. A 2015 National Coalition Against Censorship (NCAC) survey found that 62% of college faculty surveyed believed trigger warnings had an adverse effect on academic freedom. The survey quoted one professor who said trigger warnings require "teachers to change their teaching plans based on calculations about what topics might hurt students' feelings or make them feel 'unsafe'" (NCAC 2015, 4). The Court is unlikely to ever accept a mandatory trigger warning policy that impacts the content of classes or the way certain works are labeled because of the warnings' chilling effect on speech and likely implications for academic freedom. Although students may clamor for mandatory trigger warnings, they remain viewpoint- and content-based regulations of speech that the Court will likely find perilous.

Not only do colleges' speech regulations infringe free speech, but they also fail to achieve their goals. Conor Friedersdorf writes in a 2015 article for *The Atlantic* entitled "The Lessons of Bygone Speech Fights" that "there is no evidence that hate speech or bigotry decreased on any campus that adopted [a speech code]." He adds that under the University of Michigan's speech code, black students were accused of violating the code 20 times, while the only two students who were punished under the code were both penalized "for speech by or on behalf of blacks" (Friedersdorf 2015, citing Marcia Pally). Speech codes place the power to

decide what speech is acceptable in the hands of college administrators. But as an occupation, 73.5% of college administrators are white, according to 2013 statistics from the U.S. Department of Labor (Department of Labor 2013). To liberals, this is the fundamental problem underlying all speech codes: someone must be in charge of deciding what speech is acceptable and what speech is not. Whether that person is a white administrator or not, there will necessarily be some amount of personal bias or judgment brought into the decision making process. Students who ask for speech codes have underestimated the potential fallout of putting college administrators, no matter their race, gender, or religion, in charge of the crucial decision of what speech can be allowed in what should be a free marketplace of ideas.

Speech codes appear to be unsuccessful in their aims of protecting minority students, and may even penalize minority students for their attempts to raise awareness of racial problems. Thus, Proposal One suggests that we accept the decisive findings of the lower courts and reject speech codes in favor of alternative measures for preventing hate speech, such as rigorous classroom discussions of its effects.

B. Proposal Two: Speech codes can be constructed in narrowly tailored ways that pass strict scrutiny and still allow for the protection of state interests in equal educational opportunities.

Proposal Two advocates attempting to fit speech codes into the narrow space left open by the lower courts after the first wave of speech codes failed to pass muster. This is the approach recommended in Judge Murnaghan's concurrence in *Iota Xi v. George Mason University* and in Judge Stone's majority in *Corry v. Stanford*. Both judges proposed applying the strict scrutiny standard of review to campus speech codes to determine whether the codes were permissible in spite of the fact that they regulated speech on the basis of content. George Mason University and Stanford University's codes were both found to fail strict scrutiny, which requires that a law or

policy be a narrowly tailored means of achieving compelling state interests, on the grounds that the codes were not narrowly tailored. The analyses found in these decisions, however, provide insights into how a speech code might be crafted to pass strict scrutiny.

The Supreme Court acknowledged in *R.A.V. v. City of St. Paul* that there are compelling interests to be found in protecting individuals from hate speech. Although the majority in *R.A.V.* found the St. Paul ordinance facially unconstitutional, it considered (and ultimately rejected) the strict scrutiny standard of review in its analysis. Justice Scalia wrote in that case that St. Paul's ordinance did further compelling interests: it sought "to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them" (505 U.S. 377, 395). The same logic was applied to campus speech codes in *Corry v. Stanford*, when the university's interest in protecting students from "hateful discrimination" was found to be compelling (18).

Thus, campus speech codes aimed at protecting students from discrimination are likely to meet at least the first half of the strict scrutiny standard of review. The second half, that the codes be narrowly tailored, has proven more difficult. In *Corry v. Stanford*, Judge Stone offered a thorough list of possible ways to combat hate speech in more narrowly tailored ways:

> Defendants could continually press upon their students through their school calendars and handbooks, etc., the need to be respectful of each other. Defendants could implement programs to educate students against discrimination. Defendants also might through various campus media or sponsorship of events, i.e., guest speakers, movies, book readings and reviews, roundtable discussions, forums, panels, field trips, essay contests, etc., promote diversity and tolerance among students. (18–19)

One possible solution is to limit speech codes strictly to fighting words without regard to their content, as proposed in *R.A.V.* (505 U.S. 377, 395). However, because of the limitations of the

fighting words doctrine that have been imposed since *Chaplinsky*, this would mean speech codes would only be able to limit speech that causes a violent outburst.

This would substantially limit the scope of campus speech codes as they were devised during the first wave; such a code would likely not even apply to microaggressions because they are, by definition, "commonplace" slights, according to Derald Wing Sue et al. (2007, 271). Trigger warnings would fall well outside the regulatory scope of a code that was limited by the fighting words doctrine. Such a code would only limit the most vile speech, but it would do so more broadly in the sense that it would limit *all* fighting words, not just those based upon race or gender. Shiell points out that some scholars have called for "narrowly defined code[s] that target only the most egregious cases, such as threats, harassment, and mass theft of newspapers" (1998, 90). Proposal Two takes as a given the extremely limited nature of the fighting words doctrine as the courts currently use it; as such, speech codes that seek to remain within the doctrine's limits would be unlikely to prevent all of the speech that creates a hostile environment for students on college campuses. However, because such a code would also have to be content neutral, it would likely sweep up fighting words that were outside the intended scope of the speech code. Any hateful or rude speech between two individuals that caused the listener to react violently would be punishable under such a speech code.

A content-neutral code based upon the fighting words doctrine (understood as words that cause violence) might be able to pass through the judiciary. It is also possible, however, that the Supreme Court would be willing to further limit the fighting words doctrine. The doctrine has, by now, been essentially overruled *sub silentio* because of the number of limitations the Court has imposed on it since *Chaplinsky*. It is possible the Court might be willing to finally overturn the fighting words doctrine or change it in some way that could not be predicted by a college

trying to craft a constitutional speech code. As such, while Proposal Two would limit some hateful speech and might stand a chance in the judiciary because it would conceivably pass strict scrutiny, it would be unsatisfactory in other ways: it requires that speech trigger violence before it can be applied, meaning current speech debates over trigger warnings and microaggressions would be left out; it might sweep up unintended speech; and it might not pass through the courts in spite of colleges' best efforts. The use of the fighting words doctrine as laid out by the lower courts also problematically allows for a "fighter's veto," or a heckler's veto that allows for anyone who is willing to engage in violence after hearing something offensive to limit speech based upon their view of what is offensive.

Proposal Two is a compromise in that both liberals and communitarians would agree with aspects of it — liberals would be reluctantly gratified that only a very limited amount of speech was being regulated, while communitarians would praise the limitation of fighting words because they lack social value. But neither camp would wholly approve, and in fact Proposal Two seems mostly to lack aspects that would truly benefit either side of this debate. Because of its limited understanding of fighting words, this proposal would fail to protect minority and female students in any instances they did not respond to speech with violence, displeasing communitarians, but would still limit speech to an extent liberals would not approve of.

C. Proposal Three: The fighting words doctrine should be revitalized to account for power imbalances and for the psychological and educational "injury" caused by speech that prevents equal access to educational opportunities.

Proposal Three is the most communitarian and the most radical because it requires a complete rethinking of the fighting words doctrine. As it currently stands (and is being used by the courts), the fighting words doctrine has been almost entirely overturned. Only speech that causes a violent response can currently fall under the category of fighting words. This covers so

little speech as to be absurd. The idea that any kind of speech code could successfully predict which speech is going to cause a violent response is unreasonable. The current understanding of fighting words also fails to account for power imbalances in any given confrontation. As discussed in Chapter One, and pointed out by Charles Lawrence, a fighting words doctrine that requires a violent response assumes that power between the two parties — the speaker and the target — is equal. However, if a person of color is accosted by several white men, or if a woman is confronted by a man much larger than herself and targeted by hateful speech, speech that would be considered fighting words if the target responded violently, it is unreasonable to expect the target to try to physically attack the speaker, who may be able to seriously harm the target. To make a violent response the sole requirement of the fighting words doctrine unfairly hurts women and minorities' chances of being able to regulate fighting words and makes it difficult to truly address hate speech from a legal perspective.

If the Court is not going to overturn the doctrine completely, it should consider ways to reinvigorate it. Primarily, the Court should return to the initial definition of fighting words provided in *Chaplinsky*, particularly the requirement that the words "by their very utterance inflict injury" (315 U.S. 568, 572). Although the Court has said time and again that hurt feelings are not enough to justify the regulation of speech, the Court in *Chaplinsky* understood that words *could* inflict injury, could upset the public peace, and could cause violence and other illegal actions. The Court in *Chaplinsky* stated specifically that, if a reasonable person considered speech "likely to cause an average addressee to fight," the speech could be considered fighting words (315 U.S. 568, 53). Nowhere does this original stipulation require that the listener actually fight; rather, it leaves room for interpretation of which words cause injury and are likely to stir the average person to violence.

This conception of fighting words might seem to offer a heckler's veto to anyone who is "injured" by speech, but it does not offer much more of a veto than does the current conception of fighting words, which offers a veto to anyone willing to engage in violence. If the Court is willing to accept the "fighter's veto," there is not a significant leap to be made in allowing the less physically powerful to "fight" against speech through alternative means than physical violence. Particularly if the listener can demonstrate an injurious effect of certain speech, there must be recourse in the form of a more expansive fighting words doctrine.

There is a distinction to be made between hurt feelings and legitimate claims to injury caused by the buildup of racial and gendered microaggressions. As discussed in Chapter Four, microaggressions are associated with psychological and physiological health symptoms and can have a negative impact on the academic success of minority students. If students who are primarily the targets of microaggressions are losing out on educational opportunities due to discrimination, they are indeed being injured by hateful speech. As such, the fighting words doctrine should be applied to allow schools to protect students from hateful language, including microaggressions.

Proposal Three also calls for the Court to recognize that some words cause greater injury than others, and allow for a very limited use of content-based speech regulations within the category of fighting words. As Charles Lawrence (1990) argues, hate speech on the basis of membership in an oppressed class is especially pernicious because of the United States' history of discrimination against those groups. Lawrence gives the example of his student, Michael, who had, on one occasion, been referred to as a "faggot" in relation to his sexual orientation, and on another occasion, been referred to as a "mick" in relation to his Irish heritage (1990, 455). Michael says that the experience of being called a "faggot" was far worse, in terms of his

emotional response, than being called a "mick" (1990, 456). As a result, Lawrence writes, "The question of power, of the context of the power relationships within which speech takes place, must be considered as we decide how best to foster the freest and fullest dialogue within our communities" (1990, 456). The Court must take these power relationships into consideration and find that some speech causes greater injury than others — in some cases, very palpable injury — and can be regulated on the basis of content for that reason. Such a reinvention of the fighting words doctrine would be beneficial because it would take into account the serious harms caused by racism, sexism, and other forms of discrimination, and allow for colleges to regulate speech to thwart those harms.

In addition to revitalizing the fighting words doctrine, the Court could also allow for regulations of speech that has the intention of intimidating the listener, using the logic in *Virginia v. Black*. In that case, the Court determined that cross burning that was intended to intimidate those who saw it could be banned, particularly if the ban did not distinguish between "types" of intimidation, such as intimidation based upon race or religious belief. Although cross burning is a type of expressive conduct, the Court decided that it could be banned if it was done with the purpose of intimidating others. This logic could be easily applied to intimidating speech on college campuses — if it can be shown that speech or expressive conduct was undertaken with the intent of intimidating a person or group, that speech or conduct could be banned. Like in *Virginia v. Black*, schools would not be able to distinguish between types of intimidation (intimidation based on race, religion, or gender, for example), but it could ban intimidating speech completely while remaining within the confines of Supreme Court jurisprudence. If the Court were to accept this reading of *Virginia v. Black*, this would provide a possible method for schools to protect their students from speech intended to intimidate them. Thus, there are two

opportunities to protect students from hateful speech contained within the Court's decisions: a revitalization of the fighting words doctrine, and the use of the "intent to intimidate" standard of speech and conduct.

Trigger warnings do not fit neatly into the fighting words doctrine, and should not be forced into the framework. They present a different challenge than microaggression trainings. However, triggering material, when presented without warning, has the potential to prevent access to education for those students who are affected negatively. Although trigger warnings do not fall under the fighting words doctrine, it is possible they could be considered acceptable if they (1) do not result in the alteration or censorship of class topics, which many proponents argue is the case, and (2) are found to be necessary to offering an equal educational opportunity to students who suffer from PTSD and similar mental illnesses. Students who suffer from sudden triggering events lose out on educational opportunities if they cannot attend class due to traumatic flashbacks.

If trigger warnings are only used to warn these students about potentially hazardous material, and not to censor topics, they could be found acceptable even at public schools. Under Proposal Three, this would be the most desirable outcome because it allows for greater equality of academic opportunities. For some guidance, we can look to *Chaplinsky*, which stipulates that fighting words may only be limited when they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (315 U.S. 568, 572). Trigger warnings could only be deemed acceptable, even under Proposal Three, if they did not censor any speech that has enough social value (probably most material covered in college classes) to outweigh the potential harms of the material.

Proposal Three would be acceptable to communitarians because it considers the context and history surrounding speech, and allows for limited speech regulations of largely valueless speech to ensure that members of the community feel safe and able to advance in their educations. Liberals would find Proposal Three objectionable because it expands the fighting words doctrine and allows for speech codes in the interest of improving diversity and pluralism at colleges, contradicting the fundamental liberal principle that totally free speech is best for society.

II. Conclusions

Choosing from among these proposals is a difficult task, especially after spending months researching some of the more appalling racist and sexist speech that has occurred and continues to occur daily on college campuses. It is an understandable impulse, both on the part of college students and administrators, to want to put a stop to such speech (and, in some cases, expressive conduct) and to want to create an environment where all students feel welcome. Not only that, but public colleges are required by federal law to provide equal educational opportunities to students regardless of race, gender, religion, or any other characteristic. It is clear is that students of color and female students who are forced to cope with regular outbursts of hateful speech are at a disadvantage compared to their white male peers who can avoid devoting any emotion or energy to thinking about, responding to, and feeling the anger associated with hate speech. It also seems clear from the literature that students who are subjected to frequent microaggressions are legitimately harmed — many suffer psychological and physiological effects that can have an impact on educational performance.

What is not clear from all this is how to deal with the current free speech debates occurring on college campuses. It is tempting to agree with many scholars in concluding that

speech regulations will create a more open environment in which a greater plurality of voices can be heard. It is tempting to agree that little or nothing of value is lost when speech regulations are put in place, while we gain the immense value of the voices of marginalized students who might not have spoken otherwise. These are goals of the utmost importance. Colleges should be making every effort to provide an environment in which all students feel able to contribute to the academic discussions happening on their campuses. It is my contention that in perfect conditions, with all participants acting in good faith, it might be possible to enact speech regulations that only regulate hate speech that's intended to push some members out of a community.

However, I cannot conclude that speech regulations are an appropriate measure for the simple reason that they are already being and have already been abused. It is true that many media outlets choose to present only the most ridiculous examples of current speech debates like microaggressions and trigger warnings. I have attempted to avoid this practice in my own writing. But the fact remains that at many college campuses, students and administrators are calling for uses of speech regulations that demonstrate their lack of good faith. Students at several colleges, most notably Yale, have forced administrators to resign over expressions of sincere ideas. Trigger warning advocates, as Jeannie Luk (2015) memorably notes in her *New Yorker* piece, have suggested that rape law should not be taught because of its triggering content. Administrators have suggested to professors that triggering material, or opinions that could be viewed as microaggressions, are to be avoided. These examples are enough, in my view, to suggest that speech regulations can easily make the leap from protecting students to silencing speech on the basis of content or viewpoint.

Further, consider the fact that the original University of Michigan speech code was used primarily against black students or those who were engaging in speech on behalf of black

students. A similar scenario is easily conceivable within the framework of microaggressions and trigger warnings. Indeed, Luk's example demonstrates that trigger warnings are being requested in harmful ways that seek to exclude information that is both triggering and important to protecting marginalized groups.

There are ways for schools to improve educational access without using speech regulations. Professors can elect to provide their classes with warnings before difficult material as a matter of courtesy, not out of a fear of retribution from students or administrators. Many professors already consider it an important part of their jobs to provide detailed syllabi that explain what course material will be discussed, according to the 2015 National Coalition Against Censorship report on trigger warnings. Administrators, students, and professors can do their best (and certainly continue to do better) to be alert to their internalized biases and to be cognizant of the ways in which their speech might be hurtful to students of color, women, or religious students.

Colleges can also use measures that target hateful conduct, harassment, and intimidation without infringing upon speech. Policies that prohibit intimidating speech and conduct of all kinds can prevent large swaths of hateful speech without regulating on the basis of content. Policies that prohibit vandalism can punish those who write racial epithets on school property without declaring epithets a special category of speech that must be prohibited. These measures are excellent alternatives to the content- and viewpoint-based speech regulations being proposed and implemented at colleges today.

Most importantly, colleges can educate students on the vast number of cultures from which their students originate. Rather than declaring some viewpoints outdated and offensive, colleges can offer a range of viewpoints and let students decide from among them. Schools can

facilitate and encourage discussions and debates that include diverse viewpoints in a literal interpretation of the "marketplace of ideas." For those students who are unaffected and continue to use speech that is intended to intimidate on the basis of race, gender, religion, and other characteristics, schools can fall back on stronger enforcement of content-neutral harassment policies and prevent egregious intimidation without making a determination as to which content is acceptable and which is not.

In the meantime, it is truly unfair that some students are more affected by hateful speech than others. The burden too often falls on the same groups of students to bear the weight of their peers' ignorance. However, speech codes and regulations have proven to be poor vehicles for the change that these students seek. Speech codes often backfire, and they invite appropriation by those in power. They simultaneously fail to protect students from hateful speech while also stifling the marketplace of ideas by making other students feel they cannot speak on certain issues. I submit that they are not the solution to the speech issues being debated now, although the debate will certainly continue to rage on.

Works Cited

"Even Hurtful Speech." Editorial. *The New York Times.* 2 March 2011. Web.

Abdul-Jabbar, Kareem, "Every GOP Candidate Is Wrong About Political Correctness," *The Washington Post*, 22 February 2016. Web.

Beauharnais v. Illinois, 343 U.S. 250 (1952).

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Brown, Gillian, "The Beginner's Guide to Triggering," *The Body is Not an Apology*, 31 August 2015. Web.

Campbell, Bradley & Jason Manning. 2014. "Microaggression and Moral Cultures." *Comparative Sociology*. 13 (2014): 692–726.

Chait, Jonathan, "Obama on Political Correctness: 'A Recipe for Dogmatism,'" *New York*, 17 November 2015. Web.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Cohen v. California, 403 U.S. 15 (1971).

College Fix Staff, "Microaggression-Reporting System is Among 'Great Ideas' Suggested by Students, GW President Says," *The College Fix*, 7 December 2015. Web.

Corry v. Stanford University, No. 740309 (Cal. Super. Ct. Feb. 27, 1995).

Coyne, Jerry, "Life is 'Triggering.' The Best Literature Should Be, Too," *The New Republic*, 14 May, 2015. Web.

Delgado, Richard and Jean Stefancic. 2004. *Understanding Words that Wound.* Boulder, CO: Westview Press.

Dennis v. United States, 341 U.S. 494 (1951).

Deutsch, Gillian, "U. of Missouri Protesters March Again for Equality — and Melissa Click," *USA Today*, 5 February 2016. Web.

Doe v. University of Michigan, 721 F. Supp 852 (E.D. Mich. 1989).

Edsall, Thomas B., "Trump, Obama, and the Assault on Political Correctness," *The New York Times*, 23 December 2015. Web.

Fawcett, Edmund. 2014. "Liberalism: The Life of an Idea." Princeton, NJ: Princeton University Press.

Flaherty, Colleen, "Trigger Unhappy," *Inside Higher Ed*, 14 April 2014. Web.

Fleck, Micah, "What Passes for Microaggressions at Columbia: White Male Professors, 'Stressful Situations,'" *The College* Fix, 1 February 2016. Web.

Foundation for Individual Rights in Education. 2015. "Spotlight on Speech Codes." Philadelphia, PA.

Friedersdorf, Conor, "The Lessons of Bygone Free-Speech fights," *The Atlantic*, 10 December 2015. Web.

Friedersdorf, Conor, "The New Intolerance of Student Activism," *The Atlantic*, 9 November 2015. Web.

Friedersdorf, Conor, "What HBO Can Teach Colleges About 'Trigger Warnings," *The Atlantic*, 20 May 2014. Web.

Green, Adrienne & Alia Wong, "Campus Politics: A Cheat Sheet," *The Atlantic*, 19 January 2016. Web.

Greenawalt, Kent. 1995. *Fighting Words.* Princeton, NJ: Princeton University Press.

Haidt, Jonathan & Greg Lukianoff, "The Coddling of the American Mind," *The Atlantic*, September 2015. Web.

Hall, Mark A. and Ronald F. Wright. 2008. "Systematic Content Analysis of Judicial Opinions." *California Law Review*. 96 (1): 63–122.

Hartocollis, Anemona, "Yale Lecturer Resigns After Email on Halloween Costumes," *The New York Times*, 7 December 2015. Web.

Kracauer, Siegfried. 1952. "The Challenge of Qualitative Content Analysis." *Public Opinion Quarterly*. 16 (4): 631–642.

Kristof, Nicholas, "Mizzou, Yale and Free Speech," *The New York Times*, 11 November 2015. Web.

Lawrence, Charles R. 1990. "If He Hollers Let Him Go: Regulating Racist Speech on Campus." Duke Law Journal. 1990 (3): 431–483.

Lipka, Sara, "Campus Speech Codes Said to Violate Rights," *The Chronicle of Higher Education*, 5 January 2007. Web.

Luk, Jeannie, "The Trouble with Teaching Rape Law," *The New Yorker,* 15 December 2014. Web.

Manne, Kate, "Why I Use Trigger Warnings," *The New York Times*, 19 September 2015. Web.

Matsuda, Mari J. 1989. "Public Response to Racist Speech: Considering the Victim's Story." Michigan Law Review. 87 (8): 2320–2381.

McArdle, Megan, "How grown-ups deal with 'microaggressions' instead of playing the victim," Financial Review, 14 September 2015. Web.

National Coalition Against Censorship. 2015. *What's All This About Trigger Warnings?* New York, NY.

National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

O'Brien, David M. 2011. *Constitutional Law and Politics: Civil Rights and Civil Liberties.* New York, NY: Norton & Company.

Okazaki, Sumie. 2009. "Impact of Racism on Ethnic Minority Mental Health." *Perspectives on Psychological Science*. 4 (1): 103–107.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Sandel, Michael J. 2005. "Public Philosophy." Cambridge, MA: Harvard University Press.

Schauer, Frederick. 1982. "Free Speech: A Philosophical Enquiry." Cambridge: Cambridge University Press.

Schenk v. United States, 249 U.S. 47 (1919).

Schmidt, Peter, "Campaigns Against Microaggressions Prompt Big Concerns About Free Speech," *The Chronicle of Higher Education*, 9 July 2015. Web.

Shapiro, Martin M. 1966. *Freedom of Speech: The Supreme Court and Judicial Review.* Englewood Cliffs, NJ: Prentice-Hall.

Shiell, Timothy C. 1998. *Campus Hate Speech on Trial.* Lawrence, KS: University Press of Kansas.

Shire, Emily, "Victims and Microaggressions: Why 2015 Was the Year Students Lost Their Minds," *The Daily Beast*, 27 December 2015. Web.

"Siestasis," comment on "Mizzou, Yale, and Free Speech," *The New York Times*, 11 November 2016. Web.

Smith, William A. 2010. "Toward an Understanding of Misandric Microaggressions and Racial Battle Fatigue Among African Americans in Historically White Institutions." In *The State of the African American Male*, eds. Eboni M. Zamani-Gallaher & Vernon C. Polite. East Lansing, MI: Michigan State University Press.

Smolla, Rodney A. 1990. "Rethinking First Amendment Assumptions About Racist and Sexist Speech." *Washington and Lee Law Review.* 47 (1): 171–211.

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

Soave, Robby, "Exclusive: Occidental Professors Voting to Give Students Power to Report Them for Microaggressions," *Reason.com*, 23 November 2015. Web.

Soave, Robby, "New Poll: Most Students Favor Mandatory Trigger Warnings, Speech Codes," *Reason.com*, 26 October 2015. Web.

Solorzano, Daniel, Miguel Ceja & Tara Yosso. 2000. "Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students." *The Journal of Negro Education*. 69 (1): 60–73.

Statscavage, Brian, "Wesleyan Activists Demand Microaggression-Reporting System, 'Mandatory Social Justice Workshops'," *The College Fix*, 20 December 2015. Web.

Stevens, John D. 1982. *Shaping the First Amendment: The Development of Free Expression.* Beverly Hills, CA: Sage Publications.

Stoeffel, Kat, "Why I Stopped Rolling My Eyes at Trigger Warnings," *New York Magazine*, 21 May 2014. Web.

Strossen, Nadine. 1990. "Regulating Racist Speech on Campus: A Modest Proposal?" *Duke Law Journal.* 1990 (3): 487–569.

Strum, Philippa. 1999. *When the Nazis Came to Skokie: Freedom for Speech We Hate*. Lawrence, KS: University Press of Kansas.

Tedford, Thomas L. 1985. *Freedom of Speech in the United States.* New York, NY: Random House.

Terminiello v. Chicago, 337 U.S. 1 (1949).

Texas v. Johnson, 491 U.S. 397 (1989).

U.S. Department of Labor. Current Population Survey, Bureau of Labor Statistics. 2013. "Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity." Washington, DC.

U.S. v. O'Brien, 391 U.S. 367 (1968).

UWM Post v. Board of Regents of the University of Wisconsin, 774 F. Supp 1163 (E.D. Wis. 1991).

Virginia v. Black, 538 U.S. 343 (2003).

Volokh, Eugene, "UC Teaching Faculty Members Not to Criticize Race-Based Affirmative Action, Call America 'Melting Pot,' and More," *The Washington Post*, 16 June 2015. Web.

Walker, Samuel. 1994. *Hate Speech in American History.* Lincoln, NE: University of Nebraska Press.

Wells, Christina E. 2010. "Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment." *California Law Review* 1: 71–86.

Whipps, Judy D. 2009. "Jane Addams's Social Thought as a Model for a Pragmatist-Feminist Communitarianism." *Hypatia.* 19 (2): 118–133.

White, Gillian B, "The Vilification of Student Activists at Yale," *The Atlantic*, 10 November 2015. Web.

Wing Sue, Derald, "Microaggressions: More than Just Race," *Psychology Today*, 17 November 2010. Web.

Wing Sue, Derald, et al. 2007. "Racial Microaggressions in Everyday Life: Implications for Clinical Practice." *American Psychologist*. 62 (4): 271–286.

Wisconsin v. Mitchell, 508 U.S. 476 (1993).

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 773 F. Supp 792 (E.D. Va. 1991).

Iota Xi Chapter Of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993)

Zeitz, Josh, "Campus Protesters Aren't Reliving the 1960s," *Politico*, 21 December 2015. Web.